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Introduction

I

This is not only a book in international law. It is also an exercise in social theory and in political philosophy. One of the principal theses of the book is that it is neither useful nor ultimately possible to work with international law in abstraction from descriptive theories about the character of social life among States and normative views about the principles of justice which should govern international conduct. Indeed, many international lawyers have recognized that this is so. They have stressed the need to elaborate more fully on the social determinants of State conduct. And they have emphasized the law's instrumental role in fulfilling normative ideals of "world order". But they have had difficulty to integrate their descriptive and normative commitments into analytical studies about the content of the law. Typically, reflection on the "political foundations" of international law has been undertaken in the introductory or "methodological" sections of standard treatises. These have had only marginal – if any – consequence on the doctrinal elaborations of different areas of international law. Lawyers seem to have despaired over seeing their specific methodology and subject-matter vanish altogether if popular calls for sociological or political analyses are taken seriously. Ultimately, they believe, there is room for a specifically "legal" discourse between the sociological and the political – a law "properly so called", as Austin put it – and that this is the sphere in which lawyers must move if they wish to maintain their professional identity as something other than social or moral theorists.

Discussion on "theory" about international law has become a marginalized occupation. This has not always been so. During the "early" period writers such as Vitoria, Suarez or Grotius engaged in an argument about international law in which the concrete and the abstract, description and prescription were not distinguished from each other. Indeed, the fact that these aspects of discourse were so

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closely interwoven gives early writing its distinct flavour, its sense of being "other" than the more methodological, or "professional" styles of later scholarship. The standard of scholarship developed by post-enlightenment lawyers includes the methodological *dictum* of separating "theory" from "doctrine". Not that this would automatically undermine theory. But it directs scholars to maintain distance between what they say about world order or international justice and what they come up with as expositions of "valid" legal rules and principles.

But this distinction contains a potential for distortion. For once the analytical task of exposing valid norms is separated from reflection about the sociological or normative environment of those norms, the lawyer easily finds himself confined to work within the former if he wishes to retain his professional identity. Beyond "doctrine", there seems to exist no space for a specifically juristic discourse. The distinction theory/doctrine has come to denote just that conceptual differentiation which grounds the specificity of the legal enterprise. Once that distinction is made, the "proper sphere of jurisprudence" seems to have been exhaustively defined. Engaging in "theory" the lawyer seems to engage himself, on his *own* assumptions, with something other than law.

By itself, the distinction between "theory" and "doctrine" need not be particularly worrying. It is only when the former is experienced as non-legal, indeterminate and incompatible with our collective experience of international life that the move to modern pragmatism becomes understandable. Post-enlightenment lawyers have been concerned about "theory". They have discussed at length such issues as the "basis of obligation", the meaning of "sovereignty", the character of social life among States ("community/society"), for example. What has seemed puzzling, however, has been the pervasive character of the disagreements encountered within those topics. Theoretical discourse has repeatedly ended up in a series of opposing positions without finding a way to decide between or overcome them. "Naturalism" is constantly opposed with "positivism", "idealism" is opposed with "realism", "rules" with "processes" and so on. Whichever "theoretical" position one has attempted to establish, it has seemed both vulnerable to valid criticisms from a contrasting position and without determining consequence on how one should undertake one's doctrinal tasks. Typically, regardless of one's methodological premises, the doctrinal exposition one has come up with has seemed practically indistinguishable from the exposition of one's "theoretical" adversary. This has made theory itself seem suspect. The endless and seemingly inconsequential character of theoretical

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discourse has forced modern lawyers to make a virtue out of a necessity and turn towards an unreflective pragmatism, with the implicit assumption that the problems of theory are non-problems and that the sociological and normative issues of world order can be best treated by closely sticking to one's doctrinal task of analysing valid law.

The modern international lawyer has assumed that frustration about theory can be overcome by becoming doctrinal, or technical. But it is doubtful whether this strategy has worked out very well. For the lawyer is constantly faced with two disappointing experiences. In the first place, the doctrinal outcomes often seem irrelevant. In the practice of States and international organizations these are every day overridden by informal, political practices, agreements and understandings. If they are not overridden, this seems to be more a matter of compliance being politically useful than a result of the "legal" character of the outcomes or the methods whereby they were received. To explain that despite this experience, international law is in some sense "relevant" will, however, demand a "theoretical" discussion about how to disentangle law from other aspects of social life among States. And this would seem to involve precisely the sort of conceptual analysis from which will emerge the indeterminate classic controversies about the "nature" of law. In the second place, most doctrinal outcomes remain controversial. Anyone with some experience in doctrinal argument will soon develop a feeling of *déjà-vu* towards that argument. In crucial doctrinal areas, treaties, customary law, general principles, *jus cogens* and so on conflicting views are constantly presented as "correct" normative outcomes. Each general principle seems capable of being opposed with an equally valid counter-principle. Moreover, these conflicting views and principles are very familiar and attempts to overcome the conflicts they entail seem to require returning to "theory" which, however, merely reproduces the conflicts at a higher level of abstraction. There is this dilemma: In order to avoid the problems of theory, the lawyer has retreated into doctrine. But doctrine constantly reproduces problems which seem capable of resolution only if one takes a theoretical position. And this will both threaten the lawyer's identity (for "theory" did not seem capable of discussion in any specifically juristic way) and reproduce the indeterminate discussion which to avoid the retreat to doctrine was made.

Now, when one starts to deal with an international legal problem, say a dispute about the rights of States, one very soon enters certain controlling assumptions which seem to demand solution before the problem can even be approached in some determinate way and a legal

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solution be suggested. Do these rights exist simply by virtue of statehood? Do they emerge from some higher normative code? Or are they merely legislative constructions? Conventional scholarship associates such assumptions alternatively with naturalism, positivism, idealism, realism and so on. But I shall suggest that such labels are not at all useful for attaining clarity on problems which have bothered modern international lawyers. They have to be disentangled. And this will entail going beyond what is usually considered a boundary between international law and social theory, on the one hand, and international law and political philosophy (or moral theory) on the other. One needs to explicate the assumptions about the present character of social life among States and on the desirable forms of such life which make it seem that one's doctrinal outcomes are justified even as they remain controversial. This does not mean that lawyers should become social theorists or political visionaries. But it does mean that without a better grasp of social theory and political principles lawyers will continue to be trapped in the prison-house of irrelevance. They will continue to have one foot in crude pragmatism and the other in indeterminate theorizing without understanding the relations between the two and why taking a position in either will immediately seem vulnerable to apparently justifiable criticisms.

II

Most of this book is devoted to disentanglement, that is, to an exposition and critical discussion of the assumptions which control modern discourse about international law. This will involve establishing a position beyond the standard dichotomy of "theory"/"doctrine". The argument is that in each theory there is a specific conception of normative doctrine involved and each normative doctrine necessarily assumes a theory. To see theory and doctrine united in this way I shall contend that all international legal discourse presents a unified structure of argument. Moreover, I shall argue that this structure reveals a particular conception about the relationship between social description and political prescription.

In a sense, the whole of international legal "talk" is an extended effort to solve certain problems created by a particular way of understanding the relationship between description and prescription, facts and norms in international life. My argument is that the persisting disputes within the realms of theory and doctrine result from the fact that these disputes

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bear a close relationship to controversial topics encountered beyond specifically "legal" disourses. The ideas of statehood, authority, legitimacy, obligation, consent, and so on which stand at the heart of international law are also hotly debated issues of social and political theory. In each of these realms the problems turn on the justifiability of assumptions about what the character of the present social world is and how it should be changed. It would be futile to assume that the assumptions which characterize modern social and political discourse are different, or separable from those which control legal discourse on these same matters. I have chosen to group those assumptions together under the label of *the liberal theory of politics*.

I have not met an international lawyer who would have said: "Look, here is my liberal theory of politics. The international law which I teach is based on that theory". (Though quite a few legal or political theorists have said it.) And yet, I know of no modern international lawyer who would not have accepted some central tenet in it. Obviously, this is not a matter of conscious political choice. I don't think it is a matter of choice at all – apart from the sense that one can, presumably, in some sense "choose" whether or not one wishes to become an international lawyer. The case appears that if one tries to engage in the sort of debate about international legality which international lawyers undertake, then one is bound to accept an international legal liberalism. Self-determination, independence, consent and, most notably, the idea of the Rule of Law, are all liberal themes. They create distinctly liberal problems: How to guarantee that States are not coerced by law imposed "from above"? How to maintain the objectivity of law-application? How to delimit off a "private" realm of sovereignty or domestic jurisdiction while allowing international action to enforce collective preferences or human rights? How to guarantee State "freedom" while providing the conditions for international "order"? These are all distinctly liberal problems, whose connection to domestic issues concerning the legitimation of social order against individual freedom appear evident.

It is difficult to understand "liberalism" as materially controlling because it does not accept for itself the status of a grand political theory. It claims to be unpolitical and is even hostile to politics. It claims to provide simply a framework *within* which substantive political choices can be made. But, as I shall attempt to show, it controls normative argument within international law in a manner which creates ultimately unacceptable material consequences for international life. This is not evident as it does this in a negative fashion, by ultimately being unable to

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coherently justify or criticize instances of State practice. Its claimed objectivity and formality hide from sight its controlling character. But while it cannot, on its *own* assumptions, consistently hold to its objective-formal character, it will have to resort to material principles which it will leave unjustified.

III

The approach followed here is one of "regressive analysis". I shall attempt to investigate discourse about international law by arguing back to the existence of certain conditions without which this discourse could not possess the kind of self-evidence for professional lawyers which it has. In other words, I shall argue, as it were, "backwards" from explicit arguments to their "deep-structure", the assumptions within which the problems which modern lawyers face, either in theory or in doctrine, are constituted.

The approach could also be labelled "deconstructive". By this contentious term I intend to refer less to certain metaphysical doctrines than a method, a general outlook towards analysing intellectual operations through which the social world appears to us in the way it does.[1] I shall,

[1] By "deconstruction" I refer to a certain intellectual current which originated in France during the late 1960s as a criticism of attempts to apply insights originally produced within structural linguistics to philosophy, literary criticism, social and cultural theory and psychoanalysis. Though its identity lies in this criticism, it shares many insights produced by structuralism, most notable of these being their hostility to thinking of human experience as something produced by an "essence" or "nature" residing outside experience itself. Their difference lies in that while structuralism attempted to explicate the internal laws whereby experience reproduces itself, deconstruction does away with such laws, stressing the unbounded, imaginative character of experience. For useful and accessible structuralist reading, see e.g. *Saussure* (Course); *Barthes* (Elements); *idem* (Mythologies); *Lévi-Strauss* (Structural); *idem* (Savage Mind). For good introductions, see *Kurzweil* (Age of Structuralism); *Culler* (Structuralist Poetics); *Robey* (ed: Structuralism); *Piaget* (Structuralism); *Wahl* (Philosophic). To the extent that my aim is to explicate the "grammar" or routine discourse, I have profited more from these than from standard deconstructive works.

Basic, if somewhat less accessible, readings in deconstructive philosophy include *Derrida* (Of Grammatology); *idem* (Writing and Difference); *idem* (Positions). Helpful introductions are e.g. *Spivak* (Translator's Preface to Derrida: Of Grammatology); *Culler supra* pp. 241–265; *idem* (On Deconstruction) esp. p. 85 *et seq*; *Norris* (Deconstruction); *Harland* (Superstructuralism). Critical surveys are included in *Dews* (Logics); *Rose* (Nihilism); *Merquior* (Prague to Paris).

For structural-semiotic analyses in law, see *Arnaud* (Essai); *idem* XIII Arch. de philo. du droit 1968 pp. 283–301; *idem* (Vorstudien) pp. 263–343. See also *Jackson* (Semiotics); *idem* XXVII Arch. de philo. du droit 1982 pp. 147–160; *Carzo-Jackson* (Semiotics). These I have not,

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for the most part, defer the more "radical" consequences which such an outlook might produce in order to remain as close as possible to the style and *problématique* which international lawyers will recognize as theirs. Such an approach may be briefly characterized by reference to its holistic, formalistic and critical aspects.

The *holistic* aspect of my approach relates to my effort to go beyond specific doctrines about the content of international law. I shall discuss the realms of theory and doctrine as a unified whole, both exemplifying a similar structure of argumentative oppositions and revealing the same constitutive assumptions. I shall view all legal argument in both theory and doctrine as a movement between a limited set of available argumentative positions and try to make explicit:

1. what these positions are,
2. which intellectual operations lead into them, and
3. what it is that one needs to assume in order to believe that such positions and operations are justified.[2]

This can be clarified by first associating the method with that used in structural linguistics.

Linguistics makes the distinction between individual, historical speech-acts and the system of differences within which the meaning of speech-acts is constituted. The level of speech-acts (or *paroles*, to use Saussurean terminology) is merely the surface appearence of language (*langue*) which is the socially constituted code in which *paroles* receive meaning. Structural linguistics explains meaning-generation by linking individual *paroles* to

however, found particularly helpful. See my review in 84 LM 1986 pp. 1142–1147. More useful is the critical essay by *Heller* 36 Stanford L.R. 1984 pp. 127–198.

Deconstructive readings of legal texts have been used in particular within the group of American scholars associated with the Critical Legal Studies. For a good example of such reading, see *Dalton* 94 Yale L. J. 1985 pp. 999–1114. See also *Balkin* 96 Yale L. J. 1987 pp. 743–785.

[2] The work of (the early) Michel Foucault is perhaps most evidently relevant to the undertaking of such an enterprise. See *Foucault* (Archaeology), noting that the aim of what he dubs "archaeology" is the making explicit of historical *aprioris*, consisting of "the group of rules that characterize a discursive practice", p. 127. "Archaeology" seeks to make explicit "the law of what can be said", p. 129. This will be the "archive" – the "general system of the formation and transformation of statements" within a discursive formation, p. 130 and generally pp. 135–195. See also *idem* (Power/Knowledge) in which he develops this into "genealogy" – a "form of history which can account for the constitution of knowledges, discourses, domains of objects etc. without having to make a reference to a subject . . .", pp. 117, 85 and generally 78–108 and further *infra* ch. 2 n. 6. A useful introduction is, for example, *Sheridan* (Foucault) pp. 46–110.

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the determining *langue*. Each individual speech-act is understood as a transformation of some code in the underlying language. The aim is to make that code apparent. I shall treat international law in a similar way. For me, express international legal arguments, doctrines and "schools" are a kind of *parole* which refers back to an underlying set of assumptions, capable of being explicated as the *langue* or "deep-structure"[3] of the law.[4]

In other words, the aim is to study particular legal arguments by attempting to see what links them together or keeps them separate and, in particular, what makes arguments within theory and doctrine constantly enter into oppositions which seem unresolvable on the argument's own premises. What is relevant is not so much what arguments happen to be chosen at some particular time or in some particular dispute but what *rules* govern the production of arguments and the linking of arguments together in such a familiar and a conventionally acceptable way and why it is that no definite resolution of standard problems has been attained.

I shall make much use of conceptual oppositions in this work. This strategy relates to a certain vision about the meaning of (legal) concepts. In structural linguistics, the meaning (signified, *signifié*) of an expression (signifier, *signifiant*) is established by a network of binary oppositions between it and all the other surrounding expressions in the underlying language. Meaning is not (as we commonsensically assume it to be) present in the expression itself. (The meaning of "tree" can also be attained by the French expression "arbre".) In a sense, expressions are

[3] I have put "deep-structure" within inverted commas as it will become apparent that it is ultimately impossible to find such "essence" for international law into which all arguments, norms, positions, theories etc. could be reduced. See *infra* ch. 8. For me, "deep-structure" refers to a set of assumptions which, when explicated, most lawyers would probably recognize as very basic to the identity of their "legal" profession.

[4] See generally *Saussure* (Course). For useful commentary, see *Culler* (Saussure). For structuralism's linguistic basis and application in literary criticism, analysis of signs and in anthropology, see *Culler* (Structuralist Poetics) pp. 3–31; *idem* (Robey: Structuralism) pp. 20–35; *Barthes* (Elements) p. 81 *et seq*; *Lévi-Strauss* (Structural) pp. 31–51, 67–80. See also generally the introductions *supra* n. 1. In Chomskyan linguistics, the *langue/parole* distinction appears in the opposition of competence/perfomance. See *Chomsky* (Selected Readings) pp. 7–17 and comment in *Lyons* (Chomsky) p. 38. This is extended into literary analysis by *Culler* (Structuralist Poetics) pp. 9, 113–130. For useful criticism of the implicit tendency towards reductionism – pure psychologism or vulgar economism – in this scheme, see *Glucksmann* (Structuralist) pp. 68–69, 88–93; *Seung* (Structuralism) pp. 17–20. See also *Heller* 36 Stanford L.R. 1984 pp. 147–151, 156–183 and *infra* ch. 8.1.2.–8.1.3.

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like holes in a net. Each is empty in itself and has identity only through the strings which separate it from the neighbouring holes. The sense of an expression is not determined "from the inside" but by the *formal* differences which separate it, make it different from other expressions in that *langue*. Meaning is *relational*. Knowing a language – understanding the meaning of words – is to be capable of operating these differentiations.[5]

A deconstructive study applies this view of meaning in the discursive field it studies. It sees each discursive topic (e.g. "basis of obligation", "sovereignty", "nature of international law") to be constituted by a conceptual opposition (e.g. "naturalism"/"positivism", "idealism"/"realism", "rules"/"processes"). The opposition is what the topic (*problématique*) is about. The participants in the discourse proceed by attempting to establish the priority of one or the other of the opposing terms. The existence of disagreement, however, shows that this has not been successful. At that point, deconstructive criticism intervenes to show that disagreement persists because it is impossible to prioritize one term over the other.[6] For although the participants believe that the terms are fundamentally opposing (that is, that their meanings are non-identical), they turn out to depend on

[5] On the concept of the "sign" in its dual character as signifier-signified, see *Saussure* (Course) pp. 65–67. For the "arbitrary character of the sign" (i.e. of the relation signifier-signified), see *ibid.* pp. 67–70. On the extension of these principles in semiotics, see *Barthes* (Elements) pp. 101–120. For further descriptions of the structuralist view of the production of meaning by language, see e.g. *Lyons* (Robey: Structuralism) pp. 7–9; *Culler* (Structuralist Poetics) pp. 10–11 and with reference to law, *Heller* 36 Stanford L.R. 1984 pp. 141–144; *Sumner* (Reading) pp. 104–106.

[6] *Balkin* 96 Yale L. J. 1987 has usefully summarized the strategy of "deconstructing hierarchies". It involves: 1) the identification of two terms in an oppositional hierarchy, 2) showing that each defers to the other; 3) showing that each is fundamentally dependent on the other, pp. 746–751. In *Derrida* (Of Grammatology), the argument is that the underprivileged conceptual opposite – "that dangerous supplement" – will, under analysis, always show itself as the dominating one, p. 141 *et seq.* Thus he argues famously that Western philosophy has opposed speech to writing and has prioritized the former (because it is more "immediate", closer to the ideas which we aim to communicate thereby) but that, when analysed, speech becomes possible only by assuming writing (as the neutral, self-sufficient system of disseminating meanings) to be prior to it, p. 10 *et seq, passim*. In *Foucault* (Power/Knowledge) a parallel argument attains critical force: for now the bringing into surface of the supplementary – the "local, disqualified, illegitimate knowledges" (p. 83) – will make history appear as a production of "apparatuses" or "régimes" of truth (including scientific truth) with a "circular relation with systems of power which produce and maintain (them, MK)", p. 133. The usefulness of such a strategy in law is evident. (Indeed, *ibid.* contains useful hints towards that direction, pp. 93–96, 146–165.) Within the American Critical Legal Studies movement it has been used to demonstrate law's

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each other. This will make the *problématique* appear as a false dilemma; the opposing positions turn out to be the same.

I believe this to be a fruitful way of understanding international legal argument as well.[7] I shall derive the sense of particular doctrines, arguments, positions or rules exhaustively from the way in which they *differentiate* themselves from other, competing doctrines, arguments etc. This involves envisaging that legal argument proceeds by establishing a *system of conceptual differentiations* and using it in order to justify whatever doctrine, position or rule (i.e. whatever argument) one needs to justify. And I shall then attempt to show that the fact that discourse stops at points of familiar disagreement follows from its inability to uphold these differentiations consistently. We cannot make a preference between alternative arguments because they are not alternative at all; they rely on the correctness of each other.

Such a deconstructive study of legal argument (I make no claim for this to be *the* deconstructive approach; indeed, I recognize that many "deconstructivists" would not accept it[8]) is not restricted to a description, or taxonomy, of legal doctrines, arguments, positions or

dependence on incoherent assumptions about the character of social life and political value. For a review of these criticisms, see *Kelman* (Guide) pp. 15–113.

[7] This type of argument is used in *Kennedy* (Structures) ("deconstructing" international legal argument about the sources, procedures and the substance of the law). My discussion has been very much influenced by this work which I regard as the most significant piece of contemporary international legal scholarship. See also *idem* 23 GYIL 1980 (a "methodological" argument) pp. 353–391. I have received the theme apology/utopia from this article, p. 389. See further *idem* 27 Harv.ILJ 1986 (on the early history of international law) pp. 1–90; *idem* 2 Am.U.J.Int'l L.& Pol'y 1987 (the chapter on legal sources from the book *supra)* pp. 1–96; *idem* 8 Cardozo L.R. 1987 (tracing the assumptions of the legal argument which started, in early 20th Century, to regard institutional architecture as the way to world order) pp. 841–988. See also *infra* ch. 5 n. 9 and e.g. *Bederman* 82 AJIL 1988 pp. 29–40.

[8] They would not accept it because the attempt to find a centre, or a "deep-structure" to common discourse may be taken to involve another "metaphysics of presence", akin to that which *Derrida* (See the works *supra* n. 1) detected in structural linguistics. It seems to involve a groundless belief in the explicated structure as a transcendental signifier – a foundational concept whose meaning would not be established by further reference to some ulterior concept, or structure, but by reference to itself. Yet, this is not what I am trying to argue. As will become evident in chapter 8, though I believe that the *routine* of legal argument does have a reasonably evident centre of assumptions and a very limited range of operations to draw consequences from them, this is only a historically contingent phenomenon which does not provide such overriding force as to be capable to squeeze all argument within itself. The weakness of the argumentative structure constantly compels lawyers to move beyond its conventional centre. *Gordon* 36 Stanford L.R. 1984 points out, usefully: "What the structure determines, is not any particular set of

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