BETWEEN HISTORY AND VALUES

A study on the nature of interpretation in international law

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Abstract

My thesis discusses the place of evaluative judgements in the interpretation of general international law. It concentrates on two questions. First, whether it is possible to interpret international legal practices without making an evaluative judgement about the point or value that provides the best justification of these practices. Second, whether the use of evaluative judgements in international legal interpretation threatens to undermine the objectivity of international law, the neutrality of international lawyers or the consensual and voluntary basis of the international legal system.

I answer both questions in the negative. As regards the first, I argue that international legal practice has an *interpretive* structure, which combines appeals to the history of international practice with appeals to the principles and values that these practices are best understood as promoting. This interpretive structure is apparent not only in the claims of international lawyers about particular rules of international law (here I use the rule of estoppel as an example) but also in the most basic intuitions of international theorists about the theory and sources of general international law.

I then argue that some popular concerns to the effect that the exercise of evaluation in the interpretation of international law will undermine the coherence or the usefulness of the discipline are generally unwarranted. The fact that international legal practice has an interpretive structure does not entail that propositions of international law are only subjectively true, that the interpreter enjoys license to manipulate their meaning for self-serving purposes, or that international law will collapse under the weight of irresolvable disagreements, divisions and conflicts about its proper interpretation.

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Introduction

We shall not cease from exploration
And the end of all our exploring
Will be to arrive where we started
And know the place for the first time.

T.S. Eliot - *Little Gidding*

This is a thesis about the nature and character of the interpretation of general international law and, in particular, about the extent to which evaluative judgements are relevant in the interpretation of international legal practices. It raises questions such as the following. Can we interpret what international legal practices say without making a judgement about the values and principles that underlie them? Does the exercise of evaluative judgement on the part of the interpreter entail that international law must shed its claim to objectivity? Does it entail that interpreters of international law must compromise their neutrality towards the subject matter of their discipline? Won't such reliance on values expose the content of international rules to the deep and divisive evaluative disagreements that international law, with its largely consensual and voluntary structure, was supposed to defuse?

My thesis answers these questions in the negative. Drawing on the ways international lawyers argue about the interpretation of international law, it claims that evaluation is an essential part of the structure of international legal argument. It also submits that, despite popular critical claims to the contrary, the interpretive use of evaluative arguments is not a feature of our legal practice that we have to make excuses for, or an indication that the discipline of international law is somehow confused or incoherent. It is, rather, what makes that discipline interesting and vital and what allows us to approach our shared international legal traditions with a profound sense of community and discovery.

1. Why the debate about evaluation matters

Before explaining how I plan to tackle them, I would like to suggest that, despite their theoretical feel, the questions I am proposing to consider are not merely 'conceptual' or 'academic'. On the contrary, a discussion of the role of evaluative judgement in the interpretation of international law appears highly topical and necessary for two reasons.

The first is that although talk of international law as "serving" or "promoting" certain values is quite casual, international lawyers are generally uneasy with the idea that they are making (or relying on) any kind of value-judgement when they are interpreting the law. In particular, this suggestion seems to offend against some powerful and widely shared intuitions about the nature and function of international law and the proper boundaries of its study. One such intuition is that interpreters of international law should state the law as they find it in the facts of international practice, not as they would like it to be. From that perspective, the claim that value-judgements might be central to legal interpretation offends against the idea that interpreters of the law should remain *neutral* towards their subject matter. A related suspicion against evaluation stems from the belief that evaluative judgements are only subjective, i.e. that their truth-value differs with the person who makes them. If this is correct, such judgements cannot be part of an interpretation that claims *objectivity* and purports to generate *true* propositions of international law. A third suspicion against the use of evaluation in the interpretation of international law draws attention to the fact that, whether or not they can be objectively true or false, judgements of value are very often the subject of deep international disagreement and the cause of division and conflict in the international society. Exposing the content of international rules to such disagreements threatens to undermine the efficacy of international law in maintaining a modicum of social order and peace through the *consensual* regulation of international life. The collective effect of these three intuitions is to present the exercise of evaluative judgement as an affront to the very nature and function of international legal interpretation. At the very least, they seem to suggest that values may be instrumental in directing the *development* of international law and in helping assess its past successes and failures, but they have no place in a proper account of the interpretation of its rules. This is a very important claim that we must subject to close scrutiny.

The second reason for discussing the role of values in international legal interpretation is that such a discussion will help us assess the potential effect of the growing number of *moral* and *political* critiques of international law on its proper interpretation. International law is increasingly criticized as being unjust, unfair, unequal and unrepresentative[1]; as relying on impoverished conceptions of human rights[2] and democracy[3]; and as hugely inefficient in promoting the protection of the environment[4] and the elimination of poverty.[5] Most of these critiques (and perhaps some of the defences of international law against them) are no doubt justified. What remains unclear is whether they also have an impact on the interpretation of international law. Here we seem to be faced with two options. One option is to say that these critiques are *external* to international law, in the sense that conceding their point would not -in principle- affect our interpretation of its rules. We would then say that theorists like Hilary Charlesworth and Susan Marks may be right in claiming that international law fails to respect women, or that international law promotes a disappointingly thin conception of democratic governance, but that these critiques -however forceful- have no impact on what the law actually is (although they might affect its future development). The other option is to regard those critiques as *internal* to international law and to admit that, insofar as we find them compelling, we have to reinterpret the content of international law to accommodate their critical force. On this option, feminist and political critiques do not simply tell us what international law *should require*, but what international law, properly interpreted, *really requires*. The choice between the external and the internal options is therefore a choice between two completely different ways of conceptualising the relationship between international law and critical perspectives towards it. A discussion of the place of evaluative judgements in legal interpretation promises to shed light on that choice and to help

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[1] From a large literature, see Charlesworth H. – Chinkin C., *The Boundaries of International Law: A Feminist Analysis* (2000); Snyder F. – Sathirathai S., *Third World Perspectives on International Law: An Introduction* (1987); Bedjaoui M., *Towards a New International Economic Order* (1979).

[2] Kramer M. - Simmonds N. - Steiner H., *A Debate over Rights* (1998); Cranston M., 'Are There Any Human Rights', *Daedalus* (1983-IV) 1; Alston P., 'Revitalising the United Nations' Work on Human Rights and Development', 18 *Melbourne University Law Review* (1991) 216.

[3] Marks S., *The Riddle of All Constitutions* (2000).

[4] E.g Handl G., 'Environmental Security and Global Change: The Challenge to International Law' 1 *Yearbook of International Environmental Law* (1990) 3.

[5] E.g. Pogge T., *World Poverty and Human Rights: Cosmopolitan Responsibilities and Reforms* (2002); Bedjaoui, above n.1; Trachtman J., 'Legal Aspects of a Poverty Agenda at the WTO', 6 *Journal of International Economic Law* (2003) 3.

determine which alternative is most consistent with the structure of international legal practice.

2. The structure of the thesis

My thesis has a critical and a constructive aspect. On the critical side, it resists two popular claims about the role of evaluation in the interpretation of general international law. The first claim (which is characteristic of positivist legal thought) is that one can interpret the content of general international law without relying on any kind of evaluative judgement. The second claim (which has found strong support across international legal theory, especially in the critical legal studies movement) is that such reliance would in any event spell the demise of some fundamental and defining features of international law, namely its objectivity, the neutrality of its interpreters and its consensual or voluntary nature. On the constructive side, my thesis develops an alternative approach that makes adequate space for the exercise of evaluative judgement in the interpretation of international law, shows how critical perspectives are internal to the discipline, and still lives up to the compelling intuitions behind the ideals of objectivity, neutrality and consensualism. Both aspects of my discussion engage with a number of entrenched conceptions about the character of legal interpretation, the nature of the sources of international law and the viability of international law as a coherent discipline. In this task, they draw extensively on resources from the philosophy of law, mind and language.

The thesis falls into three Parts. Part I (Chapters One and Two) introduces the problem of the relationship between evaluative judgements and appeals to the history of past international practice in the interpretation of international law, taking as an example the rule of *estoppel*. Chapter One argues that although historical and evaluative arguments about estoppel often seem to stand in competition to each other (e.g. appeals to past applications of estoppel seem to support a stricter reading of the rule, whereas appeals to good faith and fairness seem to support a wider reading), their relationship features a much deeper internal connection, which I will call *interpretive*. The distinguishing mark of this connection is that appeals to the values underlying a rule of international law are not intended to replace appeals to its past applications in international practice, but to explain *how* or from *which*

perspective that practice should be interpreted. Chapter Two then turns the focus on some important sources of unease about the use of evaluation in legal interpretation, as these emerge from some popular claims about the theoretical structure of estoppel. Evaluative judgements, it is thought, are either a *redundant* part of argumentative practice, in the sense they are simply too vague to have an operational impact on the content of specific rules, or they are altogether *incompatible* with 'inductive' appeals to the history of past international practice.

Picking up the two themes of Part I, Part II (Chapters Three and Four) begins to widen the scope of my discussion by locating a more pervasive unease with evaluation in the ways international lawyers theorize about the sources of general international law. Received accounts assume either that the exercise of evaluative judgement is generally unnecessary for the interpretation of general (mostly customary) international law or that evaluation is useful only in extraordinary circumstances, where there is a 'gap' in international law. Part II submits that both of these claims are mistaken. Chapter Three argues that the idea that general principles fill 'gaps' in the law is incoherent. Either international law has no gaps, in the sense that its interpretation in hard cases is not essentially different from its interpretation in easy cases, or general principles would not be able to fill them, in the sense that hard cases would not admit of right legal answers. Chapter Four then claims that the exercise of evaluative judgement occupies a central place in the interpretation of rules of customary international law. It argues that received theories of customary law fail to appreciate the important distinction between questions of *pedigree*, i.e. questions about whether a certain practice is legally obligatory, and *interpretive* questions, i.e. questions about what those legally binding practices mean. The difference between the two is crucial, for interpretive questions cannot be resolved by a mere appeal to what States do in their practice and what they believe or intend. These questions require the interpreter to engage with the point or value behind customary practices and to provide an attractive *justification* for those practices considered as a whole.

Chapter Four also signals the transition from the critical to the constructive aspect of my account. Drawing on the work of Ronald Dworkin, I argue that claims about the content of general international law are not simply claims about certain *facts* concerning what States have done and intended. These claims have an *interpretive* structure, i.e. they aim to be consistent with

the values that provide the best justification for the history of past international practice. This interpretive structure has five important features. First, interpretive arguments rely on a distinction between what the practice *really* requires and what any one of its participants *believes* that the practice requires. Second, interpretive arguments have a *cyclical* character, since they try to show the activities of each participant in the practice as part of a unity of meaning, which in turn invests those parts with their individual significance. Third, interpretative arguments are always *evolutionary*; as a society's practices become richer and its perception of its values becomes more critical and refined, new interpretations of those practices will be required. Fourth, interpretive arguments are *situational* in nature; they capture the meaning of the practice not by looking for 'a-historical' truths about it, but by *applying* the practice in concrete historical situations. Fifth, members of a community that takes an interpretive attitude towards its practices do not regard their disagreements as unbridgeable voids that threaten the cohesion of their community but as an indication that questions about the meaning of their practices are too important to be left entirely to the contingencies of intersubjective agreement.

Part III (Chapters Five, Six and Seven) amplifies this account of international legal argument by defending it against three powerful attacks. The first attack claims that the use of evaluative arguments in the interpretation of international law will make the law wholly subjective. The second claims that the use of such judgements violates the requirement for neutrality in the interpretation of international law. The third attack claims that resort to evaluative judgements might expose international law to protracted and divisive disagreements that would defeat the very purpose and function of international law. Part III argues that although all three attacks begin from compelling intuitions, they eventually miss their target. Chapter Five argues that value-scepticism begins from the compelling idea that we should resist indoctrination and foster open and critical thinking about the values of international law. Drawing on the philosophy of Donald Davidson, I show that scepticism must nevertheless fail, but that we can give content to our desire to resist indoctrination and to foster a modest, open and critical debate about values without falling for the incoherent idea that judgements of value are subjective. Chapter Six then takes issue with the idea that the use of evaluation in legal interpretation will undermine the neutrality of the

interpreter of international law. I argue that the aspiration to neutral interpretation draws on the powerful idea that an interpreter should allow the object of interpretation to speak for itself, without distorting and manipulative mediation. Drawing on the hermeneutics of Hans-Georg Gadamer, I claim that the ideal of interpretive neutrality must nevertheless fail. Hearing the true voice of the interpreted text or practice does not require the effacement of the interpreter's historical (and contingent) situation. On the contrary, it demands that the interpreter use his preconceptions in order to engage in a dialogue with the interpreted text or practice, a dialogue through which the true meaning of that text or practice can eventually be disclosed. The proper task for the interpreter is not to efface the presuppositions with which he approaches international law, but to engage in their open and critical assessment. Finally, Chapter Seven discusses the claim that international legal interpretation should rely only on values that command consensus across the international community. I argue that this claim owes its appeal to the powerful ideas of political equality, legal certainty, predictability and the maintenance of social order. However, its appeal to consensus is ultimately empty, since it lacks the resources to supply any agreement or consensus amongst members of the international community with *sense* and content (a point partly captured in the question "consensus on *what*?"). The proper way to build the insights of this claim into interpretation does not involve a search for a consensus, but an *interpretive* commitment to equality as the primary value of international law.

3. The problem of interpretation distinguished

In this section I want to distinguish the questions I will be asking in this thesis from a number of related but distinct ways of approaching the relation between international values and the interpretation of international law.

First, I do not intend to consider whether values provide the so-called 'basis of obligation' in international law. To some degree, that discussion has become stale because very few modern international lawyers are attracted by the idea that international law can be exclusively based on the existence of some *fact*, e.g. that States have consented to it. If State consent does matter, it matters for a reason, or because there is *value* in attributing legal and political

consequences to it. But furthermore, the idea that the 'basis of obligation' in international law is evaluative in character seems to me potentially misleading, insofar as it implies that the relationship between international law and judgements of value is *exhausted* at this very abstract level. This might be so, but the question must be put in terms that leave other possibilities open.

Another issue I do not discuss in any depth is whether or not international law as a whole has become fairer and more just with the passage of time and the development of international legal institutions. Thomas Franck has produced a highly informative analysis showing that international law and international legal institutions are increasingly becoming more sensitive to arguments of international justice and fairness. The important difference between my discussion and Franck's could be described in the following way. Franck asks whether "international law is fair"[6] and "why powerful nations observe [its] powerless rules".[7] These questions make the (entirely legitimate) assumption that international law has a certain content and then proceed to discuss whether that content is consonant with fairness and to discover the reasons why States consider it as a legitimate source of obligations in their dealings with one another. My question differs from these, insofar as it asks the prior question whether the statement that international law says X or Y or Z can be free of evaluative presuppositions, *leaving open* what these presuppositions might be and how they might compare to the demands of international justice and fairness. To put the matter more simply, whereas Franck asks whether international law meets *certain values*, I am asking whether the *exercise of evaluative judgement* is an essential aspect of international legal interpretation. Having said that, there are obvious parallels between the two discussions and I will have occasion to point to some of them towards the end of the thesis.

Finally, my discussion of the role of evaluation in the interpretation of international law is not intended as a psychological claim about what goes on in the minds of the interpreters of international law or about the *motives* that underlie their choice of interpretation in any given context. It is perfectly possible that an international lawyer might interpret the content of a rule of international law without thinking about the values that underlie it or the purposes that the rule should be understood to pursue. In fact, there is

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[6] Franck T., *Fairness in International Law and Institutions* (1995) at 3.
[7] Franck T., *The Power of Legitimacy Amongst Nations* (1990) at 3.

probably a good case for claiming that, for the most part, international lawyers interpret the law without consciously engaging with evaluative concerns and that they reserve this activity for hard or contested cases only. I have no quarrel with these suggestions and I will offer no psychological evidence to support or rebut them. My claim is not that evaluative judgements *cause* international lawyers to interpret the law in one way rather than another, but that they are an essential part of the conditions that make an interpretation of international law *true* or *false*.

4. Why estoppel?

A word needs to be said about the fact that I discuss the interpretive relation of historical and evaluative legal arguments by reference to the rule of estoppel. Why not draw on a variety of international legal rules? And why estoppel?

The decision to draw on a particular rule of international law rather than an array of different rules, chosen from several areas of international law, was precipitated by my desire to look deeply into the argumentative structures that international lawyers use in their claims about the content of international law. It still seems to me that sustained attention on argumentative practice about a well-known and relatively uncontroversial rule of international law can provide unique insights into the use and interplay of historical and evaluative arguments in international legal practice. At the same time, this part of my discussion can claim illustrative value only. Its main purpose is to show how the deep suspicions of international theorists against evaluation have seeped into specialist accounts of international law and to contrast these suspicions with the open and constructive use of evaluative judgements in 'everyday' international legal argument. In any event, the main thrust of my argument, and the justification of its claim to general applicability, will rely on my subsequent discussion of the place of values in the sources and the theory of international law.

The decision to concentrate my attention on the rule of estoppel was partly biographical, in the sense that the present thesis began as a study on the interpretation and application of the rule of estoppel by international courts and tribunals. But I think that this choice can be justified on independent grounds. First, estoppel affords an excellent example for exploring the

interpretive relationship between historical and evaluative arguments, given that international lawyers tend to support their claims about estoppel by appealing not just to past decisions of international courts and tribunals, but also to municipal practice (especially that of common law systems) and to the international values that estoppel should be understood to serve (e.g. forthrightness, consistency, good faith or the stability of treaty commitments and international boundaries). Second, estoppel provides a good example of the occasionally sharp divide between the ways international lawyers argue about international law and the ways academic commentators theorize about it. One of the aspects of estoppel that struck me early in my research was that, whereas all international lawyers would readily acknowledge that estoppel follows from the principle of good faith and would always appeal to this connection in support of their claims about it, theorists of estoppel either treated this statement as an empty vessel, without any operational impact on the interpretation of estoppel, or they treated it as wholly incompatible with the 'concrete' evidence of international practice (and therefore as misleading). It was this troubling divide between argumentative practice on estoppel and theoretical accounts of that rule that prompted me to consider the broader questions that I take up in this thesis. I can only hope that the reader will find my nod towards these early intuitions more helpful than distracting.

Part I

The place of evaluation in the rules of international law: the case of estoppel

My aim in this Part is twofold. First, to draw attention to the ways in which appeals to past international practice and appeals to international values work together in the interpretation of particular rules of international law. Second, to highlight some basic doubts that international theorists have about the propriety and usefulness of the exercise of evaluative judgment in legal interpretation. To allow for more depth in my discussion, I have chosen to concentrate on the ways international lawyers argue about a particular rule of international law, the rule of estoppel, which is sufficiently well-known and uncontroversial to allow the tentative statement of some more general propositions about the place of evaluation in the interpretation of particular rules of international law. The following Parts will support and elaborate on these propositions, by extending my discussion to the sources and to the general theory of international law.

1. The place of evaluative judgements in the interpretation of estoppel

My main contention in this Part is the following. Even though appeals to the history of past international practice and appeals to the values underlying an international rule such as estoppel can appear to pull in opposite directions (e.g. historical arguments encourage the strict reading of estoppel, whereas evaluative arguments encourage a broader reading of it), their relationship features a much deeper internal aspect that I will call *interpretive*: appeals to values are generally not meant to replace or to override appeals to international practice but to help establish a proper *perspective* on its salient features. At the same time, theoretical accounts of estoppel tend to underplay the interpretive relationship between appeals to history and appeals to values

and to be suspicious towards the need or usefulness of evaluation in understanding what estoppel requires. This suspicion finds expression in two particular suggestions: first, that evaluation is a *redundant* part of argumentative practice, in the sense that appeals to abstract values are just too vague to have any practical significance for one's view of estoppel; second, that evaluation is *incompatible* with international lawyers' appeals to the hard evidence of past international practice. Thus, even though all international lawyers would agree, say, that estoppel "follows from the principle of good faith"[1] and all accounts of estoppel pay lip service to this connection, academic commentators have had serious doubts about whether propositions of this kind have any real bite or operational impact.

The aim of this Part is not to refute these objections. It is, rather, to draw attention to the various ways in which historical and evaluative arguments combine in the context of argumentative practice on estoppel, to highlight the internal structure of that practice and to explain why the idea that evaluation is not necessary or useful in interpreting international law on estoppel might appear attractive to an international lawyer.

2. Outline of Part I

The present Part falls into two Chapters. Chapter One identifies the different kinds of argument, some historical (i.e. practice-based) and some evaluative, that international lawyers use when they claim that estoppel does or does not apply in a given case. It argues that, although historical and evaluative arguments about estoppel sometimes appear to stand in competition or to pull in opposite directions, they actually have a much more subtle internal connection. More specifically, international lawyers appeal to the values underlying estoppel not as a *substitute* for past international practice on that concept, but as an *interpretive guide* to the features of that practice that are most salient to the case at hand. This combination of historical and evaluative arguments is even more characteristic of appeals to municipal legal concepts akin to estoppel. International lawyers are generally careful to emphasize that the concept of estoppel in international law is *autonomous* from any municipal

[1] Cf. *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada / United States), ICJ Reports (1984) 246 at 305, par.130.

concept, in the sense that the interpretation of its requirements depends on the special needs, purposes and values of the international situation.

Chapter Two then draws attention to the difficulties that international theorists have had with the presence of evaluative strands in argumentative practice about estoppel. Taking Antoine Martin's monograph on estoppel in international law as its primary target, it traces this unease with evaluation back to two basic intuitions. The first intuition is that appeals to international values such as good faith, consistency or stability stand in competition with appeals to past applications of that concept in the practice of international courts and tribunals. I argue that, properly understood, this intuition relies for its intelligibility on the epistemic opposition between induction and deduction as two incompatible methods for deriving propositions of international law. The second intuition is that appeals to abstract international values are redundant in the sense that they are too vague to have any real effect or impact on the practical requirements of estoppel. I argue that this intuition has both misleading and profound aspects. On the one hand, it is misleading to think that one can simply sever appeals to abstract international values from argumentative practice and that the ascent of explanation or justification from case-specific to abstract evaluative judgements cannot be interrupted by mere fiat. On the other hand, the redundancy thesis discloses an important truth about the proper structure of evaluative arguments. A good evaluative argument is not simply an argument that appeals to one or the other fundamental international value, however compelling that value might be, but an argument that also 'fits' or *particularizes* that value to the context of the case at hand.

Chapter One

The argumentative grounds of estoppel

The purpose of this chapter is to draw attention to the fact that international lawyers support of their views about estoppel by means of a wide variety of arguments, some drawing on past international practice, some drawing on international values and some drawing on municipal practices and analogies. Even though these arguments sometimes appear to stand in competition to each other, they share a much deeper interpretive connection.

1. Thinking about estoppel: practical requirements and argumentative grounds

There are at least three different sets of questions that one could ask about estoppel in international law. The first, more obvious, set concerns the *practical requirements* of estoppel, i.e. the conditions or criteria that must be present for estoppel to apply in a given case. This comprises questions like "what kind of representation can give rise to an estoppel?", "should the representee have incurred detriment in reliance upon the representation?" and the like. The answers to those questions will generally tell one whether or not estoppel will apply in a certain context. Most articles and treatises on estoppel provide detailed accounts of international practice on these matters. For example, one of the best-known statements of the practical requirements of estoppel reads as follows: "The rule of estoppel operates so as to preclude a party from denying the truth of a statement of fact made previously by that party to another whereby that other has acted to his detriment or the party making the statement has secured some benefit".[1]

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[1] Bowett D., 'Estoppel Before International Tribunals and Its Relation to Acquiescence', 33 *BYIL* (1957) 176 at 201. On estoppel in international law see Martin A., *L'*estoppel *en droit international public: précède d'un aperçu de la théorie de l'*estoppel *en droit anglais* (1979); MacGibbon I., 'Estoppel in International Law', 7 *ICLQ* (1958) 468; Sinclair I., 'Estoppel and Acquiescence' in Lowe V. & Fitzmaurice M. (eds.), *Fifty Years in the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 104 at 109; McNair A., 'The Legality of the Occupation of the Ruhr', 5 *BYIL* (1924) 17 at 34ff; Brown C., 'A Comparative and Critical

The second, somewhat less obvious, set of questions concerns what I will call the *argumentative grounds* of estoppel. This set comprises questions like "what do past international decisions say about the requirements of estoppel?", "what are the values underlying that concept?" or "is there a meaningful analogy between estoppel in municipal systems and estoppel in international law?". These questions differ from those of the first set because they do not purport to settle directly whether or not estoppel will apply in a given case. Their purpose, rather, is to provide international lawyers with a certain variety of arguments or ideas for making their case for or against a particular requirement of estoppel.

A third set of questions concerns the *proper categorization* of estoppel under the sources of general international law, either as a rule of customary international law or as a general principle of law in the sense of art.38(1)(c) of the Statute of the International Court of Justice. This set of questions differs from the second because it is concerned with distinguishing between *legitimate* and *illegitimate*, or proper and improper argumentative grounds. Thus if one thinks that estoppel is a rule of customary international law rather than a general principle of law, one will probably conclude that the proper arguments in relation to estoppel are those that aim to prove the existence of consistent and uniform State practice accompanied by a requisite intention or *opinio juris*.[2] By contrast, if one thinks that estoppel is a general principle of law, one will tend to rely much more on appeals to principles such as good faith and perhaps to some analogies from municipal legal systems.[3]

Assessment of Estoppel in International Law', 50 *U. Miami L. Rev.* 369 at 396-8; Chan P., 'Acquiescence/Estoppel in Boundary Disputes: *Temple of Preah Vihear* Revisited', 3 *Chinese JIL* (2004) 421; Weeramantry J., 'Estoppel and the Preclusive Effects of Inconsistent Statements and Conduct: the Practice of the Iran-United States Claims Tribunal', 27 *NYIL* (1996) 113; Müller J., 'Estoppel' in Bernhardt R. (ed.), *Encyclopedia of International Law* (1982), vol. VII at 78-81; Witenberg J., '*L'estoppel*, Un aspect juridique du problème des créances américaines', 60 *Journal de droit international* (1933) 529; Vallée Ch., 'Quelques observations sur l'*estoppel* en droit des gens', 77 *RGDIP* (1973) 949; Dominice C., 'A propos du principe de l'*estoppel* en droit des gens' in *Recueil d'études de droit inernational en hommage à Paul Guggenheim* (1968) at 327; Das H., '*L'estoppel* et l'acquiscement: assimilations pragmatiques et divergences conceptuelles', 30 *Revue belge de droit international* (1997) 607. A number of general works have devoted particular attention to estoppel, see especially Lauterpacht H., *The Development of International Law by the International Court* (rev. ed., 1982) at 162-5; id., *Private Law Sources and Analogies of International Law* (1927) at 79-82; Cheng B., *General Principles of Law as Applied by International Courts and Tribunals* (1953) at 141-9; Koskenniemi M., *From Apology to Utopia: The Structure of International Legal Argument* (1989) at 311-320; Kolb R., *La bonne foi en droit international public: contribution à l'etude des principes généraux de droit* (2000) at 221-45.

[2] The view that estoppel is a rule of customary international law is shared by MacGibbon, above n.1 at 512-3 and Martin, above n.1 at 135-41.

[3] This view is shared by Bowett, above n.1 at 180ff.; Cheng, above n.1 at 141-9; Kolb, above n.1 at 227-9; Vallée, above n.1 at 950; Dominice, above n.1 at 328-30.

The present Chapter is concerned with the *second* of those sets of questions. It leaves aside most questions about the practical requirements of that concept; this is the subject matter of specialist accounts, which provide much more extensive and detailed reviews of international practice on estoppel than I could hope to deliver in the present context. It also leaves aside questions about the proper categorization of estoppel under the sources of general international law. This is a matter of specialist accounts of estoppel and the theory of the sources of international law. Although my discussion in Part II of the place of evaluation in sources theory will have some bearing on these questions, I do not intend to advance any definite thesis about whether estoppel is really a rule of customary law or a general principle of law in the sense of art.38(1)(c) of the ICJ Statute. My sole aim in this Chapter to describe the different kinds of argument that international lawyers use when they make submissions about estoppel, in order to gain some first insight into the interrelation between evaluative with historical arguments in the interpretation of rules of international law.

I should say at the outset that my discussion is placed at some disadvantage by the fact that questions about the argumentative grounds of estoppel have not raised much interest in the literature. The majority of specialist articles and treatises on estoppel focus their attention on its practical requirements. Very few discuss at any length the proper categorization of estoppel amongst the sources of international law, while even fewer discuss the relationship between the different arguments that international lawyers use when they argue about estoppel. The notable exceptions in this respect are Antoine Martin's monograph on estoppel, Ian MacGibbon's and Derek Bowett's articles on estoppel, Cheng's monograph on general principles and Koskenniemi's analysis of the argumentative structure of claims of estoppel and acquiescence. It is to those pieces that I will refer mostly in my discussion in this and the following Chapter.[4]

Moreover, international courts and tribunals too are hardly ever explicit about what they would consider the proper argumentative grounds of estoppel. They are generally content to lay down its practical requirements, without necessarily explaining whether those requirements derive from the history of past international applications of estoppel, from a suitable

[4] See above n.1 for citations.

interpretation of the values underlying estoppel or from analogies from municipal conceptions of estoppel. Consider the oft-quoted extract from the judgement of the International Court of Justice in the *North Sea Continental Shelf* cases:

> [I]t appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention, -that is to say if the Federal Republic were now precluded from denying the applicability of the conventional regime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is no evidence whatsoever in the present case.[5]

Although the passage makes clear the Court's view of the practical requirements of estoppel, it is very difficult to say whether the Court reached this view on the basis of past international applications of that concept, on reflection upon what the principle of good faith requires in cases of absence of protest, or by drawing on analogies with municipal conceptions of estoppel.[6] But even when an international court or tribunal gives some indication to the kind of support that arguments about estoppel should be looking for, this will rarely be enough to permit safe conclusions on the question of argumentative grounds. For example, the recent award of the Eritrea – Ethiopia Boundary Commission on the *Delimitation of the Boundary* between the two States is very informative as to the Commission's view of the requirements of estoppel, yet its reference to the proper argumentative grounds of estoppel is limited to one footnote citation of the *Temple* case. In discussing the effect on a treaty of the subsequent conduct of the parties, the Commission held:

> The decision of the International Court of Justice in the *Temple* case is generally pertinent in this connection. There, after identifying conduct by one party which it was reasonable to expect that the other party would expressly have rejected if it had disagreed with it, the Court concluded that the latter was estopped or precluded from challenging the validity and effect of the conduct of the first. This process has been variously described by such terms, amongst others, as estoppel, preclusion, acquiescence or implied or tacit agreement. But in each case the ingredients are the same: an act, course of conduct or omission by or under the authority of one party indicative of its view of the content of the applicable legal rule – whether of treaty or customary origin; the knowledge, actual or reasonably to be inferred, of the other party, of such conduct or omission; and a failure by the latter party within a reasonable time to reject, or dissociate itself from,

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[5] *North Sea Continental Shelf* (FRG v. Netherlands / FRG v. Denmark) Judgment 20 February 1969, ICJ Reports (1969) 3 at 26, par.30.

[6] For an ambitious attempt to read into the Court's view an endorsement of a common-law based conception of estoppel, see Chapter Two, section 1.

> the position taken by the first. Likewise, these concepts apply to the attitude of a party to its own conduct: it cannot subsequently act in a manner inconsistent with the legal position reflected in such conduct.[7]

It seems difficult to conclude that the single reference to the *Temple* case gives clear support to the view that the Commission understood the requirements of estoppel to depend solely on the history of past international practice, therefore excluding arguments drawing on the values underlying that concept and municipal analogies. The most one could say with some certainty would be that the Commission clearly placed importance on the ways in which estoppel had been interpreted and applied in the past, but did not take a position on the suitability of other argumentative grounds.

To make up for the relative dearth of examples from decisions of international courts and tribunals on the question of argumentative grounds, I propose to draw on the pleadings of international lawyers before international courts and tribunals. These pleadings not only help to bring the relevant decisions of international courts and tribunals in a sharper focus, but they also provide an insight into a number of features of argumentative practice on estoppel that would otherwise be hidden from view. Several articles on estoppel have followed the same practice.[8]

My reliance on such pleadings might nevertheless strike some as arbitrary and dangerous. It might be objected that to concentrate on what international lawyers claim about estoppel in the context of international litigation risks distorting one's view of that concept. Talk, after all, is cheap. Parties and their counsel will often make any claim that suits their purposes in order to achieve a favourable result in legal proceedings, taking more care to convince their select (and often hand-picked!) audience than to ensure that their claims are correct as a matter of international law.[9]

This objection would perhaps have a point against an account of the practical requirements of estoppel, which obviously could not draw safe conclusions about the content of that concept on the basis of what international lawyers say about it in litigation. But the objection is much less potent, I think, against the sort of account I will pursue in this Chapter. On the

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[7] *Decision Regarding Delimitation*, Eritrea – Ethiopia Boundary Commission, Award of 13 April 2002, Chapter III, par. 3.9 at 23 (note omitted).
[8] For example, MacGibbon, above n.1 at 479ff.; Bowett, above n.1 at 193-5; Martin, above n.1 at 113-8, 137-43; 224-9; Koskenniemi, above n.1 at 313-20.
[9] Cf. Mendelson M., 'Practice, Principle and Propaganda in International Law', 42 *Current Legal Problems* (1989) 1 at 11-14.

one hand, my use of pleadings is not meant to confirm or reject any particular view of the requirements of estoppel. It is not intended to take a position on whether estoppel applies in all cases of inconsistent conduct, whether the party claiming an estoppel must have suffered serious detriment and the like. On the other hand, my use of pleadings is only intended to sharpen certain basic intuitions about the role of evaluation in the interpretation of international law on estoppel, intuitions that are easily found in more 'authoritative' material sources and which almost all international lawyers can be seen to share (namely the connection between estoppel and principles such as good faith and consistency, the importance of its past international applications and its common-law origins). In short, my concern in this Chapter is not to provide any *answers* about what estoppel requires, but to examine the ways in which evaluative judgments play a role in formulating the *questions* that international lawyers ask about its requirements.

2. Three intuitions and a problem

Most international lawyers appear to share at least three basic intuitions about the argumentative grounds of estoppel. They would all agree that estoppel is closely related with the general principle of *good faith*. They would also be happy to acknowledge the *common-law origin* of the concept and some of its equivalents in other domestic legal systems. Finally, they would all agree that the practical requirements of estoppel depend very much on the ways the concept has been applied in the *past practice* of international courts and tribunals. Sometimes all three intuitions will appear in the same breath, as happened in the judgement of the Iran-US Claims Tribunal in *Phillips Petroleum Co. v. Islamic Republic of Iran*:

> The principle of estoppel or preclusion has a long history in international arbitration. It has been recognized as a 'general principle of law recognized by civilized nations' and is grounded on considerations of good faith and consistency.[10]

[10] *Phillips Petroleum Co., Iran v. The Islamic Republic of Iran, et al.*, Award No. 425-39-2 (29 June 1989), 21 Iran US CTR 79 at 154-5 (notes omitted). For the Tribunal's general use of estoppel see Aldrich G., *The Jurisprudence of the Iran-US Claims Tribunal* (1996) at 168-70; Weeramantry, above n.1.

Taking each of these intuitions in turn, the relevance of past applications of estoppel to the determination of its practical requirements seems beyond dispute. Every international lawyer is acquainted with several landmark judgements on estoppel, such as those of the International Court of Justice in the *King of Spain*[11], *Temple of Preah Vihear*[12], *Barcelona Traction*[13], *North Sea Continental Shelf*[14], *Gulf of Maine*[15] and *Eletronica Sicula*[16] cases. This body of case-law is augmented, first, by a considerable amount of arbitral practice (e.g. the *Palena*[17], *Rann of Kutch*[18], *Phillips Petroleum v. Islamic Republic of Iran*[19] and *Eritrea-Ethiopia*[20] awards), second, by a constantly expanding list of cases discussing and applying estoppel in more particular contexts such as the law of the WTO[21], the law of certain human rights institutions[22] and, third, by a number of cases that do not mention estoppel by name but apply concepts and principles that share the same rationale with it (such as acquiescence, admission, preclusion, waiver etc).[23] Without doubt, this body of practice is essential to a proper understanding of the place and function of estoppel in international law.

At the same time, international practice is replete with arguments drawing on the moral principles underlying estoppel and on the value that this concept serves in relations between States. Time and again international

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[11] *Arbitral Award Made by the King of Spain on 23 December 1906* (Honduras v. Nicaragua), ICJ Reports (1960) 192 at 204ff.
[12] *Temple of Preah Vihear* (Cambodia v. Thailand), ICJ Reports (1962) 6 at 22ff.
[13] *Barcelona Traction, Light and Power Ltd. (New Application:1962)* (Belgium v. Spain), Preliminary Objections, ICJ Reports (1964) 6 at 24ff.
[14] See above n.5 .
[15] *Case Concerning Delimitation of the Maritime Boundary in the Gulf of Maine Area* (Canada/United States), ICJ Reports (1984) 246 at 303ff.
[16] *Elettronica Sicula S.p.A. (ELSI)* (Italy/United States), ICJ Reports (1989) 15 at 43-4.
[17] *Argentine-Chile Frontier (Palena Case)* (1966), 16 UNRIAA III at 164.
[18] Indo-Pakistan Western Boundary Case Tribunal ('*Rann of Kutch Case*'), Award of February 19, 1968, 50 ILR 2 at 75-9.
[19] See above n.10.
[20] See above n.7.
[21] E.g. *German Import Duties on Starch*, Award of 7 February 1955, BISD 3S/77; *Canada – EEC Arbitration on the Ordinary Wheat Agreement*, DS12/R, Award of 26 October 1990, BISD 37/80. See generally Cameron J. – Gray K., 'Principles of International Law in the WTO Dispute Settlement Body', 50 *ICLQ* (2001) 248 at 293-4.
[22] Estoppel has been frequently invoked as a bar to the admissibility of preliminary objections before the European Court of Human Rights, see e.g. *Barberà, Messegué and Jabardo v. Spain*, Case No. 10590/83, Judgement of 6 December 1988 (Plenary) at par.56; *Zana v. Turkey*, Case No. 18954/91, Judgement of 25 November 1997 (Grand Chamber) at par.44; *Ciulla v. Italy*, Case No. 11152/84, Judgement of 22 February 1989 (Plenary) at pars.28-9. The above decisions are available at <http://echr.coe.int>.
[23] E.g. *Fisheries* (United Kingdom v. Norway), ICJ Reports (1951) 116 at 138-39. On the similarities between estoppel and acquiescence see Sinclair, above n.1; Bowett, above n.1 at 197ff; Das, above n.1. On the relation between estoppel and recognition see Schwarzenberger G., *International Law* (1974) at 78-80; Lauterpacht H., 'Sovereignty over Submarine Areas' 27 *BYIL* (1950) 376 at 395-8.

courts and tribunals have described estoppel as a rule that follows from principles such as "good faith and equity"[24], "predictability and stability"[25] "fair dealing...and equity"[26], "good faith and conscience"[27], and whose substance is that "inconsistency between claims and allegations put forward by a State, and its previous conduct in connection therewith, is not admissible".[28] Similarly, all international lawyers pleading estoppel will, at one point or another, make use of a variety of general maxims that are meant to illustrate the essential moral principle underlying estoppel, such as *allegans contraria non audiendus est* (one may not be heard to make inconsistent statements), *venire contra factum proprium non consedir* (it is not admissible to deny one's previous acts), "one cannot blow hot and cold", "one cannot run with the hare and hunt with the hounds" and the like. These maxims and principles do not seek to make a point about the history of past applications of estoppel; they are meant to illustrate what estoppel is *for*, i.e. the value and purpose that it serves in international law. The point has been well put by Johannes Müller:

> Clear and unequivocal representation, prejudice or detriment are not simply addenda: they trigger the very justification for specific protection of settled expectations. A rule or principle which would prohibit any modification of conduct, statement or representation vastly overestimates the potentials of law and is not even suitable or desirable in order to promote protection of good faith, reliance and confidence in international relations.[29]

Note that evaluative arguments will sometimes be expressed not in terms of such concepts, principles or maxims, but in terms of a substantive proposition. Consider, for example, the judgement of the International Court in the *Temple of Preah Vihear* dispute between Cambodia and Thailand. In deciding the question of title over the Temple area, the Court drew attention to several instances of Thailand's attitude that seemed to amount to recognition that the Temple fell in the Cambodian side of the border. Among these events were the apparent endorsement by Thailand of a map drawn pursuant to the 1904 boundary treaty between the two States, which showed the Temple area as part of Cambodia, and a series of subsequent exchanges between higher

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[24] *Gulf of Maine*, above n.15 at 305, par.130.
[25] *Canada – EEC Arbitration on the Ordinary Wheat Agreement*, above n.21 at 86.
[26] Lauterpacht H., 'Sovereignty over Submarine Areas', above n.23 at 398.
[27] *In the Matter of an International Arbitration Under the UNCITRAL Rules Between Sandline International Inc. and the Independent State of Papua New Guinea* (Interim Award), 9 October 1998, 117 ILR 552 at 562.
[28] *Temple of Preah Vihear*, Sep. Opinion of Vice-President Alfaro, above n.12 at 40.
[29] Müller, above n.1 at 79.

officials of the two States, in which that arrangement went uncontested. The Court assessed Thailand's attitude as follows:

> Even if there were any doubt as to Siam's acceptance of the map in 1908, and hence of the frontier indicated thereon, the Court would consider, in the light of the subsequent course of events, that Thailand is now precluded by her conduct from asserting that she did not accept it. She has, for fifty years, enjoyed such benefits as the Treaty of 1904 conferred on her, if only the benefit of a stable frontier. France, and through her Cambodia, relied on Thailand's acceptance of the map. Since neither side can plead error, it is immaterial whether or not this reliance was based on a belief that the map was correct. It is not now open to Thailand, while continuing to claim and enjoy the benefits of the settlement, to deny that she was ever a consenting party to it.[30]

In this passage, the Court drew attention to the substantive unfairness of allowing Thailand to upset a boundary settlement from which it had derived benefits for a considerable period of time. The evaluative character of this point is clear, despite the fact that the Court chose to make it without appealing by name to estoppel or other similar concepts.[31]

Finally, international lawyers often draw specific attention to the municipal origin of estoppel. It is a matter of historical fact that estoppel developed as a distinct rule of English common-law and subsequently found its place in all common-law systems and, in due course, in international law.[32] The idea behind international lawyers' appeals to the municipal conceptions of estoppel is to capitalize on the accumulated wisdom of those systems in the interpretation and application of estoppel, despite the fact that occasionally it is felt that some of the technical limitations of those municipal conceptions are not appropriate for the international context.[33]

But this is where a difficult problem seems to arise. The three argumentative grounds that international lawyers invoke when they make submissions about the requirements of estoppel will sometimes appear to pull in opposite directions. Suppose, for example, that upon detailed examination

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[30] *Temple of Preah Vihear*, above n.12 at 32.

[31] This is confirmed by the individual opinions of members of the Court. In particular, see the Separate Opinions of Vice-President Alfaro and Judge Fitzmaurice and the Dissenting Opinion of Judge Spender, above n.12 at 39-51, 62-5 and 129-32 respectively.

[32] Cf. the extensive discussion by Martin, above n.1 at 5-87. See also McNair, above n.1 at 34-6. For a recent discussion of estoppel in private international law see Barnett P., *Res Judicata, Estoppel and Foreign Judgements: The Preclusive Effects of Foreign Judgements in Private International Law* (2001).

[33] For citations on the critical approach of international lawyers to common-law estoppel see section 4.3 below. On estoppel at common law see generally Cooke E., *The Modern Law of Estoppel* (2001); Spence M., *Protecting Reliance: The Emergent Doctrine of Equitable Estoppel* (1999); Wilken S. – Villiers T., *Waiver, Variation and Estoppel* (2nd ed., 2002); Bower G.S., *The Law Relating to Estoppel by Representation* (3rd ed. by Turner A., 1977).

of municipal conceptions of estoppel, we come to the conclusion that most municipal systems apply estoppel only when the claimant can prove that they have suffered 'serious detriment' as a result of the defendant's representation. Suppose, further, that we interpret good faith as demanding that States observe a measure of forthrightness and consistency in their dealings with each other. Lastly, suppose that some past international decisions on estoppel have drawn attention to the existence or threat of detriment, whereas others have not. To which of those three argumentative grounds should we assign greater weight when reaching conclusions about the content of estoppel in international law? To our survey municipal practice? To our interpretation of the principle of good faith? Or to the (in my example ambiguous) history of past international decisions on the matter?

3. Historical and evaluative arguments 'in competition'

Consider the arguments of Argentina, Brazil and the United States in the context of a dispute between the first two States concerning certain *Definitive Anti-Dumping Duties on Poultry from Brazil*.[34] Argentina and Brazil disagreed on whether Brazil had represented to Argentina that it would not bring their dispute before a WTO Panel. According to Argentina, several instances of Brazil's conduct had created in Argentina the impression that their dispute would be negotiated and settled within the context of MERCOSUR, to which both States were parties. To start with, Brazil had signed the 1991 Protocol of Brasilia in which it had undertaken to settle conflicts with other MERCOSUR parties using the procedures provided in the Protocol, and to comply with the content and scope of any arbitral awards rendered as part of those procedures. Moreover, the two parties had jointly submitted their dispute to arbitration under MERCOSUR, which had resulted in a final award in favour of Argentina. Lastly, only a week before it instituted WTO proceedings against Argentina, Brazil had signed the 2002 Protocol of Olivos, which provided that once a party decided to bring a case under either the MERCOSUR or the WTO dispute settlement systems, that party might not bring a subsequent case regarding the same subject-matter in the other forum.

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[34] *Argentina - Definitive Anti-Dumping Duties on Poultry from Brazil*, WT/DS241/R, Report of the Panel, 22 April 2003, adopted 19 May 2003, available at <http://docsonline.wto.org>

Argentina claimed that these three instances in Brazil's past conduct estopped it from instituting WTO proceedings against Argentina. For its part, Brazil claimed that there was no such bar or cause for estoppel.

As one would expect, the two parties disagreed about the practical requirements of estoppel and, in particular, about whether Brazil's previous conduct amounted to a 'representation' toward Argentina. What makes their dispute interesting for our present purpose, though, is the difference in the argumentative grounds that each party employed in order to tell whether Brazil's conduct came under the notion of a 'representation'. In Argentina's view, Brazil's decision to start WTO proceedings gave rise to an estoppel because it was inconsistent with its past conduct and thus breached the standards of good faith. "A State party is not acting in good faith", Argentina argued, "if it first has recourse to the mechanism of the integration process to settle its dispute with another State party and then, dissatisfied with the outcome, files the same complaint within a different framework, making matters worse by omitting any reference to the previous procedure and its outcome".[35] "[A] State cannot be allowed to avail itself of the advantages of a treaty when convenient and to reject that treaty when compliance becomes burdensome. It is of very little consequence whether the said rule is based on what is known in English law as the principle of estoppel or on the requirement of good faith. The first is but an aspect of the second".[36]

Brazil argued its case in a different manner. Instead of disputing Argentina's interpretation of the principle of good faith, Brazil relied on a series of past decisions of WTO Panels and the Appellate Body, which had consistently held that an estoppel could only result from an act of express, or in exceptional cases implied, consent.[37] In Brazil's view, the simple fact that it had brought a similar dispute to the MERCOSUR Tribunal and its signing of the 2002 Protocol of Olivos could not have 'represented' to Argentina that Brazil had agreed not to bring the current dispute before the WTO, because

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[35] Ibid at par.16.
[36] Ibid, Argentina - First Oral Statement, par.12 and Comments of Argentina on the Second Oral Statement of Brazil, par.9.
[37] Brazil here quoted from the Panel decision in *EEC – Member States' Import Regimes for Bananas*, 3 June 1993, unadopted, DS32/R, par.362. See also *India – Measures Affecting the Automotive Sector*, WT/DS146/R, WT/DS175/R and Corr.1, adopted 5 April 2002, note 364; *Guatemala – Definitive Anti-Dumping Measures on Grey Portland Cement from Mexico*, WT/DS156/R, adopted 17 November 2000, note 791.

those acts fell far short of a clear and unequivocal expression of consent, as required by past WTO jurisprudence on estoppel.[38]

In its third-party submission, the United States, like Brazil, also appealed to past WTO practice, but drew more radical conclusions from it. Whereas Brazil was prepared to concede to Argentina that the concept of estoppel *could* have been applicable in their dispute, the United States argued that the history of past WTO practice excluded the very applicability of estoppel in the context of WTO dispute settlement: "The United States... disagrees with Argentina that the Panel may apply what Argentina calls the principle of estoppel. The fact that Argentina cites no textual basis for its request reflects the fact that Members have not consented to provide for the application of any such principle of estoppel in WTO dispute settlement. The term estoppel appears nowhere in the text [of the Dispute Settlement Understanding] nor does Argentina cite any provision which in substance provides Argentina the type of defense it asserts".[39] To this, the United States added that "no Panel to date ha[d] applied the principle of estoppel" and pointed to "the lack of consistent description of the concept when panels have had occasion to discuss estoppel in the past".[40]

We could summarize the parties' lines of argument as follows. To make its case about what 'representation' meant for the purposes of estoppel, Argentina presented a story about why States ought not to be allowed to blow hot and cold towards other States. The heart of that story consisted in an *evaluation* of Brazil's attempted inconsistency, an appeal to certain values that States ought to respect in their relations with each other. For their part, Brazil and the United States fashioned their arguments on the basis of the *history* past applications of estoppel in WTO practice. Their stories concentrated on the lack of past practice supporting the view that Brazil's conduct could give rise to an estoppel or –in the radical view of the United States- that estoppel could ever be applied against WTO members. Whereas Argentina tried to convince the WTO Panel that the practical requirements of estoppel turn on certain evaluative judgements, made in accordance with principles such as good faith, honesty or consistency, Brazil and the United States claimed that something could be a requirement of estoppel only to the extent that this has

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[38] *Definitive Anti-Dumping Duties*, above n.36, Third Party Submission of the European Communities, paras.12-18.
[39] Ibid, Third Party Oral Statement by the United States, par.5.
[40] Ibid at par.6.

been recognized in the history of international practice. In examples of this sort, the different argumentative grounds of estoppel seem to pull in completely different directions.

(In the event, the WTO Panel did not have to take an express position on this disagreement. It held the following: "7.34 Argentina asserts that Brazil failed to act in good faith by first challenging Argentina's anti-dumping measure before a MERCOSUR Ad Hoc Tribunal and then, having lost that case, initiating WTO dispute settlement proceedings against the same measure. For the following reasons, however, we find that the preconditions for a finding that Brazil failed to act in good faith are not met...".[41] Although the Panel's finding might seem to support Argentina's point of view, a closer reading suggests that the Panel only meant to point out that, on the facts of the case, Argentina's argument failed *even on its own terms*).

The impression that the different argumentative grounds of estoppel can stand in competition with each other is strengthened by the contrast between two very famous views about the content of estoppel in international law. The first comes from the famous *Tinoco* arbitration. In that dispute, the United Kingdom and Costa Rica disagreed about whether the fact that the United Kingdom had failed to recognize the short-lived Tinoco government of Costa Rica estopped it from pursuing claims arising from concessions granted by that regime. The arbitrator approached the question by pointing to a serious tension between arguments about estoppel that were based on past international practice and arguments that pointed to the need to ensure predictability and stability in relations between States:

> It may be urged that it would be in the interest of the stability of governments and the orderly adjustment of international relations, and so a proper rule of international law, than a government in recognizing or refusing to recognize a government claiming admission to the society of nations should thereafter be held to an attitude consistent with its deliberate conclusion on this issue. Arguments for and against such a rule occur to me; but it suffices to say that I have not been cited to text writers of authority or to decisions of significance indicating a general acquiescence of nations to such a rule. Without this, it cannot be applied here as a principle of international law.[42]

Whether or not the arbitrator was right in his assessment of international practice, one thing that emerges very clearly from the award is his belief that the available historical and evaluative arguments about estoppel pulled in

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[41] Ibid at par.7.34.
[42] *Tinoco* arbitration (UK/Costa Rica), 1 U.N.R.I.A.A. 369 at 378 (emphasis added).

opposite directions, or stood in competition with each other. In the arbitrator's view, this meant that evaluative arguments could only be given weight to the extent that there was enough historical evidence that States had consented to their use in the context of estoppel.

Contrast the view of the arbitrator in *Tinoco* with the Separate Opinion of Vice-President Alfaro in the *Temple of Preah Vihear* case. In discussing when States should be precluded from going back on their representations to others, Vice-President Alfaro justified his view on the following grounds:

> The primary foundation of this principle is the good faith that must prevail in international relations, inasmuch as inconsistency of conduct or opinion on the part of a State to the prejudice of another is incompatible with good faith... A secondary basis of the principle is the necessity for security in contractual relationships. A State bound by a certain treaty to another State must rest in the security that a harmonious and undisturbed exercise of the rights of each party and a faithful discharge of reciprocal obligations denote a mutually satisfactory state of things which is permanent in character and is bound to last as long as the treaty is in force... Such a security must be upheld as an indispensable element of fruitful harmony in all treaty relationships... Finally, it may be averred that, as in the case of prescription, the principle is also rooted in the necessity of avoiding controversies as a matter of public policy (*interest rei publicae ut sit finis litium*). By condemning inconsistency a great deal of litigation is liable to be avoided and the element of friendship and co-operation is strengthened in the international community.[43]

Seen against *Tinoco*, Vice-President Alfaro's opinion reflects a much different conception of the balance between historical and evaluative argumentative grounds of estoppel, one that places more emphasis on the latter ground. From Alfaro's perspective, the rule of estoppel emerges as the guardian of certain "fundamental" and "indispensable" international values, rather than the contingent product of the development of international practice.

To sum up: although most international lawyers would agree that the requirements of estoppel are influenced by both historical and evaluative considerations, it would seem that those considerations may sometimes stand in opposition to each other and that international lawyers may then need to make a choice amongst them. In the next section, I will suggest that this idea gives only a partial picture of the much richer relationship between historical and evaluative arguments. Chapter Two will then take a first look into the reasons why the 'confrontational' or oppositional conception of their relationship seems so straightforward and appealing.

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[43] *Temple of Preah Vihear*, Separate Opinion of Vice-President Alfaro, above n.12 at 42.

4. Historical and evaluative arguments in interpretive combination

In this section I suggest that this 'confrontational' account of the relationship between historical and evaluative arguments about estoppel is only partly accurate, for it misses an important internal dimension of that relationship, which I will call *interpretive*. To make this point, I consider in more detail some prominent examples from international argumentative practice on estoppel and identify three more specific features of the interaction between its argumentative grounds. These are (3.1) the frequency with which international lawyers use historical and evaluative arguments *in combination* in order to support their views about the practical requirements of estoppel, (3.2) the tendency of historical arguments to rely to deep evaluative arguments about the *salience* of past practices and their proper justification (3.3) the *autonomy* of the international conception of estoppel from its municipal counterparts.

4.1 The joint use of historical and evaluative arguments: *combination*

One of the most striking features of international legal argument on estoppel is the *combined* use both evaluative and historical arguments in support of a single claim about why a party must or must not be precluded from adopting inconsistent positions. What is especially important is that these two kinds of argument appear to stand in a relationship of *justification* to each other.

This theme appears very clearly in the reasoning of the WTO Panel in *EEC - Member States' Import Regimes for Bananas*. The Panel decided that GATT parties should not be considered to have released their treaty-partners from their obligations simply because they have not asserted their rights at some occasion. Its Report reads:

> 362. *The Panel considers that the decision of a contracting party not to invoke a right under the General Agreement at a particular point in time could be due to circumstances that change over time. For instance, a contracting party may not wish to invoke a right under the General Agreement pending the outcome of a multilateral trade negotiation, such as the Uruguay Round, or pending an assessment of the trade effects of a measure.* The decision of a contracting party not to invoke a right *vis-à-vis* another contracting party at a particular point in time can therefore, by

> itself, not reasonably be assumed to be a decision to release that other contracting party from its obligations under the General Agreement. **The Panel notes in this context that previous panels have based their findings on measures which had remained unchallenged for long periods of time.**[44]

In this passage the WTO Panel supports a single claim about the practical requirements of estoppel, namely that non-assertion of rights does not necessarily amount to a representation for the purposes of estoppel, by appealing to both historical and evaluative arguments. The passage in bold contains a historical argument. It draws attention to the fact that the Panel's understanding of the requirements of estoppel was consistent past WTO practice. The passage in italics contains an evaluative argument. It points out that past Panels had adopted this practice for a good *reason*, namely that GATT parties should be allowed a degree of flexibility in the exercise of their rights against its treaty-partners and suggests.

One finds more examples of this theme in arbitral practice. In the case of *Martin Feldman v. Mexico*, the ICSID Additional Facility Tribunal described Mexico's submissions as follows:

> [A]ccording to the Respondent, **the cases cited by the Claimant in support of estoppel involve state boundary disputes and even there it is not clear whether the International Court of Justice really applied the doctrine of estoppel.** An attempt to borrow underdeveloped and peripheral principles from such an area of international law apply them to another *should be made with caution. The same legal affect that attaches to the conduct of States in boundary disputes, which they are presumed to have considered with the utmost seriousness, cannot apply in cases where a large state bureaucracy deals with an individual taxpayer.*[45]

Mexico's argument, with which the Tribunal eventually agreed[46], makes a case about the proper application of estoppel by using a combination of historical and evaluative arguments. First, it disputes whether the claimant's position has any support in past international practice (passage in bold). It then supports this arguments by producing a substantive argument as to why States' inconsistent conduct in the context of tax disputes should not be treated in the same way as inconsistent conduct in the far more serious context of boundary disputes (passage in italics).

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[44] *EEC – Member States' Import Regimes for Bananas*, Report of the Panel, DS32/R, 3 June 1993, unadopted, par.362.
[45] *Marvin Feldman v. Mexico*, ICSID Case No. ARB (AF)/99/1, Award, 16 December 2002 at 62, par.19.
[46] Ibid at 63, par.21.

The pleadings of international lawyers before international courts and tribunals offer further examples of the combined use of evaluative and historical arguments. Consider a very interesting extract in the Bahrainian Reply to Qatar's claim of estoppel in the merits phase of the *Maritime Delimitation and Territorial Questions* case between Qatar and Bahrain. Bahrain submitted that it was not precluded *ratione temporis* from availing itself of the options available to archipelagic States under Part IV of the Law of the Sea Convention. Here is how Bahrain phrased its argument:

> With respect to the separate question of whether Bahrain may avail itself of the options available to States qualifying under Article 46 of the 1982 Convention and exercise such of the baseline privileges of Article 47 that are appropriate to its situation and its wishes, Qatar implies that Bahrain is somehow now estopped from asserting the options under Part IV of the Convention and that, in any case, Part IV is not part of "present-day customary international law." Once again, **Qatar vouchsafes no authority for either proposition**. Both are unfounded. **Neither the language of Part IV of the 1982 Convention nor anything in its legislative history indicates any time limit whatsoever with respect to exercising the options under Part IV.** *It could hardly be otherwise, given that many States must carefully consider all of the implications of exercising the option before making their decision. States have exercised the option in the course of negotiating bilateral maritime boundaries, without it being protested.* In fact, Bahrain explained precisely why the matter of the declaration of its archipelagic status had to be deferred.[47]

The phrases in bold reflect an argument based on the facts of State practice. Bahrain argues that there was no evidence to support an estoppel against it either in the text of the 1982 Law of the Sea Convention or in the drafting history of Part IV. Bahrain then goes on to claim that there are substantive reasons why the plea of estoppel must fail, by arguing that States should be allowed enough space to consider carefully their options before making a decision under Part IV (passage in italics). The emphasis here lies not on some past historical fact but on a good that ought to be protected in the conduct of State negotiations.

4.2 Disagreements about facts / disagreements about values: *salience*

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[47] *Maritime Delimitation and Territorial Questions between Qatar and Bahrain*, Reply Submitted by the State of Bahrain (Merits), Vol. 1, 30 May 1999, par.280, available at <http://www.icj-cij.org>.

In this section, I want to give my description of argumentative practice on estoppel more depth, by taking a more detailed look into the relationship of justification between historical and evaluative arguments about estoppel. More specifically, I will try to show that evaluative arguments are intended to explain not only *why* international lawyers look at a certain body of past international practice, but also *how* or from *what perspective* they should approach it. When international lawyers make claims about estoppel, they do not just rely on a survey of the facts of past practice; they also try to show that those facts are *salient*, in the sense that they help capture the point, purpose or value that underlies the whole of international practice on estoppel.

Consider some examples. In the *Gulf of Maine* case, the United States and Canada disagreed on whether the United States' failure to protest against Canada's practice of issuing exploration permits precluded it from contesting Canada's rights over part of the Georges Bank. One of the particular issues in dispute was whether the United States' inaction was of such duration so as to represent to Canada that the United States' recognized Canada's rights. Canada claimed that a State's failure to protest in the face of significant legislative action by another State could be critical "*even in the short run*".[48] The United States disagreed. In its view, estoppel required the passage of a "substantial period of time", the precise extent of which depended on the nature of the right in question. Since the right of territorial sovereignty which Canada claimed over Georges Bank was by its nature one of a very long duration, the "substantial" period should be much longer than that concerning one-time violations.[49]

What is especially interesting about this disagreement is that both parties based their respective submissions about estoppel on more or less the same group of past judicial and arbitral decisions, including the Judgements of the International Court in the *Norwegian Fisheries*, *King of Spain*, *Temple of Preah Vihear*, *Tunisia-Libya Continental Shelf* and *Minquiers and Ecrehos* cases.[50] The parties, however, differed in their reading of this body of case-law. Whereas Canada emphasized that part of the *Fisheries* judgement which

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[48] ICJ Pleadings, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. I (1984), Memorial of Canada, par.414, p.167 (emphasis in original).
[49] ICJ Pleadings, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. II (1984), Counter-Memorial of the United States, par.253, pp.108-9.
[50] ICJ Pleadings, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. I (1984), Memorial of Canada, pars.414-7, pp.166-9; ICJ Pleadings, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. II (1984), Counter-Memorial of the United States, pars.239-256, pp.103-10 and pars.271-3, pp.115-7.

construed the United Kingdom's failure to protest against certain Norwegian Decrees as 'knowledge' of the territorial claims made in them[51], the US placed its emphasis on the fact that the UK's failure to protest had carried on for over sixty years.[52] And while Canada drew attention to that part of the *Temple of Preah Vihear* Judgment that stressed that the circumstances of the case were such that demanded Thailand's response[53], the United States pointed out that Thailand was estopped on the ground that it had failed to make any such response for a period of over fifty years.[54] The important point here is that once the most important instances of international practice were laid on the table, their disagreement between the parties started to take a deeper dimension. Instead of simply disagreeing about which side could cite the *most* instances of past international case-law in support, Canada and the US disagreed about which aspects of that case-law were *salient* or significant for the purposes of international law on estoppel.

The evaluative character of such judgements of salience appears clearly in the respective arguments of the parties in the *King of Spain* case. Honduras argued that Nicaragua was estopped from contesting the validity of the King's award, since it had failed to put forward any serious complaint against the award long after the latter had been delivered. What is especially interesting is that the parties' disagreement concerned not so much the *amount* of practice that each party could invoke in its support, but the *point* behind this practice, i.e. the purpose or value that estoppel should be understood to fulfil in international law. Honduras argued:

> 69...La principe général de droit qui vient d'être rappelé n'est pas une règle purement procédural. *Il trouve sa justification, en tant que règle de fond, a la fois dans le principe de la bonne foi et dans le principe de l'effet utile de l'institution arbitrale ou judiciaire.* Il en découle que l'État qui a renoncé a faire valoir, en temps opportun, une exception d'incompétence au cours de la procédure arbitrale ne pourra pas, sans manquer a la bonne foi, se fonder sur ce même grief d'incompétence a l'occasion d'une demande ultérieure en révision ou en annulation de la sentence arbitrale.[55]

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[51] ICJ Pleadings, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. I (1984),Memorial of Canada, par.414, pp.166-7.
[52] ICJ Pleadings, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. II (1984), Counter-Memorial of the United States, par.256, p.109.
[53] ICJ Pleadings, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. I (1984), Memorial of Canada, par.415, p.167.
[54] ICJ Pleadings, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. II (1984), Counter-Memorial of the United States, par.256, p.109.
[55] ICJ Pleadings, *Arbitral Award Made by the King of Spain on 23 December 1906*, Vol. I (1960), Reply of Honduras at 508 (emphasis added)

Nicaragua saw the matter quite differently. It argued:

> [W]hatever the term which may be used, whether it be estoppel or preclusion or foreclusion or acquiescence or other, the basic legal doctrine involved in this conception is not an arbitrary doctrine. It is designed to serve a very definite equitable purpose. It is not like a game where a player is penalized for a momentary lapse, for getting off base or deviating from his course, and it is not a rule of penal law. *The purpose of the doctrine, whatever the term used, is to compensate for some damage or prejudice suffered by a person when he relied, and was entitled to rely, upon some false statement or misleading act of another person.*[56]

Whichever view of the point of estoppel might be correct, what is particularly important here is that the two parties appealed to the values and purposes underlying estoppel not as a *substitute* for existing practice on estoppel, but as a means for its proper *interpretation.* Honduras claimed that the point of estoppel is to prevent parties from abusing arbitrary and judicial proceedings. In its view, the better interpretation of international practice showed that when a State has failed to raise a complaint in the context of an arbitral proceeding, even though it could and should have done so, that State must be precluded from raising that complaint in subsequent proceedings concerning the enforcement of the award in question. Nicaragua disagreed; it claimed that the real point of international practice on estoppel is not simply to bind a State to its previous representations but to compensate for concrete damage that its inconsistent conduct might have caused to another party. The important point for our present purposes is that the disagreement between the parties was neither *simply* a disagreement about the history of international practice, nor *simply* a disagreement about whether it would be just or fair to allow a State to get away with inconsistent conduct. Their disagreement seemed to be of an intermediate kind that we might call *interpretive*, in which each party tried to approach the history of international practice in a way that showed each particular application of estoppel as applying a coherent conception of the value or purpose that this concept serves in international law.

To get a tighter grip on the 'mixed' character of such interpretive disagreements, consider the submissions of the United States and Italy in the *EL.SI.* case. The two parties disagreed about whether Italy was estopped from raising the objection that the companies in favour of which the US was exercising diplomatic protection had not exhausted the local remedies

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[56] ICJ Pleadings, *Arbitral Award Made by the King of Spain on 23 December 1906*, Vol. II (1960), Oral pleading of Mr. Jessup (Nicaragua) at 230 (emphasis added).

available to them. One of the more particular issues in dispute was whether Italy's failure to raise the matter of local remedies in a series of exchanges with the US amounted to a 'representation' for the purposes of estoppel. In their written submissions, the two parties had disagreed on this point. The United States argued that Italy's conduct amounted to such a representation; Italy opposed this claim on the basis that international law does not impose a duty on States to recommend legal action against themselves. What is especially interesting for our purposes is that neither party tried to dismiss the other's claims by arguing that these claims had insufficient support in past international practice. What each side argued was that the other party's claims misunderstood the point, purpose or value of past practice on estoppel. This feature emerges very strongly from their oral debates. In its first round of pleadings, the United States' responded to Italy's written argument as follows:

> The Respondent also asks...whether a State is under an obligation to recommend legal action against itself. The answer to that question, in the context of the facts of this case is surely yes. *When one Government says to another Government that local remedies have been exhausted, the second Government should state that further local remedies do exist if that is what it really thinks.* The Respondent's failure to indicate to the United States that it believed such local remedies existed, precludes or estops the Respondent from raising such an objection now. Estoppel –a concept which goes by many names- is a general principle of international law often referred to by the maxim *nemo potest contra facta sua venire* (no one can contradict his own acts). Judge Lauterpacht defined estoppel in his treatise on *The Development of International Law by the International Court* (1962), at page 72, as "a general principle of law which, once more, is merely an affirmation of the moral duty to act in good faith". The principle of preclusion or estoppel is that a State party to an international litigation is bound by its previous acts or attitude when they are in contradiction to its claims in the litigation. The primary foundation of this principle is the good faith that must prevail in international relations, since inconsistency of conduct or opinion on the part of a State to the prejudice of another is incompatible with good faith.[57]

The Italian rejoinder countered these arguments directly:

> It has been further argued by the Applicant that the Italian Government is estopped from invoking the local remedies rule in relation to the claim put forward by the Applicant on behalf of Raytheon and Machlett... No explanation is offered by the United States Government as to why the Italian Government should have taken a self-defeatist attitude implying either a waiver of any right under the local remedies rule or an estoppel. Counsel for the Applicant, Mr. Murphy has tried to elaborate on the fact that an undated and unsigned Aide-Memoire was delivered to the United

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[57] ICJ Pleadings, *Elettronica Sicula S.p.A. (ELSI)*, Vol. III (1989), Oral pleading of Mr. Murphy (United States) at 87 (emphasis added).

> States Embassy in Rome in 1978, and that it did not contain an objection with regard to the non-exhaustion of local remedies. This document ...clearly in no way represented Italy's final position on the case... *If this could be seen to represent an estoppel or an implicit waiver of the application of the local remedies rule, negotiations between States over claims would be put under an unbearable strain.*[58]

The force of the Italian response was not lost on counsel for the United States, whose reply tried to elaborate and refine the United States' position regarding the point or value behind estoppel:

> The Respondent further argues that the position of the United States would mean that any government which fails to make any argument during the course of diplomatic discussions would be held to have waived it. This, of course, is not our contention. What we contend is that a State may not listen silently to good-faith assertions that all remedies that are available in its courts have been exhausted, and then engage in a long diplomatic process to find alternative means of resolving the dispute –a process made necessary by the asserted absence of local remedies, and then finally allege, after proceedings have been instituted with its concurrence, that the dispute cannot be adjudicated because there really were unexhausted local remedies in the first place.[59]

There are, I think, two important aspects to this disagreement. First, the disagreement between the two parties was not concerned *simply* with what past international decisions said about estoppel, nor *simply* with what would be fair and just treatment of inconsistent conduct. Rather, in their different ways, both parties appealed to certain international values (namely, the need for consistency and the protection of expectations and the need to allow States some latitude in their negotiations) in order to show from *which perspective* one ought to look at the facts of past international practice. As in the previous examples, here too the aim of their evaluative arguments was not to replace historical arguments about the practice, as to establish the right perspective for its interpretation.

Second, the parties' effort to establish the right perspective for the interpretation of international practice involved a continuous process of revision and *refinement* of their respective contentions. Note, in particular, the way in which the United States and Italy gradually adjusted its claims in order to take full account of the other's position. The United States started with the claim that Italy was estopped from raising the objection of non-exhaustion of

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[58] ICJ Pleadings, *Elettronica Sicula S.p.A. (ELSI)*, Vol. III (1989), Oral pleading by Professor Gaja (Italy) at 157-8 (emphasis added).
[59] ICJ Pleadings, *Elettronica Sicula S.p.A. (ELSI)*, Vol. III (1989), Reply by Mr. Matheson (United States) at 289.

local remedies because it had failed to do so in the course of earlier diplomatic negotiations. Italy initially resisted this claim on the ground that States do not have a duty to recommend action against themselves. The United States then *accepted* this response, but pointed out that, at the very least, States have a duty not to mislead other parties through their silence. For its part, Italy too *accepted* that States ought to be forthright in their conduct towards each other, but pointed out that they also ought to be allowed sufficient latitude to deliberate and formulate their diplomatic positions. It argued that consistency in conduct may be valuable, but it should not be construed so tightly as to bind States to positions taken in the course of any negotiation and thus discourage them from showing the necessary goodwill and flexibility in their relations.[60] In a further refinement of its position, the United States accepted that States should be allowed flexibility in the formations of their diplomatic position. However, it argued that this principle does not allow States to avoid the consequences of consistent and repeated representations that lead others to believe that certain matters will not be raised in litigation. What I find particularly interesting in this argumentative strategy is its attempt to *integrate* as many correct propositions about estoppel as possible -especially those advanced by the other party!- and to *unify* them into a coherent story about the point and purpose of that rule (I discuss the importance of this point in Chapter Two and Chapter Six).[61]

4.3 Appeals to municipal practice: *autonomy*

The interpretive relation between historical and evaluative arguments about estoppel is equally characteristic of international lawyers' appeals to municipal legal practice. Consider the following example from the *King of Spain* case. As we have seen, both Honduras and Nicaragua agreed that estoppel was a

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[60] Interestingly, the United States itself had taken a similar position in its dispute with Canada in the *Gulf of Maine* case: "[S]ilence or lack of protest for a comparatively short period of time is insufficient to establish acquiescence, because there may be explanations for such silence other than acceptance of the claim. For example, a State may consider it advisable to defer any protest in order to prepare for amicable negotiations or other peaceful means of settlement. *It would be contrary to the furtherance of peaceful international relations to conclude from a purported temporary silence that the drastic consequences of acquiescence and estoppel should result*", ICJ Pleadings, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. II (1984) at par.257 (emphasis added). See also ICJ Pleadings, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. VII (1984), Oral Argument of Mr. Rashkow (United States) at 376.

[61] See Chapter Two, section 3 and Chapter Six, section 3.1.

general principle of law that originated in municipal legal systems. However, the two parties disagreed about which of the features of estoppel in municipal practice were most salient for the interpretation of international law. Paul de Visscher argued the point of view of Honduras as follows:

> Dans une communauté égalitaire, la fonction essentiellement pacifique du droit repose en dernière analyse sur l'honnêteté, sur la bonne foi dont les membres de cette communauté témoigneront à l'égard l'un de l'autre. *Là il n'existe ni législateur, ni juge a compétence obligatoire, ni force publique organisée, le droit est l'œuvre de ceux qui doivent en être les sujets. Dans une telle conjoncture, l'ordre et la justice ne peuvent régner que si les Etats qui élaborent le droit, qui l'interprètent et qui l'appliquent, font preuve de bonne foi, de sincérité et d'honnêteté dans leur comportement international.* La vie international est à base de confiance réciproque.[62]

Henri Rolin, counsel for Nicaragua, responded to this argument in the following way:

> Je ne connais pas, quant à moi, de système juridique qui, de plein droit, attribue à la passivité des parties la valeur de rendre définitives les décisions judiciaires. Dans le droit interne, cette passivité n'a un sens que lorsqu'une des parties a témoigne sa volonté d'éclaircissement par une signification. Et lorsque cela a un sens, ce n'est pas parce que l'on attribue une valeur d'acquiescement a la passivité d'une partie ; une partie aura beau faire valoir, s'il y a eu signification, qu'elle s'est trouvée en voyage, qu'elle a écrit a son adversaire qu'elle n'était as d'accord, si elle n'a pas exercé le recours dans de délai péremptoire, elle sera déchue de son recours. C'est donc un contre-sans que de venir dire que la passivité a une vertu de signification. Messieurs, le sais bien que M. de Visscher nous répondra – il l'a dit incidemment dans sa réplique - : « mais le droit international ne connaît pas de significations ou de notifications une sentence arbitrale ne doit pas être notifiee, même si elle est régulière » ; c'est exact, Messieurs, mais est-ce que c'est un motif suffisant pour aller introduire dans les relations internationales un régime draconien qui serait inimaginable en droit interne ? Et pour priver les Etats de cette faculté de délibérer, fut-ce très longtemps, ou de négocier, fut-ce très longtemps, sans que l'un des deux se trouve dans la nécessité de devoir immédiatement brandir l'épouvantail de la nullité a peine de forclusion ? Ce serait vraiment rendre un service détestable à l'institution arbitrale que de prétendre introduire un système pareil dans les relations internationales.[63]

Notice that both sides to this disagreement attempt to draw on municipal legal resources but differ as to their proper interpretation. For his part, De Visscher drew a contrast between the position in municipal systems, where the presence of centralized institutions guarantees a modicum of consistency in the interpretation and application of the law, and the international system, in

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[62] ICJ Pleadings, *Arbitral Award Made by the King of Spain on 23 December 1906*, Vol. II (1960), Oral pleading of M. de Visscher (Honduras) at 39-40.
[63] ICJ Pleadings, *Arbitral Award Made by the King of Spain on 23 December 1906*, Vol. II (1960), Oral Argument of M. Rolin (Nicaragua) at 439

which States are both the makers and the addressees of the law (a feature that George Scelle referred to as *dédoublement fonctionnel*[64]) and therefore must depend on each other's conduct in a much more direct and immediate way. In de Visscher's view, this essential difference in the structure of the municipal and the international legal system justified interpreting international rules against inconsistent conduct more tightly than they might have been interpreted in the context of private relationships under municipal law. Rolin saw the analogy between municipal law and international law very differently. For him, the most important feature in the treatment of inconsistent conduct in municipal legal systems was that absence of protest does not always signify consent, especially in the absence of some detriment or harm to another party. Whichever of these views might be correct, like in the previous examples that we have discussed, here too the two sides seem to appeal to certain international values (the need to protect expectations vs. the need to allow States latitude in formulating their diplomatic positions) not as substitutes for the facts of municipal legal practices, but as guides to their proper interpretation. In other words, the purposes of those evaluative arguments to establish the right perspective on municipal practices in a way that allows international lawyers to draw on the aspects of those practices that are most salient for the purposes of international law.

But there is a further sense in which the internal relationship between appeals to the evidence of municipal practice and appeals to international values becomes prominent in international legal argument about estoppel. This sense is revealed in the *critical* way in which international lawyers approach analogies from municipal versions of estoppel. The core intuition here is that the concept of estoppel in international law may have its roots in municipal legal system but it remains *autonomous* from any municipal conception. Consider, for example, the view of Vice-President Alfaro in his Separate Opinion to the Temple of *Preah Vihear* case:

> [W]hen compared with definitions and comments contained in Anglo-American legal texts we cannot fail to recognize that while the principle, as above enunciated, underlies the Anglo-Saxon doctrine of estoppel, there is a very substantial difference between the simple and clear-cut rule adopted and applied in the international field and the complicated classifications, modalities, species, sub-species and procedural features of the municipal system. It thus results that in some international cases the decision may

[64] Scelle G. 'Le Phénomène juridique du dédoublement fonctionnel' in Schätgel W. – Schlohauer H. (eds.), *Rechtsfragen der Internationalen Organisation* (1956) at 324.

> have nothing in common with the Anglo-Saxon estoppel, while at the same time notions may be found in the latter that are *manifestly extraneous* to international practice and jurisprudence.[65]

Vice-President Alfaro's views were extensively cited with approval in decision of the Tribunal in the *Palena* arbitration:

> The principle is designated by a number of different terms, of which 'estoppel' and 'preclusion' are the most common. But it is also clear that these terms are not to be understood in quite the same sense as they are in municipal law. With that qualification in mind, this Court will employ the term 'estoppel'.[66]

In the *Nottebohm* case, Liechtenstein put its reference to the common-law heritage of estoppel in a similar context:

> Malgré la terminologie technique qui est employée pour la designer, la doctrine de l'estoppel n'a rein d'artificiel, ni même de spécial au droit anglo-saxon. Elle est simplement une des conséquences de l'obligation qu'a chaque partie d'exercer ses droits selon les exigences de la bonne foi, qui est imposée aux Etats comme aux individus. Elle est une affirmation du principe de la non-contradiction ; comme disent les jurisconsultes anglais, *une partie ne peut pas souffler a la fois le chaud et le froid.*[67]

Consider also the argument of Honduras in the *King of Spain* case:

> The private law doctrine of estoppel has taken a conventionalized pattern which is more technical and restrictive than the broader principle of acquiescence which prevails in international law... Mr President, of the cases that I have cited from the jurisprudence of the Court, some of them may, some of them may not, meet the technical aspects of the private law doctrine of estoppel; but all of them –all of them- support the principle of international law that a State which has by its declarations and its conduct acquiesced in a situation is foreclosed from later denying that validity of that in which it has acquiesced. [68]

These examples from argumentative practice suggest two things. First, whilst borrowing the *concept* of estoppel from common-law jurisdictions, international lawyers are very careful to disassociate themselves from the

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[65] *Temple of Preah Vihear*, above n.12 at 39-40 (emphasis added). Cf. ICJ Pleadings, *Temple of Preah Vihear* (Merits), vol. II (1962), Oral argument by Mr. Reuter (Thailand) at 205: « On a pu définir l'estoppel tel qu'il semble reçu en droit international comme une exception, oppose à une allégation qui, bien que conforme peut-être à la réalité des faits, est contraire à une attitude alterieure d'une des parties. *Sans avoir a rentrer ici dans toutes les finesses, qui sont grandes, de l'analyse juridique anglo-saxonne*, il faut simplement relever que dans les relations internationales la doctrine fait de l'estoppel un mécanisme répondant au principe général de la bonne foi et au besoin de sécurité qui régit les sociétés humaines » (emphasis added).

[66] *Palena*, above n.17 at 164.

[67] ICJ Pleadings, *Nottebohm* (Second Phase), Vol II (1951), Oral pleading by M. Sausser-Hall (Liechtenstein) at 138.

[68] ICJ Pleadings, *Arbitral Award Made by the King of Spain on 23 December 1906*, Vol. II (1960), Oral Argument of Mr. Briggs (Honduras) at 108, 109.

particular *conceptions* of estoppel that may prevail in common-law practice.[69] In fact, they often use some common-law conceptions of estoppel as an example of what international lawyers should *avoid* when thinking about estoppel in the international context. Second, the scepticism with which international lawyers approach municipal conceptions of estoppel derives from their doubts about the *suitability* or the *appropriateness* of those conceptions to the international situation. Their chief worry is that unless these conceptions of estoppel are interpreted to fit the particular circumstances, needs and values of the international context, they will do more harm than good to international law.[70]

5. Conclusion: from competition to interpretation

In this Chapter I have explored the various argumentative grounds that international lawyers invoke in support of their views about estoppel. My discussion has resulted in two suggestions. The first was that although most international lawyers would readily agree that the requirements of estoppel are shaped by three main forces (the history of its past international applications, its relation with principles such as good faith and consistency and its common-law origins), it would seem that these three argumentative grounds sometimes stand in competition, thus requiring international lawyers to choose the ground that they think ought to be given more weight.

To gain a better grip on this suggestion, I then looked in more detail into how international lawyers use those argumentative grounds in their practice and I drew attention to three important features of that practice. First, the frequency with which international lawyers combine evaluative and practice-based arguments in support of their views about the practical requirements of estoppel. Second, the tendency of historical arguments to rely on deeper and broader evaluative arguments about the salience of the facts of international practice. Third, the autonomy of the international conception of estoppel from its municipal counterparts. On that basis, I advanced a second suggestion, to the effect that the idea that historical and evaluative arguments

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[69] For the distinction between a concept and different conceptions of it see Rawls J., *A Theory of Justice* (rev. ed., 1999) at 12-3.

[70] I discuss this dimension of 'appropriateness' and its role in the interpretation of general principles of law in Chapter Three, section 1.

stand in a relationship of competition ignores an important internal aspect of the relationship between the two. My survey of argumentative practice showed that historical and evaluative arguments to be aspects of a single argumentative strategy, in which appeals to international values are meant not to *replace* appeals to the history of past international practice but to help *interpret* it, by identifying its salient features and showing it as a coherent and meaningful body of practice that pursues certain important international values. This is not to deny that historical and evaluative arguments may sometimes pull in opposite directions. My point, rather, is that this confrontational aspect of the relationship between historical and evaluative arguments tells only one part of a much more complicated and interesting story, since it fails to capture the various ways in which the two kinds of argument constitute mutually interdependent and internally consistent aspects of the interpretation of international law on estoppel.

I hope it is not too difficult to see how this second suggestion could be extended with safety to the interpretation of other rules of international law. Perhaps the easiest way to justify this generalization is to consider that arguments of salience seem indispensable in any kind of enquiry into past international practice. As John Finnis has noted, all attempts to draw information from a body of practice must rely on a 'criterion of significance', which fixes the researcher's attention to some facts of the practice rather than others.[71] My suggestion in this Chapter has been that international lawyers employ evaluative judgements in the role of this criterion of significance or, to put it differently, that the value or purpose that estoppel must be understood to serve plays a central role in determining the perspective from which they approach and interpret the history of international practice about it. The following Chapter tries to give a first outline of some important objections to this suggestion, as these have appeared in the ways international lawyers have theorized about the concept of estoppel.

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[71] Finnis J., *Natural Law and Natural Rights* (1980) at 18-9.

Chapter Two

"Why values won't fit": the incompatibility and redundancy theses

The previous Chapter argued that, despite appearances, international lawyers' appeals to historical and evaluative arguments do not always stand in opposition to each other. Their relationship is much more complex and rich and includes what I have called an *interpretive* aspect. In this Chapter I want to focus attention on some suspicions that international theorists have had about the propriety and usefulness of evaluative arguments about estoppel. I argue that these suspicions are attributable to two intuitions about the role of values in the interpretation of international law. I will refer to the first of those as the *incompatibility thesis* and to the second as the *redundancy thesis*. In Part II, I will explain how these two theses express a much deeper unease of international theorists with the role of evaluative judgements in the interpretation international law.

Here is a simple way to put the matter. All international lawyers will readily agree that estoppel "is based on", "emanates", "derives" or "follows" from principles such good faith and consistency. But what do these propositions actually mean? If they mean that estoppel applies whenever States show bad faith, there is enough evidence to suggest that these propositions are *incompatible* with international practice and, therefore, potentially misleading, for States often display bad faith towards each other without necessarily violating international law.[1] If they are only intended as empirical generalizations from the history of past international applications of estoppel, then these propositions are simply *redundant*, since their accuracy is completely contingent on that body of historical evidence. Either way, it is difficult to see how one could make space for appeals to international values in a way that does not show those appeals to be either incompatible with the evidence of international practice or altogether redundant. If this is correct, evaluation seems destined to drop out of the interpretation of international law on estoppel either as an ill-fitting part or as dead weight.

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[1] For examples, see n.24 below.

My basic aim in this Chapter is not to defuse these important attacks on the role of evaluation in the interpretation of international law, but to find out why they may appear intuitively compelling to international lawyers, to outline their basic structure and to show how they are connected with a much deeper and broader set of suspicions against the exercise of evaluative judgement on the part of the interpreter of international law. My main point of reference in this discussion will be Antoine Martin's monograph *L'*estoppel *en droit international* (1979), in which Martin takes a clear position in favour of both the incompatibility and the redundancy theses.

1. The incompatibility thesis: values v. practice or induction v. deduction

Although Antoine Martin was not the first to appreciate that international lawyers use both historical and evaluative arguments when they make claims about estoppel[2], his monograph contains the most thorough account of the relationship between the two. Martin organizes his account around the following reasonably attractive idea (which should be familiar from Chapter One): the different kinds of argument that international lawyers use when they make claims about estoppel reflect two *incompatible* conceptions of that rule, one 'extensive' and one 'restrictive'. Martin describes the distinction between the extensive and restrictive conceptions of estoppel as follows:

> Un examen de la pratique gouvernementale et diplomatique des Etats, de la pratique des Organisations internationales, de la jurisprudence et de la doctrine internationales permet de constater l'existence de deux conceptions générales opposées de l'estoppel en droit international public. Pour l'une, extensive, l'estoppel s'appliquerait en cas de contradiction entre un comportement actuel et un comportement antérieur d'un sujet de droit international et constituerait une règle qui viserait, indépendamment des rigoureuses conditions d'application mises au point par le droit anglais pour l'*estoppel by representation*, à empêcher une Partie, en vertu même du principe de la bonne foi, de contredire ou de contester ce qu'elle a précédemment dit, fait ou laissé croire. D'après l'autre, restrictive, l'estoppel n'opérait que si certaines éléments constitutifs –correspondant dans leurs grandes lignes à ceux que la *common law* a établies pour l'*estoppel by representation* – se trouvent réunis.[3]

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[2] The distinction between two incompatible conceptions of estoppel in international law appears in MacGibbon I., 'Estoppel in International Law', 7 *ICLQ* (1958) 468 at 477-8 and Vallée Ch., 'Quelques observations sur l'estoppel en droit des gens', 77 *RGDIP* (1973) 949 at

[3] Martin A., *L'*estoppel *en droit international public: précède d'un aperçu de la théorie de l'*estoppel *en droit anglais* (1979) at 71-2.

After a long discussion of international practice in favour of each conception, Martin concludes:

> [La] conception restrictive de l'*estoppel* parait s'être finalement imposée dans le droit des gens, ainsi que l'indiquent principalement différentes décisions arbitrales et judiciaires, et, tous particulièrement, des affirmations de la Cour International de Justice...[4]

Martin's central claim is that when one international lawyer supports his contentions about the requirements of estoppel by appealing to abstract principles such as good faith, while another supports his own by appealing to past international or municipal legal practice, these lawyers have in mind quite different and incompatible conceptions of estoppel. If that is correct, it follows that the different arguments that these lawyers use cannot be accounted for under a single conception of the grounds of estoppel. The best we can do in order to make sense of those arguments is to shape them into two opposing conceptions, choose the conception that finds more support in international practice and discard the rest as a mistake. This view, with its distinctive dilemmatic structure, has found favour with several authors, who agree that appeals to broad principles like good faith often stand in opposition to appeals to past applications of estoppel in international (or municipal) practice.[5]

Before I look more closely into the arguments that sustain the incompatibility thesis, it is important to make clearer why we should devote particular attention to it. For one thing, it is important to appreciate that Martin's distinction between an extensive and a restrictive conception of estoppel is not just a way of *organizing* the arguments that international lawyers use about estoppel in a manner that makes them workable and intelligible as a whole. On the contrary, if Martin is right that there are two opposing conceptions of estoppel in international law, one relying on evaluative arguments and the other relying on appeals to municipal practice, then at least one of the three central intuitions that international lawyers share about the grounds of estoppel must be mistaken. In particular, as long as we

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[4] Ibid at 139-40.

[5] MacGibbon I., above n.1 at 477-8; Sinclair I., 'Estoppel and Acquiescence' in Lowe V. & Fitzmaurice M. (eds.), *Fifty Years in the International Court of Justice: Essays in Honour of Sir Robert Jennings* (1996) 104 at 109; Brown C., 'A Comparative and Critical Assessment of Estoppel in International Law', 50 *U. Miami L. Rev.* 369 at 396-8; ICJ Pleadings, *Delimitation of the Maritime Boundary in the Gulf of Maine Area*, Vol. I (1984), Memorial of Canada, pars.414-7, pp.166-9. One of the first studies on estoppel notes the following about the different ways in which municipal lawyers argue about estoppel: « Ces diverses formules, variables à l'extrême, sont irréductibles à une définition ne comprenant que les cas d' *estoppel*, mais les comprenant tous», Witenberg J., 'L'*estoppel*, Un aspect juridique du problème des créances américaines', 60 *Journal de droit international* (1933) 529 at 531-2.

endorse Martin's incompatibility thesis, we will have to give up *either* the idea that estoppel follows from principles such as good faith and consistency *or* the idea that the requirements of estoppel depend on the ways that concept has been applied in past international and municipal practice. This would also entail that a significant part of international practice on estoppel must be treated as a mistake.[6] A brief statistical look at Martin's discussion of international practice bears this out very clearly. All in all, Martin discusses about thirty different examples from international case-law in which estoppel was involved. In his view, nine of those examples support the restrictive conception of estoppel[7], six can be construed either way[8], while sixteen support the extensive conception.[9] Were one to choose between the two conceptions, one would have to treat a significant part of international case-law on estoppel as false.

But does the incompatibility thesis make sense in the first place? For one thing, Martin's description of it is not very helpful. To appreciate this, notice again how Martin describes the two rival conceptions of estoppel. First, he says that the restrictive conception generally interprets estoppel in accordance with the understanding of that concept in common-law practice (l'*estoppel* n'opérait que si certaines éléments constitutifs –correspondant dans leurs grandes lignes à ceux que la *common law* a établies pour l'*estoppel by representation* – se trouvent réunis). Martin then claims that the extensive conception relies primarily on evaluative arguments based on the principle of good faith (l'*estoppel*...constituerait une règle qui viserait...à empêcher une Partie, en vertu même du principe de la bonne foi, de contredire ou de contester ce qu'elle a précédemment dit, fait ou laissé croire).

The problem with this description is that seems to run together two very different distinctions. The first is a distinction between stricter and wider interpretations of estoppel. The second is a distinction between arguments that appeal to the history of past international practice on estoppel and arguments that appeal to the international values that estoppel must be

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[6] Cf. the very telling observation of MacGibbon, above n.1 at 478: "Many of the aspects of estoppel to which attention is drawn in these pages would fall outwith a concept of estoppel restrictively delimited".

[7] Martin at 139-72. Note that Martin's groupings are somewhat misleading, since at least two of the most important cases that Martin cites in favour of the restrictive conception of estoppel (the *Barcelona Traction* and *North Sea Continental Shelf* judgements) actually offer no such support, see main text below.

[8] Ibid at 93-138.

[9] Ibid at 73-92.

understood to reflect. What is important here is that there is *no necessary correlation* between one's view of the practical requirements of estoppel and the kind of arguments that one uses to support this view. An international lawyer might well defend a 'restrictive' view of estoppel on the basis of an evaluative argument, e.g. one could argue that good faith demands consistency only when the other party runs the risk of incurring material harm as a result of one's representations. Equally clearly, one might well defend an 'extensive' position on the basis of the common-law conception of estoppel, e.g. one could claim that detriment is not an essential element of estoppel because common-law estoppel does not, after all, make such a requirement. In any event, the sole fact that an international lawyer appeals to evaluative arguments does not entail that he takes a relaxed or extensive view of the requirements of estoppel. Similarly, there is no necessary connection between appeals to historical arguments and a more restrictive conception of the requirements of estoppel.

Martin makes this inferential mistake in crucial steps of his argument. Consider the way Martin interprets what he considers the two most important instances of international judicial practice on estoppel, namely the International Court's judgements in the *North Sea Continental Shelf* and *Barcelona Traction* cases. Martin claims that both of these judgements show that the Court has accepted a conception of estoppel that draws on common-law practice and that it has rejected the alternative conception, which draws on evaluative judgements made on the basis principles of such as good faith and fairness.[10] However, the passages that he cites from those judgements have absolutely nothing to say about the grounds of estoppel. The first passage from the *Barcelona Traction* case reads:

> A...contention, having the character of a plea of estoppel, was advanced by the Respondent Government... This was to the effect that, independently of the existence of any understanding, the Applicant Government by its conduct misled the Respondent about the import of the discontinuance, but for which the Respondent would not have agreed to it, and as a result of agreeing to which, it has suffered prejudice. Accordingly, it is contended, the Applicant is now estopped or precluded from denying that by, or in consequence of, the discontinuance, it renounced all further right of action.[11]

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[10] Ibid at 139-40.

[11] *Barcelona Traction, Light and Power Company, Limited* (New Application:1962), Preliminary Objections, Judgment 24 July 1964, ICJ Reports (1964), p.6 at 24; Martin at 163.

Here the Court is simply making a point about the practical requirements of estoppel (which it then held were not satisfied[12]). It takes no position on whether these requirements are such and such because common-law practice says so, or because this follows from the best interpretation of the point or value that estoppel serves. Neither position is incompatible with the Court's view of the practical requirements of estoppel.

The same point applies even more forcefully to Martin's treatment of the *North Sea Continental Shelf* judgements. Here too, Martin argues that the Court's judgements support a conception of estoppel that draws on common-law practice and reject the alternative conception that draws on arguments of good faith. But looking at Martin's quotations from the Judgements, one would be hard pressed to find anything that supports this position:

> Having regard to these considerations of principle, it appears to the Court that only the existence of a situation of estoppel could suffice to lend substance to this contention, -that is to say if the Federal Republic were now precluded from denying the applicability of the conventional regime, by reason of past conduct, declarations, etc., which not only clearly and consistently evinced acceptance of that regime, but also had caused Denmark or the Netherlands, in reliance on such conduct, detrimentally to change position or suffer some prejudice. Of this there is no evidence whatsoever in the present case.[13]

All this passage tells us is what the Court thought were the practical requirements of estoppel. Nothing in it suggests that the Court took this view because it considered that those requirements should be drawn from common-law practice. If anything, the Court seems to have taken a very different view when, a few paragraphs later, it made the following interesting comment:

> The dangers of the doctrine here advanced by Denmark and the Netherlands, if it had to be given general application in the international law field, hardly need stressing.[14]

Although Martin quotes this passage too, he does not realize that it undermines, rather than supports, his conclusion that the requirements of estoppel follow the lead of common-law practice. The Court here made explicit use of an evaluative argument, which aimed to support its view of the practical requirements of estoppel by pointing to a value or good that would be compromised if the Court had taken a different view of those requirements.

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[12] Ibid at 24-5.
[13] *North Sea Continental Shelf*, Judgment 20 February 1969, ICJ Reports (1969), p.3 at 26, par.30; Martin at 169.
[14] Ibid at 27, par.33; Martin at 170.

I would therefore suggest that, in order to make sense of the incompatibility thesis, we must disassociate it from the dubious idea that the choice of argumentative grounds in relation to estoppel implies any particular result about the practical requirements of the concept. Here is what I consider a better statement of the case for the incompatibility thesis: "The reason why appeals to the history of international practice on estoppel and appeals to the international values that estoppel must be understood serve to stand in opposition to each other is epistemic. The former kind of appeal is *inductive* in nature; it relies on the careful observation of State practice and the decisions of international courts and tribunals in cases involving estoppel and then shapes their decisions into a single statement of the rule. The second kind of appeal is *deductive*; it starts from a broad statement about the values and purposes that international law should pursue and then proceeds to derive more specific propositions about the circumstances in which international law should bar States from behaving inconsistently towards each other. Historical and evaluative arguments pull in different directions, and cannot be accounted for in the same breath, not because one supports a strict reading of estoppel while the other supports a wider reading, but because each kind of argument reflects a different *way of thinking* about international law".[15]

In *From Apology to Utopia*, Martti Koskenniemi has put this confrontational view of the relationship between historical and evaluative arguments concerning estoppel in its sharpest form.[16] On the one hand, he too takes the view that international legal argument about estoppel is deeply torn between incompatible appeals to the history of past practice and appeals to international values.[17] On the other hand, and in contrast to Martin, he claims that international legal argument cannot hope to solve the problem by abandoning one of these two argumentative strands, because appeals to history and appeals to values are *both* internally problematic. Inductive appeals to the history of past practice are 'apologetic', in the sense that their attempt to faithfully reproduce actual State behaviour strips the law of any normative force or impact, whereas deductive appeals to international values

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[15] For a sharp contrast of deductive and inductive approaches to international law see Schwarzenberger G., *The Inductive Approach to International Law* (1957) at 4-15. See also Koskenniemi M., From Apology to Utopia: The Structure of International Legal Argument (1989) at; Kammerhofer J., 'Uncertainty in the Formal Sources of International Law: Customary Law and Some of Its Problems', 15 *EJIL* (2004) 523 at 542-6.
[16] Koskenniemi, above n.14 at 311-20.
[17] Ibid at 311-3.

are 'utopian', in the sense that they rely on standards of morality and justice that are subjective and therefore not opposable to States that do not share them. For Koskenniemi, legal argument about estoppel is destined to *oscillate* between the two argumentative strands, no resting place becoming available to it.[18] This entails that the attempt to combine historical and evaluative arguments about estoppel into a single argumentative strategy must inevitably result in making the rule incoherent and showing its application to be the result of "simply subjective, arbitrary choice".[19]

As far as my reworking of the incompatibility thesis is accurate, the appeal of that thesis can be attributed to either of two deeper and important ideas. On the one hand, one might support the claim that historical and evaluative arguments about estoppel are incompatible with each other by relying on the epistemic distinction between induction and deduction as two opposing methods of arriving at propositions of international law. Insofar as this line of thought recommends the separation of those two argumentative strands, it assumes it is in principle possible to reach conclusions about the content of international law through 'induction' from State practice, i.e. without recourse to judgements about the purpose or value that this body of practice must be understood to serve or promote. In that sense, the fate of the first argument in favour of the incompatibility thesis must eventually turn on the possibility of acquiring more or less 'pure inductive' or 'evaluatively neutral' knowledge of the content of international law. This is an issue I will discuss in Chapter Six.

Alternatively, one could support the incompatibility thesis on the sceptical ground that an interpretive combination of historical and evaluative arguments about estoppel is bound to result in incoherence and arbitrariness in the application of the rule. The plausibility of this line of thought depends on whether it is the case that international legal argument is bound to oscillate between 'apology' and 'utopia', between arguments that simply reproduce the behaviour of States, and therefore lack any normative bite, and arguments that appeal to evaluative standards that are only subjective. This is a question I will take up in Chapter Five.

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[18] Ibid at 318-20.
[19] Ibid at 320.

2. The redundancy thesis

Some theorists have detected another problem with the suggestion that the interpretation of international law on estoppel draws on the values that this concept must be understood to serve or promote. In their view, appeals to international values such as good faith, consistency, stability and the like are simply too vague to be of any practical use in determining what estoppel actually requires. If this is correct, then evaluative arguments of this sort are basically *redundant* parts of argumentative practice, with no real function or impact on the interpretation of international law.

Martin advocates the redundancy thesis at a later part of his monograph, where he claims that a proper theory of estoppel cannot accommodate all kinds of argument that international lawyers commonly use, because some of those arguments are just *too abstract*. In rejecting the suggestion that the principle of good faith might be regarded as the legal basis of estoppel, Martin says:

> Il est évident que la contradiction dans les déclarations, actes ou comportements d'une Partie au préjudice d'une autre est incompatible avec la bonne foi... L'intérêt d'une thèse est certain, car il est généralement admis que c'est en vertu du principe de la bonne foi qu'un sujet de droit international est tenu de respecter les convictions qu'il a fait naître, ou laisse naître, chez ses partenaires. *One peut soutenir toutefois...que cette thèse est d'une trop grande généralité et, partant, ne permet pas d'établir de façon suffisamment précise le fondement juridique de l'estoppel rigoureusement construit...* Le placer directement a la base de l'institution de l'*estoppel* strictement interprèté parait donc quelque peu hâtif...[I]l est claire que le principe de la bonne foi ne se trouve pas, dans le cadre d'une situation d' *estoppel*, à la base même de l'obligation pesant sur l'auteur de la représentation des choses considéré.[20]

Martin then argues that we can find a principle that is sufficiently precise and workable to form part of the grounds of estoppel in the idea of an *implicit agreement* (*accord implicite*). He says:

> Le fondement juridique de cette obligation parait bien plutôt résider...dans la force obligatoire de l'accord implicite auquel ladite représentation des choses conduit...Il est évident que l'acte unilatéral d'une Partie n'est pris en considération au titre de l'estoppel que s'il est engagé dans un mécanisme de caractère conventionnel: une autre Partie a dû, se fiant à la représentation des faits qui découlait de cet acte, agir, ou s'abstenir d'agir,

[20] Martin at 304-5 (footnotes omitted).

> de telle sorte qu'il en est résulte une modification dans les positions relatives de ces deux Parties.[21]

Martin's point here is not that appeals to good faith and related concepts are somehow incompatible with the other argumentative grounds of estoppel. His point, rather, is that such appeals do not do any useful work because they do not help us determine with enough precision the practical requirements of estoppel. Their abstract nature makes them just too difficult to handle. Our best option is to put these abstract concepts aside and concentrate on some more specific and workable principles, such as the idea of implicit agreement, which can do a far better job in suggesting what the actual practical requirements of estoppel might be.

A similar view would seem to be echoed in the opinions of many international lawyers. Some of the most famous studies on the principle of good faith concede that "what exactly this principle implies is perhaps difficult to define"[22], while others have even claimed that "la bonne foi, en tant que principe normative, est une notion absolument insaisissable".[23] The International Court itself has repeatedly made this point in very strong terms by holding that good faith "is not in itself a source of obligation where none would otherwise exist".[24] Similar views, expressed in respect of other abstract principles, appear to reinforce this argument. To take one example, in his discussion of the principles of sovereignty and self-determination James Crawford writes: "The political principle of self-determination...is too vague and ill-defined to constitute a legal principle, much less a positive legal rule applying of its own force to particular 'peoples' or to 'peoples' in general... In the present stage of development of international law, 'sovereignty' applies as a legal right (or more properly, a legal presumption) only to territories constituted or accepted as States...This is one reason why we speak of a *principle* of sovereignty; since the notion of a right presupposes identification of the subject of the right, and that identification must be made *aliunde* the

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[21] Ibid at 308, 309.
[22] Cheng B., *General Principles of Law – As Applied by International Courts and Tribunals* (1953) at 105.
[23] Zoller E., *La bonne foi en droit international public* (1973) at 344.
[24] *Case Concerning the Land and Maritime Boundary between Cameroon and Nigeria*, Preliminary Objections, ICJ Reports (1998), p.275 at 297, par.39; *Case Concerning Border and Transborder Armed Actions*, Jurisdiction and Admissibility, ICJ Reports (1988) 69 at 105, par.94.

principle of sovereignty".[25] The thrust of these learned arguments seems to be this: a principle that involves highly abstract and contentious concepts will inevitably give rise considerable interpretative difficulties and therefore lack the clarity and precision necessary in order to define the particular practical requirements of international rules like estoppel. Therefore, instead of seeking to draw abstract connections between estoppel, good faith and similar concepts, we should concentrate on finding other, more particular, guiding principles that will be able to yield practical and concrete results.

Now suppose that the suspicions that international lawyers have against broad and abstract principles are justified. What exactly do these suspicions entail? To answer this question, it would help to distinguish between two possible ways of reading them. The first reading says that abstract evaluative arguments are altogether redundant when it comes to determining the practical requirements of estoppel; I will call this the *redundancy reading*. The second reading suggests that in order for abstract evaluative arguments to play a role in the interpretation of estoppel, they must be concretized to fit the particular circumstances of the case in which the argument of estoppel features; I will call this the *insufficiency reading*.[26]

Consider the redundancy reading first. This claims that while specific evaluative arguments, like the idea that estoppel involves some sort of implicit agreement, are helpful in determining the practical requirements of estoppel, appeals to abstract concepts such as good faith are not. The particular reason for preferring the former category of concepts seems to be that they are much more helpful in 'getting at' the practical requirements of estoppel, in the sense that they focus our attention on a series of more particular questions about that concept. For example, when I claim that the reason why a State must be estopped is that it has violated some implicit *agreement* with the other party, I

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[25] Crawford J., *The Creation of States in International Law* (1979) at 97-8. For a discussion of Crawford's views on principles see Knop K., *Diversity and Self-Determination in International Law* (2002), pp.30-8.

[26] I have modelled the distinction between the insufficiency and redundancy reading in a way that matches the important philosophical distinction between *a wider analysis of concept C* and *an analysis of a wider concept C*, on which see Wiggins D., *Needs, Values, Truth* (3rd ed, 2002) at 219. Whereas the redundancy reading claims that abstract evaluative appeals to good faith are appeals to a different concept, the discussion of which is redundant for the purposes of estoppel, the insufficiency reading claims that abstract evaluative arguments about estoppel are attempts at a wider analysis of the *same* concept, but which can only yield practical returns on the condition that they are 'fitted' to the case at hand by means of more specific evaluative judgements. Of course, standard linguistic usage makes this important distinction very easy to overlook. As Wiggins observes, the term 'wider concept', which might be used to describe either reading, is "well calculated to mask the difference between these fatally similar-looking things".

am naturally inviting a series of more particular questions about what it takes for such an agreement to come to life, e.g. whether the representor must have a certain intention, whether the representation must be explicit or might also be implicit, whether the representee must have relied on the representation, whether detriment is necessary etc. An international lawyer can then use these questions in order to find out whether estoppel will apply in a given case.

In sharp contrast, appeals to good faith, equity, fairness and similarly abstract principles do not take us any nearer to those practical requirements; on the contrary, they seem to be a recipe for confusion because they can be construed in so many different ways. For example, one lawyer might think that only express representations can give rise to an estoppel, while the other thinks that silence or inaction might suffice. Whichever view might be correct, an appeal to the principle of good faith would do nothing to resolve that disagreement because it would be consistent with *both* lawyers' arguments. To put it more graphically, the appeal to good faith would just 'sit on top' of the competing interpretations without adding any force to either. If that is true, it follows that appeals to good faith and similar concepts do no actual work in determining the requirements of estoppel.

Now, the success of the redundancy reading turns on whether we can draw a tight distinction between abstract evaluative arguments, such as the appeal to the principle of good faith, and more specific evaluative arguments, such as Martin's appeal to the notion that implicit agreements must be kept. To put the matter more accurately, assuming that some evaluative arguments are a proper part of the interpretation of international law in estoppel, can we divorce them from abstract evaluative arguments?

The answer here must be negative. For one thing, he distinction between abstract and specific arguments is only relative; arguments may appear to be abstract or specific depending on the question that they are meant to respond to. For example, if one asks me to explain why a particular State should be estopped from going back on its prolonged silence and I simply say that this is because that State has violated the principle of good faith, my argument will be not just abstract but also vague, in the sense that it will have glossed over a range of legitimate questions about the proper construction of silence relative to the positions of the parties, its required length in the circumstances etc. But if one asks me to identify the principle that justifies holding persons to their representations if others would be harmed were those

persons allowed to renege, and I respond that this principle is the duty to behave in good faith toward others, my response will sound much more plausible and *to the point*. In short, arguments are only abstract or specific depending on the *question* that they are offered as answers to.[27]

The relative character of the distinction between abstract and specific arguments makes it very difficulty to draw a tight epistemic wedge between some evaluative arguments and others. Martin's own example illustrates that such an effort is misguided. Recall that Martin reacted against the excessive abstractness of the principle of good faith by proposing a more specific principle, namely the duty to keep one's implicit agreements, which he thought was far better placed to elicit a range of more specific questions about the particular practical requirements of estoppel. However, his idea that the requirements of estoppel really depend on an 'implicit agreement' between representor and representee seems to beg a number of questions itself. For one thing, the claim that every situation of estoppel involves some kind of *implicit* agreement puts Martin in a position where he needs to justify the imputation to the parties of an intention to conclude an agreement. That is no simple matter, given that any such imputation has a counterfactual character. The claim that parties involved in estoppel-situations ought to be treated 'as if' they had concluded an agreement already concedes that the pertinent question of principle is not whether parties ought to keep their agreements, but whether there are good reasons for thinking that estoppel-situations must be seen as equivalent to agreements. Any such reasons, then, must necessarily draw on considerations *other than* the duty to keep one's agreements.

What might those considerations be? An appeal to the principle of good faith would seem very appropriate here. One might argue, for example, that the principle of good faith requires States not to disappoint any expectations that their conduct might have created in others. In that sense, when one claims that a State is not honouring an implicit agreement, one is really submitting that a State which considers itself free to renege on its representations, regardless of the consequences for other persons, is not displaying the 'right kind of attitude' towards them. If that is true, then the idea of implicit agreement must really be understood to be a *placeholder* for the more

[27] I explore the idea of the 'primacy of the question' in more detail in Chapter Six, section 3.1.

fundamental principles that govern the conduct of States towards one another, amongst which the principle of good faith would appear to occupy a place.

One does not have to agree that the justification of the idea of 'implicit agreement' must necessarily refer back to the fundamental considerations that the principle of good faith seems to capture so well. What matters mostly for our present purposes, though, is that *one cannot terminate the ascent of justification from specific to abstract concepts by fiat.* Insofar as there are intelligible disagreements to be had about the correct meaning of concepts like 'implicit agreement', one will need to seek arguments in more abstract concepts, where common ground might perhaps be easier to find.

Consider now the less radical suggestion of the insufficiency reading. This reading says that when one aims to demonstrate that a party must be estopped from going back on its previous representations, it will simply not do to base one's argument entirely on appeals to abstract concepts such as good faith and the like. This is surely right. Suppose, for example, that I claim a State must be estopped because its conduct violates the principle of good faith. Stated like this, my claim looks hopelessly out of touch with the demands of the situation. To stand any chance of being convincing, I also need to demonstrate exactly how the requirements of estoppel connect with the abstract concept, by specifying certain criteria for that concept's application and by explaining how those criteria feed into the particular practical requirements of estoppel and, crucially, into the facts of the case at hand.

The insufficiency reading states an important truth. Evaluative arguments should not only seek to situate the application of a rule in the context of broader international values, but should also explain which are the *particular* features of the case at hand that offend against those values. In other words, these arguments must be made to *fit* the practice or the case at hand. This insight must come as no surprise. In Chapter One we came across several examples where the parties' respective appeals to the international values underlying estoppel went much further than a broad and vague mention of the principles of good faith, stability or (on the opposite side) the need for flexibility in international negotiations.[28] The parties to those disagreements also tried to adjust and refine their appeals to those values, or to provide more concrete interpretations of them, in order to fit the values in question to the

[28] See the examples in Chapter One, section 4.

particular features of the dispute at hand. This suggests that the insufficiency reading is not at all at odds with argumentative practice on estoppel. We can take on board its central insight about the need to 'fit' abstract values to specific practices and cases, without losing touch with the ways international lawyers use evaluative arguments in the interpretation of international law.

3. Conclusion

The previous Chapter suggested that the interpretation of international law on estoppel relies on a special combination of historical and evaluative arguments. The two theses that I have outlined in this Chapter cast doubt this suggestion, on the ground that evaluative arguments are either redundant or incompatible with their appeals to the history of past international practice. Their objections converged on the conclusion that evaluation does not sit comfortably in the interpretation of international law, either because it fails to fit with appeals to history or because it saddles us with lots of dead weight.

My purpose in this Chapter has not been to refute these objections but to begin to shape them, to relieve them of some unnecessary baggage (such as Martin's conflation of argumentative grounds with practical requirements), and to indicate the sources from which they are most likely to draw support. I have argued that the incompatibility thesis must rely for its intelligibility either on the distinction between induction and deduction as two different ways of arriving at particular propositions of international law or on a general form of scepticism about the coherence of international legal argument. I have then claimed that the intuitive suspicions of international lawyers against appeals to broad and abstract international values must be read as demanding that those values be particularized or 'fitted' to the facts of the practice or the case at hand. These suspicions do not support the much more radical claim that appeals to abstract values are a redundant part of argumentative practice, which international lawyers might be able to drop at will.

Building on these insights, the rest of the thesis generalizes my discussion of the place of evaluation in the interpretation of international law, by locating the role of evaluative judgements in received accounts of the sources of general international law and in some theoretical approaches to the study of international law.

Part II

The place of evaluation in the sources of general international law

The previous Part drew attention to the internal interpretive relationship between historical and evaluative arguments in the interpretation of international law and outlined some important doubts that international lawyers have had about the place of evaluative judgements in legal interpretation (doubts that I have grouped under the incompatibility and redundancy theses). The present Part continues and generalizes this discussion. On the one hand, it locates a similar suspicion towards the role of evaluation in the ways most international lawyers think about the sources of general international law. It claims that this suspicion is at work in two different senses: first, it is at work in the *separation* between customary international law and general principles of law as two distinct sources of general international law; second, it is at work in some of the most popular assumptions about the *structure* of each of those sources. On the other hand, this Part begins to formulate a comprehensive defence of the central role of evaluation in the interpretation of international law. This defence has a critical and a constructive aspect. On the critical side, it tries to show that received conceptions of the sources of general international law do not succeed in showing that the interpretation of international law can be value-free or that it calls for the exercise of evaluation only in extraordinary cases. On the constructive side, it sketches an alternative approach that incorporates the best intuitions of traditional accounts of the sources and explains how these intuitions are *consistent* with the recognition that evaluation plays a central role in the interpretation of international law. Part III will then defend this alternative account against a number of important theoretical objections.

I should note at the outset that my analysis in this Part does not extend to the issue of the interpretation of international treaties. Treaty interpretation raises a variety of questions that are specific to that source (e.g. the interpretation of expression of consent to be bound, the interpretation of reservations, the distinction between reservations and interpretive

declarations).[1] I do not offer much argument about how to resolve these important problems and therefore I cannot put forward my claims about the interpretation of general international law as a comprehensive account of treaty interpretation too. Having said that, my discussion of interpretation in general international law will have some bearing on questions of treaty interpretation, insofar as the principles of interpretation identified in the 1969 Vienna Convention on the Law of Treaties also happen to reflect customary international law. This is not to say that questions of treaty interpretation are always reducible to questions about general international law. The point, rather, is that one's conception of the sources of general international law will normally have a considerable effect on how one approaches questions of treaty interpretation in two ways: either as a guide to the interpretation of particular treaties, when the Vienna Convention is not itself applicable[2], or as a guide to the interpretation of the Vienna Convention itself. My use of examples in Chapter Four might amplify this connection between treaty interpretation and the interpretation of general international law, whereas Chapter Six will draw on philosophical resources suggesting that the interpretation of texts and the interpretation of practices are subject to the same fundamental principles. However, neither of those two stages of my discussion is intended to press a thesis about the interpretation of international treaties.

1. The incompatibility and redundancy theses 'writ large': customary international law, general principles and more unease with values.

Consider the following line of argument: "By and large, international lawyers can determine the content general international law without having to evaluate its merits; what international law is and what it ought to be are different questions. For example, when international lawyers are looking into customary international law, the main question they have to ask is whether there is enough evidence that States and other subjects of international law behave in a certain way and that they adopt that behaviour out of a conviction

[1] On these issues see generally Aust A., *Modern Treaty Law and Practice* (2000); Reuter P., *Introduction to the Law of Treaties* (2nd ed., 1995); Sinclair I., *The Vienna Convention on the Law of Treaties* (2nd ed., 1984).
[2] See e.g. *Gabcikovo-Nagymaros*, ICJ Reports (1997) at 36-8, pars.42-6; cf. Fitzmaurice M., 'The *Gabcikovo-Nagymaros* Case: The Law of Treaties', 11 *LJIL* (1998) 321.

that international law requires it. It is, of course, true that reasonable international lawyers will disagree about the sufficiency of the available evidence in same borderline cases (e.g. some will be reasonably satisfied with less evidence than others). In such cases, the interpreter's judgement and experience will play a greater role than it does in the run-of-the-mill interpretation of customary international law. The important thing, however, is that this exercise of judgement will not be concerned with the moral or ethical merits of the rule but with the degree to which its formulation approximates the actual practice and *opinio juris* of States. The judgement involved, in other words, will be more probabilistic than evaluative. If there is any such space for the exercise of evaluative judgements, this will probably be limited to instances where the rule *itself* asks the interpreter to make an evaluation, e.g. by requiring him to make a concrete judgement about what would be "reasonable" or "equitable" in a specific case, or where international practice is too fragmentary and uncertain to permit any safe probabilistic conclusions about what general international law requires. In such extreme (and progressively rarer) cases, one must recognize that there is a gap in the law, whose redress requires some evaluative input or 'creativity' on the part of the interpreter. This is precisely the function and purpose of general principles of law in the sense of art.38(1)(c) of the ICJ Statute".

There are, I think, two ideas that stand out in this line of argument. First, that the exercise of evaluative judgement is not an essential aspect in the interpretation of general international law, except when the rule itself expressly requires it. Second, that cases in which some exercise of evaluative judgement *is* necessary make up a distinct group, which falls under a separate formal source of general international law and requires the interpreter of international law to switch to a special and 'creative' mode of legal reasoning.

It is, I hope, clear that this pair of ideas is really a more general statement of the redundancy and incompatibility theses that we have come across in my discussion of estoppel in Part I. The form of the argument is strikingly similar in both contexts. In the context of estoppel, international writers explained the contrast between historical and evaluative arguments by pitting them against each other, in the form of two incompatible conceptions of estoppel. In the context of the sources, international theorists try to explain the contrast between historical and evaluative arguments by means of a formal distinction between the practice-based source customary international law and

the evaluation-based source of general principles. More importantly, in both contexts the substantive thrust of the argument is almost exactly the same: evaluative judgements do not fit with the rest of international legal argument either because they are unnecessary for the interpretation of general international law or because they are useful only in extreme or borderline cases, when practice-based arguments are not available or have run out of steam. On both accounts, evaluation is either pushed to the fringes of international legal interpretation or dismissed altogether as redundant.

Whether or not the case against values in the context of the sources sounds intuitively compelling, it is certainly widely popular. Most international lawyers believe that the interpretation of customary international law is only a matter of finding enough evidence of State practice and *opinio juris*, while very few would doubt that general principles of law are mainly intended for occasional or interstitial use, in order to fill the gaps of international law. In fact, the distinction between customary international law and general principles of law as two different formal processes of legal reasoning is one of the most firmly entrenched elements in international legal thinking and education. Perhaps the first thing that all students of international law are taught is to distinguish between the more important source of art.38(1)(b) of the ICJ Statute, the content of which depends primarily on what States do and believe, and the much less important source of art.38(1)(c), which requires international lawyers to fill international legal gaps in the 'best' or 'most appropriate' manner by engaging in a controlled exercise of legal 'creativity'. In short, the idea that evaluation has no (or not a significant) place in the interpretation of general international law seems to reflect the dominant orthodoxy of international legal thinking.

2. Outline of Part II

In the two Chapters of this Part, I take issue with the pair of ideas that feed the suspicions of international lawyers against the exercise of evaluative judgement in the interpretation of general international law. In Chapter Three, I discuss the idea that evaluation is necessary only in extraordinary cases, where there is a 'gap' in the law that must be filled with the aid of general principles. I argue that the idea that general principles of law apply in

extraordinary cases, or that they fill 'gaps' in the law, is incoherent and that the interpretation of international law engages the interpreter's evaluative judgement in both easy and hard cases. In Chapter Four, I take issue with the idea that the interpretation of customary international law is simply a matter of weighing of evidence of 'State practice' and *opinio juris*, i.e. the evidence of what States do and what they believe or intend. I claim that this way of thinking about customary international law cannot help resolve some of the most common disagreements about the content of customary rules and that, properly understood, the interpretation of customary international law too must always rely on evaluative judgements on the part of the interpreter.

Building on this critique of standard sources theory, the last section of Chapter Four introduces the main contention of my thesis, namely that arguments about general international law have an interpretive structure, in the sense that correct statements of general international law follow from the values and principles that provide the best justification for the relevant part of past international practice. Part III will then flesh out the details of this alternative account by defending its core idea against three important theoretical objections to the role of evaluation in the interpretation of international law.

Chapter Three

Do general principles fill gaps in international law?

In this Chapter I discuss the plausibility of a popular view about the nature of general principles of law and their role in international legal argument. That view conceives of general principles of law as propositions that fill the 'gaps' of international law with the aid of municipal or international legal material. The backbone of this conception of general principles is the idea that the interpretation of international law in easy cases is somehow different from its interpretation in hard cases and that the exercise of evaluative judgement is only necessary in the latter sort of case. I argue that this idea is false and that the interpretation of international law has the same structure -and draws on evaluative resources to the same degree, in both easy and hard cases.

1. An area of agreement about general principles

International lawyers have had different views about 'general principles of law recognized by civilized nations' ever since their inclusion amongst the sources of international law and it is not a coincidence that the search for an 'original meaning' of art.38(1)(c) of the Statutes of the Permanent and the International Courts of Justice has not yielded any conclusive results.[1] The very members of the Advisory Committee of Jurists appointed to draft the PCIJ Statute entertained quite divergent conceptions about the function of these principles in international law and their proper provenance.[2] Some members thought that general principles are really precepts of natural law; others thought that they are generalizations from legal concepts that have been accepted across the

[1] Cf. Danilenko G., *Law-Making in the International Community* (1993) at 173: "Although 'general principles' were officially recognized as a source of law long ago, there is still no general agreement as to the exact mode of their formation...In the absence of authoritative clarification, every word of this provision has become an object of conflicting interpretations supporting widely divergent theories".

[2] For summaries of their debates see Lauterpacht H., *Private Law Sources and Analogies of International Law* (1927) at; Cheng B., *General Principles of Law as applied by International Courts and Tribunals* (1953) at 1-30; Van Hoof G., *Rethinking the Sources of International Law* (1983) at 136-9.

major municipal legal traditions; others believed that art.38(1)(c) provides scope for international judges to create law in order to respond to the practical problem at hand.

But despite these disagreements, it is possible to identify three points on which some sort of agreement or shared background amongst different conceptions general principles of law has emerged. The first two concern the function of general principles; the third concerns their content.

For a start, all the different conceptions of art.38(1)(c) are meant to respond to the same substantive worry, namely that the piecemeal nature of treaty and customary legal regulation might leave important gaps in the law that international courts and tribunals could apply to international disputes.[3] Faced with the unwelcome possibility of a *non liquet* where treaty and customary law materials are sparse, all theories of art.38(1)(c) agree that international lawyers should be able to fill those gaps by drawing on auxiliary resources, such as the large experience of municipal legal systems.[4] This entails that, in the words of Louis Henkin, general principles are applicable "only as necessary for interstitial use, to fill out what international law requires but has not recognized as customary law because it has not been invoked often and widely enough, and is too cumbersome for the system to negotiate by multilateral treaty".[5]

The second point of agreement follows almost naturally from the first. As international legal practice becomes richer and denser with the passage of time, the potential for gaps in the fabric of international law tends to diminish and so does the number of occasions for applying general principles of law. This trend of steady decline in the use of general principles of law seems to be confirmed in practice, since international courts and tribunals have tended to

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[3] Cf. the oral statement of Baron Descamps during the Committee's preparatory work concerning art.38(1)(c): « «La première règle, c'est que, s'il existe un texte, une règle conventionnelle, on doit l'appliquer. A défaut d'une règle de ce genre, il faut appliquer les coutumes internationales». S'il n'y a ni loi ni coutume –se demande le Président- le juge peut-il prononcer un *non liquet*? Le Président est convaincu que non : «Le juge devra alors appliquer les principes généraux du droit» », *Procès-verbaux* at 318.

[4] Lauterpacht H., 'Some Observations on the Prohibition of "non Liquet" and the Completeness of the Law' in *Symbolae Verzijl* (1958) 196; Stone J., 'Non Liquet and the Function of Law in the International Community', 35 *BYIL* (1959) 124 at 127-9; Scobbie I., 'The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function', 8 *EJIL* (1997) 264 at 274-7; Jennings R. – Watts A., Oppenheim's International Law (9th ed., 1996), vol. I at 40.

[5] Henkin L., *International Law: Politics and Values* (1995) at 40.

make less and less express use of art.38(1)(c) in their jurisprudence[6], save in some new and relatively unexplored areas of international law.[7] The gradual relegation of general principles to the periphery of international practice has also led to a steady decline in academic interest in general principles of law, especially in comparison with the other two sources.[8] Today hardly any international sources theorists or practitioners devote to general principles even half the attention they devote to treaties or customary international law.

The third point of agreement concerns the role of evaluative arguments in determining the content of general principles. Most conceptions of art.38(1)(c) agree that the search for general principles involves sifting through existing legal material and picking out its most *important* or –in the terms of the previous Part- *salient* features, which should then be applied to fill whatever legal gap the case at hand has exposed.[9] There is also little doubt that, despite the impression created by the wording of the Statute, the 'existing legal material' in question can be *international* as well as municipal in origin. After all, it seems only reasonable that, when faced with a gap in the law, international lawyers should look for appropriate analogies within the international legal system before appealing to municipal legal resources.[10]

When an analogy from international or municipal legal material is necessary, the evaluative dimension of general principles entails that the key test for accepting or rejecting the analogy is its *appropriateness* to the circumstances at hand. As far as municipal analogies are concerned, the

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[6] Cf. Koskenniemi M., 'General Principles: Reflections on Constructivist Thinking in International Law', XVIII *Oikeustiede-Jurisprudentia* (1985) 121 at 124-6, reprinted in Koskenniemi M. (ed.), *Sources of International Law* (2000) at 359ff.

[7] Cassesse A., *International Law* (2001) at 158-9 notes the contribution of general principles of law to the development of international criminal law.

[8] Jennings R., 'What is International Law and How Do We Tell It When We See It?', 37 *Annuaire Suisse de Droit International* (1981) 59 at 60-1.

[9] Virraly M., 'Le rôle des «principes» dans le développement du droit international' in *Recueil d'études de droit international en hommage à Paul Guggenheim* (1968) at 543 writes: « [Un principe] n'innove pas, mais synthétise, au contraire, tout un patrimoine de solutions juridiques depuis longtemps admises et appliquées. Par sa généralite, néanmoins, il peut servir de prémisse à un raisonnement déductif, permettant de formuler des règles nouvelles et de fournir des solutions inédites à des situations sans précèdent. La pensée juridique est habituée à ce va-et-vient, à cette induction du particulier au général, suivie d' une déduction du général au particulier. C'est le pas qui lui permet d'avancer et d'affronter la nouveauté». Cf. Lauterpacht H., *The Development of International Law by the International Court* (rev. ed. 1958) at 171-2; id., *International Law and Human Rights* (1950) at 115; Fitzmaurice G., 'Some Problems Regarding the Formal Sources of International Law' in *Symbolae Verzijl* (1958) at 174.

[10] In this connection Cassese writes: "The reason for so proceeding is that logically [sic] one should first of all apply principles that are peculiar to international law, hence more specifically suited to regulate a matter arising within the international community. Only subsequently may one turn to more sweeping principles that underpin all systems of law", Cassese A., *International Law* (2001) at 158-9. See also Brownlie I., *Principles of Public International Law* (6th ed. 2003) at 12; Shaw M., *International Law* (4th ed., 2003) at 37.

process of art.38(1)(c) requires international lawyers to take an especially critical attitude towards municipal legal systems, rather than to search for ready-made transplants or some sort of lowest common denominator amongst municipal legal concepts.[11] In the famous of words of Arnold McNair:

> International law has recruited and continues to recruit many of its rules and institutions from private systems of law. Article 38(1)(c) of the Statute of the Court bears witness that this process is still active, and it will be noted that this article authorizes the Court to 'apply... (c) the general principles of law recognized by civilized nations'. The way in which international law borrows from this source is not by means of importing private law institutions 'lock, stock and barrel', ready-made and fully equipped with a set of rules. It would be difficult to reconcile such a process with the application of 'the general principles of law'. In my opinion, the true view of the duty of international tribunals in this matter is to regard any features or terminology which are reminiscent of the rules and institutions of private law as an indication of policy and principles rather than as directly importing these rules and institutions.[12]

McNair's main point is that municipal legal practice should serve as a source of reasons rather than ready-made results for international law. This idea justifies, for example, why international lawyers consider their conception of estoppel to be *autonomous* from municipal conceptions[13], by drawing our attention, first, to the fact that these municipal conceptions have evolved in response to the need to regulate inconsistent behaviour *as it occurs within municipal communities* and, second, to the fact that the international and the municipal communities often differ very much in their respective legal structures and the content of their legal rules. These differences suggest that international lawyers should not be expected to simply copy the practical responses of those municipal communities to the problem of inconsistent behaviour, but to resolve that problem anew as it presents itself in the international context.[14]

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[11] It is interesting to note that the European Court of Justice has rejected the comparative approach in its search for the general principles of EC law. Cf. Tridimas T., *The General Principles of EC Law* (1999) at 12: "[T]he search for principles in the legal system of Member States is not a mechanical process. The Court does not make a comparative analysis of national laws with a view to identifying and applying a common denominator. Such an exercise would be as impractical as it would be futile."

[12] *International Status of South-West Africa*, Advisory Opinion, Separate Opinion of Judge McNair, ICJ Reports (1950) at 148. See also Brownlie I., *Principles of Public International Law* (6th ed., 2003) at 16; de Visscher Ch., *Theory and Reality of International Law* (trans. Corbett, 1957) at 256-8.

[13] See Chapter One, section 3.

[14] This appears to reflect the position in EC law as well. See e.g. Case 14/61, *Hoogovens v. High Authority*, Opinion of Advocate-General Lagrange, [1962] ECR 253 at 283-4: "[T]he case law of the Court, in so far as it invokes national laws (as it does to a large extent) to define the rules of law relating to the application of the Treaty, is not content to draw on more or less arithmetical 'common denominators' between the different national solutions, but chooses from each of the

The last point is particularly worth contrasting with the older –but no longer popular- view, according to which the purpose of international lawyers' foray into municipal practice is to find rules that are accepted across the major legal traditions of the world.[15] McNair's insight shows, I think, why this view of general principles is deeply mistaken. Saying that the point of international lawyers' appeals to municipal legal practice is to identify some widely accepted solution to a practical problem puts the cart in front of the horse, for *the nature of the problem* in international law may be such that no widely accepted municipal rule is able to provide an appropriate response to it. In other words, there is no necessary correlation between what rules municipal legal systems accept and what rules are appropriate to the circumstances of international law. A municipal legal rule may be widely accepted but inappropriate for international law (e.g. a rule of family law), or it may be peculiar to a certain municipal system and nevertheless provide a very good fit for the international legal context (e.g. common-law rules on trusts). In any event, the point of appealing to municipal practice is not to find some common ground amongst municipal legal systems but to assess whether (or to what extent) the justification behind certain municipal legal concepts retains its strength when these concepts come to be applied in the international context.[16] Most international lawyers understand very well that it is this evaluative assessment that makes or breaks an analogy from a given municipal concept, not the popularity of that concept across different municipal systems.

We could summarize the rough plateau of agreement amongst approaches to art.38(1)(c) of the ICJ Statute as follows. Most international

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Member States those solutions which, having regard to the objects of the Treaty, appear to be the best."

[15] Cf. Rudolf Schlesinger's declaration of faith to the comparative approach: "What are the general principles of law recognized by civilized nations? As long as concrete answers to this question are lacking, there is necessarily a gap in the structure of public international law, a gap which can be filled only by those who have learning and experience in what is commonly called comparative law", Schlesinger R., 'Research on the General Principles of Law Recognized by Civilized Nations: Outline of a New Project', 51 *AJIL* (1957) 734 at 735. For a contribution to this project see Seidl-Hohenvederln I., 'General Principles of Law as Applied by the Conciliation Commissions Establishing Under the Peace Treaty with Italy of 1947', 53 *AJIL* (1959) 853. See also Gutteridge H., 'Comparative Law and the Law of Nations', 21 *BYIL* (1944) 5 at 8; Schwarzenberger G., *The Inductive Approach to International Law* (1965) at 36-7; Friedmann W., 'The Uses of "General Principles" in the Development of International Law', 57 *AJIL* (1963) 279 at 282, 284; Guggenheim P., «Contribution à l'histoire des sources du droit des gens», 94 *Recueil des Cours* (1958-II) at 78; Jennings R. – Watts A., *Oppenheim's International Law* (9th ed., 1996), vol.I at 37, n.3.

[16] One is reminded here of Gadamer's remark about past social practices being "not a guide to action but a guide to reflection", Gadamer H.-G., 'What is Practice?: the Conditions of Social Reason' in *Reason in the Age of Science* (trans. Lawrence J., 1981) at 82. I draw on Gadamer's hermeneutic philosophy in Chapter Six.

lawyers would agree that general principles of law are propositions that fill the gaps of international law; that the practical importance of those principles is steadily decreasing owing to the proliferation of treaty and customary law; and that we should identify these principles by drawing on the important or salient features of existing international or municipal legal material.

In the remainder of this Chapter I argue that, despite their plausibility, these three points of agreement do not cohere with each other. In particular, the belief that general principles can provide answers in hard cases by making an evaluative judgement about the salience of existing legal material is not consistent with the belief that those principles are meant to fill gaps in the law, and thus to be applied only interstitially. Properly conceived, the application of international law in hard cases, where standard conceptions of art.38(1)(c) spot a 'legal gap', is not different in nature from the application of international law in easy or run-of-the-mill cases. Legal interpretation in *both* sorts of occasion takes the form of a search for the salient features of existing legal material and therefore engages the interpreter's evaluative judgements to the same degree.

2. General principles and the distinction between easy and hard cases

Suppose that someone wanted to attack the idea that general principles fill gaps in international law. Here is one way to do this, taking estoppel as an example. Most international lawyers believe that estoppel is a general principle of law and almost invariably use that term when they refer to estoppel in their practice and academic writing. But when these international lawyers invoke estoppel in the context of a dispute, they never claim that they are engaged in the extraordinary exercise of filling an international legal gap. Indeed, the very fact that these lawyers are able to invoke the concept of estoppel as an *established* part of international law seems to tell against the idea that the dispute at hand has exposed any such gap. In short, applications of estoppel in international law never seem to involve the kind of extraordinary activity that the gap-filling conception attributes to general principles of law.

Let us take a closer look at the target of this intuitive attack. On first approximation, the idea that general principles such as estoppel fill international legal 'gaps' seems to rest on two implicit claims. The first claim is

that the application of international law involves a different process depending on whether the case at hand is easy, in the sense that international lawyers have adequate and readily available resources to deal with it, or hard, in the sense that it exposes an area of uncertainty or a 'gap' in international law and sets in motion an special legal process to fill it.[17] The second implicit claim is that the various such gaps of international law *can* actually be filled using existing international and municipal legal concepts, i.e. that not only easy but also hard cases can have right legal answers, notwithstanding the fact that finding the right answer in hard cases may be a more complicated legal exercise.[18] Combined, these two claims make up the key idea behind the gap-filling conception of general principles of law: that the process of finding the right answer in easy international cases is essentially different from the process of finding the right answer in hard international cases.[19]

Now, consider how we might try to flesh out the first of those assumptions, namely that there is an essential difference in the way international lawyers decide easy and hard cases. One possibility is to say that the difference lies in the respective relationships of easy and hard cases to past international practice. In this sense easy cases can be distinguished from hard cases because the former are *recurrent* whereas the latter are *new*. From that perspective, the defining feature of an easy case seems to be that past occurrences of that case can in themselves be dispositive of future occurrences, i.e. that an easy case can in principle be decided by simply *re*iterating the decisions reached in the past, as long as these decisions are valid applications of international law. By contrast, in new cases the option of reiterating past decisions is not on offer. Any legal response to those cases thus has to be

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[17] One could perhaps try to distinguish two ideas that I mention in the same breadth, namely the idea that there is a *gap* in the law and the idea that there is some *uncertainty* about what the law says. The ground for this distinction would be that first idea relates to the 'formal completeness' of the international legal order (see n.4 above), whereas the latter relates to the degree of our epistemic confidence in the truth or falsity of certain propositions of international law. Although I cannot enter here into the discussion of whether the international legal order is 'complete' (I pick up a slightly different version of this debate in Part III), it should be enough to point out that the use of the expression 'legal gap' in the greatest part of international literature denotes some uncertainty in the interpretation of the law rather than a more radical doubt about whether international law regulates a certain area of activity *at all*.

[18] The idea that all cases of international law admit of right answers features prominently in the work of Hersch Lauterpacht, see Lauterpacht H., *The Function of Law in the International Community* (1952) at 110-35; Koskenniemi M., 'Lauterpacht: the Victorian Tradition in International Law', 8 *EJIL* (1997) 215 at 223.

[19] The familiar pair of 'easy' and 'hard' cases is sometimes criticized on the ground that it gives little insight into the essence of the distinction it denotes. I have nevertheless used it here for two reasons: first, the easy/hard binary captures very well the feeling of familiarity that comes with some cases and the feeling of puzzlement that comes with others; second, it is flexible enough to allow for different explanations of those intuitive responses (see main text).

justified by reference to more complex considerations of principle –this is where the 'hardness' of the case lies-, which will involve a mix of historical and evaluative arguments (remember the third point of agreement amongst theories of general principles). If this distinction is correct, then the application of international law in easy cases differs from the application of international law in hard cases in the following respect. Whereas easy cases are decided by a simple reiteration of past international decisions involving the same case, decisions in hard cases must draw on the salient features of past international practice.

It is not difficult to spot a serious difficulty in this account of the easy/hard case distinction. Claims about a relation of recurrence and similarity between past cases and the case at hand will, at the first sign of controversy or doubt, need to explain *in what sense* the two cases are similar. These claims too will then need to sift through the myriad facts respectively present in past cases and the case at hand (from the name of the State official who made the representation in question, to the amount of damage another party may have suffered as a result of its retraction) in search of those similarities or dissimilarities that really matter for the purposes of international law.[20] This point emerges from our discussion of salience in Chapter One. Parties to an international litigation will often agree that the case at hand is recurrent and still disagree on which respects of past occurrences of the case are truly salient. When this happens, each party will try to produce not just more historical support but also an attractive justification for its views about the salience of past cases.[21] This goes to show that the claim that a case is recurrent must already rely on some argument or implicit assumption that identifies the important or salient aspects of past international practice.[22] But if that is true, the application of international law in recurrent cases seems to draw on the same mix of historical and evaluative resources that one would be expected to use in applying international law to new (or hard) cases. Rather than defend the distinction between easy and hard cases, the distinction between recurrent and new cases has seriously undermined it.

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[20] Cf. Finnis J., *Natural Law and Natural Rights* (1980) at 12; Raz J., 'Two Views on the Nature of Legal Theory' in Coleman J. (ed.), *Hart's Postscript* (2001) at 26-8.
[21] See Chapter One, Section 2.
[22] This is also the point of Wittgenstein's famous remarks on ostensive definition, see Wittgenstein L., *Philosophical Investigations* (1954) at par.67. I explore this idea in more detail in Chapter Four.

A more credible way of defending the distinction between easy and hard cases would finds the essence of that distinction in the *shared* or *contested* character of the criteria for their proper resolution. This view would concede that as soon as there is disagreement about the salience of past practice one must come up with an evaluative argument that justifies why this or that feature of past cases is more important than others. It would nevertheless suggest that the true point of distinction between easy and hard cases is precisely that easy cases are marked out by the fact that international lawyers agree on the criteria for resolving them, whereas hard cases reflect substantive and non-trivial disagreements about how a certain case ought to be resolved, where all sides can produce reasonable arguments to their support. The difference is crucial because when lawyers do not share certain criteria for resolving the case at hand

> there is no possibility of treating the question raised by the various cases as if there were one uniquely correct answer to be found, as distinct from an answer which is a reasonable compromise between many conflicting interests.[23]

The hardness of hard cases, according to this view, consists in the idea that when lawyers reasonably disagree about the correct meaning of past applications of a certain rule, there can be no legal fact of the matter about what the 'proper' or 'right' meaning of the rule is. Whatever decision one reaches in such cases will be the result of an exercise of the interpreter's discretion rather than a statement of something already required by the law.

I will discuss this view of legal interpretation (which is sometimes called 'conventionalism') in Chapter Six.[24] There is, however, one immediate difficulty with taking its method of differentiation between easy and hard cases as support for the idea that general principles fill gaps in international law. The difficulty is that this view goes firmly against the *second* assumption underlying the gap-filling conception, namely that both easy and hard cases can have right answers: if hard cases do not admit of a right answer as a matter of law, general principles could never hope to provide one.[25] In other words,

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[23] Hart H.L.A., *The Concept of Law* (2nd ed., 1994) at 132. Hart attributed the appearance of hard cases to the fact that language has an 'open texture'. For an exposition of the conventionalist semantic underpinnings of Hart's view see Stavropoulos N., 'Hart's Semantics' in Coleman J. (ed.), *Hart's Postscript* (2001) at 88ff.

[24] See Chapter Six, section 2.

[25] The fact that general principles are themselves expressed in language makes the emergence of disagreements about their meaning very probable, see Brink D., 'Legal Interpretation, Objectivity and Morality' in Leiter B. (ed.), *Objectivity in Law and Morals* (2000) at 19-20.

from the moment we accept that hard cases cannot have right answers, we are bound to give up the assumption that there is a correct way to fill a gap in the law, or we would have to make the self-defeating claim that when there is no gap in international law resort to general principles is unnecessary, but when there is such a gap resort to general principles is futile. Accordingly, the view of hard cases as cases in which there is no legal right answer would treat art.38(1)(c) of the ICJ Statute not as a device for filling the gaps of international law, but as an outright admission that there may be some (or many, depending on how much international lawyers can reasonably disagree!) cases in which international law provides no answer at all.[26]

This point shows that we cannot hold on to *both* of the assumptions underpinning the idea that general principles of law fill gaps in international law. Making sense of the claim that general principles are meant to apply in extraordinary cases -where there is some uncertainty or gap in the law- requires us to give up the claim that cases exposing such gaps can have a right answer. Making sense of the claim that all questions of international law can have a right legal answer requires us to drop the claim that the application of international law in easy cases is substantially different from its application in hard cases and the idea of 'legal gaps' that supported this differentiation. In short, the thought that there are gaps in international law, which general principles of law are nevertheless able to fill, is incoherent.

3. Right answers and some first thoughts on scepticism

An important dilemma ensues. If we cannot hold on to both the idea that general principles fill gaps in the law and the idea that the discovery of right answers in both easy and hard cases draws on the same mix of historical and evaluative resources. Should we give up the idea that general principles fill gaps the law, or the idea that hard cases can have right legal answers?

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[26] Hart stated this very clearly in his Postscript to the second edition of *The Concept of Law*: "Such cases are mot merely 'hard cases', controversial in the sense that reasonable and informed lawyers may disagree about which answer is legally correct, but the law in such cases is fundamentally *incomplete*: it provides *no* answer to the question at issue in such cases", Hart H.L.A., above n.46 at 252. This claim has been strongly attacked by Ronald Dworkin, see Dworkin R., 'The Model of Rules I' in *Taking Rights Seriously* (1977) at 31ff.; id., 'One Right Answer?' in *A Matter of Principle* (1985) at ; id., *Law's Empire* (1984) at.

Although I deal with a broader form of this question in Chapter Five[27], in this section I argue that we have good reason to accept the claim that all applications of general principles admit of right answers. First, the bulk of international lawyers' argumentative practice about particular rules of international law relies on the assumption that all applications of international law admit of right or wrong answers. Second, international legal debate about the provenance and content of general principles is clearly directed towards the discovery of such answers.

A moment's reflection on how international lawyers argue about particular rules of international law reveals that their claims are invariably *veridical* -or truth-oriented- in character.[28] For example, whenever international lawyers invoke a rule of international law in the context of a dispute, they are trying to convince the international judge or arbitrator that their arguments are better than those of their opponents, *in the sense* that they accurately reflect international law. International judges and arbitrators justify their views on the basis that they reflect the true or correct state of international law, while academic writers defend or criticize a particular application of international rules on the basis that they do or do not correctly reflect international law. Similarly, no international lawyer, judge or academic thinks that their view about what international law requires is just as good as any competing view, that it is *merely* their view or opinion, that it may or may not reflect international law.[29] Their views always purport to capture the right answer about what international law says in the case at hand.

The veridical character of lawyers' claims about the content international law should not be confused with the patently false claim that international lawyers will always have a high degree of confidence in their claims. Sometimes international lawyers will be simply uncertain about the true state of the law or will put forward a view they have little faith in because this is the only way to sustain their case. But uncertainty about whether one's view really captures the true content of the law does not entail that such a truth is unavailable (or –as is sometimes said- that the law is indeterminate).

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[27] See Chapter Five, sections 1 and 4.
[28] I take the idea of the intrinsically veridical character of beliefs from the work of Donald Davidson. Davidson's key idea is that one cannot believe X without believing that X is true, see Davidson D., 'A Coherence Theory of Truth and Knowledge' in *Subjective, Intersubjective, Objective* (2001) at 145-6. I discuss this idea at length in Chapter 5.
[29] Cf. Dworkin R., 'Objectivity and Truth: You'd Better Believe It', 25 *Philosophy & Public Affairs* (1996) 87 at 91-3.

If anything, the fact that lawyers entertain doubts or disagree *about* the correctness of a given view only strengthens the assumption that the case at hand admits of a right answer. For what these lawyers appear to doubt is whether a *certain* answer is the right one, not whether there could be a right answer at all.[30] Perhaps the point is put most forcefully and eloquently by the decision of a US-British Claims Tribunal in the *Eastern Extension, Australasia and China Telegraph Co.* case:

> Even assuming that there was in 1898 no treaty and no specific rule of international law formulated as the expression of a universally recognized rule governing the case..., it cannot be said that there is no principle of international law applicable. International law, as well as domestic law, may not contain, and generally does not contain, express rules decisive of particular cases; but the function of jurisprudence is to resolve the conflict of opposing rights and interests by applying, in default of any specific provision of law, the corollaries of general principles, and so to find – exactly as in the mathematical sciences- the solution of the problem.[31]

Claims about the requirements of particular international rules are not the only ones possessing a veridical character; the same holds for claims about the proper provenance and content of general principles of law in the sense of 38(1)(c) of the ICJ Statute. The different conceptions of art.38(1)(c) are competing in the sense that each purports to reveal the Statute's correct meaning. Theorists who defend those conceptions of general principles do not rest content with the claim that their own conception is as good as any other. They do not accept that general principles may be drawn from any province one would care to look into, nor do they accept that the content of those principles can be anything one would care to make it. Irrespective of the degree of confidence each has in their view, they cannot –unless they are pretending- put forward that view as anything else but the right or correct view of general principles of law.

To sum up: we have found it very difficult to give any content to the idea that the application of international law in hard cases is essentially different from its application in easy cases. Against this popular conception of general principles, we have concluded that there are no cases in which we need

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[30] One could put the matter differently by saying that our occasional inability to demonstrate the truth of our views shows nothing more than that; it certainly does not entail that these views cannot be true or false (truth, as is sometimes said, can exceed its own demonstrability), see Dworkin R., 'Are There Right Answers in Hard Cases?" in *A Matter of Principle* (1984) at 58; Guest S., *Ronald Dworkin: Jurists - Profiles in Legal Theory* (2nd ed., 1996) at 110ff.

[31] *Eastern Extension, Australasia and China Telegraph Co.*, US-British Claims Tribunal, Award of 6 April 1923, 6 UNRIAA 108 at 114-5. I take up the relevance and plausibility of the analogy between legal interpretation and scientific methods in Chapter Six, section 3.

to switch to a different or more 'creative' type of legal reasoning in order to be able to invoke and apply international law. Our argumentative practice shows that we treat all its applications alike: whether or not we happen to agree on what the proper result should be, and whether or not the process of finding that result puts a strain on our investigative resources, we always strive to apply international law in a manner consistent with the salient features of the relevant international or municipal legal history.

Some may be tempted to raise a sceptical objection at this point. My rejection of the idea that there are gaps in the fabric of international law, i.e. that there are cases in which international law does not provide an answer, seems to rely on the claim that all cases admit of right answers just because international lawyers appear to believe that they do. But this claim cannot get off the ground, as it were, by lifting its own bootstraps: the mere fact that international lawyers believe that something is true is not enough to make it actually true. For it is possible that international lawyers may be *massively* mistaken. That is, even though they generally behave as though there were right answers in all cases, the truth of the matter may actually be that some of those cases do not admit of right answers. My argument, the objection goes on, has produced no independent proof to show that this possibility of massive mistake can be safely excluded. Such a demonstration is nevertheless necessary, because unless we can find some independent support –i.e. support that is not merely based on what international lawyers think- for the view that all cases have right answers and that international lawyers are not massively mistaken in believing that they do, we cannot conclusively reject that idea that international law might feature something like gaps.

I think one could offer an outright counter to this sort of scepticism, by pointing out that it is extremely hard to articulate the possibility of massive mistake from anything other than a veridical or truth-oriented perspective. The sceptic who claims that international lawyers may be massively *mistaken* in thinking that all cases admit of right answers must himself be thinking that he is right in what he says.[32] Appreciating this throws up a couple of important consequences. First, that the sceptic's claim appears to be of the same kind – and to demand the same kind of support- as those that it is supposed to falsify. Second, that the sceptic cannot put forward his claim without also making a

[32] Cf. Dworkin R., 'Objectivity and Truth', above n.29 at 104. I discuss an apparently more threatening form of scepticism (which Dworkin calls 'external') in Chapter 5, sections 2-3.

case for it, i.e. he cannot at the same time seek an advantage over non-sceptical positions and also purport to be exempt from the conditions that would make those positions true or false. In short, like anyone else's, the sceptic's position cannot succeed just by defiantly flaunting its possibility; it also needs to be argued for. Unless the sceptic himself mounts a good case against the idea that all international cases admit of right answers, we have no reason to believe that international lawyers are massively mistaken in thinking that they do.

4. Conclusion: are general principles a distinct formal source of general international law?

In this Chapter I have looked into the popular idea that general principles of law are propositions meant to fill the 'gaps' of international law. I have found this idea and the distinction between easy and hard cases that underlies it to be incoherent. Either there are no gaps in international law, in the sense that there are no occasions in which the interpretation of the law requires us to switch from a 'standard' to a special and 'creative' form of legal reasoning, or general principles could not possibly provide right answers about how to fill them. I have then taken a position in the ensuing dilemma and argued that the phenomenology of everyday international legal argument about particular rules of international law and its sources suggests that all problems of application of international law have right answers and that their discovery involves the same process of identifying the salient features of international legal history, no matter whether the case is easy or hard.

This conclusion is, of course, provisional in the sense that we still need to confirm whether evaluation indeed occupies a central place in the interpretation of customary international law. But insofar as that turns out to be the case, it would seem that the application of general principles of law is not substantially different from the application of other rules of general international law, for *both* contexts of application appear to require international lawyers to identify the most salient features of existing legal material and to use those features to decide specific disputes about the content of international law. This point has at least one very conspicuous consequence. It entails that *the distinction between customary international law and general principles of law is much less consequential than it is commonly*

thought. More specifically, it means that art.38(1)(c) of the ICJ Statute can be said to constitute a distinct source of international law only in the sense that it extends the *database* of existing legal material to which international lawyers may legitimately appeal in support of their arguments about international law. In terms of legal reasoning, it introduces nothing that is not already present in the ways international lawyers think about standard applications of general international law. To put the matter in more technical terms, whereas articles 38(1)(b) and 38(1)(c) refer to different *material* sources of international law, they are not (despite overwhelming opinion to the contrary) separate *formal* sources, since they set in motion exactly the same process of reasoning for the identification of general international law.[33]

The suggestion that the two sources of general international law are not really distinct from each other may challenge theoretical orthodoxy but it should not come as a complete surprise. For one thing, defusing the formal distinction between customary law and general principles helps us explain the striking lack of independent interest in the former source. It suggests that international lawyers do not devote *special* attention to art.38(1)(c) because they intuit that the form of legal reasoning that it describes is not radically different from the one that guides their enquiries into customary international law. In other words, the message behind their disinterested attitude towards art.38(1)(c) of the ICJ Statute is not that the formal process described in that article is obsolete, but that it permeates the interpretation of all rules of general international law.

The same idea seems to explain why practical international lawyers never spend too much time pondering whether a certain proposition reflects a rule of customary international law or a general principle of law, except perhaps in order to give an indication of the main source of material support for their arguments. For example, it seems hardly a coincidence that, with the exception of Antoine Martin[34], international writers have never attempted to *dis*prove that estoppel falls under a particular source of international law. Their thesis is almost invariably that estoppel falls under this or that source,

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[33] For the distinction between formal and material sources of international law see Brownlie I., *Principles of Public International Law* (6th ed., 2003) at 2-3.

[34] Martin A., *L'estoppel en droit international public* (1979) at 219-40. Martin argues that estoppel in not a general principle of law.

whether or not it might fall under another source as well.[35] Perhaps we now have a reasonable explanation for this trend: the fact that international lawyers have refrained from making a clear either/or choice between customary law and general principles as the proper home of estoppel indicates that the choice itself may be misconceived and unnecessary. I cannot, in the present context, pursue this discussion much further and look at examples drawn from other general concepts and principles of international law. What I want to suggest is that if the only remaining function of the separation between the sources in art.38(1)(b) and art.38(1)(c) is to distinguish between cases where the legal material involved is international from cases where the legal material is municipal, then that distinction may not be important enough to merit special attention in our legal thinking, nor essential enough to require its impression on new students of international law.

The collapse of the distinction between the two sources of general international law also has an important consequence for our discussion of the place of evaluation in the interpretation of general international law. In particular, the rejection of the idea that legal interpretation takes a different form in easy and hard cases weakens the attack against values, since it blocks its access to the claim that evaluative judgments have a *limited* role in international legal interpretation. If it is true that evaluative judgements are essential to the application of general principles of law, then the same must be true of all applications of international law, for there is no convincing way of drawing a distinction between cases in which evaluation matters and cases in which it does not. The only way to maintain the attack on evaluation (and the formal distinction between the two sources of general international law) is to claim that the interpretation of general international law need not, for the most part, engage the interpreter's evaluative judgements, taking the interpretation of rules of customary law as an example. Chapter Four looks at the merits of this important and popular claim.

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[35] This possibility was suggested by Vice-President Alfaro in his Separate Opinion in the *Temple of Preah Vihear* case, ICJ Reports (1962) at 42-3.

Chapter Four

Customary international law and the interpretive attitude

My aim in this Chapter is to expose some important flaws in the ways international lawyers have theorized about customary international law. I argue that, despite recent attempts to offer more 'modern' conceptions of that source, theorists of customary international law are still not alert to the conspicuous ways in which evaluative arguments are central to the interpretation of customary international rules. In particular, most theorists have focused their attention on asking how customary international law can be created (I will call these questions of *pedigree*), thus neglecting a host of questions about how customary rules should be interpreted (I will call these *interpretive* questions). I argue that this extraordinary preoccupation with questions of pedigree -is the practice law?- at the expense of interpretive questions -what does the practice say?- has blinded theorists to the centrality of evaluative arguments in the interpretation of customary international law.

1. Traditional and modern theories about customary international law: the varying significance of practices and intentions

The idea that rules of customary international law emerge from the union of two elements, one objective and one subjective, serves the purpose of distinguishing binding customary rules from 'mere' habits or usages. What makes the behaviour of States regarding the personal immunity of foreign diplomats different from their behaviour regarding, say, the despatch of condolences for the death of a Head of State is that the former sort of behaviour is accompanied by a sense of legal obligation whereas the latter is not. The underlying intuition here is that legal obligation consists of more than

a simple regularity of behaviour. It also features a connection between that behaviour and some special psychological attitude, intention or disposition.[1]

Based on this powerful intuition, traditional theories of customary law claim that the existence of a customary rule needs to be confirmed by a succession of two independent tests. On the one hand, it must be shown that States (or, for that matter, other subjects of international law) engage in a certain practice with sufficient uniformity and consistency.[2] On the other hand, it must be shown that States follow this practice out of a sense of legal obligation.[3] The first of those tests is objective in the sense that it describes the behaviour of the participants in the practice from a detached observational perspective. The second test is subjective in the sense that it identifies the intentions and attitudes of participants towards their shared practice. The combination of the objective and subjective element is supposed to effect a reasonably tight distinction between legally binding practices and mere usages, since some kinds of social practice might satisfy the tests of uniformity and consistency and still fail to qualify as customary international law on the ground that they lack the crucial subjective supplement.

Over the years international lawyers have expressed a number of dissatisfactions with this basic account. For one thing, the standard treatment of the two elements seems to be riddled with practical problems. If it is necessary for States to *believe* that their practice reflects customary international law in order for that practice to actually become legally binding, then the beliefs entertained by the initiators of the practice must by definition

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[1] Wolfke K., *Custom in Present International Law* (2nd ed., 1993) at 41: "Without the subjective element of acceptance of the practice as law the difference between international custom and simple regularity of conduct (*usus*) or other non-legal rules of conduct would disappear"; Akehurst M., 'Custom as a Source of International Law', 47 *BYIL* (1974-5) 1 at 33: "If States habitually act in a particular way, is this because international law requires them so to act, or because international law merely permits them so to act? The frequency or consistency of the practice provides no answer to this question; *opinio juris* alone can provide the answer"; Thirlway H., *Customary International Law and Codification* (1972) at 53: "The principal objection to the 'single-element' theory...is that it affords no means of distinguishing between usages which give rise to legally binding custom, and usages which remain in the sphere of mere courtesy or convenience"; Villiger M., *Customary International Law and Treaties* (2nd ed., 1997) at 48. Cf. Mendelson M., 'The Formation of Customary International Law', above n. at 247; Cheng B., 'United Nations Resolutions on Outer Space: Instant International Customary Law?', 5 *Indian JIL* (1965) 23 at 25.

[2] *Nicaragua* (Merits), ICJ Reports (1986) par 186; *North Sea Continental Shelf*, ICJ Reports (1969) 3 at 43; *Right of Passage*, ICJ Reports (1960) 6 at 40; *Asylum*, ICJ Reports (1950) 266 at 276-7; International Law Association, *Statement of Principles Applicable to the Formation of General Customary International Law* (ILA Statement of Principles), Final Report of the Committee on the Formation of Customary (General) International Law, London Conference (2000) (available at <www.ila-hq.org>), Sections 13-15, pp.21-9.

[3] *North Sea Continental Shelf*, ICJ Reports (1969) 3 at 44; *Right of Passage*, ICJ Reports (1960) 6 at 42-3; *Asylum*, ICJ Reports (1950) 266 at 277.

have been mistaken.[4] But even if we interpret the subjective element as the requirement that States must have *consented* to the practice being legally binding, it remains unclear whether States that have expressed no view on the matter should, in virtue of their omission to act, be bound by any new customary rule.[5] Furthermore, given that we do not have any kind of privileged access to States' minds, how can we identify their attitudes towards a given practice in a way that does not depend on what would already count as evidence of the objective element?[6] Should we say that some kinds of behaviour, e.g. physical action by the States forces, concern the objective element, whereas some others, e.g. broad statements of a State's policy, concern the subjective element only?[7] If we do not endorse such a sharp distinction, can we simply *infer* the presence of the subjective element from the presence of the objective one?[8] Would that not constitute a suspicious act of *double-counting*?[9]

Those practical difficulties aside, international lawyers have voiced some more radical doubts as to whether the union of the two elements, as described by standard theories of customary law, is at all capable of generating genuine legal obligations. A State may regularly follow a certain course of conduct in the belief that law requires it and still incur under no obligation towards other States; for that State may be simply mistaken about what the law requires. This difficulty is not alleviated even if we accept that the two elements are satisfied only when a *sufficiently great* number of States engage

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[4] Kelsen H. , 'Théories du droit international coutumier', *Revue International de la Théorie du Droit* (1939) 248 at 253-4; Kunz A., 'The Nature of Customary International Law', 47 *AJIL* (1953) 66; Thirlway H., *Customary International Law and Codification* (1972) at 47-8; Akehurst M., 'Custom as a Source of International Law', 47 *BYIL* (1974-5) 1 at 32.

[5] On whether omissions can count as State practice see Mendelson M., 'State Acts and Omissions as Explicit or Implicit Claims' in *Le droit international au service de la paix, de la justice et du développement: Mélanges Michel Virally* (1991) at 373; *ILA Statement of Principles*, Section 6. The paradox acquires added bite in the case of new States, see Waldock H., 'General Course in Public International Law', 106 *Recueil des Cours* (1962) 5 at 52.

[6] Cf. Virally M., 'The Sources of International Law' in Sørensen M.(ed.), *Manual of Public International Law* (1969) at 134; Koskenniemi M., 'Theory: Implications for the Practitioner' in *Theory and International Law: An Introduction* (1991) at 15-7.

[7] On this point see *Anglo-Norwegian Fisheries*, Dissenting Opinion of Judge Reid, ICJ Reports (1951) at 191; Wolfke K., above n.2 at 41-3; Akehurst M., above n.2 at 1-5; Thirlway H., *Customary International Law and Codification* (1972) at 58; D'Amato A., *The Concept of Custom in International Law* (1971) at 88; Fitzmaurice G., 'The Law and Procedure of the International Court of Justice: General Principles and Sources of Law', 30 *BYIL* (1953) 1 at 68; *ILA Statement of Principles*, above n.2, Sections 3-6.

[8] See e.g. Lauterpacht H., *International Law, vol. I: The General Works* (1977) at 66: "the element of consent is satisfactorily met by the circumstance that a rule has been generally followed".

[9] Mendelson M., 'The Nicaragua Case and Customary International Law' in Butler W.(ed.), *The Non-Use of Force in International Law* (1989) 85 at 92; Chigara B., *Legitimacy Deficit in Customary Law: A Deconstructionist Critique* (2002) at 10-11.

in the practice in question in the belief that law requires it. For although it seems quite improbable for the vast majority of States to be mistaken about what the law requires (*communis error facit jus*), the question is still not answered. How could the mere fact that many States follow a certain kind of behaviour in the belief that it is required by law result in them having a legal obligation to *continue* observing that behaviour in the future?[10] Don't we need to appeal to some other, non-consensual standard in order to bind States to their present behaviour and beliefs?[11]

Some of these concerns have prompted a number of 'modern' alternatives to standard theories of customary international law. One group of theorists have located the problem with traditional accounts of custom in the subjective element. Some of those authors have suggested that the subjective element is wholly unworkable and thus should not be part of our efforts to account for customary international law.[12] Others believe that we should retain a reduced role for the subjective element, by allowing it to be satisfied by some form of tacit or implied consent.[13] Other theorists suggest that enquiring about the presence of the subjective element is really necessary only in hard cases, where it is difficult to tell whether the practice in question reflects legal obligation.[14] The recent ILA Principles on the Formation of Customary International Law take this approach a step further and argue that in hard cases our enquiry into the subjective element has a negative character: the question in such cases is not so much whether there is evidence of the

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[10] Schachter O., 'Towards a Theory of International Obligation', 8 *VaJIL* (1967) 300 at 312; Allott P., 'The People as Law-Makers: Custom, Practice and Public Opinion as Sources of Law in Africa and England', 21 *Journal of African Law* (1977) 1 at 2-3; Koskenniemi M., 'The Normative Force of Habit: International Custom and Social Theory' 1 *Finnish YIL* (1990) 77 at 78-9; Chigara B., above n.9 at 52-4.

[11] Cf. Brierly J., *The Basis of Obligation in International Law* (1958) at 8; Fitzmaurice G., 'Some Problems Regarding the Formal Sources of International Law' in *Symbolae Verzijl* (1958) 153 at 161-8; D'Amato A., 'Consent, Estoppel and Reasonableness: Three Challenges to Universal Customary Law' 10 *VaJIL* (1969) 1 at 4-10.

[12] Kelsen, 'Théories du droit international coutumier', above n.4 at 263ff.; Guggenheim P., 'Principes de droit international public', 80 *Recueil des Cours* (1952) 36 at 70-2; D'Amato A., *The Concept of Custom in International Law* (1971) at 73 (proposing a requirement of 'articulation' instead). Kelsen and Guggenheim later accepted the necessity of a subjective element, see *ILA Statement of Principles*, above n.2, Part III.

[13] Akehurst, above n.1 at 38 (drawing a distinction between permissive rules –in respect of which consent might be inferred- and duty-imposing rules); Hudson M., *Permanent Court of International Justice 1920-1942: A Treatise* (1972) at 35-9; Villiger M., *Customary International Law and Treaties* (2nd ed., 1997) at 50-1; van Hoof G., *Rethinking the Sources of International Law* (1983) at 77-79.

[14] *ILA Statement of Principles*, above n.2 Part III, Secs. 16-7; Mendelson M., 'The Formation of Customary International Law', 272 *Recueil des Cours* (1998) 155 at 245ff.; Haggenmacher P., 'La doctrine des deux élements du droit coutumier dans la pratique de la Cour internationale', 90 *RGDIP* (1986) 5 ; Kirgis F., 'Custom on a Sliding Scale', 81 *AJIL* (1987) 146.

subjective element, but whether there is evidence that States *do not* consider a certain practice to be the source of legal obligation (the Statement uses the expression '*opinio non juris*' to denote this way of approaching the matter).[15]

A second group of theorists have traced the source of the difficulties of standard accounts of customary law in the objective, rather than the subjective, element. 'Modern' customary law, they argue, is no longer the product of extensive and uniform international practice that develops over a long period of time.[16] It arises when there is good evidence that States display an intention to the effect that a proposition reflects international law, whether or not they have acted on that intention in their practice.[17] This strong reliance on the element of intention entails that 'modern' customary rules can arise more quickly than 'traditional' ones, especially when the intentions in question have found expression in authoritative contexts, such as international treaties, resolutions of the UN General Assembly or Final Statements of international conferences.[18]

Now, the theoretical disagreements between 'traditional' and 'modern' theories of customary international law (and between the two camps of 'modern' theorists) should not obscure a number of points on which these different approaches appear to converge. First, it seems clear that customary rules derive from the practice of States and other subjects of international law and thus that any argument of the kind 'X is a rule of customary law' must seek some grounding in the history of international practice on the matter.[19]

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[15] The expression '*opinio non juris*' has been coined by Maurice Mendelson, see Mendelson M., 'The Formation of Customary International Law', above n.14 at 272.

[16] Some have argued that this trend spells the demise of customary law as a law-creating process, see Dunbar N., 'The Myth of Customary International Law', *AYIL* (1983) 1; Kelly P., 'The Twilight of Customary International Law', 40 *VaJIL*(2000) 449.

[17] For this increasingly popular view see Roberts A., 'Traditional and Modern Approaches to Customary International Law: A Reconciliation', 95 *AJIL* (2001) 757 at 758-9; Charney J., 'Universal International Law', 87 *AJIL* (1993) 529 at 544ff; Fidler D., 'Challenging the Classical Concept of Custom', *GYIL* (1996) 198 at 216-31; Simma B. – Alston P., 'The Sources of Human Rights Law: Custom, *Jus Cogens* and General Principles', *AYIL* (1988-9) 82 at 84-89.

[18] Bodansky D., 'Customary (and Not So Customary) International Environmental Law', 3 *Indiana Journal of Global Legal Studies* (1995) 105 at 116ff.; Chodosh H., 'Neither Treaty nor Custom: The Emergence of Declarative International Law', 29 *Texas ILJ* (1991) 87 at 102. I cannot enter here into the question when such instruments can create customary international law. On that matter see the *ILA Statement of Principles*, above n.2, Parts IV-V at 42ff.

[19] This is conceded even by those who argue that certain human rights norms have become part of customary international law despite the absence of uniform and consistent State practice, see e.g. Meron T., *Human Rights and Humanitarian Norms as Customary Law* (1989) at 44; Roberts E., above n.15 at 790. I do not have the space to discuss at length whether human rights are part of customary international law. My view is that this thought is deeply unsatisfactory. Insofar as the source of human rights is the very humanity of persons, their force is independent of whether or not States have agreed to respect those rights in their practice. In fact, general respect for human rights is a condition for the participation of States in the international legal

Second, it also seems clear that the concept of 'international practice' should be understood to include not only actions but also (at least some) statements of the participants in the practice. Third, only *some* instances of international practice can properly affect (confirm, support, challenge, alter etc.) the content of customary international law, namely instances where the authors of that practice intend it to have that effect.[20] Third, finding out whether the authors of a practice have that special intention will often be a difficult matter and certain evidential presumptions will probably have to be put to work. Fourth, the need for such presumptions seems to be reduced by the fact that the very contexts in which customary international law is usually invoked leave little doubt that the international practice in question is intended to be binding as law and thus save us the need to conduct special research into the subjective element. Finally, it seems clear that for the whole process to impose genuine obligations on States, one must provide a substantive *reason* why consistent and widespread practice that is intended to create a legal obligation can actually create that obligation, e.g. because that is essential to ensure a minimum of international order and cooperation[21] or because it is important not to defeat certain reasonable expectations of behaviour amongst States.[22]

Whether or not 'traditional' and 'modern' theories are successful, it seems to me that the points on which they converge amount to a profound truth about the nature of customary international law: *rules of customary international law are binding because there is independent good reason to believe that international practices intended to be legally binding actually have that effect.* This statement may be too abstract for most practical purposes, but it still seems to offer a by and large correct (quasi-promissory)

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process and, *a fortiori*, a condition for their being able to contribute to the development of customary international law. This is precisely why we do not count as instances of torture by State officials as evidence of State practice and why such acts do not count as exercises of official capacity, say, for the purposes of the law of immunity. I explore these issues in a separate paper titled "Are Human Rights Norms Part of Customary International Law?" (on file with author).

[20] It is a different question whether one is thinking here of a *general* intention of States to submit to the customary law-making process or a *specific* intention to be bound by a certain rule of international law. For this distinction see Allott P., *Eunomia: New Order for a New World* (1990) at 145-77; Lowe V., 'Do General Rules of International Law Exist?', 9 *Review of International Studies* (1983) 207; id., 'The Politics of Law-Making: Are the Method and Character of Norm Creation Changing?' in Byers M. (ed.), *The Role of Law in International Politics: Essays in International Relations and International Law* (2000) at 207.

[21] Cf. *Gulf of Maine* (Canada/US), ICJ Reports (1984) at 299, par.111: "[C]ustomary international law... comprises a limited set of norms for ensuring the co-existence and the vital co-operation of the members of the international community...".

[22] Cf. Mendelson M., 'The Formation of Customary International Law', above n.12 at 183-6; Byers M., *Custom, Power and the Power of Rules* (1999) at 142-5.

description of the nature of customary law.[23] I would suggest that its special appeal is due to two reasons. First, this description of the customary law-making process locates customary law *between* the history of international practice and the ethical and political principles that give that history its normative force. Customary law may depend for its existence on the history of the practice of States and their intentions as well as on certain reasons why that practice ought to be obeyed, but it is neither *just* what States do and intend, nor *just* what is most conducive to, say, the maintenance of international order and cooperation.[24] Rather, it is the binding product of the intention of States to regulate their behaviour towards each other in a manner that responds to some shared and fundamental values. Second, this description of the customary law-making process preserves an important space between what States as a whole take their customary practices to require and what individual States believe that those practices require. The distinction between what the practice really requires and what individual participants *believe* that it requires not only gives sense to the idea that States can be mistaken in their views about customary international law, but also emphasizes the *collective authorship* of those practices (I will return to these points in section 4).

2. Practices, intentions and interpretive disagreements

I am only drawing attention to these fairly abstract (perhaps tedious) propositions about the nature of customary international law in order to highlight how easily theorists of customary law tend to forget their significance. More specifically, it seems to me that both 'modern' and 'traditional' theories of customary international law feature a tremendous gap between their assumptions about the *nature* of customary law and their conclusions about the *criteria* for its identification and interpretation. To start with, all these theories must assume that the justification of the binding force of customary law *as a whole* requires the appreciation of some fundamental international values. However, when it comes to the interpretation of

[23] I discuss the sceptical challenge of critical theorists to statements of this sort in Chapter Five.
[24] Critical theorists famously maintain that this intermediate position is untenable. I discuss their views in Chapter Five.

particular customary rules, these theories conceive of the task of legal interpretation as a matter of simply proving the existence of a certain body of international practice and the requisite element of intention; they differ only on which of those two elements should have priority over the other. In this section I argue that this discontinuity undermines the prospects of success of both 'modern' and 'traditional' theories of customary international law. In particular, I claim that, by effacing evaluation from the interpretation of particular customary rules, these theories fail their own best intuitions about the nature of customary law and thus become unable to explain and resolve some of the most significant disagreements that States have about its content.

To appreciate this point, consider the following general problem. Suppose that we agree that a trend of widespread and consistent international practice has been followed in the belief that the law requires it and that therefore this practice is a source of legal obligation. However, we happen to disagree about exactly what obligation this -indisputably binding- practice actually imposes on States. Suppose that, like France and Turkey in the *Lotus* case[25], we agree that customary law gives the flag State jurisdiction over acts committed on board a vessel but we disagree as to whether this jurisdiction is exclusive. Or, to take a more recent example from the *Arrest Warrant* case[26], suppose that we agree that certain State officials enjoy customary immunity from prosecution before foreign courts and that customary law characterizes certain heinous crimes as crimes against humanity and allows such crimes to be tried before the courts of third States that claim jurisdiction over them.[27] However, we disagree as to whether customary law allows the prosecution of a serving Foreign Minister suspected of such crimes before foreign courts. What is distinctive about these disagreements is that they do not concern the legal status or *pedigree* of a customary practice but its proper *interpretation*. The question they pose is not "is this practice law?", but rather "what does this legally binding practice require?". How are we to arbitrate such interpretive disagreements?

Received accounts of customary law are likely to approach the problem in the following familiar way: "When two parties differ on the interpretation of a customary rule, they are really disagreeing about which of the two views

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[25] *SS Lotus* (France/Turkey), PCIJ, Series A, No. 10 at 3.
[26] *Arrest Warrant of 11 April 2000* (Congo v. Belgium), ICJ Reports (2002) at 3.
[27] A further issue in that case was whether the Foreign Minister of the Congo could have been prosecuted and tried *in absentia*.

satisfies the objective and subjective elements of customary law. This entails that, just as with questions of pedigree, the proper way to resolve such disagreements is to consult the history of international practice in order to identify the behaviour of States and the intentions that accompany it. The only difference will be that this time our search will need to be more specific, in the sense that it must look for practice and intention proving or disproving that one of the two sides is right in the particular dispute. In the *Lotus* scenario, we should ask whether the practice of States and their requisite intentions suggest that criminal proceedings before foreign courts in respect of collisions in the high seas are legal or illegal.[28] In the *Arrest Warrant* scenario, we should ask whether the practice of States and their requisite intentions allow or prohibit the prosecution of serving Ministers of Foreign Affairs for crimes against humanity before foreign courts. In that sense, the difference between questions of pedigree and questions of interpretation is only one of degree".

This response will not be very helpful. In the interpretive disagreements I have pointed to, a blunt look at international practice will not be able to tip the balance in favour of one or the other view. The reason for this is that *both* sides' arguments seem able to find considerable support in the practice of States, albeit in different areas of international law. In the *Lotus* case, France found good support for its position in the extensive international practice of recognizing the jurisdiction of the flag State over vessels in the high seas. But Turkey too found support for its position in the absence of serious protests against States that had claimed criminal jurisdiction over crimes committed on board a foreign vessel in the high seas. In the *Arrest Warrant* case, Belgium claimed that its position found support in the extensive practice recognizing the right of States to exercise jurisdiction over crimes against humanity, especially concerning the crimes of torture and genocide, wherever these may have been committed. In the same way, the Congo claimed to have found staunch support for its view in States' customary practice of according immunity from their jurisdiction to certain foreign State officials. In such interpretive disagreements, both sides claim that the case at hand falls under the body of practice they are appealing to. The main issue between them is not

[28] Note that this way of putting the matter does not 'rig' the question in favour of one party by imposing on it the burden of proof, as the Permanent Court arguably did in the *Lotus* case when it said that restrictions on the capacity of Turkey to exercise criminal jurisdiction could not be presumed (above n.15 at 18). Incidentally, the Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case criticizes the Lotus judgement "as the high water mark of laissez-faire in international relations", above n.16 at par.51.

which view can find support in past practice and which cannot, but which kind of support in State practice is more *salient* or pertinent to the case at hand.[29]

Here is a more plausible way of putting the matter in terms friendly to received theories of customary international law. Even if a judgement of salience is necessary in order to decide interpretive disagreements, this does not necessarily entail that interpreters of customary law have to give priority to whichever body of practice they find more morally or ethically valuable. In fact, interpreters of customary law have at least two alternative responses to such situations. They can say, first, that if parties can find equal support for their views in international practice, this only shows that international practice is inconclusive and that there is *no rule* of customary law on the matter. Or they might say that the test for deciding between two strong appeals to different bodies of international practice is to examine whether States have *intended* one of those two bodies to prevail over the other.

The first of those responses is clearly disingenuous for two reasons. First, if that response were correct, then we would have to conclude that customary law simply provides no answer to interpretive disagreements like the ones we are discussing. We have seen, however, that this 'no right answer' thesis is both counterintuitive and confused, in the sense that it runs together the concepts of uncertainty and indeterminacy.[30] Second, and more importantly, the idea that customary law offers no *answer* in certain difficult cases assumes that there is agreement about the *question* that should be asked of customary practice. But this is precisely the point on which the parties disagreed in *Lotus* and *Arrest Warrant*. They did not disagree about the answer that customary practices provided to an agreed question, but about the proper perspective from which the Permanent Court should have approached the facts of international practice. To say that international practice provides no answer to such disagreements is disingenuous, insofar as it fails to see that the issue is not which view can find better support in the practice, but which is the proper formulation of the question that must be asked of that practice.

The second response looks more promising. When two or more well-established bodies of practice claim to regulate the same case, we can try to resolve their conflict by appealing once more to the *intentions* of States. This

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[29] Cf. Fastenrath U., 'Relative Normativity in International Law', 4 *EJIL* (1993) 305 at 316-9; Roberts, above n.17 at 761.
[30] See Chapter Three, section 3.

time we will not be asking whether States intended the practices in question to be legally binding (that has already been settled) but whether those States intended that one of those bodies of practice should have *priority* over the other. For example, if we can show that, when States recognized the exclusive jurisdiction of the flag State in the high seas, they intended to prohibit the criminal jurisdiction of third States over collisions in international waters, then we could argue that the body of practice invoked by France was more salient to the *Lotus* dispute than the body of practice (of omissions, to be exact) invoked by Turkey. Similarly, if we could show that the practice of allowing States to claim jurisdiction over crimes against humanity was intended to allow its exercise regardless of the status of the accused, then we could argue that the body of practice invoked by Belgium in the *Arrest Warrant* dispute was more salient to the case at hand than that invoked by the Congo (obviously, these scenarios could –as they eventually did- run the other way, favouring the respective claims of Turkey and the Congo).

However, this second manoeuvre through the element of intention would run into difficulty quite soon. One group of difficulties is this: suppose that we can identify the intentions and motives of each State that has participated in the practices at issue.[31] Whose intentions should we count as crucial for the purposes of deciding the interpretive disputes in *Lotus* and *Arrest Warrant*? After all, States will usually participate in a community practice for different reasons and with different intentions and motives. Some States will have supported the practice of granting exclusive jurisdiction to the flag State over vessels in the high seas, in the belief that this practice prohibits all exercises of concurrent jurisdiction by third States. Other States will have supported the same practice in the belief that it does not prejudice their capacity to exercise concurrent jurisdiction. How are we going to decide which of those intentions should count as the intention of States as a whole?

One suggestion to get around this problem would be to adopt a *particularistic* approach: our aim should be to identify not the intentions of all participants in the practice but the intentions of the parties to the

[31] This is sometimes though to be too generous an assumption, on the ground that trying to identify the intention of a corporate body relies on an unfortunate anthropomorphism. This objection, I think, is somewhat overstated. If we feel that we can attribute *actions* to States (obviously by appealing to some notion of agency between natural persons and the corporate entity), why should we think that we cannot attribute *intentions* to them?

disagreement before us.[32] Narrowing the field of enquiry may allow us to show that, whilst they were engaged in the same customary practice, the two parties happened to share certain intentions about its interpretation. On that basis we would be able to argue something like an estoppel, i.e. that these parties cannot now be heard to deny that they shared those intentions about the meaning of their practice.[33] This trick would not work for two reasons. First, it can be undermined at any point by evidence that the parties did not actually share the same intentions about the interpretation of the practice. Second, and more importantly, the particularistic manoeuvre would distort the claims of both parties in the disagreement.[34] France, Turkey, Belgium and the Congo all claimed that they were right about the state of customary international law because their arguments captured what the *customary practice* meant, not because they captured what *they* or any other particular State understood it to mean. Their claims concerned the proper interpretation of the practice itself, not the interpretation of their own or someone else's view of the practice.

Suppose, however, that we could somehow fix on the State or States whose intentions must count as the intentions of the community for the purposes of customary law or, slightly more plausibly, that all the States concerned happened to share the *same* intentions about the meaning of the customary practice. Would we then be able to resolve our interpretive disagreements?

To help with this important question, consider the obvious but under-appreciated similarities between the appeal to intentions for the interpretation of customary law and similar approaches to domestic constitutional interpretation (for reasons that will become apparent I want to run the international and the municipal examples side by side for a while). One notable school of American constitutional thought claims that the meaning of the United States Constitution should be interpreted in the light of the intentions of its Framers.[35] This view of constitutional interpretation holds that whenever there is a dispute about the meaning of a certain constitutional

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[32] Cf. the discussion by Koskenniemi M., *From Apology to Utopia* (1989) at 410-5.
[33] A well-known example of this approach can be found in the *Nuclear Tests* cases, ICJ Reports (1974) at 260-3, par. 25-30, where the Court was presented with the claim that the tests were illegal under international law but held that France was bound to cease testing on the ground it had unilaterally undertaken to do so. For criticism of the Court's approach see the Joint Dissenting Opinion of Judges Onyeama, Dillard, Jiménez de Aréchaga and Waldock at 312-7.
[34] See also Koskenniemi M., above n.32 at 413.
[35] See particularly Scalia A., *A Matter of Interpretation* (1997); Bork R., 'Neutral Principles and Some First Amendment Problems', 47 *Indiana Law Journal* (1971) 1

clause, e.g. whether the 'equal protection' clause in the 14th amendment outlaws racial segregation in schools[36], lawyers and judges should opt for the interpretation that the Framers themselves would have chosen had they considered the question.

Now, as all appeals to an author's intentions, this view will often run up against problems of historical proof (US lawyers faced that problem in the segregation cases). But let us assume for argument's sake that, in both the international and the municipal cases that we are discussing, the production of such historical proof will not be a problem. Suppose, then, that we know everything there is to know about the shared intentions of States concerning the customary practices pertinent to the *Lotus* and *Arrest Warrant* cases and about the shared intentions of the Framers of the 14th amendment to the US Constitution. Would we not have a solution to our interpretive disagreement?

The answer would still have to be negative, for we would still need to know on what level to *pitch* our appeal to those original intentions.[37] In the case of the 14th amendment, the problem would take the following form. Suppose that we know two things about the intentions of the Framers of the US Constitution. The first thing we know, from the very text of the Constitution, is that the Framers wanted each US citizen to enjoy the equal protection of the laws. The second thing we know, say from their private letters or public addresses, is that the Framers only supported the equal protection clause because they believed that racial segregation was consistent with it. Now, when it comes to implementing what the Framers intended when they passed the equal protection clause, we are faced with a dilemma. Should our interpretation of the 14th amendment follow the intentions of the Framers about equal protection or should it follow their intentions about the constitutionality of racial segregation?

The same difficult choice appears in our international examples. Suppose that we know two things about the intentions of the States engaged in the customary practices pertinent to the *Arrest Warrant* dispute. First, we

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[36] On which see *Plessy v. Ferguson*, (1896) 163 US 537 (upholding segregation on the condition that the educational facilities were of the same standard – better known as the "separate but equal" principle) and *Brown v. Board of Education*, (1954) 347 US 483 (overturning *Plessy* on the ground that all segregation violates the equal protection clause).

[37] My discussion of 'pitches' of intention follows Ronald Dworkin's attack on intentionalism in the context of US constitutional law, see Dworkin R., 'The Forum of Principle' in *A Matter of Principle* (1985) at 48ff. Dworkin distinguishes between the abstract and the specific intentions of the Framers and argues that constitutional interpretation must, as a matter of political morality, respond to the former.

know that they intended to ensure that perpetrators of crimes against humanity would be brought to justice by making such crimes justiciable before the courts of any State that claimed jurisdiction over them. Second, we know that they engaged in this practice only because they were sure that this would not prejudice the ability of their high officials to claim personal immunity from the jurisdiction of foreign courts. We would still need to answer the following difficult question: should we attend to States' intention to allow the extension of criminal jurisdiction over all crimes against humanity, or to their intention to maintain the ability of certain State officials to plead their immunity?[38] It seems clear that any further appeal to States' intentions will only recycle these difficult questions and will do nothing to resolve the parties' interpretive disagreements one way or another.

Consider, then, another attempt to make the appeal to intentions work. That attempt would concede that we cannot resolve interpretive disagreements about customary international law by a blunt appeal to States' intentions. But it does not follow that the resolution of such disagreements must involve an evaluative judgement on the part of the interpreter. To resolve disagreements about which set of State intentions has priority over the other, we can organize our task in the following neutral and objective way. First, we can fix on the set of intentions that has some sort of *prima facie* priority, either because it is most uncontroversially true, or because it was firmly established as the law before the other set of intentions came to the fore, or because it is more fundamental to nature of international law. Then we can ask whether the other set of intentions offers clear and strong evidence rebutting our working presumption that the first set of intentions reflects the state of customary law on the matter. This pairing of hypothesis and counter-hypothesis (or of a rule and its exceptions) seems both epistemically sound and very common in the ways lawyers think about questions of international law.

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[38] Similar dilemmas arise in deciding the fate of reservations that go against the object and purpose of human rights treaties according to the intentions of the reserving State. Should one give priority to the broader intention of that State to become a party to the treaty, or to its more specific intention to avoid the application of certain parts of it? For a spirited attempt to answer this question by distinguishing between that State's overriding and its more short-sighted interests and intentions see Goodman R., 'Human Rights Treaties, Invalid Reservations and State Consent', 96 *AJIL* (2002) 531. Goodman may be right that invalid reservations do not affect the consent of the reserving State to be bound by a human rights treaty and can therefore be severed from that expression of consent. However, the argument in favour of severability is not that it respects the reserving State's 'real' or 'enlightened' consent, but that a severability regime is most compatible with the purpose of ensuring wide participation in human rights instruments. On this matter see the *Reservations* Opinion in the main text below (n.49).

I am drawing attention to this rule/exception model because the intuitions behind it are central to the respective judgements of the Permanent Court and the International Court in the *Lotus* and *Arrest Warrant* cases. In *Lotus*, the Permanent Court found that the right way to put the question raised by the dispute between France and Turkey was not whether international law allowed Turkey to exercise criminal proceedings, but whether it prohibited it from doing so. It was therefore incumbent on France to demonstrate that States had evinced a settled intention to create an exception from this default position in respect of vessels flying the flag of another State in the high seas. In choosing this way of formulating the question, the Permanent Court gave *prima facie* priority to the intention of States to allow all exercises of jurisdiction unless there was an explicit rule to the contrary. But what was the reason that led the Permanent Court to this choice? In a well-known passage, the Judgement reads:

> *This way of stating the question is...dictated by the very nature and existing conditions of international law* (emphasis added).
>
> The rules of law binding upon States...emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions on the independence of States cannot therefore be presumed.
>
> [T]he first and foremost restriction imposed by international law upon a State is that, failing the existence of a permissive rule to the contrary, it may not exercise its power in any form in the territory of another State. In this sense jurisdiction is certainly territorial; it cannot be exercised by a State outside its territory except by virtue of a permissive rule derived from international custom or convention.
>
> It does not, however, follow that international law prohibits a State from exercising jurisdiction in its own territory, in respect of any case which relates to acts which have taken place abroad, and in which it cannot rely on some permissive rule of international law. Such a view would only be tenable if international law contained a general prohibition to States to extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, and if, as an exception to this general prohibition, it allowed States to do so in certain specific cases. But this is certainly not the case under international law as it stands at present. Far from laying down a general prohibition to the effect that States may not extend the application of their laws and the jurisdiction of their courts to persons, property and acts outside their territory, it leaves them in this respect a wide measure of discretion which is only limited in certain cases by prohibitive rules...[39]

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[39] *Lotus*, above n.25 at 18-9.

For the Permanent Court, the choice of question (or the accordance of *prima facie* priority to one set of State intentions) followed from the voluntary nature of international law, which entailed that States are generally free to act as they please as long as there is no specific rule to the contrary.

This argument has been repeatedly criticized as vacuous.[40] Even if international law is essentially voluntary, it does not follow that States are free to do as they please unless someone can point to an exception to their freedom of action. For if that argument were correct, it would apply *as much* against Turkey as it applied against France. It would certainly entail that Turkey was free to exercise concurrent jurisdiction but, on pain of illegitimate partiality, it would also entail that France was free to exercise exclusive jurisdiction over events occurring on vessels flying its flag. The resulting position would be a very awkward stalemate, in which both States would be able to claim that they are *prima facie* free to do as they please and that it is incumbent on their opponents to show otherwise. It follows that the appeal to the voluntary nature of international law, and the presumption that the intention of States to permit a course of action has priority over their intention to prohibit it, can offer no assistance in resolving interpretive disagreements about the content of customary international law, since *both* sets of intentions can be described as permissive or prohibitive.

It is unfortunate that this glaring weakness in *Lotus* has been reproduced in the judgement of the International Court in the *Arrest Warrant* case. The Court said the following about the interpretation of customary practice regarding the exercise of jurisdiction for crimes against humanity:

> 51. The Court would observe at the outset that in international law it is firmly established that, as also diplomatic and consular agents, certain holders of high- ranking office in a State, such as the Head of State, Head of Government and Minister for Foreign Affairs, enjoy immunities from jurisdiction in other States, both civil and criminal...
>
> 58. The Court has carefully examined State practice, including national legislation and those few decisions of national higher courts... It has been unable to deduce from this practice that there exists under customary international law *any form of exception* to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for

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[40] Brierly J., 'General Course in Public International Law', 84 *Recueil des Cours* (1936 – IV) at 146-8; Fitzmaurice G., 'General Course on Public International Law', 92 *Recueil des Cours* (1957 – II) at 55-8.; Koskenniemi M., above n.25 at 220-3. For a discussion of the weaknesses of the *Lotus* principle when applied to shared natural resources see Voyiakis E., 'Shared Oil & Gas Resources: Does the Rule of Capture Reflect International Law?' in Bantekas I. – Paterson J. – Suleimenov M. (eds.) *Oil & Gas Law: National and International Perspectives* (2004) at 77-92.

> Foreign Affairs, where they are suspected of having committed war crimes or crimes against humanity.[41]

It is clear that the Court gave *prima facie* priority to the intention of States to accord certain immunities to some of their high officials, considering that the intention to allow foreign State jurisdiction would have to be established as an exception to that rule.[42] But in sharp contrast to *Lotus*, where the Permanent Court at least tried to justify its way of prioritising intentions by appealing to the very nature of international law, the *Arrest Warrant* judgment gives no reasons why the intention to accord immunity should be taken to reflect the rule and the intention to allow jurisdiction over crimes against humanity should be seen as the alleged exception.[43]

Could it be said that the intention of States to leave traditional immunities in place must be given some priority because it has an older history (or because it is, the Court put it, more "firmly established") in international law? That argument, I think, would not even get off the ground, for it would amount to saying that when faced with a choice between an intention that an agent has held for a long time and an intention that this agent has held more recently, one should give priority the former. If anything, the more justifiable decision would be to accord primacy to the fresher of those intentions on the ground that they provide a truer expression of the agent's will.[44] For exactly the same reasons, the broader idea that older rules must be presumed to remain in place unless they are explicitly overruled by later practice would fall at the first hurdle.

To sum up: I have argued that some of the best-known disagreements about the content of customary international law do not concern the legal pedigree of the practice but its proper interpretation. However, both modern and traditional theories of customary law fail to appreciate this difference

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[41] Arrest Warrant, above n.26 at 22 (emphasis added).

[42] The European Court of Human Rights followed a similar approach in respect of the relation between the law of State immunity and the ECHR in *Al-Adsani v. UK*, Case No. 35763/97, Judgement [GC], 21 Nov 2001, pars.55-6 and 61. Cf. Voyiakis E., 'Access to Court v. State Immunity', 52 *ICLQ* (2003) 297 at 323ff. The Court gave no explanation as to why the intention to retain immunity should be taken as the rule and the exercise of jurisdiction as the alleged exception. For an account of why the minority was equally mistaken in its converse belief that the exercise of jurisdiction should be taken as the rule on the ground that it was based on the *jus cogens* norm prohibiting torture, see Voyiakis E., 'Access to Court' at 319-21.

[43] The same charge has been levelled against the *Legality of the Threat or Use of Nuclear Weapons* Advisory Opinion, ICJ Reports (1996) at 238 par.20, which gave *prima facie* primacy to the intention of States to retain a free choice of means for their self-defence and considered any prohibition in the use of nuclear weapons as an exception. See Bodansky D., 'Non Liquet and the Incompleteness of International Law' in Boisson de Chazournes L. & Sands P., (eds.), *International Law, the International Court of Justice and Nuclear Weapons* (1999) at 153ff.

[44] On this point see Parfit D., *Reasons and Persons* (1984) at 18ff.

between questions of pedigree and questions of interpretation. They argue that we can settle interpretive disagreements in the same way we would settle a disagreement about pedigree, i.e. by looking into the available evidence of the practice of States and the intentions that accompany it. I have found this approach unhelpful. In the examples I discussed, it was not possible to prefer one of the two competing arguments on the ground that it reflected State practice and *opinio juris* whereas the other did not, because both arguments found good support in different bodies of State practice and intention. The question then became which of those bodies of practice should be regarded as most salient to the dispute at hand. To answer this more difficult question, received theories need to appeal to the intentions of States for a second time, in order to establish whether one or the other of the conflicting sets of practice and intention should be given priority over the other. That strategy too was of no avail. On the one hand, it is very difficult to say whose intentions must count as the intentions behind the customary practice. On the other hand, even supposing that States taking part in the practice shared the same intentions, the appeal to intentions lacks an argument that specifies *which* of the various shared intentions of States we ought to defer to. The idea that we should posit one set of intentions as the rule and the other as the exception, or that we should give priority to permissive over prohibitive rules, has proven both dubious and irrelevant.

This conclusion does not just expose the inadequacy of traditional theories of customary international law. It also suggests that 'modern' theories of custom have proceeded on a flawed diagnosis of the pathology of traditional accounts. As we have seen, these 'modern' theories claim that traditional accounts either pay too much attention to the subjective element -which is really necessary only in hard cases[45], or that they pay too much attention to the objective element, thus failing to recognize that contemporary custom can arise even in the absence of extensive and uniform practice.[46] I would suggest that, to some extent, these theories have been barking up the wrong tree. The fault with traditional theories is not so much that they set the evidential threshold of practice and intention *too high* (no matter which of the two elements is given more weight), but that they approach customary practices from a *deficient perspective*, since they lack the theoretical resources to

[45] See e.g. Mendelson M., 'The Formation of Customary International Law', above n.14.
[46] See e.g. Roberts, above n.157.

analyse and resolve interpretive questions about what these practices require. One important corollary of this point is that the biggest challenge for international lawyers is not, as 'modern' theories suggest, to explain how customary international law can arise "more quickly", "spontaneously", "instantly", "deductively", "automatically", "by declaration" etc., for these efforts are no more than variations on the poor theme of traditional accounts. What theorists need to produce urgently is not an account that sets the threshold of State practice and intention higher or lower, but an account that can help international lawyers resolve interpretive disagreements about what customary legal practices require.

3. The central role of evaluation in the interpretation of customary international practice: a suggestion and some examples

Recall the analogy between the interpretation of customary practices and the interpretation of constitutional texts. We have already seen that the blunt appeal to intentions carries little explanatory force in either case. In this section I want to continue this juxtaposition briefly in order to show that the example of constitutional interpretation can provide us with valuable insights into the interpretation of customary practices.

The example I have in mind will be familiar to all. In *Brown v. Board of Education*, the US Supreme Court had to resolve the dilemma between appealing to the intention of the Framers to enact the equal protection clause in the 14th amendment and their intention to allow racial segregation in schools as being consistent with the amendment. In its landmark judgement, the Supreme Court said the following:

> In approaching this problem, we cannot turn the clock back to 1868, when the Amendment was adopted, or even to 1896, when *Plessy v. Ferguson* was written. We must consider public education in the light of its full development and its present place in American life throughout the Nation. Only in this way can it be determined if segregation in public schools deprives these plaintiffs of the equal protection of the laws.
>
> Today, education is perhaps the most important function of state and local governments. Compulsory school attendance laws and the great expenditures for education both demonstrate our recognition of the importance of education to our democratic society...To separate [negro children] from others of similar age and qualifications solely because of their race generates a feeling of inferiority as to their status in the

> community that may affect their hearts and minds in a way unlikely ever to be undone...We conclude that, in the field of public education, the doctrine of "separate but equal" has no place. Separate educational facilities are inherently unequal. [47]

There are, I think, at least two points of this epoch-making decision that deserve our attention as far as the matter of legal interpretation is concerned. First, the Supreme Court treated the interpretive question about the meaning of the 14th amendment as a question that required the interpreter to *engage* with the text of the Constitution, to 'locate' that text in the present, in a way that allowed its full impact and meaning to come through. Second, the particular way in which the Supreme Court tried to engage with the text of the 14th amendment involved the exercise of careful *evaluative judgement* concerning the point, structure and purpose of the education system and its broader role in upholding and furthering the democratic tradition of the United States. Some might say that this way of interpreting the US Constitution amounts to a rejection of the Framers' real intentions. This complaint would simply beg the question, insofar as it assumes that the Court ought to have attended to the Framers' *specific* intentions about the constitutionality of racial segregation rather than their *abstract* intentions to provide equal protection of all US citizens. But the question "to which set of intentions should we defer?" cannot receive the answer "to the intentions that the Framers intended us to defer!" without lapsing to circularity and silliness.

I want to suggest that the best examples of interpretation of customary international law follow a substantially similar path to *Brown*. In interpretive disagreements about the content of customary international law, the search for the right interpretation of a customary rule is not simply a search into the facts of what States do and intend but above all a search for a *justification* that will show their practice and intentions in their most attractive light.[48] For one thing, the justificatory aspect of interpretation fits perfectly with (and follows from) the evaluative aspect of the *nature* of customary international law.[49] Furthermore, its presence is apparent in all the examples of interpretive disagreement that we have discussed. Consider the effort of the Permanent Court to show that its view of customary law in *Lotus* showed customary

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[47] *Brown v. Board of Education*, above n.36 at 485-6.
[48] Cf. Dworkin R., *Law's Empire* (1985) at Ch.3.
[49] See section 1 *in fine*.

practice to promote international justice. In a frequently ignored passage, just before the *dispositif*, the Permanent Court noted:

> The offence for which Lieutenant Demons appears to have been prosecuted was an act...having its origin on board the *Lotus*, whilst its effects made themselves felt on the *Boz-Kourt*. These two elements are, legally, entirely inseparable, so much that their separation renders the offence non-existent. Neither the exclusive jurisdiction of either State, nor the limitations of the jurisdiction of each to the occurrences which took place on the respective ships would appear calculated to satisfy the requirements of justice and effectively to protect the interests of the two States. It is only natural that each should be able to exercise jurisdiction and to do so in respect of the incident as a whole.[50]

This passage reveals a much more plausible justification for the *Lotus* judgement than the appeal to the voluntary nature of international law. It suggests that the choice between the two different ways of formulating the object of the dispute (or the two competing sets of States' intentions) should be made in favour of the interpretation that facilitates the proper administration of justice over the criminal incident in question and thereby shows customary international law on jurisdiction in a better (here, morally attractive) light.

The justificatory aspect of the interpretation of customary practices is also evident in the Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in the *Arrest Warrant* case. The three Judges treated the choice between attending to the intention of States to retain immunity for their officials and attending to their intention to bring perpetrators of crimes against humanity to justice as a challenge to construct an interpretation of customary law that was most consistent with important international values[51]:

> 75...On the one scale, we find the interest of the community of mankind to prevent and stop impunity for perpetrators of grave crimes against its members; on the other, there is the interest of the community of States to allow them to act freely on the inter-State level without unwarranted interference. A balance therefore must be struck between two sets of functions which are both valued by the international community. Reflecting these concerns, what is regarded as a permissible jurisdiction and what is regarded as the law on immunity are in constant evolution. The weights on the two scales are not set for all perpetuity.
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> 79...International law seeks the accommodation of this value with the fight against impunity, and not the triumph of one norm over the other. A State may exercise the criminal jurisdiction which it has under international law, but in doing so it is subject to other legal obligations, whether they pertain to the non-exercise of power in the territory of another State or to the

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[50] *Lotus*, above n.25 at 30-1.

[51] For a discussion of the moral values behind customary law on State immunity (autonomy and political independence), see Voyiakis E., above n.34 at 326-7.

> required respect for the law of diplomatic relations or, as in the present case, to the procedural immunities of State officials. In view of the worldwide aversion to these crimes, such immunities have to be recognized with restraint, in particular when there is reason to believe that crimes have been committed which have been universally condemned in international conventions.[52]

Notice that the appeal of Judges Higgins, Kooijmans and Buergenthal to the values behind the extension of criminal jurisdiction and the retention of immunity for high officials is not meant to replace or to override the evidence of international practice in those areas, but to help interpret it. To put the point differently, the three Judges are not choosing a 'moral' interpretation of international practice over one that is based on States' intentions; rather, the appeal to international values is essential in giving *sense* and meaning to those intentions, just as the appeal to liberal democratic values in *Brown* was essential in giving sense to the intentions of the Constitutional Framers.

Similar examples can be found in some of the best-known judicial interpretations of customary international law. Consider the way that the International Court interpreted the customary law on reservations to treaties in the *Reservations* Advisory Opinion. The Court had to decide whether customary international law, as applied to the 1948 Genocide Convention, allowed States entering reservations to the Convention to remain Contracting Parties to it, even if other Parties objected to their reservations. The Court took the following view:

> It is a generally recognized principle that a multilateral convention is the result of an agreement freely concluded upon its clauses and that consequently none of the contracting parties is entitled to frustrate or impair, by means of unilateral decisions or particular agreements, the purpose and *raison d'être* of the convention... However, as regards the Genocide Convention, it is proper to refer to a variety of circumstances which would lead to a more flexible application of this principle...
>
> The Convention was manifestly adopted for a purely humanitarian and civilizing purpose. It is indeed difficult to imagine a convention that might have this dual character to a greater degree, since its object on the one hand is to safeguard the very existence of certain human groups and on the other to confirm and endorse the most elementary principles of morality. In such a convention the contracting States do not have any interests of their own; they merely have, one and all, a common interest, namely, the accomplishment of those high purposes which are the raison d'être of the convention...

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[52] *Arrest Warrant*, Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal, above n.26 at 18-19.

> The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible.[53]

In this case too, the Court did not contrast a 'moral' interpretation of customary law on reservations with an interpretation based on the intentions of the General Assembly and the States parties to the Genocide Convention. Instead, it treated the consideration of the values and purposes behind the Convention as an essential means of making proper sense of those intentions and determining the content of customary international law.

Note, finally, that the interpretation of particular customary practices and rules will often need to be sensitive to values reflected in materially distinct areas of general international law. We have already come across this point in the Joint Separate Opinion of Judges Higgins, Kooijmans and Buergenthal in *Arrest Warrant*, in which the learned Judges brought the values served by the law of human rights to bear on the interpretation of the law of the immunity of State officials. By way of further example, consider how the Chamber of the Court approached the interpretation of the principle *uti possidetis juris* in the *Frontier Dispute* between Burkina Faso and Mali.

> 20...[*Uti possidetis*] is a general principle, which is logically connected with the phenomenon of the obtaining of independence, wherever it occurs. Its obvious purpose is to prevent the independence and stability of new States being endangered by fratricidal struggles provoked by the challenging of frontiers following the withdrawal of the administering power.
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> 23...The essence of the principle lies in its primary aim of securing respect for the territorial boundaries at the moment when independence is achieved. Such territorial boundaries might be no more than delimitations between different administrative divisions or colonies all subject to the same sovereign. In that case, the application of the principle of *uti possidetis* resulted in administrative boundaries being transformed into international frontiers in the full sense of the term
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> 25. However, it may be wondered how the time-hallowed principle has been able to withstand the new approaches to international law as expressed in Africa, where the successive attainment of independence and the

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[53] *Reservations to the Convention for the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, ICJ Reports (1951) at 23-4.

> emergence of new States have been accompanied by a certain questioning of traditional international law. At first sight this principle conflicts outright with another one, the right of peoples to self-determination. In fact, however, the maintenance of the territorial status quo in Africa is often seen as the wisest course, to preserve what has been achieved by peoples who have struggled for their independence, and to avoid a disruption which would deprive the continent of the gains achieved by much sacrifice. The essential requirement of stability in order to survive, to develop and gradually to consolidate their independence in all fields, has induced African States judiciously to consent to the respecting of colonial frontiers, and to take account of it in the interpretation of the principle of self-determination of peoples.[54]

I draw attention to these examples in order to highlight the fact that the search for the values underlying international practice will often require international lawyers to interpret particular customary rules in a way that accommodates the force of *several* and apparently competing international values, some of which will be reflected in materially distinct parts of general international law. This process of mutual accommodation, or what Philippe Sands has called the 'cross-fertilization'[55] of different areas of customary international practice, represents one of the greatest contemporary challenges in the interpretation of customary international law. It does not take a trained eye to observe that international legal debates are replete with examples of a growing demand for the interpretation particular customary rules in the light of values and purposes reflected in other parts of general international law. Amongst them, one finds questions about the relation between the customary law of State immunity and the law human rights[56]; the relation between principles of international environmental law and the law on State responsibility[57], international trade law[58] and the law on the use of natural resources[59]; the relation between the law of treaties and the law of human

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[54] *Frontier Dispute* (Burkina Faso/Mali), ICJ Reports (1986) at 565-7. Cf. *Land, Island and Maritime Frontier Dispute* (El Salvador/Honduras), ICJ Reports (1992) at 386-7, par.42.

[55] Sands P., 'Unilateralism, Values and International Law', 11 *EJIL* (2000) 291 at 300.

[56] See e.g. *Al-Adsani v. UK*, above n.42; *Bankovic v. Belgium et al.*, Case No. 52207/99, Judgement of 12 December 2001 (Grand Chamber).

[57] Fitzmaurice M., 'The Contribution of Environmental Law to the Development of Modern International Law' in Makarczyk J. (ed.), *Theory of International Law at the Threshold of the 21st Century: Essays in honour of Krzysztof Skubiszewski* (1996) at 909, 914-18 and 925.

[58] Cf. the Reports of the WTO Appellate Body in *US – Standards for Reformulated and Conventional Gasoline*, WT/DS2/AB/R (1996), reported in 35 ILM (1996) 274; *EC – Measures Concerning Meat and Meat Products ('Beef Hormones Case')*, WT/DS26/AB/R (1997); *US – Import Prohibition of Certain Shrimp and Shrimp Products*, WT/DS58/AB/R (1998). See also Loibl G., 'Trade and Environment – A Difficult Relationship: New Approaches and Trends' in *Liber Amicorum Professor Ignaz Seidl-Hohenvederln* (1998) 419

[59] Cf. Birnie P. – Boyle A., *International Law and the Environment* (2nd ed., 2002) at 84-97.

rights.[60] I would suggest that the juxtaposition of these different areas of international practice raises questions that cannot be resolved by simply counting instances of States practice and checking whether States have engaged in it with the requisite 'law-making' intention. A proper response to these questions requires the engagement of the interpreter and the exercise of careful judgement that will show the values underlying these different parts of customary practice as aspects of a coherent and attractive unity of meaning.

4. Conclusion and agenda: customary international law and the interpretive attitude

Despite their own best intuitions about the nature of customary international law, neither traditional nor 'modern' theories of that source have been able to account for some of the most important challenges facing the interpreter of customary rules. In more than one sense, these theories seem to be preoccupied with the wrong set of questions. They ask what it takes for a customary rule to be created, rather than how customary rules should be interpreted. They ask whether States have consented to a certain rule or whether they have intended their practice to be legally binding, rather than in what sense these practices and intentions should be understood when there is reasonable disagreement about their interpretation. Such unhelpful questions generate unhelpful answers. Driven to their conclusion, both traditional and 'modern' theories show the interpretation of customary law to be no more than a process of identifying historical evidence of what States do and believe. They make no space for exercise of evaluative judgement on the part of the interpreter, or for the idea that the interpretation of particular customary rules should be sensitive to values, principles and purposes reflected in the whole of general international law. This is also why they run out of steam with the first signs of interpretive disagreement.

In this concluding section, I want to draw together the different strands of my criticism against received theories of the sources of general international law and to begin to weave them into certain positive claims about the character

[60] The International Law Commission is currently considering the relationship between human rights and the law on reservations to treaties in its survey of the latter area, *Law and Practice relating to Reservations to Treaties*, Second Report of the Special Rapporteur Mr. Alain Pellet (48th Session, 1996), U.N. Doc. A/CN.4/477, Corr.2.

and structure of international legal interpretation. What follows is intended only as a first sketch of these claims. Part III will then amplify my account by defending it against some important theoretical objections about the proper role of evaluative judgements in international law.

As a first proposition, I want to suggest that legal argument about general international law displays an *interpretive* structure or, in what amounts to the same thing, that international lawyers approach their subject matter with an *interpretive attitude.* The notions of an interpretive practice and an interpretive attitude will be familiar to those acquainted with the work of Ronald Dworkin and my first description of them will draw very much on his. Dworkin explains the special character of the interpretive attitude with the aid of a fictional story about a community whose members follow a set of rules that they call "rules of courtesy" in certain social occasions. All members of that community are reasonably familiar with several rules of courtesy, such as "take off your hat to nobility", "give your seat to the elderly", "hold the door for the person entering behind you". They apply those rules without much question or variation in their everyday interactions with each other.

> But then, perhaps slowly, all this changes. Everyone develops a complex 'interpretive' attitude towards the rules of courtesy, an attitude that has two components. The first is the assumption that the practice is courtesy does not simply exist but has value, that it serves some interest or purpose or enforces some principle –in short, that it has some point- that can be stated independently of just describing the rules that make up the practice. The second is the further assumption that the requirements of courtesy –the behaviour it calls for or the judgements it warrants- are not necessarily or exclusively what they have always been taken to be but are instead sensitive to its point, so that the strict rules must be understood or applied or extended or modified or qualified or limited by that point. Once this interpretive attitude takes hold, the institution of courtesy ceases to be mechanical; it is no longer unstudied deference to a runic order. People now try to impose *meaning* on the institution –to see it in its best light- and then to restructure it in the light of that meaning.[61]

The interpretive attitude relies on a special combination of arguments about the history of the practice and the values that it must be understood to serve. Its aim is neither simply to *describe* the practices of the community, nor simply to *prescribe* some rules that its members ought to follow. Its aim is *interpretive*: to make the existing practice the best that it can possibly be, to approach it as a valuable and complex unity of meaning and, in this way, to *reform* the way participants in the practice understanding its particular rules.

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[61] Dworkin R., *Law's Empire* (1986) at 47.

Dworkin then draws attention to some further features of the fictional community's interpretive attitude towards courtesy. He points out that the interpretation of courtesy will change and evolve with the ways members of the community understand its value and purpose. For example, supposing that people agree that the point of courtesy is to show respect to one's social superiors, their understanding of courtesy will change depending on what they regard as the proper grounds of respect for others (e.g. their age, gender or wealth). In the same way, the interpretation of the practice will change if people somehow come to believe that respect is not at all a matter of external behaviour but of feeling only, or if they come to believe that respect is only due to natural properties of persons rather than to their personal achievements and so on.[62] Members of that community will naturally disagree on some of these matters. In fact, as long as an interpretation of courtesy responds to some genuine question about what this practice requires, its results will be very likely to unsettle certain views on the matter. However, even though interpretations of the practice can conceivably challenge any single one of people's beliefs about courtesy, they must show the bulk of those beliefs to be largely correct, for otherwise no-one will recognize them as interpretations of *that* practice rather than another.[63] The point is really simple: the most one could say of a person who criticized chess-players for moving bishops diagonally, rooks horizontally or vertically and pawns forward, and who berated them for going after the opponent's king instead of trying to keep as many pieces as possible on the board, would be that this person is talking about a different game altogether.

Before considering how the notion of the interpretive attitude can be transposed to the case of general international law, it is possible summarize the main insights in Dworkin's description of that attitude in five points.

(i) The interpretive attitude involves a complex relationship between what participants in a practice *believe* that the practice requires and what the practice *in fact* requires. For something to count as an interpretation of the practice, it must show most of the participants' beliefs about the practice to be true. At the same time, none of the participants' individual beliefs about the practice is immune from

[62] Ibid at 48-9.
[63] Ibid at 69-70.

revision in the light of a better interpretation. What participants in the practice believe that the practice requires and what that practice really requires are regarded as two different matters.

(ii) Interpreting a social practice requires one to conceive of it as a *unity of meaning*, i.e. to hypothesize a point or purpose for the practice as a whole and to use that point as a guide to the interpretation of its particular rules.

(iii) There is a *cyclical* relation between one's understanding of the particular rules of the practice and one's appreciation of its overall point or purpose. The interpretation of particular rules of a social practice evolves depending on how participants in the practice understand its overall value, point or purpose. Similarly, the more widespread and radical the change in the ways participants interpret particular rules of the practice, the more need there is for them to revise their understanding of its overall point or purpose.

(iv) As long as participants in a social practice are genuinely interested in making best sense of it, there will always be a need for new and better interpretations of the practice and its particular rules.

(v) As long as members of a community identify themselves as participants in a shared social practice, they are likely to have disagreements not just about the interpretation of some of its particular rules, but also about the overall point and purpose that the practice should be understood to serve.

I hope that the similarities between this rather abstract description of the interpretive attitude and my survey of international legal argument in Parts I and II are apparent enough to excite some interest in my claim that argumentative practice about general international law displays an interpretive structure.

Up to a point, this claim should not be controversial. Consider five aspects where the interpretive attitude fits international legal argument very closely (I have deliberately arranged them in a one-to-one correspondence). First, there is little doubt that the content of customary international practices generally depends on the practice and intentions of the community of States as a whole. Yet it is equally clear that the content of customary law cannot be identified by reference to any single State's beliefs about what customary

practices require; to put it simply, States can be mistaken about the true meaning of customary practices.[64] Second, my discussion in this Part has shown that the interpretation of particular rules of general international law requires the interpreter to treat particular instances of State activity as a shared *practice*, a *unity* whose meaning is sensitive to the value or purpose that this practice should be understood to reflect.[65] Third, the previous Part gave several examples of how international lawyers revise and refine their interpretation of the point and purpose of a rule of international law in order to account for as many instances of past international practice as possible.[66] Fourth, there is little doubt that the interpretation of international legal practices is never exhausted, since new problems will give rise to new questions about the meaning of those practices and their interrelation.[67] Finally, even a cursory look at argumentative practice shows that lawyers can disagree not just about the point and purpose of a particular rule of international law, but also about the value that the very customary law-making process should be understood to serve (be that the protection of State's legitimate expectations, the need to foster international cooperation etc).[68]

However, other aspects of that interpretive attitude will surely arouse suspicions and it is precisely these suspicions that I intend to use in order to shape and sharpen my account of its importance for international law. For one thing, what does it mean to say that the interpretation of international legal practices must be sensitive to the value that those practices are best understood as serving? How can we hope to settle disagreements about whose perspective and whose values must count as "best" in a rational and objective manner? Values are not "out there" in the universe for us to observe. Experience teaches us that people differ radically in what they value and how they value it, depending on their upbringing, their culture and their interests. To the extent that value-judgements are *subjective*, a theory of interpretation

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[64] See sections 1 and 2. The possibility of "persistent objection" on the part of States during the emergence of a new rule of international law is not an exception to this point, since the legality of persistent objection itself depends on the fact that international law is best interpreted as allowing it. On the notion of persistent objection see Charney J., 'The Persistent Objector Rule and the Development of Customary International Law', 56 *BYIL* (1985) 1; Stein T., 'The Approach of the Different Drummer: The Principle of the Persistent Objector in International Law', 26 *Harvard ILJ* (1985) 457; Mendelson M., 'The Formation of Customary International Law', above n.12 at 227-44.

[65] See section 3 *in fine*.

[66] See Chapter One, section 3.

[67] See section 3.

[68] See section 1.

that relies on evaluative judgements will be subjective too by definition. To put the point more formally, if there is no space between what a person *believes* to be valuable and what is *really* valuable, then the incorporation of value-judgements in the interpretation of international law must result in the collapse of the space between truth and belief in that domain too. If that is correct, my suggestion that the interpretation of international law requires the exercise of evaluative judgement seems to entail the deeply troubling conclusion that, objectively speaking, no interpretation of international law can be right or wrong.

Furthermore, doesn't talk of values compromise the important idea that the interpretation of international law should be *neutral* towards the competing views and interests of members of the international community? After all, the task of the international lawyer is to interpret the law as he finds it, not as he would like it to be. This is a task that he will not be able to carry out unless he distances himself from his personal values, interests, biases and prejudices. In asking the interpreter to exercise evaluative judgement, my suggestion seems to allow interpretation to be used to achieve self-serving and manipulative ends.

Then there is a third problem. One of the fundamental aims of international law is to create a normative space in which States can resolve their disputes in accordance with rules derived from consensual law-making processes, unaffected from their protracted and divisive disagreements about international justice or fairness. My suggestion that legal interpretation must rely on some evaluative judgements seems to jeopardize the very ability of international law to perform its conciliatory function. At the very least, it would have to be read as saying that interpretation should rely draw on values that command *consensus* across the international community, lest it become embroiled in the same protracted and divisive political disagreements that it was meant to help avoid.

These are important and deep objections. If my suggestion that international legal practice has an interpretive structure ends up trashing the aspiration of international law to objectivity; if it violates the neutrality that must distinguish the interpreter of the law from its critic; and if it exposes the content of international law to the divisive consequences of international disagreement, then what reason do we have to endorse it?

Part III

The place of evaluation in international legal theory

1. From confidence to anxiety: the core case against values

My enquiry into the role of evaluative judgements in particular rules and the sources of international law has come across a persistent pattern of distinctions. Part I drew attention to the idea that we only needed to account for *some* of the evaluative strands in legal argument about estoppel; the remaining ones were either incompatible with the rest or altogether redundant. Part II traced a similar group of distinctions in the ways international lawyers theorize about the sources of general international law. The evaluative standards expressed in general principles of law, we were told, are useful only in *hard* cases; in run-of-the-mill cases international lawyers can apply international law without their assistance. In much the same way, we came across the idea that an account of the *nature* of customary international law may require a combination of historical and evaluative arguments, but the *criteria* for the identification of customary rules are basically historical. What connects all these ideas is the assumption that one can separate the historical and evaluative strands in international legal argument and still provide a coherent and useful account of international law.

I have tested and rejected a number of arguments for this confident assumption. I have suggested that historical and evaluative strands in legal argument about estoppel are actually mutually supportive and coherent. A good claim about estoppel needs to do more than simply recite past decisions, or appeal to abstract principles such as good faith, consistency or flexibility in international negotiations. It needs to appeal to both the history of past decisions and the international values at play, in order to identify the features of past decisions that are most salient to the dispute at hand. My discussion of the sources in Part II confirmed and generalized this conclusion. It has found that the combination of historical and evaluative arguments is central to the ways international lawyers

think about international law and its application, whether that application is easy or hard and whether it involves the use of general principles or the interpretation of customary international practices. All in all, I have argued that the idea that we can jettison the evaluative strand of legal argumentative practice and still come up with a coherent account of international law lacks a good case for itself. Each one of the distinctions I have looked at, each attempt to isolate evaluative judgements from the rest of legal argument, has been exposed as a misunderstanding of argumentative practice and its interpretive structure.

In this Part I discuss what I have already identified as the core of the case against the interpretive account of general international law that I presented towards the end of the previous Part. This case differs from the confident arguments that I have examined so far in both style and orientation. It does not claim that we can easily *afford* to exclude evaluative judgements from the interpretation of international law, by applying some version of Ockham's razor to them, but that we *need* to exclude them in order to maintain our theoretical grip on international law.

The core case can be summarized as follows. "Suppose that the attempt to exclude evaluative judgements from theories about particular rules of international law and its sources runs against some deep intuitions that international lawyers have about their argumentative practice. There are three important reasons why we should nevertheless resist the suggestion that evaluative judgements play a central role in the interpretation of international law. More specifically, the effort to account for evaluative strands in legal argument will entail that international law (a) will forsake its claim to be an *objective* science, since evaluative judgements are really a matter of subjective belief or preference; (b) will forsake its claim to be *neutral* towards States' divergent interests and their conceptions of the right and the good, since it will force the interpreter to take a stand on important questions of evaluation; and (c) will fail to fulfil its primary function, namely the promotion of international peace, social stability and certainty through rules that reflect an international *consensus*, since it will be exposed to the divisive effects of protracted and irresolvable evaluative disagreements".

The core case relies on three distinct lines of attack. The first attack disputes the philosophical possibility of an account that would assign a central role to evaluative judgements and would still manage to generate true propositions about international law (I will henceforth call this the *philosophical attack* on values). The second attack claims that one can determine the meaning of propositions of international law without making any evaluative judgement and, therefore, that reliance on such judgements will compromise the neutrality of a theory of legal interpretation (I will call this the *semantic attack*). The third attack disputes the political wisdom of making the content of international law depend on evaluative judgements that are the subject of contention and disagreement amongst members of the international community (I will call this the *political attack*). These three lines of attack are reasonably independent of each other. Even if evaluative judgements in fact admit of a truth-value, it may still be the case that one can make true statements about international law without engaging in any sort of evaluation. And even if all true statements of international law must rely for their intelligibility on some evaluative presuppositions, it may still be the case that legal interpretation must draw on those evaluative judgements that command consensus across the international community, not those that divide it. Having said that, if either of these three attacks against evaluation succeeds, my claim that international legal practice has an interpretive structure will be exposed as a mistake.

These three attacks against evaluation have been immensely popular with theorists of international law, some more so than others. International positivists have, at different times, embraced all three of them. They have argued that evaluative judgements have no place in a theory of international law because they are subjective (Kelsen), because they would compromise the neutrality of interpretation (Oppenheim, Schwarzenberger, Weil) or because they would give rise to protracted disagreements amongst members of the international community (Oppenheim, Weil, Kingsbury, Falk). For their part, critical theorists have built their devastating critique of traditional international legal doctrine on the philosophical attack. They have argued that the subjectivity of value entails that legal propositions cannot be true or false and, therefore, that the task of international lawyers can only be to resolve disputes on the basis of their

subjective convictions about justice (Koskenniemi, Kennedy) or to re-imagine their discipline as a kind of descriptive legal anthropology (Carty). At the same time, it is important to note that critical theorists have actively *resisted* the semantic attack on evaluation, since they believe that all attempts to interpret international law are permeated by evaluative presuppositions. The spearhead of their resistance to semantic neutrality has been feminist legal theory and its crucial insights into the silent sexist prejudices of the international legal system (Charlesworth, Chinkin). It might perhaps come as a surprise that even international *natural* lawyers have, almost unwittingly, succumbed to the semantic attack against evaluation. The arcane claim that "an unjust law is not law" concedes that it is in principle possible to interpret what a certain rule of international law says before one decides to subject it to evaluative critique; to decide whether a rule is just or unjust, one must first have a grasp of what the rules says and natural lawyers must suppose that this task can be carried out in a value-free manner. Having said that, natural lawyers resist both the philosophical and the political attacks on evaluation (Verdross, Hersch Lauterpacht, Teson). The only tradition of international legal thought that has consistently resisted all three attacks on evaluation is the New Haven school. Myres McDougal and his associates have incorporated an expressly evaluative perspective into their functional jurisprudence (Reisman, Higgins), making their interpretation of international law depend on the maximization of certain international values.

My purpose in this Part is not to engage every one of those schools of thought, but to discuss the attractions and weaknesses of the three attacks against evaluation. The limited scope of my enquiry entails that I will not take up some important parts of what natural lawyers and the New Haven school have to say about international law, except where their claims help sustain my defence of evaluation against the philosophical, semantic and political attacks that have become so characteristic of positivist and critical legal thought. However, once I have defused the attack on evaluation, I will return to the natural law and New Haven schools with the tentative suggestion that, even though these theories accommodate the force of evaluative judgements in legal interpretation, they are ultimately unattractive, insofar as they rely on the unattractive moral theory of teleology and perfectionism.

I should also note that my attempt to defuse the three attacks on evaluation is not intended to show that positivists, critical theorists and any other theorists who endorse these attacks "have got it all wrong". On the contrary, my discussion of Part III is intended as a tool for bringing out what is *best* in those theories, for casting light on the deepest intuitions that have commended them to generations of international lawyers. In that vein, whilst resisting some of their central claims, I will try to show that *each of the three attacks on evaluation is prompted by some powerful and legitimate intuitions.* Scepticism about values is motivated by the aspiration to resist indoctrination and to nurture critical doubt and honest and open debate about what individuals, States and the international community ought to value. The aspiration to interpretive neutrality builds on the compelling intuition that the interpreter ought to allow the interpreted texts or practice to "speak for themselves", free from distortion and self-interested manipulation on the part of the interpreter. Finally, the search for consensus as the mark of good interpretation draws on fundamental intuitions about the equality of all members of the international community. Rather than resist those intuitions, my point will be that, despite popular opinion to the contrary, these are perfectly compatible with the suggestion that the exercise of evaluative judgement plays a central role in the interpretation of international law.

A final point that needs to be made at the outset is the following. Part III will draw extensively on insights from the philosophy of mind, language and interpretation. It is very important to keep the points that will emerge from that discussion in proper perspective. Familiarity with certain philosophical arguments does not necessarily make one a better international lawyer, nor does it entail that one's theory of legal interpretation has some sort of intellectual advantage over its rivals. The one thing that an informed philosophical perspective on legal interpretation *can* achieve is to keep us from asking unhelpful and confused questions about our subject matter. In this sense, my appeal to philosophical sources in this Part is intended to be defensive rather than offensive in character. Its aim will not be to *make* the case for my suggestion that international legal practice has an interpretive structure, but to defend that case against some important and popular theoretical objections.

2. Outline of Part III

This Part takes issue with the three attacks against the idea that evaluative judgements play an essential part in the interpretation of international law. Chapter Five confronts the claim that evaluative judgements do not admit of a truth-value, i.e. that they cannot be objectively true or false. It starts by locating the frequent misgivings that international lawyers have about claims of value within a broader philosophical trend of value-scepticism. Drawing on the philosophical work of Donald Davidson, it argues that a proper account of our capacity to understand and interpret propositions of value entails that value-scepticism cannot be coherently formulated. Insofar as one is able to understand *any* kind of utterance as a proposition, one is already committed to the idea that this proposition admits of a truth-value.

Chapter Six discusses the idea that it is possible to interpret the content of international law without making any sort of evaluative judgement. Drawing on the hermeneutic philosophy of Hans-Georg Gadamer, it argues that the central premise of this attack, namely that it is possible to provide a *neutral* account of the content of legal rules, is deeply mistaken. Unlike the case of natural sciences, the interpretation and understanding of human history is always "prejudiced" by, or engaged in, the concerns of the present as these appear in the interpreters' beliefs about the world and their place in it. This entails that interpretive prejudices are essential to the discovery of truth about the meaning of human practices and traditions, in exactly the same way as they can obstruct it. The challenge for interpreters of international law is not to decide whether or not to take evaluative judgements into account, but to bring their evaluative presuppositions to the foreground of interpretation.

Finally, Chapter Seven takes up the popular idea that interpreters of international law should promote the values of international peace and stability by grounding their interpretations on values that command agreement or *consensus* across the international community. It argues that consensualism is a flawed conception of international legal interpretation for two reasons. First, it generates an empty instruction to the interpreter of international law (a point

partly captured in the question "consensus on what?"). Second, its pursuit of agreement as a prerequisite to social peace relies on a flawed diagnosis of the pathology of international politics and the relation between disagreement and social conflict.

Chapter Five

The philosophical attack on evaluation: truth, objectivity and scepticism

Here is a formal version of the philosophical attack on the idea that evaluative judgements should play a central role in the interpretation of international law. Suppose that I state two propositions, "Mary hit John" and "what Mary did was wrong". If the evaluative proposition expressed in the second statement cannot have a truth-value, when I try to combine the two propositions in the statement "Mary hit John and what she did was wrong" that statement too will not admit of a truth-value.[1] Similarly, if it is true that value judgements cannot be true or false, then any theory that makes the determination of international law depend even partly on value-judgements will be unable to generate true (or false!) statements about its subject.[2] This is not to say that such statements will be altogether useless, since they may produce a helpful report of the speakers' feelings, say my attitude towards Mary's hitting John.[3] But that would be of little comfort, since the statements in question do not purport to be about anyone's feelings; I am not saying "what Mary did made me feel angry, or sorry for John". My statement purports to relate *what is the case* about Mary's action (i.e. that it is wrong), just as statements of international law purport to relate what is the case about international law, not how the speaker feels about the matter. This means that unless statements like the above can have a truth-value *as statements of what is the case*[4], rather than statements of someone's feelings or dispositions, they can find no place in any theory that aspires to state truths about the world.

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[1] Another, if not entirely accurate, way of putting the point is to say that, if x is indeterminate, the result of its addition to any determinate quantity (e.g. 3+x) will also be indeterminate.

[2] This argument is stated in its general philosophical form by John Mackie in Mackie J., 'The Third Theory of Law', 7 *Philosophy & Public Affairs* (1977) at 3-16.

[3] Such an 'emotivist' or 'projectivist' view is famously defended by Simon Blackburn, see Blackburn S., 'Moral Realism' in Casey J. (ed.), *Morality and Moral Reasoning* (1971) at 101ff.

[4] I cannot discuss here whether describing truth as 'what is the case' must count as a definition of that concept. Anyway, I do not think that any such definition is necessary or possible, for truth is the most basic concept we have. For an illuminating account of various efforts to define truth by

But why should we care whether evaluative judgements can be *objectively* true or false? You might value friendship, whereas I value solitude; you might think that abortion is morally permissible, whereas I think that it is always immoral. You may think that the invasion of Iraq in 2003 was justified, whereas I think that it was a horrific moral blunder. We can very much debate these matters and perhaps reach a point where we agree or become unable to articulate our disagreement any further. But what is the point of discussing whether my or your views on these matters are somehow 'objectively' correct or true? Do we have reason to think that there is some 'real' world of values to which we can appeal to in order to find out who is right? In fact, if nothing like an observable 'moral universe' exists, and if this discussion of objectivity involves no more than a repetition of our original arguments, then talk of objectivity of values might even be counter-productive. It might give us an excuse to stick to our beliefs even in the face of a better argument or, worse, it might make us believe that we are right and others are wrong without ever having to argue for our position. In short, talk of truth and objectivity may threaten to push our evaluative beliefs to the domain of indemonstrable and almost fanatical quasi-religious conviction. Is it not better to acknowledge that reasonable people may differ in what they value and how they value it and that there is little point in trying to dismiss some of their judgements as 'objectively mistaken' and to promote some others (usually our own) as 'objectively true'?

The opposition to the objectivity of value-judgements (a form of opposition that we might call *value-scepticism* or *subjectivism*) responds to a number of compelling intuitions. To start with, it is difficult to resist the thought that appeals to 'objective truth' have something of the occult about them. They are, to put it more mildly, metaphysically suspect insofar as they seem to ask us to believe in a wholly counterintuitive universal ontology, which includes 'things' called values amongst the real entities. But the chief appeal of subjectivism about values lies in its ethical and moral constitution. Subjectivists draw on the powerful idea that each one of us has to decide what to value and what not to value *for himself* or *herself*. When it comes to deciding such questions, other people have

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reference to other concepts and of the reason for their indiscriminate failure, see Davidson D., 'The Folly of Trying to Define Truth', Essay 2 in *Truth, Language and History* (2005) at 21ff.

no right to "push us around", to indoctrinate us, to make decisions in our stead or to undercut our deliberations on the ground that they know better. The burden of making such value-judgements for ourselves is a feature that we recognize as constitutive of our ethical and moral agency.[5] This is an aspect of our freedom that we want to use with critical intelligence and sensitivity, but which we are not prepared to give up in favour of any luminary (usually a religious or political leader) who claims to have 'objectively true' moral or ethical insights. The demand for toleration and *respect for difference* also follows from this conception of agency. Respect for others includes the recognition that they are equally capable of carrying their own burdens of judgement and that in doing so they might well reach conclusions different to our own. As Barry Stroud has put it:

> A person's choice of what to do or the best way to live is not constrained by some "objective" standard against which it can be measured. The thought that the world cannot force us to accept one set of values rather than another can be liberating. It does not necessarily make life easy. There are great differences and conflicts amongst people's valuings and social and political life is a matter of resolving those conflicts and reconciling opposed interests. But what calls for solution is the question which is to prevail. Each opposing interest must somehow be accommodated. All are there to be dealt with, and there are none that can be dismissed on the grounds that they are mistaken.[6]

The argument acquires added bite when the frame of reference becomes international. Talk of 'objective' truth seems calculated to induce an impression of moral and ethical uniformity that flies in the face of the huge diversity of moral and ethical codes across different communities and cultures and –much worse- may even contribute to its suppression.

Having said that, scepticism about values itself is not on all fours with the way we normally think about evaluation and evaluative disagreements. For one thing, scepticism about values entails that people cannot be mistaken in their value-judgements. It suggests that we may find some views on matters of value horrible, detestable or disagreeable but we have no ground for saying that the people who hold them have made a mistake. By the same token, scepticism entails

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[5] The idea is prominent in the work of John Rawls, see Rawls J., *Political Liberalism* (1996) at 54ff.
[6] Stroud B., 'The Study of Human Nature and The Subjectivity of Value', *The Tanner Lectures on Human Values*, delivered at the University of Buenos Aires, June 7, 1988 at 219 (available at <http://www.tannerlectures.utah.edu>). Stroud eventually dismisses value-scepticism on the ground that it draws a metaphysically confused distinction between matters of fact and matters of value (see especially at 220-37).

that our disagreements about, say, the morality of the invasion of Iraq or the permissibility of abortion have no subject matter for there is nothing that we actually disagree *about*. More specifically, if our judgements of value are no more than reports of our subjective feelings or emotions, then our debates about matters of value amount to no more than exchanges of reports of our respective psychological states, with nothing to share or divide between them. Indeed, if the sceptics are right, the very idea of evaluative *agreement* or *disagreement* is inherently fallacious, for both of these attitudes requires a *locus*, a *case* (eine *Sache*, in German) on which different views may be said converge or differ. In the same vein, evaluative arguments can never be interesting in themselves, for they only tell us things about the *speaker*, not about the way things are. Unlike statements of fact, the sceptic says, judgements of value can never simply 'be' true or false. Rather, they are *made* true or false by the person of the speaker: the proposition "the invasion of Iraq was immoral" can be true for you or for me, but false for the government, for Halliburton or for George W. Bush; in any case, its truth-value will change with the person who utters it. This way of thinking about values and evaluative disagreements has significant consequences for our conversational ethics. On the one hand, it leads us to look at evaluative disagreements as unbridgeable voids, which can be overcome only by leaps of faith and empathy, not by rational and patient debate (given that there is nothing to be debated). On the other hand, it tempts us to try to reduce our evaluative debates to disagreements about what are supposed to be the only matters that admit of correct and mistaken answers, namely matters of fact.

The counterintuitive streak in value-scepticism emerges when we attend to the way we normally think about values and evaluative disagreements. For example, we actually tend to think that people can be mistaken in saying that an action was wrong or right and that they are generally able to identify and correct those mistakes through rational argument. We also tend to think that our disagreements about values are genuine in the sense that there is always a *case* that we are trying to defend or dismiss. We think that the worth of an argument does not generally depend on the identity of the person who expresses it; if someone said that international law is prejudiced against women, we would find a response of the kind "well, she would say that because she is a feminist" both

unfair and beside the point. Finally, we think that our evaluative disagreements are not wholly reducible to disagreements about some matter of fact; people can have all the facts about the status of an embryo straight and still disagree vehemently about whether abortion is morally permissible.

I do not pursue these points in order to show that subjectivism is necessarily false but to suggest that, despite its initial plausibility, the case for scepticism is not at all self-evident and that much more needs to be said to sustain it. In what follows, I will try to show why the subjectivist case must eventually fail and why the compelling intuitions behind it are not just compatible with the idea of evaluative objectivity but also depend on that idea for their intelligibility.

1. Two arguments against the objectivity of evaluative judgements: Martii Koskenniemi / John Mackie

The key idea of value-scepticism is that judgements of value are a matter of subjective belief or preference and that, consequently, they do not admit of a truth-value. In a moment I will explain why subjectivism of this sort looks attractive and why it is nevertheless incoherent. It will be helpful, however, to start by gaining some impression of the form and the extent to which subjectivism has exercised a hold over international legal theory. One of the foremost exponents of subjectivism about values is Hans Kelsen. One of the arguments that Kelsen uses in order to defend his positivist pure theory of law is that judgments of value do not admit of truth or falsity and therefore cannot feature in a scientific theory of law. He writes:

> Which human needs are worthy and what is their proper precedence? The decision of these questions is a judgement of value, determined by emotional factors and therefore subjective in character, valid only for the judging subject and therefore relative only...[7]
>
> Yet one is inclined to set forth one's own idea of justice as the only correct one. The need for rational justification of our emotional acts is so great that we seek to satisfy it even at the risk of self-deception. And the rational justification of a postulate based on a subjective judgement of value, on a wish, as, for example,

[7] Kelsen H., 'The Pure Theory of Law and Analytical Jurisprudence', 55 *Harvard LR* (1941-42) 44 at 45.

> that all men should be free, or that all men should be treated equally is self-deception or –what amounts to much the same thing- an ideology.[8]

This sort of subjectivism has made its sharpest presence in the most erudite, comprehensive and influential work in modern international legal theory, Martti Koskenniemi's *From Apology to Utopia.* Koskenniemi's position on the question of the objectivity of values is summarized in the following statement.

> Concreteness [this, for Koskenniemi, is a central dimension of objectivity] requires that we exclude not only explicit political opinions from the process of verifying, or justifying, the law's content but that we also exclude theories of justice. For, it is held, theories of justice are "subjective", they cannot be verified or justified regardless of the political opinions held by some people.[9]

A statement of this view can also be found in Koskenniemi's critique of the idea that international justice plays a role in interpretation of customary international practice. He says:

> This view is utopian as naturalistic. Because "justice", "social need", "reasonableness" and "moral utility" are *subjective* notions, they cannot be used in order to achieve a determinate delimitation between practice which is and which is not the law.[10]

Koskenniemi's scepticism towards the objectivity of values occupies a crucial position in his general argumentative strategy. International legal discourse, he famously claims, is condemned to an endless oscillation between appeals to historical argument about what States have done, believed or accepted and appeals to international values.[11] The reason for this oscillation is that although appeals to the history of international practice need to be justified by reference to some value or purpose, every attempt to identify the point, purpose or value that the practice serves runs against the fact that matters of value do not admit of a right or wrong answer. For Koskenniemi, every attempt to turn the legal project into more than an abject historiography by infusing it with evaluative content is condemned to lack truth-value. The subjectivity of values creates a pitfall into which all attempts to argue about the true point of international law

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[8] Ibid at 47.
[9] Koskenniemi M., *From Apology to Utopia: the Structure of International Legal Argument* (1989) at 458.
[10] Ibid at 364-5.
[11] Koskenniemi M., 'The Politics of International Law', 1 *EJIL* (1990) 4 at 7-8.

are doomed to fall. Critical theorists such as David Kennedy[12] and Anthony Carty[13] share this view, despite their other differences with Koskenniemi's account.[14]

This sceptical claim is of crucial importance to my discussion of the place of evaluation in legal interpretation. If Koskenniemi is right, my suggestion that international legal practice has an interpretive structure, in the sense that it derives true statements of international law by means of a combination of historical and evaluative arguments, will have fallen at the first hurdle.

A first look into Koskenniemi's critique of evaluative objectivity suggests that this critique consists of two powerful strands. The first strand premises the subjectivity of values on the rejection of certain *ontological* ideas about the place of values in the world. Discussing the dissatisfaction of modern theories of international law with the idea of a 'natural normative order' whose truth does not depend on what States think or believe, Koskenniemi writes:

> If law had no relation to power and political fact, it would be a form of natural morality, a closed normative code which would pre-exist the opinions and interests of individual States. An early scholarship did assume the existence of such a code. For it, the law existed autonomously as divine will or natural purpose and effectively determined what States could will or have a legitimate interest in. But modern scholarship lacks the faith needed to sustain such a code. For it, law is an artificial creation, based on the concrete behaviour, will and interests of States. Attempts to argue on the basis of a natural code are seen as camouflaged attempts to impose the speaker's subjective, political opinions on others.[15]

The thrust of this strand in Koskenniemi's argument is that accepting the objectivity of values would commit us to a weird ontology, which would need to make room for a 'divine will' or some other kind of 'natural order', which 'pre-exists States' and forms a 'closed normative code'. The fact that we find such ontological claims highly implausible gives us reason to doubt whether judgements of value can have objective truth.

The second strand in Koskenniemi's critique of evaluative objectivity relies on the fact that evaluative judgements are essentially *contestable.* This point

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[12] Kennedy D., 'A New Stream of International Law Scholarship', 7 *Wisconsin ILJ* (1988) 1. See also Cass D., 'Navigating the Mainstream: Recent Critical Scholarship in International Law', 65 *Nordic JIL* (1996) 341.

[13] Carty A., 'Critical International Law: Recent Trends in the Theory of International Law', 2 *EJIL* (1991) 66; id., *The Decay of International Law?* (1986) at 108ff.

[14] See especially Carty, 'Critical International Law', above n.13 at 68ff.

[15] Koskenniemi M., *From Apology to Utopia*, above n.5 at 3.

emerges clearly in his discussion of modern interpretation of early communitarian international legal thinking:

> [Modern lawyers] often applaud the sense of justness and communitarian spirit of the early lawyers while deploring what in classicism has seemed like narrow-minded chauvinism. But these interpretations arise from controversial assumptions about what we are allowed to take as self-evident and what we may reasonably regard as open for doubt in matters of law, State practice and international justice. As we lack a unifying perspective for grading the relevant assumptions (whether norms exist by virtue of a theory of justice or through State will, interest or behaviour), we really have little reason to claim for our re-interpretations a status of truth which they cannot sustain beyond the (controversial) system of assumptions in which we move.[16]

The argument here is not focused on the dubious ontology of objective values but on the fact that international lawyers can have deep disagreements that reach *all the way down* to their most fundamental respective assumptions about the origin and content of the right and the good. The essential contestability of those assumptions (or the incompatibility of these 'conceptual schemes'[17]) is supposed to make a meal of the idea that any of the competing views about the good and the right could lay a claim to objective truth.

Pausing here, it is important to distinguish Koskenniemi's sceptical claims from the very different claim that the truth of evaluative judgements is *relative.* Claims of relativity do not dispute that evaluative judgements can have a truth-value; they only suggest –very plausibly- that the truth or falsity of a given value judgement should depend on the context in which the judgement is expressed, e.g. putting up one's feet may be acceptable behaviour in one community but quite offensive in another. This means that, just like the objectivist views that Koskenniemi is attacking, claims of relativity too are only intelligible on the assumption that evaluative judgements admit of truth or falsity.[18] Their 'relativity' concerns the situation, not the speaker.

Now, one indication that the arguments from the ontological weirdness of objective values and their essential contestability deserve our full attention is that they have found support not just amongst international lawyers but also amongst moral and ethical philosophers. A look at these philosophical arguments will

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[16] Ibid at 98.
[17] Carty prefers this formulation, see Carty, 'Critical International Law', above n.13 at 68.
[18] Cf. Davidson D., 'Objectivity and Practical Reason', Essay 1 in Ullmann-Margalit E. (ed.), *Reasoning Practically* (2000) at 3-5.

therefore help illuminate and support the subjectivist position. The best-known advocate of the attack on evaluative objectivity is John Mackie, whose *Ethics: Inventing Right and Wrong* presents the two arguments in their most general philosophical form. Mackie formulates the argument from the essential contestability of evaluative judgements (which he refers to the as "the argument from relativity") in the following (cautious) way:

> The argument from relativity has as its premises the well-known variation of moral codes from one society to another and from one period to another, and also the differences between different groups and classes within a complex community. Such variation is in itself merely a truth of descriptive morality, a fact of anthropology which entails neither first order nor second order ethical views. Yet it may indirectly support...subjectivism: radical differences between first order moral judgements make it difficult to treat those judgements as apprehensions of objective truths... In short, the argument from relativity has some force simply because the actual variations in the moral codes are more readily explained by the hypothesis that they reflect different ways of life than by the hypothesis that they express perceptions, most of them seriously inadequate and badly distorted, of objective values.[19]

Mackie then turns to the ontological argument (which he refers to as "the argument from queerness") and makes the following claim:

> Even more important...and certainly more generally applicable is the argument from queerness. If there were objective values, then they would be entities or qualities or relations of a very strange sort, utterly different from everything else in the universe. Correspondingly, if we were aware of them, it would have to be by some special faculty or moral perception or intuition, utterly different from our ordinary ways of knowing everything else... When we ask the awkward question, how we can be aware of the truth [of values]..., none of our ordinary accounts of sensory perception or introspection or the framing and confirming of explanatory hypotheses or inference or logical construction or conceptual analysis, or any combination of these, will provide a satisfactory answer; 'a special sort of intuition' is a lame answer, but it is the one to which the clear-headed objectivist is compelled to resort.[20]

Ever since their appearance, Mackie's arguments have continued to challenge ethicists and they have elicited a variety of serious philosophical responses.[21] (Koskenniemi's scepticism, by contrast, has gone largely unchallenged in

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[19] Mackie J., *Ethics: Inventing Right and Wrong* (1977) at 36-7. Cf. Harman G., *The Nature of Morality: An Introduction to Ethics* (1977).
[20] Ibid at 38-9.
[21] Cf. McDowell J., 'Values and Secondary Qualities' in Honderich T. (ed.), *Morality and Objectivity* (1985) at 118ff; Wiggins D., 'Truth, Invention and the Meaning of Life', 62 *Proceedings of the British Academy* (1976) at 348-9; Dworkin R., 'Objectivity and Truth: You'd Better Believe It', 25 *Philosophy & Public Affairs* (1996) at 77ff.

international legal circles). In the following section, I will try to identify some of the assumptions that lend force to value-scepticism and to draw attention to the weaknesses of certain philosophical responses to it. This discussion will pave the way to a more accurate statement of the problem of evaluative objectivity.

2. Formulating the problem of objectivity: internal v. external scepticism and the connection between truth and belief

When trying to state the problem of evaluative objectivity in the right way, it is important to appreciate that scepticism about values comes in two varieties. Consider an example. Two sceptics happen to overhear you and me disagree about an article in the paper, which claims that Billy Bragg's music is better than Wagner's. One of them says: "These chaps are both mistaken. They are having an evaluative disagreement and we know that there cannot be a fact of the matter about which view is right and which is wrong on matters of value". The other says: "My friend, you are falling for the same trick as them! By claiming that their views are *false*, you have already conceded that their evaluative judgements admit of a truth-value. If you want to maintain your sceptic stance, as I suppose you do, all you can do is say that your view simply differs from theirs, that you feel differently about different sorts of music, and perhaps add that your view is preferable because you have studied musicology, you hate opera etc. What you cannot do is say that your view is objectively *true*". Ronald Dworkin has aptly called the first kind of scepticism *internal* and the second *external*.[22] The clear difference between them is that internal scepticism claims the same logical space, and requires the same kind of support, as the statements whose truth it is disputing. Internal sceptics, such as the first interlocutor, need to appeal to the concept of objective evaluative truth as much as their rivals. Although they may pose a challenge to the objectivists' substantive claims about what is the case, they pose no challenge to the objectivists' claim that the substantive question admits of true and false answers. By contrast, external sceptics consider themselves wholly

[22] Dworkin R., above n.13 at 83

liberated from the task of disputing the truth of anyone's evaluative claims.[23] Their simple but crucial claim is that we ought to guard against the folly of thinking that our preferences or beliefs are anything *more* than just our preferences and beliefs. They urge us to argue for, defend, promote or revise our evaluative judgements and to reject, criticize or accept those of others; but they warn us that we are not entitled to claim objective truth or falsity for either.

It is easy to see why sceptics about the objectivity of values will always try to align themselves to the external perspective, whose distinguishing mark is that it rejects the notion of objective truth about values without losing the intuition that we can have meaningful disagreements about our evaluative preferences and beliefs. Indeed, both Koskenniemi and Mackie want to maintain their attack on evaluative objectivity whilst making clear that they have their own firm (although not true!) views about moral and political issues.[24] Of course, taking this view comes at one considerable loss. If there are no right or wrong answers on matters of value, then there is no ground for accusing anyone of having missed a moral or ethical insight. This entails that, insofar as Koskenniemi and Mackie are right, suggestions that international law is racially and culturally prejudiced, or biased against women, can claim no *critical* power over their target. They can only claim to reflect just 'another' or a 'different' perspective, which expresses no truth, and which one might or might not decide to share depending on one's tastes and preferences. In that sense, a vindication of the sceptics will not just show that statements of international law are a matter of taste and preference, insofar as they need to rely on evaluative judgements. Such scepticism will also entail that international law's critics are not entitled to talk of its failings.[25]

Now, leaving the toothless challenge of the internal sceptics to one side, we need to ask what exactly one would need to demonstrate to external sceptics in order to convince them that evaluative propositions can have a truth-value. According to Koskenniemi and Mackie, there are two *probanda*. First, one would need to provide reasons for us to accept a world ontology that, contrary to our immediate experience and intuition, makes room for distinct, perceptible and real

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[23] Ibid at 86-7.
[24] Mackie J., above n.10 at 4-6; Koskenniemi M., above n.5 at 475-7.
[25] Cf. Kymlicka W., *Contemporary Political Philosophy* (2nd ed., 2002) at ?? Note also Heidegger's remark that sceptical arguments have "something of the attempt to bowl one over", Heidegger M., *Being and Time* (1927) at 229.

entities called values. Second, one would need to show that our frequent and deep disagreements about matters of value should be attributed to our varying success in perceiving those elements of reality, rather than to our different subjective desires or ways of life.

These two *probanda*, I would suggest, are not really that different, for the two sceptical arguments are at core alternative formulations of the same assumption. They both assume that proving the objectivity of evaluative judgements requires one to show that values are *real*, that they exist *somewhere* in the 'external' world and that we possess a special, though of course fallible, faculty for *sensing* their presence in the way we sense the existence of celestial bodies, coins or vacuum cleaners. Perhaps this is less immediately evident in respect of the argument from the contestability of evaluative judgements. Still, both Mackie's and Koskenniemi's arguments on that front assume that the only way to resolve our disagreements about what is good, right, beautiful is to posit the existence of distinct and real evaluative entities, a bare appeal to which would clinch the result for one or the other competing claim. The heart of their scepticism about values, then, lies in the ontological argument.

Some philosophers have attempted to confront and defeat the sceptics' ontological argument on its home ground, insisting that values exist as real features of the world. Among the most distinguished contributors to this debate, John McDowell and David Wiggins have maintained that there is no reason why we should treat our perception of values differently from perception of different aspects of the world, such as the colour and texture of objects. McDowell says:

> To ascribe a value to something is to represent it as having a property which (*although it is there in the object*) is essentially subjective in much the same way as the property that an object is represented as having by an experience of redness –that is, understood adequately only in terms of the appropriate modifications of human...sensibility... [E]valuative 'attitudes' are like colour experience in being unintelligible except as modifications of a sensibility like ours (emphasis added).[26]

I cannot here discuss the full merits of a realist response to a sceptic about the objectivity of values. It seems to me, however, that this response sets off on the wrong foot, since it *accepts* that the truth or falsity of evaluative judgements

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[26] McDowell J., above n.13 at 118. Cf. Wiggins D., above n.13 at 349.

depends on whether values are real features of the world, whose sheer existence affects our faculties of perception in one way or another. But this is clearly an unhelpful way of making the case for objectivity, if only because it commits the objectivist to a grand ontological scheme that will strike many of us as odd and counterintuitive. If you were asked whether you have seen, heard, touched or felt any values lately, you will probably find the question silly, for when you are making evaluative judgements you are not claiming that values exist any*where* or in any*thing*. In fact, there is little reason why you should even be committed to such an implausible and counterintuitive claim. If you are an objectivist about values, the only idea you *need* to defend is that one cannot consistently deny that evaluative propositions can have a truth-value. Insofar as you manage to defend this claim without appealing to Koskenniemi's talk of "closed normative codes" which "pre-exist States" and reflect some sort of "divine will" or "natural order of the world", Mackie's claims about "queerness", or the realists' talk of values as secondary qualities of things, you will be entitled to dismiss their scepticism (or, in the case of realists, their reasons for rejecting scepticism) about values as unnecessary ontological clutter.

But we need to say more in order to formulate the problem of evaluative objectivity correctly. In particular, we need to ask why both the sceptic and the realist feel so strongly committed to the idea that proving the truth-aptness of value judgements must be an ontological enterprise. I would suggest that the explanation lies in two fundamental intuitions that, as both realists and sceptics appreciate, any plausible theory of truth should be able to meet. The first intuition is that a theory of truth ought to make ample room for the distinction between what we believe and what is the case, or it will end up losing the concept of truth altogether.[27] The second, apparently conflicting, intuition is that a theory of truth should show truth to be connected to our beliefs and sensibilities, or it will end up making it completely inaccessible to us, something reserved for the intelligence of gods and omniscient beings.[28] Whilst making sure that there is space between

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[27] For a view that defines truth as (simply) justified belief or assertability see Dummett M., 'Truth', Essay 1 in *Truth and Other Enigmas* (1978) at 23-4.

[28] This is effectively the position of Hilary Putnan, who defines truth as '*idealized* justified assertability', see Putnam H., *Realism and Reason* (1983) at xviii. For an attempt to apply Putnam's semantics to legal interpretation see Stavropoulos N., *Interpretation in Law* (1999) at ??.

truth and belief, a theory of truth should not define truth in a way that makes it wholly independent of our 'conceptual schemes' and our beliefs about the world.

Realists like McDowell and Wiggins try to meet this tall order by reifying truth, i.e. by conceiving it as part of the furniture of the universe, which exists independently of what we believe but is still there for us to perceive with our senses. Sceptics like Koskenniemi and Mackie complain that this manoeuvre loses or trivializes the second intuition, because it ultimately divorces truth from the ways we conceptualise the world. It seems to me that the sceptics have a good point. Truth that resides in the *thing* under observation is effectively a truth that we should have to appreciate independently of what we believe about the world, lest our beliefs contaminate our grasp of it. But this is clearly a weak idea. We can never step outside our beliefs in order to take a look at the world "as it really is"; we can only respond to the world through our given conceptual schemes. The sceptics are, to that extent, right. Truth reified is ultimately truth that is inaccessible and it is difficult to see what use there could be for such an idea.[29]

We have now tightened our grip on the problem of evaluative objectivity. A successful defence of the truth-aptness of evaluative judgements must steer clear of the temptation to reify values. The crucial question is whether we can make sense of the idea that our beliefs on matters of value can be objectively true or false without sacrificing the intuition that moral, ethical or aesthetic truth cannot be identified independently of what we believe.

3. Truth and objectivity as prerequisites of thought: Donald Davidson's theory of radical interpretation

Drawing on the work of one of the foremost analytic philosophers of the 20th century, Donald Davidson, in this Section I want to show that the objectivity or truth-aptness of evaluative judgements does not need to be thought of in realist or ontological terms. Rather, the objectivity of evaluative judgements is entailed

[29] Cf. Davidson D., 'Epistemology and Truth', Essay 12 in *Subjective, Intersubjective, Objective* (2001) at 186-7.

from the structure of our beliefs and our ability to understand and interpret any kind of linguistic utterance.

The argument can be stated very briefly in the following way. Sceptics assume that they can understand the meaning of a person' s evaluative judgements and still be able to claim that these propositions do not admit of trith or falsity. This view rests on a misconception of what is involved in having a belief (indeed any propositional attitude) or understanding someone else's. To be able to understand any utterance, whether one's own or anyone else's, as a belief, one must necessarily possess the concept of objective truth.

I should say at the outset that I cannot go into all the details of Davidson's account of truth, meaning and interpretation, which has been the focus of extensive discussion and research in western analytical philosophy for the last three decades.[30] What I propose to do is to draw together some prominent strands in Davidson's thought, to highlight their interdependence and to explain, as briefly as would befit a thesis not directly concerned with the philosophy of mind and language, how they defuse the sceptical challenge to the objectivity of values.

Even those who are convinced that Descartes' *cogito ergo sum* fell short of demonstrating that the external world truly exists[31] recognize that he set out in the right track. One thing we can be sure of is that thought exists and we have every reason to take this as a starting point for our enquiry into whatever else might exist in the world.[32] One of Davidson's basic suggestions is that quite a lot follows from the existence of thought.[33] Consider the nature of the most common vehicle for our thoughts, namely our beliefs. To start with, one cannot have a belief without understanding that it is possible that this belief may be falsified by the facts. I believe that I have five pounds in my pocket; I look and I find that I have only three. My belief turned out to be false, yet this does not make it any less true that I had it (after all, I looked into my pocket to *check* whether my belief was

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[30] Cf. especially the volume of essays *The Library of Living Philosophers: The Philosophy of Donald Davidson*, (Hahn L.E. ed.), vol. XXVII (1999) with replies by Davidson.
[31] One problem with *cogito ergo sum*, at least in the context Descartes used it, is that it does not establish that *I* exist, for this is supposed in the first person use of *cogitare*. The only non-circular way of reading this statement is "I think, therefore there is thought". This is also Davidson's use.
[32] Davidson D., 'The Problem of Objectivity', Essay 1 in *Problems of Rationality* (2004) at 6.
[33] On the Cartesian beginnings of Davidson's project see Nagel T., 'Davidson's New *Cogito*', Essay 7 in *The Philosophy of Donald Davidson*, above n.30 at 195-8.

correct). The risk of falsehood, the distinction between what I believed and what was the case, was built into my belief from the start.

Another corollary of having a belief is that one cannot give one's belief any *content* without understanding what it would take for it to be true.[34] To make sense of my belief that I have five pounds in my pocket, I must have a grasp of what it is that would make that belief true, namely the presence of five pounds inside my pocket (or false, namely the presence of less or more than that amount). Notice that this condition holds even if I have no way of making *sure* that my belief is true. The statement "London will never organize the Olympic Games" will be perfectly intelligible to any audience even though there is no possibility that members of that audience will be able to confirm whether the statement is true or not. The audience understands this sentence well enough insofar as it has a grasp of what would need to be the case for the statement to be true. The same point applies to our possession and use of concepts. To have concept is to be able to *classify* things under it, i.e. to have criteria that distinguish things that fall within the concept from things that fall outside it. Here too, an essential part of having a concept is the awareness of the possibility of mistake in its application, e.g. I believed I was seeing a *red* object, but the object was actually orange, so my application of the concept seemed correct but was not. In all, to have concepts and beliefs, one must be able to identify the conditions that would make them or (for concepts) their application true. If thought exists, then so does the idea of truth that is independent of the content of one's beliefs about the world.[35]

Davidson extends this argument to support the idea of the *holism* of our beliefs. This idea says that identifying the truth conditions of any belief presupposes that I have a grasp of a whole web of other concepts and beliefs. My believing that there are five pounds in my pocket requires that I have a grasp of the concepts of pound and pocket, as well as of basic arithmetic and orientation. Given the flexibility of our use of language and sentence-construction, this entails that there is no definite amount of beliefs that I must assume to be true in order to identify the truth conditions of a given belief.[36] Rather, to identify the truth

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[34] Davidson D., 'The Problem of Objectivity', above n.32 at 8-9.
[35] Cf. Davidson D., 'What Thought Requires', Essay 9 in *Problems of Rationality* (2004) at 135ff.
[36] E.g. consider the range of beliefs that I would need to assume are true to give sense to my belief that 'my manager's husband put five pounds in my pocket whilst we were watching the solar eclipse'!

conditions for any one of my beliefs I must always rely on the assumption that my beliefs *as a whole* are objectively true.[37] It is only against such a rich background of truths that it makes sense to think that any *particular* of my beliefs or my applications of a concept may be false.[38]

The argument thus far only shows that we cannot entertain a belief or apply a concept unless we assume that our beliefs about the world are largely correct. But sceptics will justifiably demand more. They will ask how we can be sure that our body of beliefs is *actually* true, that is how we can be sure that our beliefs and conceptual schemes 'latch on' to the world as it really is.[39] Davidson begins his response to this challenge by looking into the structure of the sceptics' question. To formulate their doubts, sceptics must assume that they have true knowledge of the content of their own thoughts and, to the extent that they purport to understand them, the content of other people's thoughts. What the sceptics are doubting is whether knowledge of one's own mind, or knowledge of other people's minds, is enough to guarantee that one also has knowledge of what the *world* is like. This third variety of knowledge, the sceptics say, does not follow from the first two.[40]

Davidson notes that sceptics make a crucial assumption here. They believe that our knowledge of our own minds enjoys some sort of especially secure status because of its sheer immediacy, and that it is the same status which needs to -but presumably cannot- be extended to our knowledge of the world.[41] Put simply, the sceptics assume that we can 'look inside' ourselves, but doubt whether this tells us anything about the possibility of 'looking out' into the external world.

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[37] This idea is developed in the first part of Davidson's famous 'A Coherence Theory of Truth and Knowledge', Essay 10 in *Subjective, Intersubjective, Objective* (2001) at 138-40. Davidson has taken great pains to emphasize that his theory does not assume that a body of belief is true *just* in virtue of the fact that it is consistent, see his 'Afterthoughts' to 'A Coherence Theory' ibid at 154. I deal with this point in the main text.

[38] One conspicuous consequence of holism is that my beliefs are not made true because they *correspond* or *refer* to particular aspects of the world, for the ideas of correspondence and reference acquire their sense from the false assumption that we experience the world in bits, of which our sentences are supposed to be mental representations. See Davidson D., 'Indeterminism and Antirealism', Essay 5 in *Subjective, Intersubjective, Objective* (2001) at 78-9, where Davidson develops this point by talking about the 'inscrutability of reference'.

[39] The oft-quoted sceptical example in this connection is a brain wired so as to produce all the normal sensations but is really placed inside a vat in a scientist's laboratory.

[40] Davidson D., 'Three Varieties of Knowledge', Essay 14 in *Subjective, Intersubjective, Objective* (2001) at 204ff. This essay offers perhaps the easiest route into Davidson's thoughts on the matters of objectivity, truth and meaning.

[41] Davidson D., 'First Person Authority', Essay 1 in *Subjective, Intersubjective, Objective* (2001) at 3.

The sceptics' assumption that an enquiry into our knowledge of the world should begin or follow from the knowledge of our own minds is false. To demonstrate this, Davidson develops a well-known theme in 20th century philosophy, namely the linguistic character of thought and the public nature of language.[42] The only creatures that we can credit with thoughts are creatures that possess beliefs, desires, concepts etc.; in short, creatures that possess what Davidson calls "propositional attitudes".[43] In turn, the expression of propositional attitudes or thoughts requires the mastery of a language. What is especially important about the linguistic character of thought is that the mastery of any language is a social, or inter-subjective, matter.[44] The only way to learn a language is to become apt in aligning one's verbal responses to certain aspects of the world with those of one's fellow creatures, e.g. to say "table" when one sees a table, or to say "five pounds" when one sees five pounds. In fact, as Wittgenstein's famous rejection of the 'private language' argument has demonstrated, the social or inter-subjective nature of language is exactly what allows one to make the distinction between true and false applications of words and concepts because it provides the only possible criterion of checking the *identity* of one's responses to a given aspect of the world.[45] Confirmation that I am using the word "table" correctly when I am looking at some thing can only come from the fact that users of English would display the same verbal behaviour when looking at the same thing.[46] Without this background of shared responses to a shared sensory stimulus (here seeing a table), I could have no concept of my use of language being correct or mistaken, and thus I could have no thoughts. The linguistic character of all thought entails

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[42] This point is prominent in the early work of Martin Heidegger and the philosophy of Hans-Georg Gadamer and Ludwig Wittgenstein. See Heidegger M., *Being and Time* (1927) at 25-6;; Gadamer H.-G., *Truth and Method*, trans. Weinsheimer J. – Marshall D. (2nd rev. ed., 1989) at 383ff; Wittgenstein L., *Philosophical Investigations* (1954) at par.72ff.

[43] Davidson D., 'What Thought Requires', above n.35. This does not mean that thoughtless creatures cannot interact with their environment. A worm is perfectly capable of getting by in the world, e.g. it can look for and find food, but it does not identify its food *as* food, nor does it have any belief *that* it is looking for it.

[44] Cf. the useful analogy in Putnam H., 'Meaning and Reference', 70 *Journal of Philosophy* (1973) 699 at 705: "There are tools like a hammer or a screwdriver which can be used by one person; and there are tools like a steamship which require the cooperative activity of a number of persons to use. Words have been thought of too much on the model of the first sort of tool".

[45] Wittgenstein L., *Philosophical Investigations* (1954) at pars. 225-34. For a sceptical reading of Wittgenstein's point see Kripke S., *Wittgenstein on Rules and Private Language* (1982).

[46] Cf. Davidson D., 'The Second Person', Essay 8 in *Subjective, Intersubjective, Objective* (2001) at 116, where Davidson reads Wittgenstein as saying that "without an interpreter, no substance can be given to the claim that the speaker has gone wrong –that he has failed to go on in the same way".

that the sceptics' assumption was mistaken: knowledge of one's own mind is not a privileged pivot from which any attempt to know the content of other minds and of the world must depart.[47] Without the knowledge of other minds that is involved in the intersubjective character of language, one could not give one's own thoughts any content whatsoever.

Davidson then extends the thesis about the linguistic character of thought to explain how, against the sceptics' assumptions, the mastery of a language, which is what grounds the knowledge of what is inside the mind, is possible only through knowledge of the world. Following the lead of W. V. Quine[48], Davidson approaches the matter by asking the following question: given that knowledge of any mind (one's own or another's) depends on the existence of a shared language, what conditions need to obtain for an interpreter to be able to interpret the verbal utterances of a speaker with success? In order to put the question of interpretation in its sharpest or most radical form (hence the reference to his theory as one of *radical interpretation*), Davidson supposes that interpreter and speaker do not share the same language and asks what conditions would need to obtain for the former to interpret successfully the utterances of the latter. By discussing the problem of interpretation in this very difficult context, Davidson undertakes to lay bare the kind of knowledge that is required for all linguistic understanding, without relying on any prior knowledge of the speaker's language, beliefs or conceptual scheme.

Davidson argues that radical interpretation is only possible on the condition that the interpreter credits the speaker with two attributes, which collectively amount to what Davidson calls the Principle of Charity in interpretation.[49] First, the interpreter must credit the speaker with the same

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[47] Davidson argues that the only special feature of knowing one's own mind is that one knows what one thinks without the aid of empirical observation, Davidson D., 'First Person Authority', Essay 1 in *Subjective, Intersubjective, Objective* (2001) at 6ff.

[48] Cf. Quine W.V.O., *Word and Object* (1960).

[49] Some interpreters of Davidson have read the principle of charity as a *plea* to the interpreter to bring the speaker's beliefs as close as possible to one's own, see Hacking I., *Why Does Language Matter to Philosophy?* (1975) at 146-50; Taylor Ch., 'Understanding the Other: A Gadamerian View of Conceptual Schemes', Essay 15 in Malpas J. – Arnswald U. – Kertscher J. (eds.), *Gadamer's Century* (2002) at 291-2. The idea that the interpreter has a *choice* about how much of his own beliefs to attribute to the speaker in order to understand him is false and certainly not Davidson's. As long as one tries to interpret the utterances of a speaker, one is committed to maximizing agreement between the interpreter's and the speaker's beliefs, insofar as there is no cause for thinking that one of the parties labours under a mistake or other misapprehension. So claims such

apparatus that makes the interpreter capable of having thoughts and language, i.e. the interpret must attribute to the speaker's beliefs the same degree of holism or coherence that characterizes his own body of beliefs. Second, the interpreter must credit the speaker with the same ability to respond to aspects of the world that the interpreter attributes to himself (and to other users of his language). Davidson calls the first attribute the Principle of Coherence and the second the Principle of Correspondence. He describes their effect in the following way:

> The Principle of Coherence prompts the interpreter to discover a degree of logical consistency in the thought of the speaker; the Principle of Correspondence prompts the interpreter to take the speaker to be responding to the same features of the world that he (the interpreter) would be responding to under similar circumstances. Both principles can be (and have been) called principles of charity: one principle endows the speaker with a modicum of logic, the other endows him with a degree of what the interpreter takes to be true belief about the world... It follows from the nature of interpretation that an interpersonal standard of consistency and correspondence to the facts applies to both the speaker and the speaker's interpreter, to their utterances and to their beliefs.[50]

Notice that the attribution by the interpreter to the speaker of basic logical consistency and responsiveness to the world may credit the speaker with more than he actually is entitled to (e.g. the speaker may be a parrot) but it is *no more* charitable than the attribution that the interpreter must make to himself in order to make sense of having thoughts and beliefs.

Here is an example: suppose that you are sharing a table with someone whose language you do not speak. At some point that person points to a five-pound note on the floor and exclaims "πέντε λίρες!" Now, as long as you can see what he is pointing at, you would probably understand very quickly that his exclamation means "five pounds!" or something to that effect (e.g. "a banknote!", "you dropped something"). Why is that? Davidson's claim is that your interpretation of "πέντε λίρες" as "five pounds" was generally successful because you credited the speaker (of Greek, as it happens) with two attributes: first, a

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as Taylor's (at 292) that "Davidson's principle of charity is vulnerable to being abused to ethnocentric ends" misses the point of that principle, to the extent that it assumes that an interpreter can manipulate it. On this point see Hoy D., 'Post-Cartesian Interpretation: Hans-Georg Gadamer and Donald Davidson', Essay 3 in *The Library of Living Philosophers: The Philosophy of Hans-Georg Gadamer* (Hahn L.E. ed.), vol.XXIV (1997) at 122-5. In Section 4 I argue that charity does have an ethical significance, but of a different kind. See below at.

[50] Davidson D., 'Three Varieties of Knowledge', above n.40 at 211.

capacity to have concepts and beliefs in the same way as you do and, second, a like ability to respond correctly to a source of sensory stimulation, namely the existence of the fiver on the floor. In other words, the reason why your interpretation of the Greek phrase was successful lay in your assumption that the speaker's beliefs about the world were in agreement with your own and therefore, by your own standards (these are all you have), largely true.

In this way, Davidson's argument demonstrates that, contrary to the assumption that gives scepticism its currency, knowledge of the content of any belief is only possible on the assumption that we, and the speakers we interpret, have a largely true view of the world. Our three varieties of knowledge are, after all, interdependent: knowing the content of our minds and of the minds of others requires us to have knowledge of the shared environment in which thought acquires its content (so the idea of a conceptual scheme which is unintelligible to us is incoherent[51]), while knowledge of the world is only possible for creatures that are able to have and to communicate thoughts and beliefs about it.

Notice that Davidson's argument does not entail the obviously silly conclusion that all our beliefs are correct. The attribution to the speaker of logical consistency and a largely correct view of the world is a necessary condition for radical interpretation, but the attribution of *particular* beliefs to the speaker is always defeasible by evidence (usually empirical) that the speaker actually holds another belief.[52] There is enough space between the attribution to speakers of a largely right view of the world and the attribution to them of particular beliefs to accommodate interpretive error. For example, the more often I observe that the speaker utters the word "σκύλος" when -as far as I can tell- he sees a dog, the more support I have for attributing to him the belief that he sees a dog. Once I have enough evidence to treat this attribution as reasonably safe, I am entitled to treat as mistaken the speaker's use of the word "σκύλος" to refer to what, to me, is a table.[53] But it may well be that the source of mistake lies with me; perhaps my

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[51] Cf. Davidson D., 'On the Very Idea of a Conceptual Scheme', above n.37 at 191.
[52] Davidson D., 'The Second Person', above n.46 at 116ff.
[53] It is possible that the speaker *intends* to use the word "σκύλος" to mean table rather than dog, say, in order to make a joke about the fact that both dogs and tables have four legs. But the speaker's intention does not change the meaning of the word he is using. For unless an interpreter had any clue from the speaker that the word is intended to be understood in this extraordinary way (e.g. laughter, special gesturing etc.), he would have no reason to treat its use as anything other than

observation of the speaker's behaviour when he says "σκὐλος" was inaccurate or I may have had little chance to observe the full range of situations in which that word is used. These are instances where interpretation fails. But the important point, again, is that recognition of this failure requires a grasp of what it would have taken for interpretation to have succeeded and it is on that very ground that we stand in order to explain error.[54] No less than the attribution of a true belief to the speaker, the attribution of a false belief or mistake is intelligible only against the assumption that speaker and interpreter share a largely true view of the world. In the course of exposing the sceptics' challenge as incoherent, Davidson's work has provided us with a theory of truth that vindicates an important part of my description of the interpretive attitude, since it explains how it is possible for interpretive arguments to preserve the crucial space between what participants in a practice *believe* that it requires and what the practice *truly* requires, whilst showing that truth and belief remain connected to each other in a holistic way.

4. Back to values: is objectivity relevant?

We all share the concepts of good and bad, right and wrong, beautiful and ugly, worthy and unworthy and we make judgements using those concepts everyday. We communicate and understand each other's claims about these concepts and we frequently disagree about which claims are true and which are false. Sceptics like Koskenniemi and Mackie argue that even though we are able to understand ourselves as being in evaluative disagreement, we cannot claim truth for our evaluative judgements. I have tried to expose this view as incoherent. To say that value-judgements can be objectively true or false is not, as the sceptics assume, to postulate the existence of weird entities in the furniture of the universe. It is to say

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mistaken. On the loose relation between meaning and intention see Davidson D., 'The Second Person', above n.46 at 111-2.

[54] Davidson D., 'The Irreducibility of the Concept of the Self', Essay 6 in *Subjective, Intersubjective, Objective* (2001) at 89-90: "Mistakes on the part of the interpreter or the speaker are to be expected, but these cannot be the rule, since errors take their content from a background of veridical thought and honest assertion. The crucial difference between the predominant, mostly banal, run-of-the-mill but on target beliefs and assumptions and the occasional deviation is this: errors, confusions, irrationalities have particular explanations; getting things right, aside from hard cases, is to be expected".

that the notion of objective truth is essential to our ability to have thoughts and beliefs and to interpret the thoughts and beliefs of others. Without the grasp of the concept of truth, no understanding -and *a fortiori*- no disagreement is possible, no matter whether the proposition involved is factual or evaluative. Indeed, only a shared background of agreement on true values could give our evaluative disagreements their bite and interest and explain their occasional and baffling intractability. In one of his last essays, which is worth quoting at longer than usual length, Davidson put the matter as follows:

> I do not say that there cannot be real differences in norms among those who understand each other. There can be, as long as the differences can be seen to be real because placed within a common framework. The common framework is the area of overlap, of norms one person correctly interprets the other as sharing. Putting these considerations together, the principle that emerges is: the more basic a norm is to our making sense of an agent, the less content we can give to the idea that we disagree with respect to that norm. Good interpretation makes for convergence, then, and on values in particular, and explains failure of convergence by appeal to the gap between apparent values and real values (just as we explain failure to agree on ordinary descriptive facts by appeal to the distinction between appearance and reality). There is thus a basis for the claim that evaluations are correct by interpersonal –that is, impersonal, or objective- standards. For if I am right, disputes over values can be genuine only when there are shared criteria in the light of which there is a answer to the question who is right. Of course, genuine disputes must concern the values of the very same objects, acts, or states of affairs [55]. When we find a difference inexplicable, that is, not due to ignorance or confusion, the difference is not genuine; put from the point of view of the interpreter, finding a difference inexplicable is a sign of bad interpretation. I am not saying that values are objective because there is more agreement than meets the eye, and I certainly am not saying that what we agree on is therefore true. The importance of a background of shared beliefs and values is that such a background allows us to make sense of the idea of a common standard of right and wrong, true or false.[56]

The sceptic might want to avoid this conclusion by saying "well, if understanding the other's evaluative judgements commits me to accept that these judgements admit of a truth-value, then I feel inclined to say that I do not understand them in the first place". But that trick would be too cheap, if only because as long as we

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[55] Is it not the case that many disagreements about 'values' are exacerbated (if not altogether created) by the fact that the parties offer different accounts of the underlying facts? Think no further than the debate about the 2003 invasion of Iraq.

[56] Davidson D., 'The Objectivity of Values', Essay 3 in *Problems of Rationality* (2004) at 50-1.

share the same language with those whose judgements we are interpreting, there is little (if any) possibility that their utterances will strike our ears as mere noise.

Putting scepticism about values to one side, before rounding off our discussion of objectivity we need to consider a very different, and recently popular, complaint towards talk of objectivity in morality, ethics, politics and law. This complaint might be stated as follows: "it may be true that questions of value admit of right and wrong answers. Knowing this, however, does not in the least help us resolve our everyday moral, ethical or aesthetic disagreements. For even though all sides will agree that there is a fact of the matter about which view is right and which is wrong, each will claim rightness for itself and wrongness for its rivals. The appeal to the objectivity of values will therefore drop out of our disagreement as useless, since it can offer us no ground for discovering *which* ethical, moral or aesthetic view is right and which is wrong".[57]

In one respect, the complaint is surely correct. Trying to attach the label 'objectively true' to one or the other view does nothing to reinforce it *vis-à-vis* its rivals.[58] Indeed, whenever people claim in the midst of a genuine and reasonable disagreement that their view simply reflects the truth, we tend to take that as a sign that they have ran out of decent arguments for their position. Does this not entail that talk of truth and objectivity deserves no place in our practice of ethical, moral, legal or aesthetic deliberation? Will we not get on just as well with our substantive debates without any appeal to those concepts?

We should regard this suggestion with suspicion for two reasons. The first, which proponents of the complaint in question will acknowledge, is that talk of objectivity and truth is surely necessary in order to defend our deliberative practice against certain fashionable sceptical challenges, by exposing the latter as incoherent. Sceptics about truth, as Stanley Cavell has put it, hide in the space between what can be said and what can be the case, between what can be

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[57] Cf. Waldron J., 'The Irrelevance of Moral Objectivity', Essay 8 in *Law and Disagreement* (1999) at 165ff; Waldron J., *The Dignity of Legislation* (1992) at 61-2. The idea that the concepts of truth and objectivity are largely irrelevant in all our everyday decisions and practical deliberations, and can therefore be dropped from our vocabulary without loss, has been put in its general philosophical form by Richard Rorty, see Rorty R., 'Pragmatism, Davidson and Truth', in Lepore E. (ed.), *Truth and Interpretation: Perspectives on the Philosophy of Donald Davidson* (1986) at ??.

[58] Cf. Dworkin R., 'Objectivity and Truth: You'd Better Believe It', above n.21 at 94.

articulated and what can be true.[59] There is no other way of forcing them out of their hideout but to talk directly about the object of their doubts, namely truth.

The second reason for insisting that truth and objectivity remain relevant in our deliberative practice about ethics, morality or law is more difficult to grasp yet no less important. To appreciate its nature, consider the following contrast. There are evaluative questions on which we care to distinguish right and wrong answers (e.g. when is pre-emptive self defence justified?) and questions on which we do not (e.g. is strawberry ice cream better than vanilla?). We tend to say that the former are issues on which we should be aiming to discover the truth, or issues that require us to exercise careful judgement; and we say that the latter are issues of subjective preference and taste. It should, of course, be clear by now that there is no interesting *philosophical* difference between the two groups of issues; the concept of objective truth is equally essential in both, if claims about them are intelligible at all. Now, the crucial point is to see that those who find talk of truth and objectivity superfluous (or even suspect) in everyday moral, ethical or legal debates assume that those concepts exhaust their usefulness on the philosophical level.[60] These thinkers acknowledge that the concept of truth is necessary for people to be able to understand and perhaps disagree with each other; they claim, however, that this concept tells us nothing about the disagreements themselves and thus can play no role in their development and resolution.

The very last suggestion is surely correct, almost trivially so. Truth and objectivity are not arguments in a performative sense; they do not clinch debates, nor do they put one of the competing views to disadvantage. Yet the claim that they are not relevant to or useful in those debates must be resisted, because it ignores the special motivating force that the *conscious pursuit* of truth exerts over our attitude towards a given proposition. In this connection, consider the important difference in your attitudes towards the legality of pre-emptive self-defence, on which we agree that there are objectively true and false answers, and towards a comparison of ice cream flavours, which we think of as matters of taste. To make your case for or against pre-emptive self-defence, you feel compelled to

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[59] Cf. Cavell S., *Conditions Handsome and Unhandsome: The Constitution of Emersonian Perfectionism* (1990) at 65, where Cavell attributes to sceptics the tendency to 'hyperbolize words'.

[60] See e.g. Waldon J., 'The Irrelevance of Moral Objectivity', above n.57 at 170: "The question of moral objectivity...might be an interesting debating topic 'for a calm philosophical moment, away from the moral and interpretive wars'".

consider the arguments of those who are seriously engaged in the same debate and you wish your arguments to be considered fully by them too. You also want your disagreement to lead all participants in the debate reconsider their positions and to admit mistake or confusion whenever that is exposed. Now, provided that your fellow discussants are well-meaning and honest, in such a debate you will get the sense that you are all working towards a common end and directing your argumentative efforts towards the same target. Whatever the result of the debate, your feeling will be one of shared achievement or failure. By contrast, your attitude to disagreements about ice cream flavours will be very different. There you are likely to 'let go' of any debate more easily. You will not feel compelled to justify your view in any length, to engage deeply with other people's views on the matter or to revise your view when someone points an inconsistency in it. In fact, you may even admit that someone else is right in order to get rid of what seems to you a pointless disagreement. This marked difference in your attitude, or your *conversational ethic*, towards the two issues calls for some explanation.

There is, it will be objected from the start, a perfectly clear explanation for this difference, one that need not appeal to the concepts of truth and objectivity, namely that the legality of the use of force is an inordinately more *important* matter for us than finding the best ice cream flavour.[61] In a different world, where people did not know how or care to use force against each other and instead believed that ice cream is the nearest thing to the Gods' ambrosia, finding the best ice cream flavour would be the more important project and people's attitude in debates about it would resemble their present attitude towards the question of pre-emptive self-defence. Any talk of truth and objectivity in such debates can only be parasitic on identifying the project that interests people more.

However, the appeal to the notion of importance is simply too thin to explain the nature of the difference in our attitudes towards projects in which truth is at stake and other projects. In particular, it tells us nothing about the reasons that move us to take the distinctive attitude that we do towards a topic whenever we understand that the purpose of debating it is to discover the truth. For we may agree that we seek truth only when we think that it is important to do so, but we still need to explain *how* the judgement that a certain topic is important

[61] Cf. Rorty R., *Philosophy and Social Hope* (1999) at 35-7.

generates the special attitude that we adopt when trying to discover the truth about it. In short, we want to ask: why does the pursuit of truth on some topic move us to adopt the distinctive conversational ethic that we do when debating it?

Here is one explanation. The concept of truth does not just give sense to out utterances; it also moves us to recognize the *intersubjective* nature of our quest for right answers.[62] When participants in a debate recognize that the aim of their effort is the discovery of truth, they are moved to see that they stand a better chance of getting close to it by allowing their individual perspectives to penetrate and fertilize each other. Debates genuinely focused on discovering truth are characteristically open and constructive in exactly this fashion. They resemble less a group of perspectives 'battling it out' until one of them dominates than a process of constant reformulation of each perspective in the light of the other until a mutually satisfactory equilibrium is reached.[63] This is an attitude we cannot even begin to account for in (the obviously self-referential) terms of the 'importance' of the topic in question for us. It is an attitude that we need to attribute to the special motivational force that the pursuit of truth exerts on human beings and the special conversational ethic that constitutes its distinguishing mark. If this is correct, talking of truth and objectivity in the context of our ethical, moral or legal debates may not offer an argument for one or the other of the competing views, but it points to the constructive attitude or ethic that participants in a truth-oriented debate about need to adopt for their joint effort to be able to bear fruit.

The reason I have laboured this rather abstract point is its close connection with my discussion of the interpretive attitude towards international law.[64] Drawing on the fruits of this Chapter's excursion to the notions of truth and objectivity, we can now describe this attitude in more detail. We can say that, insofar as it aims to generate true statements about international law by finding

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[62] The intersubjective nature of objectivity and truth should be familiar from our discussion of Davidson's work, see Section 3 above. My suggestion is that the idea of truth as an intersubjective concept carries an ethical sense too.

[63] My argument here draws on Hans-Georg Gadamer's account of the dialogical structure of interpretation, which I discuss more fully in the next Chapter. Cf. Gadamer H.-G., *Truth and Method*, trans. by Weinsheimer J. – Marshall D. (2nd rev. ed., 1989) at 363ff. Note that the goal of a genuine and honest debate about the truth of the matter is not to achieve agreement *simpliciter*, but agreement *on the truth*. If mere agreement were the goal, we would not be able to explain what moves participants in such debates to eschew a quick mutual accommodation of their views in the first available opportunity.

[64] See Chapter Four, Section 4.

the justification that shows international legal practices in their most attractive light, the interpretive attitude must be characterized by the open and constructive conversational ethic that follows from the intersubjective nature of truth. This last point is especially important because it shows that the search for coherence between our conception of the point of international legal practices and our interpretation of their particular rules is not radically different from, and should not be contrasted with, a search for the true meaning of those practices. The search for correct interpretation and the search for truth are in fact the same intellectual exercise.

5. Conclusion: modesty and charity, not subjectivism

The purpose of this Chapter has been to sweep away the cobwebs that scepticism about values has laid over international legal argument. I have argued that there is no philosophical reason to deny truth-value to a theory of international law that accounts for the evaluative strands in legal argumentative practice. If this is correct, then the interpretive account I have proposed is not exposed to the charge of subjectivism.

But I think that one would be justified in arguing for a broader point. Appeals to values in both domestic and international political and legal debates are often permeated by a certain passivity, or at least a lack of the same degree of assertiveness that one finds in claims about descriptive facts (e.g. the possession of weapons of mass destruction by a rogue regime). In fact, taking a firm stand on matters of value is often perceived as abandoning the sphere of rational debate and retreating into the world of indemonstrable conviction. Sceptics like Koskenniemi supplied a philosophical story about truth that supposedly explains and supports this attitude. They said that we are not assertive about our evaluative beliefs -and we are suspicious towards those who are- because matters of value do not admit of right or wrong answers. They were prepared to mix this sceptical argument with epistemic claims about what is present in the mind and political claims about the freedom of agents to determine questions of value for

themselves. Consider the following example of Koskenniemi's argument against objective values:

> Liberal lawyers start from the assumption that questions of justice (normative necessities, objective interests) are ultimately matters of subjective opinion. [But] how can a theory of objective interests, that is a theory about someone else *knowing better* what my interests are or what it is that I will or have willed, be defended in an objective way? Does it not...look suspiciously like political opinions in disguise? Moreover, in order to "know better" we should have to accept that there exists a manner in which we can penetrate the subjectivity of the State to receive knowledge of the meaning, to the State itself, of its actions. But this would be an indefensible position within the liberal doctrine of politics. It would make legislation unnecessary. We could simply posit ourselves as dictators because we "know better" what States will or what lies in their interest – even better than what States have expressly said. It would make us Leviathans.[65]

This is a disappointing mixture of dubious philosophy and uncharitable reading of liberal politics.[66] On the one hand, it should be clear by now the sceptical story about "knowing better" one's mind or having to "penetrate the subjectivity" of another in order to understand the meaning of their utterances is not credible. On the other hand, we can easily explain the core intuitions that lend such scepticism about values its surface appeal without falling for the incoherent philosophical claim that values are subjective, a matter or taste and preference, the only way to respect other people's views and the like. In fact, we have at hand two far more plausible stories to account for our non-assertiveness and our liberalism about questions of value. The first story is theoretical. We can accept that all questions of value do admit of true and false answers and still say that, on some matters of value, legal and political institutions should leave individuals to discover those answers for themselves, by being as neutral as possible towards the competing views (all liberal political philosophers take such a position in respect of questions about the good). I will say something about this view in the conclusion. The second story is more practical. We need to remember that even though they admit

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[65] Koskenniemi M., *From Apology to Utopia*, above n.5 at 278.

[66] Unfortunately, Koskenniemi is not alone in this view. Similar claims are made by Unger R., *Knowledge and Politics* (1984) at 66-7; Sullivan W., *Reconstructing Public Philosophy* (1982) at 38-40 and Kelman M., *A Guide to Critical Legal Studies* (1987) at 64ff. Will Kymlicka has argued that the confusion of subjectivism ("arguments about whether X is good do not admit of a truth-value") with liberalism ("X can only be good for persons *if are allowed to discover and endorse it freely*") goes hand-in-hand with a more dangerous confusion between objectivism ("arguments about whether X is good admit of true and false answers") and perfectionism ("the law has a duty to encourage right ways of life and to discourage or prohibit mistaken ones"), Kymlicka W., *Contemporary Political Philosophy* (1990) at 201. I pick up this point in the conclusion.

of true or false answers, disagreements about values are sometimes very difficult to define with precision, let alone arbitrate. This is a fact of life that we must register not just in theory but also in the way we conduct our evaluative disagreements about the point and purpose of international legal practices. In fact, the very nature and orientation of our international legal and political debates requires that we adopt an open, critical and charitable conversational ethic. The availability of right and wrong answers, and our conviction that we are right and others are wrong, may entitle us to dismiss value-scepticism as incoherent, but it does not in the least give us license to lay aside the virtues of modesty, charity and circumspection.

Chapter Six

The semantic attack on evaluation: neutrality and interpretation

In this and the following Chapter I take issue with two important and popular claims against the suggestion that evaluative judgements are essential to the interpretation of international law. Although I deal with each one separately, I will present them together in order to highlight their common thrust and, at the same, the important differences in their structure.

The first claim can be stated in the following way. "Evaluative judgements may admit of a truth-value, but this does not necessarily make them relevant for the interpretation of international law, for it is in principle possible to interpret international legal rules without resorting to evaluative argument. What the law *is* and what the law *ought to be* can and must be treated as two separate questions". This claim, which I will discuss in the present Chapter, makes a point about the possibility of grasping the meaning of international legal rules in a neutral manner, without resort to evaluation on the interpreter's part. I will henceforth refer to it as the *semantic* thesis against values (*semasia* is Greek for 'meaning').

The second, more complex, claim might be stated as follows. "Suppose that in order to make true statements of international law one needs to rely on some evaluative judgements and presuppositions. We would still have good reason to want to exclude such judgements from the interpretation of international law, on the ground that their contentious nature would impair certain objectives that any system of law should secure, such as neutrality, legal certainty or predictability and social cohesion and order. That is, we would still be able to mount a compelling moral case in favour of the idea that the interpretation of international legal rules should be free of the interpreter's own evaluative judgements". This view might at first seem contradictory, for insofar as one claims that legal interpretation should serve the values of certainty, predictability and social order,

one must have already rejected the idea that such interpretation can be 'value-free'. So the aspiration 'value-free' interpretation here needs to be read differently. It must not be understood as a wholesale denial of the role of values in legal interpretation, but as the claim that the values of certainty, predictability and social order require the interpreter to do his work by drawing not on evaluative judgements that *he* regards as true, but on evaluative judgements that command *consensus* across the international community. I will take up this claim in the following Chapter.

The semantic thesis has been traditionally associated with positivist legal theory. This, however, is an oversimplification. It is of course true that legal positivists laboured for long under the spell of a naïve sort of scientism, which understood the truth of propositions as a matter of empirical verification[1], and that they were undoubtedly influenced in this by similar trends in early 20th century analytic philosophy.[2] But although some positivists still believe that one can describe the rules of a legal system in such an evaluatively neutral manner, modern positivists (sometimes called ethical or normative positivists) generally dismiss this semantic thesis. Instead, they provide a thoroughly political justification of positivism, arguing that the core purpose of law is to guarantee a modicum of social stability, order and certainty in the life of a community and that therefore legal interpretation owes its primary allegiance to those values.[3] In fact, the clearest traces of the semantic thesis associated with older positivism are now to be found either in lay (or less theoretically informed) accounts of legal interpretation, or in non-positivist legal thought. On the one hand, the core semantic claim that we can generally understand what a rule of international law means without making any sort of moral or ethical judgement continues to dominate 'lay' international legal opinion. A great number of international lawyers still believe that their task is evaluatively neutral, that they are just describing the

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[1] Perhaps the clearest exponent of that view is Georg Schwarzenberger, see Schwarzenberger G., *The Inductive Approach to International Law* (1957) at 4-13. See also the quotation from Oppenheim, below at n.6.

[2] To paraphrase early Wittgenstein, logical positivists thought that the world was everything that was the case, see Wittgenstein L., *Tractatus Logico-Philosophicus* (1917).

[3] See Campbell T., *The Theory of Normative Positivism* (1994); Simmonds N., 'Imperial Visions and Mundane Practices', 46 *Cambridge Law Journal* (1987) 465; Waldron J., 'Normative (or Ethical) Positivism' in Coleman J., *Hart's Postscript* (2001) at 410ff.; Dickson J., *Evaluation in Legal Theory* (2001). A notable exception is Kramer M., *In Defence of Legal Positivism* (2000).

content of international law 'as they find it' in the facts of international practice. On the other hand, and perhaps more worryingly, the semantic thesis is implicitly accepted by all theorists who regard themselves as external critics of international law, i.e. theorists whose aim is to criticize *the law* rather than one or more of its interpretations as being inherently unjust or otherwise prejudiced.[4] Such external perspectives appear to share the semantic thesis, inasmuch as they suppose that the content of international law can be determined independently of the value-judgements that give their criticisms special bite.

1. The semantic thesis and neutrality in interpretation

International lawyers who mistrust theory and consider themselves to be 'practical' people, capable of distinguishing good from bad legal arguments when they see them, tend to believe that the interpretation of international legal rules is something that can be done without engaging one's moral or ethical beliefs; in short, without making a evaluative judgement. They think that interpreting international law is just trying to understand what the rules say, not judging whether the rules are just or unjust, good or bad, fair or unfair. The latter projects may be fine and important in their own right (after all, one can only hope to make the law better through evaluative criticism) but they are not the tasks of the international lawyer. Proper legal interpretation is interpretation that lets the interpreted legal texts, or the facts of the interpreted practices, speak for themselves and does not attempt to substitute their 'voice' with that of the interpreter. These intuitions have found strong support in positivist international

[4] For the distinction between external and internal critiques of international law, see Introduction, section 1. Feminist international theorists have not always steered clear of this line of thought. Charlesworth and Chinkin have argued that "sex and gender are an integral part of international law in the sense that men and maleness are built into its structure; to ignore this is to misunderstand the nature of international law", Charlesworth H. – Chinkin C., *The Boundaries of International Law: A Feminist Analysis* (2000) at 19. Inasmuch as this view suggests that maleness is a conceptually necessary feature of international law, it seems to concede that the interpretation of international law is not sensitive to the values and beliefs of the interpreter on matters of sex and gender (i.e. that it is not possible to see international law through a more enlightened perspective). However, given that Charlesworth and Chinkin clearly regard their account as reconstructive rather than simply critical (at 20-1), we should construe the above passage as an internal critique of sexist legal interpretations, rather than an external critique of international law as an institution.

legal theory. Lassa Oppenheim expresses their connection with positivist thought very clearly:

> If we exclude the law of nature and what is called "natural" international law altogether, and if we consider international law real law, the method to be applied by the science of international law can be no other than the positive method... The positive method is that applied by the science of law in general, and it demands that whatever the aims and ends of a worker and research may be, he must start from the existing recognized rules of international law as they are to be found in the customary practices of the states or in law-making conventions.[5]

Then he points to a source of jeopardy to the success of this essentially neutral task:

> I have a last sin of method to discuss, which is frequently committed by workers in the field of the science of international law: Errors of judgment created by political, humanitarian, or other bias. Many a controversy which is ventilated at greater or shorter length owes its origin to such errors of judgment. If the positive is the right method of the science of international law, we must endeavor to get rid of bias of all kinds... Our science will not succeed in this point, unless all authors endeavor to write in a truly international and independent spirit, and unless they make an effort to keep in the background their individual ideas concerning politics, morality, humanity and justice. We must take the facts of life as they are and the rules of international law as we find them practiced in everyday life.[6]

Prosper Weil has voiced the same aspiration more recently. He has written:

> [I]f the heterogeneity of the components of international society, far from being an obstacle to the formation of international law, is on the contrary its *conditio sine qua non*, it follows that international law will be unable to carry out its function of coordination unless it is *neutral*. This certainly holds true for religious neutrality... But ideological neutrality is also necessary to guarantee the coexistence of heterogeneous entities in a pluralistic society. Both religious and ideological neutrality are inherent in the concept of international law.[7]

Bruno Simma and Andreas Paulus have put the argument slightly differently. Explaining the positivist position in relation to the problem of responsibility for human rights abuses in internal conflicts, they have argued:

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[5] Oppenheim L., 'The Science of International Law: Its Task and Method', 2 *AJIL* (1908) 313 at 333.
[6] Ibid at 353, 355.
[7] Weil P., 'Towards Relative Normativity in International Law?', 77 *AJIL* (1983) 413 at 420. Weil's view is a classic example of theoretical confusion, for it appears to make an argument from the need to preserve and respect diversity and heterogeneity to the idea that law should be evaluatively neutral. This obvious *non-sequitur* makes Weil's view difficult to categorize. Is he a normative positivist, as his appeal to heterogeneity would suggest? Or does he believe in the semantic thesis, as his appeal to the possibility of neutrality implies?

> Our humanitarian instincts strongly demand that we treat the legal consequences of distinctions between international and internal conflicts, between wartime and peacetime atrocities, as irrelevant. On the other hand, our professionalism does not allow us simply to follow this urge without regard to 'international law as it is', as compared to 'how it should be'... Thus, *the lawyer must, as far as possible, openly distinguish between the "law in the books" and her personal prejudices or political motivations.*[8]

For Simma and Paulus, the need for neutrality in legal interpretation is entailed by the very distinction between what the law *is* and what the law *ought to be* (*lex lata/lex ferenda*). Since legal interpretation is concerned only with the first task, it should be kept free from the evaluations and judgements inherent in the second.[9]

Whatever the merits of the semantic thesis of neutrality, this last point is clearly disingenuous. The distinction between *lex lata* and *lex ferenda* states a conclusion rather than an argument as far as the nature of legal interpretation is concerned. We all agree that the task of international lawyers is to interpret the law as it stands, or to let it speak on its own, without distorting its voice through their own personal motivations and aims.[10] But what is really at issue is not the distinction between *lex lata* and *lex ferenda*, but it is possible to interpret the *lex lata* in a value-free manner. The question, to continue the aural metaphor, is whether we can hear the law's 'voice' without relying on some evaluative grounds and presuppositions. If such value-free interpretation is indeed possible, then we would be justified in thinking that evaluative arguments are really about what the law ought to be, not about what it is. But this is a big 'if' and a lot of substantive argument is needed to support it. The blunt appeal to the distinction between *lex lata* and *lex ferenda* as an indication that the law should be free of evaluative judgements makes sense only on the assumption that the semantic thesis has already won the argument.

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[8] Simma B – Paulus A., 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', 93 *AJIL* (1999) 302 at 303, 306 (emphasis added).

[9] In the words of John Austin, "the existence of law is one thing; its merit and demerit another. Whether it be or be not is one enquiry; whether it be or be not conformable to an assumed standard, is a different enquiry", Austin J., *The Province of Jurisprudence Determined* (Rumble W. ed., 1995) at 157. Cf. Weil P., above n.7 at 421 for the view that positivism "is simply intended to emphasize the necessity of envisaging international law as positive law, i.e., as *lex lata*. This means that...the distinction between *lex lata* and *lex ferenda* must be maintained with no abatement of either its scope or its rigour" (notes omitted).

[10] The point is reflected very strongly in the Judgement of the International Court in the *South-West Africa* case, ICJ Reports (1966) at 44 par.80: "...the Court is not a legislative body. Its duty is to apply the law as it finds it, not to make it". Earlier the Court had noted that if it were to base its decision on humanitarian considerations, "it is not a legal service that would be rendered" (at 34, par.49). Cf. Simpson G. (ed.), 'Introduction' in *The Nature of International Law* (2001) at xvi-xvii.

2. Two versions of the semantic thesis: intentionalism and conventionalism

What is the argument in favour of the semantic thesis and its idea that the interpretation of a rule need not involve a judgement as to its substantive merits? It seems to me that advocates of semantic neutrality start from a compelling idea: *legal interpretation should allow the interpreted text or practice to speak for itself, without substituting its voice with that of the interpreter.* This is a powerful intuition that any plausible account of international legal interpretation should take seriously. Interpreting international law, and indeed any social practice, is not a report one's own feelings and predispositions towards the practice, but an effort to understand a *subject-matter*, to get to grips with something that is distinct from (or "other" than) the person of the interpreter. In that sense, correct interpretation must be interpretation that lets itself be governed by the nature of the subject-matter (*die Sache*), rather the beliefs and prejudices of the interpreter.

Advocates of semantic neutrality hold that this fundamental intuition has two corollaries. On the one hand, it raises a question: how can one achieve a direct and *unmediated* contact with the true meaning of the interpreted text or practice? On the other hand, and more importantly, it expresses a general hermeneutic ideal: that the discovery of the correct meaning of a text or utterance requires the *self-effacement* of the interpreter, the careful elimination of his personal biases, presuppositions or prejudices about the meaning of the 'object' of interpretation. One aspect of this neutral interpretive ideal is that correct interpretation must always be *independent* of the person of the interpreter and "capable of determination...on the basis of legal standards that are valid and applicable independently of the purposes of the judge, of the parties or any particular State".[11] This is not to deny that legal interpretation will always need to rely on a criterion of salience or significance and will therefore require the exercise of some judgement on the part of the interpreter. The point, rather, is that this judgement of salience is not *evaluative* in character but *reconstructive.* Its proper aim is not to engage the interpreter's evaluative beliefs but to bring to light a meaning that

[11] Schachter O., 'General Course in Public International Law', 178 *Recueil des Cours* (1982-V) at 58.

pre-exists the interpreter's decision to engage with a text or practice, and to do so in a way that the pre-existing meaning is rendered pure and unchanged in the present. In other words, the semantic thesis of neutrality sees interpretation as the recovery in the present of a meaning previously 'posited' in the object of interpretation.

Who posits the meaning of the interpreted proposition and how should one go about reconstructing it? Advocates of the semantic thesis have put forward two suggestions in this regard. The first is that the meaning of the proposition is posited by its author and, therefore, that correct interpretation requires the recovery or the reconstruction of the author's original intention (a view one might call *intentionalism*). The second suggestion is that the meaning of a proposition is fixed not s much by the author's original intentions but by the attitudes of the community of users of the language in which the proposition has been stated. On this view, which might be called *conventionalism*, correct interpretation must rely on social conventions about the correct use of the words employed by the author, i.e. it must reconstruct and draw upon the agreements implicit in the ways competent speakers use the language of reference.

We have come across intentionalism and some of its discontents in the context of our discussion of customary international law in Part II and I will not repeat the full discussion here.[12] There we concluded that despite its initial plausibility, the blunt appeal to intentions is unable to resolve these important questions of interpretation. In particular, we identified two practical difficulties with it. First, when the authors of a text or practice are more than one, as is almost invariably the case in international law-making, we need to know *whose* intentions should count as those of the original author. Second, even in the unlikely event that all authors of the interpreted text or practice shared the same intentions about its meaning, we still need to determine the pitch of our appeal to their intentions, i.e. we need to know *which* of their shared intentions (some of which will be more abstract than others) we ought to follow. In all, we have found that intentionalism lacks the resources to analyze and help resolve interpretative disagreements about the content of general international law.

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[12] See Chapter Four, sections 2-3.

Conventionalism would appear to fare much better as a semantic theory. Its big advantage over intentionalism is that it has consciously taken on board many of the insights of 20th-century philosophy into the intersubjective nature of language and the public character of the standards for its correct use.[13] Conventionalists argue, we have no reason to suppose that our statements and use of concepts can ever be right or wrong *in themselves*, without reference to the practices of our linguistic community. For conventionalists, meaning resides in the 'conventions' or implicit agreements that competent users of a language (linguistic communities) observe when they speak it. It is vain to look for some other non-conventional ground on which to tell whether the use of a term or a concept is right or wrong. Drawing on the work of Stanley Fish[14], Ian Johnstone has recently applied this conventionalist view of legal interpretation to international law.[15]

However, this version of the semantic thesis too is unsatisfactory. A first difficulty with conventionalism is that it seems to offer a weak explanation of disagreement amongst reasonable lawyers, inasmuch as it entails that "divergence from the conventions and practices of the relevant interpretive community signifies that the interpreter has taken himself or herself out if it altogether".[16] This claim sounds doubly implausible. On the one hand, the idea that people who disagree about the interpretation of particular legal rules cannot belong to the same interpretive community is counterintuitive. As we have seen, the very existence of *disagreement* amongst any two interpreters must already presuppose that these interpreters share a common language and, therefore, a generous background of beliefs.[17] In any event, the conventionalist claim risks trivializing the notion of community membership, in the sense that it reduces the rich and complex relationships that make up this membership to the fact of intersubjective

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[13] See Chapter Five, section 3.
[14] See especially Fish S., *Is There A Text in This Class? The Authority of Interpretive Communities* (1980); id., *Doing What Comes Naturally: Change, Rhetoric, and the Practice of Theory in Literary and Legal Studies* (1989).
[15] Johnstone I., 'Treaty Interpretation: The Authority of Interpretive Communities", 12 *Michigan JIL* (1991) 371; id., 'Security Council Deliberations: The Power of the Better Argument', 14 *EJIL* (2003) 437.
[16] Johnstone, 'Treaty Interpretation', above n.15 at 377-8.
[17] See Chapter Five, section 3.

agreement about individual propositions.[18] On the other hand, the idea that when we disagree about a certain proposition we must belong to different interpretive communities has a distinctly debilitating effect on our conversational ethics, in the sense that it deprives our competing views of any chance of exercising critical impact on each other. If Fish and Johnstone are right, it is difficult to see how people who disagree could offer any argument to each other; their only option would be to say that they do not understand each other's perspective.[19]

But more importantly, conventionalism seems weak even in cases where interpreters of a practice happen to *agree* with each other about what the practice means. Suppose that all international lawyers agree that a treaty provision should be interpreted in a certain way. Whenever they are asked to identify the meaning of that provision, they all give more or less the same response and they all find this interpretation so natural that think it "goes without saying". Is it right to say that these international lawyers agree on their interpretations because there is a convention as to how the treaty must be read? Or should we say that their agreement is not so much evidence of a *convention*, but of a convergence of their independent *convictions* about the proper interpretation of the treaty? The difference between the two options is immense. Ronald Dworkin has explained it as follows:

> If lawyers think a particular proposition about legislation is true by convention, they will not think they need any *substantive* reason for accepting it [e.g. that it is most consistent with a certain principle of law]. So any substantive attack on the proposition will be out of order..., jut as an attack on the wisdom of the rules of chess is out of order within a game. But if the consensus in one of conviction, then dissent, however surprising, will not be out of order in the same way, because everyone will recognize that a attack on the substantive case for the proposition is an attack on the proposition itself. The consensus will last only so long as most lawyers accept the convictions that support it.[20]

The choice between explaining consensus as evidence of a social convention and explaining it as a convergence of independent convictions cannot (on pain of circularity) be made on conventional grounds. For one thing, even if we accept the conventionalist story, we still need to know *at what level* we ought to look for a

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[18] I explore the relation between disagreement and social peace and stability in Chapter Seven, section 4.
[19] Cf. Bahdi R., 'Truth and Method in the Domestic Application of International Law', 15 *Canadian Journal of Law & Jurisprudence* (2002) 255 at 262-3.
[20] Dworkin R., *Law's Empire* (1986) at 136.

convention amongst international lawyers. Should we look for convergence at the level of particular interpretations, or should we look for convergence at the level of the nature of interpretation itself? Suppose, for example, that all international lawyers agree that proper interpretation turns on the conventions of their 'international interpretive community'. Do they agree because there is a convention to that effect or because each of them is convinced that there are substantively good reasons to hold this view, even if other lawyers would happen to disagree? If the former were the case, then the only interesting question an interpreter could ever pose would be whether international lawyers agree or disagree on what the law means. The competing views *themselves* would never have to be discussed, because the very fact that they are contentious would immediately disqualify them from being correct interpretations. By contrast, if the interpretive agreement of international lawyers were one of independent conviction, then there would be ample room for argument, substantive debate and reasonable disagreement when at some point a rival interpretation came along. But whichever of the two views is correct, it should be clear that conventionalism lands us in a dilemma that it does not have the resources to resolve. One way or another, the mere fact of agreement of international lawyers on the matters of interpretation is itself something that needs to be given sense; it cannot provide an argument for any view about how the treaty should be interpreted.

No doubt, conventionalists will feel that so far they have been given unfair treatment. To start with, they will complain that it is not enough to say that their theory of interpretation has weaknesses; one would also need to show that there is *another* semantic account, which avoids those weaknesses and still lives up to the core intuition that the interpreter should allow the object of interpretation to speak for itself. If such a better account is not forthcoming, then despite its flaws conventionalism will emerge as the closest approximations of this interpretive ideal. Granted, conventionalists may not be able to explain how meaning succeeds in coming across even when there is widespread disagreement about what a legal text or practice means, but they do explain the rest of our interpretive practices with relative ease and certainty. "After all", we can hear them complain, "*most* international lawyers can apply *most* of international law in *most* cases without having to make any sort of moral or ethical judgement."

This is a complaint that we must take seriously. Perhaps conventionalism –as the philosophically more plausible of those two versions of the semantic thesis- cannot account for legal interpretation in cases of disagreement because these cases are genuinely special and thus require exceptional treatment.[21] Indeed, perhaps we should not even demand that a theory of legal interpretation account for such extraordinary cases; it should be enough that a theory accounts for the countless banal or run-of-the-mill cases where the interpretation of international law gives rise to little or no dispute.[22] Such a blunt retreat to the uncontentious areas of legal interpretation may make conventionalism sound completely uninteresting, but it does not show it to be false. As long as the conventionalist is able to point to totally uncontroversial cases of uniform agreement, his thesis will retain some plausibility and it will be up to his rivals to show that the meaning of those uncontroversial propositions is not fixed by convention but by a convergence of independent conviction. In fact, the chances that the conventionalist will be able to point to a wealth of such uncontroversial cases are extremely good. Even conceding that conventionalism cannot tell us anything about the increasing amount of instances where the content of international law is contested or unclear, it remains true that international lawyers for the most part happen to agree on what international law says. Better still, a very high level of agreement must always be presumed to exist, as long as international lawyers manage to understand each other's claims.[23] Conventionalists can therefore afford to restrict their semantic thesis as much as necessary and still find enough core of agreement to back up their claim that they can explain the greater part of international interpretive activity.

A credible attack on the conventionalist semantics must therefore be bolder. It must not confine itself to the claim that conventionalism cannot explain the nature of interpretation in hard cases, no matter how wide that category turns

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[21] Some positivists have taken this line against Ronald Dworkin's claim that moral standards are central to legal interpretation. They have claimed that Dworkin really offers a theory of 'adjudication' rather than a theory of law, i.e. a theory that tells judges how to decide cases instead of a theory that identifies the truth conditions of propositions of law. See Hart H.L.A., The *Concept of Law*, above n.6 at 240-2; Raz J., 'Two Views on the Nature of the Theory of Law: A Partial Comparison' in Coleman J. (ed.), *Hart's Postscript* (2001) at 27ff. For Dworkin's response, see Dworkin R., 'Hart's Postscript and the Character of Political Philosophy', 24 *Oxford Journal of Legal Studies* (2004) 1.

[22] Cf. Simmonds N., above n.3 at 484-6.

[23] See Chapter Five, section 3.

out to be, for the wealth of the remaining easy cases will guarantee that conventionalism explains more about international legal interpretation than any competing semantic theory. Rather, such an attack must claim that the broad semantic thesis that evaluative judgements are not a necessary part of interpretation is *radically* mistaken, i.e. that it is provides a flawed account of all instances of interpretation.

In what follows, I outline the structure of such a radical attack on the semantic thesis by drawing on the hermeneutic philosophy of Hans-Georg Gadamer.[24] My discussion questions the connection between the fundamental intuition that interpretation should allow the interpreted text or practice to 'speak for itself' and the conventionalist/intentionalist semantic thesis. In particular, it claims that hearing the true voice of the interpreted legal text or practice does not require the self-effacement of the interpreter and the elimination of his presuppositions, since it is exactly those presuppositions that allow the interpreted text or practice to assert its 'otherness' *vis-à-vis* the interpreter. Although the style of Gadamer's account in *Truth and Method* is sometimes rather difficult, its general thrust is quite simple and some of its points will surely sound familiar to readers of Wittgenstein, Finnis and Dworkin. The reason I have devoted particular attention to Gadamer's hermeneutics is that it provides a fuller insight to the fundamental nature of interpretation and the relation between the person of the interpreter and the interpreted text or practice. Having said that, I should note that my purpose here is not provide a full overview of Gadamer's great contribution to hermeneutics, but to borrow some key elements of his thought, to highlight their interrelation and to explain their bearing on the problem of legal interpretation.

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[24] In *Interpretation in Law*, Nicos Stavropoulos has developed a suitably radical account of interpretation that attacks positivist semantics by drawing on Hilary Putnam's and Saul Kripke's theories of truth and meaning, see Stavropoulos N., *Interpretation in Law* (1999). Although I cannot do justice to this view in the present context, I believe that the argument in Chapter Five goes some way toward explaining why the 'internal realist' view of truth and meaning held by Putnam and Kripke -and relied upon by Stavropoulos- is misguided, in the sense that it grapples with a wrong formulation of the question of truth. See Chapter Five, section 2.

3. "We understand differently, if we understand at all": Hans-Georg Gadamer on interpretation

Recall the ideal of interpretation that informs the aspiration to interpretive neutrality. Interpretation must allow the interpreted text or practice to 'speak for itself', free of distorting mediation. Its purpose must be to convey the true meaning of the text or practice *itself*, not the interpreter's personal view of it. Those who advocate the neutrality of legal interpretation believe that this ideal requires the interpreter to efface his own presence in the interpretation. That is, in order to lay a claim to truth, an interpretation of a text or practice must not be affected by the contingencies of the interpreter's own situation. This does not mean that the interpreter should have no view of his own whatsoever. Like any person, the interpreter will have personal beliefs and presuppositions about their meaning, which might sometimes turn out to be correct. But in order to understand the text or practice for what it really is, he must not allow these presuppositions to affect the performance of his role as an *interpreter*, in the same way that a scientist's personal beliefs and preferences should not get in the way of his scientific observations about the natural world. In short, advocates of neutral semantics consider it a requirement of true interpretation that the interpreter should be able to rise above his own prejudices and presuppositions.

In *Truth and Method*, Hans-Georg Gadamer takes issue with this idea. He claims that understanding and interpretation do not work in a 'scientific' manner. Interpretation requires the interpreter to engage with the interpreted text or practice, to place that text or practice *within a stream of history and tradition* to which the interpreter himself belongs. This means that interpreting a social practice is not so much a matter of knowing *something*, i.e. of acquiring complete mastery over some 'object' of knowledge, as it is a matter of knowing *how*, of being able to engage in an open exchange of question and answer that allows the interpreted text or practice to reveal its full meaning and significance.[25] The engaged nature of our ability to understand and interpret each other contradicts the model of neutral interpretation, according to which the interpreter's own

[25] For distinction between "knowing that" and "knowing how" see Wittgenstein L., *Philosophical Investigations* (1954) par.76-80.

presuppositions and prejudices are obstacles to the truth and the success of interpretation. Good interpretation, Gadamer urges, is not interpretation that has become free of all prejudice, but interpretation that is conscious of its own prejudices and can therefore bring them to the foreground of understanding and scrutinize them for their efficacy in allowing the true voice of the interpreted text or practice to be heard.

For ease of exposition, I will divide Gadamer's account in two parts, the first dealing with the phenomenology of interpretation, the second dealing with Gadamer's rehabilitation of the idea of prejudices as enabling aspects of our ability to interpret.

3.1 The phenomenology of interpretation: tradition and the hermeneutic circle

Can an interpreter of a social practice efface personal preconceptions from his work in the way a natural scientist could? To start with, consider the suggestion that the aim of understanding in human sciences is very different from the aim of understanding in the natural sciences. Gadamer explains the difference between them as follows:

> In the human sciences we cannot speak of an object of research in the same sense as in the natural sciences, where research penetrates more and more deeply into nature. Rather, in the human sciences the particular research questions...that we are interested in pursuing are motivated in a special way by the present and its interests. The theme and object of the research are actually constituted by the motivation of the inquiry... [F]or this reason it is not possible to speak of an "object in itself" toward which its research is directed.[26]

One aspect of this contrast should be immediately apparent. The purpose of enquiry in the human sciences is never to acquire knowledge by standing over and above a certain 'object' of attention. It is rather to illuminate what is significant in the history of human action from the point of view of our present interests and purposes. The special significance of the interpreter's present emerges "at the beginning of any such research as well as at the end, in choosing the theme to be

[26] Gadamer H-G., *Truth and Method* (trans. Weinsheimer-Marshall, 1987) at 285.

investigated, awakening the desire to investigate, gaining a new problematic".[27] To put it more simply, it is always our present interests and concerns that determine what is *worth* looking into (or looking for) in the world of historical fact.[28]

But the contrast between natural sciences and humanities goes deeper than that. We can make our way into its deeper aspect by reflecting on the sense in which we talk of 'progress' in the natural sciences compared to the humanities. Generally speaking, we associate progress in physics, chemistry or biology with the acquisition of wider and deeper knowledge of facts about the workings of nature or the development new abilities to manipulate natural elements. Progress in humanities, say in political philosophy or law, has a different meaning. We can make genuine progress in our thoughts about the concepts of justice or legality without acquiring any new information about what the external world is like. In fact, such progress may take the form of a *return* to ancient thought, e.g. when we come to realize that a philosopher who lived thousands of years before us, and who probably had nothing like our informational resources, may actually have had much better insight into the subject matter of our research. A political philosopher cannot begin to think seriously about his topic without engaging with Aristotle's *Nicomachean Ethics* or Plato's *Republic*, just as an international theorist cannot begin to think seriously about international law without engaging with the works of James Brierly or Hersch Lauterpacht. By contrast, a physicist can excel in his science without ever looking at Aristotle's *Physics* and a doctor can pursue his calling without having the slightest knowledge of the works of Hippocrates. Although we would perhaps refer to all these works as 'classics' in their field, in humanities the term carries a significance that is only partly present in the natural sciences.[29] It is not an exaggeration to say that the classics of political philosophy or international law *demand* to be studied and interpreted in a much more pressing and immediate way than the classics of medicine and physics.

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[27] Ibid at 283 (emphasis added). John Finnis expresses exactly this point when he says that all description presupposes a 'criterion of significance', see Finnis J., *Natural Law and Natural Rights* (1980) at 18-9.

[28] This is why we do not care about how many stones there are in the world. Such a question may actually be extremely hard to answer (are grains of sand stones? what about planets?), but we do not ask it since there is no human purpose that would be furthered by pursuing it.

[29] Gadamer, above n.26 at 285ff.

This point applies equally to the respective 'objects' of study of natural and human sciences. Theories of physics can be intelligible without engaging with what previous physicists thought and believed about the subject matter of their research; at any rate, the truth of a scientific theory cannot be ruled out just because it relies on sets of assumptions that have never been entertained before. By contrast, inasmuch as they are concerned with understanding *social* practices, theories of justice and law must not only engage with the beliefs that people have about what conduct is just, fair or legal; it must also show those beliefs to be by and large correct. To put it differently, these beliefs "make up" the subject matter that theorists of justice or law are studying, in a way that scientists' beliefs do not make up the subject matter of physics or chemistry. Thus we might say that our beliefs about justice or law *demand* to be accounted for by theories of those concepts, whereas our everyday intuitions about the molecular structure of buttercups do not. A theory that failed to respond to the ways people think about justice or law would be disqualified from counting as a theory of their practice; this would not happen to a theory of physics that showed all of our beliefs about the molecular structure of buttercups to be mistaken. The resulting picture is this: in contrast to the natural sciences, an attempt to understand and interpret a social practice must engage not only with classical interpretations of that practice but also with what members of the relevant societies believe about it.[30]

What is the source and character of the demand that social practices and their classic interpretations make on the student of humanities? Gadamer finds this source, which he regards as "the soul of all hermeneutics", in the realization that *the other person may have a better appreciation* of the topic that concerns us.[31] This better appreciation, however, is not just a matter of the other person possessing more *answers* about that topic than we do. It is primarily a matter of that person asking the right *questions* about the topic or having the right *perspective* on it. The idea again is quite straightforward. What makes social practices and their classic interpretations required items of study is the fact that their better acquaintance allows us to approach the facts of the social practice from the right perspective or with the right questions in mind. We immerse

[30] Cf. Winch P., *The Idea of a Social Science and its Relation to Philosophy* (1958) at 86-91.
[31] Gadamer, above n.26 at 302-6.

ourselves in Aristotle's ethics or Lauterpacht's views about the function of international law not because these thinkers had more information than we do, because we believe that their perspective will help us gain a better grip on our ethical and our legal practices. In much the same way, we look to the ways rules of international law have been interpreted and applied in the past by States and international courts and tribunals in order to gain a proper perspective on the point and purpose that those practices must be understood to reflect. In both cases, our interest in the past is grounded on the realization that our understanding of the practice needs to be informed by the insights of its competent past interpreters, who once stood where we are standing and faced the same challenges that we are facing now. Following Gadamer, we can call the body of social practice and previous interpretations that the interpreter must engage with a stream of *tradition.*

If understanding a social practice requires us to *engage* with the stream of tradition that defines and sustains it, the next challenge is to describe more precisely what is involved this act of engagement. Gadamer here borrows and develops an idea from the work of Hegel and Heidegger. Our engagement with tradition, he says, has the structure of a dialogue or a continuous process of *question and answer.*[32] This idea is really the fusion of the need for engagement with tradition with the insight that all research in the human sciences is motivated by the problems and questions of our historical present. Gadamer draws particular attention to two features of this dialectical process. First, that our engagement with tradition always begins with a question, i.e. with a request for information. Second, that quite often tradition will not simply provide answers to our questions, but it will poses questions of it own, prompting us to reconsider the perspective from which we address it.

An example will clarify this last and most significant point. We are all aware that sometimes people approach a text or practice with the wrong expectations and thus risk missing its real meaning. Suppose, for example, that you were presented with this volume with the instruction that it is a collection of poetry. As soon as you began to read past the second or third phrase, you would realize that the text steadfastly refuses to answer the questions that you think are

[32] Ibid at 356ff.

worth asking of any work belonging to the genre of poetry. It has no meter, it does not rhyme, it has footnotes, it does not address matters that poetry normally does and so on. In short, your encounter with the text would defeat almost all your expectations about what a poem should look and read like. As an experienced interpreter, you would probably come to conclude that the only way to make the text intelligible is to ask different questions of it, questions that would allow its statements to become intelligible as a whole.[33] That is, you would try to read it as a study in international legal theory.

Gadamer sees in examples of this kind something that is fundamental to all understanding and interpretation. Following Martin Heidegger's reworking of an Aristotelian idea, he suggests that interpretation always takes the form of a *hermeneutic circle*, which involves a continuous movement between the presuppositions and expectations with which we approach *parts* of the interpreted text or practice and our overall conception of its meaning as a *whole*.[34] This idea must be intuitively appealing to an international lawyer. For one thing, our attempts to understand and account for, say, customary international practices display very clearly the cyclical form that Gadamer speaks of. Whenever we make statements to the effect that there is a 'trend' in State practice; that customary law has 'developed' in one or another way; that there has been a 'change' in the practice; that the practice has been 'consistent' or 'inconsistent' etc., we are thinking in the terms of the hermeneutic circle. That is, we are approaching particular international events in the expectation that they form a unity of meaning, which we then appeal to in order to invest each individual event with its significance. But our hermeneutic journey does not take us only from the whole to the parts. Sometimes, we find that the evidence defeats our expectations

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[33] To my surprise, even Microsoft Word seems to display this charitable attitude. When a certain number of consecutive words appear to have been misspelled, it will automatically search for a language in which the text emerges as grammatically correct.

[34] Gadamer, above n.26 at 291: "We learn that we must construe a sentence before we attempt to understand the linguistic meaning of the individual part of the sentence. But the process of construal is itself already governed by an expectation of meaning that follows from the context of what has gone before. It is of course necessary for this expectation to be adjusted if the text calls for it. This means, then, that the expectation changes and that the text unifies its meaning around another expectation. Thus the movement of understanding is constantly from the whole to the part and back to the whole... The harmony of all the details with the whole is the criterion of correct understanding. The failure to achieve that harmony means that understanding has failed". The concept of the hermeneutic circle captures exactly the same intuition as John Rawls's famous concept of a 'reflective equilibrium' between our first intuitions and our theoretical accounts of a practice, see Rawls J., *A Theory of Justice* (rev. ed., 1999) at 18-9.

about the meaning of the practice, e.g. we start from the assumption that a certain ICJ judgement is a correct statement of customary international law but then find that this assumption shows the majority of States to act in 'violation' of the law. We realize that something has gone wrong and rework our assumptions in the light of the new data. This time the circle has taken us from the parts to the whole.

Gadamer goes on to claim that the cyclical structure of understanding has a number of formal implications about the role of the interpreter and his presuppositions in the process of interpretation. He calls the first of those the "fore-conception of completeness and truth" and explains it as follows:

> [O]nly what really constitutes a unity of meaning is intelligible. So when we read a text we always assume its completeness, and only when this assumption proves mistaken –i.e., the text is not intelligible- do we begin to suspect the text and try to discover how it can be remedied... Just as the recipient of a letter understands the news that it contains and first sees things with the eyes of the person who wrote the letter –i.e., considers what he writes as true, and is not trying to understand the writer's peculiar opinions as such- so also do we understand traditionary texts on the basis of expectations of meaning drawn from our prior relation to the subject matter. And just as we believe the news reported by a correspondent because he was present or is better informed, so too are we fundamentally open to the possibility that the writer of a transmitted text is better informed than we are, with our prior opinion... The prejudice of completeness, then, implies not only this formal element –that a text should completely express its meaning- but also that what it says should be the complete truth... *Hence the most basic of all hermeneutic preconditions remains one's own fore-understanding, which comes from being concerned with the same subject. This is what determines what can be realized as unified meaning and determines how the fore-conception of completeness is applied.*[35]

The "fore-conception of completeness and truth" forms the heart of the objection towards the neutral ideal of interpretation. Gadamer's point shares a lot with an idea that we have already come across as the 'principle of charity'. To understand a text or a practice, the interpreter must credit the author with a largely true view of the world and therefore regard the bulk of his statements as correct, i.e. he must hypothesize a point, purpose or value that *unifies* that text or practice and, as far as possible, shows it to be the *complete* truth about the matter. The crucial feature of charity and the "fore-conception of completeness and truth" is that they constitute the interpreter's *own* contribution to the interpretation, insofar as they

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[35] Gadamer H.-G., above n.26 at 294 (emphasis added).

reflect hermeneutic conditions that must be in place *in advance* of any successful engagement with the interpreted text or practice.

We have come across several examples of this aspect of interpretation.[36] We have seen how, in its *Reservations* Opinion, the Court found that the object and purpose of the Genocide Convention was to allow for universal participation to the Convention, even at the cost of some concessions regarding the uniformity of the obligations that the Convention imposed on particular States. The Court's reasoning provides a perfect example of the work of the interpretive principle of charity and the fore-conception of completeness and truth:

> The object and purpose of the Genocide Convention imply that it was the intention of the General Assembly and of the States which adopted it that as many States as possible should participate. The complete exclusion from the Convention of one or more States would not only restrict the scope of its application, but would detract from the authority of the moral and humanitarian principles which are its basis. It is inconceivable that the contracting parties readily contemplated that an objection to a minor reservation should produce such a result. But even less could the contracting parties have intended to sacrifice the very object of the Convention in favour of a vain desire to secure as many participants as possible.[37]

Note that it would be a mistake to think that, in this passage, the Court somehow 'substituted' its own view of the Convention for what the General Assembly and the participating States 'actually' intended. The point, rather, is that in order to give *content* to those intentions, the Court had to credit the parties with what *it* considered to be the true beliefs about the object and purpose of the Genocide Convention. In other words, making sense of what the parties intended required the Court to interpret the Convention in the light of what the Court regarded as the most compelling justification for it.

Here is another example. In its *Namibia* Advisory Opinion, the Court needed to interpret Security Council Resolution 276 (1970) in order to determine the precise extent of the duty of UN member-States to refuse to enter into treaty relations with South Africa, in contexts that might imply that the presence of South Africa in Namibian territory was legal. One particular question, on which the Resolution was silent, was whether States ought to perform their human rights

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[36] See the discussion of the *Arrest Warrant* Judgement and *Reservations* Opinion in Chapter Four, sections 2-3.

[37] *Reservations to the Convention for the Prevention and Punishment of the Crime of Genocide*, Advisory Opinion, *ICJ Reports* (1951) at 23-4.

obligations towards the Namibian population, even though that they had formally incurred those obligations *vis-à-vis* South Africa. Now, suppose that the Court had followed an intentionalist or a conventionalist approach to the interpretation of Resolution 276. It would have had to search either for the intentions of the Security Council (whatever that metaphor might mean) or for a consensus amongst international lawyers as to the interpretation of the Resolution. The Court did nothing of the kind. Instead, it approached the issue by enquiring into the point and purpose of Resolution 276 as a whole and then taking this as a guide for its response to the particular question before it. The Court held:

> [M]ember States are under obligation to abstain from entering into treaty relations with South Africa in all cases in which the Government of South Africa purports to act on behalf of or concerning Namibia. With respect to existing bilateral treaties, member States must abstain from invoking or applying those treaties or provisions of treaties concluded by South Africa on behalf of or concerning Namibia which involve active intergovernmental co-operation. With respect to multilateral treaties, however, the same rule cannot be applied to certain general conventions such as those of a humanitarian character, the non-performance of which may adversely affect the people of Namibia... In general, the non-recognition of South Africa's administration of the Territory should not result in depriving the people of Namibia of any advantages derived from international co-operation.[38]

Once again, note that it would be wrong to say that the Court *preferred* a purposive view of the Resolution over one based on the Council's intentions. The point, rather, is that the appeal to what the Council intended could acquire sense only on the condition that the Court credited the Council with what *the Court* took to be the best justification of the Resolution, i.e. to assist and support the population of Namibia, not to harm it.

Gadamer then draws attention to two further implications of the hermeneutic circle, both of which highlight the centrality of the interpreter's own situation in all instances of successful interpretation. The first concerns the effect of *temporal distance* on interpretation. The idea behind this concept is very simple but crucial. The more we distance ourselves from a certain thing or event, the better placed we are to see it 'in its proper context', to appreciate a richer web of meaningful relationships between that thing or event and its environment.

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[38] *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) Notwithstanding Security Council Resolution 276 (1970)*, ICJ Reports (1971) at 55, 56, pars. 122, 125

Given that the meaning of each particular event must be understood by reference to the whole and vice-versa, this meaning will necessarily *evolve* as history develops and the tradition that lends individual events their meaning becomes more densely populated. Many of these relationships and meanings will have been hidden to the original author, simply because the author stood too close to his statements to have an equally broad view of their connections and interactions with the rest of history. More importantly, the effect of temporal distance entails that far from obstructing our access to the meaning of a text or practice, the passage of time actually *produces* meaning. Gadamer puts the matter as follows:

> Time is not primarily a gulf to be bridged because it separates; it is actually the supportive ground of the course of events in which the present is rooted...[T]he important thing is to recognize temporal distance as a productive condition enabling understanding. It is not a yawning abyss but is filled with the continuity of custom and tradition, in the light of which everything handed down presents itself to us. [39]

The effect of temporal distance on the way we understand events, texts or practices entails that all interpretation is in its nature *evolutionary*. The play of historical development will always reveal new connections and relationships between individual events, from which new sources of meaning and significance will become apparent.[40] In virtue of the hermeneutic circle, these new meanings will in turn affect the questions that we ask of a text or practice, sometimes confirming their usefulness and pertinence, sometimes showing them to be unhelpful or unduly limiting. In that sense, evolution in understanding is not so much a change in the answers one receives from what is interpreted, but the effect of history on the interplay of question and answer from which the *interpretandum* receives its meaning. As Gadamer puts it:

> Every age has to understand a transmitted in its own way, for the text belongs to the whole tradition whose content interests the age and in which it seeks to understand itself. The real meaning of a text, as it speaks to the interpreter, does not depend on the contingencies of the author and his original audience. It certainly is not identical with them, for it is also co-determined also by the historical situation of the interpreter and hence by the totality of the objective

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[39] Gadamer, above n.26 at 297. The influence of Heidegger's thought, especially as regards the connection between time and the mode of existence (*Dasein*) that constitutes understanding, is very evident in this beautiful passage. See Heidegger M., *Being and Time* (1927).

[40] Cf. Taylor Ch., 'Understanding the Other: A Gadamerian View on Conceptual Schemes' in Malpas J. – Arnswald B. – Kertscher J. (eds.), *Gadamer's Century* (2002) 279 at 284; Rorty R., *Philosophy and Social Hope* (1999) at 52-61.

> course of history...Not just occasionally but always, the meaning of a text goes beyond its author. That is why understanding is not merely a reproductive but a productive activity as well. Perhaps it is not correct to refer to this productive element in understanding as "better understanding"... It is enough to say that we understand in a *different way, if we understand at all.*[41]

The other formal implication of the hermeneutic circle and the effect of history is that all understanding and interpretation is *situational* in character, i.e. it always occurs in the *application* of a meaning to the particular situation in which the interpreter finds himself.[42] Again, the essential idea behind the concept of situationality is quite simple. The basic thought behind the ideal of neutral interpretation was that application consists simply in the concretization of a result that has been already reached by reflection alone: one first interprets, and then one applies the interpretation to the text or practice in question. This thought is false because it assumes that it is possible to detach oneself from the stream of historical development that gives the interpreted text or practice its meaning. However, the hermeneutic circle and the effect of history concern and engulf the interpreter as much as they concern and engulf the *interpretandum.* To put it more directly, historical development affects meaning and understanding exactly *in the sense* that it affects the content of human consciousness. Gadamer writes:

> Consciousness of being affected by history is primarily consciousness of the hermeneutical *situation.* To acquire an awareness of a situation is, however, always a task of peculiar difficulty. The very idea of a situation means that we are not standing outside it and hence are unable to have any objective knowledge of it. We always find ourselves within a situation, and throwing light on it is a task that is never entirely finished. This is also true of the hermeneutic situation...The illumination of this situation –reflection on effective history- can never be completely achieved; yet the fact that it cannot be completed is due not to a deficiency in reflection but to the essence of the historical being that we are.[43]

Given that the interpreter can never extricate himself completely from the development of history -or that the effect of history can never become entirely

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[41] Gadamer, above n.26 at 295-6.

[42] The idea of situationality has recently been put to use in international theory by Outi Korhonen, see Korhonen O., *International Law Situated: An Analysis of the Lawyer's Stance Towards Culture, History and Community* (2000). I cannot do full justice to Korhonen's view of the fundamental interpretive situation and, more precisely, her insistence that there are meanings that thoughts that are incommunicable and thus that interpretation will always have the effect of 'shutting them off' from what is perceived as the truth (especially at 275ff.). In Chapter Five, section 3, I have given some reasons for thinking that the idea of incommunicable thought is not coherent.

[43] Gadamer, above n.26 at 301. Cf. Sokolowski R., 'Gadamer's Theory of Hermeneutics' in Hahn L.E., *The Library of Living Philosophers: Hans-Georg Gadamer,* vol.XXIV (1997) at 226-7.

transparent to him, the fundamental interpretive problem can never be to find out what a text or practice means in an 'objectified' or 'a-historical' manner, but to find out how it speaks to the particular situation that has precipitated his interpretive effort, i.e. how that text or practice can be *applied*. If this is correct, then application is not a subsequent or a merely occasional part of interpretation, which simply concretizes a result fixed by reflection alone, but one of the formal conditions for its possibility. To understand anything is nothing short of knowing how to apply its meaning to one's own historical situation.[44]

3.2 Interpretive prejudice and truth

The following complaint almost suggests itself: "If one's understanding of what treaties say and what States do will differ according to the perspective that one takes on it, or according to the historical circumstances in which its interpretation takes place, does it not follow that all enquiry into international practice is necessarily partial? In other words, if it is up to the interpreter to ask the question that he finds interesting from within his own historical situation, does it not follow that different interpreters will produce different interpretations and thus that we will lose all grip of right and wrong answers about what the interpreted text or practice *really* or *objectively* means?"

We should be careful to distinguish between two possible readings of this objection. In its first reading, the objection can be understood to claim that as long as an interpreter brings his presuppositions to bear on the interpretation of a text or practice, his interpretation cannot have a truth-value. We have already come across this sceptical line of thought and there is no need to repeat the arguments against it here.[45] Suffice it to say that the sceptical reading is confused,

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[44] Ibid at 321: "[A]pplication does not consist in relating some pre-given universal to the particular situation. The interpreter dealing with a traditionary text tries to apply it to himself. But this does not mean that the text is given for him as something universal, that he first understands it *per se*, and then afterward uses it for particular applications. Rather, the interpreter seeks no more than to understand this universal, the text –i.e., to understand what it says, what constitutes the text's meaning and significance. In order to understand that, he must not disregard himself and his particular hermeneutical situation. He must relate the text to this situation if he wants to understand at all".

[45] See Chapter Five, section 3.

since the truth-aptness of an interpretation is already guaranteed as long as that interpretation is intelligible.

It is the second reading of the objection that conveys its real power. Interpretation that relies on presuppositions may not necessarily deny us all access to the true meaning of the interpreted text or practice, but it does seem to make its attainment much more difficult. The cause of this difficulty is twofold. On the one hand, it often happens that the presuppositions with which an interpreter approaches a text may in fact reflect nothing more than entrenched prejudices, stale opinions and assumptions that could hardly stand up to critical scrutiny. Indeed, the idea that interpretation requires us to engage with tradition seems to carry an inherent risk of allowing the perpetuation of false beliefs and illegitimate prejudices.[46] On the other hand, the cyclical nature of interpretation entails that it is extremely difficult to tell where good and honest interpretation ends and illegitimate prejudice begins. Illegitimate prejudices may lie hidden and unnoticed for long, indeed long enough to debilitate our critical powers and to put the truth of the interpreted text or practice out of our reach. Critical theorists like Hilary Charlesworth have pressed strongly the charge of hidden or silent prejudice against traditional international legal thinking. They have argued that "the silences of international law may be as important as its positive rules and rhetorical structures"[47] and that these silences are in the end "an integral part of the structure of the international legal order, a critical element of its stability".[48]

Perhaps Gadamer's greatest contribution to hermeneutic philosophy has been his response to this philosophical and political concern through the careful dissociation of the notion of prejudice from the negative significance which post-Enlightenment thought had placed upon it. His main insight is that recognizing the central role of prejudice and presupposition in all interpretation and understanding does not amount to an abandonment of critical thought. Our prejudices *enable* us to engage in the interpretation of our practices, but they

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[46] This point has been pressed by Jürgen Habermas, see Habermas J., *On the Logic of the Social Sciences* (trans. Nicholsen S. – Stark J., 1988). For Gadamer's response see Gadamer H.-G., 'On the Scope and Function of Hermeneutical Reflection' in *Philosophical Hermeneutics* (trans. Linge D., 1976) at 18, 26-36.

[47] Charlesworth H., 'Feminist Methods in International Law', 93 *AJIL* (1999) 379 at 381; Charlesworth H. – Chinkin C., *The Boundaries of International Law: A Feminist Analysis* (2000) at 18-9. For discussion of this view see Korhonen O., *International Law Situated*, above n.37 at 212-6.

[48] Ibid.

neither fully *determine* that interpretation nor do they *exhaust* it. On the contrary, our prejudices are always capable of being brought to the foreground of understanding and put before the tribunal of critical thought and debate. In that sense, prejudiced understanding becomes not as a denunciation of critical interpretation but as a condition for its possibility.

Gadamer begins his discussion by asking why modern (or post-Enlightenment) thought has come to attribute such a negative meaning to the notion of prejudice. His aim is to look behind the banishment of prejudices in modern thought in order to retrieve a more flexible and fundamental meaning of that notion. He writes:

> The history of ideas shows that not until the Enlightenment does the concept of prejudice acquire the negative connotation familiar today. Actually "prejudice" means a judgment that is rendered before all the elements that determine a situation have been finally examined [this is perhaps clearer in the Latin version of *praejudicium* (pre-judgement)]. In legal terminology a "prejudice" is a provisional legal verdict before the final verdict is reached. For someone involved in a legal dispute, this kind of judgment against him affects his chances adversely... But this negative sense is only derivative. The negative consequence depends precisely on the positive validity, the value of the provisional decision as a prejudgment, like that of any precedent. This "prejudice" does not necessarily mean a false judgment, but part of the idea is that it can have either a positive or a negative value.[49]

The reason why the Enlightenment threw all its weight behind the negative aspect of prejudices is surely familiar. The heart of that intellectual revolution, famously encapsulated in the rule of Cartesian doubt, lay in the fundamental assumption that nothing can be accepted as true as long as it can be subject to reasonable doubt. This credo led Enlightenment thinkers to the conclusion that judgements are true only to the extent that they can be 'grounded' by means of a rational and verifiable *method*, whose every step must be checked by the powers of logic and reason. By that standard, judgements that are not grounded in our reason and verifiable by method cannot be part of a true description of the world. The core concern behind the banishment of prejudices by the Enlightenment is precisely that, *not having been verified by critical and methodical reason*, these pre-judgements will pose an obstacle to the attainment of truth.[50]

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[49] Gadamer, above n.26 at 273.
[50] Ibid at 279-80.

Gadamer explains why this inference is false by looking into what post-Enlightenment thinkers considered the most dangerous source of prejudice (apart from carelessness), namely *reliance on authority* in the place of one's own reason. Gadamer's main point is quite simple: Enlightenment thinkers may have been right in urging that reliance on authority (e.g. previous interpretations of customary law, judicial *dicta* etc.) in the stead of one's own reason is a source of prejudice; however, they were not entitled to the inference that such reliance may not be a source of truth.[51] In making this inference, Gadamer argues, the Enlightenment distorted the concept of authority because it presented it in diametrical opposition to the demands of an agent's reason and freedom. According to Enlightenment thought, insofar as truth is only attainable through the exercise of one's reason, reliance on authority can be nothing more than blind obedience.[52] Yet this view misunderstands the nature of relationships of authority:

> [A]uthority...is ultimately based not on the subjection and abdication of reason but on an act of acknowledgement and knowledge –the knowledge, namely, that the other is superior to oneself in judgment and insight and that for this reason his judgment takes precedence –i.e., it has priority over one's own. This is connected with the fact that authority cannot be bestowed but is earned, and must be earned if someone is to lay claim on it. It rests on acknowledgement and hence on an act of reason itself which, aware of its own limitations, trusts to the better insight of others... Thus, acknowledging authority is always connected with the idea that what authority says is not irrational and arbitrary but can, in principle, be discovered to be true.[53]

Our reliance on authority, i.e. our openness to the point of view of the more informed interpreter, does not involve the abdication of our reason and our freedom. On the contrary, recognizing that the other may be right or better informed is itself an exercise our freedom, consciously intended to profess our own limitations (in the way every student professes his own limitations by turning to a teacher). This recognition entails nothing like total obedience or unquestioning acceptance of another's views. Rather, it constitutes the

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[51] Ibid at 280-3.
[52] Ibid at 280-1.
[53] Ibid at 281 (emphasis added). Gadamer's account of authority can be contrasted with that of Joseph Raz, see Raz J., 'Authority, Morality and Law' in *Ethics in the Public Domain* (1994) at. Raz takes the view that authority *replaces* one's own reasons and thus claims legitimacy irrespective of the content of its demands. For a critique of Raz's view of authority as providing 'content-independent' reasons see Markwick P., 'Law and Content-Independent Reasons', 20 *Oxford Journal of Legal Studies* (2000) 579.

background on the basis of which critical thought can begin to challenge particular inherited beliefs, prejudices and presuppositions.[54]

In the light of this thought, Gadamer famously asks us to conceive of proper understanding and interpretation not as a process of gaining complete mastery over a text or practice by means of one's self-sufficient and methodical reason, but as a *fusion* of the interpreter's and the text's respective *horizons*. As far as all interpretation begins from the recognition that the author of a text or practice may be better informed than us, the interpreter's desire to engage with the author is a desire to see what is interpreted from a broader perspective or horizon, which will incorporate what is best in the particular viewpoints of both interpreter and author. Gadamer puts this thought as follows:

> [O]ne intends to understand the text itself. But this means that the interpreter's own thoughts have gone into re-awakening the text's meaning. In this the interpreter's own horizon is decisive, yet not as a personal standpoint that he maintains or enforces, but more as an opinion and a possibility that one brings into play and puts at risk, and that helps one truly to make one's own what the text says. I have described this as a "fusion of horizons". We can see that this is the full realization of conversation, in which something is expressed that is not only mine or the author's but common.[55]

Gadamer's point is that our prejudices and preconceptions are neither obstacles to correct understanding and interpretation, nor the final arbiters of its results. Instead, they are the keys that enable us to *enter* into a constructive conversation with the other perspective that is expressed in what is being interpreted, as well as the source of our first contribution to that conversation. Yet once the conversation in which interpretation finds its home begins to develop, these prejudices are themselves "put at risk" and exposed to the critical power of the better argument and the more informed perspective.

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[54] Gadamer, above n.43 at 34-6.

[55] Gadamer, above n.26 at at 362. Let me risk a further metaphor to convey Gadamer's point. Imagine an enormous dark room and a group of people in it, each carrying a small torch that allows them to look a couple of steps forward. These people start off without much awareness of each other's presence or of the features and dimensions of the room. However, they soon realize that the room is too big for each one of them to be able to illuminate it on their own. To stand any chance of acquiring a more comprehensive vision, they must bring their torches sufficiently close to form the widest possible single pool of light. For one thing, this means that they must not keep their torches *too far* from each other, otherwise they will get lost in the intervening darkness. But it also means that they must not bring their torches *too close*, for that would reduce the overall efficiency of their effort. Their chances of success lie in fusing their individual perspectives in a way that does not eliminate their distinctiveness.

To sum up: Gadamer exposes the idea that interpretive prejudices or presuppositions are necessarily an obstacle to truth as a mistake. In order to hear the 'true voice' of any text or practice, we always have to assume that the interpreted text or practice expresses a truth or better insight of which we want to be informed and whose content we therefore consider important to bring to light. Understanding and interpretation are always 'prejudiced' in this way because they are only possible on the condition that the interpreter has willingly immersed himself to the conversation between different perspectives from which the interpreted text or practice acquires its meaning and significance.[56] Crucially, it is the same context of conversation that opens up the possibility of better understanding, inasmuch as it allows particular prejudices to be brought to the foreground and to be scrutinized for their ability to show the interpreted texts or practices at their most meaningful form.[57]

If Gadamer is right, the proper task of interpretation cannot be to eliminate interpretive prejudice, but to distinguish between prejudices that take us closer to the truth of the matter and those that do not. This point carries important consequences for our conversational ethics. Telling our interlocutors that they only have the views the do because they rely on implicit assumptions that may be contested (this is a favourite ploy of some critical theorists) is not a way of exposing their views as wrong or 'prejudiced' but an unfortunate exercise in sophistry. Genuine debates and disagreements about interpretation are not at all about pointing the finger at the prejudices or presuppositions behind the other person's argument. They are about each interlocutor helping the other to bring those prejudices and presuppositions to the foreground of interpretation, in a way that allows the parties to examine each prejudice in a critical light and to endorse or reject it accordingly. In much the same way, the aim of abstract enquiries into legal interpretation can never be to eliminate evaluative presuppositions, since these presuppositions are an essential part of the conceptual setup that allows us

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[56] Ibid at 295: "Hermeneutics must start from the position that a person seeking to understand something has a bond to the subject matter that comes into language through the traditionary text and has, or acquires, a connection with the tradition from which the text speaks. On the other hand, hermeneutical consciousness is aware that its bond to the subject matter does not consist in some self-evident, unquestioned unanimity, as is the case with the unbroken stream of tradition. Hermeneutic work is based on a polarity of familiarity and strangeness..."

[57] To put it differently, the exercise of critical power over any single prejudice is only feasible from *within* one's own contingent (and to that extent prejudiced) situation.

to engage with the legal text or practice that are interpreting. Our aim, rather, should be to bring these evaluative presuppositions to light and to expose them to critical scrutiny for their efficacy in allowing the interpreted legal texts and practices to speak in their true voice.

4. Conclusion: the interpretive attitude revisited

In this Chapter I have discussed an important theoretical objection to the suggestion that evaluative judgements play a central role in the interpretation of international law. This objection relied on the idea that it is in principle possible to interpret the content of international law in a *neutral* manner, without engaging into any sort of evaluation of its merits. I have argued that the ideal of interpretive neutrality starts from the compelling intuition that interpretation should allow the interpreted legal texts or practices to speak for themselves, free from distorting and manipulative mediation. At the same time, I have tried to show that advocates of interpretive neutrality (in the form of either intentionalism or conventionalism) fail to flesh out this intuition in a convincing way. Drawing on the work of Hans-Georg Gadamer, I have argued that living up to the ideal of letting the interpreted text or practice speak for itself requires not the self-effacement of the interpreter but his *active* and *critical engagement* with the tradition in which the interpreted text or practice finds its proper home. Such engagement is a matter of treating what is being interpreted as a unity of meaning, by hypothesizing a value that gives sense to the interpreted whole and its parts. This process has the structure of a hermeneutic circle, i.e. an evolutive and situational exchange of question and answer between the interpreter and the text or practice.

It is perhaps time to take stock of the progress of Part III so far. The discussion in Chapters Five and Six has helped amplify my description of what I

called the *interpretive attitude* towards international law at the end of Part II.[58] There I identified five features of that attitude, namely (i) that although interpretations of the practice must show the bulk of people's beliefs about it to be correct, they still preserve a space between what the practice *really* requires and what individual participants *believe* that it requires; (ii) that interpretations of a practice treat the practice as a coherent unity of meaning; (iii) the cyclical character of interpretation, (iv) its evolutionary structure and (v) its capacity to accommodate interpretive disagreement. The two attacks that I have discussed so far claimed that my description of the interpretive attitude is a bad fit for international law, either because it will end up making the interpretation of that law a subjective matter or because it would compromise the neutrality of the interpreter. Both attacks converged on the conclusion that the use of evaluative judgements in the interpretation of international law would have serious detrimental consequences for the intellectual coherence of the discipline.

I have argued that both attacks eventually miss their target. The use of evaluative judgement in the interpretation of international law does not threaten to make interpretation subjective or arbitrary. On the contrary, it provides a further ground on which to press the important distinction between what the law *really* requires and what individuals States *believe* that it requires or, to put it more formally, the distinction between truth and belief. It shows why it makes sense to say that States may be mistaken not only as regards the facts of the practice but also as regards the point, purpose or value that provides its best justification. Likewise, the exercise of evaluative judgement may entail that the interpreter of international law can never be neutral towards his subject matter, but it does not threaten to eliminate the important space between the true meaning of the interpreted text or practice and the beliefs or presuppositions with which the interpreter approaches it.

Here I must tread carefully and repeat a point made in the introduction to Part III. I am not suggesting that the special combination of historical and evaluative arguments that I have referred to as the 'interpretive attitude' fits the ways we think about international law simply because it happens to be philosophically plausible. If my suggestion that international legal practice is

[58] See Chapter Four, section 4.

interpretive happens to be correct after all, it is correct in virtue of the particular features of international legal practice that I have described in Parts I and II, rather than in virtue of some abstract philosophical truths about interpretation. My appeal to the philosophy of mind, language and hermeneutics in this Part has been defensive, in the sense that its purpose has not been to make the case for the interpretive character of international legal practice, but to show why this argument is not threatened by some popular theoretical objections against evaluation.

There remains one objection to discuss in this Part, an objection that draws attention to the tendency of evaluative judgements to become the subject of protracted disagreement and social conflict, more so in fragile contexts such as that of international community. Accordingly, Chapter Seven concludes my discussion of the place of evaluation in the theory of international law by taking up the relation between interpretation, consensus and social conflict.

Chapter Seven

The political attack on evaluation: consensus and interpretation

In this Chapter I take up what I regard as the most plausible argument for 'value-free' interpretation in international law. This argument, familiar from the start of the previous Chapter, concedes that international legal interpretation always engages the interpreter's evaluative presuppositions. Its distinguishing claim is that international law can serve the fundamental objectives of securing a modicum of social peace and discouraging international conflict and oppression only if it is interpreted in ways that command general agreement or *consensus* amongst the members of international community. This position differs from the one I have been recommending in this thesis, in that it instructs the interpreter of international law to rely on certain values and principles not because of their capacity to provide an attractive justification for international practice but because of the fact that they meet with international consensus.

A similar position in municipal legal theory is sometimes called normative or ethical positivism.[1] The name has been taken up by international theorists only recently[2], but the heart of this normative argument can be found in most positivist accounts of international law. (As we will see, the description of this position as 'normative' obviously follows from the kind of argument that supports it, but its description as 'positivist' calls for some further comment.) Making this point, Benedict Kingsbury has recently argued that:

> the vitality of mainstream positivist traditions in international law has been sustained by a deeply felt commitment to the ethical view that legal positivism provides the best means for international lawyers to promote realization of fundamental political and moral values.[3]

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[1] For citations see Chapter Six, n.3.
[2] Benedict Kingsbury has asked the question directly: "Is there a normative (ethical) case for positivism in international law?", Kingbury B., 'Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law', 13 *EJIL* (2002) 401.
[3] Ibid at 402.

Kingsbury finds evidence that this idea that normative positivism has very deep roots in international legal thinking by highlighting its strong presence in the work of one of the chief early exponents of international positivism, Lassa Oppenheim, whose views we came across in Chapter Six.[4] According to Kingsbury:

> [Oppenheim] believed that the best means to advance the substantive normative values to which he was committed was to adopt and propagate his particular positivist conception of law. For the development of an effective international law, he saw numerous advantages in features associated with positivism in law: the distinctive formulation and interpretation of legal rules as a basis for clarity and stability; their reduction to writing to increase certainty and predictability; the elaboration of distinct legal institutions; the development of ethically autonomous professional roles, such as that of international judge; and the separation of legal argument from moral arguments as a means to overcome disagreement.[5]

I think that Kingsbury's claim can be extended with confidence to the arguments of almost all international positivists. Even those who have defended positivism on the ground that it provides the only adequate theory of legal meaning, such as Hans Kelsen, have often supplemented their arguments with appeals to the fundamental values that international law should secure.[6] Georg Schwarzenberger thought that a positivist approach was the only way the international lawyer could contribute to the maintenance of international peace.[7] Prosper Weil, Bruno Simma and Andreas Paulus have argued respectively that positivism allows the heterogeneity of the members of the international community to flourish in conditions of equality and for a shared background mutual understanding and peace to be possible.[8] Even if some of their semantic claims for positivism are false (as I have argued in the last section), their positions share enough with normative positivism to merit further serious attention. Furthermore, the appeal of the ideal of interpretive consensus clearly exceeds the bounds of normative positivism. Theorists such as Richard Falk[9] agree that the primary purpose of international law is to

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[4] See Chapter Six, section 1.
[5] Kingsbury, above n.2 at 416.
[6] See Kelsen H., *Das Problem der Souveränität und die Theorie des Völkerrechts: Beitrag zu einer Reinen Rechtslehre* (1920) at 314-7; id., *Principles of International Law* (3rd ed., 1967) at 569-88; Zolo D., 'Hans Kelsen: International Peace Through Law', 9 *EJIL* (1998) 306.
[7] Schwarzenberger G., *Power Politics* (3rd ed., 1964) at 198ff.
[8] Weil P., 'Towards Relative Normativity in International Law?', 77 *AJIL* (1983) 413 at 441; Simma B. – Paulus A., 'The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: A Positivist View', 93 *AJIL* (1999) 302 at 305-6.
[9] Falk R., *The Status of Law in International Society* (1970) at 15-23; id., 'The Inadequacy of Contemporary Theories of International Law – Gaps in Legal Thinking', 50 *Virginia LR* (1964)

guarantee systemic stability in the international community and that the achievement of this purpose requires that international law be interpreted in accordance with international consensus. Thus, although my discussion will take its cue from the claims of normative positivist thinkers, its implications for international legal theory will be more general.

1. Domestic and international normative positivism

A first thing to note about normative positivism is that the argument for it must differ significantly from the domestic to the international case. Taking up the difference will help us gain a better grip on the normative positivist position in international law. Domestic normative positivists such as Jeremy Waldron and Tom Campbell see their normative positivism as advocating a particular conception of separation of powers.[10] Their main claim is that judges lack the legitimacy to impose their moral views on people and, therefore, that whenever the moral issues involved in legal interpretation are contentious and divisive, courts should defer to the decisions of the democratically elected legislature. Two points are clear about this position. First, normative positivists draw on the strong republican ideals of citizen *self-rule* and *pluralism* and the need to exclude *oppression* or *hegemony* from political life. It is precisely these concerns that underlie their suspicious attitude towards the un-elected and unrepresentative (not to mention, predominantly white, male, rich etc.) judiciary and also their preference for majoritarian decision-making as the means for resolving moral disagreement. Second, normative positivists do not say that the law should be silent when the moral issues involved in a legal decision are contentious. Their claim is that such hard decisions should be made by one community institution rather than another, i.e. by the legislature rather than the courts. The crucial point here is that whichever institution gets to make the decision, *the issue always stays within an institutional setting* with generally sufficient democratic and representative credentials. Furthermore, the existence of a democratic political

231 at 246-7. Falk situates his approach between the positivism of Hans Kelsen and the policy-oriented approach of Myres McDougal, see *Status of Law* at x-xi.

[10] Waldron J., 'Normative (or Ethical) Positivism', above n.3; Campbell T., *The Theory of Normative Positivism* (1994); id., *Prescriptive Legal Positivism: Law, Rights and Democracy* (2004) at 43ff.

structure ensures that no particular person or group of interests can easily frustrate or derail the political process. No matter how much people disagree, the community will -in the end- reach a decision that is binding and enforceable on everyone.

Now, a first difference with the international case is that the second point cannot apply in the present conditions of the international community, since there are no central political institutions that may legitimately make binding law for all States. Indeed, the unregulated nature of international political relations poses the very dangers that normative positivists are so anxious to guard against, namely oppression and hegemony. Powerful States are not only able to maintain (and often act on) their views in the face of worldwide opposition; they are sometimes able to frustrate the whole process of political decision-making.[11] This means that the international normative positivist is faced with a very different strategic problem. He cannot follow the domestic path and argue that international legal decision-makers should pass legal questions that involve contentious moral issues to another international political institution, for no such institution exists. He also cannot argue that those questions should be left to the international political community 'as a whole' to settle, because that would betray his first and most powerful intuition by exposing the content of the law to the unregulated and unequal forces of international politics. Prosper Weil has expressed this point very eloquently in his manifesto against the idea of peremptory norms of international law:

> The rules of general international law tend no longer to be elaborated, at present, by the states *ut singuli* to which they are addressed, but by the international community of states 'as a whole'... However, as the international community still remains an imprecise entity, the normative power nominally invested in it is in fact entrusted to a directorate of the community, a de facto oligarchy... The consequences of this upheaval are all too obvious. The sovereign equality of states is in danger of becoming an empty catch phrase: for now some states are more equal than others. Those privileged to partake of that legislative power are in a position to make sure that their own hierarchy of values prevails and to arrogate the right of requiring others to observe it.[12]

The message of Weil's anxiety is that the peculiar problem for the international normative positivist is how to serve the compelling values of international self-rule, equality and pluralism and resist the forces of oppression and hegemony,

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[11] This is especially true of the permanent Members of the UN Security Council.
[12] Weil, above n.8 at 441.

without surrendering hard legal questions to the unequal domain of international politics. Insofar as such deference to politics is not an attractive option, to achieve these important political aims, the normative positivist needs to work towards them *though* legal interpretation (I will return to this suggestion in a moment).

The question that normative positivists ask themselves is therefore the following: which conception of legal interpretation is more likely to contribute to the avoidance of situations of political oppression and hegemony and to further the ideals of community self-rule and pluralism in relations between States? The answer to that question depends on a proper understanding of the pathology of international politics. Kingsbury attributes the following diagnosis to Oppenheim:

> [B]ecause deep disagreement about justice is almost inevitable in most societies, and judgmental decisions made simply on the ground of justice would be subject to the ebb and flow of social struggles and would often be unacceptable to those who lose a particular struggle, laws are enacted to replace the sense of justice as the basis for authoritative decisions.[13]

Notice that this view does not locate the source of the problem with international politics, and of the resulting need for legal regulation, in the great inequality of power between strong and weak States. The real source of the problem is the fact that States *disagree* about matters of justice. This way of putting the matter might sound counterintuitive at first, but on reflection it seems quite straightforward. If all States agreed about what is right, any inequality in their strengths would not by itself lead them to conflict. You and I may differ very much in our hunting abilities; while you are able to catch more game than you need, I cannot even catch enough. However, if we happen to agree that all members of our community must have an adequate share in the food, you are likely to give the part of the catch that you can spare to cover for my deficient resources. The difference in our hunting power by itself does not have detrimental consequences for our peace and stability as a group. As in this example, in the case of international politics too the mere difference in power amongst States is unlikely to lead by itself to conflict and oppression.[14]

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[13] Kingbury, above n.2 at 415. Cf. Friedmann W., *The Changing Structure of International Law* (1964) at 77-80; Henkin L., *How Nations Behave* (2nd ed., 1979) at 4-7.

[14] John Rawls makes the same point by distinguishing between two sources of social conflict, one deriving from incompatible comprehensive doctrines about the right and the good and the other deriving from differences in class, social status, occupation, ethnicity or race. Rawls argues that if a society has managed to resolve the first conflict (through the idea of an *overlapping*

It seems to be the presence of disagreement that 'lights the fuse' and prompts States to use their unequal power to oppress those who stand in their way.

If the root cause of international conflict, hegemony and the oppression is evaluative disagreement, then international law can contribute to the fight against these evils by providing an alternative normative space in which States will have less occasion to disagree and whose content will therefore be generally acceptable, reasonably certain and predictable. The normative positivist ideal of interpretation follows directly from this thought: the main purpose of international law should be the furtherance of international peace and stability through certain and predictable rules whose content meets with acceptance across the membership of the international community. This ideal generates a more specific -and surely familiar- interpretive standard that we might call *consensualism*: international lawyers should interpret the rules of international law in ways that will render the content of those rules generally acceptable to the international community as a whole.[15] The negative phrasing of that standard will be more familiar still: international lawyers should not provide interpretations of international law that divide the international community, reduce the certainty and predictability of its rules and pave the way to conflict, domination and inequality.

Now, before considering some objections to international normative positivism and the consensualist ethic that runs through it, it is important to take up a question raised a while ago and ask to what extent a consensualist approach to international legal interpretation can be described as 'positivist'. It is here, I think, that the difference between domestic and international normative positivism becomes more marked and important. Domestic normative positivists have good reason to claim that they stand in the same tradition as Hobbes, Austin, Kelsen and Hart, insofar as they too think that some answers to questions of law should be 'posited' (by a legislature) rather than 'constructed' out of a whole web of true beliefs about law and political morality (by a judge). For these thinkers, the buck of interpretive questioning stops at an act of comprehensive, organized and legitimate political will. It is not clear how the international normative positivist could share in this

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consensus), the second will not pose much of a threat to its stability, Rawls J., 'The Idea of Public Reason Revisited' in *The Law of Peoples* (2001) at 177.

[15] A recent contribution to the normative positivist project puts it very directly: "If law must contain values, why then not seek to make law contain the values *agreed* upon by its subjects; let law reflect the *congruence of their interests*", Beckett J., 'Countering Uncertainty and Ending Up/Down Arguments', 16 *EJIL* (2005) 213 at 238.

company. The community of his focus lacks the organization that might produce anything as comprehensive, organized and politically legitimate.[16] As we have seen, this entails that the international normative positivist must weave the core values of self-rule and resistance to oppression or hegemony *into* legal interpretation, on pain of having to abandon their fate to the unregulated and unequal world of international politics. But it also entails that his commitment to international consensus must be understood differently from that of domestic normative positivists. For him, a commitment to consensus cannot translate to an act of *deference* towards a source of organized political will, but to an *instruction* towards interpreters of international law. To put the point more directly, whereas domestic normative positivists appeal to political consensus as a source of authority that eventually takes *precedence* over any particular interpreter's view of the meaning of legal texts and practices, the international normative positivist must take inter-State consensus as a *substantive reason* for choosing one interpretation of international legal texts and practices over another. Consensus must figure in his theory as an interpretive instruction, or not at all.[17]

2. Four attacks on international normative positivism

It is very easy to caricature normative positivism in ways that make it look ridiculous, useless or partial, thus missing what is most wise and profound about it. In this section I look at some of these attacks in order to amplify the consensualist position and to highlight some important reasons why it might appear attractive to an international lawyer.

One popular caricature of positivism is the idea that normative positivism asks legal decision-makers to decide matters of international law by 'polling' for what States would consent to on each and every issue that comes

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[16] This is not the occasion to consider whether the UN Security Council or the UN General Assembly might perhaps fit some aspects of that description. Here I am simply assuming that the UN institutional setup is not sufficiently analogous to the structures of domestic communities, especially on the dimensions of comprehensiveness and legitimacy. On recent debates about the capacity of the Security Council to 'legislate' see Szasz P., 'The Security Council Starts Legislating', 96 *AJIL* (2002) 901; Alvarez J, 'Hegemonic International Law Revisited', 97 *AJIL* (2003) 873; Dyzenhaus D., 'The Rule of (Administrative) Law in International Law', Working Paper 2005/1, *International Law and Justice Working Papers*, Institute for International Law and Justice - New York University School of Law (2005) at 15ff (available at http://www.law.nyu.edu).

[17] I return to this, hopefully provocative, suggestion in section 3.1

to be decided.[18] If that were true, consensualism would perform no useful function, since its advocates would have to raise their hands in despair in every case States happened to disagree on what international law says –especially when such disagreement can be manufactured on the spot.[19] But consensualists do not have anything so implausible in mind. Their guiding thought is that international legal interpretation should not *fuel* disagreement, not that it should always avoid taking a stand in it. In fact, it is precisely when States disagree about a legal issue that consensualism shows the full extent of its potential, since it provides international lawyers with a method of defusing the disagreement by appealing to more fundamental principles of international law on which the parties will happen to converge. In other words, consensualists do not just look for agreement on the surface of States' attitudes, only to give up whenever they find none. They also *make for* agreement, i.e. they devote all their interpretive resources to make the best of whatever principles States have actually agreed on. This constructive (or consensus-*finding*) side of consensualism is indeed one of its chief strengths.

A second line of attack against consensualism comprises arguments to the effect that consensualists may claim that they look for consensus across the international community, but they are actually limiting their interest to a group of powerful western States and pay little attention to the views and interests of developing and weaker States, of oppressed minorities or of women.[20] Consensualists would take this critique very seriously, but they would not feel that it threatens the core of their position. After all, the complaint against them seems to be that they are failing their own standards, by satisfying themselves all too easily that they have hit upon a genuine international consensus; the standards themselves remain beyond reproach.[21]

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[18] I am indebted to George Letsas for discussion on this point.

[19] This is often presented as the great paradox of consensualism: if consent is the reason why States are bound by a rule of international law, its subsequent withdrawal would have to mean that the rule stops being binding. See Fitzmaurice G., 'Some Problems with the Formal Sources of International Law' in *Symbolae Verzijl* (1958) 153 at 161-8; Koskenniemi M., *From Apology to Utopia* (1989) at 279-83. See also section 1.1 above.

[20] This is one of the criticisms on the part of feminist theorists, see Charlesworth H. – Chinkin C., *The Boundaries of International Law: A Feminist Analysis* (2000) at 16-7. For a critique of consensualism on the ground that its application tends to leave third world perspective under-represented see Chigara B., *Legitimacy Deficit in Custom: A Deconstructionist Critique* (2001). See also Snyder F. – Sathiratai S. (eds.), *Third World Attitudes Toward International Law* (1987); Sinha H., 'Perspectives of the Newly Independent States on the Binding Quality of International Law', 14 *ICLQ* (1965) 121.

[21] Cf. Scott S., 'International Law as Ideology: Theorizing the Relationship between International Law and International Politics', 5 *EJIL* (1994) 325 at 326.

A third charge against consensualism complains that its advocates are hardly ever precise about the threshold that must be crossed before they are satisfied that they have hit upon an international consensus. Should all States endorse an interpretation before it can be put forward as expressing a consensus? Is a 'vast majority' or a simple majority of States enough? Does the majority have to include the most powerful States etc.?[22] Normative positivists can justify their unwillingness to provide detailed answers to these questions on the ground that, at core, finding international consensus is not a matter of crude head-counting. Rather, the search for such consensus involves a sensitive and pragmatic appreciation of the international political climate and the balance of States' expressed views about the law, the aim of which is to prioritise interpretations of international law that are more likely to meet with international agreement over interpretations that threaten to become a source of international friction and conflict.

A fourth, and more ambitious, line of attack against consensualism would challenge the core of its moral and political theory. Proponents of this attack could adopt either of two argumentative strategies. The first strategy would be *teleological* or *consequentialist.* It would claim that achieving consensus is important but only instrumentally, i.e. as a means for ensuring more fundamental values and interests, such as peace, justice, fairness and respect for human dignity. If this is correct, it follows that the pursuit of those more fundamental values will sometimes be better served by abandoning the idea that the interpretation of international law should always meet with international consensus. The second strategy would be *deontological.* It would claim that the normative positivist's focus on consensus does not make enough room for the deep intuition that subjects of international law have *rights,* whose existence cannot depend on whether others have agreed to recognize them or on whether respecting them would fulfil some social goal.[23] Claims of

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[22] Cf. the anxiety expressed recently by Kammerhofer J., 'Uncertainty in the Formal Sources of International Law: Customary Law and Some of Its Problems', 15 *EJIL* (2004) 523 at 530: "No-one imposes exact limits on the amount of state practice needed to create law. While there might not be significant disagreement amongst writers and the tribunals on the criteria, there is still uncertainty".

[23] The deontological claim is not that consequences never matter, but that rights do not serve an instrumental purpose, that they are not a means to the achievement of other ends. This is the point of the third formulation of Kant's 'categorical imperative', see Kant I., *Groundwork on the Metaphysics of Morals* (Gregor M. ed., 1998) at 23-4; Korsgaard C., *The Sources of Normativity* (1996) at 131ff. For the general compatibility of means-end reasoning with deontological accounts of rights see Cummiskey D., *Kantian Consequentialism* (1996); Lyons D., 'Utility and Rights' in Waldron J. (ed.), *Theories of Rights* (1984) at 110. Cf. the famous remark in Rawls J.,

right are not made false simply because upholding them will go contrary to what the majority of States believe. They raise issues of principle, on which we are not entitled to make concessions in order to please occasional majorities or to maximize social goods or utility.[24]

The normative positivist has a convincing response to the consequentialist argument. He would readily agree that the search for international consensus has only instrumental value; consensus is desirable only to the extent that it helps us realize some more fundamental aims such as equal respect for the dignity of al subjects of international law or international justice and fairness. He would also agree that there might be circumstances in which the search for consensus forestalls the achievement of those aims and perpetuates entrenched injustices. He would still claim, however, that we generally stand a better chance of realizing the more fundamental aims of equality, justice and fairness in an international community that is peaceful and stable, rather than divided and in conflict. The risk in thinking otherwise is simply too great, for history shows all too clearly that the fuelling of deep ideological divisions between States can bring humanity to the brink of self-destruction. The normative positivist proposes to avoid these risks by taking a slower but steadier way forward. At the very least, his insistence on the idea of international consensus ensures that, whatever the setbacks, the forces of moral progress will live to fight another day with their critical force undiminished.[25] This may not be much, but is there good reason to think that we should run the grave risks involved in demanding more?

The deontological attack poses a much tougher problem for the consensualist. In particular, it is hard to see how consensualism could be seen as thoroughly compatible with the fundamental intuition that subjects of international law have legal rights, respect for which cannot depend on the ebb

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A Theory of Justice (rev. ed., 1999) at 26: "All ethical doctrines worth our attention take consequences into account in judging rightness. One which did not would be simply be irrational, crazy".

[24] Cf. Dworkin R., 'Rights as Trumps' in *Theories of Rights*, above n.17 at 153. A deontological approach to international rights has been recently advocated by Teson F., *The Philosophy of International Law* (1999).

[25] Herbert Hart made the same point by arguing that normative positivism sharpens our moral criticism of the law and discourages 'quietism' about its shortcomings, see Hart H.L.A., *The Concept of Law* (2nd ed., 1994) at 210: "What surely is most needed in order to make men clear-sighted in confronting the official abuse of power, is that they should preserve the sense that the certification of something as legally valid is not conclusive of the question of obedience, and that, however great the aura of majesty or authority which the official system may have, its demands must in the end be subjected to a moral scrutiny". Cf. Murphy L., 'The Political Question of the Concept of Law' in *Hart's Postscript*, above n.5 at 371.

and flow of international political opinion. Indeed, it would seem that insofar as one is prepared to take those legal rights seriously, one must reject the idea that international consensus is the *litmus* test of legal interpretation.[26] Insisting on that idea would undermine not just the political appeal of consensualism but also its affinity to actual international practice, in which claims of right have come to occupy an absolutely central place.

Consensualists should be able to withstand the deontological attack as well, since their appeal to consensus can be made compatible with respect for international legal rights. Consensualists do not have to make the extreme claim that the validity and content of *all* international legal rights depends on international consensus. Such a claim would not even get off the ground, since it would be unable to provide a non-circular answer to the question about the reasons why the validity and content of claims of right should depend on consensus in the first place.[27] In fact, the plausibility of consensualism as an approach to international legal interpretation turns on the assumption that subjects of international law have certain pre-legal entitlements that define their status as members of the international community, including the right to participate as equals in the formation of an international political consensus. Certain basic rules of international law, such as the prohibition on the aggressive use of force between States and respect for their political independence, seem to follow directly from this foundational right of political equality (it is not accidental that these rules used to be called the "international law of co-existence"[28]). Consensualists would recognize that the validity of those rules is not so much a consequence of international consensus as part of the conditions that vest consensus with its political and legal weight. Still, the idea that recognition of *some* international legal rights is a prerequisite of a sensible consensualism does not entail that consensualism is mistaken. The reason is that by far the greater number of international legal rights have a *conventional* character, in the sense that their validity and content is generally contingent on the development of international practice. States' right to political independence may necessarily precede the notion that

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[26] Dworkin R., *Taking Rights Seriously* (1977) at 138ff. George Letsas has made this point forcefully in the content of the European Convention on Human Rights, see Letsas G., 'Truth in Autonomous Concepts: How to Interpret the ECHR', 15 *EJIL* (2004) 279.

[27] This point has been made very frequently see particularly Brierly J., *The Law of Nations* (6th ed. by Waldock H.) at 32; Fitzmaurice G., 'Some Problems Regarding the Formal Sources of International Law' in *Symbolae Verzijl* (1958) at 185.

[28] The distinction between the international law of *coexistence* and the international law of *cooperation* has been advocated by Wolfgang Friedmann, see Friedmann, above n.14 at 77-80.

international law rests on consensus, but their rights to a 12-mile territorial sea, to certain consular immunities, to certain trade freedoms, to certain measures of compensation for damage incurred etc. have become established through the gradual development of an international legal consensus. To put it differently, these rights do not reflect some kind of 'natural' entitlement of States, but the contingent result of the various ways in which their shared legal practices have developed over time. Consensualism retains its plausibility because it is able to account for such conventional rights while being consistent with the idea that these rights do not necessarily exhaust the legal entitlements of the subjects of international law.

We now have a fuller sketch of international normative positivism. We know that its advocates share a rather loose connection with domestic normative positivists, for each group is faced with a different pair of strategic choices. We also know that international normative positivists do not look for consensus just at the surface level of State behaviour, but also at the deeper level of principle; that they do not see the search for consensus as a matter of crude head-counting, but as a matter of interpreting the law in ways that enhance agreement amongst members of the international community; and, finally, that their view of interpretation is consistent with the recognition that at least some legal rights of States may precede the idea of consensus. In the course of describing this position, I have suggested that international normative positivism builds on some compelling moral and political intuitions, such as the need to avoid political oppression and hegemony and the desire to achieve social progress through peace. Is there reason to think that international normative positivism is nevertheless a flawed conception of legal interpretation?

3. The real difficulty with normative positivism: consensus and the problem of sense

In this section I suggest that international normative positivism must fail as a theory of legal interpretation not so much because it relies on flawed moral and political assumptions, but because its main instruction to the interpreter ("seek consensus") cannot be given any self-standing content and, therefore, cannot operate as the *litmus* test of good interpretation. I then claim that

normative positivists are enticed into this position because they begin from a flawed diagnosis of the pathology of international politics and the relation between disagreement and social conflict.

3.1 The emptiness of consensualism as an interpretive instruction

The image of a community of equals getting together to make decisions about its future exerts an extraordinary influence on our thought. If we find this process of *decision-making* so compellingly and unreservedly right, shouldn't we structure our process of *reflecting* about community matters in a similar way? From Hobbes and Rousseau to Rawls and Habermas, moral and political philosophers have taken up this suggestion and have modeled their theories of justice (conveniently called 'social-contract theories') according to the ideal vision of community decision-making.

But this ambitious analogy faces a problem at the start. Thinking theoretically about something and deciding what to do as a community are very different things. When the issue is one of theory, the setting is one of people thinking as *individuals*; when the issue is one of decision-making, the setting is one of people making decisions as a *community*. This gap between the necessarily individual (though not altogether private) act of thinking about justice and the public act of community decision-making must somehow be bridged for the analogy between the two activities to be plausible and helpful.

Thomas Hobbes proposed a radical way of bridging this gap. He famously believed that individuals are naturally short-sighted and disinclined to care about anything other than their own interests. They will therefore be chronically unable to reach agreement on matters of justice, thus exposing themselves to the grave ills of anarchy in the 'state of nature'. Hobbes' suggestion for ending this predicament is astonishingly (even paradoxically) simple. Given that it is impossible to get people to exercise a collective rationality, that would allow them to opt for decisions benefiting the community as a whole, political decision-making should be modelled on

individual rationality.[29] Let *one* person (the Leviathan) decide all political matters and the problem of political stability and organization is no more.[30]

Most modern political philosophers are not only appalled by the authoritarian consequences of Hobbes' proposal; they also think that Hobbes made a mistake in supposing that collective rationality is beyond the reach of the individual mind. Our personal deliberations on justice can and should make space for others[31]; they can and should be modelled on the ideal of community decision-making. John Rawls has captured this intuition by asking us to think about justice in terms of an 'original position', in which members of a political community come together to choose basic principles of justice.[32] Thinking about justice, in this sense, involves turning one's mind into a theatre, in which community decision-making in certain ideal circumstances will be acted out.[33] The same image drives the theory of communicative action of Jürgen Habermas.[34]

This point is important for our discussion, since consensualists about international law appear to be motivated by a similar aspiration to bring the image of an international political community of equals to work as a model for legal interpretation.[35] On the one hand, they too believe that the interpreter of international law should act out in his mind the image of an international community getting together to express its shared attitude towards this or that interpretation of international law. On the other hand, they too see consensus as convergence on propositions of law in certain *idealized* circumstances, often removed from actual political reality, rather than as a crude process of 'polling' or counting heads. Not all acts of States can be put forward as plausible claims of right and not any dissent (especially *ex post facto* dissent) can be taken into account, in much the same way that not all silence must be understood as

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[29] Cf. Hampton J., *Hobbes and the Social Contract Tradition* (1986) at 8-10

[30] Hobbes T., *Leviathan* (Tuck R. ed., 1996).

[31] On the ability of individuals in Hobbes' state of nature to reach free and rational co-operation, see Axelrod R., 'The Emergence of Co-operation Among Egoists', 75 *American Political Science Review* (1981) 306. On the duty to take the separateness of others into account when deliberating about justice see Wiggins D., 'Universalizability, Impartiality, Truth' in *Needs, Values, Truth* (1998) at 69ff; Waldron J., *The Dignity of Legislation* (1999) at 61-2.

[32] Rawls J., *A Theory of Justice* (rev. ed., 1999).

[33] Cf. Cavell S., *Conditions Handsome and Unhandsome: The Constitution of Emersonian Perfectionism* (1990) at 101ff.

[34] Habermas J., *The Theory of Communicative Action - vol.1: Reason and Rationalization* (McCarthy T. trans., 1984).

[35] Cf. Kingsbury, above n.2 at 428:"If Oppenheim's positivism entrenches the *status quo* and disempowers visionaries, a formal international law based on consent has an increasing hold on the democratic imagination and on the growing number for whom anti-formalism is a specific or systemic threat".

acquiescence.[36] In line with all plausible philosophical attempts to give consensus a role in political thought, the consensus that the normative positivist seeks is constructive or interpretive.[37]

But the honour of being placed in the company of social contract theories of justice must also force a first concession from the normative positivist. No social contract philosopher is a consensualist, in the sense that none thinks that the conclusions derived in an ideal 'original position' have met or must meet with any sort of literal political consensus in the community. In making use of the idea of a social contract, political philosophers are not trying to get at principles that members of any given community *will* consent to, or even principles that they *would* consent to if they had the moral facts straight, but to principles that they *ought to* consent to as free and equal agents. The purpose is never to forge actual political agreement but to tease out the political implications of our moral equality.[38] As Ronald Dworkin has put it, "a hypothetical agreement is not simply a pale form of an actual contract; it is no contract at all".[39] If this is correct, then the search for a constructive international political consensus is, to speak with Dworkin, not a search for an idealized form of an actual consensus; it is not a search for consensus at all. It is a *heuristic device* whose purpose is to help us theorize about international justice by exciting our thought with the compelling image of a community of equals making political decisions. This is not to say that the

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[36] One of the best statements of this point comes from the Dissenting Opinion of Mr. Bebler in the *Rann of Kutch* arbitration, see Indo-Pakistan Western Boundary Case Tribunal (*'Rann of Kutch Case'*), Award of February 19, 1968, Dissenting Opinion Bebler, 50 ILR 2 at 414-5: "As for the duty to speak to avoid undesirable legal consequences, one could argue that the weak neighbour's embarrassment in fact ought to be a reason for a presumption in his favour in the sense that his silence ought not to be interpreted will all that rigour with which it might be interpreted in cases of less factual inequality than the one prevailing between suzerain and vassals in India under British rule". See also MacGibbon I., 'Customary International Law and Acquiescence', 32 *BYIL* (1957) 115; Mendelson M., 'State Acts and Omissions as Explicit or Implicit Claims' in *Le droit international au service de la paix, de la justice et la developpement: Mélanges Michel Virally* (1991) at 373.

[37] In this connection, Gerry Simpson has suggested that "[w]here liberal theorists suggest a fictitious social contract between citizenry and the State...classical liberals [of international law] demand an actual covenant between the law and the States in international society. Classical liberals seem to have escaped reliance on metaphor", Simpson G., 'Imagined Consent: Democratic Liberalism in International Legal Theory', 15 *AYIL* (1994) 103 at 114. As far as Simpson is implying that consensus acquires its moral force only under certain conditions of political equality, he must be right (I make this point in the main text). However, it seems to me that the way he puts the point is potentially misleading, inasmuch as it suggests that consensualist theories of international law rely on a *crude* conception of consent that lacks the moral weight of the liberal political metaphor. This charge is rather uncharitable, for some consensualists are careful to emphasize that their reliance of consensus is a device designed to capture the fundamental equality of all States, cf. Weil P., above n.7 at 441-2.

[38] Kymlicka W., *Contemporary Political Philosophy* (1990) 60.

[39] Dworkin R. *Taking Rights Seriously* (1977) at 151.

image of political consensus is an altogether dispensable prop for our moral and political thought.[40] The point, rather, is that the image of political consensus exerts this strong appeal *on the condition* that the necessary circumstances of equality are in place; it is this egalitarian background, not the fact of agreement, that we find so compelling.[41] This entails that in order to live up to their egalitarian intuitions consensualists have to drop the idea that the interpretation of international law must meet with a literal, whether actual or hypothetical, consensus amongst members of the international community.

I suspect that many consensualists might be willing to go along with this view. They might concede that their appeal to international consensus should not be taken literally, that it is simply a device designed to bring the international values of political equality to bear on the interpretation of international law. However, they might argue that consensualism is still defensible as a literal condition of interpretation because it serves other important international values, such as the need for legal *certainty* and *predictability* in the interpretation and application of international law. They will say that if we abandon the idea of consensus as an interpretive instruction, we are opening the door to the dangers of wide divergence, disagreement and conflict about the content of international law.

In the remainder of this section I want to show that this argument too is flawed because consensus does not carry any weight as an interpretive instruction even when the ideal circumstances of equality are in place. The intuitive way of putting this suggestion is to say that one can interpret the meaning of a consensus; one can perhaps hope that one's interpretation meets with consensus on the part of other interpreters; but one cannot interpret *according to* a consensus.

The heart of the matter lies in a slight but crucial inaccuracy that I let slip by when I attributed to social contract theorists the idea that individuals are indeed able to think on the basis of a collective rationality. We have seen that the consensualist embraces this belief inasmuch as he understands

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[40] Tim Scanlon has recently defended an inverse variation of view that we ought to model our moral reflection on the ideal of intersubjective agreement, by appealing to the notion of 'reasonable rejection'. See Scanlon T., *What We Owe to Each Other* (1998) at 162: "The contractualist ideal of acting in accord with principles that other (similarly motivated) persons could not reasonably reject is meant to characterize the relation with others the value and appeal of which underlies our reasons to do what morality requires. This relation, much less personal than friendship, might be called a relation of mutual recognition. Standing in this relation to others is appealing in itself –worth seeking for its own sake".

[41] Cf. Simpson, above n.38 at 114-5.

consensus as an idealized process of deliberation or as an idealized "theatre" of political interaction amongst equals. These are obviously metaphors meant to convey some deeper moral truths. If we try to deconstruct those metaphorical images of a process of collective deliberation or a "theatre of collective political activity" inside one's mind, we are not likely to encounter elements of thought that we might reasonably call 'collective'. What we will find are some powerful intuitions about the moral status of international persons and a particular conversational ethic about community matters. We will find beliefs such as "all States free and equal", "they all deserve to be treated with equal respect", "all States must have an opportunity to contribute to the development of international law" and "international law-making processes should be designed in ways that meet those three intuitions". But although we can make sense of these intuitions as thoughts *about* the community and our role in it, we cannot make sense of them as thoughts *of* a community. By the same token, the notion of collective rationality does not require anything as silly as one starting to think in terms of a collective consensus.

I am only pursuing this rather obvious point because I think that consensualists about international legal interpretation have failed to absorb its full impact. For if I am right, the interpretive instruction "seek consensus" lacks content even in the ideal circumstances of equality. The point is really simple: the task the interpreter is not to make participants in a practice agree with each other, but to offer a *perspective* on their shared practices and agreements, to establish a unitary point from which those practices and agreements can be given *sense*. "The trick", as Brian Bix has noted, "is not to reach agreement, but to have an idea of what we are agreeing *about*".[42] To put it more simply, the interpreter of international law can try to construct a unity of meaning out of the data of international practice by hypothesizing a point or purpose shows the practice in a favourable light. He can also try to make his interpretation of international law as *consistent* as possible with the point or purpose of the practice.[43] What he cannot do is think *according to* a consensus

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[42] Bix B., *Law, Language and Legal Determinacy* (1993) at 115. In this sense, it is inaccurate to say that people can engage in a certain practice *just because* others do the same, for their intersubjective agreement in the context of any sufficiently complex social practice will always need to be given content and thus will elicit questions like "what does our convention require?", "what counts as 'the same' behaviour" and so on.

[43] Ronald Dworkin distinguishes between two kinds of consistency with previous interpretations of the law in legal decisions. The first he calls 'consistency in strategy', whose aim is to make sure that past and future legal decisions will fit together and work as a whole to produce a better set of circumstances. He calls the second 'consistency in principle', whose aim is to interpret

about its interpretation, since the instruction "interpret a practice according to the consensus about its meaning" is empty of sense. It is not hard to see that the argument applies equally against the aspirations to 'certainty' and 'predictability' in legal interpretation, since phrases like "seek certainty" or "seek predictability" are equally empty of meaning as interpretive instructions. Of course, an interpreter should assign meaning and sense to a given practice in a way that shows previous interpretations of it to have been by and large correct. But the only way he can do this is by proceeding on the basis of what he perceives as the point and purpose of previous interpretations, of what he understands those interpretations to be *about*. Thus while an interpreter can try to make his interpretations consistent with what one regards as the point and purpose of what others are doing, he cannot try to make his interpretations predictable for others or to instil certainty in their thoughts, for these efforts would lack sense ("*what* is it that must be made predictable?", "certainty about *what*?").

The only plausible way to read the consensualist instruction would be something like "seek consistency" or, more exactly, "seek to make your beliefs about what the interpreted international text or practice means as coherent as possible with all other propositions of international law that you take to be true". But such an instruction is no different from the instruction "seek to interpret" or "seek to make what is being interpreted as intelligible as possible"! My discussion of Donald Davidson's theory of truth, meaning and interpretation in Chapter Five has shown that all acts of interpretation involve the attribution of a coherent and true web of beliefs to the person or persons whose acts are being interpreted.[44] This means that a large measure of agreement (and therefore of certainty and predictability) amongst interpreters who understand each other will be *given* from the start. I hit upon this point again in Chapter Six as part of our discussion of the Gadamerian fore-conception of completeness and the idea that only what is perceived as a unity

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past decisions in a way that shows them to express a single and comprehensive view of justice, Dworkin R., *Law's Empire*, above n.24 at 132-5. I would argue that the important difference between the two is not that identified by Dworkin, given that strategists themselves will often be motivated by an ideal conception of what justice requires. The real difference between the two conceptions of consistency is that the strategist thinks that he can interpret the law and administer justice in self-contained bits, whereas his counterpart is a holist about interpretation. Inasmuch as the former view downplays the possibility of meaningful connections between different 'bits' of the law or different intuitions about justice, it relies on an implausible interpretive prejudice, see Chapter Six, section 3 *in fine*.

[44] See Chapter Five, section 3.

of meaning can be made intelligible.[45] In the end, by instructing interpreters to seek consistency and to treat all propositions of international law as a unity of meaning, one is not instructing them to do anything other than to interpret. But chances are that they knew that already.

To sum up: I am suggesting that the appeal to consensus cannot generate any meaningful instruction about how to interpret to community texts and practices, because it does not have enough resources to solve the problem of sense. The fact that participants in a practice have reached some sort of consensus may explain the absence of active contestation amongst them but it does not in itself tell us anything about what the practice requires, or what the consensus is *about*. The answer to that question will always depend on what the interpreter of the practice has reason to regard as the best justification for it, or as the purpose or value that underlies it. The distinction between the interpreter's view of the point of the practice and the "collective view" reflected in the community consensus has proven untenable, insofar as the second viewpoint cannot be given any self-standing sense.

By the same token, agreement or consensus is valuable, and something we can hope to achieve with other interpreters, but it is not something that we can *construct*. It is an essential background to our ability to understand each other, but it can never be the *aim* of an interpretation. To give the point a semantic dimension, we might say that although one's thoughts may be consistent with each other -and they generally will be, if they are intelligible at all- it would be inaccurate to say that they can ever stand in agreement, for agreement and consensus are only meaningful between *persons* (this is all the more true of certainty and predictability, which are psychological states).[46] If anything, we should expect that good interpretation will bring disagreement to the fore because it will use our shared background of belief to focus attention on the propositions that we do not share. That is exactly why we often say that the need for interpretation arises only when there is some dispute about what a text or practice means.

If I am right that interpreting and looking for agreement, certainty or predictability are fundamentally different projects, consensualists will feel that they are thrown back to square one. Having diagnosed that disagreement is the

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[45] See Chapter Six, section 3.
[46] This was the gist of Gadamer's insistence that to understand is to understand differently. See Chapter Six, section 3.

key problem of international politics and the major source of international friction and hegemonic tendencies, they hoped to establish an alternative normative space in which international consensus would be forged through legal interpretation. Now that this hope has proven misguided, it seems that they cannot avoid having to choose between interpreting international legal texts or practices and forging or maintaining international consensus about their meaning. Given their diagnosis of the pathology of international politics, some of them might find the case against interpretation and in favour of pragmatic consensus-finding compelling. To keep up their search for international peace and self-rule and their struggle against oppression and hegemony, these theorists will have to give up on the idea of international law as an interpretive practice.

3.2 Disagreement and social conflict

This will no doubt sound too melodramatic and it is. In this section I will suggest that normative positivism ends up in the implausible position of having to choose between interpretation and consensus because it relies on a wrong diagnosis of the pathology of international politics. Disagreement is not a cause of social conflict, either by itself or when coupled with great differences in power amongst members of a community. Trying to eliminate or restrict it serves no useful social purpose.

Hobbes understood this point very well and that is why he did not list disagreement amongst what he regarded as the three causes of conflict in the state of nature, namely *resource scarcity*, *mistrust* and *vanity*.[47] This omission was not accidental. Hobbes' reductive account of human motivation entailed that people in the terrible state of nature would not disagree fundamentally about the good and the right.[48] Given their shared natural constitution and inclinations, they would all be likely to think that each should care for their own self-preservation and that each should lay down their 'right of nature' on the condition that everyone else did the same. Of course, Hobbes did not deny that people may often disagree about the good and the right. His point, however, was that the circumstances of the state of nature are such that they

[47] Cf. Oakeshott M., *Hobbes on Civil Association* (1975) at 15ff.
[48] Ibid at 23-4.

would sooner or later lead people to take arms against each other *whether or not* they happen to disagree.[49] In other words, Hobbes' description of the state of nature allowed for the possibility that people would enter the destructive war of all against all without necessarily disagreeing on anything.[50]

Now, whether or not Hobbes' description of the state of nature was correct, the point that disagreement is not directly related to social conflict and instability must be. To appreciate this, look at the matter from the completely opposite angle. Consider not so much the reasons that might lead certain societies to conflict, but the reasons to which peaceful and free human societies (say, Scandinavian liberal democracies) might owe their success. To that extent would it be correct to say that peaceful and free human societies are marked by the absence of disagreement amongst their members?

Some strong answers to this question will be out of contention from the start. For one thing, those societies are not successful because everybody agrees on *everything*. In fact, in most free societies people regard the fact that they may often disagree with others as one of the traits that make them distinctive and valuable as individuals (or a welcome consequence of what John Rawls has called the 'burdens of judgment'[51]). In fact, these people look at uniformity of opinion more as the work of covert forces of oppression and hegemony than as a guarantee of social peace and stability.

How about the more plausible idea that people in successful societies agree on the *basics* of political life and organization? In one sense, this would seem right. To be sure, people in liberal democracies tend to share certain *concepts* such as freedom, justice, equality, liberty, democracy and responsibility. It is by no means the case, however, that they all agree on what these concepts mean, or on what *propositions* follow from them. In fact, it is probably true that disagreements about the meaning of, say, equality and democracy are much more common, heated and protracted in liberal democracies than anywhere else. Yet such deep disagreements do not lead to conflict or instability, even though they concern what we would recognize as the most basic ingredient in those societies' continuing success.

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[49] Hampton J., *Hobbes and the Social Contract Tradition*, above n.28 at 72ff.
[50] In this respect, consider the following question: would it be correct to say that the United States and the Soviet Union fought forty years of cold war because they *disagreed* over some proposition?
[51] Rawls J., *Political Liberalism* (1993) at 54-8.

Here is what I think is a better statement. Successful liberal democracies are characterized by the fact that their members tend to converge on most propositions about what justice, equality, democracy and similar fundamental political concepts mean and yet do not regard any of these shared beliefs as immune from revision and reconsideration in the face of a better interpretation. If this statement is roughly accurate, then the success of those societies can plausibly be attributed to two key factors that we have identified in previous Chapters: first, the existence of a *shared language* with a sufficiently rich deposit of political concepts like justice, equality and democracy; second, the adoption by members of that community of an *interpretive attitude* towards their shared moral and political practices.[52] The presence of shared language entails that members of such societies have the same concepts in mind, that they understand propositions about what these concepts mean and that they find themselves in agreement over most of those propositions (otherwise their claims would not even be intelligible). The presence of an interpretive attitude expresses the conviction that members of such societies see themselves as trustees of the same moral and political tradition and as bearers of a common responsibility to make the best of it. The combination of these two factors does not just make enough space for disagreement; it welcomes it in exactly the same way that a person concerned to make the best of a situation that he values welcomes an honest challenge to his beliefs about it. At the same time, the very same combination entails that such disagreements can never be radical. Even the sharpest challenge to any particular view about justice, equality or democracy receives its content and bite from the assumption that the interlocutors share a rich background of true belief about what those concepts mean.

My suggestion, then, is that disagreement does not threaten by itself the peace and stability of any society, no more the society of States. As Hobbes saw, but normative positivists have failed to appreciate, it is human failings such as unjust distribution of scarce resources, alienation, mistrust, vanity, short-sightedness and greed that must be blamed for that. A theory of international law that sets as its aim the creation of an 'alternative normative space' for international agreement does not only end up in a completely empty

[52] See Chapter Four, section 4; Chapter Five, section 4.

interpretive instruction. It also diverts our focus from the real ills of international society.

4. Conclusion: from consensus to equality

So where does the rejection of normative positivism leave us? My answer is that it leaves us free to engage in the interpretation of international legal texts and practices and to give full play to the deep moral and political debates that are an essential part of this interpretive project, without fear that our natural and reasonable disagreements on those issues will somehow pave the way to oppression, hegemony, conflict and destruction. The idea that we should suppress our evaluative presuppositions for the sake of the bigger goal of consensus has proven misguided. The same goes for the (delightfully contradictory!) idea that conscious exposure of our practices to disagreement or our occasional failure to achieve international consensus might amount to some sort of death- or hegemony-pact. As long as honest and diligent interpreters of international law are able to understand each other, there is no reason to expect that they will disagree radically about the content of its rules. At the same time, there is every reason to expect that such honest and diligent interpreters will probably continue to differ on several particular points, including some fundamental issues such as the overall point and purpose of international law -what Jacques Lacan has called its *point de capiton*. But this is not a sign of disorder, conceptual confusion or disintegration. It is a sign that these interpreters care too much about international law to let its content be fixed by the contingent fact of intersubjective agreement.

Having said as much, our freedom to give full play to our moral and political presuppositions when interpreting the content of international law carries with it considerable responsibilities. It entails that the proper interpretation of international law requires us to construe the meaning of international legal texts and practices in the light of a credible theory international political morality. Crucially, that theory would need to incorporate, as one of its primary tenets, the compelling moral intuition behind consensualism, namely that *all members of the international community deserve to be respected as persons of equal worth*. Such a theory must at the very least address the following issues. What is the proper moral

status of States and of individuals? How should international law respond to the fact that different political communities entertain different conceptions of the right and the good? Does it matter that even when these conceptions happen to converge, their convergence is really only an overlap of very different comprehensive doctrines about the value of human life? Although I will say a few words about these matters in the conclusion, I cannot take them up fully in the present context. The aim of my thesis has been to show that asking these questions is not only crucial for addressing the weaknesses and the failings of the international community but also central to the interpretation of its law.

One last point. Someone might object that the account of interpretation that I have presented in the last three chapters could perhaps pass muster on paper, but it fails to capture the realities of international legal decision-making. The objector might say that, whether we like it or not, the main concern of most international lawyers, judges and arbitrators is to make decisions that diverge as little as possible from what the States involved want and expect to hear from them. Whether or not their behaviour fits with my view of interpretation and the negligible role of consensus in it, the fact of the matter is that these decision-makers attribute much more weight to maintaining consensus than to, say, achieving coherence with past international practice.

Assuming that the objector has got the facts about the real motivation of those decision-makers right (this is an extraordinarily generous assumption), I am inclined to surrender to this objection completely and unreservedly. I have no quarrel whatsoever with superior knowledge about what goes on in decision-makers' minds. If it is true that many international lawyers, judges and arbitrators tailor their decisions to meet the wants and wishes of powerful international actors, then this is a cause for regret and worry about the usefulness and the future of the legal profession. My point is simply that these international lawyers are not entitled to claim that their actions are shielding international law from the detrimental consequences of disagreement and the international community from the danger of conflict of disintegration. International law does not need saviours of this kind. What it needs are lawyers capable of interpreting international legal practices in ways that make those practices worthy of a community of equals.

Conclusion

These concluding pages are intended to summarize my argument, to draw attention to a number of questions that follow from it and to point to some broader implications of my thesis for the character of international legal scholarship.

1. A summary of the argument

My basic claim in this thesis has been that international legal practice has an *interpretive structure*, which is constituted by a special combination of appeals to the history of past international practice and appeals to the point, purpose or value that this practice is best understood as serving. The interpretive structure of international legal practice entails that one's understanding of international law and its various rules must always be sensitive to the principles that provide the most attractive justification for the history of past international practice considered as a whole.

My thesis fell into three Parts. The first Part introduced some aspects of the interpretive structure of international legal argument and highlighted some early signs of the unease of international theorists with the use of evaluative judgements in interpretation.

Chapter One identified the historical and evaluative strands in international legal argument, taking as an example the various ways in which international lawyers support their claims about the rule of estoppel. I argued that these two argumentative strands may appear to stand in opposition to each other, or to pull in different directions, but in reality they share a much deeper interpretive connection. In particular, the use of evaluative judgements in argumentative practice is not intended only to explain *why* international lawyers rely on past international or municipal legal practice but also to explain *how* or from *which perspective* that practice should be approached.

Chapter Two fine-tuned this first description of international legal argument against the background of some serious suspicions about the role of values in the interpretation of international law, as these emerged from some popular claims about the theoretical structure of estoppel. Evaluative judgements, it was thought, are either a *redundant* part of argumentative practice, in the sense they are simply too vague to have an operational impact on the content of specific rules, or they are altogether *incompatible* with 'inductive' appeals to the history of past international practice.

Part II widened the scope of my discussion and started to engage critically with the suspicions of international lawyers towards the use of evaluative judgements in interpretation. It began by locating a deep unease with evaluation in legal thinking about the sources of general international law. It noted that received wisdom has it that the exercise of evaluative judgement is generally unnecessary for the interpretation of general (mostly customary) international law. This popular view of interpretation shows evaluation to be useful only in extraordinary circumstances, where international lawyers have to fill legal 'gaps' using the special form of legal reasoning required by art.38(1)(c) of the ICJ Statute. Chapters Three and Four argued that both of these claims are mistaken.

Chapter Three argued that the idea that general principles fill 'gaps' in the law is incoherent. Either international law has no gaps, in the sense that its interpretation in hard cases is not essentially different from its interpretation in easy cases, or general principles would not be able to fill them, in the sense that hard cases would not admit of right legal answers. But this dilemma is itself illusory. Claims of international law are characteristically *veridical*, that is they always purport to capture what is the case about international law. Unless presented with a compelling sceptical case, we therefore have no reason to resist the idea that all questions of international law can have right answers.

Chapter Four then claimed that, despite received opinion to the contrary, the exercise of evaluative judgement occupies a central place in the interpretation of rules of customary international law. It argued that both traditional and modern theories of customary law fail to appreciate the important distinction between questions of *pedigree*, i.e. questions about whether a certain practice is legally obligatory, and *interpretive* questions, i.e. questions about what those

legally binding practice mean. The difference between the two emerged as extremely important, since interpretive questions proved impossible to resolve by a mere appeal to what States do in their practice and what they believe or intend. Rather, interpretive questions require the interpreter of international law to engage with the point, purpose or value of customary practices and to provide an attractive *justification* for those practices considered as a whole.

Drawing on the work of Ronald Dworkin, I then introduced an alternative approach to interpretation, which I claimed does a better job of accommodating the force and function of evaluation in argumentative practice about general international law. In particular, I suggested that claims about the content of general international law are not simply claims about what States have done and intended. These claims have an *interpretive* structure, in the sense that they aim to be consistent with the point, purpose or value that provides the best justification for the history of past international practice. I identified five key features of the interpretive structure of international legal practice. First, interpretive arguments always assume that there is logical space between what the practice *really* requires and what any one of its participants *believes* that the practice requires. Second, interpretive arguments have a *cyclical* character, in the sense that they try to show the activities of each participant in the practice as part of a unity of meaning, which in turn invests those parts with their individual significance. Third, interpretative arguments are always *evolutionary*, in the sense that as a society's practices become more complex and rich, new interpretations of their point and purpose will be required. Fourth, interpretive arguments are *situational* in nature; they capture the meaning of the practice not by looking for 'a-historical' truths that will be valid once and for all, but by applying the practice in concrete historical situations. Fifth, members of a community that takes an interpretive attitude towards its practice have a special attitude towards disagreement amongst them. They do not regard their disagreements as unbridgeable voids that threaten the cohesion of their community but as an indication that questions about the meaning of their practices are too important to be left entirely to the contingencies of intersubjective agreement.

Part III amplified this account of international legal interpretation by defending it against three powerful attacks. The first of those attacks claimed that the use of evaluative arguments in the interpretation of international law would make the law wholly subjective. The second attack claimed that the use of such judgements would violate the requirement for detachment and neutrality in the interpretation of international law. The third attack claimed that resort to evaluative judgements might expose international law to protracted and divisive disagreements that would ultimately defeat the very purpose and value of international law for the international community.

I argued that although all three attacks begin from compelling intuitions, they eventually miss their target. Chapter Five took issue with the sceptical claim that the use of value-judgements in the interpretation of international law would necessarily rob the discipline of any semblance of objectivity. I argued that value-scepticism begins from the compelling idea that we should resist indoctrination and foster open and critical thinking about values. However, the incoherence of its scepticism fails to do justice to its own best intuitions. Drawing on the philosophy of Donald Davidson, I showed that scepticism must fail because it wants to have its cake and eat it too. Sceptics want to say that we can understand each other's evaluative claims and judgements but that we can coherently doubt whether any of those claims and judgements admits of a truth-value. But this is a confused idea: to be able to understand any utterance as a proposition, one must already know what it would take for that proposition to be objectively true or false. The failure of the sceptical story left us with two lessons. First, the use of evaluation in the interpretation of international law does not threaten its objectivity (i.e. its truth or falsity). Second, that we can give content to our desire to resist indoctrination and to foster a modest, open and critical debate about values without falling for the incoherent idea that judgements of value are subjective.

Chapter Six then took issue with the idea that the use of evaluation in legal interpretation would undermine the neutrality of the interpreter of international law. I argued that the aspiration to neutral interpretation draws on the powerful idea that an interpreter should allow the object of interpretation to speak for itself, without distorting and manipulative mediation. However, it soon became apparent that the ideal of interpretive neutrality could not be made to work as a

theory of meaning for propositions of international law. Both the claim that legal meaning depends on the intentions of the author and the claim that meaning depends on the conventions of the relevant professional community failed to fit some of the most basic features of argumentative practice about international law. Drawing on the hermeneutics of Hans-Georg Gadamer, I claimed that the ideal of interpretive neutrality fails because it misreads its own basic intuition. Hearing the true voice of the interpreted text or practice does not require the effacement of the interpreter's historical (and contingent) situation. On the contrary, it demands that the interpreter use his preconceptions in order to engage in a dialogue with the interpreted text or practice, a dialogue (or "fusion of horizons") through which the true meaning of that text or practice can eventually be disclosed. Contrary to the claims of neutral semantics, the fact that interpretation gives full play to the interpreter's presuppositions and "prejudices" *enables* its access to truth as much as it may undermine it. Thus the proper task for the interpreter is never to efface his own contingent presence from his enquiry into the meaning of international legal texts and practices, but to engage in an open and critical assessment of the prejudices and presuppositions that govern his interpretation.

Finally, Chapter Seven discussed the claim that international legal interpretation should rely only on values that command consensus across the international community (a position I called *consensualism*). I argued that consensualism builds on a handful of powerful intuitions, such the idea that all subjects of international law must be treated as political equals, that the content of international law should be certain and predictable and that one of the chief aims of international law should be the maintenance of social order and the avoidance of international conflict. However, consensualism too fails to live up to its own compelling beginnings. The appeal to consensus can never work as an instruction about how to interpret, since it lacks the resources that will supply any agreement or consensus amongst members of the international community with *sense* and content; more simply, the appeal to consensus does nothing to disclose what that consensus is *about*. That is the task of the interpreter, who has to supply the consensus with sense and content by approaching it as a unity of meaning that serves a point, purpose or value. By the same token, the proper way to build the moral demand of political equality into interpretation does not involve a search

for an international political consensus, but an *interpretive* commitment to equality as the primary value of international law.

Next to the main argument, it might be worth summarizing some points that have emerged incidentally in my discussion. The first of those points, made towards the end of Chapter Three concerns the distinction between customary international law and general principles of law as two separate formal sources of international law. I have contended that there is no interesting difference between these two sources as regards the form of legal reasoning that they prescribe. The only point on which they might be distinguished concerns the (usually) different provenance of their legal material. My claim entails that customary international law and general principles of law may constitute distinct *material* sources of international law but they do not constitute distinct *formal* sources.

The second point concerns the various roles of *consensus* in the interpretation of international law. Throughout the thesis, I looked at several versions of the appeal to consensus as the mark of good interpretation. In Chapter Three, the appeal to consensus was meant to supply the criterion for telling easy and hard cases apart. In Chapter Four, it was meant not only to settle whether a certain practice was legally binding but also to decide which of several sets of authorial intentions was most salient to the interpretation of a rule. In Chapter Six, consensus emerged as an essential part of a conventionalist semantic theory about the meaning of propositions of international law. Finally, in Chapter Seven, the search for international consensus was meant to be the only way to live up to the demands of equality and to avoid the potentially destructive consequences of deep evaluative disagreement amongst States. The problem with the appeal to consensus at each and every stage was the same. The blunt appeal to consensus tells us nothing about how to attribute *sense* to an intersubjective agreement. To put it differently, the thought that we should interpret according to a consensus is empty, insofar as it fails to appreciate that the purpose of interpretation is not to forge any sort of consensus but to explicate what the consensus reflected in a certain practice is about.

A third and final point concerns the relation between disagreement and social conflict. A long stream of international legal scholarship has laboured under the assumption that one of the chief purposes of international law is to provide an

alternative normative space inside which States will be able to debate and resolve their disputes by appealing to an international consensus, without becoming involved in protracted and divisive disagreements about justice. I have argued that this aspiration begins on a flawed diagnosis of the pathology of international politics. Disagreement and social conflict are not directly related, if only because disagreement acquires its sense only against a rich background of agreement amongst the rival arguments. In any event, members of free and peaceful communities are more likely to have deep and protracted disagreements about fundamental political concepts. This is not a sign of disintegration and conflict, but an indication that members of those communities take their shared political and legal traditions too seriously to allow their content to be permanently fixed by the contingent fact of intersubjective agreement.

2. An outstanding issue: "which values?" and the distinction between the right and the good

I would now like to look briefly at one very important question that my account of the interpretation of international law has left open and to explain why I have not engaged with it. That question is the following: supposing that the exercise of evaluative judgment is a central part of international legal interpretation, *which* values should go into the interpretation of international law?

Let me immediately sweep aside a version of that question that I consider most unhelpful. That version reads the question as asking *whose* values must play a role in legal interpretation, be they the values of western or developing States, of liberal male intellectuals or left-wing feminists, of capitalists or socialists, of the rich or the poor etc. What I find objectionable in this way of putting the matter is the implicit assumption that the truth of a value-judgement is contingent on the identity of the person who expresses it. The point of my discussion in Chapter Five has been that it is possible to distinguish between the speaker and the proposition and that, in fact, this distinction lies at the basis of all propositional thought. Read charitably, claims of the sort "you would say that, because you are a white, rich and male liberal" can only be interpreted as "your *position* or your *argument* is

mistaken for the following substantive reasons...". Whereas claims of the latter sort are the heart and soul of any critical debate about ethics, morality, politics and law, claims of the former sort are paradigms of counterproductive sophistry.

A better way to approach the question is to ask which *kinds* of evaluative judgement may legitimately go into the interpretation of international law. More to the point: should the interpreter of international law be allowed to prefer one reading of the law rather than another because it promotes a certain view of the *good*, e.g. it facilitates economic activity, it promotes the better preservation of wildlife or the global commons? Or should his interpretation be sensitive only to arguments about the *right*, i.e. arguments about which interpretation will be more consonant with the best conception of international political morality and justice? I regard this as the most challenging aspect of international legal interpretation, an aspect that is bound to engage theorists of international law into some of the deepest controversies in political and moral philosophy, hence my decision to leave it for another occasion. Still, I think it is important to have a rough idea of how important and helpful the engagement with these issues will be for the international lawyer.

So here is a bird's eye look of their importance and usefulness. The relation between the right and the good has been one of the most important areas of philosophical debate since the time of Plato and Aristotle. The philosophical tradition of *teleology* or *consequentialism* (as developed by Bentham and Mill) holds that questions about the right and questions about the good are inseparable. To find out what it is right to do, one must ask which of the possible courses of action is likely to achieve a state of affairs that maximizes some good or general utility. When transposed to political theory, teleology generates a position called *perfectionism*: those who make political decisions in the name of the community must make that decision which is more likely to maximize some good for the community, e.g. it will entail more freedom for economic activity, more efficient governance, more protection for wildlife, clean high seas, less air pollution, more security etc. In contrast, the philosophical tradition of *deontology* (as developed by Kant) holds that questions about the right have lexical priority over questions

about the good.[1] To find out what it is right to do, one must not ask which decision will maximize some good, but which decision follows from the principle of equal respect for all those that it concerns. Translated to political theory, deontology generates the familiar position of *liberalism*. The difference between these two views is immense. For the perfectionist, rightness is measured by *outcomes*. For the liberal, rightness is a matter of *reasons*. The perfectionist worries about making decisions that will *maximize* some good for the community. The liberal worries about making decisions that will treat all members of the community as persons of *equal* moral worth, even if those decisions will jeopardize the achievement of some social goal.

Now, if my thesis is correct, the debate between teleologists and deontologists (or between perfectionists and liberals) emerges as absolutely central to the proper interpretation of international law. Let me illustrate this point briefly by looking at how the choice between a theory of legal interpretation that regards rightness and justice as a matter of outcomes and a theory that regards them as a matter of reasons would affect the choice between the best-known alternative theories of international law.

Consider, on the one hand, two schools of international legal thought whose views I have not discussed at any depth in my thesis (since they both consider it uncontroversial that evaluation is central to legal interpretation). Advocates of the New Haven functionalist approach to international law, and some natural lawyers, take an explicitly teleological approach to legal interpretation. As Myres McDougal and Michael Reisman have put it:

> The trans-national legal system, like a national system, can be appraised in the aggregate only in terms of the values it *maximizes* within the total context of the public order. The overall task of enquiry is, hence, to assess the degree of success or failure of the system, to account for the factors that condition such results, and to clarify the goals and the policy alternatives available in the emerging structure.[2] (emphasis added)

In the same vein, Alfred Verdross has argued that theories of international law should be measured by their efficacy in facilitating the achievement of certain

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[1] See especially Rawls J., *Political Liberalism* (1996) at 173ff.

[2] McDougal M. – Reisman M., 'International Law in Policy-Oriented Perspective' in MacDonald R. – Johnston D. (eds.), *The Structure and Process of International Law* (1983) 103 at 113. See also Higgins R., *Problems and Process: International Law and How We Use It* (1994) at 1: "Normative systems make possible that degree of order if society is to maximize the common good..."

international social ends.[3] Domestic natural lawyers such as John Finnis take a similar position, inspired by the writings of Aristotle and Thomas Aquinas.[4] Whatever their weaknesses, all these teleological theories start from plausible conceptions of the good (e.g. more respect for human dignity and freedom, decent education, preservation of cultural diversity) and then rely on the extremely powerful intuition that things should be arranged so as to lead to the most good.

Contrast these views with those of positivists and critical legal theorists. Both positivist and critical theories of international law concentrate their attention on the *reasons* that underlie international legal decisions, rather than their efficacy in promoting certain international goods. Despite its various weaknesses, the positivists' emphasis on consent and neutrality is permeated by the liberal intuition that the interpretation of international law should treat all members of the international community as equals and that it should not favour some States' interests, preferences and conceptions of the good over those of others. Similarly, notwithstanding the incoherence of their radical scepticism, critical international theorists premise their project on the compelling intuition that international domination in all its forms should be eliminated and that international society should be re-imagined as a genuine community of equals.

I would like to suggest that conceiving of the debate between the natural law/New Haven schools of thought and the positivism/critical theory camp as a debate about the relative merits of teleological and deontological theories of justice is very helpful for two reasons. First, it throws light on the political and moral foundations of each of those groups of theories and, in this way, allows us to identify the real points of disagreement between them. Second, it helps us to reassess the point of some of the most serious dissatisfactions that international lawyers have expressed with those theories.

Let me explain. One of the standard criticisms of the New Haven approach is that it collapses the distinction between law and politics.[5] I hope I have

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[3] Verdross A. – Koeck H., 'Natural Law: The Tradition of Universal Reason and Authority' in MacDonald R. – Johnston D., above n.1 at 17-9.

[4] Finnis J., *Natural Law and Natural Rights* (1980) at 75ff.; D'Entreves A., *Natural Law: An Introduction to Legal Philosophy* (2nd ed., 1970).

[5] See e.g. Young O., 'International Law and Social Science: The Contribution of Myres S. McDougal', 66 *AJIL* (1972) 60; Morison W., 'The Schools Revisited' in MacDonald R. – Johnston D., above n.1 at 136-7

succeeded in showing that the criticism is misconceived as far as it assumes that a theory of international law can be evaluatively neutral. However, I suspect that what McDougal's critics are really getting at is that the New Haven approach fails not because it makes the interpretation of the law subject to evaluation but because it begins from a settled conception of the values that the international community should strive to maximize and therefore commits itself to drawing illegitimate distinctions between some conceptions of the good and others. I think that the same intuition accounts for the disenchantment of international lawyers with natural law theories. A theory that relies on a fixed conception of the good and interprets international law accordingly offends against two important liberal intuitions: first, that all members of the international community should be allowed to choose their own conception of the good subject to the limitations of international justice and, second, that international law should respect the diversity in conceptions of the good by allowing only considerations of right to affect the interpretation of its rules.[6]

Although I find liberalism the more appealing theory, my intention here is not to make a conclusive case in favour of a liberal theory of international legal interpretation and against its teleological rivals. Judging from the amount of current misunderstanding about liberalism, making that case would require a thesis-long work on its own. International lawyers have variously argued that liberalism pursues " the general and formal aim of maximizing liberty" but fails to provide "a material legitimation of social practices"[7], that it "imposes a pattern of conformity on all the States of the world" which fails to respect "the plurality of values, cultures and systems"[8], that it requires "procedural rather than substantive equality"[9] and promotes "the equal treatment of people or states, but without reference to their actual situation"[10], or that it tries "to depict international legal knowledge as a matter of immediate observation" which is free

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[6] A more accurate formulation is that a theory of international law should rely on a 'thin' theory of the good. For this idea see Rawls J., *A Theory of Justice* (rev. ed., 1999) at 347-50.
[7] Koskenniemi M., *From Apology to Utopia* (1989) at 64. For Koskenniemi's unfortunate association between liberalism and subjectivism, see Chapter Five, sections 3-4.
[8] Simpson G., 'Imagined Consent: Democratic Liberalism in International Legal Theory', 15 *AYIL* (1994) 103 at 120.
[9] Charlesworth H. – Chinkin C., *The Boundaries of International Law: A Feminist Critique* (2000) at 32.
[10] Ibid.

of any evaluative presupposition.[11] It is unclear to me why liberals should have to endorse such dubious political and epistemic commitments in order to defend their claim that all persons are entitled to equal respect and concern and that this entitlement includes the freedom of all persons to form and revise their own conceptions of the good.[12] But perhaps it is more important that an open and substantive debate is finally on between liberals and the various teleological perspectives.

3. Interpretation, legality, community and self-constitution

"All law is old law. All law is potential law"
Philip Allott, *Eunomia* (1990) at 6.70.

My thesis asked whether and to what extent evaluative judgements have a place in the interpretation of general international law. I have answered that question with the claim that evaluation is an integral part of the complex interpretive attitude that international lawyers adopt toward their subject matter. In this concluding section, I would like to pose the question slightly differently. Supposing that the interpretive attitude is a good match for the structure of international legal practice, is it an attitude that we should *endorse*? Will such conscious endorsement make us better international lawyers and will it lead to some general improvement in the way international law is understood and applied?

I think that answer to these questions should be affirmative for two reasons. The first is that the interpretive attitude to international law allows us to preserve our deepest intuitions about the value of law and legality, whilst showing that these intuitions do not stand in necessary competition with our most profound beliefs about international justice, fairness and political equality. On the one hand, the interpretive attitude preserves the crucial space between what the law really requires and what States or individuals believe that it requires. It also preserves the crucial idea that interpretation is not a matter of subjective opinion

[11] Marks S., *The Riddle of All Constitutions* (2000) at 4.
[12] For one liberal response to some of these critiques of liberalism, see Teson F., *A Philosophy of International Law* (1998) at 158ff.

nor does it involve any license to the interpreter to manipulate the meaning of international legal texts and practices to suit his personal biases and purposes.[13] Furthermore, it preserves the fundamental political intuition that all members of the international community must be treated as political equals and that none should be afforded less opportunity to participate in the development of international law. On the other hand, the interpretive attitude explains why our fundamental intuitions about legality are not only consistent with the exercise of evaluative judgement on the part of the interpreter, but also *require* that such judgements be careful, critical, open and constructive.

This point is especially important in the wake of many, sometimes devastating, critiques of the content and efficacy of international law. We are often told that international law is unjust and unfair, that it is too old and cumbersome to live up to modern challenges for the international community, that it focuses too much on the interests of States and leaves cultural and racial minorities, women and children unprotected and under-represented. We are told that big structural and conceptual changes are required for international law to be able to deliver. These include calls for the establishment of an international government, a more active role for the United Nations and non-State actors in areas such as domestic political administration, or even the wholesale abandonment of the State as a form of political organization. In a nutshell, we are warned that international law is found wanting on too many counts and that both States and individuals are increasingly considering it irrelevant and regressive. Something radical is needed to shake it up.

Quite possibly, most of these diagnoses are correct and it is not hard to see why that might be the case. To speak with Allott, all international law is old law. The question facing international lawyers is not the pressing and performative "what shall we do?" that confronts politicians, but the more backward-looking "what do *our practices* require us to do?" International lawyers are therefore wedded to the past in a way that philosophers and politicians are not. There is also no denying that, as long as this is the right way to frame the question of legality, our past practices may yield answers that fall short of what is required as a matter

[13] I believe that this is also the point of Franck's discussion of the relationship between the need for coherence in the application of international rules and the legitimacy of those rules, see Franck T., *The Power of Legitimacy Among Nations* (1990) at 150ff.

of international justice, fairness or even practical expediency. There is also reason to fear that even the most conscientious and open-minded commitment to international legality will only perpetuate entrenched injustices and inequalities.

At the same time, those who criticize international law for its failings may have underestimated its ability to internalise the broadening and deepening of international values in the contemporary world. If it is true that the interpretation of international law requires the interpreter to reflect on the values that provide the most attractive justification for past international practices, international law is not just more receptive to evaluative critique than it is usually made out; its argumentative structure *demands* that such critique be available and that it be as sharp as possible. Indeed, it seems to me that a number of those who condemn international law as being insensitive to the changing values of the international community actually share in the predicament of old-school positivism and its claim to evaluative neutrality, insofar as they assume that what the law says can be determined in a value-free way. Their critique owes much of its bite to the false assumption that international law is still the domain of the gritty but philosophically uninformed international lawyer who thinks that he can do his job well without ever having to make a judgement about the moral worth of the practices that he is interpreting.[14] But this is not only a caricature of international lawyers but also a misrepresentation of the nature of their argumentative practice. In reality, critiques of international values and of international legal structures and institutions are as internal to international law as can be.

There is, I think, a second and quite different reason why we should endorse the interpretive attitude. In particular, it seems to me that attentiveness to the interpretive structure of international legal argument will allow us to understand and internalise what I regard as the greatest development or shift in the history of international law. That development has not been specific to a particular area of international law, such as the law of human rights, the

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[14] Although I would hesitate to attribute this false view to any particular theorist, some are more guilty of endorsing it than others. One such group are theorists who present as an uncontroversial *given* that positivism is the right theory of international law, see e.g. Scott S., *International Law in World Politics: An Introduction* (2004) at 96: "Positivism is the philosophy underpinning the contemporary system of international law". I find that it is casual statements like these that are most counterproductive and distorting of how international lawyers actually go about their practice.

environment or international trade. In fact, such particular developments were only possible because of the more general and pervasive shift I am referring to.

Thomas Franck has described that shift very eloquently. In his study on *Fairness in International Law and Institutions*, he writes:

> We are witnessing the dawn of a new era, defined both by moderate scarcity and by an emerging sense of global community. We have not arrived there yet, but that is where we seem to be heading as we turn the corner into the third millennium. Both moderate scarcity and a shared sense of community have become constant characteristics of our contemporary world. These economic, social and political conditions have eventuated *at the same time* as the international legal system has reached a high level of maturity and complexity. This confluence of factors makes discussion of fairness both opportune and necessary.[15] (emphasis added)

To this perceptive assessment, I would only add that the emergence of a sense of global community and the coming-of-age of international law have not just emerged 'at the same time', but are also intrinsically connected. Let me explain. My thesis argues that the heart of the interpretive attitude is the idea that a community treats its practices as meaningful stream of tradition, whose interpretation engages questions like "what does this shared body of practice mean for us?" and "how can we make the best of our shared legal tradition?" This entails that every application of international law requires the interpreter to *rethink* the meaning of that tradition in a way that responds to the present concerns of the community and to the particular features of the situation that has prompted the interpretive effort. At the same time, it entails that these new interpretations will be interpretations of the *same* tradition that spoke to previous interpreters of the law in previous situations. It seems to me that the great development that Franck describes has found its home between these two points: interpreters of international law have come to occupy a unique position in the international community, as *the professional mediators between its history and its values*. By showing past and present as aspects of a single stream of tradition, international lawyers have begun to chronicle the process of evolution through which the international community gains its distinct identity. Their interpretations demonstrate what the international community is like, though not

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[15] Franck T., *Fairness in International Law and Institutions* (1995) at 7. For an illuminating discussion of Franck's work see Tasioulas J., 'International Law and the Limits of Fairness', 13 *EJIL* (2002) 993.

just in the sense of showing what that community *has been*, but also in the sense of disclosing what that community is capable of *becoming*.[16]

To put it more simply, I suggest that the most significant development in international law has been the willingness of international actors to treat their practices not just as shared habits that define the structure of the community and shape its internal power relations, but also as a *shared tradition* that adds a new dimension to their identity and reflects their shared aspirations and prospects. International law is no longer the domain of the self-serving political statement; its rules are debated and interpreted as aspects of a comprehensive structure that aspires to reflect the values of the community. This is well reflected in the fervour with which international actors now look to international law in order to address their chief concerns about the direction of the international community in the areas of global and domestic justice, the environment and human rights. These actors no longer consider international law as a regressive tool in the hands of the powerful few; at any rate, they are no longer willing to allow the elites to exercise an exclusive hold over its content. International law is *their* law too, capable of being sensitive to their values and needs, and representative of their new identity as active participants in international political life.

My point is that the various 'external' critics of international law seem to be doubly misguided. On the one hand, they have failed to appreciate that the promise of moral progress for international law is already in the process of becoming fulfilled *through* interpretation rather than beside it. On the other hand, they are misguided to the extent that they conceive of international law in purely instrumental terms, as a mere vehicle for the achievement of social justice or fairness or equality, the success or failure of which must be measured according to the outcomes that it produces. If my suggestion has any plausibility, the function of international legal interpretation is much deeper than that and its success falls to be assessed by different and more demanding standards. For inasmuch as it effects a unique fusion of international history and international values, the interpretation of international law is not just a means for the achievement of certain social ends, but an integral part of the identity and self-constitution of the international community.

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[16] My discussion here owes an obvious debt to Philip Allott, see Allott P., *Eunomia* (1990) 57ff.

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