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## REVIEW ESSAYS

# International Law and the Poststructuralist Challenge

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Peter Fitzpatrick and Patricia Tuitt (eds.), *Critical Beings: Law, Nation and the Global Subject*, Aldershot: Ashgate, 2004, 226 pp. (hb).

Sinkwan Cheng (ed.), *Law, Justice, and Power: Between Reason and Will*, Stanford: Stanford University Press, 2004, 278 pp. (pb).

### I. INTRODUCTION

Some books, Umberto Eco once said, seem to be easier to review than they are to read. There is something about them that makes them far more predisposed to commentary than to simple reading. Take, for instance, Kant's *Critique of Pure Reason* or Grotius's *De Jure Belli ac Pacis*. Books like this are almost impossible to read without constantly reformulating their theses: 'it is only by applying yourself to a gloss that you can follow their argumentation without distraction, their implacable syllogistic necessities, or the precise knots of relation'.<sup>1</sup> Such books have few admirers, but many commentators.

And then there are other books,

books that are extremely pleasant to read, but impossible to write about: because the minute you start expounding them or commenting on them, you realize that they refuse to be translated into the proposition 'This book says that.' The person who reads them for pleasure realizes he has spent his money well; but anyone who reads them in order to tell others about them becomes furious at every line, tears up the notes he took a moment before, seeks the conclusion that comes after his 'therefore,' and cannot find it.<sup>2</sup>

Take, for instance, David Kennedy's *International Legal Structures*.<sup>3</sup> What is this book about? What does it try to say? That you can think of international law as a canon of rhetorical moves? That the discourse of substance always refers us back to the discourses of process and sources? That legal aporia is ineradicable and that it is precisely because of this that international law has managed to retain its importance in modern politics? Some books are just impossible to sum up. Certainly, that does

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1. U. Eco, *Faith in Fakes: Travels in Hyperreality* (1998), 221.

2. Ibid.

3. David Kennedy, *International Legal Structures* (1987), 195–8.

not make them any less remarkable, pleasant, or enlightening – far from it – but it definitely makes them very difficult to review.

Truth be told, however, I do not know in which category the two volumes I am supposed to review here belong.<sup>4</sup> On the one hand, *Critical Beings*<sup>5</sup> and *Law, Justice, and Power*<sup>6</sup> are, of course, very intelligent books. Reading them without ‘applying yourself to a gloss’ is almost certainly impossible: ‘a mutual appetency of the universal and the particular’ (*Critical Beings*, p. xi (Fitzpatrick and Tuitt)). is not how most people talk of the nation-state. On the other hand, they are also very difficult books to try to pin down. Twenty-five essays written by 24 contributors, only nine of whom are lawyers – how often do you come across law books that take interdisciplinarity that seriously? Five hundred pages of elaborate polemic, cerebral, complex, and intense, unafraid to offend or raise awkward questions, and conceiving its subject-matter under the rubrics of ‘preventive counter-revolution’ and ‘the misery of the *Untermenschen*’ (*Law, Justice, and Power*, p. 2 (Cheng)) – how often do you get to pass judgments about texts that speak that confidently and in that kind of voice?

Then again, perhaps, such ambivalence is not really a problem. One of the three main themes that constitute the common intellectual space covered by these two volumes is marked by the name of Jacques Derrida. Derrida’s most enduring philosophical legacy today, certainly, is the theory that all binary oppositions are essentially unstable. Or, to put it slightly differently, however convincing they may look at first, most dichotomies do not actually work if you start taking them seriously. Let me explain this in a bit more detail.

To start with, one does not have to be a Derridean to recognize that the whole modern Western culture is essentially grounded in a binaristic sensibility. One can be a Platonic and still accept the same idea. Nature versus nurture, subject versus object, reason versus will, truth versus power, lordship versus servitude – whichever way you look at the world, if you look at it through Western eyes, it always comes out as an endless chain of binary oppositions. The West just likes that kind of thing.<sup>7</sup> The same, of course, holds true for Western law: ‘The more sophisticated a person’s legal thinking, regardless of her political stance, the more likely she is to believe that all issues within a doctrinal field reduce to a single dilemma of the

4. That they are at least intended to belong in the same category seems to be beyond doubt: both books are explicitly identified as contributions to the same line of juristic debate. *Critical Beings* is part of the ‘Law, Justice and Power’ series edited by Austin Sarat. *Law, Justice, and Power*, as the title indicates, is directly inspired by the same series. See *Law, Justice, and Power*, 17.

5. *Critical Beings* consists of 11 essays organized in three parts – ‘introversion’, ‘extraversion’, and ‘formation’ – and an introduction. The first part focuses on the relationship between the concepts of nationhood and refugeehood and the corresponding legal regimes. The second part attempts to set the framework for the study of the universal dimension of the international and its relationship with the particularity of nationhood. The third part seeks to review the various ways in which the new hybrid subjects whose subjectivity is regularly overlooked in the traditional accounts of the global juridical order are constituted.

6. *Law, Justice, and Power* consists of an introduction and 14 essays organized in six parts: ‘the “new world order” between state sovereignty and human rights’, ‘colonialism and the globalization of western law’, ‘legal pluralism and beyond’, ‘new ethical and philosophical turns in legal theory’, ‘the “inhuman” dimension of law: poststructuralist assessments’, and ‘psychoanalysis: justice outside the “limits” of the law’. Given the incredible diversity of the essays, it may have made sense to divide the volume even further.

7. Further on Derrida’s take on binarisms, see G. Gutting, *French Philosophy in the Twentieth Century* (2001), 293–4.

degree of collective as opposed to individual self-determination',<sup>8</sup> or, slightly more familiarly, 'The dynamics of international legal argument . . . lies behind such dichotomies as "positivism"/"naturalism", "consent"/"justice", "autonomy"/"community", "process"/ "rule", etc'.<sup>9</sup>

Now, what Derrida had to say about all of this was basically as follows. First, he said, every binary opposition, however stable it may seem at first, if you look at it hard enough, sooner or later is going to reveal its fundamental instability. Nature always slides into nurture, lordship always transforms into slavery, truth blends into power, exceptions become the rule, positivism turns into a version of naturalism, and so on. Why does this happen? The answer, said Derrida, is very simple. No entity can ever keep at bay that analytical antithesis on whose ontological isolation its identity depends. Or, to put it slightly less abstractly, every Self carries within it an ineradicable trace of its external Other, which is to say that the Other is never really external and, moreover, never really an Other.

The implications of these observations, as soon as Derrida formulated them, needless to say, were enormous. Post-Derrida there are left now no real masters or slaves, no reason or will, no separation between culture and nature, truth and power, books for commentators and books for admirers, legalism and politicking. Instead, there is only one eternal, all-encompassing haze of sparkly oscillation called *différance* and everything that we may feel about it.

All of which now brings us to four basic questions. First, what is *différance*? Second, how is what Derrida says in any sense different from the old cliché that 'everything is subjective, anyway'? Third, what does this have to do with the two volumes in question? And, fourth, how is it at all relevant for international law? Four questions, one justification, two lines of enquiry. Before I try to explore either of them, however, let me take a short detour and enter a few remarks about canons, law, and disciplinary renewals.

## 2. POSTSTRUCTURALISM AND THE CANONS OF INTERNATIONAL LAW SCHOLARSHIP

The first tenet of classical structuralism states that every activity always proceeds according to a certain canon, that is, a set of constitutive norms and procedures through the totality of which the ideal model of the given activity is practically established, changed, and enacted. Needless to say, to endorse this idea does not necessarily presuppose the belief that every act always embodies only one canon – obviously, some acts are internally contradictory (clash of canons), while others have several dimensions of functionality (overlapping of canons) – or that canons exist independently of the corresponding practices or that they are transcendental, self-sufficient, universal, and ahistorical. Not at all. What it does presuppose, however, is the belief that, however you go about it, whatever you do, whichever way you turn,

8. Duncan Kennedy, 'The Structure of Blackstone's Commentaries', (1979) 28 *Buffalo Law Review* 205, 213.

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

you always work within some kind of canon. Even canon-bashing, come to think of it, has its basic rules and procedures.

The fact that canons are so ubiquitous naturally makes them a very important psychological tool. To put it simply, canons command emotional capital. The closer you follow the established canon, the more comfortable, even if bored, your audience is going to feel. The further you step away from it, conversely, the more uneasy their experience will become, the less likely they are to remain indifferent to your acts.

Approaching our two volumes against this background, then, it seems rather self-evident that the main reason why they appear to be so difficult to read and write about from the perspective of an international lawyer is that each, in its own way, seems to defy some of the most fundamental canons of international law scholarship.

To start with, not only do they both advocate a rather wide-ranging renewal of international law as a discipline, but they also talk of it as if it were something almost unreservedly good. No self-respecting international lawyer in his right mind, however, will ever accept that kind of ethics in good faith. International lawyers hate disciplinary renewals.

Perhaps this is a sign that the 'profession' has finally developed some kind of a collective unconscious – who knows? – every disciplinary renewal in international law over the last hundred years or so has invariably ended in a large-scale professional crisis, which probably could be explained by the fact that most international lawyers, historically, have been idealists by creed, and idealists, as a rule, tend to be too thin-skinned to survive disciplinary ruptures unscathed.

Or maybe it has something to do with the job market: there are simply too few real jobs in the field of international law, even today. Most international lawyers over the course of the last century and a half have been academics. Academics are not particularly well known for their ability to reinvent a career midway through the flight. They are, in this sense, all slaves of methodological fashions. Every time the discipline sheds its skin, then, the bulk of the profession risks ending up on the street, figuratively or literally. Think of what happened to Kelsenians and their employment patterns after the Second World War, when pure theory fell from grace, or Tunkin's school, for that matter, after the disintegration of the USSR.

Feeling bad about disciplinary renewals, however, is no more a central part of what makes someone a good international lawyer than feeling good about them ought to be a central part of what makes someone a good international law student. Think again: there *are* too few real jobs in the field, even today. The house of international law is overcrowded. Unless the old guard with their old ways and habits are completely squeezed out, the new guard will have no room to take as their own. What better way to go about securing a job, then, than with a disciplinary renewal?

Still, even disciplinary renewals are known to follow certain rules. The renewalist scholarship in international law, like all other lines of discourse, has its own aesthetics, customs, and master plots,<sup>10</sup> and the two volumes under review appear to observe them only half-heartedly.

10. See further David Kennedy, 'A New World Order: Yesterday, Today, and Tomorrow', (1994) 4 *Transnational Law and Contemporary Problems* 329, 358–61.

Ideologically, the main function of *Critical Beings* and *Law, Justice, and Power* as pieces of scholarly discourse seems to be to create some kind of a working platform for the formulation of a new wave of theoretical interventions. The starting ‘base-camp’ for the interventions appears to be the classical canon of French poststructuralism;<sup>11</sup> the targeted domain in question, the second-oldest debate in jurisprudence: ‘what should legal analysis become?; the suggested point of first entry, the newly formed discourse on ‘law and globalization’.<sup>12</sup>

Every renewal project is normally expected to proceed according to a certain sequence. First, it is supposed to engage in basic self-promotion and proselytization. The ideological project outlined by our two books – let us call it, for the sake of expediency, ‘legal poststructuralism’ – at this point seems to proceed more or less in line with the established practice. The most accessible (in discursive terms) essays, even though they are not placed at the beginning of each collection, adopt exactly the kind of tone one would usually expect from someone trying to popularize his or her line of products. Speaking at this level of its organization, legal poststructuralism calls on its audiences to ‘try to transcend reference to “law” and “the law” as a singular phenomenon and treat [it, rather,] as a social artifact’ (*Law, Justice, and Power*, p. 159 (Brigham)). The main justification for doing this is cited as follows: (i) all legal theories that do not practise such a kind of transcendence are known to end up ‘hypothesiz[ing] a state of nature in order to justify or explain the legitimacy of institutionalized law’; (ii) such hypotheses, however, always lead, in one way or another, to glossing over the intrinsic ambivalences of the traditional concept of the nation-state by, for instance, overlooking the existence of ‘stateless peoples, and refugees, and changing national borders’ (*Critical Beings*, p. 4 (Stauffer)); and (iii) all this, of course, is morally wrong and intellectually dishonest and can cause innocents to suffer.

As soon as the initial message is received and processed, the tenor of the renewal project discourse is expected to change from that of the announcement to that of an

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11. For a good introductory overview of poststructuralism, see further C. Belsey, *Poststructuralism: A Very Short Introduction* (2002). The irony here, of course, is that the poststructuralist ‘classics’ themselves (Derrida, Lacan, etc.) seem to have thought it quite revolting to fetishize any modality of action or knowledge and to construct on this basis any sort of canon or dogma. Then again, maybe that is the reason why they are called the classics. Marx, after all, was not a Marxist either.
  12. I was not sure at the beginning whether it was fair to include both books under the same heading of poststructuralist scholarship. In the end, I decided that it was, on the understanding that poststructuralism, like all other intellectual traditions, has different faces and manifestations. Thus, where *Critical Beings* seems to come across as a rather conscious attempt to provide a poststructuralist exegesis of law and globalization, *Law, Justice, and Power* appears to be more of an (unintended?) illustration of what such exegeses may become if the logic of poststructuralization is left to take shape on its own. Moreover, while the poststructuralist aspirations of *Critical Beings* are clearly detectable at almost every level of its substantive dimension, from the concrete theses advanced in the individual essays to the general message of the book as a whole – but not, interestingly, in the form of its internal organization, which continues to remain more or less orthodox, or its take on its own imputed subjectivity (more on this later) – the individual essays comprising *Law, Justice, and Power* do not, as a rule, appear self-consciously poststructuralist, either in aspiration or in execution, even though the book as a whole exhibits all the classic symptoms of poststructuralization: the text – the materiality comprised by the 14 essays – incessantly turns against its own self-image, outlined in the introductory section; the metanarrativist aspirations of the editor are honoured far more in breach than in observance; the substantive contents of the writing constantly break free from the formal structures imposed on it by the authors; the multiplicity of interpretations invited by the conjunction of mutually not comparable essays repeatedly evokes the image of a semantic inundation, and so forth.

illustration. The audiences must be invited to witness the new teaching in action, rather than just listen and read about its alleged miracles and promises. The way in which legal poststructuralism goes about this task again seems to be rather traditional. The essays of the second tier of complexity explicitly identify themselves as works in ‘applied theory’, thus inviting the reader to watch and learn the new ‘truth’ by example. Take for instance the refugee/migrant theme uniting the two volumes: ‘This chapter combines sociocultural theory, experience (life historical accounts/cultural memory), and action/praxis (art forms) to explore and better understand the experiences of being in exile, a refugee, an asylum seeker in the United Kingdom between the twentieth and twenty-first centuries’ (*Law, Justice, and Power*, p. 70 (O’Neill)). ‘This chapter concerns the ways in which the refugee is symbolized in contemporary political theory, as exemplified by the works of Agamben, Malkki and Xenos . . . Above all, I am concerned with those works that assert that the refugee condition is politically productive of a new political consciousness able to challenge the nexus of state, territory and identity’ (*Critical Beings*, p. 37 (Tuitt)). ‘In this chapter, I want to shift from the view of the immigration state as one involved in the sovereign activity of “defending” a territorial “inside” through the exercise of exclusion and deportation powers. This is a view that animates, albeit in very different registers, the work of Sassen, Smith and the “plenary power doctrine” of US constitutional law . . . Instead, I want to introduce a sharply different view, that of a state driven by the impulse to eject the disenfranchised elements of its own “inside” by exploiting the fortuities of the legal structures available to it.’ (*Critical Beings*, p. 184 (Parker)).

Only after the illustrative stage is duly completed can the renewalist discourse begin to allow its audiences to peek into its ‘internal proceedings’ and listen in on the ‘private’ discussions of its leaders through whose bargains and disagreements the course of its ideological development is in fact determined. Anyone who has a basic understanding of sociology will already know that it is in the [s]truggle among individuals and groups over resources – institutional resources, prestige, the resources of perceived plausibility, disciplinary hegemony – and the processes by which these resources are in turn allocated’ that the ‘explanations for the dominance of some ideas at some times and for transformations in the disciplinary vocabulary’<sup>13</sup> must be sought, but it is still part of the established canon that, as far as possible, one must never acknowledge as much about one’s own discourse, for that is supposed to be the knowledge of the initiates, and the lay should never be allowed to reach it easily.

It is part of the renewalist canon, in other words, that a renewalist project will never proceed successfully if it starts to reveal to the outside world all its internal splits before it takes the opportunity to establish itself in the best possible light. Transferring to the context of contemporary international law scholarship, achieving this condition for an international lawyer essentially means presenting the proposed renewal as the most effective solution to the discipline’s eternal predicament,

13. David Kennedy, ‘When Renewal Repeats Itself: Thinking against the Box’, (2000) 32 *New York University Journal of International Law and Politics* 335, 423.



namely, how can international law be made practically relevant while retaining its discursive distinctness from international politics? Given the discipline's established dogma and the unmistakably natural-law flavour of the predicament's formulation, to achieve this effect, it appears, the solution must always come across as if it were derived from the *objective nature of the social reality* or the *reason* itself. Probably this has something to do with the absence of a centralized political process in the international arena and the enormous size of stakes disposed by international law. In any event, international lawyers' fixation with objectivity borders on pathological, and, if we look at the history of international law's disciplinary renewals in the last hundred years, every successful project from League institutionalism to UN pragmatism to the transnational-legal-process school has shamelessly taken advantage of this. Who cares that the social reality may suggest several different things about its nature, all of which will look equally objective to an outside observer, or that the reason does not itself prescribe what the international standards on the utilization of the deep-seabed resources should be – if you want your renewalism to be accepted, this is the way to go.

The more divided the leaders of the new movement appear to be, the less convincing they look when they try to persuade the rest of the profession that their renewalist project is objectively justified and that their teaching is not, therefore, just an ideological construct. Seen against this background, the first political paradox of legal poststructuralism is that, on the one hand, it still appears to think of itself as a project of disciplinary renewal that has long been overdue, while, on the other hand, it immediately admits to anyone who cares to read its introductions, that not only is it completely fragmented, constantly turned against itself, and utterly proud of it, but that it also does not believe in objective reason and, moreover, is not sure if it can provide that kind of solution which its audience expects.

The ink had not yet dried on the passage revealing its basic intellectual affinity with the scholarly projects led by Giorgio Agamben and Michael Hardt and Antonio Negri, and *Critical Beings* already starts charging against those whom, in any reasonable, pragmatic assessment, one should have considered to be its main, if not only, ideological allies (*Critical Beings*, p. xii). Then again, for poststructuralism this may be the most natural thing to do. Admitting internal fragmentations, as far as the poststructuralist aesthetics is concerned, is perhaps the best rhetorical tactic ever.

'We see our engagement as . . . concerned more with a dynamic of formation than with a peremptory resolution', declare the editors of *Critical Beings*. The resulting 'emphasis on unsettlement and ambivalence . . . set[s us] dramatically against [all the] recent attempts to delineate a new global or quasi-universal subjectivity and to connect this to a juridical order' (ibid.). What legal poststructuralism seeks to do, in other words, is to offer not a reinvention of the international law discipline around a new set of truths and dogma, but to overthrow the discipline of international law as such. Not a replacement, that is, of Westphalia or 'transgovernmentalism' with another ideological closure, but an end to *closing* as a practice.

To be sure, none of this prevents legal poststructuralism from continuing to issue statements like '[this kind of] shift in ethics, to one of responsibility prior to universality, is not opposed to the rule of law, or indeed to the realm of legal institutions' (LJR, 187, Gibbs), but it does force it to acknowledge the need to 'reinterpret



[the concepts of] law and norms' (ibid.). Hence the tremendous density of the ensuing intellectual operations and the continuous quest to overcome the anxieties of the liberal political theory: 'but what if law (like any economic, social, or moral structure) is indeterminate? What if law is not an objective and neutral representative of something (legislative will, community interest) beyond itself? This is what political theory considers a scandal. But it need not be' (*Law, Justice, and Power* p. 61 (Koskenniemi)). Perhaps, 'in its indeterminate being, law [could] provide . . . the path from [private] morality to [public] justice' (p. 62) and thus save us all. Or, perhaps – one is immediately pushed to respond – by pointing out the precarious character of law as a discipline, by bringing home the idea that not only the formal legal institutions themselves, but also the legal concepts and the legal theories behind them, are nothing but artefacts – a task that is, admittedly, as emotionally costly as it is intellectually taxing – legal poststructuralism restores to the surface not only that traditionally forgotten 'moment of decision that underlies any *sedimented* set of social relations' but also its twin axiom – whose memory, alas, is far too often suppressed by the would-be deconstructionists – that 'from the fact that there is the impossibility of ultimate closure . . . , it does not [necessarily] follow that there is an ethical imperative to "cultivate" that openness or even less to be . . . committed to a democratic society'<sup>14</sup> and thus acknowledge, however briefly, that liberalism's fears of poststructuralism are not perhaps all irrational and misplaced.

There is nothing inherently emancipatory or progressive about poststructuralization, just as there is nothing inherently oppressive or reactionary about structures and reifications. Doctrinal formalism does not always work against the weak and the oppressed.<sup>15</sup> The Westphalian conception of sovereignty does not always contradict the aspirations of human dignity. The reifications imposed by the liberal theory of the nation-state do not always and necessarily make things worse for the downtrodden.<sup>16</sup> Of course, this is not the case when we should invoke the metaphor of the coin, which, as the conventional wisdom holds, always has its two sides. The logic of the relationship between structures and emancipation looks rather more like that of the buttered toast released in a free fall: although it has more than one side too, the toast, as everyone knows, always lands buttered side down. Formalism *does*, as a rule, harm the weak more than it harms the strong. The doctrine of sovereignty *does*, as a rule, work against the interests of the refugees and the downtrodden more than it works for them. But for a discourse that is so passionately wedded to the goal of anti-reification, it must be at least questionable to exhibit such an unequivocal admiration for epistemological openness, unless, of course, that is just a tactical ruse.

Traditionally, poststructuralism's main aspiration has been to struggle against all forms of reification and hypostatization, that is, any kind of substantialization of meaning or presence. It was Julia Kristeva, incidentally one of the 14 contributors to

14. E. Laclau, *Emancipation(s)* (1996), 77–8.

15. Indeed, as Koskenniemi correctly observes, 'if the law is indeterminate, then there is nothing that may obstruct or realize any purposes' (*Law, Justice, and Power*, 60).

16. There is a powerful tradition of postcolonial criticism resisting unbridled enthusiasm for anti-statism. See, e.g., Sundhya Pahuja's essay in *Critical Beings*, 161–79. See also B. S. Chimni, 'International Institutions Today: an Imperial Global State in the Making', (2004) 15 *EJIL* 1.

*Law, Justice, and Power*, who originally gave, perhaps, the most systematic expression to this aspiration 'proposing to replace the older metaphysical notions of literary form with that of the text as a self-generating mechanism, as a perpetual process of textual production'. Any attempt to repress such understanding of literature, in that view of things, had to be interpreted as the sign of 'a fear of the process of [the] infinite relay of meaning from signifier to signified', the same kind of fear that had earlier been described by existentialists as the fear of the human condition, the fear which, once it strikes, makes people 'unable to live within [the] pure temporality of difference and [needing] ultimately [to] have recourse to some comforting doctrine of a transcendental signified at whatever level, whether it be that of God, political authority, *machismo*, the literary work, or simply meaning itself'.<sup>17</sup> The poisonous influence of pervasive alienation and wicked interpellation apart, all hypostatizations are, the argument ran, a symptom of the hypostatizer's basic anxiety about life. People are afraid of time because it brings with itself not only the promise of change but also the threat of death. The love for essences and hypostases, thus, is the first mask of the fear of death.

Seen from this perspective, poststructuralism effectively comes out as just another variation of the old existentialist tradition, with the crucial difference that where existentialism perceived the fear of indeterminacy as something to be confronted and overcome, poststructuralism takes it as something to be avoided at all costs, thus, in a deeply ironic twist on Roosevelt's felicitous phrase, creating its own object of fear and, with it, inevitably, its own set of hypostases. By relentlessly struggling against all forms of disciplinary dogma, poststructuralism, brought to its logical conclusion, ends up producing a dogma of its own. Attempting to escape from the 'cretinism' of formalism it slips into the trap of 'romanticizing' anti-formalism and interdisciplinarity.<sup>18</sup> Then again, perhaps, it is not impossible to see in this the surest sign of poststructuralism's own poststructuralization, for, after all, what can be more poststructuralist than when a text begins to turn against itself, ridiculing the sovereign design created for it by its authors?

Or maybe in the end it all boils down to the same old observation: there is a very thin line between pragmatism and opportunism, and far more often than not the two simply cannot be told apart. By melting the rigid structures of dogma, poststructuralism, on the one hand, rewards every reformist movement with a powerful know-how of unorthodox politics and, on the other hand, undermines every radical project in its sight whose performance requires time, planning, and discipline, by immediately turning all its anti-dogmatic arsenal against it. By romanticizing the practice of endless questioning and denouncing the act of closure as such, does poststructuralism not risk becoming just another strand of intellectual anarcho-terrorism whose only real achievement is to inoculate the Established Order against any effective challenges from the left? Neither book under review seems to show much awareness of this possibility,<sup>19</sup> which inevitably leads one to wonder: is it just

17. F. Jameson, *The Prison-House of Language* (1972), 182.

18. G. Lukács, *History and Class Consciousness* (1990), 270.

19. There are, however, some occasional exceptions. See, e.g., Sundhya Pahuja's essay in *Critical Beings*, 161–79.

a case of naivety or utter cynicism to invest that much trust in poststructuralization? Is one simply mistaken or does one necessarily act in bad faith when one begins to imply that the oppressive regimes sustaining global injustices will dissolve as soon as ‘everyone’ learns that all binary structures are unstable, that law can be indeterminate, that the opposition between reason and will is flawed, and that, therefore, it is perfectly fine that this awareness may also serve to undermine every emancipatory project hitherto formulated better than any reactionary ideology? Or, better still, can knowledge ever set the world free on its own and what happens if that knowledge is the knowledge about *différance*?

### 3. STRUCTURES, *DIFFÉRENCE*, AND WHAT COMES AFTER

What is *différance*? Following Derrida’s own lead, no self-respecting Derridean, probably, will ever consent to answering this question definitively.<sup>20</sup> Where definitions do not work, however, as a learned jurist has remarked, descriptions can still sometimes do the trick.<sup>21</sup>

One way to solve the riddle of *différance*, consequently, is to describe it as the synchronic aspect of that phenomenon whose diachronic aspect is (supposed to be) embodied in the material-dialectical notion of Becoming. Seen from this perspective, where the latter stands for the actual evolution of Substance, the former, one could say, marks the ontological limits of this evolution’s theoretical potentiality, or, in other words, serves as the marker of its *potentia*.<sup>22</sup>

Another way of addressing the issue is to explore *différance*’s functional significance in the context of the classical structuralist dogma.

Meaning, teaches classical structuralism, is, essentially, the effect not of a natural link existing between a constructed sign and the corresponding physical object existing in the outside world, but of a structural system of differentiation posited by the given frame of reference. We know what a ‘coffee cup’ means, for instance, not because we know which exact physical object corresponds to this term, but because we know how it relates to all other terms with which it is discursively connected: ‘mug’, ‘carafe’, ‘soup bowl’, ‘champagne glass’, and so on. Knowledge, to put it differently, is derived not from the study of some non-discursive reality but from the intra-discursive relations occurring between various conceptual constructs. The first structuralist thinker in modern legal history (even if he did not know it) was, perhaps, Hohfeld.<sup>23</sup>

All intra-discursive relations, meanwhile, are ineradicably systemic in nature, and the most fundamental system of relations, it seems, is that which is based on the quadrangle constituted by the two types of logical negation: contradiction and opposition. Naturally, there also exist many other relational systems – familial,

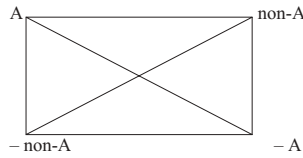
20. For a rather concise explanation, see P. Schlag, ‘“Le Hors de Texte, C’est Moi”: The Politics of Form and the Domestication of Deconstruction’, (1990) 11 *Cardozo Law Review* 1631.

21. See B. Cardozo, *The Growth of the Law* (1924), 24. Cf. K. Llewellyn, ‘A Realistic Jurisprudence – The Next Step’, (1930) 30 *Columbia Law Review* 431, 432.

22. Cf. Jameson, *supra* note 17, at 187.

23. See, e.g., W. Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning* (1919).

hierarchical, associational, and so forth – but all concepts with which they work are ultimately established on the basis of this fundamental structure.



As soon as we try to conceptualize an entity 'A' we also inevitably create some imaginative space for the conceptual formation of its contradictory 'non-A' and its contrary '-A' as well as the latter's contradictory '-non-A'.<sup>24</sup> Or, to use a slightly more familiar example, we cannot properly conceptualize the idea of 'legal' until our discourse simultaneously creates room for the ontological recognition of 'non-legal', 'illegal', and, for lack of a better word, 'alegal', that is, 'undiscussible in terms of legality', i.e. 'lying completely outside that discursive domain in which it makes sense to talk of things in terms of their legality or illegality'. The created room, of course, does not ever need actually to be filled – the structural positions can remain discursively unused in practice. What matters in the final analysis is that they exist and are fit for discursive utilization – which is why in practice it often happens that the discursive process relies only on the contradictory mechanism (hence the habit of creating binary oppositions), leaving the oppositional possibility unexplored. Consider, as an illustration, Anzilotti's classic excursus in the *Customs Regime* case:<sup>25</sup> to explain the meaning of 'independence', Anzilotti had to discuss its relationship with its contradictory ('dependence'), but never its relationship with its (still nameless) contrary.

To understand the functional significance of *différance* in the context of this intellectual tradition, consider the concepts that represent the state of simple absence, i.e. 'non-A' and 'non-legal'. The only reason why in practice our discourses grant such concepts any ontological recognition, says classical structuralism, is because somewhere beyond them we also imagine the existence of their corresponding contradictories that represent the state of simple presence (in our case, 'A' and 'legal'). Without these logical negations that comprise their conceptual exteriors and mark the limits of their ontological identity, we cannot make any practical sense of such concepts. Put differently, in its very existence every concept that represents simple absence is always permeated (contaminated) with the traces of that concept which represents simple presence. (How do you know that something lacks unless you know what it would be like when that something is present?) In their own turn, the concepts that represent simple presence are similarly inconceivable without a structural reference to the concepts that represent simple absence. (How do you know there *is* something unless you can imagine a condition in which that something lacks?)

24. Further on this see A. J. Greimas and F. Rastier, 'The Interaction of Semiotic Constraints', (1968) 41 *Yale French Studies* 86; Jameson, *supra* note 17, 163–8. See also generally A.-J. Greimas, *Sémantique Structurale* (1966).

25. (1931) PCIJ, Series A/B, No. 41.

The moment we arrive at this point, says Derrida, two conclusions invite themselves to be made.

First, since absence is logically dependent on presence and presence is logically dependent on absence, it follows that neither presence nor absence can be definitively identified as ontologically primary vis-à-vis one another, which means that the 'discovery' of the first point of contamination, that is, the original source, has to be suspended and deferred. Second, if everything necessarily contains in itself a trace of its logical outside – if all Selves, that is, are dependent in the establishment of their ontological identity on their Others – it follows that every conceptual space marked by a pair of opposites – presence vs. absence, legal vs. illegal, dependence vs. independence – is nothing but a temporary effect representing the contingent confluence of such traces, which is to say that the only thing that really exists is the *differentiation* of the interdependent but mutually irreducible contaminations; everything else is just a temporary manifestation of its realization. Put the two conclusions together, and the resultant amalgam – the condition of a perpetual *differentiation* suspended in the state of perpetual *deferral* of the question of its origin – is what makes up *différance*.<sup>26</sup>

A question arises now. What challenges does the notion of *différance* pose to the project of the international rule of law? The answer, it seems, is not as simple as it may appear at first.

First, the notion of *différance* radically destabilizes the traditional theory of legal interpretation. To refer back to an earlier observation, the theory of *différance* proclaims that there are no easy or difficult texts to review, which is basically to say: it is pointless to invest either in reflective commentaries or in first-hand reading. Texts are always irreducible to anything other than themselves. No interpretation can ever exhaust the discursive richness of any text. Or, in other words, it is never superfluous to read the text itself. That said, no act of reading is ever completely pure of gloss and reformulation, i.e. interpretation. Furthermore, no act of reading is ever like any other. Reading the text itself, therefore, is not going to produce the same results every time it is attempted. Moreover, it is not even going to produce results of the same quality. Put differently, reading the text itself is not necessarily better or more progressive than reading its reviews or not reading anything at all. (Guess now where that leaves Article 31 of the Vienna Convention.)

Second, it introduces into the self-consciousness of the international law discourse a pervasive awareness of its ontological instability. If *différance* is all there ever has to be, then, ontologically speaking, all structural constructs are by definition contingent. Naturally, this is not to say that they are, therefore, also contingent historically or that they are ontologically epiphenomenal or illusory or anything like that. They are simply not part in any way or manner of the sufficient reason (in the Leibnizian sense of the term), that is, there is nothing inherent in any single structural construct that makes *its* existence ontologically necessary. Put differently, all structural constructs are ontologically aleatory: none of them had to be or take the form or valence it has today. The fact that they nevertheless

26. On *différance*, see further J. Derrida, *Margins of Philosophy* (1982), 1–28. Cf. Jameson, *supra* note 17, at 173–86. See also Sarah Kyambi's essay in *Critical Beings* at 19–36.

did can, consequently, be explained only in terms of their immediate historical contexts, that is, the basic political struggle between concrete social groups and social formations that surrounds their creation, alteration, and maintenance.<sup>27</sup> Seen from this perspective, everything that exists in our discursive universe, including the discourse of international law, is effectively the product of our particular history and not of any transcendental domain, such as, for instance, universal justice, the nature of the international community, or the basic principles of reason. History, in its turn, as every historian is perfectly aware, is a thing that could have always turned out in a completely different way. We could as easily have lived in a world in which the international legal argument was not split between apology and utopia<sup>28</sup> and the substantive discourse of international legality did not have to resolve its ambiguities by constantly referring us back to the discourses of process and sources.<sup>29</sup>

That said – and this is the third point – precarious as the ontological status of the individual structural constructs may be, structuration itself, as an abstract condition and as a general phenomenon, is functionally unavoidable. The reasons for this are essentially twofold. First, even in an utterly poststructuralized context, all epistemology is always structuralist in character: the structuralist observation about knowledge being the product of the logical operations of contradiction and opposition is not only not disproved by the notion of *différance*, but is in fact reinforced by it. Second, even in a radically poststructuralizing discourse, there will always have to be some kind of basic structural framework, if only because each discourse is essentially a practice of signs, and all signs, even the most primitive ones, are by definition structural constructs.<sup>30</sup>

27. The moment poststructuralism proclaimed the theory of *différance* and thus suggested that structural constructs lacked any metaphysical foundations, the phenomenon of structuration had to receive a new theoretical explanation. The most convincing attempt, historically, came in the form of the theory of the master signifier. According to it, some parts of the structural construct, even though they are themselves deprived of any given (i.e. externally provided) content of their own, in practice can serve as the content-endowing points for the rest of the construct. For this to happen, all other parts of the structural construct would have to be organized in such a way as to acquire their meaning through their relation to these nodal points. Thus, even though the ontological foundations of the construct as a whole would stay completely precarious, its structural image would continue to remain more or less stable. The next step in the development of poststructuralist thought came when the theory of the master signifier was combined with the Gramscian theory of hegemony. The concept of hegemony in the Gramscian tradition basically refers to that type of situation where a limited historical particularity attempts to aggrandize for itself the position of a limitless ontological universality: a particular class acts in the name of the whole society (class hegemony), a particular culture assumes knowledge of the universal values (hegemony as cultural imperialism), a dictator's will masquerades as a democratic decision (hegemony as dictatorship), etc. The fruitfulness of the ideological union between the two theories became apparent when the poststructuralist philosophy started reformulating the concept of the hegemonic struggle as that type of struggle whose ultimate political prize consists in securing privileged access to the content-plane of the master signifier. Hegemony, on this reading of events, is the regime of controlling the ideological substance of the relevant set of master signifiers: whoever gets to define the meaning of the master signifier decides the mood and direction of the rest of the given discourse at whose structural centre it rests. Thus, where the theory of the master signifier explains how the phenomenon of structuration works *in abstracto*, the theory of hegemony explains how the master signifiers are actually selected and used in practice. For further elaboration, see, e.g., E. Laclau and C. Mouffe, *Hegemony and Socialist Strategy* (2nd edn, 2001).

28. See M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

29. See Kennedy, *supra* note 3.

30. Compare this with Derrida's own observation that 'The foundations of the metaphysic of presence have been shaken by means of the concept of a *sign*. But as soon as one attempts to show . . . that there is no transcendental or privileged signified and that at that point the field or play of signification knows no limit, then one ought – but this is exactly what one cannot do – to refuse the very concept and word sign. For the signification "sign" has always been understood and determined in its meaning as a sign-of, as a signifier



Needless to say, the double thesis that (i) structuration as a phenomenon is effectively inevitable, and (ii) all structures are essentially webs of logical negations, raises a number of very important implications for international law as a political project.

First, it raises the possibility that the age-old aspiration of making international law universal, that is, turning it into the law of the all-humanity,<sup>31</sup> has to be recognized as completely unrealizable. Insofar as all presence is always permeated with absence, and all entities, real or conceptual, require in their constitution a certain boundary of exclusion beyond which they locate their constitutive outsides and thus derive a sense of their identity, the view that international law could ever become all-inclusive appears to be analytically unsustainable. Consider the following argument. If international law is a social project – and all legal orders, of course, are social projects by definition – then, to be practically realizable, it must always require the effective presence of some global subjectivity, call it a ‘family of nations’, an ‘international community’, or ‘the civilized world’. Without a global juridical ‘subject’, there can be no global juridical order. In order to develop a practical sense of its subjectivity, however, every social agent in question, whatever its degree of self-consciousness, must always retain a certain awareness of its ontological incompleteness. There must always, in other words, remain a certain incommensurable Other outside the structural ambit of its selfhood against which it can produce the knowledge of its own existence, construct its *raison d’être*, and develop its ideal self-image. Without negating that perceived Other, the agent cannot discover the motivation for its self-becoming and the organizing logic for its self-identification. Being the basis subjectivity of a global juridical order, therefore, the community of international law, in order to realize the project of international law in practice, must always retain an ontological awareness of the global Other. Or, in other words, to the extent to which there has to be created a domain of international legality, there must also be (simultaneously) created a corresponding class of global outlaws. The ‘rogue states’, barbarians, *hostes humanis generes*, illegal migrants, the enemies of the free world – the names may change, but the basic principle always remains the same: international law is impossible without a global caste of international *refusés*. Law and exclusion walk hand in hand. Global law requires global exclusion.

Given that no subjectivity can be non-exclusive, moreover, it also follows that to the extent to which international law strives to become or present itself as the law of the all-humanity, it necessarily becomes a hegemonic enterprise.<sup>32</sup> That said,

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pointing back to, a signified, as a signifier different from its signified. If now we erase the radical difference between the signifier and signified, then we ought to abandon the very word signifier itself as involving an essentially metaphysical concept. When Lévi-Strauss, in his preface to *Le Cru et le cuit*, says that he ‘has attempted to transcend the opposition between the sensory and the intelligible by immediately installing [himself] on the level of signs,’ the necessity, the force, and the legitimacy of his gesture cannot allow us to overlook the fact that the concept of the sign cannot in itself transcend this opposition between the sensory and the intelligible. It is itself determined by that opposition, utterly and completely and throughout its entire history. Its vitality derives precisely from that opposition and from the system which the latter sets up’ (Jameson, *supra* note 17, 185–6). NB: I have opted here for Jameson’s translation, which, I believe, is superior to the ‘official’ one by Alan Bass. Cf. J. Derrida, *Writing and Difference* (1978), 281.

31. Cf. P. Allott, *The Health of Nations: Society and Law beyond the State* (2002).

32. Cf. Laclau and Mouffe, *supra* note 27, at xiii: ‘This relation, by which a certain particularity assumes the representation of a universality entirely incommensurable with it, is what we call a hegemonic relation.’



one must also recognize that hegemonies, like exclusions, also come in different stripes and colours. The ‘hegemonies of love’ (paternalism, Crusades, and all the other so-called ‘civilizing missions’), for instance, it is believed, tend to be fairly open about their hegemonic character. The ‘hegemonies of reason’ (imperialism, empiricism, religious fundamentalism), on the other hand, seek to deny it.<sup>33</sup> From the poststructuralist point of view, the opposition between the two categories, of course, tends to collapse as soon as it is posited, but the basic point they raise still makes some sense, for there are, indeed, some hegemonic projects that are more ‘honest’ about themselves than others. The question then becomes: why do some hegemonic projects become hegemonies of ‘reason’ and others of ‘love’? Or more relevantly, under what conditions does the international law project become more willing to admit its hegemonic nature? Could it be that Lucien Goldmann was right and it all has something to do with ‘being in power’, i.e. that it is the mark of every *ruling* ideology that it feels obliged to deny its ideological character?<sup>34</sup> If that is so, then, perhaps, it is pointless to keep telling the international human rights people to wake up to the fact that they do not actually speak ‘truth to power’ but are part of that ‘power’ themselves: they simply ‘won’t hear it’.

The third challenge which the notion of *différance* raises for international law derives from the constant attention it draws to the unavoidability of hegemonism and exclusionism in the construction of the international legal project. By emphasizing the idea that hegemony and exclusion are ontologically inevitable, poststructuralism alerts us to the concrete political realities created by the different regimes of international legality and the corresponding representations of these regimes in the international law discourse. Consider as an illustration Catherine Dauvergne’s essay from *Critical Beings* (pp. 83–99). Dauvergne’s main concern in ‘Making People Illegal’ is to point out the increasing convergence of the immigration-related discourses in the First World countries and to expose the ideological significance of the terms of this convergence. Increasingly, she observes, the identity of the Third World migrants in the First World contexts is coming to be constructed not with reference to their national origins (or some other relatively ‘personal’ features) but in terms of those First World laws which their intended migration patterns seem to violate. By identifying these laws as the base point against which the global migrant subjectivity is discursively fixed, such practices not only legitimize the underlying exclusionary policies by depoliticizing them, naturalizing them, and emptying them of their problematic content, but also essentialize, decontextualize, and mystify the migrant figure, evoking at once the ambivalent imagery of the ‘barbarian at the gates’ and, through the label ‘illegal’, the notion of the *hostis humani generis* (an enemy of humanity as a *whole*).

What does it mean to exhaust a person’s being with a single descriptor ‘illegal’? ‘The label “illegal” is empty of content’, writes Dauvergne. ‘It circumscribes identity solely in terms of a relationship with law: those who are illegal have broken (our)

33. The current patterns of hegemonism practiced in the international arena incline in this direction. See Martti Koskenniemi’s essay in *Law, Justice, and Power*, 46–69, and Sundhya Pahuja’s essay in *Critical Beings*, 161–79.

34. See L. Goldmann, *The Hidden God* (1964).

law. [I]lllegals are transgressors – and nothing else – by definition’ (*Critical Beings*, pp. 92–3). To flatten someone’s identity into the category ‘illegal’ is to prejudge their claim to recognition as a legal subject<sup>35</sup> in the most effective and terrifying way; it is to say, ‘you do not exist in the eyes of the law because the law thinks you have not shown enough respect for it’.

Unsurprisingly, as soon as one starts to look at the ‘nominalization of illegality’ from this angle one is immediately led to recall Foucault’s third version of politics: politics as an avowedly ‘non-political’ project of ‘cleansing’ the society of its unwanted elements.<sup>36</sup> The moment one begins to see things in this way, however, one also develops a completely new appreciation of the Fukuyamian end-of-history thesis. The third version of politics, according to Foucault, comes essentially into existence only when the discourse of political struggle starts to give way to the discourse of racial purity:

the theme of historical war – with its battles, its invasions, its looting, its victories, and its defeats – [is] replaced by the postevolutionist theme of the struggle for existence. It is no longer a battle in the sense that a warrior would understand the term, but a struggle in the biological sense. . . . Similarly, the theme of the binary society which is divided into two races or two groups with different languages, laws, and so on [is] replaced by that of a society that is, in contrast, biologically monist. [This society is no longer split into two warring factions.] Its only problem is this: it is threatened by a certain number of heterogeneous elements which are not essential to it, . . . which are in a sense accidental [–] the deviants who are this society’s by-products.<sup>37</sup>

The analogy with the Cold War and the subsequent development of the international society is impossible to miss. A new caste of global outcasts is fast coming into existence but this time around even their *moral* right to be identified as ‘the enemy’ will be denied. Such is the new logic of the international political process.

‘Making people illegal,’ observes Dauvergne, ‘reflects an increasingly globally coherent view that there are proper and improper reasons to migrate.’ In the nineteenth century people migrated to other countries because they sought a better life. Today, it is only the First Worlders and the highly skilled labourers from the Third World who are expected to take advantage of the economic mobility opportunities offered by modern globalization (*Critical Beings*, pp. 94–5). All the rest are simply expected to remain forever in their global *über*-ghettos, the garbage-heap of a superfluous humanity (*Law, Justice, and Power*, pp. 1–2 (Cheng)).

The problem with that expectation – completely deluded as it is, of course – is that even though the regime of the global economic apartheid is indeed fast becoming a political reality, the global underclass who populate its Third World reservations, as many critics have quite correctly pointed out,<sup>38</sup> are not actually all that superfluous. Everything else aside, it is they who today operate the informal sector of the global economy, the income from which sustains the economic dynamic

35. Cf. Art. 6 of the Universal Declaration of Human Rights: ‘Everyone has the right to recognition everywhere as a person before the law.’

36. See M. Foucault, *Society Must Be Defended* (2003), 59–62, 80–2, 254–60.

37. *Ibid.*, 80–1.

38. See, e.g., S. Žižek, ‘Knee-Deep’, (2004) 26 (17) *London Review of Books*, 2 Sept. 2004.

of its formal cousin, and supply the cheap labour force that keeps the dream of global outsourcing afloat and the myth of the 'golden straitjacket' in circulation. It is they, moreover, who provide that constitutive outside of poverty and barbarism against which the First World stories of civilization, human dignity, progress, and economic development acquire their ethical and political identity and multiply their utopian capital.

The mainstream discourse about law and globalization has never acknowledged the existence of this caste of global *refusés*. It is only their social antipodes – the international civil servants, international non-governmental organization activists, global chief executive officers, and all the rest of that 'transnational norm entrepreneur' crowd, these self-appointed postmodern Illuminati, who claim to run the 'real new world order' through their 'transnational issue networks' – that register on its radar screen.<sup>39</sup> For most international lawyers, the oppressed and the dispossessed exist only in the shape of voiceless victims, preferably dead, imprisoned, disappeared, or ethnically cleansed (or, failing that, exiled, displaced, interned, separated by salt water, or otherwise shut up and, therefore, 'presently unavailable' for contact, personal visit, or some other form of self-representation as concrete embodied existences). The wretched are nothing but a political symbol, an additional footnote, a formal pretext for a new *lex ferenda*.

Is this, however, a sign of a classic ivory-towerism and amateurish ignorance? It may well be. But insofar as most of the political and economic oppression occurring in the world today is actually a product of the field of possibilities created by the current institutional structure installed and maintained, *inter alia*, through the instrumentality of international law, one cannot but begin to suspect that there may be something else going on there, something other than just a mere 'myopia of the maidens'. After all, is it not true that '[t]he Other is good [only] *insofar as it remains a victim* (which is why we are bombarded with pictures of helpless Kosovar mothers, children, and the elderly, all telling moving stories of their suffering); the moment it no longer behaves as a victim but wants to strike back [against its oppressors], it suddenly, magically turns into a terrorist/fundamentalist/drug-trafficking Other' (*Law, Justice, and Power*, p. 36 (Žižek))?

To the extent to which legal poststructuralism seeks to decentre these dubious fixations of the mainstream discourse and raise the question of their ideological bias, its contribution to the scholarly project of international law cannot but be greeted with a tentative look of hope. With hope, however, must also come caution.

The second challenge which legal poststructuralism raises for the project of international law, as I mentioned earlier, derives from the acknowledgement of law's total contingency. Seen from the poststructuralist perspective, all objectivities, real or imagined, appear as utterly impermanent and dynamic phenomena, inherently prone to momentary transmutation. To the extent to which the rules and institutions of international law are recognized as leading an objective existence, it

39. See, e.g., H. Koh, 'Bringing International Law Home', (1998) 35 *Houston Law Review* 623; H. Koh, 'Transnational Legal Process', (1996) 75 *Nebraska Law Review* 181; A.-M. Slaughter, 'The Real New World Order', (1997) 76 (5) *Foreign Affairs* 183.

follows that they can do so only in the Renanian sense of a ‘plébiscite de tous les jours’: now it is here, now it is not. Like a cloud of smoke, a rule of international law is at once ephemeral and real, both dense and concrete enough to block out the sunlight of ‘pure politics’ with a *pacta sunt servanda* strictness, and unstable and volatile enough to dissolve instantly into the thin air under the blow of *rebus sic stantibus*.

All law is living law, teaches legal poststructuralism; living not in the sense of ‘yesterday’s breach is tomorrow’s norm’, but more in the sense of ‘the universe is, instant by instant, re-created anew . . . Blink your eyes, and the world you see next did not exist when you closed them’.<sup>40</sup> Being a consistent poststructuralist, it seems, one must not only endorse the view that all structural constructs, including, for instance, the doctrine of functional immunity and the principle of the self-determination of nations, are inherently contingent and unstable, but also openly accept the idea that aporia, antinomianism,<sup>41</sup> and interdisciplinarity are the defining features of *all* decision-making processes, including the legal process and, however one goes about it, this is not a view that is likely to sit well with the general public.

Whether one likes it or not, it seems generally irrefutable that, taken as a whole, the international law profession<sup>42</sup> is ‘hired’ and ‘paid’ by the rest of the society to impersonate the likes of a Fullerian Rex or a Dworkinean Hercules, not a Schmittian decisionist. Certainly, some of us may genuinely believe that posing as a Dworkinean Hercules, with however many disclaimers, is a task as silly and ludicrous as it is immoral and dishonest. But that does not for a moment change the fact that most of the rest of society do not share this view. The terms of the profession’s implicit contract with the general public quite unequivocally seem to stipulate that the ‘invisible college of international law’ will keep its current jobs only so long as it is seen to live up to that ideal. Stepping on the poststructuralist path, under such conditions, is effectively equivalent to advising your boss that he has made a serious mistake hiring you – what are the odds you will still be in your work by next Monday? And given what was said earlier about the state of employment opportunities in the field of international law, what are the odds that the rest of your colleagues will follow in your footsteps?

#### 4. ON INTERDISCIPLINARITY

One of the most important phenomena in contemporary international law scholarship is, undoubtedly, interdisciplinarity. ‘International law and international relations’, ‘international law and economics’, ‘international law and gender studies’ – whichever way one turns today, an interdisciplinarity of one kind or another constantly tries to raise its head above the parapet of traditional doctrinalism. In

40. T. Pratchett, *Thief of Time* (2001), 39.

41. Further on antinomianism, see Duncan Kennedy, ‘A Semiotics of Critique’, (2001) 22 *Cardozo Law Review* 1147, at 1158–69.

42. I am perfectly aware of Sarat’s warning not to reify the legal profession or treat it as more of a unitary body than it really is (see A. Sarat, ‘The Profession versus the Public Interest: Reflections on Two Reifications’, (2002) 54 *Stanford Law Review* 1491), but on this occasion, I think, the generalization is warranted.

McNair's days it was popular to be able to tell the difference between law and not-law and to retain some kind of loyalty to the former.<sup>43</sup> Today, it seems to have become fashionable to insist that the former is always defective without the latter and that it cannot, therefore, ever survive on its own.<sup>44</sup>

Whichever way one goes about it, interdisciplinarity has, nevertheless, not yet become a completely self-evident stance in modern international law. You cannot just take off on an interdisciplinary note as soon as you feel like it. The reader has to be warned and wooed first. Moreover, as with every other game of courtship, there are certain rules and conventions you have to follow. You cannot just say, for instance, 'look, I promise you, interdisciplinarity is fun' or 'why don't we try something new today?' The case for interdisciplinarity has to be made step by step and advanced on what should seem like objective grounds. The reader must be convinced that the move to interdisciplinarity is dictated by a genuine, objective necessity, not a simple choice.

Seen against this background, how do the two volumes we are reviewing here fare on the interdisciplinarity front? 'The new millennium dawns,' announces the editor of *Law, Justice, and Power*, 'with a pressing need for fresh strategies to counteract abuses of law, justice, and power.' The 'force of globalization needs to be taken up on its own terms before we can find some *wise and appropriate answers* to some of its problematic consequences . . . . *Only a multidisciplinary volume would enable us to see how law . . . is "everywhere" – both "majestic and ordinary,"* thoroughly penetrating every aspect of culture and society' (*Law, Justice, and Power*, p. 2, emphasis added).

The 'interminable elevations of the global' cannot be understood by analytical 'reduction of the global to the powers of nations', declare the editors of *Critical Beings*. The ontology of the global lies 'beyond the reach of nations' (p. xi). To a large extent, of course, it is predicated on the multitude of individual human beings; nevertheless, 'The critical beings of our title [are not the same entity as the] individual subjects of international law and of particular international and regional juridical forums' (p. xix). Rather, 'These are [the] people excluded or marginalized in the persistent but ever unsettled processes of national/global affirmation' (p. xi). 'In their ambivalent relation to law, to nation and the global *lies the promise of new consciousnesses*, and ways of thinking and relating to the world. To suggest this, however, is not to assert that our critical beings are orientated along definite paths, pursuing definite claims, and establishing particular, identifiable "rights" . . . . What the critical beings of our account do is *challenge the theoretical trajectories* that dominate so much of the literature that creates and purports to account for the "new global juridical order"' (p. xix, emphasis added).

Consider now, for a moment, the argument sequence rehearsed in these two passages. At first sight everything seems to be quite straightforward: the occurrence of an ontological rupture has necessitated the execution of an epistemological reform: (i) something called 'globalization' started happening, as a result of which a

43. See R. Jennings, 'Closing Address', in C. Brölmann et al. (eds.), *Peoples and Minorities in International Law* (1993), 341, 344.

44. Cf. *Law, Justice, and Power*, 2–4 (Cheng).

series of unprecedented challenges have been posed to international law; (ii) none of the old frames of reference can enable us to understand these challenges or engage with them in the way in which they deserve to be engaged; consequently, (iii) we must all now turn to interdisciplinarity. Leaving the methodological overture at this stage, one would probably find no significant problems with the rest of the proposed discourse. But let us try to look at the presented arguments again, from a slightly more reflective angle.

How do we know that the 'old frames of reference' are epistemologically inadequate to deal with 'globalization'? The argument in favour of interdisciplinarity advanced by legal poststructuralism seems to rest on some kind of logical circle: (i) because of globalization (event one) everyone must turn to interdisciplinarity (event two); however, (ii) to be able to verify why this is actually so, i.e. to see why statement (i) is correct, everyone needs to have already become interdisciplinarian. In other words, event two must always be ready to take place/have taken place before event one can begin to look sensible. Put differently, either we ought to have always-already been interdisciplinarian but kept this fact about our methodological allegiance an absolute secret from everyone else (which is another way of saying that we need always to have hated the established disciplinary tradition of international law and to think that only now have we a fitting excuse to badmouth it in the open), or we ought to be ready to make a leap of faith into that twilight zone beyond reason and will, where event one and event two have already ended before even beginning. (Kierkegaard, with his penchant for crisp descriptions, would probably call this the moment of madness.) Either way the constructed argument in favour of interdisciplinarity seems to fail the established convention by not grounding the call for interdisciplinarity in an objective justification, which inevitably leads to a number of new questions. What exactly is so great about interdisciplinarity? Is the discipline of international law really that narrow-minded and intellectually poor that on the threshold of the new century any methodological stance that has the words 'law and something' in its heading looks necessarily better than staying 'inside the box'? What precisely are the methodological limits of that discipline which the interdisciplinarian crowd calls 'law' and beyond which it asks us to aspire?

The unreservedly enthusiastic view which the two volumes in question take of interdisciplinarity is certainly not unproblematic. Take, for instance, the essays contributed by the 15 non-lawyers. As different as they are from one another, most of them tend to suspend the question of what their authors understand by 'law' without at the same time, however, suspending their discussions of it. What kind of discursive practices can a stance like this generate?

To be sure, the idea of *différance* may be a really great idea, but there is still a world of difference between refusing to take a final position on a given question and not engaging with it with any degree of commitment whatsoever. It is one thing for an ontologist to insist that he must forever defer the question of what constitutes the original trace of Being; it is a completely different thing for someone purporting to write about law and globalization to bracket out the question of what he understands by these terms and yet to proceed with the discussion. For the fact remains that none of us is free from the enslaving grasp of the conventional wisdom.



The less we question our assumptions, the more likely we are to fall for one or another set of urban legends, and being an insightful economist or psychoanalyst does not (yet) immunize one against becoming a trite jurist. For good or ill, the truth of the matter is that most of the theories non-lawyers entertain about the nature of international law are embarrassingly silly.

## 5. WHEN THE RENEWAL FORGETS ITSELF

Every time I hear a distinguished non-lawyer offer a pearl of wisdom to the legal profession I recall a short comment made by Duncan Kennedy some 15 years ago. The immediate occasion at the time was the discussion of Foucault's potential contribution to modern jurisprudence. Comparing Foucault's insights with those of Robert Lee Hale, the American legal realist scholar from Columbia, Kennedy, wrote:

It is, I think, instructive to compare Hale's approach to Michel Foucault's. Both start from the more or less categorical rejection of two great traditions: that of classical liberalism, which tended to restate the outcomes of social conflict as voluntary agreements; and that of orthodox Marxism, which tended to restate these same outcomes as the unilateral exercise of the power of capital over labour. Both writers choose power over liberty as a central concept (and in this extend the Marxist tradition), but both reject an understanding of power as unilateral imposition, emphasizing its situational, bilateral, and indeterminate character (and in this extend the liberal tradition). . . . Along with the similarities, there are great differences between the approaches of Hale and Foucault. There is, I think, a sense in which Foucault is inferior to Hale and that is in his presentation of the role of law. There is also a sense in which Foucault is his superior, and that is in his understanding of the pervasive constituting role of power in the 'social body' . . . I don't find Foucault's assertion of 'absolute heterogeneity' between legal and disciplinary discourse convincing, nor his very tight connection between law and sovereignty, nor his call to fight disciplinary power through 'a new form of law, one which must indeed be anti-disciplinarian, but at the same time liberated from the principle of sovereignty' . . . Oliver Wendell Holmes criticized the great English positivist John Austin on the ground that he approached law as a 'criminalist', meaning that he was obsessively focused on the fact that the sovereign orders or prohibits acts on pain of a sanction . . . Foucault is unmistakably a 'criminalist' in his understanding of law.<sup>45</sup>

What I think Kennedy was trying to say in this passage is essentially this. First, legal scholars can certainly learn a lot from Foucault. His theories of socialization and subject-constitution are far superior to anything the traditional legal scholarship has been able to offer on this front so far. Second, whatever wisdom we may gain from Foucault does not actually include his 'immediately jurisprudential' views. Foucault's own understanding of what the law is and how it works was, to put it mildly, a tad too simplistic. Maybe he should have consulted better legal theorists before finalizing his views who knows. Or maybe he was just out of his depth when it came to jurisprudence – nobody's perfect. In any event, and this is the third point, Foucault's programmatic prescriptions about law – his vision of what we have to

45. Duncan Kennedy, 'The Stakes of Law, or Hale and Foucault!', (1991) XV *Legal Studies Forum* 327, at 351–7.



do with/through/to law – if you consider them as they are, are on the whole quite untenable and too crude to be taken seriously: ‘Foucault gives law an important place in his general social theory, but his version of law is, unfortunately, prerealist’.<sup>46</sup> This said, there is also, I think, a fourth message in Kennedy’s article and that is: ‘Had legal scholars not managed to forget what people like Hale taught some seventy or eighty years ago, perhaps we should not have had to reinvent the wheel today’, but more on this later.

The idea that law is a dynamic, multifaceted phenomenon, contingent and unstable, but nevertheless powerful and ubiquitous, so passionately advanced by the legal poststructuralists, is not, of course, a new one. More than 70 years ago (people known today as) legal realists expounded exactly the same views.<sup>47</sup> To be sure, seven decades have taken a rather considerable toll on their theories. Some of their ideas today sound hopelessly naïve, others seem lacking in sufficient conceptual rigour. But for a school of thought that had espoused contingency, complexity, and temporality some 40 years before Foucault and Derrida ever published anything, legal realism still seems to be in a terrific shape.

Certainly, one should not flinch every time one hears a non-lawyer preach to the legal profession how we should go about doing our jobs. Despite the numerous cosmetic changes on the surface of its ‘high scholarship’, modern international law is still too solipsistic and narrow-minded as a discursive enterprise to declare itself to be in the position to decline any kind of offerings, however naïve or inept they may look, from other disciplines. Moreover, given the enormous importance of the modern international law project as the discursive site of global power processes, it seems rather self-evident that, in a society aspiring to think of itself as democratic, people from outside the international law ‘profession’ must always have an opportunity to contribute their say to the debate about international law. To the extent to which the life of the law is indeed led in the field of pain and death<sup>48</sup> and the reach of international law covers the whole world, the international law discourse has no right to remain an exclusive club accessible only to a privileged caste of quasi-priests, if only because the non-lawyers should be able to choose how they die too, or at least to have a say in what it takes – or should take – for a thinly disguised neo-colonialist war over natural resources to be considered lawful.<sup>49</sup> Too much is at stake to try to afford otherwise.

46. *Ibid.*, at 327.

47. See, e.g., F. Cohen, ‘Transcendental Nonsense and the Functional Approach’, (1935) *Columbia Law Review* 809; J. Frank, ‘Legal Thinking in Three Dimensions’, (1949) 1 *Syracuse Law Review* 9; L. Green, ‘The Duty Problem in Negligence Cases’, (1928) 28 *Columbia Law Review* 1014 and (1929) 29 *Columbia Law Review* 255; R. Hale, ‘Coercion and Distribution in a Supposedly Non-coercive State’, (1923) 38 *Political Science Quarterly* 470; Llewellyn, *supra* note 21.

48. Cf. R. Cover, ‘Violence and the Word’, (1986) 95 *Yale Law Journal* 1601.

49. Cf. U. Bernitz et al., ‘Letter to the Editor’, *Guardian*, 7 March 2003: ‘A decision to undertake military action in Iraq without proper Security Council authorization will seriously undermine the international rule of law. Of course, even with that authorization, serious questions would remain. A lawful war is not necessarily a just, prudent or humanitarian war.’ Cf. M. Craven et al., ‘We Are Teachers of International Law’, (2004), 17 *LJIL* 363, 370: ‘Aren’t we reinforcing here the idea that justice is something you know, and furthermore knowledge to which we have privileged access, as opposed to something that gets defined and redefined in the crucible of social struggle?’

And anyway, other than the new Chicagoan economists,<sup>50</sup> who can say today with any degree of confidence what exactly constitutes ‘the limits of international law’? The main legacy of the ‘pragmatic revolution’ of the 1950s, let us remember, was the realization that international law possessed an immense political potential.<sup>51</sup> Its ideological counterpart correspondingly was the realization that the international law discipline had no distinct identity of its own. The emperor, it turned out, never wore any clothes; all there had ever been was just a tradition and a set of historically contingent habits.<sup>52</sup> ‘It is revolting’, said Oliver Wendell Holmes once, ‘to have no better reason for a rule of law than that so it was laid down in the time of Henry IV’.<sup>53</sup> Clearly, it is no less revolting to insist that a textbook of international law should have as its natural field of coverage the law governing the use of military force but not economic aggression, the use of rivers as international boundaries but not as a source of drinkable water, the international responsibility of states and individuals but not that of transnational corporations, for no other better reason than that ‘this is what international lawyers have always written about’.

There is nothing sacred or self-evidently right about sticking to the established disciplinary consensus. As Foucault himself would say, ‘when I see you straining to establish [what constitutes the true international law discourse] I do not really think that you are demonstrating once and for all [what the natural subject matter of the international law discourse is]; for me you are doing something altogether different, you are investing [particular types of international law] discourses and those who uphold them with . . . power.’<sup>54</sup> The more there are alternative ways of looking at international law, the more democratically responsible the international law project can become – that much is clear. The enabling potentiality of interdisciplinarity, at this point, is obvious and virtually impossible to ignore. To resist epistemological pluralism on this level is to occupy a profoundly suspect ideological stance.

Having said this, one must also recognize the fact that interdisciplinarity can hardly be considered an unqualified blessing. Respect placed where it is due, far too often, reading interdisciplinary writings one tends to find oneself feeling slightly embarrassed on behalf of their authors and profoundly annoyed on behalf of their purported target audiences.

To be sure, interdisciplinarity does make reading law books a lot more fun. But this does not mean that the ‘view from outside’ cannot at the same time be quite unintelligible, incoherent, or completely beside the point, or, worse still, daft, pretentious, and recklessly uninformed.<sup>55</sup>

50. See J. Goldsmith and E. Posner, *The Limits of International Law* (2005).

51. For a telling account of this discovery, see, e.g., O. Schachter, ‘Dag Hammarskjöld and the Relation of Law to Politics’, (1962) 56 AJIL 1.

52. For a brief review of this development, see, e.g., David Kennedy, ‘A New Stream of International Law Scholarship’, (1988) 7 *Wisconsin International Law Journal* 1, 4–5 (‘the post-war generation expanded the practice of international law by sacrificing its distinctive intellectual self-image and coherence’).

53. See O. Holmes, ‘The Path of Law’, (1997) 110 *Harvard Law Review* 991, 1001.

54. M. Foucault, *Power/Knowledge* (1980), 85.

55. Or maybe I am just over-reacting. For a more tempered reaction along the same lines to Agamben’s writings on Guantánamo Bay, see F. Jones, ‘Guantánamo Bay and the Annihilation of the Exception’, (2005) 16 *EJIL* 613, 623–8.

It seems difficult to imagine, for instance, how statements like ‘sovereigns have at their disposal an uncommon form of speech: sovereign sentences [which by virtue of their sovereign nature] remain outside of the legal order’, or ‘sovereignty [means] exemption from legal processes’ (*Law, Justice, and Power*, p. 97 (Fenves)), would ever be taken seriously under the rubric of ‘progressive thought’ if they were made by an international lawyer. And while the suggestion that ‘as long as the threat of a [sovereign sentence] has not been fully extinguished, no legal process can be sure that it will have the last word [or, indeed,] the first one’ (p. 100) is not entirely without parallel in modern doctrinal scholarship, its thoughtlessness, one must admit, is not thereby made any less irritating. Just because there are many unintelligent passages ‘inside the box’, it does not mean that it is okay to import more at bulk prices.<sup>56</sup>

One does not have to have gone far along the path of legal education to discover the argument that (i) if sovereignty can trump the legal process, it can do so only to the extent to which the latter has already provided it with such an opportunity, for it is within the domain of the law that the notion of sovereignty is constituted; and (ii) when a sovereign act thus conceived suspends the application of a legal norm, that, too, is in itself a legal act. There is, if one thinks about it carefully, nothing ‘threatening’ – nor can there be – about sovereign sentences as far as the legal process is concerned. Of course, as ethical and political subjects, some of us may dislike those legal processes which grant sovereigns too much leeway and an opportunity to churn out as many sovereign sentences as they like, but that does not in itself make these processes – unless, of course, we decide to turn into natural lawyers or endorse some other form of legal transcendentalism/fundamentalism – any less legal or, indeed, deprive them of their ‘last’ or ‘first’ word about sovereignty, just as the formal binding of the sovereign by legal rules does not – unless, that is, we turn into the die-hard fetishists of the legal form – by itself make the corresponding regime of governance any more ‘legal’. Again, reading people like Hale (or, for that matter, Kelsen) would probably not have been such a bad idea.

Probably it is because all of its contributors have some basic background in law – nine of eleven are legal scholars – that the interdisciplinarity of *Critical Beings* tends to look somewhat more convincing than – or, rather, not as misplaced as – that of *Law, Justice, and Power*. Where the former reads as a serious contribution to the international legal theory debate, the latter – with the predictable exceptions of the true-to-form, excellent essays from Martti Koskenniemi on the history of universalism in international law (pp. 46–69) and Peter Fitzpatrick on law’s attraction for finalities (pp. 207–22) – reads more like a parody or a rebellion against what its

56. By the same token, other than the above-mentioned observation about wanting to see the Other as weak and voiceless, I find it difficult to see what *Law, Justice, and Power’s* target reader, however interdisciplinary she may be, can gain from Slavoj Žižek’s (partly recycled) ruminations about NATO and global capitalism. Certainly, it is not for statements like ‘[the Multilateral Agreement on Investment] will basically undermine the sovereignty of nations by assigning power to the corporations that is almost equal to that of the countries in which these corporations are located’, or ‘The recent catastrophic economic situation in Russia, far from being the heritage of old socialist mismanagement, is a direct result of this global capitalist logic embodied in MAI’ (*Law, Justice, and Power*, 31), that one of the most engaging thinkers of our day deserves to be known by international lawyers.

introduction suggests it could have become. Then again, rebelling and parodying are perhaps what poststructuralism is all about.

In the same year when Duncan Kennedy tried to bring Hale and Foucault together, David Kennedy wrote,

[there is] a sense in sophisticated postmodern cultural criticism that law is supposed to be something, must be, or should strive to be, or is unthinkable as other than something that we do not subject to [postmodern] techniques . . . . It is all right to postmodernize other areas or culture zones, but law is too associated with power or authority, or order, or whatever to feel comfortable once modernity is left behind . . . . Perhaps too crudely put, I think the idea here is a division of labor in which the lawyers would be responsible for holding it all together against all odds while the culture people took it apart. I think it is a bad job, and I do not think we can do it . . . . I just do not think law is like that. It does not have [any of those] qualities of fixity, order, meaning, or identity [which the cultural critics ascribe to it]. . . . Of course we certainly operate with ideas that sometimes seem very crude to a postmodernist [but] if the challenge raised for lawyers . . . is that we should get hip to postmodernism as a compelling description of the contemporary social scene and a cool way to be, I guess my answer would be . . . we lawyers have [already] been postmodern for a while.<sup>57</sup>

Perhaps I should just leave it at that. Or perhaps I should bring it back to Foucault and his famous question: ‘what types of knowledge do you want to disqualify in the very instant of your demand [that this, too, is international law discourse]? Which speaking, discoursing subjects – which subjects of experience and knowledge – do you then want to “diminish” when you say: “I who conduct this discourse am conducting a [true international law] discourse, and I am [an international lawyer]”? Which theoretical-political avant-garde do you want to enthrone in order to isolate it from all the discontinuous forms of knowledge that circulate about it?’<sup>58</sup>

## 6. CONCLUSION

Books, Umberto Eco once said, often speak not of things, human or divine, that lie outside them, but of other books, shifting slowly in a centuries-old murmuring conversation unmasterable by any human mind, least of all that of a scribe or a conveyor.<sup>59</sup> As I finished reading *Critical Beings* and *Law, Justice, and Power*, these ‘other books’ whose stifled murmurs I heard most loudly were surprisingly not the books by Derrida, Lacan, Levinas, or Foucault. They were, rather, the books written by another generation of thinkers, those with a far stronger commitment to Kant and the old tradition of Königsberg.

Every book can be said to have what for lack of a better name one can call the autochthonous principle of its rationality: an organizational logic that governs its practical realization and thus determines what it can and cannot say, how it says what it can say and how it does not say what it cannot say, which of these things can be changed, under what conditions, and so on. It is a principle that is

57. David Kennedy, ‘Some Comments on Law and Postmodernism: A Symposium Response to Professor Jennifer Wicke’, (1991) 62 *University of Colorado Law Review* 475, 480–2.

58. Foucault, *supra* note 54, at 85.

59. U. Eco, *The Name of the Rose* (1983), 286.

neither inscribed anywhere in particular (searching for it in the opening chapter, for instance, is a complete waste of time) nor formulated independently of the book, but is rather embodied in all those material effects that serve as the medium of the book's realization and the origin of its specificity: the sequence of the book's narratives, the combination of its master plots, the structure of its arguments, the richness of its vocabulary, and so on. Pinning down such principles, rendering them visible to the naked eye, is never an easy job. One would be ill-advised to believe otherwise. Books are not reducible to anything other than themselves, and there is no such thing as a view from nowhere with which one could approach every book in a fair, neutral, and equitable way. Part of the cruelty of the centuries-old conversation described by Eco is that we always speak from within other books, even when we are not aware of that.

The books from within which I speak here – or at least those that I am aware of – are the books of critical legal scholars, left-wing modernist philosophers, post-modern cultural studies people, and structuralist literary theorists.<sup>60</sup> They are books mostly written in the shadow – and against the background – of the 'original' post-structuralists and their epigones and often because of their work. The voice in which this leads me to speak, then, is also – if only through the contaminatory power of *différance* – the voice of a poststructuralist. It is with this recognition in mind that I believe I am writing these remarks. Then again, what one says one believes and what one does believe are not necessarily (or even often) the same thing, and the last set of remarks I am going to offer here is precisely about that.

The voice in which *Critical Beings* and *Law, Justice, and Power* add their contributions to the centuries-old conversation about international law is a very strange voice. In terms of its *substantive employment*, it is used in both cases to articulate the need to change the existing international legal practice, disciplinarize interdisciplinarity, explore otherness, and reopen every epistemic consensus in modern international law scholarship. On the *background aesthetic* level, however, it constantly reverberates with the same tone of self-confidence and monolithicity which one usually finds in traditional legal scholarship and that is, probably, where the main irony that characterizes these two books lies: it is *not* that each of them attempts, in its own way, to formulate, however disjointedly, a vision of an international law that would be both universal in its origins and egalitarian in its effects, without recognizing at the same time that the kaleidoscopic bouquet of philosophical teachings which serves as their ideological platform does not really allow this, but that, amidst the intensity of their brilliance and improvisation, each of them regularly loses sight of its own sermon, as if trying to bear out the old poststructuralist thesis about the uncontrollability of writing and prove right all of Pierre Schlag's concerns about the domestication of deconstruction.<sup>61</sup> Seeking to decentre the alleged *object* of their substantive discourse (law, globalization, justice), they constantly leave aside the effective *subject* position from whose imputed point of view that decentring gets offered, producing as a result a truly uncanny re-enactment of the classic

60. See *supra* and *infra* notes 1, 3, 8–11, 13, 14, 16–18, 20, 24, 27, 28, 41, 52, 57, 62, 73.

61. See *supra* note 20.

vanguard-intellectuals-inform-the-masses-what-the-truth-really-is scenario. (Not that mainstream scholarship is not guilty of the same sin – it is, and always has been – but at least most of its participants can cite the excuse of never suspecting that ‘the Author is dead’<sup>62</sup> and that each of them, therefore, is ‘a language game run by bureaucratic, institutional, and linguistic practices’.<sup>63</sup>)

For, indeed, as Schlag pointed out, if we are to take the idea of legal poststructuralism seriously, *preaching about* deconstruction and *applying* it to those things in law that attract our initial attention are not really enough. To be sure, both of these activities may help – they may even be necessary, no one denies that – but what is really required, in the end, if we are to stay loyal to our poststructuralist impulses, is not so much a special form of self-consciousness or a mastery of some fancy analytical technique, but ‘a displacement, a subversion of the discursive practices that constitute each of us’.<sup>64</sup> Every other scenario will only lead to an eventual endorsement of the old jurocentric fiction in which the point of the interdisciplinary mission – and who said that poststructuralism, once it is ‘codified’, cannot constitute a discipline? – is limited to ‘applying the conceptual vocabulary and grammar of a foreign discipline . . . to the field of law,’ so that ‘the foreign discipline [may apparently acquire] the status of a constituting subjectivity [that is invited] to describe, organize, and explain law – not the other way around,’<sup>65</sup> while in reality ‘in this very privileging of the foreign field, the foreign field is privileged in a distinctly legal, logocentric manner[employed] as an instrument, a technique to resolve in an authoritative manner a legally defined set of problems’.<sup>66</sup>

Perhaps it is because most of the contributors to the *Law, Justice and Power* volume have virtually no experience of the everyday life of the legal project that the collective take which this collection of essays offers on the law front so easily falls into the rut of the traditional legal scholarship with its imageries of the law as a hypostatized self-coherent process.<sup>67</sup> Or maybe it is because not having much of an idea about who does (international) legal theory these days, they decided to err on the safe side and adopted a voice one might expect someone who spends half of his days fighting the ghosts of H. L. A. Hart and John Austin to be able to understand. Who knows? With almost a dozen contributors, it is difficult to offer an accurate guess. But what becomes increasingly clear as one reads both books is this: even if one of them may demonstrate a better awareness of the ongoing international law debates, neither of them, in the end, manages to overcome the pull of the jurocentric aesthetics:

the self of the legal thinker [is] a privileged individual subject[; he is] the author of his own thoughts, the captain of his own ship, the Hercules of his own empire . . . Later on, out in the hall, in informal conversation, the legal thinker will, of course, readily

62. See R. Barthes, ‘The Death of the Author’, in R. Barthes, *Image Music Text* (1977), 142.

63. Schlag, *supra* note 20, at 1671.

64. *Ibid.*, at 1640, n. 25.

65. *Ibid.*, at 1651.

66. *Ibid.*, at 1653.

67. See, especially but not exclusively, the essays by Robert Gibbs, Sinkwan Cheng, and Robert Fenves.



admit that he is just as much a fit subject for sociological, economic, psychoanalytic explanations as the next guy. But when he is doing law, when he is in role, the rhetorical form of his statements will effectively deny all these twentieth-century knowledges in favor of eighteenth-century Lockean fantasies. What's more, the legal thinker will [also] invite the authorized audience . . . to participate in the same fantasies[, treating and constituting its] members . . . as [similarly] autonomous, coherent, integrated, ordinary selves capable of rational argument and moral choice.<sup>68</sup>

One cannot be fruitful unless one is ready to be riddled with contradictions, wrote Nietzsche once.<sup>69</sup> Perhaps he was right. Or perhaps where one sees contradictions there really are none. Perhaps we should not look at *Critical Beings* and *Law, Justice, and Power* through the prism of their (declared) inspirations and forerunners, be it Derrida, Kant, or Anzilotti, and celebrate or lament their (dis-)loyalty to these inspirations, but remember instead that books are irreducible to anything other than themselves, and that even when the Middle Ages 'falsified sacred texts, interpolating other passages' into them, in so doing it 'wrote "its own" books'.<sup>70</sup> Perhaps, we should remember, as pop-zenists do, that every encounter produces a singular experience that has to be valued on its own terms, not against any external yardsticks like 'politics', 'justice', or professional canons. In that case, the most important thing I have to say about these two books is that what emerged at the end of my encounter with them was an awareness of an amusingly Hegelian – what with this whole pull-of-history talk ('the new millennium dawns with a pressing need'), the dialectical supersecession of one epistemic 'truth' by another, an insistence on studying the 'law in action in order to reveal [the] hidden complexity in the relationship between law and justice' constant hypostatization of justice as the universal spirit alienating itself in (international) law, the immediate correspondence between the social logic of globalization and the thought logic of interdisciplinarity – performance directed in support of an essentially anti-Hegelian set of messages, which at times seemed to overpower it and at other times to be subdued by the dictates of its formal aesthetics. Was this what Nietzsche had in mind by 'contradiction'? Probably. But even if it was not it still resulted in an experience that was fruitful by any standard.

So here is, then, the last thing I think I should say about *Critical Beings* and *Law, Justice, and Power*: these are very fruitful and rewarding books that deserve to be read by every serious student of international law and legal theory, for even if they are riddled with contradictions, each of them is only a testimony to their authors' exceptional ambition and brilliance.

What is going to be the effect of the poststructuralist intervention in international law? Will it be to encourage international lawyers – by reminding them that now, as ever before, everything in the international arena is only a transient product of a contingent combination of traces and hegemonic self-exertions – to experience

68. Schlag, *supra* note 20, at 1637–9. Is the pull of the jurocentric aesthetics really so powerful? If it is, how does one ever write a book about law (which a leading publisher would agree to publish) and remain a deconstructionist?

69. F. Nietzsche, *Twilight of the Idols and The Anti-Christ* (2003), 54.

70. Eco, *supra* note 1, at 84.



their everyday work as an ongoing exercise of power? Or will it be to discourage all but the most dedicated of them, with its confusing vocabulary and uncritical interdisciplinarity, from performing any other kind of intellectual operations than a linear explication of the established dogma? Or will it, perhaps, simply tire them with its dogged insistence that the existing tradition is too outdated and a new method has to be created?