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Conclusion

The Dark Side of Legalization

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Its expansion since the mid twentieth century is a remarkable achievement for international law, right after two world wars seemed to have signalled the bankruptcy of modern international law before it fully matured. While Hans Morgenthau and his new colleagues in the juvenile discipline of International Relations propagated an agenda of realistic power politics, the process of legalization of international society only got started, resulting in an impressive collection of 158 000 treaties and 125 international courts and tribunals, and legal regimes for each and every issue area in foreign policy by the end of the millennium. As identified by Wolfgang Friedmann, the normative thickening of international life has not just resulted in a significant expansion of treaty law and international judiciaries but also led to qualitative transformations of international law itself, incorporating different subjects and issue areas, such as human rights, international criminal law and climate change. At the same time, it would be naïve to present this transformation of international law as a purely progressive project beyond politics. As has been pointed out by different scholars, international law is both surrounded by and steeped in power politics.[1] Similarly, post-colonial and historical legal scholars remind us how modern international law is rooted in imperialism and complicit in past and present exploitation.[2]

A key problem of celebratory (hi)stories of international law's expansion as a progressive teleology lies with simplistic conceptualizations of

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[1] Detlev F. Vagts, 'Hegemonic International Law' (2001) 95 *American Journal of International Law* 843–48; Martti Koskenniemi, 'International Law and Hegemony: A Reconfiguration' (2004) 17 *Cambridge Review of International Affairs* 197–218.

[2] B. S. Chimni, 'Third World Approaches to International Law: A Manifesto' (2006) 8 *International Community Law Review* 3–28; Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2005).

opposing dichotomies: from power politics to norms, from strategy to rules, from sovereignty to international law with one side of the dichotomy always necessary trumping its opposite. Yet, as this volume has argued, the development of international law presents a far more nuanced, complicated and interesting story of the politics of international law. In this concluding chapter, we want to summarize the main findings and contributions of the volume in conceptual, analytical and methodological terms, and make some suggestions for the further development of the research agenda initiated here.

9.1   Conceptual Reorientation

This volume shows how legal proliferation has indeed changed the playing field for members of the international society, and the sovereignty games they play. For most states, big and small alike, moving outside the confines of international law has become more difficult and costly. As such, international law is indeed disciplining politics, but the crucial point is that it does not do so in a unidirectional way, away from politics. In the face of a rather dense net of legal rules, and international law at every corner of foreign affairs, to paraphrase Kennedy,[3] it is the very confines of international law and the meaning of international rules that are the subject of engaged political contestation. Based on the general and somewhat contradictory developments in international law as an elaborate yet fragmented patchwork of rules, the foregoing chapters have analyzed the paradox of increasing legalization leading to increasing politicization through various case studies. More specifically, they have investigated how normative developments both change the obligations and agency of states under international law, yet at the same time, and through international law's proliferation and transformation, provide the backdrop for governmental strategies to instrumentalize legal discourse.

Crucially, this paradox of simultaneous legalization and politicization is not a sign of international law's shortcomings or failure, but rather the result of an extensive legal system at work. If sovereignty is an international ordering device that works by linking freedom and responsibilities,[4]

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[3] See quote on p. 5, this volume.

[4] Tanja E. Aalberts and Wouter G. Werner, 'Sovereignty beyond Borders: Sovereignty, Self-Defense and the Disciplining of States', in Rebecca Adler-Nissen and Thomas Gammeltoft-Hansen (eds), *Sovereignty Games: Instrumentalising State Sovereignty in Europe and Beyond* (Houndmills, UK: Palgrave, 2008), 129–50. See further Chapter 2, this volume.

the upshot of the international legal patchwork is that it provides a larger playing field for states to creatively manage this relationship. This is the dark side not only of disaggregated sovereignty, as Mann argues with regard to executive cooperation on mass surveillance,[5] but also of international law's own success story of expansion. Multiple and overlapping regimes and responsibilities enable states to eschew legal obligations, thus resulting in, as Brummer provocatively formulates it in Chapter 3, law's complicity in creating irresponsibility. The expansion of international law thus challenges the rule of law by facilitating 'organized irresponsibility',[6] precisely because there is so much law to draw on and to legally escape, disperse and disavowal responsibilities and shift them elsewhere.

At the conceptual level, what the chapters to this volume have sought to provide is a counter-balance to the progressive image of international law. These critical reflections on the operation of international law should not, however, be understood as a rejection of international law's regulatory significance and potential. As Fleur Johns has argued, 'experiencing law as manipulable rhetoric is not the same as experiencing law as wrong or worthless'.[7] Rather our point is that in order to have a better understanding of the limits and possibilities of the international rule of law, and law as a check on state power, we need to take a step back and analyze how state practices to strategically navigate this normative terrain are intimately connected to developments of international law itself.

9.2   Empirical Reorientation

In line with this conceptual reorientation, the volume has secondly called for an empirical reorientation. To understand how international politics and the international legal order operate in tandem, we need to empirically investigate the concrete ways in which states navigate the international legal order; how states concomitantly play *by* and *with* the rules. The chapters to this volume identify a range of different cases where states rely on international law's complex and fragmented structure in order to turn legal norms and structures to their own advantage, regain sovereign room for manoeuvre and legitimize otherwise controversial policies.

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[5] Chapter 6, this volume.

[6] Scott Veitch, *Law and Irresponsibility: On the Legitimation of Human Suffering* (Abingdon, UK: Routledge, 2007).

[7] Fleur Johns, *Non-Legality in International Law: Unruly Law* (Cambridge: Cambridge University Press, 2013), 20.

As a framework for such an empirical analysis, Chapter 1 set out a general repertoire of different strategies, derived from the literature and our previous work: jurisdiction shopping, international cooperation, regime or treaty shopping, judicial forum shopping, interpretive framing and extra-legal deferral. This preliminary typology is intended as starting point for a new empirical research agenda on the politics of international law, and as such not intended to be exhaustive. Thus, while each chapter identifies one or more of these general strategies as part of the various case studies, they also further nuance this framework, showing additional perspectives and connections, as well as pointing to new and different strategies.

One of these perspectives relates to the temporal dimension. As Baumgärtel shows in Chapter 5, states may pursue different strategies at different stages of the legal process; from developing policies in 'grey areas' of international law, to pursuing legal interpretation and mobilizing peer support during court proceedings, and to post-judgment positioning and adjustment of policies. Another important temporal factor is the relative state of legal development. The limited degree of codification in areas such as environmental law and mass surveillance shapes both the form of international cooperation and the kind of strategies pursued. As Mann highlights, executive agreements, Memoranda of Understanding and other soft law instruments have come to shape arrangements on issues such as mass surveillance, migration control, rendition and trade in a way that at once provides political flexibility and shrouds these arrangements from the public eye, effectively limiting political debate and requiring public interest lawyers to pursue different strategies to access and understand the 'underwater part of the iceberg'.[8]

In areas of political sensitivity, the development of international law may further serve a more performative role, not backed by any real interest among states to ensure that new legal instruments effectively regulate the issues at stake. As Ellis argues in regard to international environmental law, poor regulatory design may in itself be seen as a strategy through which states seek to avoid or reduce constraint. Questions may be framed in economic or scientific rather than legal terms, deflecting political-legal struggles to other forms of expertise.[9]

Moreover, the analysis shows that even in light of complex legal constructions involving various forms of international and transnational

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[8] Chapter 6, this volume.   [9] Chapter 7, this volume.

forms of cooperation, traditional distinctions concerning state sovereignty, the public-private divide and territory far from disappear. This can be seen in regard to the law of sea, where the otherwise universal obligation to perform search and rescue is increasingly tied to geographical divisions of the high seas.[10] More fundamentally, Brummer shows in Chapter 3 how the formation of extra-territorial zones is connected to particular political-legal vocabularies of international law, allowing the legal character of a specific piece of territory to be defined from a multitude of legal bases.

Together the case studies show how the combined quantitative and qualitative transformations of international law further facilitate strategic engagement with the law, or navigating the room for semi-compliance, as Langford et al. formulate it in Chapter 4. The varied patchwork of legal regimes, institutions and instruments enables the invocation of one register of law, not to disregard or violate the law, but to avoid it by 'comply[ing] with other law – while at the same time thwarting law's stated normative commitments'.[11] In other words, the expansion of international law has not eliminated politics, but transformed its operation as states are pursuing their foreign policy goals through a variety of strategies that mobilize international law in sophisticated ways in order to mitigate its constraining effects on the one hand, while legitimizing international politics, on the other.

9.3   Towards a New Research Agenda

The next step for this research agenda is to elaborate on the typology as a template to systematically reflect on international legal practices. The case studies themselves already provided hints for further elaboration. For instance, in Chapter 5, Baumgärtel discusses a strategy of containment in European litigation on migration and asylum, as well as 'peer mobilization' as a specific form of international cooperation. In her analysis of international environmental law, Ellis identifies managerialism as another important transformation of law which facilitates efficiency as another strategy in Chapter 7. Brummer provides an insightful discussion of how jurisdiction shopping takes on different shades in the context of different understandings of what constitutes jurisdiction across different legal regimes.[12] Focusing on international cooperation between executive agencies, Mann shows the

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[10] Chapter 8, this volume.   [11] Chapter 6, this volume, p. 131.
[12] Chapter 3, this volume.

importance of transnational security networks.[13] Similarly, Langford, Behn and Fauchald point to the intricate interplay between domestic and international law and judiciaries.[14]

Other possible additional strategies to be explored in further research are strategically created treaty conflicts and 'treaty rambling'[15] which relates to, but provides a more specific dynamic than treaty shopping as a more general category; or 'legal inter-textuality' as a more specific strategy of interpretive framing combined with some form of judicial forum shopping.[16] On a more epistemological level, one could trace different modes of reasoning, or 'dialects' within legal reasoning that go back to different paradigms within the disciplinary history of international law, building on natural law, legal positivism or the recent turn to legitimacy and/or managerialism.[17]

Apart from the fine-tuning and/or expansion of the typology of strategies, a further step would be to broaden the analysis to other issue areas and cases. Cases might include the current process surrounding control over resource utilization and access to the Arctic, the global regime for tax evasions as evidenced by the Panama papers, or new types of warfare (with new types of actors, such as private military companies, as well as new weaponry, such as drones and other automated weapon systems) more generally. Such an expansion into other areas of international law would be a crucial contribution to the making of an inventory of strategies as initiated in this volume.

Moreover, our investigation has focused on the repertoire of political-legal strategies, rather than on who and under what conditions these strategies are deployed. A next stage in developing this research agenda should move beyond elaborating and fine-tuning the typology and zoom out to further investigate its workings across the board: which strategies are the most popular, across which issues areas, which states are most active if not successful in their politico-legal strategies (as well as other actors within the transnational legal field – such as executive agencies,

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[13] Chapter 6, this volume.   [14] Chapter 4, this volume.

[15] Surabhi Ranganathan, *Strategically Created Treaty Conflicts and the Politics of International Law* (Cambridge: Cambridge University Press, 2015).

[16] Philip Liste, 'The Politics of (Legal) Intertextuality' (2010) 4 *International Political Sociology* 318–21.

[17] David Kennedy, *A World of Struggle: How Power, Law & Expertise Shape Global Political Economy* (Princeton, NJ: Princeton University Press, 2016). Martti Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law' (2009) 15 *European Journal of International Relations* 395–422. See also Chapter 7, this volume.

non-governmental organizations and private regulators). Indeed, another aspect coming out of the several chapters relates to the need to differentiate amongst states. Not all states share the same outlook on international law, and great differences persist in terms of resources to design and implement strategies.

Another crucial entry that follows from this concerns the scope conditions, and in particular the political economy, of this form of legalized politics. Even if hegemony does not necessarily trump law, and law can also be an instrument to resist hegemony, it is indeed costly to engage in this kind of legal navigation. For one thing, you will need an army of the cleverest lawyers. Perhaps unsurprising, it is particularly states in the Global North that have engaged in cumbersome and often costly policy schemes to manage international and domestic legal commitments in regard to issues such as migration, prisoner rendition and surveillance. Vice versa, despite a formal emphasis on reciprocity, economic inequality and outlook inevitably shape states' approach to international investment law. At the same time, the asymmetry between states and private parties invariably provide the former with a range of strategic possibilities to exploit their sovereign status in order to resist foreign investor arbitration.[18] So a further step would be to focus on different types of (state) actors to see if and how inequality gets reproduced within the system of equal sovereigns.[19] Of particular interest would be to investigate the specific repertoire of how great powers engage with international law, insofar as they would seem to be best positioned to ignore international law without repercussions.

9.4   Methodological Reorientation

While it has not been made explicit so far, the research agenda proposed in this volume methodologically shares a number of affinities with the recent 'practice turn' in International Relations and International Law, as well as with its elaboration in terms of 'European new legal realism' in international legal theory.[20] In order to further locate this research agenda, it is

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[18] Chapter 4, this volume.

[19] Chapter 7, this volume. See also Nico Krisch, 'International Law in Times of Hegemony: Unequal Power and the Shaping of the International Legal Order' (2005) 16 *European Journal of International Law* 369–408.

[20] Nikolas M. Rajkovic, Tanja E. Aalberts and Thomas Gammeltoft-Hansen, 'Introduction: Legality, Interdisciplinarity and the Study of Practices', in Nikolas M. Rajkovic, Tanja E. Aalberts and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (Cambridge: Cambridge University Press, 2016); Jakob

worthwhile to highlight some of the main pointers of a practice approach, albeit only summarily at this stage.

While both International Law and International Relations have been familiar with the notion of 'practice' as a generic or descriptive term, as an analytical approach the practice turn invites us to examine how international practices constitute and transform domains we usually take for granted as given, separate and even juxtaposed. Crucially, in order to do so, a practice approach calls for a move away from a priori theorizing towards empirically investigating what communities of actors are doing in and on the world. In our case, it means putting politics and law as social practices – as an actual, contingent, evolving and productive set of activities that reconstitute the international order – centre stage.[21]

While related to specific epistemologies on knowledge production and its relation to world-making,[22] the practice approach proposed here (investigating *how* practices constitute law) may accommodate different theoretical orientations and explanatory frameworks as to *why* states would engage in this behaviour.[23] In this regard Langford et al. rely on rationalist explanations, whereas Ellis' chapter aligns more with constructivist reasoning, Mann engages with liberal institutionalist concepts, and Brummer's approach is closer to legal realism.[24] What unites the various contributions, however, is a shift away from deductive theory-testing and towards a more bottom-up or inductive investigation of a repertoire of practice. Such a research agenda, we believe, can help avoid theoretical trench wars and instead provide an agora for pluralist dialogue.[25] As

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V. H. Holtermann and Mikael Rask Madsen, 'European New Legal Realism and International Law: How to Make International Law Intelligible' (2015) 28 *Leiden Journal of International Law* 211–30.

[21] Such a focus on practices remains different from recent calls for an 'empirical turn' seeking to turn legal studies into a more scientific discipline by placing more emphasis on social scientific methods. See below and note 34.

[22] Friedrich Kratochwil, 'Making Sense of "International Practices"', in Emanuel Adler and Vincent Pouliot (eds), *International Practices* (Cambridge: Cambridge University Press, 2011), 36–60.

[23] See Chapter 2, this volume.

[24] See Chapters 4, 6 and 7, this volume. In a previous version of our chapter on the Search and Rescue regime, we engaged with the Foucaultian concept of governmentality. Tanja E. Aalberts and Thomas Gammeltoft-Hansen, 'Sovereignty at Sea: The Law and Politics of Saving Lives in Mare Liberum' (2014) 17 *Journal of International Relations and Development* 439–68.

[25] Our own divergent theoretical orientations illustrate how focusing on practices can overcome theoretical standstills. Crucially, our call is for a pluralist agenda which does not seek to synthesize different theoretical approaches into an eclectic hotchpotch.

Dunoff has recently observed, '[t]here is increasing convergence [among mainstream and counter currents] on the proposition that the best teaching and research is problem driven. Scholarship should neither be led, nor constrained, by the structures of the academy or by academic trends'.[26] Even if its label of a 'turn' might indicate another theoretical trench war in the making, the practice turn invites us to reflect upon (inter)disciplinarity as a practice itself, and engage in question-driven research.[27] With its specific focus on politico-legal strategies within a globalized international order, we hope that the current volume puts the practice turn into sharper focus by extending this 'movement' into new fields, events and issues.

9.5　Towards a New Interdisciplinary Agenda

The turn to practices also opens up interesting avenues for interdisciplinary research collaboration.[28] The underlying argument of this volume is that in order to analyze the interplay between politics and international law, we need to move the interdisciplinary agenda beyond a division of labour based on narrow conceptions of how international law and politics work as separate and autonomous practices. Instead, we propose an integrated approach combining legal insight and doctrinal legal analysis with an understanding of the broader context in which international rules operate. Such an approach, on the one hand, requires legal scholars to move beyond a strict focus on (international) law as a body of rules, to focusing on how these rules come to life. International law, in other words, must be seen as 'an activity, and not a thing. Its 'being' is in the 'doing' of the participants within the practice'.[29] On the other hand, the

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[26] Jeffrey L. Dunoff, 'Perspectives on the Perils, Promise, Politics – and Practice – of Interdisciplinarity', in Nikolas M. Rajkovic, Tanja E. Aalberts and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (Cambridge: Cambridge University Press, 2016), 345–70, at 370.

[27] Friedrich Kratochwil, *The Status of Law in World Society: Meditations on the Role and Rule of Law* (Cambridge: Cambridge University Press, 2014).

[28] Tanja E. Aalberts and Ingo Venzke, 'Moving Beyond Interdisciplinary Turfwars: Toward an Understanding of International Law as Practice', in André Nollkaemper et al. (eds), *International Law as Profession* (Cambridge: Cambridge University Press, 2016); Rajkovic et al., 'Introduction: Legality, Interdisciplinarity and the Study of Practices'; Dunoff, 'Perils, Promise, Politics'.

[29] Dennis M. Patterson, 'Law's Pragmatism: Law as Practice and Narrative', in Dennis M. Patterson (ed.), *Wittgenstein and Legal Theory* (Boulder, CO: Westview Press, 1992), 85–121, at 87. For an analysis of the different communities of practice construing legality in specific areas and times, see Nikolas M. Rajkovic, Tanja E. Aalberts and Thomas Gammeltoft-Hansen (eds), *The Power of Legality: Practices of International Law and Their Politics* (Cambridge: Cambridge University Press, 2016).

approach forwarded here rejects one-sided methodologies to establish the power or irrelevance of international law based on external causalities and behavioural compliance, erasing the importance of doctrinal practices for understanding international law altogether. This kind of external approach has driven large parts of the interdisciplinary agenda between International Law and International Relations over the past few decades,[30] and also finds expression among scholars promoting an 'empirical turn' based on social scientific methods within international law.[31] However, such external perspectives easily risk reducing the politics of international law to measuring and managing rule compliance.[32] In contrast, we argue that an understanding of the specific characteristics of international law as a set of argumentative practices as well as the engagement with the technicalities and craft of developing legal argument are essential for analyzing what, in any particular instance, compliance means in the first place.[33] In other words, we embrace the call by European New Legal Realism that in order to understand the workings of international law, we need to accommodate both the internal dimension of international law as a particular legal form and discourse *and* the social context as the external dimension in which legal argumentation gains its power, and is contested.[34]

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[30] For an important overview, see Jeffrey L. Dunoff and Mark A. Pollack (eds), *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge: Cambridge University Press, 2013).

[31] Gregory Shaffer and Tom Ginsburg, 'The Empirical Trend in International Law' (2012) 106 *American Journal of International Law* 1–46. In the quantitative variant propagated by the Society for Empirical Legal Studies, empirical work is identified with a specific form of data collection and quantitative statistical analysis and thus provides a similar external perspective to law as compliance studies in IR. As such, it stands in stronger opposition to doctrinal work than a practice approach as another form of empirical legal studies. Jakob V. H. Holtermann and Mikael Rask Madsen, 'Toleration, Synthesis or Replacement? The "Empirical Turn" and Its Consequences for the Science of International Law' (2016) 29 *Leiden Journal of International Law* 1001–19.

[32] Koskenniemi, 'Miserable Comforters'.

[33] It should be emphasized that we do not suggest all IR approaches are necessarily external perspectives on law. Such generalizing and homogenizing dichotomies are one of the reasons behind the current deadlock in the IL/IR debate, possibly creating another trench war and even outright rejection of interdisciplinarity altogether. Such a view also goes against the premises of a practice oriented approach and neglects for instance the work by Nicholas Onuf and Friedrich Kratochwil, who share a critical constructivist approach that is adamant to recognize the *proprium* of international law as an argumentative practice and thus provide a critical alternative to the mainstreamed IL/IR agenda. Aalberts and Venzke, 'Moving beyond Interdisciplinary Turfwars'.

[34] Holtermann and Madsen, 'European New Legal Realism'; see also Wouter G. Werner, 'The Use of Law in International Political Sociology' (2010) 4 *International Political Sociology* 304–7.

Last, but not least, we believe that a practice approach can address some of the concerns regarding what a move to politics and inter-disciplinarity entails for the autonomy of international law as an (academic) field.[35] Analyzing the politics of international law from a practice approach allows for an understanding of international law as simultaneously autonomous and political.[36] International law is autonomous as a *social* practice. As such, its autonomy is not an inherent feature emanating from its normative corpus, nor an empirically given thing, but rather a contingent outcome of its different practices. At the same time, despite its distinctive mode of reasoning, international legal argumentation remains an undeniable political enterprise. Legal arguments, in other words, never simply produce substantive outcomes, but always also seek to justify them.[37] As aptly put by Andrew Hurrell: '[I]f there remains an unavoidable need to hold on to the specificity of law as a social institution, neither is it possible to evade the complexity and specificity of politics',[38] and, we would emphasize, the *interplay* between these two.[39] A practice approach provides a way to keep in focus the mutually constitutive relationship between international law and politics, which in turn enables a grounded understanding of how international law is politicized without reducing law to an epiphenomenon of power politics, based on various understandings of what power entails.[40] It also means that, rather than focusing on bodies of rules and legal texts alone, we need to trace day-to-day actions and processes through which international law is produced, performed, disseminated *and* resisted.[41]

If what emerges from this volume is a profound ambivalence about international law and its capabilities, we follow the lead by Veitch who suggests that the response to our schizophrenia with regard to

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[35] See e.g. Jan Klabbers, 'The Bridge Crack'd: A Critical Look at Interdisciplinary Relations' (2009) 23 *International Relations* 119–25.

[36] Aalberts and Venzke, 'Moving beyond Interdisciplinary Turfwars'.

[37] Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989; repr., Cambridge: Cambridge University Press, 2005), 570.

[38] Andrew Hurrell, 'Conclusion: International Law and the Changing Constitution of International Society', in Michael Byers (ed.), *The Role of Law in International Politics* (Oxford: Oxford University Press, 2000), 327–47, at 333.

[39] See also the forum on international law and international political sociology in (2010) 4(3) *International Political Sociology*.

[40] Michael Barnett and Raymond Duvall, 'Power in Global Governance', in Michael Barnett and Raymond Duvall (eds), *Power in Global Governance* (Cambridge: Cambridge University Press, 2005), 1–32.

[41] See also Johns, *Non-Legality*; Rajkovic et al., *Power of Legality*.

(international) law as either an absolute good or a corrupt force should be not to loose sight of either of these sides, but rather 'to explore in nuanced ways precisely where and how the extremes meet. It is here that we must address how what might appear to be an excess can be, and often is, simultaneously rooted in the norm [. . .], enacting and legitimating disavowals and amnesias of responsibilities'.[42] We hope that this volume has put the inherent ambivalence of the politics of international law to productive scrutiny by empirically exploring politico-legal strategies as specific ways of engagement and contestation in practices of (ir)responsibilities. Not to accuse or dismiss international law as toothless or irrelevant, but as a basis to come to terms with the fact that international law and politics are entangled, and, crucially, that the impulse to create more international law in order to seal up its loopholes is not necessarily the best way forward.

[42] Veitch, *Law and Irresponsibility*, 11.