2021

The Deceptive Dyad: How Falseness Structures International Law

Jason A. Beckett
American University in Cairo, jasonbeckett@aucegypt.edu

The Deceptive Dyad

Falseness and Fantasy in International Law

Jason Beckett

Many of those who write about Public International Law (PIL), portray it as a relatively autonomous and tolerably just legal system; emphasizing an understanding of law as a technical practice. A determinable system of rules and principles, deployed by trained professionals to evaluate and constrain the global machinations of power and politics. This is the image of law as a tool, an authoritative structure through which global justice can be pursued. These assumptions entrench a comforting, but false, progress narrative; and obscure the limitations of actually pursuing progressive change through international law.In this paper, I expand on Susan Marks' suggestion that PIL is structured by a falsity which has two distinct but interrelated forms: false necessity and false contingency. These become visible when the practice of international legal argumentation is examined in the context of PIL's radical indeterminacy. To explain this, I will first describe the two forms of falseness, and how they interact to create what I call the Deceptive Dyad. I will then outline the inexorable, radical, indeterminacy of PIL; three strategies through which international lawyers endeavour to domesticate or suppress this; and why these are unlikely to succeed. PIL's purported demands, however meticulously crafted, do not effect change in the real world. This is made visible, and intelligible, through the lens of the deceptive dyad. Emancipatory change at the global level is possible. However, it faces systemic obstructions in our contemporary world order of "planned misery". These obstructions, and the implausibility of PIL overcoming them, reveal a global normative architecture bifurcated between two competing systems: the one we think of as PIL; and another I will introduce and sketch as the Global Legal Order (GLO). To sharpen this distinction, I adopt Weber's theory of law as the centralized deployment of violence, through a specifically "legal rationality". Combining this with false contingency, I develop an analytic schema which clearly distinguishes the two normative orders. The GLO, possesses coercive authority, and deploys it in a legal-rational manner. Characterised by its capacity to enforce its will and the widespread obedience this commands, it imposes an ideologically coherent set of policies in a consistent manner; producing identifiable

The Indonesian Journal of International & Comparative Law
ISSN: 2338-7602; E-ISSN: 2338-770X
http://www.ijil.org

legal norms. PIL is radically indeterminate, but aspires to ethical perfection. It mimics the rituals of law, but lacks the capacity to enforce its demands. PIL has authority, but only the GLO is authoritative.

The two systems co-exist and overlap, each functions to define and correct "delinquents", but they do so in incompatible ways. For the GLO the delinquent is the government that refuses its neoliberal economic prescriptions. For PIL delinquency is defined in ethical terms: those oppressing or subjugating others, violating their rights. I argue that these two visions of delinquency are incompatible, but they are not unrelated. As I will illustrate, the GLO's coercively imposed policy prescriptions impoverish states and immiserate their populations. This provokes protest and opposition, which necessitates oppressive governance, culminating in what PIL understands as "human rights abuses". Consequently, the suppression of delinquency by the GLO produces delinquency in PIL.

However, these two systems, apparently contradictory at every level, actually work in tandem. By analysing human rights abuses and other "illegalities" a-structurally, PIL obscures their links to the obligations imposed by the GLO. This unintentional diversion from the GLO perpetuates the very atrocities PIL claims to condemn. In return, the GLO provides material support, and the illusion of importance, to PIL. Together, they regulate and disguise our neocolonial present: producing and reporting human rights abuses.

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

She lied not from a desire to deceive but in order to correct reality and mitigate the absurdity that struck her world and mine.

Kamel Daoud, *The Meursault Investigation*

We have created a lifestyle that makes injustice permanent and inescapable.

Sven Lindqvist, *The Myth of Wu Tao*

INTRODUCTION: HOW FALSENESS STRUCTURES INTERNATIONAL LAW

Public International Law (PIL), in its professional, academic, and activist manifestations, forms a deceptive discourse, a managed fantasy of a relatively autonomous, tolerably just, and determinable, legal system. This framework depicts law as a practice of technical expertise; and "legal scholarship as a discipline which disentangles complex patterns into individual actors and acts and provides a frame for enabling and constraining power in concrete situations."[1] This is an image of PIL as a system of professionally determinable rules and principles, a mechanism through which state conduct may be impartially evaluated, and global justice pursued. These assumptions condition both the postures of legal resistance and the limits of pursuing progressive change through PIL; they foster a comforting, even inspiring, narrative. But that narrative is false, and potentially paralyzing.

PIL lacks "enforcement", this renders it radically indeterminate as the coercive authority of a legal system is a prerequisite for the impartial identification of its norms. Only an institutionalized, enforced legal system is capable of producing impartially identifiable norms, and distinguishing competent from incompetent legal argumentative techniques. Law is intangible, imperceptible to our senses, it can be

1. Ingo Venzke, et al., *From Public International to International Public Law: Translating World Public Opinion into International Public Authority*, Max Planck Inst. for Comp. Pub. L. & Int'l L. 11 (Paper No. 2016/02, 2016).

identified only in the inscriptions it makes on the physical world; in its consistent enforcement. Only as a coercively imposed system could law, even potentially, operate as "a frame for enabling and constraining power in concrete situations."[2]

PIL leaves no such traces, its demands are ephemeral due to its decentralized, non-institutionalized form. Consequently, its radical indeterminacy cannot be constrained. PIL is not authoritative, it produces neither determinate norms, nor a methodology for distinguishing competent from incompetent legal arguments. Instead, it mass produces equally (in)competent, and completely incompatible, normative demands. It cannot be empirically identified or described, because it leaves no marks on the world. Its supposed "obligations" are entirely fanciful, and rarely inspire compliance or enforcement. The GLO, in contrast, is an authoritative legal system with determinable and enforced content.[3] Its demands are legibly inscribed into the world. Its obligations demand compliance; they are *actualized.*

A. False Contingency And False Necessity:

The falsity of PIL takes two distinct but related forms: false necessity and false contingency. These come into view when we examine legal analysis and argumentation in the context of PIL's radical indeterminacy. They are effects of, and responses to, that indeterminacy. They operate together as what I will call the deceptive dyad.

1. False Necessity

Roberto Unger coined the term "false necessity" to emphasise the plasticity, the *contingency*, of all social order(s). The neoliberal world order, like neoliberalism within individual states, is presented as inevitable; background, apolitical, technocratic, almost mechanical. A scientific fact, which forces governments to make "hard choices", which in turn must be accepted simply because they cannot be avoided. But

2. *Id.*

3. Although their terminology is different, Linarelli et al. describe the operation and impacts of the GLO in harrowing detail. *See*, John Linarelli, Margot Salomon, & Muthucumaraswamy Sornarajah, The Misery of International Law: Confrontations with Injustice in the Global Economy (2018).

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

this is simply untrue, neoliberalism is not a scientific fact or theory; it is an economic ideology imposed through politics and law. It is neither natural nor *necessary*; any claim to the contrary is, quite simply, false. Unger's analysis refutes the necessity of the actually existing present.

He reminds us that every society is a contingent structure, based on human decisions, and alterable by human action. He reveals new choices, new options, in a system presented as predetermined; as *necessary*. Unger emphasises that social orders are made by people, and can be changed by people. There is nothing natural, inevitable, or *necessary*, about our social relationships or structures; about our societies. When these societies—including global society—are patently iniquitous, they ought to be changed; and this change is always possible. False necessity is a refutation of the assertion that the contemporary neoliberal order—and the austerity politics it demands—are inevitable.[4]

False necessity shows that societies can be made more "just" in some way; that a progressive politics *is possible*. However, it is an iterative concept, and ideas like "justice" and "progress" are also subject to its critique. They are euphemisms for our politico-ethical desires; as are liberalism, secularism, rights, and reason. Pushed to its logical conclusion, false necessity unearths the radical indeterminacy of normative thought *tout court*.

2. False Contingency

Susan Marks developed the term "false contingency" to name a form of analysis which asks why, in such a contingent social world, certain things happen, and others do not; and why this gives rise to discernable patterns of oppression, subjugation, and exploitation. False contingency draws our attention to the fact that although things could be otherwise, there are reasons that they are as they are. This entails accepting that not all calls for change are equally plausible. The present is both contingent and largely predetermined; and so is the future:

> [T]here is a kind of necessity which must be reckoned into, rather than always contrasted with, our sense of what it is to be an artefact of history. And since social scientific enquiry

4. Roberto Mangabeira Unger, *Introduction to the New Edition in* False Necessity (paperback ed., 2004).

> is not only entangled with false necessity but also with false contingency, we are only doing half the job we need to do as critics if we attend solely to false necessity.[5]

Progressive thinking becomes fantastical, and paralyzing, when it ignores these constraints. Pursuing impossible dreams diverts attention from the limitations of the present, and diverts energies away from constructing a viable, better, future.[6] False contingency is "hard to disentangle from ... false necessity, for which it serves as a complement and corrective."[7] It demands that we look for, and attempt to alter, the "background conditions"[8] which determine the likelihood of our emancipatory projects being realised. False contingency explains the ephemerality of most of PIL's demands; its oft noted lack of effect.

This reveals a spectrum of possibility: some normative demands are actualised in the world, others stand a high chance of being actualised, while others bear very little possibility of realization within contemporary global structures. This last group are, by far, the most numerous in scholarly and activist legal analyses and demands. Understanding this reveals the futility of certain tactics and strategies (including progressive international legal argumentation) in the contemporary global order. False contingency is not a philosophy of despair, but it is a call to take seriously the difficulties inherent in changing the world.

B. The Deceptive Dyad

Between them, false necessity and false contingency allow us to navigate a course between the Charybdis and Scylla of necessitarian and utopian thinking; to steer a path away from the paralysis of the present. They point up the possibilities, and the limitations, inherent in law as a mechanism of social change. False necessity and false

5. Susan Marks, *Human Rights and Root Causes,* 74 Mod. L. Rev. 57, 74 (2011).

6. Jason Beckett, *Faith and Resignation, A Journey Through International Law, in* New Critical Legal Thinking 153,-156 (Matthew Stone, Illan rua Wall, & Costas Douzinas eds, 2012).

7. Susan Marks, *False Contingency,* 62 Current Leg. Prob. 1, 11 (2009).

8. Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State,* 38 Pol. Sci. Q. 470 (1923).

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

contingency inexorably lead us to the same thing: the hegemonic global ideology (currently neoliberalism). False necessity adverts to the possibility of alternative normative visions and arrangements. False contingency forces us to ask why neoliberalism's normative visions are consistently realised, and others quashed instead. It allows us to see that the oppression and abuses of particular people and groups, particular states or regions, are not random, but obey systemic logics. This is closely related to Marks' development of "root cause" analysis.[9]

Root cause analysis is an iterative process, which demands to know why things are as they are: what has happened to cause this? It reveals that "human rights abuses" and other atrocities are the effects of underlying structural logics; not uncaused "free-floating" bad things. States have *reasons* for oppressing their citizens. This contrasts starkly with PIL's tendency to deracinate analysis, to merely report on, and condemn, individual atrocities.[10] Pursued to its (il)logical conclusion, root cause analysis inexorably leads to what Marks identifies as the global structure of "planned misery":

> Viewed from the perspective of false contingency, planned misery does not denote intended or deliberately inflicted misery ... it denotes misery that belongs with the logic of particular socio-economic arrangements.[11]

In our case, this is the logic of neoliberal economics (the hegemonic ideology which structures our contemporary global order) the falseness of whose necessity Unger has exposed. There is, of course, another (hi) story to tell, another set of iterative root cause questions to ask, which concerns *how* neoliberalism came to such global prominence and power. This has been recounted in various ways by Baxi,[12] Chimni,[13]

9. Marks, *supra* note 5.

10. *Id.* at 75.

11. *Id.*

12. Upendra Baxi, The Future of Human Rights (3d ed., 2002).

13. B. S. Chimni, *Third World Approaches to International Law: A Manifesto*, 8 Int'l Comm. L. Rev. 3 (2006).

Foucault,[14] Harvey,[15] Klein,[16] Pahuja,[17] Whyte,[18] and others; but lies beyond the scope of this paper. And so, like Kelsen,[19] I choose to make an arbitrary stop in an infinite regression; and declare neoliberalism the "uncaused cause"; the hegemonic global ideology in action. False necessity exposes the non-justification of this system of "planned misery", but false contingency reminds us that its very existence renders progressive legal claims unrealizable.

False necessity exposes the contingency of the belief that all states *ought to* become European-style liberal democracies; populated by developed, rights bearing, individuals. False contingency allows us also to see that this transformation simply would not be possible anyway. These myths of progress (or development) sustain a contingent, and unattainable, ideal of global justice. They distract from the causes of the catastrophe of the present. False necessity reminds us of the deficiencies and dependencies of what we call liberal democracy—and of the possibilities of alternative forms of social organization. False contingency reinforces this critique, emphasizing the *economic impossibility* of all states becoming developed, rights-respecting, democracies.

False necessity and false contingency operate together, forming the *deceptive dyad*, which invisibilises both. When our preferred normative claims are not realised, we frame this as a problem of non-compliance, or lack of enforcement, rather than as a matter of delimited contingency. In this way we avoid the arbitrariness of our imperative demand, and continue to present our claim as legally correct. However, compliance and enforcement are themselves contingencies. If we assume these simply *should* occur, we disguise the impediments to realising our preferred interpretations; we cannot perceive the *reasons* our demands

14. Michel Foucault, The Birth of Biopolitics: lectures at the Collège de France 1978-79 (2008).

15. David Harvey, A Brief History of Neoliberalism (2005).

16. Noami Klein, The Shock Doctrine: The Rise of Disaster Capitalism (2007).

17. Sundhya Pahuja, Decolonizing International Law (1st ed. 2011).

18. Jessica Whyte, The Morals of the Market: Human Rights and the Rise of Neoliberalism (2019).

19. Hans Kelsen, The Pure Theory of Law 5 (M. Knight trans., 1967)

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

were not realised. These reasons are hidden by analyses predicated on the abstract stipulation of compliance with authoritative legal demands.

The deceptive dyad is a lens which allows us to look at PIL differently, both internally and externally. Once we look for it, we see this dyad manifested throughout the practices, discourses, networks, and institutions of PIL. With this lens, we can analyse the operations of PIL more comprehensively. Internally, we can reassess both PIL and the ways in which we interact with or deploy it. Externally the dyad allows us to observe PIL and the GLO in action. To see how their colonial violences are reproduced,[20] and perpetually re-inscribed on the body of the earth, and the bodies of her inhabitants.[21]

As an analytic grid the deceptive dyad foregrounds structurally-determined features of the claims made in the name of PIL, which render them futile. First, because PIL is radically indeterminate, *any* claim made in its name is, ultimately, arbitrary. Second, because PIL unfolds in a global context of "planned misery", most "progressive" claims made in its name are, always already, structurally precluded. PIL is a language through which its users present their subjective grievances as something greater—as objective legal demands. But it does not provide, or possess, the resources to realise these.

I. Viewing Legal Argumentation Through the Deceptive Dyad

The deceptive dyad combines the perspectives of false necessity and false contingency to reveal new data, new objects of analysis—or rather new ways of conceptualizing old objects of analysis, namely legal arguments, conclusions, and demands. Legal decisions are never necessary, alternative rules and interpretations are always available. And most do not create genuine contingencies either, because their realization is precluded by structural constraints. This creates a linguistic problem for me, I would like to use the terms "false contingency" and "false necessity" as nouns, to refer to this newly uncovered data. However,

20. Rose Parfitt, The Process of International Legal Reproduction (2019).

21. Susan Marks, *Torture and the Penal Colony*, 20 Leiden J. Int'l.L., 535 (2007).

there is already an accepted way to use these terms: as postures, perspectives, or analytic lenses. They offer a different way of looking at the world, and PIL's situation within it; revealing different data. I don't want to reframe concepts already accepted in that tradition. So, I shall instead define, and provisionally name, the distinct data I see as important:

> False necessity:
>
> "Any legal claim presented as determined or determinable, when in fact it is completely arbitrary, a projection of its finder's desire."
>
> New name: "Arbitrary Law Projection" (ALP).
>
> False contingency:
>
> "Any legal claim presented as imperative or important which, for mappable structural reasons, will not be implemented or actualised."
>
> New Name: "Projected Legal Fantasy" (PLF).

Legal argumentation in PIL is never conclusive. Alternative norms and different, equally competent, techniques are always available. Any attempt to present PIL as providing a determinate conclusion is an ALP; even those which are "widely accepted". Any contingent political claim presented as a compelling legal conclusion is an ALP. Competing claims can always be formulated, promoting alternative projections.[22] All PLFs are ALPs, but not vice versa. False necessity is the greater group: *all* legal determinations are ultimately ALPs. This is true even when consistent enforcement, stabilized by structural bias, provides the appearance of determinacy (e.g. in the GLO or idealised municipal systems). Deceptive dyads of ALPs and PLFs operate together throughout PIL; where the undisclosed falsity of each serves to disguise the falseness of the other. All claims made about PIL are contingent, until one is actualised in reality. But not all contingencies are equal.

22. Martti Koskenniemi, *The Politics of International Law: 20 Years Later*, 20 Eur. J. Int'l L. 7, 9 (2009).

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

A. The False Necessity of Legal Analysis

The lens which false necessity provides allows us to see that all claims presented as true, imperative, authoritative, necessary, or even as optimal, may nonetheless be challenged. The quotidian practices of PIL, the production of legal norms (interpretations, claims, conclusions, judgments, applications, committee or commission reports, activist or NGO analyses, and academic writings) is often presented as logically, pragmatically, ethically, or legally, entailed. But there is no external point from which these claims can be verified, ranked, or assessed.

Schematically, there are three modes, or genres, of legal argumentation: Stipulative, the judge or textbook writer: "the law says"; Persuasive, the advocate, the scholar, the presenter of the best available argument: "the law could and should say"; Normative, the policy maker, the norm entrepreneur: "the law ought to be". All produce ALPs, albeit at different levels, and modulating with varying degrees of self-awareness.

The judge, academic, or textbook writer; describing what the law actually says, and stipulating what it means, offers a direct ALP; the law could say otherwise. This applies equally to claims that are presented as the "best" available reading of the law. These manifest their arbitrariness in however they ground their claim to superiority. Consequently, the nuance, situationality, complexity, argumentative or deontic rigor, aesthetic charm, or other "unique selling point", of an argumentative style or technique are functionally irrelevant. Any approach which claims objectivity or superiority is an ALP, or a chain of them.

The advocate, the presenter of the "best available" argument, produces an indirect ALP, with the contingent standard displaced to the evaluative criteria, where it assumes the role of axiom. This mode of argumentation accepts the plasticity of legal argument, but does not accept its radical indeterminacy. It offers a strategy (which can be complex, nuanced, and immanently attractive) to domesticate indeterminacy through a superior argumentative or analytic critique. Its arbitrary referent can be either internal to the system, like integrity, or legally superior argumentative technique; or outsourced to another system—e.g. ethics, political theory, philosophy, rhetorical analysis—into which the fantasy of determinacy is projected.

At first glance, the policy maker, or norm entrepreneur, is largely

unconcerned with the question of indeterminacy. However, in practice, this approach must at least assume determinability. Otherwise, it is a performative contradiction. There is no point to policy proposals in a fundamentally indeterminable system. They must assume the system can be stabilized—made to produce determinable legal norms. So they make sense only in the structural assumption (projection) of a determinable legal system. They also embody at least one substantive projection – the politics driving the substance of the proposal.

This is all particularly problematic, in a legal system which does not exist in a manner conducive to supplying (or limiting the supply of,) data against which to measure postures, techniques, or genres. Given the radical indeterminacy of PIL,[23] economics, political science, and moral philosophy, all normative injunctions made within the system are necessarily contingent. They cannot be stabilized, ranked, or divided into the competent and the incompetent. All are formally equal, structurally non-authoritative. The "system" cannot produce rankable modes of norm identification or interpretation. It cannot hierarchize its institutions, norms, or argumentative strategies. All are, necessarily, ALPs. More importantly, as PIL lacks authority, its purported normative injunctions are also PLFs.

B. The False Contingency of Legal Analysis

False contingency highlights the distinction between legal claims which affect the material world and those which do not. It allows us to see that this distinction is *in itself* important.[24] To mark this divide, I will call the former "actualised laws", and the latter "projected legal fantasies" (PLFs). In the abstract PIL is radically indeterminate, a vast collection of ALPs presented as authoritative statements of law. But in reality, these are not equally likely to be realised. False contingency allows us to analyse *why* certain legal claims are realised while others remain ephemeral. The answer is revealed in distinct, empirically observable, *patterns* of realisation and non-realisation; it is the global system of "planned misery", enforced by the GLO.

23. *See infra* footnotes 40-74 and accompanying text.

24. Marks, *supra* note 7.

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

Statements and analyses of, and arguments over, PIL are situated within a spectrum of possibilities. Some are actualised in the world, others stand a high chance of being actualised, while others bear very little possibility of realization within contemporary global structures. The latter are PLFs, normative provocations which will not be actualised in the material world, regardless of their intrinsic, rational, pragmatic, or moral force. They appear as legal claims, but function as forlorn appeals to a structurally precluded better nature. The actualization of legal demands has much less to do with any immanent merits than with factors usually presented as "external" to legal analysis—including, critically, the effects of the GLO. False contingency brings these factors back into play. It expands the scope of analysis.

False contingency disrupts any neat distinctions between inside and out, situating PIL in the realm of politics; in the actuality of the world it purports to regulate or govern. It problematises the distinctions between validity and efficacy; identification and implementation. As such, it denies law the "alibi" of politics,[25] confronting us instead with a world where law was *actualized* as well as "breached", and thus precluding the simple claim that the law is good, but was displaced by venal political considerations.

A legal assertion is a normative injunction, a call for change in the material world beyond the confines of PIL. It is a claim that the world should, *and could*, be different; better. However, PIL and IHRL offer only languages in which to express our political desires, not mechanisms to realise them. It is not enough to demonstrate that people "have a right" in the abstract. This as meaningless as it is disputable. People do not want rights; they want the resources to realise their basic needs and freedoms. Without these, articulations and enunciations of human rights are PLFs. This exposes the characteristic ephemerality of normative demands made in the name of PIL; their lack of impact in the real world of distributions and outcomes. It is an argument against taking the shortcuts of abstract legal analysis, throwing "rights" around like confetti, documenting violations, and imagining that the world is improving as a result.[26]

25. Nathaniel Berman, *In the Wake of Empire*, 14 AM. U. L. REV. 1515, 1537 (1999).

26. David Kennedy,T*he international human rights regime: still part of the problem?* in EXAMINING CRITICAL PERSPECTIVES ON HUMAN RIGHTS (Rob Dickinson,

Viewed from this perspective, PIL appears solipsistic and blind to reality: none of its constructs (arguments, injunctions, incantations, or demands) create the conditions needed for their realisation. Even at the level of legal argumentation, few acknowledge resource implications; let alone the current global distribution of resources, and the concentrations and dearths this maintains.[27] However, these factors are vital to understanding why particular legal claims are likely, or unlikely, to be realised. False contingency allows us to examine the world *outside* of legal texts, arguments, pronunciations, and conference proceedings. It forces us to acknowledge that the articulation of a legal demand, however eloquent or morally persuasive, is, in itself, worthless.

II. Law, Violence, and Determinability Under Actually Existing Neoliberalism

In this paper, I deploy a very specific, stipulative, definition of law, and so false necessity threatens my own argument. Law can be understood in many different ways. My own conceptualizations of it have altered over the years, as my understanding and analysis of the global order has evolved. But for now, I adopt a version of Oliver Wendell Holmes' "bad man theory".[28] Although this choice is contingent it is not without reason: Holmes offers a particularly productive lens in the context of my analysis. He asks us to:

> understand the law by viewing it not from the internal perspective of a good man, "who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience," but from the external perspective of the "bad man," who "cares only for the material consequences which

Elena Katselli, eds., 2012).

27. Sundhya Pahuja, *The Poverty of Development and the Development of Poverty in International Law*, *in* 3 Select Proceedings of the European Society of International Law 356 (James Crawford & Sara Nouwen, eds., 2012),

28. Oliver Wendell Holmes Jr., *The Path of the Law,* 10 Harv. L. Rev. 457 (1897).

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

such knowledge enables him to predict."[29]

This is law as an institutionalized exercise of socially-centralized violence, empirically identifiable through its coercive enforcement, its "material consequences"; a system of norms which are consistently enforced against delinquents. Enforcement makes legal norms observable; and, *if it is consistent* it also makes those norms predictable. The monopoly over legitimate violence constitutes the authority of law. It is also critical to the determinability of law. The act of authoritative enforcement is a violent act. In affirming one interpretation it destroys all others: "claims over legal meaning are ... closely tied to the ... monopoly over the domain of violence".[30] Only an authoritative legal order is *able* to create determinable rules.

Understanding law in this way sharpens the analytic force of false contingency, and exposes the distinction between "doing law" and "performing legality."[31] That is, between imposing the rules of a functioning legal system, and quarrelling over the ethics of particular conduct in the guise of legal argumentation. This distinction brings into relief a bifurcation within the set(s) of data we think of as PIL. There are actually two global normative orders: PIL as we loosely understand it; and the GLO. The GLO possesses the hallmarks of a legal system, PIL does not. This affects their interaction in important ways.

The system I call the GLO is similar to that Chimni has identified as a nascent "imperial global state" governing the formerly colonised, or "neo-colonial" states.[32] Chimni identifies a set of international institutions who coercively regulate the policy decisions of under-developed states. He sees this as an imposed global state-making project which ought to be resisted. Rule by the GLO may well be the prolegomena to a state building process, and if so that state certainly would be imperial in form and function. It would, in effect, become a

29. Marco Jimenez, *Finding the Good in Holmes's Bad Man" 79* FORDHAM L. REV. 2071 (2011).

30. Robert M. Cover, *Nomos and Narrative,* 97 HARV. L. REV. 52 (1983).

31. Nikolas M. Rajkovic, *Performing "Legality" in the Theatre of Hostilities: Asymmetric Conflict, Lawfare and the Rise of Vicarious Litigation*", 21 SAN DIEGO INT'L L. J. 435 (2020).

32. Chimni B.S. *International Institutions Today: An Imperial Global State in the Making,* 15 EUR. J. INT'L L. 1 (2004).

global settler-colony; where the imperialists occupy the world's largest gated community. Enclosing themselves and excluding the "natives"; extracting tribute in the form of undervalued labour and resources. Living in Fanon's "settler's town", "a satiated town, relaxed, its belly is perpetually full of good things. The settler's town is a town of white people, of foreigners",[33] or imperial global citizens. The capital of the imperial global state, for whom the GLO rules.

As I currently conceptualize it, the GLO is comprised of three executive institutions: the World Trade Organization (WTO), the International Monetary Fund and the World Bank (IFIs), and the system of International Investment Arbitration (IIA).[34] These institutions act in concert, displaying what Weber calls "legal-rational" authority.[35] They are distinguished by their capacity to enforce their will, and the widespread obedience this commands. They impose an ideologically coherent set of policies in a consistent and predictable manner; they "do law". The GLO's role is analagous to the apex courts in municipal legal systems: determining the content of the legal system. In doing so it creates the actual legal obligations of its subjects—the norms they shall be punished for breaching, and are thus coerced into obeying.

Because the GLO is institutionalized and enforced, capable of imposing its will on recalcitrant states, its commands are legibly inscribed into the world. Because these are internally coherent (its institutions have a clear neoliberal "structural bias") they manifest consistently and predictably. They are *laws*, which are empirically verifiable, widely complied with (even against states' better interests[36]) and enforced. The GLO is an *authoritative* normative order, with consistent diktats; its rules are empirically determinable. It is an archetypal Hartian legal system: centralized, institutionalized, and commanding its officials "committed internal point of view". The kind of legal system I had always hoped to find in PIL, and yet very much *not* the one I wanted to

33. Frantz Fanon, The Wretched of the Earth 42 (Constance Farrington trans., 1963).

34. I am not sure how the the UN Security Council (UNSC) interacts with the GLO or is even a part of it. However, I exclude it from the present analysis because it rarely displays anything resembling a legal rationality.

35. Max Weber, Economy and Society, 217 (1968).

36. Linarelli et al., *supra* note 3.

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

find. Its laws can be identified through the scars they leave on the world and her peoples.

The rest of what we call PIL may have institutions, but these are not legal institutions. However much they mimic the forms and rituals of law, they have no enforcement power, and cannot impose their demands on the world. It is important to maintain this distinction, and the distinct meanings of authority it entails, when analysing a faux-institutional order like PIL, in its (non-)relation with an operative *legal system* like the GLO. One system provokes contemplation, judgement, even indignation; the other compels state conduct. These structural differences—ideological homogeneity and enforcement power—matter. The laws of the GLO are imposed, authoritative, and relatively determinate; the norms of PIL are not.

The GLO was created within the framework of PIL, constituted using the sources of PIL (treaties). However, there are two quite distinct *forms* of treaty: those with coercion built in, and those without. The specific treaties which form the GLO's "constitutional order" are unique, in that they provide for their own enforcement. They give system officials the right *and the capacity* to impose their interpretations; this is legal authority. The GLO is now a functionally differentiated and autonomous legal system. Its laws are actualised, they are obeyed, or enforced; its delinquents are punished and brought into line.

The physical traces of these norms scar the earth and humanity. These are *not*, legally speaking, ALPs or PLFs. They are the determinate demands of the legal system, and they will be realised. These norms exist in an authoritative legal system that secures their necessity (by enforcing them) and turns their contingent possibility into actualization (through enforced obedience). Juxtaposed to this, the rest of PIL is reduced to set of deceptive dyads: PLFs masquerading as ALPs.

The operative system now hidden behind PIL was created around 500 years ago,[37] to facilitate and justify the plunder of the colonised world. It has survived many apparent shifts, and has modulated itself successfully behind a variety of justifications over that time.[38] It continues today, as the GLO, operated from the three centers. This has

37. Antony Anghie, Imperialism, Sovereignty and the Making of International Law (2005).

38. *Id.*

important economic and political ramifications around the world, it is the "root cause" of most of the occurrences PIL condemns, and feigns to suppress. The "good man" of the GLO becomes the "bad man" of PIL; and vice versa.[39]

III. THE RADICAL INDETERMINACY OF PIL

Viewed as a set, or "system", of norms, all legal systems are radically indeterminate: because the languages of law and liberalism are inherently indeterminate.[40] They pursue incompatible ends: determinacy and justice; freedom and constraint; the community and the individual; power and restraints on power.[41] As Koskenniemi has demonstrated, PIL is no exception; it too is an indeterminate language through which political claims are articulated. This indeterminacy—and the techniques through which it is denied and manipulated—is familiar to most international lawyers as the oscillation between Apology and Utopia.[42]

In an institutionalized legal system, indeterminacy can be suppressed by an ideologically homogeneous judiciary, as the inherent indeterminacy of the law is offset by the predictability of judicial decision-making. This is what Hart called the "committed internal point of view".[43] Koskenniemi calls this process "structural bias";[44] and claims that it also permeates some of the institutions of PIL. Like Hart, Koskenniemi focuses on law in its institutional settings. Structural bias is an attribute of *specific* institutions: ""Winning" or "losing" seemed

39. Linarelli et al., *supra* note 3, at 173.

40. David Kennedy, *The Structure of Blackstone's Commentaries*, 28 BUFF. L. REV. 205 (1979).

41. *Id.*

42. MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA (1989); For an accessible summary, *see* Martti Koskenniemi, *The Politics of International Law*, 1 EUR. J. INT'L L. 4 (1990).

43. H.L.A HART, THE CONCEPT OF LAW, 101 (1994).

44. Koskenniemi, *supra* note 39, at 569.

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

always less connected to the intrinsic worth of the arguments than the preferences of the institutions before which they were made."[45]

The mere coherence, even the intellectual brilliance, of a legal argument is not sufficient to bring about its actualisation. The law is plastic, malleable, and indeterminate; and yet the probable outcomes of particular claims heard by particular tribunals or institutions can often be predicted accurately.[46] In reality, however, few legal systems possess a sufficiently homogeneous judiciary to produce such stabilizing effects; this is key to Dworkin's critique of Hart. It is particularly acute in PIL, which does not possess a judicial structure at all.[47]

PIL, as an academic, professional, or activist discourse, as a social or institutional practice, is a mélange of different bodies and texts; states and international organisations; assemblies and committees; tribunals and rapporteurs; activists and academics; courts, quasi-courts, legislators, and quasi-legislators; rules, principles, interpretative/argumentative techniques and deductive syllogisms; documents and practices; books and articles; claims and counterclaims. These provide a lot of inconsistent, conflictual, data from which new legal arguments can be formed and decisions reached; more books and articles written, more reports and decisions generated. There is no authoritative test by which these may be differentiated into the competent and incompetent.

More importantly, PIL is *not* an institutionalized legal system (it is not really a legal system at all), and so *cannot rely on even the possibility* of judicial homogeneity as a stabilizing mechanism. Consequently, PIL is beset by both semantic and ontological indeterminacy.[48] Not only are its individual norms indeterminate in their structural (non-) relation with one another, but there is also no authoritative technique to determine which norms form part of PIL, and which are excluded. There are three separate issues:

1. Legal norms, in sets or systems, are inherently indeterminate.

45. *Id.*

46. *Id.* at 600-15.

47. Jason Beckett, *Microwaving Dreams? Why There is no Point Reheating the Hart-Dworkin debate for International Law, in* METHODOLOGIES OF INTERNATIONAL LAW 111–30 (Rossana Deplano & Nicholas Tsagourias, eds., 110).

48. Jason Beckett, *Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project*, 7 GERMAN L. J. 1053-56 (2006).

2. No person or body is authorized to decide which norms exist in PIL.

IV. NO PERSON OR BODY IS AUTHORIZED TO DECIDE WHAT SPECIFIC PIL NORMS MEAN

A. Interpretative Indeterminacy

If we assume that treaties are somehow "law" (that they possess some identifiable quality that distinguishes them from novellas, newspaper Op-eds, or impromptu theatrical performances) their textual existence is obvious. Unlike norms of CIL, it is relatively easy to identify specific international treaties and the states party to them. However, determining the content and scope of their obligations under these is fraught with difficulty and outright contradiction. This is because the rules of treaty interpretation as encapsulated in arts. 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) are contradictory to the point of meaninglessness:

> According to art. 31, one must neither add to nor subtract from the text, merely interpret 'naturally', whatever that means. However, according to art. 32, if that is ambiguous or 'absurd' (unpalatable) one may go behind the text, find an 'intention of the parties'. Moreover, and returning to art. 31, if the result is *still* undesirable, one may impose an 'object and purpose' (a *telos*) on the text, and interpret in its light. Which allows the interpreter to add or remove words as necessary to realise the *telos* imposed.[49]

There are those who argue that the qualification that a "natural meaning" can only be rejected if "manifestly absurd or unreasonable" provides a genuine constraint which underwrites the distinction between (competently) "interpreting" a treaty text, and re-writing

49. Jason Beckett, *Fragmentation, Openness, and Hegemony: Adjudication and the WTO, in* International Economic Law and National Autonomy 57 (Meredith Kolsky Lewis & Susy Frankel, eds., 2010).

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

or "abusing" it.[50] This could be true if "manifestly" had a specifiable meaning[51] (which it lacks) but is rendered untenable by the plethora of contradictory texts on treaty interpretation which circulate concurrently around the domains we call PIL. Deploying interchangeable techniques of treaty interpretation under the guise of "eclectic pragmatism" gives the "interpreter" an absolute freedom to define a state's "treaty obligations". Ultimately, to "refer to objectives is to tell the law applier: 'please choose'."[52]

B. Ontological Indeterminacy

The norms of customary international law (CIL) are also indeterminate. Moreover, the *identification* of CIL norms is subject to dispute. There is no authoritative procedure to determine when, or if, a rule of CIL *exists*. This *ontological indeterminability* flows from the wording of article 38(1) of the Statute of the ICJ: "international custom, as evidence of a general practice accepted as law", which has engendered a longstanding dispute regarding the appropriate methodology for ascertaining the existence of customary legal norms.[53]

Although it is widely accepted that customary international law is composed of two elements—a "general practice" (state practice), "accepted as law" (*opinio iuris*)—neither the definition of the elements, nor the constitutive relationship (if any[54]) between the two, has garnered the same consensus. Structurally, the options for the relationship between practice and *opinio iuris* are that they could create CIL as *either* an aggregate or a synthesis. But this shifts the question immediately onto the definition of each part. To provide a synthesis, the two parts would have to be part of the same thing, reflections of each other; inexorably bound and inseparable. To be an aggregate,

50. The Oxford Handbook of the Sources of International Law (Samantha Besson & Jean d'Aspremont eds, 2017).

51. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Colum. L Rev. 809, 821 (1935) (on the "dormitive principle").

52. Koskenniemi, *supra* note 39, at 569.

53. Jason Beckett, *Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL*,16 Eur. J. Int'l. L. 213 (2005).

54. *Id.* at 219.

the opposite must be assumed, that the two elements are radically separate from one another, each enjoying an atomistic existence. These options encapsulate the classic[55] and the modern[56] theories of custom, respectively. They *cannot* be reconciled.[57]

This leaves two options for State Practice: either it is *everything* that States do, or it is *some of* what States do. After this choice is made—or perhaps before this choice is made—we must decide how to decide which of the things which States do should count as State Practice. For a classical natural lawyer it is the congruence of the action with an arbitrarily chosen ethical order which separates Practice from mere Conduct; for a classic positivist *opinio iuris* distinguishes the two. Those following an aggregationist theory of CIL must assume all conduct to be Practice.

Opinio iuris too is a term of many meanings: it could be about the nature of the *claim* to act, or about the reception of this claim. Alternatively, it could be wider, covering all that states say; or narrower, some of what states say—e.g. that sufficiently congruent with "World Order Values". Then again *opinio* may be a "state of mind" imputed onto states. Within this latter perspective, *opinio* could be understood as a belief in legality,[58] a consent to be bound,[59] or a simple normative claim for legality.[60]

It is impossible to track the potential permutations available between state practice and *opinio iuris*, the "agreed elements" of CIL. Each permutation (theory) will focus on different data, perceive rule formation differently, and so will "identify" different rules. "In practice," this profusion of articulated and unarticulated theories is masked by the apparent agreements over the existence and elements of CIL. Disputes over which rules exist, are elided with disputes over the content and

55. *Id.* at 220.

56. *Id.*

57. Anthea Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 Am. J. Int'l L. 757 (2001).

58. Hugh A.W. Thirlway, International Customary Law and Codification 47 (1972),

59. Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 Indian J. Int'l. L. 23 (1965).

60. Beckett, *supra* note 52, at 219.

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

application of rules already *presumed* to exist. These disputes cannot be resolved, because there is no body within the diffuse structures of PIL with the competence to give authoritative answers. CIL is ontologically indeterminate.

C. Structural Indeterminacy

The fundamental indeterminacy of law could be contained only if there was an institution empowered to impose authoritative meaning on specific norms. This was first elucidated by the American Legal Realists of the early 20th Century;[61] who offered a critique which has simply not been answered, let alone refuted, in the intervening century.[62] However, they failed "to reproduce themselves as vital intellectual enterprises".[63] And so, their critiques and insights were largely lost, until they resurfaced as Critical Legal Studies in the 1980's and New Approaches to International Law in the 1990's. Many still ignore their central insight—that law is *radically* indeterminate—today.

In 1935, Felix Cohen provided a mature legal realist manifesto, in which he ridiculed the classic approaches to legal reasoning as "a special branch of the science of transcendental nonsense".[64] Their questions, he argued, were "identical in metaphysical status with the question [of the] scholastic theologians . . . 'How many angels can stand on the point of a needle?'"[65] Legal language, he continued, is "entirely useless when we come to study, describe, predict, and criticize legal phenomena."[66] This is because "the traditional language of argument and opinion neither explains nor justifies court decisions."[67] Rather, "the vivid fictions and metaphors of traditional jurisprudence are poetical or mnemonic

61. For an accessible overview, *see* Neil Duxbury, *The Evolution of a Mood, in* Patterns of American Jurisprudence (1995).

62. Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97(3) Geo. L. J. 803 (2009).

63. *Id.* at 821.

64. Cohen, *supra* note 37, at 821.

65. *Id.* at 810.

66. *Id.*

67. *Id.*

devices for formulating decisions reached on other grounds"[68]

Legal rules are radically indeterminate, and cannot direct or justify legal decisions. Their function is to disguise the true nature of legal decisions. Cohen exposed judicial reasoning (and its academic impersonations) as an exercise in fetishisation: an inversion of cause and effect. Judges decide (whether calculatively, intuitively, or inadvertently) how they wish to resolve a given case; and reverse engineer law to justify, to appear to *necessitate,* that conclusion. The two movements are then switched, the chosen rules presented as the cause of the decision; itself the product of impartial legal reasoning.

Cohen demonstrates the meaninglessness of legal rules, and the consequent circularity of legal reasoning. The decision comes first, and only then can its "reason" be perceived. The cart is ever before the horse, but by smoke and mirror the image is reversed. In criminal law, an accused is not punished because he is found guilty, rather he is found guilty in order to be punished.[69] Likewise, a labour union is not liable to being sued because it is a corporation, it is found to be a corporation in order to make it susceptible to being sued.[70] This seemingly subtle difference undermines the directive power of legal rules:

> If we say that a court acts in a certain way "because a labor union is a person" we *appear to justify the court's action …* If, on the other hand, we say that a labor union is a person "because the courts allow it to be sued" we recognize that the action of the courts has not been justified at all.[71]

"To justify or criticize legal [analyses] in purely legal terms is always to argue in a vicious circle."[72] In legal terms, the decision can be both justified and repudiated; it is right and wrong simultaneously. The law did not demand either outcome, though it mandated both; each can be reached through competent legal argument, and neither can be *legally* preferable to the other.

The simultaneously legal and illegal invasion of Iraq in 2003

68. *Id.* at 812.

69. Cohen, *supra* note 16, at 837.

70. *Id.* at 813, 814.

71. *Id.* at 814.

72. *Id.*

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

provides a perfect example of this process. For those who opposed the intervention on moral or pragmatic grounds, its illegality was obvious; patent and inarguable. However, for those supportive of the invasion, its legality was equally clear; equally patent and inarguable. The prior decision on the *merits* of the invasion *constructed* the "applicable law" and its manifestly correct application to the "relevant facts". It is, however, important to note that the invasion went ahead, no person or state was sanctioned for this, and the UNSC ultimately endorsed the subsequent occupation.[73]

Aside from the obvious point that we should not delegate our moral decision-making to the law, this also highlights the fact that law *cannot* make ethical determinations. Our ethical determinations make "the law". Likewise, our views on empirical matters determine our understanding of the relevant legal rules. "Judicial reasoning . . . is thus entirely mythical, and the actual motivation . . . in reaching given decisions is effectively concealed from all true believers in the orthodox legal theology."[74]

V. RADICAL INDETERMINACY AND STRATEGIES OF LEGAL ARGUMENTATION

Academic (and activist) international lawyers tend to have unrealistically high expectations of law's transformative potential.[75] They present PIL as reasonably determinable, just, and *authoritative*.[76] Overestimating law's coherence and force at the national level,[77] students, schol-

73. United Nations (UN) Security Council Resolution. 2013. *On Lifting the Economic Sanctions On Iraq Imposed by Resolution 661 (1990)*, S/RES/1483. Adopted by the Security Council at its 4761st meeting, https://undocs.org/S/RES/1483(2003).

74. Cohen, *supra* note 16, at 818.

75. David Lefkowitz, *What Makes a Social Order Primitive? In Defense of Hart's Take on International Law*, 23 Leg. Theory 258 (2017).

76. Vaughan Lowe, International Law (2007).

77. Anthony D'Amato, *Is International Law Really "Law"?*, 79 N.W. U. L. Rev. 1293

ars, and practitioners of PIL seek to bring the rule of law to the international plane, to tame or regulate international affairs.[78] Projecting their fantasies about the rule of law,[79] they imagine PIL in the image of municipal law: its demands suffused with the authority of law, carrying force, commanding compliance, directing State and individual behaviour, altering the world, and ultimately creating or accelerating positive change.[80]

Things do not work that way: effective municipal law exists within a coercive structure; its force is not persuasive but violent. Law is not the opposite of violence or politics, legal authority is founded on the violence of enforcement; the efficacy of law depends upon the political centralization of legitimate violence.[81] However, an entrenched academic distaste for discussing law as an exercise in overwhelming violence leads to a form of magical thinking; conjuring up "ideas that a right is a power of an incorporeal nature, a kind of inner, invisible dominion over the object of the right, a power manifested in, but nevertheless different from, the exercise of force (judgment and execution)."[82]

In this understanding, law and rights stand *before* violence, force, or politics; they are abstract entities with objective content, and their own "compliance pull".[83] This underwrites faith in law and rights. It produces an unfortunate tendency to conflate the articulation of a right with the realisation of its object:

> Many legal academics, for instance, genuinely seem to believe that when they advocate "progressive legal change" in the

(1985).

78. Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics*, 70 MODERN L. REV. 1,2 (2007).

79. Paul O'Connell, *The Death of Socio-Economic Rights*, 74 MODERN L. REV. 532 (2011).

80. Sorcha MacLeod, *Stuck in the Middle With You? Alternative Approaches to Realising Accountability for Human Rights Violations by Business in* INTERNATIONAL LAW AND DISPUTE SETTLEMENT: NEW PROBLEMS AND TECHNIQUES 87-107 (Duncan French & Matthew Saul eds, 2010).

81. WILLIAM RASCH, SOVEREIGNTY AND ITS DISCONTENTS 49-65 (2004); MICHEL FOUCAULT, DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON, 16 (1975).

82. Alf Ross, *Tu-Tu*, 70 HARV. L. REV, 812, 818 (1957).

83. THOMAS M. FRANCK, THE POWER OF LEGITIMACY AMONG NATIONS (1990).

> pages of the law reviews, they are somehow actually helping to advance progressive legal change. It seems not to have occurred to them that the net effect of their advocacy might amount to little more than the circulation of a three-word phrase ... through the disciplinary grids of ... legal thought.[84]

This is "because they have fully assimilated the discipline's conflation of the two."[85] The Bad Man's understanding of law, as the violent imposition of political demands, destroys this conflation. It demands that we confront the disjunction between demands for progressive legal change and the world's stubborn refusal to implement them.

Any stipulation of what PIL, or international legal argumentation is, should be, or means, is an ALP. PIL's radical indeterminacy should be taken as a given, but it is not.[86] The spectre of indeterminacy has caused some anxiety to be sure, but this has been largely assuaged through three strategies: to deny indeterminacy; to adapt to indeterminacy by seeking to relativize or constrain it; or to refute the indeterminacy critique. None of these have domesticated indeterminacy.

A. Denial

In the first strategy, PIL is presented as a set of determinate rules, and a narrative is presented as to what some of those rules state,[87] and how they should be applied to a specific set of facts.[88] Law as a system of norms which, competently interpreted and applied, determines the outcome of any given case. This creates the perception of legal analysis as an empirical exercise, consisting of identifying, interpreting, and applying the relevant legal norm(s) to the relevant facts. Consequently, the reality—that both the applicable legal norm and its interpretation were chosen from multiple available possibilities—is hidden. A set

84. Pierre Schlag, The Enchantment of Reason, 9 (1998).

85. *Id.*

86. For a recent and comprehensive attempt at taming the radical indeterminacy of PIL, *see* Besson, *supra* note 36.

87. Ardi Imseis, *On the Fourth Geneva Convention and the Occupied Palestinian Territory*, 44 Harv. L. J. 65 (2003).

88. *Id.*

of contingent choices are presented as necessary outcomes. Both the norms "identified" and the interpretations chosen are ALPs.

This approach functions in simple denial of the fact that alternative rules and application procedures were equally available; or relies on a stipulated distinction between competent and incompetent understandings of PIL. Any alternative formulation of PIL is simply rejected, "as so 'replete with basic errors', in Sands' phrase, that it needs no engagement with . . . anyone with 'the most rudimentary understanding of international law' will immediately know it to be 'deeply flawed.'"[89]

These legal practitioners, academics, and students, adopt a judicial posture, in the belief that they are imitating the judicial role—impartially identifying and applying the law:

> And because what we do as legal academics is a kind of pretend-law (unlike the courts, when we declare what the law is, nobody listens), we can also attach to this pretend-law a kind of pretend-intellectual integrity.[90]

This integrity, and our supposed expertise, often lead academics not merely to describe, or extrapolate from, cases, but to criticize them. Mavroidis, for example, maintains that he understands WTO law better than the WTO dispute and appellate bodies.[91] Hovell's analysis of the "claim" of universal jurisdiction "properly understood" provides another excellent example of an academic telling judges how to do their jobs.[92] But each also illustrates the basic insight of realism: that the same rules, applied to the same facts, can "justify" or "determine" radically different conclusions. Each interpreter interpolates their moral and political preferences into the law, presenting idiosyncratic intuitions in the guise of objective legal analysis,[93] and pursuing "an objectionable

89. China Miéville, *Multilateralism as Terror: International Law, Haiti and Imperialism*, 18 FINNISH Y.B. INT'L L. (2007).

90. Schlag, *supra* note 48.

91. Petros Mavroidis, *Last Mile for Tuna (to a Safe Harbour): What Is the TBT Agreement All About?*, 30 EUR. J. INT'L L. 279 (2019).

92. Devika Hovell, *The Authority of Universal Jurisdiction*, 29 EUR. J. INT'L L. 427 (2018).

93. Jason Beckett, *The Economics of Fantasy: Reflections on the Resurgence of*

attempt to score political victories outside of politics."[94]

B. Accommodation

This strategy accepts the existence of indeterminacy, but rejects, or attempts to constrain, its radicality:

> Even if one does not share Koskenniemi's fundamental skepticism about legitimizing the exercise of power through law, the critical approach forcefully underlines the epistemological and political challenges that legal scholarship has to meet.[95]

In attempting to meet these challenges, this approach develops nuanced theories of argumentation which purport to domesticate indeterminacy. Recognizing that incompatible legal answers to any given question are possible, it sets out to demonstrate that one answer, or one argumentative technique, is qualitatively superior to the alternatives:

> Most theories of legal argumentation are concerned with the justification of legal decisions. That argument is concerned with justification is something which for lawyers ... requires no further explanation ... No doubt there is good sense in justifying decisions in distinguishing between more or less convincing arguments. After all as far as decisions are concerned it cannot really be disputed that any decision could have been made differently.[96]

This draws on the assumption that a *competent* legal argument is not necessarily the *best* or or *most appropriate* argument, by internal or external standards. "It is by now a common standard of legal research that it needs to be attuned to insights of political science and political

Formalism in PIL, 1(3) Eur. Soc'y Int'l L. Reflection (2012), https://esil-sedi.eu/post_name-633/

94. Martti Koskenniemi, *The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law*, 65(2) Modern L. Rev. 159, 173 (2002).

95. Bogdandy, *supra* note 1, at 13.

96. Niklas Luhmann, *Legal Argumentation: An Analysis of Its Form*, 58 Modern L. Rev. 285 (1995).

theory."[97] Consequently, it is claimed that two arguments can be equally competent whilst one is clearly superior to the other.[98] After all, "anti-positivist lawyers are still lawyers, and must still be able to distinguish good from bad legal reasoning."[99] These nuanced theories of argumentation engage:

> fundamental questions, about the relationship between text, reasoning and outcome that are traditionally the preserve of legal theorists and philosophers … This … requires going beyond traditional emphases on State consent … to engage with substantive duties … that States owe towards outsiders.[100]

However, to construct and evaluate such theories, we require something against which the merits of a legal argument can be measured. Suttle advocates for an understanding of trade law grounded in a redistributive theory of economic justice. This is a noble aim, but also an arbitrary one. It attempts to suppress the indeterminacy of PIL by importing (allegedly determinate) norms from another system; but the choice of *which* system to import—"moral philosophy", "economics", the "insights of political science and political theory", etc.—is entirely subjective. Moreover, the other systems are themselves indeterminate and incoherent. Such arguments cohere and confirm their creators' normative desires within another system, before transposing them back into PIL as ALPs.

Complex theories of legal argumentation can also be assessed against concepts or criteria internal to the legal system: integrity, sources, rules of interpretation, etc. This approach could then be verified or measured empirically (and thus with some degree of determinacy) *if* the legal arguments took place in an institutional setting, with enforcement powers and a jurispathic function. But only if those institutions *also* consistently implemented an authoritative definition of the relevant concepts. It relies on an institution's "structural bias" as an arbitrary

97. Bogdandy, *supra* note 1, at 14.

98. Luhmann, *supra* note 94. Luhmann goes on to reject this possibility, noting the "inability of grounds to ground".

99. Oisin Suttle, *Rules and Values in International Adjudication: The Case of the WTO Appellate Body*, 68 Int'l & Comp. L. Q. 401 (2019).

100. *Id.* at 401, 402.

stabilising mechanism; a referent against which arguments could be ranked. However, if there is no observable and consistent institution to observe and describe, then it simply moves the arbitrary choice up a level: What is integrity, and why? What are sources, how do we identify and interpret them? And we have no referents against which to judge the answers to those questions.

PIL lacks the institutional centralization on which this strategy depends. There is nothing within the system against which arguments or argumentative techniques can be evaluated. Consequently, there can be *no rankability of legal arguments* in PIL. On what register would relative merit be measured? We could say one is "immanently superior", but that just shifts the ALP up a level to the definition of law. We could say "morally" or "pragmatically" superior, but that simply outsources the ALP to another, equally indeterminate, system. It works only if we presuppose the (false) self-description of liberalism, or some alternative universal truth, in a world lacking universal truth.[101]

Moreover, false necessity is an iterative concept. It relativises not only neoliberalism, but liberalism, ethics, justice, etc. All evaluative positions succumb to its critique. There is no outside, only situated judgement; and the situation of the evaluator is itself contingent. Competence is subject to the same critique, leading back to the conclusion that competences are indeterminate, and cannot be ranked or hierarchized in anything but an arbitrary manner. There can be no hierarchy or rankability of argumentative strategies in PIL. There is no-one authorized to rank, and there is no standard of evaluation, so there can be no sorting or ranking.

Consequently, these more complex and theoretically nuanced approaches to the identification and interpretation of PIL fare no better than their simplistic counterparts. It does not matter how sophisticated any proposed analysis or theory of legal argumentation is; how philosophically, pragmatically, sociologically, or ethically compelling it is. It is still a fantasy, a description of a non-thing. It is the equivalent of describing the best game of quidditch (n)ever played, in exquisite detail and style. The literary flair or academic brilliance of the analysis does not matter. It is still a description of an imaginary object; or the rejection of a real institution:

101. Rasch, *supra* note at 78.

> Whether or not the WTO was conceived by its architects as a neo-liberal project, adjudication requires a broader normative foundation. Principles of global economic justice move, on this view, from being external standards for criticizing the existing WTO regime, to being necessary components in WTO legal reasoning.[102]

Unless and until the WTO functionaries accept this claim, it remains a PLF—a scream into the normative abyss. "Justified-choice" theories share the fate of their formalist peers: they are accepted by those who accept them, and rejected or ignored by everyone else; usually including those with their hands on the levers of power. This is especially true as they are justifying/describing arguments and conclusions made in a diffuse system, with indeterminate borders,[103] practiced largely in academic books and journals.

C. Refutation

The third strategy seeks to produce a philosophically defensible model of an operative, (relatively) determinable PIL. The desire to constrain indeterminacy provides the impetus behind the various methodological turns in PIL scholarship.[104] These are best understood as attempts to refute the arbitrariness of legal argumentation—to *prove* the superiority of certain forms of legal analysis.[105] Despite Thomas Franck's famous claim that PIL has entered its "post-ontological phase", where no-one takes seriously old concerns about whether it

102. Suttle, *supra* note 97, at 402.

103. Stephen Riley, *The Philosophy of International Law*, *in* Research Methods in International Law: A Handbook 385–401 (Rossana Deplano & Nicholas Tsagourias eds, 2021).

104. *See e.g.* Jörg Kammerhofer, Uncertainty in International Law: A Kelsenian Perspective; d'Aspremont Formalism and the Sources of International Law (2021); Beckett, *supra* note 39; Samantha Besson, *Theorizing the Sources of International Law,* in The Philosophy of International Law, 164, 180 (Samantha Besson & John Tasioulas eds, 2017); Basak Cali, On *Interpretivism and International Law,* 20 Eur. J. Int'l. L. 805 (2009); Mehrdad Payandeh, *The Concept of International Law in the Jurisprudence of H.L.A. Hart,* 21 Eur. J. Int'l. L. (2010).

105. Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 Eur. J. Int'l. L. 113 (2005).

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

is *really* law,[106] the field witnesses periodic (re)turns to theory and to foundational methodological questions.[107] The driving force of these returns is to purify the discourse: to settle the disputes over what count as rules of PIL, and how these should be interpreted and applied.

The recent iterations of the neo-formalist turn share a common goal: to create a methodologically coherent foundation for a particular vision of PIL. This entails an explicit or implicit claim that this particular version is objectively correct, inarguable, or at least the very best available.[108] Thus each neo-formalist theory is presented as both immanently determinate *and* objectively superior to its rivals. The attempt to resolve and forestall theoretical disputes is an attempt to challenge the contingency of legal analysis: to convert ALPs into determinate legal injunctions.

But, at least in PIL, it is an attempt doomed to failure. There are too many competing theories, and, more importantly, there are no 'impartial' or even inter-subjective standards against which their relative merits can be judged. They cannot be judged legally, as that is the very question at issue. They cannot be judged descriptively, as there is no agreement on an object to describe. Nor can they be judged morally in our pluralistic world, which also precludes any pragmatic judgment. All approaches are equally (in)competent; none can claim superiority. The indeterminacy of PIL is, literally, radical: it goes to the roots of the discourse, and beyond—into the soil it purports to inhabit. However, the mere existence of these attempts shores up a set of mainstream paradigms, allowing academics and others to assume the indeterminacy critique has been contained or refuted; that they can go about "the practice of international law" as usual.[109]

There is an orthodox rebuttal, which claims PIL can, contingently, be determinate, because all participants (must) share certain points of view. This means that some questions in PIL *do* have singularly correct

106. Thomas Franck, Fairness in International Law and Institutions 6 (1995).

107. *See* Besson, *supra* note 36; Tsagourias eds, *supra* note 44.

108. Beckett, *supra* note 50.

109. Cali, *supra* note 102; Besson, *supra* note 102.

answers. One example is the question "where is the seat of the ICJ?". This might be answered by all participants with "The Hague" because art. 22(1) of the ICJ Statute states: "The seat of the Court shall be established at The Hague." However, the rebuttal merely emphasises my point. First, art. 22(1) actually says nothing whatsoever about where the seat of the ICJ *currently* is, only where it was to be established in 1945. Second and more important, this is *only* a PIL question for those who take the ICJ to be a(n important) part of PIL. For those who reject the relevance of the ICJ, it is a geography question with a determinable answer; which will be found on Google Maps, not in a 75-year-old legal artefact.

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

VI. AN INTERRUPTION, FOR CLARITY

My argument relies heavily on two multivalent concepts—falseness and authority—which come with their own baggage and assumptions. I would like to clarify how I understand them, and how this impacted my decision to adopt Holmes' definition of law to structure my analysis.

A. On Falseness

Whilst false necessity and false contingency are in many ways twinned concepts, two sides of the same coin, they are very different in their manifestations of falseness. An ALP is false in the simple sense of being untrue, something is fraudulently presented as being necessary when it is not. This does not mean that presenting an ALP is an act of bad faith, it is often an innocent error.[110] But it does mean that its claim of necessity is always false.

A PLF is not false in this straightforward sense. In fact, PLFs truly are possibilities—they are just unlikely to occur. Marks thus develops an alternate sense of falsity as material incompleteness. What identifies a legal claim as a PLF is the failure to engage or analyse the factors militating against its realisation. This is particularly common in academic, activist, and institutional claims regarding human rights. Arguments that the right to life includes rights to shelter, water, food,

110. Alasdair MacIntyre, After Virtue 14 (1984).

and basic healthcare are now supported by the "authoritative" General Comment 36 of the HRC,[111] but they will not be realised. They are PLFs, not because they could never be realised, but because they *will not* be realised; even though, in theory, they could be. It is not the lack of legal analysis, nor the absence of an articulation of rights, which prevents the impoverished from accessing shelter, food, healthcare, etc. It is an *artificially imposed* dearth of resources.[112] The articulation of a right, no matter how well supported, does not lead to the creation or allocation, of the requisite resources. The global economic order is designed to move resources from poor to rich, not vice versa.[113]

Human sufferings, exploitations, and deprivations (whether presented as "human rights abuses" or not) are not random, free floating, bad things; they are systemically rational responses.[114] They are the product of a coherent but rarely analysed system of "planned misery": the GLO in action, *actualized PIL*.[115] They cannot be overcome with pious dyads of ALPs and PLFs. It is fallacious to conflate rights claims with progress, because rights cannot be eaten, drunk, worn, injected, or sheltered under. We must bring into relief the system which *causes* these deprivations, because the possibilities represented by rights claims can only be realised through systemic change. And systemic change is beyond the ambitions of IHRL.

Olivier De Schutter in his role as *Special Rapporteur* on the right to food, offers a clear illustration of this fallacy.[116] In a detailed, meticulously

111. Human Rights Committee. 2018. *General comment No. 36 (2018) on article 6 of the International Covenant on Civil and Political Rights, on the right to life*. CCPR/C/GC/36, Para 27. Adopted by the Committee in 1982 and 1984. https://tbinternet.ohchr.org/Treaties/CCPR/Shared%20Documents/1_Global/CCPR_C_GC_36_8785_E.pdf

112. Susan Marks, *Human Rights and the Bottom Billion*, 1 Eur. Hum. Rts. L. Rev. 37 (2009).

113. Jason Hickel, The Divide: A Brief Guide to Global Inequality and Its Solutions (2017).

114. Marks, *supra* note 5; Jason Beckett, *Creating Poverty*, *in* The Oxford Handbook of International Legal Theory (Florian Hoffmann & Anne Orford, eds., 2016), DOI: 10.1093/law/9780198701958.003.0048.

115. Marks, *supra* note 5.

116. Oliver De Schutter, Report of the Special Rapporteur on the Right to Food, *Crisis Into Opportunity: Reinforcing Multilateralism*, UN Doc. A/HRC/12/31,

supported, and wide-ranging analysis, De Schutter asserts:

> The right to food is the right of every individual, alone or in community with others, to have physical and economic access at all times to sufficient, adequate and culturally acceptable food that is produced and consumed sustainably, preserving access to food for future generations.[117]

He believes that this right can be realised through "concerted effort at local, national, and international levels."[118] National governments should focus "in particular on small-scale food producers ... [and] towards the diversification of the economy, to create opportunities for income-generating activities; and towards the establishment of standing social protection schemes".[119] But, he warns: "For such strategies to succeed, the careful sequencing of actions matters, requiring strong cross-sectoral coordination."[120] In enjoining states to proceed carefully, De Schutter simply *assumes* that they have the freedom to proceed as he requests. They do not. De Schutter's analysis also lays the groundwork for locating the causes of the inevitable failure *locally* – to the lack of careful sequencing.[121]

Despite noting an international tendency of "obstructing" "domestic efforts towards the realization of the right to food",[122] culminating in "the ninth Ministerial Conference of WTO ... which failed to place food security above trade concerns,"[123] De Schutter maintains that there is, simply, a "need to improve coherence of global governance for the realization of the right to food".[124] And insists that a focus on "the right

21 July 2009.

117. Olivier De Schutter, *Report of the Special Rapporteur on the right to food Final report: The transformative potential of the right to food,* para 2.

118. UN Doc, *supra* note 115, para. 35.

119. *Id.*

120. *Id.* para. 42.

121. Pahuja, *supra* note 26.

122. UN Doc, *supra* note 114, para. 35.

123. *Id.* para. 48.

124. *Id.*

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

to food will encourage all the actors involved in the implementation of these goals to … address the political economy of food systems".[125] However, De Schutter fails to examine the *actual* political economy in which the WTO, functioning as part of the GLO, prioritizes trade efficiency over hunger. Ignoring the effects of the "trade commitment restrictions on national food security strategies"[126] it entails, he assumes that the "paramount objective" of food security, once properly understood will create:

> an enabling international environment, in which policies that affect the ability of countries to guarantee the right to food —in the areas of trade, food aid, foreign debt alleviation and development cooperation—are realigned with the imperative of achieving food security and ensuring adequate nutrition.[127]

In short, despite recognizing famine as a man-made phenomenon, and identifying the routes through which it is inflicted on specific poor populations, De Schutter ultimately offers recommendations focused on the idea that the right to food has been misunderstood and misapplied.

The failure to acknowledge the deceptive dyad at work leads to an intellectual confusion between the determination of a right and the realisation of the interests the right is assumed to protect or confer.[128] Viewed through the dyad, De Schutter's strictures on the right to food are unveiled as ALPs (in the simple sense that the law could be read otherwise); and as PLFs in the more complex sense that although the law can be interpreted in that way, systemic factors make it highly improbable this would be actualised. *Contra* de Schutter, our systems "of global governance" do not lack "coherence", they simply cohere around a "normative vision" very different to his own. The GLO is aligned with an imperative of profit and growth, not "human security".

De Schutter is correct about the existence and meaning of the right to food, but he is also incorrect. IHRL is radically indeterminate: the right to food exists in some understandings of conventional and

125. *Id.* para. 49.

126. Linarelli et al., *supra* note at 19.

127. UN Doc, *supra* note 114, para. 50.

128. Kennedy, *supra* note 92, at 19.

customary IHRL; but not in others.[129] The "paramount" right to food is an ALP. However, within the faux-institutional structure of IHRL, it is important that it was *Special Rapporteur* De Schutter who wrote what he did. His position gives him authority and adds weight to his opinion but, as it is not underpinned by organised enforcement, it is not authoritative. Neither De Schutter's conclusions, nor the various proclamations of the other UN Human Rights *Rapporteurs* and Committees, have *legal authority*.

B. On Authority

There are different *types* of authority. One can have political, professional, academic, legal, etc. authority. One can be an authority, and one can have authority. To be an authority is to be respected in your field, and perhaps by wider audiences; this is a persuasive authority, binding only if the argument made is accepted. The proponent's authority may be a persuasive factor in this process; but it is not conclusive.

To *have authority* is different. To have authority is to be able to compel recalcitrant others into accepting your decisions. This is a binding, coercive, authority; the authority of managers, professional superiors, politicians, police, and courts. Its dictates are mandatory, not optional; providing exclusionary, not persuasive, reasons for action. Binding whether one agrees with the conclusion and/or reasoning or not. In a structure like law – as it is idealistically reconstructed[130] – this authority is exercised consistently to create determinable norms, laws. The norms identified are those that are observable, those that are enforced against each delinquent, as guidance to others.[131] Only if such a pattern of obedience and enforcement is empirically identifiable, can we authoritatively recognise a norm's existence.

This kind of authority, within a social structure of violence where a "sovereign" body possesses the monopoly of legitimate violence, can produce identifiable legal norms. It is a necessary, but not sufficient,

129. Wendy Brown,*The Most We Can Hope For: Human Rights and the Politics of Fatalism,* 103 S. ATLANTIC Q., 457 (2004).

130. Neil MacCormick, *Reconstruction after Deconstruction: A Response to CLS*, 10 OXFORD J. LEG. STUD. 539 (1990).

131. *See* Foucault, *supra* note 78, on "delinquency".

condition for the production of perceptible laws. Political authority is closely linked to legal authority, and could be conceptualized as the power to make the laws that the legal system is to apply. But that is too simplistic. The legislature may draft the laws, but it is up to the courts to recognise and construct them. The laws mean only what the courts make them mean.[132] Of course, there are several other ways of exercising political authority. Courts and parliaments are in a constant struggle for sovereignty; ultimate enforcement power, the sovereign decision.[133]

The different forms of authority inter-relate, but only legal authority can create legal norms. The distinction is in its capacity to wield violence to impose its decisions. Access to socially centralized violence is the hallmark of legal authority, the precondition for creating or recognizing *legally authoritative* norms. The phenomena we currently classify as PIL rarely possess the necessary characteristics of legal norms. The institutions and "authorities" purporting to create or recognise them generally lack legal authority. Their dictates leave no empirically visible traces; do not exist *as laws* in the real world. They are not part of global governance per se; just discursive fantasies, however intricate, well-crafted, or noble, they may be. Let me try to illustrate this point.

Phillip Alston is rightly recognised as an authority in/on IHRL. He has both academic and professional authorities. His opinions are respected because of his scholarly and professional reputation, and for their content, presentation, and reasoning. His professional authority stems from his role as a *special rapporteur* to the HRC. This grants him powers and privileges, perhaps even some coercive authority, within the UN's institutional human rights system. Within that specific system, and over those who respect it, he has authority. But the system itself is not authoritative. There is no compulsion to obey it. It lacks the capacity to coerce delinquents into line. It is an institutional structure, but it is not a legal institution.

Thus Alston does not have legal authority. He cannot declare, recognise, or interpret law *authoritatively*. He is not authorized to create law (the act of authoritatively identifying and applying the

132. O'Connell, *supra* note 98.

133. Carl Schmitt, The Concept of the Political (1932).

law is always an act of law creation[134]). This fact is often concealed by his carriage and presentation as UN *special rapporteur on extreme poverty*; by his comments, and his reports. He is an authority; and he *appears authoritative*. What he says and writes is meticulous, his legal craftsmanship is exceptional, his normative political vision is humane. His work is compelling, and it is presented in the imperative, as if he *had authority*; and within that system he does. But, for those who do not voluntarily respect that system, his is merely an opinion like any other. Persuasive or not on its own terms but with no obligation or compulsion of obedience; it cannot determine the law.

Think about Alston's report on poverty in the UK, the government's response, and his reaction to that—he is reported as noting: "governments normally responded with a detailed analysis or refutation of his reports but that had not yet come from the UK. Laos, which he investigated earlier this year, had already filed a detailed 20-page response."[135] Essentially this amounts to the admission that his reports are never implemented, although he is familiar with them being rejected more respectfully. This is as clear a confession of the lack of authoritative power as is imaginable from a high-ranking HRC functionary. The system officials of the GLO, in contrast, can impose their decisions; realise their normative visions coercively, through law. They represent an *authoritative* legal order.

Those arguing for the implementation of human rights misread the problem as one of ignorance and misunderstanding: once states and other officials are made to understand the true content of the rights, their normative importance will pull behaviour towards their demands. This, it is assumed, will happen because it is good, and because there is no reason it should not. However, there *are* reasons why states act as they do, why people are immiserated; these flow from the commands of the GLO. The human rights of immiserated peoples' could be realised; this is a genuine contingency. But it can only be actualised if we first

134. Stanley L. Paulson, *Hans Kelsen and Carl Schmitt Growing Discord, Culminating in the "Guardian" Controversy of 1931, in* The Oxford Handbook of Carl Smith 510, 528 (Jens Meierhenrich & Oliver Simons eds, 2014).

135. Robert Booth, *UN Poverty Expert Hits Back Over UK Ministers' 'Denial Of Facts'*, The Guardian (May 24. 2019), https://www.theguardian.com/society/2019/may/24/un-poverty-expert-hits-back-over-uk-ministers-denial-of-facts-philip-alston

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

examine and eliminate those structures—the GLO and its system of planned misery—which currently preclude it.

VII. FALSE CONTINGENCY, PROSPERITY, AND PLANNED MISERY

Planned misery embodies the enduring coloniality of PIL. PIL is a product of the colonial project; to which it remains closely tied despite its best efforts to appear otherwise.[136] The system of planned misery is maintained by the GLO, and annually transfers an estimated $5.5 trillion (in cash and resources) *net* from the under- to the over-developed states.[137] This plunder is enabled and enforced through loan conditionalities, WTO rules and sanction procedures, and regularly enforced arbitral awards.[138] This process, naturally, further impoverishes the under-developed states, and immiserates their populations.[139] It reproduces "the logic of [the] particular socio-economic arrangements" which entail misery.[140] It does not matter if this was "intended or deliberately inflicted misery", because false contingency allows us to see that the infliction of misery is inexorable in the systemic logic of the GLO. The poor must be immiserated to sustain the rich.

For most of the history of PIL, this plunder was acknowledged, and attempts were made to justify it. These took the form of a distinction between superior and inferior peoples, and the need for the former to improve the latter, and further the progress of civilisation. From salvation, through evolution and civilisation, to democratization, human rights, and development, PIL has always been divided between an "us", the model to be imitated, and a "them", the inferiors to be corrected.[141] This complex of beliefs structures PIL generally, and IHRL

136. Anghie, *supra* note 34.

137. Hickel, *supra* note 111, at 25-28.

138. Linarelli et al., *supra* note 3, at 160, 161.

139. *Id.*

140. Marks, *supra* note 5.

141. Rasch, *supra* note 78, at 57.

and development in particular. IHRL and development discourse distract attention from the rule of the GLO, "localizing pathologies" in the under-developed states themselves, and insisting on technocratic governance-oriented intervention. They posit a singular model of development as necessary and as *possible*, thus disguising a global PLF by presenting it as an ALP: they must become like us!

However, in absolute terms, they *cannot* develop like us'[142] because the Earth simply could not sustain the resource demands this would entail.[143] In more relative terms, we will not *allow* them to develop. The GLO must continue to extract tribute, because our prosperity *is dependent upon* their poverty.[144] It is precisely their under-development that opens these states and their peoples to exploitation for our benefit. We are developed *because* they are not, our over-development was, and continues to be, financed through their active under-development; the plunder of their resources.[145] The wealth of the North *is produced by* the poverty of the South; the wealth of the West *produces* the poverty, and the misery, of the rest. IHRL advocates fail to acknowledge this, or actively conceal it.[146] The emancipatory demands of human rights are PLFs, but they are not without function. They maintain the actualized system of the GLO, whose commands preclude IHRL's ethical fantasies:

> The futile pronouncements are not merely epiphenomenal ... nor evidence of the irrelevance of international law. Rather, they define its real, productive contribution to ... the solipsistic self-affirmation that guarantees a progressive promise while deferring political possibility.[147]

142. Pankaj Mishra, *The Western Model is Broken,* The Guardian (Oct. 14. 2014), https://www.theguardian.com/world/2014/oct/14/-sp-western-model-broken-pankaj-mishra

143. *Earth Overshoot Day*, https://www.genevaenvironmentnetwork.org/resources/updates/earth-overshoot-day-take-a-step-to-movethedate/#scroll-nav__2

144. Marks, *supra* note 110, at 3.

145. Ugo Mattei & Laura Nader, Plunder: When the Rule of Law is Illegal (2008); Eduardo Galeano, The Open Veins of Latin America: Five Centuries of the Pillage of a Continent (1971); John Newsinger, The Blood Never Dried: A People's History of the British Empire (2006).

146. Whyte, *supra* note 18.

147. Geoff Gordon, *The Time of Contingency in International Law, in* Contingency

VIII. FRAGMENTATION: CHRONICLE OF A PROMISE FORECLOSED

PIL contains a multiplicity of institutional structures: the ICJ, various subject-specific tribunals, the committees of the human rights bodies, and other expert commissions. However, underlying this apparent multiplicity lies the critical distinction between those institutions whose judgments are enforced, and those whose are not. Institutions with the capacity to impose their demands on delinquents can inscribe their normative system legibly into the world. Those without cannot. The former create laws which currently, contingently, cohere into an operative legal system, the GLO. The latter create only literature, distraction, and sentimental satisfaction.

ICJ decisions cannot be considered authoritative. Lacking enforcement, they cannot serve the role of stabilising the law, nor of determining authoritatively which legal norms exits; or what they mean. Put differently, those who *choose* to accept the claimed authority of the ICJ do *not* thereby become more competent international lawyers than those who reject that claim to authority. The two groups simply understand PIL differently – they *perceive different international legal systems*. Moreover, the ICJ is not the only tribunal in town. There are many tribunals, courts, and committees "authorized" to decide "cases". There is no agreed hierarchy, no demarcation between the overlapping jurisdictions of the various bodies.[148] This leads to disputes over legal framing, forum shopping, and competing jurisprudences from which to select arguments.[149] Institutional judgments in PIL are ALPs; and, generally, PLFs, as most of the tribunals, and all of the committees, lack enforcement powers.

This absence of authority remains decisive even if particular institutions produce internally coherent sets of norms and standards. PLFs can be consistent, and are often woven into intricate tapestries,

IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES (Ingo Venzke & Kevin Jon Heller eds., 2021). DOI: 10.1093/oso/9780192898036.001.0001.

148. Koskenniemi, *supra* note 22.

149. *Id.* at 1.

portraying harmonious normative visions. If a specific institution is staffed by people with similar political perspectives, or a shared sense of their institution's role and purpose, it may develop consistency among its proclamations. However, these patterns of consistent judgment cannot stabilize or determine "the law" in their field. Such a structural bias may appear to operate as a corrective to claims of radical indeterminacy, but this is only important if the institution also has the capacity to impose its decisions on the world – to enforce its judgements. Only then could it authoritatively identify, delimit, or create law.

Three things follow from this:

1. Institutional law application is as arbitrary as individual claims about law;

2. The legal authority of a tribunal judgment is only as powerful as that tribunal's capacity to enforce its decisions;

3. Unless a specific institution has effective enforcement capacity, there is no reason to treat its interpretations as authoritative determinations of the law.

Tribunal decisions remain ALPs, stabilized only, if at all, by consistent patterns of structural bias. If they cannot be imposed on the real world, they remain also PLFs which we have no particular reason to acknowledge or respect. Tribunals whose decisions are enforced have greater authority. If they function consistently, they are capable of creating empirically identifiable legal norms. But such tribunals are rare in international law. The proliferation of institutions and their lack of authority combine to offer another manifestation of the deceptive dyad, the "fragmentation of international law".

A. If You Don't Like This Legality, We Have Others[150]

Institutionalisation (or institutional capture) is the first step away from the deceptive dyad; but it needs to be followed by establishing, or preserving, the *authority* of the institution. Once an ideology has captured an authoritative regime, it forms the basis for functional, actualised, (though still arbitrary) legal demands; this renders all competing interpretations PLFs. However, nascent structural biases

150. I owe this rather delightful phrasing to Ntina Tzouvala.

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

can be circumvented by those who disapprove, if they possess sufficient political power.[151] "Irrespective of indeterminacy, the system still *de facto* prefers some outcomes or distributive choices to other outcomes or choices".[152]

This is well illustrated in the over-developed states' tense relationship with the doctrine of development, especially as it evolved during the 1960s and 70s. Developmentalist thinking, and the concurrent turn to GDP, formed a post-racial principle to maintain racial ordering for the post-WW II world order.[153] This instantiated the centralization of economic growth, and the re-inscription of free-trade-economics, at the heart of then contemporary PIL.[154] However, it also provided a point of institutionalized resistance:

> The most characteristic instance of this attempted appropriation was the effort of the then Third World to establish a New International Economic Order (NIEO) in the course of the 1970s. The aim of the NIEO was to restructure the international economic order using the post decolonization numeric strength of the Global South.[155]

The under-developed states were attempting to mould the "structural bias in the relevant legal institutions";[156] especially UNCTAD. The Third World states wanted to use their numerical strength democratically, to "capture" key UN institutions. They wanted to change the laws governing global trade. The over-developed states reacted unfavourably to this appeal to global democracy and equity. This created a conflict between two contrasting institutional structures, dominated by radically incompatible normative visions, and economic theories. A normative vision of a more equitable redistribution of global wealth, the "New International Economic Order" (NIEO), was

151. Aoife O'Donoghue & Ntina Tzouval, *Mega-Market' Trade Agreements and the Global South,* 8 Trade, L., & Dev. 30 (2016).

152. Koskenniemi, *supra* note 39, at 608.

153. Pahuja, *supra* note 26.

154. *Id.*; *see also,* Jason Hickel, *The "Girl Effect": Liberalism, Empowerment and the Contradictions of Development,* 35 Third World Q., 1355 (2014).

155. O'Donoghue, *supra* note 149, at 35.

156. Koskenniemi, *supra* note 39, at 608.

being developed and entrenched in the UN institutions.[157] As Jessica Whyte observes:

> The NIEO offered an ambitious programme for re-organising the post-colonial international economic order, including effective control over natural resources, regulation of the activities of multi-national corporations, just commodity prices, technology transfers, debt forgiveness and monetary reform.[158]

Those who opposed this sought to circumvent it; embarking in response on a "process of institutional 'shopping'"[159] to relocate authority to an alternative legal system, one committed to maintaining global inequality and exploitation:[160]

> one of the major tactical manoeuvres of the Global North in the wake of the NIEO was the prioritization of the World Bank and the IMF in matters of global economic governance over the relevant UN institutions, such as the UNCTAD, which were understood as having been 'high jacked' by the then Third World.[161]

It is hardly surprising that this strategy was driven by "international financial institutions and the most powerful states."[162]

Perhaps more surprisingly, the global IHRL community threw its lot in with those *fighting to preserve inequality and oppression*. This "period of neoliberal ascendancy" was supported, implicitly and explicitly, by the IHRL community. In hindsight, "a picture [emerges,] of human rights NGOs ... operating as what Naomi Klein calls a set of 'blinders' that divert attention from the economic and structural causes of state violence".[163] But this picture is incomplete, as other

157. *Id.*

158. Jessica Whyte, *Powerless Companions or Fellow Travelers?*, 2 RADICAL PHIL. 14 (2018).

159. O'Donoghue, *supra* note 149. at 49.

160. Whyte, *supra* note 156, at 14.

161. *Id.*

162. *Id.* at 13.

163. *Id.*

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

IHRL NGOs actively *promoted* "the mobilisation of the language of human rights against newly-independent post-colonial states ... to challenge the affirmations of post-colonial sovereignty and economic self-determination."[164] A particularly stark example is offered by the Médecins Sans Frontières off-shoot *Liberté sans Frontières* (LSF):

> Far from vacating the economic field and confining itself to criticising violations of civil and political rights, LSF mobilised the language of human rights explicitly against ... demands for post-colonial economic redistribution ... contesting the idea that 'poverty, misery in the global South was the by-product of our prosperity in the global North.' ... In doing so, they lent their moral prestige to the neoliberal counter-attack on the struggle for post-colonial economic justice and thus were, indeed, complicit in the dramatic deepening of inequality that has been its consequence.[165]

The efforts of the Third World to institutionalize a new paradigm were thwarted; *legal* authority was transferred to, or vested in, the IFIs, soon to be joined by the WTO and IIA in the unholy trinity of the GLO. The UN system, UNCTAD, still exists, and sort of functions; and the NIEO itself lingers on, a normative spectre of some kind. But these are no longer authoritative, or legal, institutions. Their demands have been reduced to PLFs. The institutions promoted by the rich states, and their erstwhile comrades in the IHRL community, have, by stark contrast, evolved into a coercive, and authoritative, *legal system*, the GLO.[166] The IHRL communities' engagement secured the conditions for their own self-reproduction. And so did the development industry. They helped to entrench the exploitation, misery, and oppression, they require to survive and pretend to function; the continual necessity of "defending" IHRL by reporting its violations.

The "eventual defeat of the NIEO points to the far-reaching impact of institutional shifts";[167] which can be seen today, in "the ongoing negative reactions of the Global North to the strength in numbers of

164. *Id.*

165. *Id.* at 15.

166. Linarelli et al., *supra* note 3, at 1.

167. O'Donoghue, *supra* note 149. at 49.

the Global South within the WTO".[168] This, in turn, has prompted further institutional shifts – from TRIPS, TRIPS+, and BITs to the rise of "mega-markets" through the pursuit of regional trade agreements.[169] All under the jurisdiction of the GLO. This response to the under-developed states' pursuit of democratic institutional capture has driven the fragmentation of international economic law; which "ought not to be seen as an accident, but as a conscious strategy on the behalf of powerful states ... to weaken the negotiating position of their weaker counterparts."[170] It has entrenched the institutional authority of the IIA:

> With almost every modern BIT now providing for a dispute settlement mechanism through the ICSID, consenting to the treaties is tantamount to developing countries undermining their independence, sovereignty and control. ... the inflow of FDI into developing countries is conditioned on the latter sacrificing their sovereignty for credibility. ... BITs ... are ... instruments of Economic Hegemony.[171]

International Economic Law (IEL) is an indeterminate system. It has its mainstream, its dissenters, and internal divides.[172] It straddles PIL and the GLO:

> International trade regulation engages various competing concerns, including economic efficiency, national sovereignty, democratic legitimacy, international and domestic distributive justice, competitive fairness, economic development, human health, environmental protection, public morality, and so forth. It also engages competing interests of different groups, both within and between States.[173]

However, within the institutionalized legal order of the GLO, actualized IEL has been cleansed of these deviant elements. It operates

168. *Id.*

169. *Id.*

170. *Id.* at 48.

171. George Forji Amin, *All that Glitters is Not Always Gold or Silver: Typical Bilateral Investments Treaties (BITs) Clauses as Peril to Third World Economic Sovereignty*, 6 ATHENS J. L. 3 (2020).

172. Suttle, *supra* note 97, at 399.

173. *Id.* at 401.

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

technocratically. Its politics are predetermined, and so its functionaries do not bear the burden of competing commitments and approaches: "WTO lawyers … implicitly assume a positivist approach."[174] Claiming merely to apply the rules generated by authoritative texts, past practice, and technocratic expertise, they suppress indeterminacy by acting homogenously, deploying a single hegemonic ideology (neoliberalism) to "apply the law". Whether they do this with true eschatological belief or cynicism does not matter.

The struggles within IEL—between competing visions of economic thinking—continue; but the advocates of neoliberalism have captured the authoritative institutions. IEL as a discourse remains radically indeterminate, but the GLO as an actualized legal system has suppressed this indeterminacy; instantiating a clear line between its own authoritative demands, and the PLFs others produce from—or against—its texts. In doing so, it has suspended the falseness of its ALPs; making them authoritative legal obligations. Its institutions are consistent in their application of the law, which is enforced, observable, and predictable.

A curious example can be drawn from the relatively consistent interpretations of the WTO's dispute settlement bodies; which have created determinate rules. The indeterminate content, the interpretive possibilities, of the treaties regulating global trade and finance, are largely foreclosed as specific interpretations are actualised consistently. "The WTO as an institution, in tandem with trade experts from influential member states, filled the concept of a 'trade barrier' with meaning."[175] This should have been difficult, as the rules apply to rich and poor alike, and, in theory, restrict both. However:

> Because the power of enforcement is distributed asymmetrically according to market size, there is little reason for rich countries to play by the WTO's rules. They can do whatever they want. But poor countries have no choice. If they decide to break trade rules that harm them, rich countries can impose sanctions that could very well ruin them altogether.[176]

174. *Id.*

175. Michael Waibel, *Interpretive Communities in International Law*, Univ. Camb. Leg. Stud. Res. Paper Series (Paper No. 62/2014, 2014).

176. Hickel, *supra* note 111, at 195.

It is precisely *because of this asymmetry* that the rules themselves are clear and can be authoritatively determined. The case of the "Cotton Four" (C-4) (Benin, Burkina Faso, Chad, and Mali) illustrates this apparent paradox clearly. Since 2003, the Four have consistently "raised the issue of the serious damage caused to their economies by America's trade-distorting cotton subsidies."[177] No-one disputes either the trade distorting nature of the subsidies ("they result in at least a 10 percent reduction in global cotton prices"[178]) nor their "illegality" within the WTO system. Yet it is pointless for the Four to raise a case through the dispute settlement process, even though they would "win", the award would represent another PLF:

> Under the WTO there is no provision for collective sanctions. The DSB can make a judicial determination but it itself has no sanctions power—this is left to the aggrieved party or parties. The US might even accept the panel's decision, and then challenge the C-4 to impose sanctions against the US. What sanctions can the C-4 impose on the US?[179]

The US, and the other developed states, have little incentive to problematize, nor obfuscate, the rules on trade distortion. They can use them when they wish, safe in the knowledge that they cannot (normally) be used against them. The rules are clear, as are their subjects—the under-developed states. The reality of this can be empirically observed in its predictable and patterned effects in the world.

IX. TWO LEGALITIES: THE REAL AND THE SIMULACRUM

And all of this, finally, brings us to the structural bifurcation which lies beneath the apparent chaos of fragmented international law. This is manifested as the divide between the GLO on the one hand, and PIL, including dissident IEL, and institutionalized IHRL, on the other. Viewed schematically PIL appears, and is often engaged, as a Webe-

177. Yash Tandon, Trade is War: The West's War Against the World (Kindle ed., 2015).

178. *Id.*

179. *Id.*

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

rian universe of warring godheads. A non-sovereign, loosely institutionalized, antihierarchical, fragmented, mélange of functionally, morally, philosophically, and methodologically divided communities and sub-systems.[180] Sides and missions are chosen, armaments are developed; and battles fought over the nature, direction, or soul, of international law.

However, this apparent conflict is illusory. There is one true God, the GLO—which rules with an iron fist and no accountability. It plays by its own rules, and coerces everyone else into doing so too. It is the law! The other battles are PlayStation tournaments. Virtual conflicts, performances of legality, in vicarious litigation.[181] The GLO is unconcerned with that game; impervious to it. In fact, the GLO even funds the virtual conflict, and awards prizes and prestige within it. In return, the GLO is hidden behind the spectacular extravaganza of failure we call PIL. PIL inadvertently operates to legitimate the processes of exploitation, to distract attention, and to exculpate the present through the promise of a brighter future:

> In the present, we the participants in international law refer back to past failures for the latent correction that they ultimately will have activated. Failure never undermines the system. To the contrary, failure always reinforces the importance of the system, and the importance of sustaining its ethical promise.[182]

However, the material reality of the GLO endlessly defers the ethical "promise" of PIL, reduces its demands to PLFs. Consequently, the apparent paradox that "what PIL demands PIL condemns" dissolves when we accept that PIL is being used in two quite distinct senses, to describe two quite different normative enterprises. There is an undisclosed and awkward relationship of conflict and collaboration between PIL and the GLO. But the bifurcation itself exposes PIL as the mere simulacrum of law; contrasted with the operative legal system of the GLO. PIL's "substitutions of ... simulacrum for original are often invisible" because they are "effectuated by and throughout

180. Waibel, *supra* note 173.

181. Rajkovic, *supra* note 21.

182. Gordon, *supra* note 145.

the discipline"[183] As a result, international lawyers all too often "settle for and settle into the pursuit of a simulacrum of the object of their desire."[184]

Reflecting on the possibility of a global law of humanity, Carl Schmitt concluded that it would have to be either unified and truly sovereign, or it would result in conflicting legal orders. It would become a law which demands obedience, but is unable to offer protection.[185] Prosecutions from Nuremberg to those of former East German border guards have proven him correct.[186] A law unable to afford protection may *demand* obedience, but it cannot *command* obedience. Only an enforced legal system can offer protection in return for loyalty – and punishment in response to disobedience. The conflict between the GLO and PIL illustrates this perfectly.

Each system sets out to define, identify, and correct delinquents. But they have conflicting definitions of delinquency, and contrasting corrective techniques. PIL relies on shame and public opinion, the GLO wields the coercive violence to starve nations into submission.[187] The GLO is a legal system: institutionalized, ideologically coherent, with adjudicative machinery and a monopoly over legitimate violence; albeit that violence appears economic rather than physical. The physical violence is latent in the threatened economic devastation should a delinquent state refuse to obey, and choose instead to exit the system.[188]

Each of the institutions which combine to create the GLO has the coercive authority to enforce its decisions.[189] They make laws which are obeyed or enforced; laws with observable effects in the real world. Each has authoritative system officials who can enact and enforce those laws. And all three institutions remain enthralled to that version of

183. Schlag, *supra* note 103, at 9.

184. *Id.*

185. Rasch, *supra* note 78, at 54.

186. Peter Quint, *Judging the Past: The Prosecution of East German Border Guards and the GDR Chain of Command,* 61 Rev. Pol. 303 (1999).

187. Hickel, *supra* note 111, at 195; Linarelli et al., *supra* note 3.

188. Hickel, *supra* note 111.

189. Linarelli et al., *supra* note 3.

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

neoliberalism formerly known as the Washington Consensus.[190] The system officials of the GLO form a tight knit community of economists, lawyers, and technocrats; bound by their commitment to the nostrums of neoliberal thinking. They operate together to direct and coercively impose a cohesive legal system. Largely impervious to external critique, these officials have developed and expanded the GLO's original texts through their jurisprudence and implementation advice.

The system that would become the GLO emerged in the 1980s as the global debt crisis forced under-developed states into the hands of the IFIs, which had, not coincidentally, been purged of their Keynesian officials and captured by neoliberal technocrats.[191] The threat of bankruptcy, and effective exclusion from the global economy, left the under-developed states entirely at the mercy of this nascently hegemonic regime. The IFI's loan conditionalities took the form of direct orders, "with over 80% of programmes between 1990 and 2004 including conditions" which demanded neoliberal restructuring.[192] The policies imposed by the IFIs can be grouped into four sets: stabilization, liberalization, deregulation, and privatization. Each represents a specific aspect of neoliberal economic faith. Each has been coercively imposed on unwilling states and governments by several interlocking institutional imperatives.[193]

The WTO complements and further embeds the neoliberal agenda initiated by the IFIs; its charter commits it, and hence its members, to co-operation with the IFIs, "with a view to achieving greater coherence in global economic policy-making".[194] It too possesses coercive authority in the form of the Dispute Settlement Process, which, by decentralizing sanctions, operates differentially binding under-developed states to its

190. Alexander Kentikelenis, et al., *IMF Conditionality and Development Policy Space, 1985-2014*, 23 Rev. Int'l Pol. Econ. 543 (2016); Geertje Baars, The Corporation, Law, and Capitalism A Radical Perspective on the Role of Law in the Global Political Economy 7 (2019).

191. Betul Sari-Aksakal, *World Bank and Keynesian Economics*, 10 Bus. & Econ. Res. J. 81 (2009).

192. Stubbs, *supra* note 188, at 557

193. *Id.*

194. World Health Organization. *The Ottawa Charter for Health Promotion.* art. 3(5) (1986), *available at* http://www.who.int/healthpromotion/conferences/previous/ottawa/en/index.html.

decisions, while affording substantial leeway to over-developed states. The WTO, like the IFIs, also wields significant soft power in the form of its technical assistance and implementation programmes.[195]

The most relevant provisions of the WTO are the Agreement on Subsidies and Countervailing Measures (SCM); which prohibits under-developed nations from using the type of nascent industry protective tariffs and subsidies through which the over-developed countries built their own national economies.[196] This functions to trap them in their customary role as deposits of raw natural resources and low-cost labour. The Technical Barriers to Trade (TBT) Agreement complements this, forcing states to streamline their regulatory structures to ensure access to foreign corporations and prevent favorable treatment for nascent national industries. The Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs) entrenches this immiseration, obligating under-developed states to recognise the intellectual property regimes of their over-developed "adversaries."[197] This ensures that they pay monopoly prices for digital and physical technological advances, and for life-saving medicines.

The institutions of IIA complete the contemporary GLO. Here, "a powerful group of multinational corporations, large law firms, and a select group of arbitrators" have implemented "rules developed in arbitral awards to create an inflexible system of investment protection to the detriment of developing states."[198] These techniques have also been deployed to give foreign investors the right to unilaterally invoke arbitration against states, even in treaties which contain no such clause.[199] This particular vitiation of under-developed states' "consent" was achieved by transposing the WTO concept of "most favoured nation" status into individual bilateral investment treaties (BITs). It creates "an effective compliance mechanism, at least for foreign

195. Lisa Toohey, *Accession as Dialogue: Epistemic Communities and the World Trade Organization,* 27(2) Leiden J. Int'l. L. 397, 407 (2014).

196. Ha-Joon Chang, Bad Samaritans: The Myth of Free Trade and the Secret History of Capitalism (2007).

197. Tandon, *supra* note 175.

198. Linarelli et al., *supra* note 3, at 148.

199. Muthucumaraswamy Sornarajah, Resistance and Change in the International Law on Foreign Investment 44 (2017).

investors and multinational corporations, who can enforce arbitral awards through the New York Convention."[200]

These institutions work together, as the GLO, to implement a wide range of neoliberalising legal and economic reforms in "institutional and administrative systems . . . in the areas of trade in goods and services, commercial dispute settlement, intellectual property rights protection, development of foreign direct investment, and transparency and the right to appeal."[201] They maintain and entrench a global infrastructure of exploitation and immiseration, regulating "the distribution of advantages through a coercively structured legal order."[202] As a sovereign legal order, the GLO:

> intrudes into an internal process and externalizes it by demanding conformity with imposed standards of treatment, ensuring that the state has to sublimate its essential national interests to the protection of the foreign investment or face the heavy cost of arbitration and the possibility of an even heavier burden by way of an award for damages against it.[203]

The GLO defines its delinquents as those (under-developed) states which fail to obey the rules of its global economic order, or which attempt to renege on their debts. In imposing its laws, it restricts, and in many cases eviscerates, the under-developed states' control over their macro-economic policy. The specific content of its restraints functions to deprive these states of "policy space,"[204] or governance options. History tells us, with remarkable consistency, that the reforms the GLO has imposed do not produce development or alleviate poverty. Instead, they *immiserate* states and peoples. They undermine development, exacerbate poverty, and fuel national and global inequality. This is exactly what they are intended to do.[205]

This creates localized governance problems; it is hard to maintain order, pacify or satisfy the people in a state when the fiscal policy

200. Linarelli et al., *supra* note 3, at 160, 161.

201. Toohey, *supra* note 193, at 413.

202. Linarelli et al., *supra* note 3, at 32.

203. Linarelli et al., *supra* note 3, at 5.

204. Kentikelenis, *supra* note 188, at 543.

205. Hickel, *supra* note 111; Linarelli et al., *supra* note 3.

imposed upon you by the GLO is, basically, to keep selling your assets and resources cheaply; focus on debt repayment; and slash social welfare provisions and labour rights. A neoliberal economic order generates opposition, resistance, and protest. It requires a repressive political order to operate. The GLO's deployment "of the rule of law ... promotes stability for foreign investment", but it also "ensures that trade unions are suppressed, political freedoms are curtailed, and the legal system is geared to furthering the interests of the dominant groups".[206] It is a system "best promoted in ... dictatorships."[207]

Ranged against the authoritative legal system of the GLO stands a largely de-institutionalized PIL, and its most institutionalized manifestation, IHRL. These have produced fragmented, but often compelling, analyses of the world's ills; and have made normative claims and demands for reform. These tend to take the form of specific or generalized demonstrations of the purported illegality of the side-effects, or symptoms, of the GLO's laws. The austere and oppressive governance the GLO demands *produces* IHRL's "human rights abuses".[208] These are catalogued and condemned, but then nothing happens, nothing changes, no-one is punished; no-one is relieved from immiseration or exploitation. However, there are always new violations to report.

Human rights and other progressive legal "obligations" are rendered PLFs in this context. They are political luxuries the under-developed states cannot afford. Ultimately, it is cheaper to oppress a people than to appease them. States 'violate' IHRL because they must.[209] This is "planned misery",[210] and it is here that our analyses of PIL should take place. It is the system of the GLO, the *actualisation of PIL*; yet it stands judged by the fantasies of PIL. A deracinated set of "judgments" which ignores the GLO's global rule; which distract attention from that rule.

This happens, with unintended irony, because of PIL's focus on the *effects* of the GLO's own laws, as these ripple down into exploitation,

206. Linarelli et al., *supra* note 3, at 172.

207. *Id.* at 173.

208. Marks, *supra* note 5.

209. Beckett, *supra* note 112.

210. Marks, *supra* note 5.

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

repression, and oppression. The so-called violations of PIL, and especially IHRL, are necessitated by the actualized laws of the GLO. Laws which under-developed states cannot violate without fear of grave punishment.[211] The under-developed states end up (unsurprisingly and rather aptly) as the East German Border Guards: condemned by a global faux-legal order for obeying the commands of a very real global legal order. Their elites form a comprador class, effectively adopting the position of Camp Commandant; complicit in, and benefitting from, the oppression of their people; but always subject to the directives of their superiors, the system officials of the GLO.

In this context, refining our understandings, descriptions, or developments of PIL, IHRL, "humanity's law",[212] or even the possibilities of an "ethical" WTO or IEL,[213] is pointless. It is the equivalent of building an ornamental carapace instead of fighting a battle. It does not matter how nuanced, complex, reflective, or morally compelling our interpretative techniques are. These are still focused on an imaginary legal system; while the real GLO is actualized against us and the world. No response to radical indeterminacy is plausible, PIL is inexorably plural and conflicted; a profusion of ALPs. Moreover, and more importantly, the GLO renders its claims PLFs. We can craft the incantations and fables of PIL more or less elegantly and eloquently. But in the presence of the GLO, they remain just that, stories, fantasies, myths, and desires. Lacking effect, yet attracting an inexplicable global popularity.

THE END? SOME CONCLUDING THOUGHTS

The GLO is the current iteration of actualized PIL, which functions to

211. Linarelli et al., *supra* note 3.

212. Ruti Teitel, Humanity's Law (2011).

213. Robert Howse, *The World Trade Organization 20 Years On: Global Governance by Judiciary*, 27 Eur. J. Int'l. L., 9 (2016) 9; Antonia Eliason, *Using the WTO to Facilitate the Paris Agreement: A Tripartite Approach,* 52 Vanderbilt J. Transnat'l. L. 545 (2019).

move resources from the poor to the rich, and to justify or invisibilise this. Actualized PIL has been doing this for so long – around 500 years – that its coerced redistributions have come to seem normal, an invariant backdrop.[214] To begin to challenge this, we must focus on the political economy actualizing PIL; and understand how fantastical PIL became unmoored from it. We must examine the "background conditions", and look to how these can be foregrounded, critiqued, and altered. Unless and until we acknowledge, and reconnect with, PIL's economic and colonial base, our 'legal arguments' (no matter how technically brilliant, or morally pleasing) are doomed to remain PLFs.

The manner in which the quotidian and the grandiose are intertwined is particularly interesting. The classic PIL demand that "they" emulate "us" is divided into an ever-expanding plethora of legal claims: treaties, final acts, interpretations, expansions, concretizations, evolving CIL, workshops, expert group recommendations, conferences, committee decisions, and much more. From this wide and varied menu, practitioners, academics, activists, and judges select the 'legal norms' of their choosing, and with these norms they critique the present and construct their blueprint for the future. We refine the demand that they emulate us.

These normative blueprints are both ALPs and PLFs; they are not necessary, and they cannot be realised. The development and emancipation project they cumulatively propose is itself the grandest of PLFs. It is not the "value-package of individual rights" which is "attractive to all cultures",[215] but the lifestyle this is assumed to entail.[216] What is pursued is the impossibility that we *all* become the beneficiaries of global plunder.

This returns us to Marks' underlying challenge: to overcome false contingency in development, PIL, and IHRL, to alleviate poverty and oppression, we have to look at the world of distributions and outcomes beyond PIL. Only an analysis which takes seriously the interconnection of poverty and wealth, of over- and under-development, of plunder and rights, can offer proposals which could be more than

214. Hickel, *supra* note 111.

215. Jeroma J. Shestack, *The Philosophic Foundations of Human Rights*, 20 Hum Rts Q. 201 (1998).

216. Klein, *supra* note 16.

VIII Indonesian Journal of International & Comparative Law 277-335 (July 2021)

PLFs. Only an active programme of wealth redistribution (or, more accurately, restitution) on a global scale could make the realisation of rights *realisable*.

But such a programme is far off, and we need the perspective offered by false contingency to understand why PIL's mass-marketed alternatives will only entrench the problems they claim to resolve. False contingency demands that we dispel the magical thinking of PIL, IHRL, and "sustainable development", to offer more than the current banal and insulting platitudes.[217] Without it we can but despair and hope: at present, the under-developed may be lacking; but in the future, perhaps they *just will* emulate the successes, freedom, and consumption of the developed. In the meanwhile, if they lack bread, then let them eat rights.[218]

217. Jason Hickel, *Forget Developing Poor Countries, It's Time to 'De-develop' Rich Countries*, The Guardian (Sept 23. 2015), *available at*: http://www.theguardian.com/global-development-professionals-network/2015/sep/23/developing-poor-countries-de-develop-rich-countries-sdgs

218. Paul O'Connell, *Let Them Eat Cake: Socio-Economic Rights in an Age of Austerity, in* Human Rights and Public Finance: Budget and the Promotion of Economic and Social Rights (Aoife Nolan, Rory O'Connell & Colin Harvey eds, 2013).

COMMENT