

SONDERDRUCK AUS

GERMAN YEARBOOK
OF INTERNATIONAL LAW

JAHRBUCH FÜR INTERNATIONALES RECHT

Volume 23 · 1980



DUNCKER & HUMBLOT / BERLIN

CONTENTS

Articles

A. A. FAROUROS: On the Hegemonic Role of International Functional Organization	9
OLE LANDO: Renegotiation and Revision of International Contracts — An Issue in the North-South Dialogue —	37
THOMAS W. WÄLDE: The Evolution of International Economic Development Law: Legal Process and Institutional Consideration	59
WOLFGANG SEIFERT: Zur Geltung Internationaler Verhaltenskodizes für Unternehmen aus den RGW-(Comecon) Ländern	91
MEINHARD SCHRÖDER: Wirtschaftssanktionen der Europäischen Gemeinschaften gegenüber Drittstaaten — dargestellt am Beispiel des Iranembargos	111
PHILIP ALSTON: Linking Trade and Human Rights	126
THEODOR SCHWEISFURTH: Operations to Rescue Nationals in Third States Involving the Use of Force in Relation to the Protection of Human Rights	159
H. G. SCHERMERS: Judicial Protection of International Rights	181
BOLESŁAW A. BOCZEK: The Baltic Sea: A Study in Marine Regionalism	196
ALEXANDRE CHARLES KISS: International Co-operation for the Control of Accidental Marine Pollution	231
STANISŁAW E. NAHLIK: The Case of Displaced Art Treasures — History and Appreciation of a Polish-Canadian Strife	255
EMMANUEL G. BELLO: Reflections on Succession of States in the Light of the Vienna Convention on Succession of States in Respect of Treaties 1978	296
KONRAD GINTHER: Das Anerkennungsverbot der Homelands — Überlegungen zur Anerkennungsproblematik im südlichen Afrika —	323
DAVID KENNEDY: Theses About International Law Discourse	353

Theses about International Law Discourse

David Kennedy

I. Introduction

- A. The Argument Summarized
- B. The Argument Distinguished
- C. The Two Puzzles of Theory and Practice Expanded
- D. The Argument's Structure

II. The Fundamental Contradiction

- A. Thesis: The Contradiction and its Transformational Structure
- B. Manifestations of the Contradiction in Argument
- C. The Binary and Transformational Structure of the Contradiction
- D. The Fundamentality of the Contradiction

III. The Problem of Doctrine: Discourse in International Law

- A. Thesis: Indeterminacy Results from the Transformation of a Contradiction
- B. Repeating Contradiction
- C. Failure of Argumentative Resolution
- D. Failure of Authoritative Resolution
- E. The Problem Unified: A Model of Doctrine

IV. The Problem of Theory: Discourse About International Law

- A. Thesis: Failure of Explanation Results from Transformation of a Contradiction
- B. Contradiction: The Source of Law
- C. Transformation: The Size of Law
- D. Reconstruction: The Mechanics of Law
- E. The Problem Unified: A Model of Theory

V. The Paradigm Which Causes the Fundamental Contradiction

- A. Thesis: A Basic Paradigm Directs and Defeats Scholarship
- B. A Model of International Society
- C. A Model of International Law
- D. The Paradigm Causes Contradiction for Practitioners and Scholars
- E. The Problem Unified: A Model of Theory

VI. Theses for a Dynamic Model of Theory and Practice

VII. Conclusion

boration or explanation, may combine the two in a single article or course, may recognize that in some way each requires the other, or that each alone is unsatisfactory, but he cannot perform both simultaneously. These tasks require and preclude each other for the same reason: if the world is divided into theory and practice, to explore either realm, the other must be held constant.

The key to developing a style of legal analysis which could aid in elaborating the connections between practice and theory, in my mind, is concentration upon discourse and upon the hidden ideologies, attitudes and structures which lie behind discourse, rather than upon the subject matter of legal talk.⁴

⁴ The analytical method I propose can only be quite loosely defined. The denotation "style" permits the liberties of departing from logical rational methods of exposition quite drastically in favor of a more aesthetic approach. The style could be called neorealist, dialectical, structuralist, or all three. It is neorealist in its starting point: the identification of twin puzzles in the indeterminacy of legal discourse and the unsatisfactory nature of theoretical explanations, justifications and reconstructions. To my mind, "neorealism" if it may be called that, begins with a look at the indeterminacy of legal argument first analyzed in the early part of the twentieth century by the American realist school and adds a historical scepticism that any reconstructive theory will solve the deeper difficulties those early realists almost unintentionally discovered. See: *Wolfgang Fikentscher, Methoden des Rechts in Ver gleichender Darstellung*, Band II, 1975; *Duncan Kennedy, The Structure of Blackstone's Commentaries*, 28 Buffalo Law Review 1979, 205; *Norbert Reich, Sociological Jurisprudence and Legal Realism in Rechtsdenken Americas*, 1967. Cf.: *John Hart Ely, Democracy and Distrust*, 1980, 106-108 ff; see also: *Mark Toshnet, Truth, Justice, and the American Way: An Interpretation of Public Law Scholarship in the Seventies*, 57 Texas Law Review 1307, 1979.

The style could be labeled structuralist because it seeks to explain the current pattern of discourse and commentary and the interconnectedness of both doctrinal areas and conceptual schools by reference to their underlying structures. These relationships are sought not in patterns of impact upon social life or of subject matter, but in the deeper patterns of justification which stand beneath the manifestations. See: *Peter Gabel, Intention and Structure in Contractual Conditions: Outline of a Method for Critical Legal Theory*, 61 Minnesota Law Review 1977, 601; *Noam Chomsky, Syntactic Structures*, 1957, and *Deep Structure, Surface Structure and Semantic Interpretation*, in *Steinberg and Jacobovits* (eds.), *Semantics: An Interdisciplinary Reader*, 1970; *Philip Pettit, The Concept of Structuralism*, 1977; *Jean Piaget, Structuralism*, 1971; *Ferdinand de Saussure, Course in General Linguistics*, 1966; *Claude Lévi-Strauss, Elementary Structures of Kinship*, 1969, and *The Savage Mind*, 1966. The technique employed here is also familiar from structuralist analysis of myths and folklore. For an excellent example and bibliography of literature in this field, see: *Ellis Kängäs Maranda and Pierre Maranda, Structural Models in Folklore and Transformational Essays*, 1971.

This style is dialectic because it concentrates on patterns of repeating contradiction. The structural similarity between the problems of discourse and those of theory lies in their parallel contradictions or tensions. See: *Georg Hegel, Philosophy of Right*, 1952; *Claude Lévi-Strauss, supra*, 1966; *Duncan Kennedy, supra; Karl Popper, Conjectures and Refutations, The Growth of Scientific Knowledge*, 1972, 312-335. Lévi-Strauss best illustrates the transformational nature of the contradictory structure which I seek. A standard introduction to modern linguistic structuralism remains *John Lyons, Einführung in die moderne Linguistik*, 1973. Recent developments in structural semiotics are presented in *Rosalind Coward and John Ellis, Language and Materialism, Developments in Semiology and the Theory of the Subject*, 1977.

I. Introduction¹

A. The Argument Summarized

1. The division of theory and practice

In this article, I seek to describe and practice an analytic approach directed to accomplish two quite different tasks. In the first place, I present a theoretical argument about the methodology of international legal scholarship. At the same time, I seek to improve the advocacy skills of international legal arguers and practitioners. In traditional parlance, the making of methodological arguments is far removed from the actual practice of international law, and seems quite irrelevant to it. Indeed, international legal curricula typically reinforce the division of theory and practice². This approach will be successful if it proves able to reorient our thinking about international law so as to avoid this sharp differentiation between doing and explaining.

Traditional analysis separated these two tasks because something about the performance of each precluded the performance of the other. Those engaged in the elaboration of legal rules and standards could be either descriptive or creative. But in either case, they were not simultaneously able to search for the source or justification of the law they propounded. In order to search for legal rules, to separate law and not law, one must first understand the difference between legal norms and other behavioral patterns. That much seems inherent in the definition of elaboration. Likewise, to practice the scholarship of justifying or explaining the resulting system of laws from the remove of a theoretical perspective, one must begin with a vision of the corpus of law which needs explanation or justification. That much seems required by our understanding of the nature of explanation³. The scholar may practice either ela-

¹ This paper has benefited from the advice of many. I am particularly indebted to Rainer Lagoni, Eibe Riedel and Susanne Tongue for their comments on earlier drafts. The section concerning the nature of international legal discussion benefited from many helpful discussions with Henry Steiner. My work on this paper has been supported by the Alexander von Humboldt Stiftung.

² International legal advocacy has traditionally been treated only in handbooks, moot court guides or introductory volumes explaining international law to diplomats and politicians unfamiliar with its contents. See for example: *Melquíades Gamboa, Elements of Diplomatic and Consular Practice*, 1966; *John Wigmore, A Guide to American International Law and Practice*, 1943; *Lord Gore-Booth, Satow's Guide to Diplomatic Practice*, 1966; *William Bishop, International Law Cases and Materials*, 1971, xii-xviii; and *John Garbatz, The Moot Court Book*, 1979. A number of guides to military rules and human rights procedures have also been compiled, but a comprehensive analysis of international legal argumentation remains to be attempted.

³ I am reminded of the classic Gestalt perceptual experience of viewing a pattern of dots which looks either like a duck or a rabbit. A mental transformation of background and foreground produces either a duck or a rabbit, but never a rabbit-duck. See: *Ernest Hilgard and Gordon Bower, Theorien des Lernens I*, 1973, 260-297.

2. The resulting problems of theory and practice

This search for a new approach to these familiar problems has been motivated by a feeling that international legal scholarship is in crisis. I am persuaded by the increasingly common view that an ever more complicated international legal model can account for and control an ever broader spectrum of players, ideologies and subject matters. Moreover, to my mind, the scattered scholarship of reconstruction and optimism is itself a symptom of the growing crisis for our vision of international law⁶.

The following is a preliminary statement of this crisis. Scholars engage in two tasks. First, international jurists work to elaborate the international system of rules, to assist and step in for practitioners of international law. Second, they engage in an analysis of the rule structures which result. Both tasks are aimed at improving international legal fabric. Both seem important because we believe that clearer understanding will produce better rules and thereby a better world.

But international legal scholarship does not seem to be working. Theory has bogged down in controversy again and again. Practice, and the elaboration of arguments, has produced ever more complicated and diffuse arguments, but seems ever less able to determine outcomes. As the practice of international law has expanded, it seems to have become weaker. Its natural development seems to render it either irrelevantly abstract or trivially specific. This has resulted in rhetorical and ideologically motivated manipulation of the international legal fabric.

3. The thesis

In a nutshell, this article argues that this breakdown occurs in the same way and for the same reasons in the realms of both theory and practice. A small set of basic beliefs make these realms seem separate and force us to seek a specific sort of connection between them. The related nature of the problems presented in each realm, and their common origin in a single paradigm, can best be demonstrated by a structural look at the discourse of each realm. The connections I describe are not so much logical or causal as aesthetic.

⁶ By reconstruction scholarship I mean the diverse works of such authors as: Philip Jessup, *Transnational Law*, 1956; C. Wilfred Jenks, *Prospects for International Adjudication*, 1964; Richard Falk, *The Status of Law in International Society*, 1970, and *The Future of the International Legal Order*, 1969—1972; Wolfgang Friedmann, *The Changing Structure of International Law*, 1964; Roger Fisher, *Points of Choice*, 1978; and Louis Henkin, *How Nations Behave*, 2nd ed., 1979.

4. Rejection of the traditional connection of theory and practice

International legal scholarship seems based on the belief that the process of legal elaboration and analysis is in some way connected to clarification of the relationship between law and improved social life. This assumption is difficult to express adequately for it lies beneath the work of scholars with incompatibly different views of the rule and role of law in international society. Although no one may be satisfied with my statement of this fundamental belief, I think all would want such law as exists to be connected to behavior in a way which bridges the gap between ought and is and permits the application of law to life. We all believe that in real life thought and action are connected in a way we do not seem able to replicate in our curriculum. After exploring this belief, this article concludes that it is not meaningful to speak of a particular solution to a legal problem as having been compelled by a line of reasoning. It is not true that some arguments, because of their content are more convincing or persuasive than others.

There remains within our traditional vision, disagreement about the reason for the convincingness of arguments, about which arguments are persuasive and which are not, and about the extent to which actual statesmen do or should submit themselves to the whole process. These problems divide scholars into positivist and naturalist, idealist and realist scholars. But common to these and other groups is the very simple idea that if and when law exists, it is a scheme of reasoning, the content of which at least sometimes controls outcomes. My idea is that such an understanding of the process of legal reasoning is not tenable.

B. The Argument Distinguished

Because this thesis bears a close resemblance to much within traditional scholarship, it may be helpful at the outset to suggest what I do not mean thereby. For example, I do not contend that some people are not sometimes convinced by legal argument. To my mind, however, they have been deluded if they believe it was the reasoning process, or the arguments themselves, which compelled their behavior. Skillfully undertaken, the reasoning process can be extended until it accounts for mutually incompatible outcomes. "Being convinced", then, is a matter of giving up the fight, or of accepting the unstated moral and/or political values which lie beneath a given line of reasoning.

I also do not mean simply to say statesmen, as a matter of fact, are not persuaded. Some are, some aren't. Mine is not a skeptical its-all-politics-anyway

C. The Two Puzzles of Theory and Practice Expanded

Because I contend that problems of theory and action place our discipline in crisis and because without a willingness to grant that we are at least in a tight spot it is hardly worth reading further, I here elaborate the two puzzles to which discourse in and about international law continually returns. The first puzzle is that international legal argument seems unstructured and indeterminate. The normative moorings of the most basic discourse by international lawyers, diplomats and scholars seem infirm. Legal principles and rules seem to dissolve far too easily into thin disguises for assertions of national interest. This unstructured indeterminacy results from the manipulability of the basic norms out of which international legal discourse is constructed and has become more visible as international law has come to be applied to ever more diverse conflicts by ever more diverse or ideologically motivated disputants.⁷ On the other hand, descriptions and analyses of international law have been unable to explain satisfactorily the unstructured nature of international law without either abandoning the idea of a *normative* international law (abstraction), or limiting the ambit of such a legal structure to a few quite narrow areas (reduction).

These two tendencies are visible just as clearly in the work of those who exalt international law as in that of those who would debunk it. For some enthusiasts, the unstructured nature of international law results from its horizontal primitiveness. That is, international law is only nascently normative and requires attentive nurturing. In the meantime we must limit our expectations. For other enthusiasts, international law is a rather fully developed system of law. These commentators are of two views. Some understand international law to be a rigid affair of norms, and therefore see a fully developed international legal system which is unhappily only partially accepted by states. In this version, we must work to preserve the purity of international legal norms until they can be more fully implemented in a more enlightened age. Moreover, we must steadfastly oppose the erosion of rules, such as those governing international diplomacy, which seem currently acceptable. Others understand law as a systematic structure underlying international intercourse even when agreement on specific rules or outcomes cannot be achieved. In this view, international law is normative in a wide sense, but it is substantive only in the rather limited sense in which these enthusiasts seem willing to acknowledge that process controls substance. Among those who conclude that international law is of limited import, a similar dualism is even more readily visible. Some

⁷ See: Wolfgang Friedmann (n.5) for an early and upbeat discussion of this process.

approach.⁸ I do not mean to focus at all on the psychological lynchpins of state behavior because I do not believe we understand the connection between theory and action sufficiently yet to draw such conclusions about the power of law. I focus on the stuff of legal reasoning and explore whether it *could* control the behavior of an able and willing statesman. Naturally, because I conclude that it cannot, my thesis bears a relationship to that of those who decry the minor role played by international law in a world of self-interested national statesmen. Indeed, I believe that the very process of using legal argument will improve statesmen's understanding of its vaporous nature and hence undermine its influence. But my critique focuses upon the law itself rather than upon delinquent diplomats.

Critiques which concentrate on the evil and short sighted power politician seem slanted towards the belief that we must fear anarchy and chaos if the law is rendered impotent. If, as I maintain, statesmen, good or evil, should never have been restrained by law's content, we must look elsewhere for the source of such stability as has been achieved, and must alter our visions of the singularly rapacious nature of international actors in a world without a convincing process of legal reasoning. We might then begin to teach statesmen to live in that world, and to provide them with the tools to do so rather than reinforce both their faith in the convincingness of a process which is at best obfuscatory and the temptation to act as selfishly as they indeed sometimes feel.

Lastly I do not mean to suggest that legal argument is an anarchistic anything-goes morass, or that arguments can be joined and opposed without respect to their content. Arguments connect in rather specific, determinative ways and lines of reasoning have an internal coherence. It is by fitting or tracking patterns recognized as legitimate that good arguments distinguish themselves from bad arguments. The distinction between the content and the form of international legal argument is only important because in traditional analysis it should be an argument's content which is persuasive. By suggesting that it is not, but that a connection between arguments remains, I am not triumphing form over substance. Rather, I suggest that the specific form/substance configurations which are recognizable as valid arguments follow patterns structured so as to obscure or repeat the dilemmas they were intended to resolve. The argument, then, is not that arguments are not distinguishable as good and bad, but that good arguments do not resolve the questions posed by legal cases.

⁸ For statements of the power politics position see to various degrees: George Kennan, *Realities of American Foreign Policy*, 1954; Stanley Hoffman, *The State of War*, 1965; and International Law and the Control of Force, in Karl Deutsch and Stanley Hoffman (eds.), *The Relevance of International Law*, 1968, 21-46; and Hans Morgenthau, *Politics Among Nations*, 1967.

to obscurity. I conclude that we can reject this paradigm without rejecting the goal of improving and ordering social intercourse. Indeed, I think that only by rejecting these beliefs can the goals they stand for be achieved.

I have organized this paper to illustrate the approach I am suggesting. First, I describe what I take to be the ground premise of this analytical style: the existence of a fundamental confusion about the relationship between states and the nature of sovereignty. Then, I consider the problems of theory and doctrine. Explanation of the first problem requires elaboration of a method for understanding some typical international legal doctrines and patterns of discourse. Explanation of the second problem requires presentation of the structure of international theoretical discourse. Thereafter, I explore the set of basic beliefs which I take to be responsible for these problems. In a final section I explore the connection between the realms of theory and practice.

II. *The Fundamental Contradiction*

A. Thesis: The Contradiction and its Transformational Structure

This analysis begins with a basic quandary which is both familiar and elusive.⁹ A first statement of this quandary would be: individual nations find in socialization both the source of their identity and a threat to their existence. It could be said that states face the following dilemma. Their identity as sovereign states with legitimate and respected internal authority depends upon their participation in an international society which is not compatible with that sovereign authority. They cannot be both internally absolute and externally social. Moreover, their ability to be social depends upon their community membership. This contradiction seems inherent in the idea of a boundary between domestic and international life. The domestic state is legitimated and given an identity by its participation in an international world. Yet the existence of other sovereigns renders hollow the absoluteness of any single sovereign's sovereignty.

The idea that individuals are both threatened and supported by association with others is a familiar one¹⁰. The individual's identity is the boundary between self and other. Yet that boundary fails as the self both seeks and fears others in its struggle to maintain its identity. The fundamental contradiction in international social life is merely an expansion of this tension to group relations. The quandary for states results from contradictory visions of group

⁹ See: *Duncan Kennedy* (n. 4).

¹⁰ See: *Roberto Unger, Knowledge and Politics*, 1975, 191-235.

are skeptical about the strength of the "oughtness" of international rules and principles. Others are more impressed by what they regard as international law's rather narrow scope.

Modern international legal scholarship, then, has encountered two quite distinct puzzles. In the first instance, practitioners have a difficult time finding firm footing when making international legal arguments. This must be a particularly acute dilemma for international legal decision makers and judges. As the indeterminacy of argument becomes clearer, and manipulation of legal principles more widespread, they are presented with ever more polarized arguments from which to fashion a decision. Scholars experience this difficulty as an increasing inability to retain scholastic objectivity as one after another colleague becomes a partisan for one or another national position. Theorists who describe and analyse what goes on in actual international discourse experience a second dilemma. At this level, attempts to build a model of international law which could account for the unstructured nature of actual discourse seem to take one or the other of two incompatible courses. Some explain the normativity of international law, in the process reducing its scope. Others explain its scope, but simultaneously reduce its normative power.

I have gone to some length here to explain this duality because I do not wish to suggest that the puzzle which confronts theorists is in any way an offshoot of the competition between advocates and sceptics of international law. Nor do I understand it to be merely another description of the old naturalist/positivist dilemma. I mean to suggest that it transcends and encompasses both of these more traditional oppositions.

D. The Argument's Structure

In this article, I aim to demonstrate a specific methodological style for explaining the interrelated structures of these two puzzles. My hypothesis is that this style can unify these difficulties and show their common origin in a set of fairly commonplace ideas which are accepted by practitioners and theoreticians alike. By isolating this paradigm⁹ I seek to substantiate the hypothesis that a shared delusion revealed in the structural underpinnings of theoretical and practical discourse dooms our practice to conflict and our scholarship

⁹ I use the word "paradigm" here in the same sense in which it was originally used by *Thomas Kuhn*, *The Structure of Scientific Revolutions*, 1962. Kuhn has refined his concept to differentiate a general belief structure from the narrower set of exemplary problem solutions provided by a traditional scientific discipline. He would apply the term paradigm only to the latter. See: *Thomas Kuhn*, *The Essential Tension*, 1977, xix and 292-319. I retain his initial approach and mean by paradigm the set of first principles accepted by those working in a given discipline which defines the problems to be addressed and the criteria for recognizing solutions.

could be an exercise of domination, either benign and paternalistic or oppressive. For examples we need only look to the treaties between "allies" and "ex-enemy states" which followed the Second World War. Likewise, one nation may abandon or ignore another to enable it to be independent: as an indication of respect and solidarity. This may explain the treatment of unpopular or new regimes by major powers which might feel compelled to oppose developments in which they were to play an actual role. To come full circle, we discover that respect may be expressed either by paternalism or distance. Enmity likewise may find expression in either distance or smothering attention. On the receiving end, we can never be sure from the behavior alone what attitude it represents. Nor can we choose among behaviors simply by "applying" our attitude.

This is a very general example of the contradiction's manifestation. It is characterized by the repeated reappearance of the basic tension as discussion moves from an abstract ideal to its concrete application and back again. At each level, the basic tension is repeated. Each absolute position contains the contradiction within itself. This structure shows up in legal discourse as well as in everyday discussions about international political relations. Skilled theorists, who can move easily among these positions, are simultaneously those whose arguments seem hardest to challenge and those who experience the most comprehensive inconclusiveness when speaking with one another.

A second more general and complex example of the structure of the contradiction can be developed in examining national attitudes towards participation in international groups.¹⁹ Speaking most generally, individual states may participate in the international community either directly, and singly, or as members of a group. The familiar groups, of course, are alliances, regional associations, economic and political communities, and international organizations. Traditionally we associate group participation with the ideal that national interests are somehow best met through community. Fulfillment, in other words, is understood to mean submergence in the group. Likewise, going

¹⁹ My discussion of various visions of group participation draws heavily upon *Laurence Tribe's* discussion of the role of religious, military and family structures in U.S. Constitutional Law, as well as of affirmative action in: *American Constitutional Law*, 1979. I am also indebted to Roger Fisher for helpful discussions in this connection. See also: *Gordon Clark*, *Individual Rights and the Spatial Integration of the United States* (unpublished manuscript, Kennedy School of Government), 1980. American affirmative action doctrine seems simultaneously to affirm and to deny both individual equality and group affinity, or to be unsustainable without an external resolution of this dilemma. See: *Jeffrey Blattner*, "The Supreme Court's 'Intermediate' Equal Protection Decisions: Five Models of Constitutional Equality (unpublished manuscript, Harvard Law School), 1980. It is also familiar from international discussions of ethnic minorities which seem unable to resolve the contradiction between ideals of assimilation and ethnic identity. See: *Lois Sohn* and *Thomas Buergethal*, *International Protection of Human Rights*, 1973, 213 ff.

association: as a necessary reference point for self awareness and identification and as the greatest threat to national existence.

My contention is that as legal observers become more sophisticated in their manipulation of legal doctrines and theory it should seem ever more obvious to them that every doctrinal area and theoretical issue is a manifestation of this fundamental contradiction, as is the division between legal theory and practice itself. There seems to be no international legal doctrine which does not involve a conflict between the autonomy and cooperation of states, because by definition no international legal issue is raised until the interests of states collide.²¹

In myriad manifestations throughout international social life, the contradiction takes only a few characteristic forms. These can be transformed into each other according to certain rules. The resulting pattern I call the "structure" of the contradiction. That structure is binary because it repeats the contradiction. It is transformational first because its various manifestations are metamorphoses of the same contradiction and secondly because the contradiction is not in permanent opposition. Because its elements require and deny each other, their opposition can be mediated by internal transformation.

B. Manifestations of the Contradiction in Argument

Before describing this pattern any further, let me pose two examples of the contradiction manifested in arguments which are not legal.²² First, consider manifestations of international friendship and enmity. A nation enters into a treaty of friendship and commerce with its neighbor as an expression of solidarity and community. Correspondingly, a nation breaks off diplomatic relations as a symbol of enmity. These actions might at first seem to represent the extreme choice between international community and national separation. We seem able to move from the feeling of either solidarity or solitude to its factual manifestation or application. If we want to express enmity we sever relations. When we feel fraternal we negotiate a friendship treaty. But we can interpret the acts of others only with difficulty. A treaty of friendship

²¹ See: *Duncan Kennedy* (n. 4), 213, n. 1.

²² The reduction of complex arguments to simple structures is inherently dangerous. If the reductions are seen as commentary about the content of the problem to which the arguments were addressed rather than as ideal structural argumentative types, they will be hopelessly banal. Yet as ideal types, they seem too weak to support or logically prove the sweeping assertions derived from them. For an analysis of this problem in linguistic, literary and anthropological structuralism which also summarizes much of the current literature, see: *Marc Eli Blandhard*, *Description: Sign, Self and Desire; Critical Theory in the Wake of Semiotics*, 1980, particularly at 67 ff.

it alone is usually associated with the ideal of self protection, and fear of just such submersion. Fulfillment in this view means the self determination of being alone.

This initial pairing of ideals and behavior patterns, however, does not account for the full set of feelings states may have about participation in groups. Those going it alone may be attracted by their relationship with the broader international community rather than repelled by the group. Whatever their position in the wider community, their reference point is not a feared group, but rather the wider community with which they feel solidarity. For example, if the state is a small one, freedom may mean the blissful anonymity of submersion in an undifferentiated international community. Likewise, states who choose group participation may do so as an expression of fear rather than of solidarity. Their point of reference may be the international community rather than the group they join, and their goal may be protection rather than submersion.

C. The Binary and Transformational Structure of the Contradiction

The structure revealed in the two foregoing examples is binary and transformational¹⁴. By "binary" I simply mean that each level is exclusively occupied by two mutually exclusive possibilities which never exist without each other. The oppositions are binary because at each level they seem to account for all available positions (they are exclusive) and they are incompatible, or of mutually exclusive content. These two aspects of the contradiction are readily visible because they are experienced in static analyses of the content of each position. Far more difficult to apprehend is the transformational element.

By "transformational", I mean that the various levels of appearance and positions within each level are connected in a particular way, so that we may

¹⁴ Discussions concerning participation in international communities illustrate the contradiction. Consider, for example, the decisions of European domestic courts on implementation of Article 177 of the EEC Treaty providing for certification by local judges of questions of community law to the European Court of Justice. Whether or not intended to carve out an unencroachable Community jurisdictional field, the Article 177 procedure provides a series of opportunities for domestic court discretion in submitting cases. As a principled matter, these exceptions seem capable of devouring any community discretionary area. If some provisions were not directly applicable, some decisions not 'necessary', some European provisions not 'clear', there would be no local court discretion in submitting to the European court. On the other hand, it seems impossible to distinguish between asking what rights are created and whether rights are created in the situation raised by a given case. Neither the wisdom of the system of rules nor the persuasiveness of argument can claim credit for the apparent success of the Article 177 procedure, for no greater amount of uniformity has been achieved than each national court has felt comfortable with. See: Eric Stein, *Peter Hay and Michel Waelbroeck*, European Community Law and Institutions in Perspective, 1976, 261 ff.

speak of one being transformed into the other. One can begin to see this transformational element in static analysis of the content of the two positions. Each pole of the binary opposition seems to contain its opposite in some sense. But this is not a full explanation of transformation. It may be misunderstood to imply only that each position is meaningful only relative to the other. Such a statement may be true, and begins to approximate transformation, but may also be merely a positive restatement of their mutual exclusivity. Transformation can only be fully understood by a dynamic look at the relationship between levels and within each level: in both cases between sets of binary oppositions.

Transformation, then, happens in two ways: between and within levels of argument. We experience transformation between levels of argument as reappearance of the basic tension when discussion moves from the abstract to its concrete expression and back again. Arguing about the application of the ideal reaffirms the ideal's antithesis. The explanation of the fact reveals incompatible ideals¹⁵.

Transformation with in each level of argument is more difficult to apprehend. We experience it when the contradiction seems to lose its contradictory appearance. Consider argument strictly about the ideals of domestic particularism and international solidarity (X/Y). Consider two other ideal oppositions: free will/communal will, (A/B) and independence-authority/equality-mutual respect (C/D). Free will seems associated with particularism, as does independence-authority. Communal will seems associated with solidarity, as does equality-respect. It seems that the same principle separates each polarity. Symbolically (X like A like C) opposed to (Y like B like D). Yet sometimes the poles seem contradictory and sometimes they seem compatible. Particularism and solidarity, like free and communal will seem opposed. But independence-authority seems compatible with equality-respect. Without mutual respect there can be no independence. Absolutely independent entities must be equal. Independence seems to foreclose a hierarchy. In other words X opposes Y and A opposes B but C is compatible with D. The contradiction of X opposes Y or A opposes B can be mediated by moving to C is compatible with D. This is transformation in this second sense.

Moreover, it works the other way. Equality-respect also seems to preclude complete independence. A world of unhindered authorities seems to require a hierarchy and deny equality. Thus C opposes D. But the communal will consists of individual wills and seems required to ensure the freedom of individual will. Thus, A is compatible with B. A scheme of particularism is also a

¹⁵ See: *Duncan Kennedy*, Form and Substance in Private Law Adjudication, 89 Harvard Law Review 1976, 1685.

communal scheme, and solidarity seems unimaginable without discreet members. The reverse transformation then would mediate the contradiction of C opposes D by commuting (C like A like X and D like B like Y) to either X is compatible with Y or A is compatible with B. By mastering these transformational rules, practitioners can become far more effective arguers so long as the community at large does not abandon belief in the overall power of argument.

We are led to appreciation of transformation in part by the reversability of various arguments¹⁶. Occasionally an argument which seems a watertight deduction from a general principle can be made to support the opposite factual application. For example, in the structural contradiction presented above, the rationale "freedom is submersion" supported the conclusion "form groups". By switching perspectives slightly, it also supported the incompatible conclusion "go it alone in the community at large"¹⁷.

This "reversability" experience, however, is not one of total confusion. Any argument cannot be applied to yield any result. Patterns emerge. We have seen that the case "styles of participation" plus the argument "freedom is submersion" will yield either "form groups" or "do not form groups". This could be symbolically represented as $A + B = C$ and $A + B = \text{not } C$. Still it is clear that the combination of A and B is related to C. Under no circumstances does $A + B = D$, or E, etc. This is what leads me to believe there is a structure beneath the experience of reversability. The rule which covers the transaction $A + B$ is not outcome determinative. In fact, it is characterized precisely by its production of incompatible outcomes. But some pattern exists. Some rules govern movement from $A + B$ to either C or not C. These are transformational rules.

D. The Fundamentality of the Contradiction

Further exploration will be necessary to clarify the range of transformational rules which govern the conduct of argument and to support my hypothesis that

¹⁶ These experiences were documented by the legal realists. See: *Wolfgang Fikentscher* (n. 4) and *Norbert Reich* (n. 4).

¹⁷ Mohammed Bedjaoui observes: "when newly independent States, confronted with development problems . . . have tried to exercise their sovereign rights over their own natural resources, they have been accused either of 'dangerous excesses of sovereignty' or of making an anachronistic use of sovereignty in an age in which, it is said, interdependence should prevail. . . . This achievement of permanent sovereignty by certain States over their own natural resources was immediately condemned as putting an end to the sovereignty of other States. OPEC's periodical revision of prices . . . was stigmatized by some lawyers from the industrialized countries as an intolerable 'right of unilateral action,' a 'constant repudiation of agreements,' a lawless power, of decision and an 'intoxication' with sovereignty, all of which brought about a lamentable instability in legal situations and relations." *Mohammed Bedjaoui*, *Towards a New International Economic Order*, 1979, 103-104.

this contradiction unifies problems which arise in both the theory and practice of international law. With such support, however, this thesis would undermine the meaningfulness of argumentation. The issue under discussion, be it factual or theoretical, would have to be decided without reference to argument, because the process of argument can illuminate or obscure the contradictory structure I have here suggested, but it cannot resolve it.

Moreover, the peculiar separation of theory and practice which I described in the introduction is a manifestation of the contradiction. The key to unifying the two realms, in my view, may be found in an examination of their discourse and in the rules which govern transformation from one to the other. To begin investigation of those transformations, I proceed in the next two sections to analyze the contradiction's manifestation in practical legal discourse and theoretical legal analysis.

III. The Problem of Doctrine: Discourse in International Law

A. Thesis: Indeterminacy Results from Transformation of a Contradiction

In the last section, I developed a contradiction which seems to lie beneath actual discourse and scholarly theory. In this section, I return to what I identified in the introduction as the first half of the twin puzzle which confronts the international legal community: the problem of indeterminate discourse. In my view, the increasingly unstructured, indeterminate and manipulable nature of international legal argument can be explained by sifting typical argumentative styles and approaches to familiar problems searching for clues to the relationship between arguments. My informal application of this method to various doctrinal areas has provided only an initial formulation of the problem. The next step, it seems to me, is to analyse a series of decisions and doctrines more rigorously. In this article, I confine myself to a theoretical description of the patterns which seem responsible for indeterminacy. That description should serve as a model for the development of such case studies.

My claim is that indeterminate discourse results from the contradictory and transformational nature of legal argument. The thesis is that arguments are connected in predictable, rigid, and most importantly, indeterminate or contradictory patterns. The relationship between arguments is transformational in exactly the same way as was the basic contradiction which I described in the last section. Indeterminacy is experienced in three ways. First, the substantive choice presented by each doctrinal area is the same. Consequently, the process of analogous argument soon renders the same arguments available in each doctrinal area. Second, the arguments do not resolve this substantive

choice. Neither specific fact grounded rules nor broader and more general standards or international legal metaprinciples will do so. Third, arguments about the authority of arguments, the last resort of the unconvincing, will also confront and fail to surmount this dilemma. These three experiences need to be considered in turn.

B. Repeating Contradiction

The first part of the experience of indeterminacy occurs when we realize that each doctrinal area poses a choice between an internationalist vision of sharing and a nationalist vision of exclusive domestic power. Two things about this experience might confuse us. First, the contradiction looks different in different areas. Second, the connections between specific doctrinal choices and the ideals of international community and national particularism are fluid. Neither of these observations should confuse us for long. The first can be clarified by a description of the various faces of the contradiction. The second merely restates the transformational structure of the contradiction. Let me eliminate both of these confusions before considering the other two experiences of indeterminacy.

Different international legal doctrines manifest the contradiction differently. At the very least, public international law reveals the fundamental contradiction less readily and in a slightly different form than does transnational law or the domestic consideration of international or foreign rules and situations. The contradiction is between sovereignty understood as authority and as equality. In public international law, two national autonomies are opposed. These can be resolved either objectively (external standard) or subjectively (internal standard). An objective solution would be based on a clash of wills and the key to solution would be agreement. A subjective solution would bring values beyond consent into the process. In private international law, the autonomy of the deciding state is set off against its participation in the international community. Should the decision be based on the external community value, the national autonomy of the other state is supported. Should autonomy prevail, the authority of the other state is defeated.¹⁸ Moreover, international regulatory regimes are expressions of national protection as much as of oppression and a regime of mutual respect and tolerance is as internationalist as one of standardization. Thus, in both private and public law, the contradiction appears.¹⁹

¹⁸ See: *Henry Steiner and Detlev Vagts, Transnational Legal Problems, 1976*, for general treatment of these doctrinal areas and problems.

¹⁹ In public law, the contradiction may, for example, appear in the tension between grouped or singular participation in international social life. The law of the sea presents

Furthermore, the contradiction seems different in different doctrinal areas of public international law. The substantive rules of international law, such as those governing the sea, air, space, war and the use of force, reduce to a choice between visions of cooperation and of autonomy for states. But cooperation will be understood to imply either good faith negotiation and compromise or to contain an external set of cooperative standards. This is a return to the choice between consent and external value. Autonomy as well can be interpreted to mean either pursuit of national goals alone, or definition of national goals in harmony with others.

A similar contradiction confronts the internal structural rules of international organizations which enshrine either technical regulation by experts or political autonomy for diplomats. All areas of international technical regulation involve a choice between the establishment of international regimes and the requirement of mutual respect for local regulations. The unity of these tensions can be seen when grouped and singular participation are reduced to a choice between cooperation and fear, for each can express both attitudes. Moreover, both national autonomy and international cooperation can be understood and achieved either as the fulfillment of national authority or as the imposition of external values.

In doctrines of international process, such as those governing actors (states, recognition, individuals, international organizational competence, etc.) or the allocation of jurisdiction, (immunities, local remedy exhaustion claims, nationality, reserved domain, justiciability, etc.) analysis of the argumentative structure will reveal an inability to avoid the substantive choices which are supposed to be factored out of the rules of process. Here the tension is between an objective and a subjective approach to the existence of international claims and powers. This is often presented as the tension between formal rules (*de jure* recognition) and more flexible standards (*de facto* recognition), or between constrained and extensive roles for courts.²⁰

.....

numerous choices between a vision of trust and sharing among nations and one of independence and autonomy. When, as in the case of semi-enclosed seas under UNCLOS III Draft Convention on the Law of the Sea (UN Doc./A/Conf. 62/WP. 10/Rev. 3 of 27 August 1980), international cooperation is mandated, the tension is not relieved, for, under Article 123, it is unclear whether cooperation means good faith negotiation and sufficient self restraint to avoid harming others, or if substantive and particular content can be teased from the duty to cooperate. See: *Rainier Lagoni, The Concept of Cooperation in Enclosed or Semi-Enclosed Seas*, in, 14th Annual Law of the Sea Conference Proceedings, 1981.

²⁰ Recognition doctrine provides a good example of this repeating tension. Recognition may or may not be required for a finding that a state's powers have legal effect. Compare: *In re Al Fin Corporation's Patent* (1969) 2 W.L.R. 1405 (holding that North Korea is a foreign state despite lack of recognition) with *In re Harshaw Chemical Co.'s Patent*, (1964) 41 Int'l L. Rep. 15 (1970) (holding that North Korea cannot, without recognition, be considered

In doctrines concerning the sources of international law, (the authority of custom or treaty, their bindingness on third or new states, unilateral declaration, etc.), the contradiction is between consent based norms which must be externally validated (or implied from "objective" facts) and external norms which must be subjectively justified and defined. This tension cuts across all such traditional sources as treaties, custom, principles or the writings of judges or publicists. By trying to fit new sources such as U.N. declarations and resolutions into these categories we expose the dual nature of each traditional source and the positive and naturalist strains which divide them both internally and from one another.

These three manifestations of the contradiction in public international law are united in two ways. First, they have the same structure. Second, they are transformations of the same underlying moral dilemma. Their similar structure is easier to describe. In each opposition, the extreme poles seem to exclude one another, to imply one another, and to be individually indefensible without the other. In the substantive opposition, national independence seems incompatible with equality, for the triumph of one state's independence is the triumph of another state's communal respect. Yet, if all states are independent they must be equal, for mutual independence precludes a hierarchy just as mutual authority must create one. Moreover, authority can only be defended if respected, just as consent can only be binding if objectively implied. Equality can only be defended if it means separation for fulfillment of national goals, just as external standards gain concrete meaning only through consensus. In the formal or procedural opposition, rules must be interpreted just as standards must be applied. The judge cannot fully abdicate any more than he can fully decide.

a foreign state). If required, recognition may be seen either as a formal expression of consent or as a constitutive 'objective' fact. The interplay of formal requirements and a substantive contradiction can also be seen in the requirement of a 'genuine link' between a state and its formally recognized national for the national to receive international protection from the state. See: *Nottebohm Case (Lichtenstein v. Guatemala)* 1955 I.C.J. Rep. 4. In arguing the Nottebohm case, the first issue was whether the nationality decision was to be made internationally or domestically. Then, if internationally, was it to be made in accord with domestic form (passport) or after inquiry into deeper substantive connections. If deeper connections were to be considered, the passport, of course, might be among them. The structure of these two examples is identical. Recognition presented choices at three levels: state/not state; recognition critical/not critical; as expression of formal consent/as constitutive fact. Nationality initially presented issues on three levels; decision domestically/internationally; on the basis of formalities/substance; including/not including passport. The nationality problem as could be rearranged to present the issues in a fashion parallel to the recognition problem as follows: passport sufficient/not sufficient; sufficient as domestic decision/international criteria; insufficient because form is not enough/other substance necessary; as formal intent/as substantive indicia. This transformational rearrangement is possible because the same underlying conflict structures both problems.

These three oppositions are also united as transformations of the same moral dilemma: the choice between individual national particularism and community.²¹ This is clearly the background to the substantive opposition of authority and equality. The formal opposition and the source of law opposition are transformations of this dilemma because they would each justify intervention (of judges or norms) either on the basis of individual consent (an expression of authority) or of some external standard (an expression of community). These various manifestations, then, are united by common theories of the extent of justifiable intervention. They are all manifestations of a conflict between a vision of a noninterventionist international order, which justifies its rules on the basis of private (treaty) or public (custom) consensus, and a communal order whose intervention goes much farther but which cannot then be meaningful without resorting back to consent.

Domestic or transnational legal doctrines which concern the extent of international law and its municipal implications exhibit the contradiction differently than do public law doctrines. In transnational or municipal contexts the contradiction may initially appear as a clash between governmental branches responsible for maintaining a system of domestic rights and for conducting foreign relations. Opposed are visions of a sovereign free to cooperate with his peers and one restrained by his responsibilities to his citizens. The conflict may also appear as a conflict between domestic law and international rules, or between domestic and international interpretations of international rules as in the context of the Act of State Doctrine or the Connally Amendment.²² When international legal obligations are domestically considered, it may appear in the conflict between governmental branches which arises under the political question doctrine or in the conflict between domestic and international rule hierarchies in considerations of the self-executing nature of international agreements. In these cases, the contradiction would be recognized as the tension between the relations a sovereign has with its constituents and with its peers. All of these familiar dilemmas are manifestations of the conflict between the sovereign's authoritative and cooperative identities. In public international law that dilemma was presented as a conflict between two national particular interests and a cooperative scheme. In the transnational or municipal context, the conflict in the first instance will be between expression by the deciding state of its autonomous or its cooperative identity.

²¹ The unity of the formal and substantive dimensions has been argued by *Duncan Kennedy* (n. 15).

²² See: *Stephen Jacobs, Robert King and Sabino Rodriguez, The Act of State Doctrine: A History of Judicial Limitations and Exceptions*, 18 *Harvard International Law Journal* 1977, 677; and *William Bishop* (n. 2), 69-74.

This is clearly visible in determination of the extent of national participation in international regimes. The decisions to enforce a foreign judgment, recognize foreign court jurisdiction, implement the choice of a foreign law or treaty in domestic courts, or apply international standards to domestic expropriations and treatment of nationals all pose a choice for the deciding state between exercising its autonomy or trusting an external regime. Moreover, the decision to exercise extraterritorial jurisdiction and extend either criminal or economic regulation abroad poses the same choice in reverse. But these oppositions are substantially the same as those present in the international public context. Between states, the autonomy of one is the community of the other. A doctrine which triumphs our particularity forces other sovereigns to cooperate and vice versa. What is domestically presented as a question of trust in foreignness transforms into a systematic choice between cooperation and national particularism. Arguments may be transposed from one context to the other.

Just as the contradiction takes many forms, so it is also extremely fluid. We should not be confused by the variable connections between particular doctrinal choices and the ideals of community and national particularism. I have suggested that as argument moves from facts to ideals it is oddly reversible. In each doctrinal area, two quite different actions are possible. The doctrinal choice between them cannot be described as one between behaviors articulating two ideals, because such interpretations are subject to reversibility or transformation. But these choices do seem similar. They are all binary, to begin with. They are also either expressions of unity or seclusion. Although each choice can express both visions, it expresses each fully and, in relation to its opposite, expresses only one vision at a time.

To explain this symbolically, we could imagine the behavioral choice posed by any one doctrinal area as between behaviors A and B. Although a multiplicity of choices may in fact present themselves, they can be arranged on a line from A to B, be seen to dissolve into practical equivalents of A and B. From one standpoint, A represents community and B, particularity. From another, A represents particularity and B, community. This is reversibility or transformation. But relative to each other, in any one moment, it can be said that it is community and particularity which distinguishes them.

C. Failure of Argumentative Resolution

Just as the contradiction in each area is the same, so the same arguments can be used in each context. The second major element of the puzzle of discourse is thus contained in the first. Only a detailed textual analysis of argument could prove the thesis that arguments are unable to resolve these choices, but, given the structure of the contradiction, it seems at least plausible. In the

first instance this inability is simply reversibility revisited. As we have seen, if the choice is to be resolved in accordance with the principle that "states should live together in community by sharing", two fully incompatible actions are possible. Exactly parallel arguments can be developed for both choices which invoke the same principles. At a second look, however, this element of the puzzle is even more crucial, because metaarguments which are cast in the language of either community or autonomy will also not resolve the tension.

The candidates for international metaprinciple are legion, and quite familiar. Often arguments appeal to the "nature" or "requirements" of the international system; the "status" of statehood, the "nature" of sovereignty, or some other metaprinciple which is meant to suggest that an examination of the relationship between actors will yield a principled method of selecting among alternate types of interaction. This approach to the dilemma posed for doctrine is insufficient because it is circular. Doctrinal discussion seeks to determine precisely what the nature of a particular relationship should be. If the doctrinal discussion is truly open, that is, if other decisions in other nearby areas have not as a *practical* matter determined the outcome, an examination of the status of international actors will not do so either.

More familiar metaprinciples are utility, preserved expectations, or reciprocity. Of these I will say little here. Still, it is more than a linguistic trick to observe that the decision principle "benefit maximization" is meaningless without an external theory of benefit; that to preserve legitimate expectations we must know what expectations are legitimate; that the power to preserve expectations is precisely the power to create them; or that an international Golden Rule cannot tell us how "we would have them do unto us". All of these metaprinciples return us to an argument about the ideals to be implemented²².

D. Failure of Authoritative Resolution

Finally, an examination of international legal argument produces a third experience of indeterminacy. Arguments about the authority of arguments will

²² Literature which attempts to fit law obedience into the constellation of national self interest has affected the content of law by emphasizing reciprocity. But reciprocity will not tell a state whether it prefers a world in which states respect treaties or in which they do not, for example. Either strictness or mercy may be reciprocal. At this point one is returned to a decision to follow or break the treaty. At first treaty breaking is associated with national autonomy, and following with international solidarity. But the reverse may as well be true. To release a state from a harsh treaty may be an expression of merciful community solidarity, while to hold a state to such a treaty may be an expression of national autonomy. Moreover, harshness itself may reflect love or hate, just as mercy may be either loving or smothering. For a discussion of international reciprocity as a legal norm, see: Fisher (note 5).

also be unconvincing and will exhibit the same transformative structure as did the arguments themselves. Naturally, one would only uncover a crisis at this level after the indeterminacy of normal argument had been understood by all participants. Only then would advocates be forced to say "this version may be unconvincing, but it is authoritative".

All arguments about the authority for a norm appeal either to some form of consent, or to some form of deal outside of consent. These are exclusive possibilities. Yet no single appeal can be simultaneously to both. They are mutually exclusive. A norm is authoritative either because states say so, or for some other reason which overrides consent. By definition, if consent is the basis for a norm, to be authoritative, it must overrule other sources of authority. Likewise, to be authoritative, a normative source must be able to overrule consent.

Yet neither of these sources alone can justify a doctrinal choice. The criticisms of absolute positivism and naturalism are too familiar to require elaboration. The positivist is unable to explain why consent should be binding against a dissenter (and in every contentious case someone will by definition object) without reference to a higher norm. Likewise, the naturalist can not explain the content of extraconsensual norms except by reference back to consensual standards.

This third experience of indeterminacy heightens the experience of crisis for practitioners and thereby connects the crisis of theory with that of practice. Set free by theory, practitioners can manipulate discourse²⁴. This third experience of indeterminacy then, is the drive shaft which connects the two spheres of theory and action.

E. The Problem Unified: A Model of Doctrine

Should the preceding description of the crisis of doctrine prove tenable, we might imagine a theory of discourse which could crudely borrow from the field of structural linguistics²⁵. Ferdinand de Saussure described the mechanism of language in the following way:

The system is a complex mechanism that can be grasped only through reflections; the very ones who use it daily are ignorant of it . . .

²⁴ It is in part this phenomenon which led me to suggest that terrorism may be a response to theoretical emptiness in *David Kennedy*, Book Review of Henkin, *How Nations Behave*, 21 *Harvard International Law Journal* 1980, 301.

²⁵ See: *John Lyons* (n. 4) and sources cited therein at 453 ff.; and *Marc Eli Blanchard* (n. 12). The linguistic model of structuralism is summarized in *Philip Petit* (n. 4). See also: *Rosalind Coward* and *John Ellis* (n. 4).

Language is a system of interdependent terms in which the value of each term results solely from the presence of the others²⁶.

This idea remains at the root of structural linguistics. Language is neither simply a system of names for tangibles nor a system of value. Rather it is a shared and largely unconscious structure which both controls and permits communication by the choice and recognition of the variable contents presented according to fixed patterns. Using a liberal poetic license, it can serve as the starting point for explanation of a theory of legal argument. Focus on the last sentence in the above quotation. By replacing the word "language" with "discourse" and "term" with "argument" the sentence can be made to read:

Discourse is a system of interdependent arguments in which the value of each argument results solely from the simultaneous presence of the others.

At first, this seems to say nothing more than that the meaning or strength of individual arguments can only be gauged relative to each other. The addition of a transformational element changes this theory of linguistic meaning into a theory of discursive communication.

The goal of structuralist descriptions of the active dimension of language was to explain how the process of setting words together could be both open to new combinations and yet comprehensible; exactly as we search for a discourse which could be both open-ended and outcome determinative. For the linguists, these two conditions were necessary for communication. In legal theory they are necessary for persuasion. Although sceptical about the existence of an "incorporeal syntax" governing the relationship between individual words, Saussure admitted that both speakers and listeners must at a minimum have a complex memory bank of legitimate word combinations at their disposal²⁷. To account for the comprehensibility of novel combinations, later attention has focused on these rule patterns²⁸.

²⁶ *Ferdinand de Saussure* (n. 4), 73 and 114.

²⁷ See *Philip Petit* (n. 4), 14.

²⁸ *Philip Petit* (n. 4) provides a good introduction to this "syntagmatic approach." *Noam Chomsky's* work in this area on a 'generative grammar' is best known. See e.g.: *Topics in Generative Grammar*, 1966. This second element is particularly important for a theory of argument because the individual is displaced as a repository of initial essence. *Rosalind Coward* and *John Ellis* (n. 4), 3-4. Without entering the battle over the source of these structures (innate and universal or cultural) or over the form of this syntax (unified or split into deep and surface structures) we might imagine that the relationship between patterns visible in theoretical and in doctrinal discourse may be linked just as deep and surface structures of language are linked.

Communication seemed precluded by Saussure's preliminary observation that words alone are meaningless. A structural syntax resurrected the possibility of openended comprehensible communication. The meaning of linguistic units in combination is only given by an *a priori* shared understanding of the structural rules governing their assembly. Persuasion cannot be so easily resurrected. If arguments are meaningful only in opposition, they can never be determinative, for in their triumph, their meaning would be lost. More importantly, the development of an argumentative syntax will not solve the problem. It would ensure that discourse can be communicative but cannot be dispositive.

We might visualize discourse as follows. The speaker assembles arguments according to syntactic rules. To be understood, the same framework of recognition must be present in the listener. The meaningfulness and power of arguments is determined by a shared structure²⁹. If the listener were to fully elaborate the argumentative permutations permitted under that structure, he could have invented and recognized the argument without the speaker. So also with his response. The arguments are meaningful only in combination and can be combined only in accordance with preexisting rules. This renders empty the possibility that the listener may be convinced by something argued³⁰.

To me, then, international law discourse is a conversation without content — a ritualized exchange which avoids confronting the very question it purports to address. A statesman speaks. A diplomat hears. The argument is either recognized and accepted or it is not. If so, a response may be given and received. But no one is persuaded. Recognition means simply that the argument formally corresponds with a preexisting structural set of rules. With an underlying value consensus or pattern of coercion, the conversation may at any point be ended by action. But this action was not compelled by the power of the argument. The action reflects either the underlying value choice, or the pattern of coercion. The better the underlying rules are understood, the more often good, recognizable arguments will be put and paradoxically the less persuasive will listeners find these arguments.

²⁹ Whether investigation of those structures can yield information about inner cognitive values or universal values is another question. See: *Jean Piaget* (n. 4). At the least such an investigation would reveal what the very facility of argument tends to obscure: the basic quandary which structures the opposition of arguments and the ideological premises which motivate speakers.

³⁰ Although such a vision is related to a view of law as a communication tool, I do not mean communication about the content of the issue raised, and as a result about acceptable behavior, as *Lon Fuller* suggested when he spoke of "stable interactional expectancies" in *Human Interaction and the Law*, 14 *The American Journal of Jurisprudence* 1969.

IV. *The Problem of Theory: Discourse about International Law*

A. Thesis: Failure of Explanation Results from Transformation of a Contradiction

International legal practitioners experience the indeterminacy of discourse directly. Those who describe, analyse and speculate about the work of practitioners seem unable to account for this indeterminacy and their inability is visible in a controversy within international legal theory which stubbornly resists solution. In my view, the dilemma which plagues theory, like the dilemma of discourse, has a binary and transformational structure. Any single manifestation of this structure, in a scholastic school or in the work of one theoretician, may not be clearly visible, and will not make sense to us as an element of a broader structure because each manifestation is only meaningful as a transformation of the basic dilemma³¹. That can best be illustrated by analyzing the relationship between three distinct theoretical inquiries which have occupied international legal scholars.

First, scholars have sought to justify the claim that international law is an affair of norms by explaining the source of law's binding force. Second, they have explored the size and influence of international law: this has often been done by seeking to differentiate and compare international law and international politics. Third, they have sought to explain how law actually works: the mechanics by which norms influence behavior. The exploration of these questions has often overlapped, but inquiries which do not shed light on one of these problems seem outside the mainstream of legal scholarship. Each of these inquiries has produced two radically opposed schools. Each has developed as an attempt to bridge or avoid the opposition created by its predecessor. It is my contention that these shifts are transformations of the basic dilemma and, as such, relate the various inquiries to one another in a fairly rigid way³².

³¹ Therefore systematic criticisms of various approaches alone will not illuminate the controversy which unites them. Nevertheless, this criticism process as a whole is the force behind general theoretical disintegration. See: *Karl Popper* (n. 4), vii, 215—250.

³² My description of these transformations, while cast in the language of historical development and logical causality is crudely ahistorical and extremely stylized. There may be no pure adherents to the positions I describe and their movements may have been motivated for entirely different reasons than I suggest. I mean to suggest that to the extent scholars fell within the aura of one or another of these positions, their argument was structurally, or aesthetically, or impressionistically related to other positions in the way I describe. For another example of this style, see: *William Simon: The Ideology of Advocacy: Procedural Justice and Professional Ethics*, 30 *Wisconsin Law Review* 1978.

B. Contradiction: The Source of Law

The theoretical inquiry into the source of the normative power of international law arose in the 18th century from what had been a largely descriptive scholarship. Earlier scholars had compiled and elaborated international legal rules. Some found these rules by examining state practice⁸⁵, others by elaborating quasi-religious models⁸⁴, and still others by a combination of methods. As theoretical work became less descriptive and more analytical, what had been techniques of description became theories of legitimacy. To some, rules were binding *because* they were rooted in practice⁸⁶; to others because they were elaborations of an extrabehavioral value structure⁸⁷. As this debate became ever more pronounced, partisans tended to rewrite scholastic history to impose one of these views on earlier scholars who had hardly been concerned with analytical justification.

As descriptive techniques there had been much overlap between these positions and a compromise "eclectic" position seemed tenable⁸⁷. As they developed,

⁸⁴ A short international legal history is *Arthur Nussbaum, A Concise History of the Law of Nations*, 1954. A standard doctrinal history is *J. H. W. Verzijl, International Law in Historical Perspective*, 1968. International legal scholarship is rarely treated historically except as an appendage to a history of political theory. See: *E. B. F. Midgley, The Natural Law Tradition and the Theory of International Relations*, 1975; *A. de la Pradelle, Maître et Docteur du Droit des Gens*, 1950; *F. Parkinson, The Philosophy of International Relations*, 1977; and *F. Melian Stawell, The Growth of International Thought*, 1929.

⁸⁵ See: *Francisco Vitoria, The Indians Recently Discovered and The Law of War Made by the Spaniards on the Barbarians*, 1532; *Francisco Suárez, On Laws and God as Legislator*, 1612. See: *Josef Sódor, Francisco Suárez und das Völkerrecht*, 1973; *Antonio Truyol Serra, Die Grundsätze des Staats- und Völkerrechts bei Francisco de Vitoria*, 1957; and *James Brown Scott, The Catholic Conception of International Law*, 1934, and *The Spanish Origin of International Law*, 1928.

⁸⁶ See: *Richard Zouche, An exposition of Feacial Law and Procedure, or of Law between Nations and Questions Concerning the Same*, 1650; *Samuel Rachtel, Dissertations on the Law of Nature and of Nations*, 1676; *Cornelis Bynkershoek, Questions of Public Law* 1737; *Johann Jacob Moser, Essay on the Most Recent European Law of Nations*, 1777—1780; *Georg Martens, Essay on the Existence of a Positive European Law*, 1787; and *Accounts of Memorable Controversies of the More Recent European Law of Nations*, 1800—1802; *Robert Phillimore, Commentaries Upon International Law*, 1861. These authors are treated, especially as they were important for the growth of international organizational theory, in *Walter Schiffer, The Legal Community of Mankind*, 1954. Otherwise, positivist historiographers who might discuss their work generally downplay the importance of scholastic developments in favor of an analysis of practice. See: *Arthur Nussbaum* (n. 33) 164—185.

⁸⁷ See: *Samuel Pufendorf, On the Law of Nature and of Nations*, 167; *Christian Wolff, Law of Nature Treated According to Scientific Method*, 1740—1748; *Emmerich de Vattel, Le Droit des Gens*, 1758; on Vattel and this period generally, see: *Francis Stephen Ruddy, International Law in the Enlightenment*, 1975; and *Walter Schiffer* (n. 35). See also: *Francis S. Ruddy, The Acceptance of Vattel*, in *C. H. Alexandrowicz, Grotian Society Papers*, 1972, 177—196.

⁸⁸ *Hugo Grotius, On the Law of War and Peace*, 1624, has been made out, for example, to have been the pioneer eclectic. See: *Arthur Nussbaum* (n. 33), 102—114. See also: *J. G.*

however, the two analytic positions became increasingly polarized. Rules were either binding on states because a higher order so dictated (in which case this dictate by definition would overrule dissent) or because states consented. If state consent was to be the basis for rules of law, states must be free to consent — they must be liberated from any higher principle. No tenable compromise position seemed possible. Yet neither was either absolute positivism or naturalism satisfactory.

Equally striking has been the unconvincingness of subsequent "neo-positivist" or "neo-naturalist" positions. Repeated attempts have been made to solve the dilemma of naturalism by justifying a sociological inquiry of one sort or another into practice to determine the content of natural norms⁸⁸. Likewise, positivist scholars have developed a series of ever more elaborate "theories" of law which could retain law's roots in consent and still explain its force against the dissenter⁸⁹. To each other, however, these positions seem indistinguishable from earlier extreme statements of naturalism or positivism.

C. Transformation: The Size of Law

Positivism, the dominant theoretical strain for more than a century, was associated with extreme cynicism about the possibility of binding interna-

Stärke, The Influence of Grotius upon The Development of International Law in the Eighteenth Century, in *C. H. Alexandrowicz* (n. 36), 162—176. *L. Oppenheim and Herold Lauterpacht, International Law*, 1955, view Grotius as a natural law precursor, while the opposite view is held by *Paul Guggenheim, Jus naturae und Jus gentium als geistesgeschichtliche Grundlagen der zeitgenössischen Völkerrechtsordnung*, in *Festschrift für J. Spiropolous*, 1957, 213—225.

⁸⁹ Much neopositivist literature is surveyed by *Josef Kunz in Natural Law Thinking in the Modern Science of International Law*, 55 *American Journal of International Law* 1961, 951—958. See also: *Richard Falk*, (n. 5), 1970), ix—xii. Representative of modern approaches are *Alfred Verdross, Völkerrecht*, 1964; and, with *Bruno Simma, Universelles Völkerrecht, Theorie und Praxis*, 1976; *Charles de Visser, Theory and Reality in Public International Law*, 1957; and *Myres McDougal, Law and Minimum World Public Order*, 1961. McDougal's unique contributions are discussed in *Philip Allott, Language, Method and the Nature of International Law*, 45 *British Yearbook of International Law* 1971, 79—135 at 121—133. A recent work in this tradition is *Charles Beitz, Political Theory and International Relations*, 1979.

⁹⁰ Early neopositivist efforts are described in *C. Wilfred Jenks* (n. 5), 617—627; in *Josef Kunz, The Vienna School and International Law*, in *New York University Quarterly Review* XI, 1934, and in *Richard Falk* (n. 5), 1970), ix—xii. Landmarks in this development were *Dionisio Anzilotti, Lehrbuch des Völkerrechts*, 1929; *Hans Kelsen, The Essence of International Law*, in *Karl Deutsch and Stanley Hoffman* (n. 6), 85—92, and *The Pure Theory of Law*, 1967; *H. L. A. Hart, The Concept of Law*, 1961, especially at 230—231; *Leo Gross, The Peace of Westphalia 1648—1948*, 43 *American Journal of International Law* 1948, 20—41, and *States as Organs of International Law and the Problem of Autointerpretation* in *Georg Lipisky* (ed.) *Law and Politics in the World Community*, 1953, 59—89; and *Georg Schwarzenberger, The Inductive Approach to International Law*, 60 *Harvard Law Review* 1947, 539—570.

tional norms⁴⁰. The neopositivist development of a domestic system of sovereign authority into an international regime based on sovereign consent attempted to avoid this cynicism. But while the notion that a positivist sovereign could not be bound *without* his consent eliminated the possibility of a naturalist scheme, no theorist satisfactorily explained why a sovereign could be bound *with* his consent.

The critical success of both schools rendered inquiry into the source of law increasingly unproductive, and scholars devoted increasing attention to this pervasive cynicism. The goal was to isolate normatively controlled behavior from behavior expressing crude or uncontrolled national interest: to separate international law from international politics. This debate descended almost immediately into two polar positions. For some it was all law, for others, all politics⁴¹.

Interestingly, the opposition of law and politics was connected in a very complicated way to the earlier opposition of naturalism and positivism. The tension between realists and idealists had always been quite close to the surface in the naturalist-positivist debate. Idealism seemed associated with naturalism, and realism with positivism. But neopositivists tended to bring idealist argument to bear against their positivist forbearers. Similarly, neorealists seemed to distance themselves from earlier naturalists with realist argument. While naturalists had opposed positivism with idealism, neopositivists had now overtaken this position. Likewise, while positivists had always used realism against the naturalists, they now found this to be the province of neorealists⁴².

Although both positivism and naturalism are thus compatible with either realism or idealism, one can be transformed into the other only in certain ways. Imagine two notions of the relationship between law and behavior. Legal rules might be close to, fused with and uncritical of behavior patterns, or law might be separate from and critical of behavior. My assertion is that each pole of the naturalism-positivism opposition can only be transformed into either the idealist or realist position by relying on a vision of law as either separate from or fused with behavior. These two debates, then, are transformations of the opposition of separation and fusion.

⁴⁰ See for example: *John Austin*, *The Province of Jurisprudence Determined* (Hart ed.), 1954. For an early response, see: *Thomas Walter*, *A History of the Law of Nations*, 1899, 2-19.

⁴¹ See for example: *George Kennan* (n. 6), *Hans Morgenthau* (n. 6); *Stanley Hoffman* (n. 6), *John Fried*, *How Efficient is International Law?*, in *Karl Deutsch* and *Stanley Hoffman* (eds.), (n. 6), 93-132.

⁴² These two developments can be experienced by reading the naturalist scholarship in chronological order from *Francisco Suárez* (n. 34) to *Myres McDougal* (n. 38), or by reading positivist scholarship from *John Austin* (n. 40) to *Hans Kelsen* (n. 39).

This can best be illustrated by reconstructing typical argumentative movement between positions. In the following imaginary argument a criticism of the politics or realist position (i. e., the idealist position) is transformed into a criticism of the positivist position (i. e., the naturalist position), by arguing from the perspective of law fused with behavior.

If all action is political, we cannot fully explain the coincidence of law observance or our sense of law present in the very patterns of political interaction. An instrumental account of individual law related behavior fails to account for our sense that law observance at least occasionally transcends even a long term understanding of risk aversion or profit maximization. Law separated from individuals seems incompatible with our sense of law as a shared internalized system of value. We cannot imagine the source of content for a law separate from social consensus.

If legitimate law is an exercise of individual or communal will (positivism) we are unsure how the rule that law is will can itself be justified. In the following paragraph I transform an argument critical of law or idealism (expressing the realist position) into one critical of naturalism (positivism) by relying on a vision of law separate from behavior:

If all action is legal, we cannot understand instances of conflict or our nagging sense of the separation of ought and is. An intrinsic account of law fails to account for our sense that conflict about norms may create deviation from ideals. If law is legitimized as shared consensus or custom, the concept of an ideal or rule is trivialized, for all deviations are expressions of changing consensus. Law fused with individual action seems inadequate to explain the persistent view of individual policy makers that external norms must be considered. If law is legitimized by its fusion with social life, we cannot understand normative criticism. If law is an expression of our ideal made manifest in life (naturalism) it seems devoid of content except through willed consensus.

It is no coincidence that power politicians, in their attack on legal idealists, set up a positive model of law. Nor is it a coincidence that legal idealists rely on a broad naturalist model of law in attacking the power politician. But positivism transforms into the cynicism of the power politician only when law is consistently understood to be separate from behavior. Naturalism transforms into legal idealism only when law is understood to be merged with social life. A naturalist is only able to avoid cynicism about law's importance by arguing from the perspective which sees law in social life. It was this realization which motivated the neo-naturalist movement. A positivist, on the other hand, can be seen as cynical of law's strength only when he continues to view law as critical of behavior.

But these positions can be reversed. A positivist can be enthusiastic about law's strength, while a naturalist can doubt it. This is accomplished when the naturalist thinks of law separate from behavior — as an abstract and distant force. Then, he is compelled to an absolute idealist position which will not find the results of law's force in daily life. His conclusion must be that in this unenlightened age, state action is political. This is the absolutist position against which neo-naturalists reacted.

On the other hand, some positivists are enthusiastic about law's strength. This position is achieved by arguing from the perspective of law fused with behavior. It was this realization which motivated the neopositivist movement. By considering law to exist in behavior, the positivist can avoid the cynicism forced upon him by a perspective committed to a law which is critical. This is the real significance of the neopositivist substitution of "consent" for "authority".

D. Reconstruction: The Mechanics of Law

As these two inquiries seemed less productive, scholars began to focus ever more on the mechanism producing law abiding behavior⁴⁸. These reconstructive theories became increasingly complex as they grappled with the relationship between developing legal norms and changing patterns of state behavior. Complex cross-disciplinary models drawing on political science, psychology or sociology were developed⁴⁹. But elaborate feedback systems to the contrary notwithstanding, no model could explain whether law led or followed change. The theory depended upon the theoretical vision of actors, who must view each act as either law abiding or law creating⁴⁸. The behavioral approach has not yet played itself out and it is therefore perhaps premature to imagine it as a transformation from the idealist/realist opposition. It must remain a hypothesis at this stage that such a development would also be a transformation of the separation/fusion dichotomy.

⁴⁸ See for example: *Louis Henkin* (n. 5) or *Roger Fisher* (n. 5).

⁴⁹ See for example: *Robert Seidman*, *Law and Development: A General Model and Agenda for Research*, University of East Africa Social Science Conference, December, 1969.

⁴⁸ This realization entered the literature in the form of an argument that discussion of normative schemes in developing nations was cultural imperialism of a subtle sort. By convincing actors that norms could control behavior theorists merely hid them from the theoretical discoveries they had already made. See for example: *David Trubek* and *Marc Galanter*, *Scholars in Self-Estrangement: Some Reflections on the Crisis in Law and Development Studies in the United States*, 4 *Wisconsin Law Review* 1974.

E. The Problem Unified: A Model of Theory

These three scholarly inquiries are united because they all sought to avoid, and then succumbed to, a single dilemma. To develop an overall theory of the fundamentality of the underlying structure I am proposing would require other examples of this sort of transformation. A further clarification of the transformational rules with govern movement between manifestations would allow us to develop ever more sophisticated theories, just as a structuralist analysis of discourse would produce better arguers. But such scholarship would also destroy our faith in the possibility of any definitive reconstruction. Moreover, such an analysis could lead to the development of a model of scholarship something like the following.

There is a basic theoretical dilemma. One may imagine law to be either critical of or grounded in state behavior, and neither understanding of law is sufficient. A law separate from and critical of behavior suffers from what I term the problem of normative source or content. That is, such norms seem incapable of determinative application. The rule applicable to a given behavior may be too vague to permit violations to be distinguished from compliance. This presents itself as a challenge to the tools of legal reasoning, which seem inadequate to the task. It may also appear as the inability to distinguish behavior which a permissive rule renders privileged from behavior which falls within a gap in the web of rules. That is, it appears as the indistinguishability of law and non-law. To those who see law separate from behavior, the core of critical rules becomes smaller as the rest of behavior becomes privileged or falls within a lacuna. A law fused with behavior which falls within a gap in the web of rules. That is, it appears as a violation. When behavior appears to violate a norm, it seems impossible to distinguish deviant activity from that which is constitutive of a new behaviorally based norm. Each dissenter seems able to rewrite the norm. Absent an external rule, all contranormative behavior might as well be pronormative.

The problem of normative source will devour the law which is the slightest bit critical of behavior. The problem of normative legitimacy will devour any legal scheme based however slightly on the fusion of law and practice. But these problems must be solved simultaneously to answer the question of law's source or of its strength. This could be accomplished only by an argument which attempted to combine, or to switch between, these two visions of law. The rules of transformation which govern these switches and combinations would determine the nature and failure of the resulting scholarship.

In the process of transformation the questions addressed by scholars would change. Each of the three large scholastic efforts I have described, for example,

redefining the job to be performed by practitioners. We must build a new model of conflict resolution, and flesh it out with the same care which has been lavished on the traditional model for so many years.

VI. *Thesis for a Dynamic Model of Theory and Practice*

The key to joining theoretical and practical work lies in focusing on the structure rather than the content of discourse. It has been easier to substantiate the claim that a structural approach enlarges our awareness of the dilemmas of both theory and practice than it is to substantiate the claim that it permits us to unify them. To do so, we must explain how the transformations possible in each realm depend on developments, and above all attitudes, in the other realm.

Scholars experience the transformation within their work and in the practice of statesmen as increasing cynicism about practice and jadedness with scholarship. Scholarship changes rapidly and yet it remains somehow frustrating and incomplete. At any moment the debate seems to be richly diverse and complete, yet as scholars pose new questions, others are able to develop a completely new panoply of arguments. As scholars reform the questions to be addressed, their own reconstructions transform the basic dilemma, but seem convincing only to themselves. To the scholar who has been through several such shifts, new positions seem somehow familiar and it would be easy to conclude that there was nothing new under the sun. The process of critical thought makes everything seem familiar and unsatisfying.

For practitioners, the process is not as direct. Still, an analysis of the history of international legal argument could reveal the following crudely stylized developmental pattern. Initially, doctrinal areas seemed separate and rules were explained as the working out of very specific relationships. The process of discourse, the process of continual movement between fact and principle or of analogous argument, slowly unified doctrines into a single system of principles and applications. This unification process revealed the alternative applications possible for any principle and the alternative justifications possible for given behavior patterns. The wider the number of areas brought within the discourse, the greater the awareness of this reversability and contradiction. Practitioners come to rely on broader and broader generalities and, paradoxically, to argue more often on a "case by case" basis. Eventually practitioners' faith in the ultimate meaning of doctrine is reduced.

One might imagine that this growing realization would feed on itself up to a certain point. But when practitioners also recognized the indeterminacy of arguments about *authority*, they would come to see all legal talk as window

dressing. So long as actors retain faith in the mediational strength of theory, action will be affected. Because theory is a way of understanding and structuring events in the hands of practitioners, so long as the theory seems to expand, it will.

Finally, the process of legal argument renders meaningful legal argument impossible. As law develops hierarchically, faith in the meaningfulness of higher level distinctions is eroded by each reappearance of the tension. As the level at which meaningful distinctions seem possible becomes lower and lower, boredom and exasperation with the law increases. The core area of successful mediation becomes smaller and smaller as the doctrine factors out of law difficult questions through a process of trivialization. At the same time, however, the horizontal expansion of legal theory brings larger areas of social activity within the legal order. In the process, the model mutates in all its previous applications to become more general. As it does, it becomes abstract and less outcome determinative.

Eventually, the model expands to account for contradictory results within the same framework. Recent developments have brought us close to such a doctrinal explosion. I have argued that the true significance of the recent developments which most modern theorists describe, such as the call for a New International Economic Order, Law of the Sea, Law of Human Rights, the advent of new international actors, the growing role of ideology and challenges to the neutrality of international law, organization and diplomacy lies in the theoretical perceptions they spawned. They expose the contradictions in legal theory and weaken both theory and discourse. I have suggested that this process may have had at least two sorts of results. First, policy makers for the great powers who share a structural interest in systematic continuity may find theories of power politics increasingly attractive and may increasingly dismiss proponents of law as "legalistic" or useful only as apologists. Because they have been led to this dismissal by a loss of faith in the determinativeness of legal reasoning, and hence in the separation of law and ethics, they may be led to dismiss the moralist as equally irrelevant. This reveals a strange paradox: the more legal scholars press statesmen to wrap their action in the cloak of legality, the more statesmen lose faith in ethical as well as legal constraints on their behavior. Second, the lesser powers, which, regardless of ideological position, share a structural interest in systematic revision, may also be led to lose faith in the theoretical and ethical limits on their behavior. Again the strange paradox: the more both major ideological camps instruct the lesser powers in the law, the less restrained everyone feels.

By far the most difficult issue posed for a theory such as the one I am suggesting is the connection between theoretical and practical problems. The

argument about discourse is fairly straightforward, as is the analysis of theory. Both spheres exhibit the same structure: a basic dilemma repeatedly transformed and thereby hidden. But how are these two connected? A beginning can be made by suggesting that both spheres are transformations of the same dilemma. The problem of separation and fusion is clearly linked to the problem of aloneness and solidarity. A start can also be made by suggesting that the same rules of transformation control theory and discourse and that both dilemmas rise from the same common paradigm.

Further, in this dynamic vision, we see theoretical developments affecting theory and vice versa. In both cases contradictions are exposed and an exploration speeded. My guess is that examination of this process will tell us something deeper about the role of the common paradigm, not only in establishing the two dilemmas, but in artificially separating them as it separated subject from object, domestic from international and states from each other. At this point that remains a guess to be tested by examination of the process by which transformations in both fields are fueled by both the pressures of logical operations and the introduction of new cases, for the engine of transformation seems to be critical theory and adversarial argument.

VII. Conclusion

I have suggested that the discourse and scholarship of international law are in crisis. It is a crisis which cannot be resolved without abandoning the paradigm we all share of international society. It might well be asked, however, why such a sweeping change is necessary when scholarship and discourse appear in the great run of instances actually to solve problems. To what tasks and questions could scholars more profitably turn their attention?

To my mind, we must abandon our paradigm because we have no choice. It has abandoned us. That is the meaning of a discipline in crisis, whose arguments become increasingly vacuous and whose scholarship becomes ever more complex but unconvincing. If we are not already stunned by these inadequacies, we soon will be. New developments in the law of nations, most particularly the presence of new actors and subject matters, continue to demonstrate the inconsistency of discourse and the hollowness of theory. Much of current scholarship-as-usual has the common goal of demonstrating that while these changes provide strong challenges to our notion of international law, that law is flexible enough to adapt to them. In the course of demonstrating their flexibility, however, this scholarship provides the tools for understanding that this expansion will expose a contradiction which can no longer be hidden.

In a more practical sense, scholars must pursue the nature of this crisis because practitioners are doing so. The process of cynical manipulation of doc-

trine will not be pushed back by the exhortations of traditional scholars. It is doctrinal emptiness which induces such manipulation, not the perniciousness of statesmen. We have not provided the tools with which the dilemma that confronts statesmen can be handled. Scholars can only arrest this trend by providing statesmen with an alternative style of discourse aimed at revealing and resolving the dilemmas of social life, rather than hiding them or factoring them out of the discourse of law.

Finally, I think we must pursue a different scholarship because our current approach is not neutral. Our goal, after all, has been to solve the riddles posed by a common paradigm of international society dominated by the idea that freedom and peace would be possible only in a world of law. Should that riddle be unsolvable, one might imagine several sorts of results. First, by protecting the model, we might induce statesmen to believe that they may act as the model implies: rapaciously except when confronted with law. Statesmen learn their identities from the model as surely as do scholars. Should a rule of law fail to materialize, the chaos would be greater in a world whose actors so understood their identities.

Second, the activity of scholars and practitioners tends to support the vision that a rule of law is possible in the international community and that to some extent it already exists. Should such claims prove false, those who were led to participate by the promise of neutrality will have been deceived. A rule of law is supposed to create a regime of procedural justice which rationally arbitrates substantive claims. The tools of that arbitration are argument and discourse. Should such a scheme be possible, we might well exhort the weak to participate as procedural equals with the rich, for procedural equality could result in justice. Should argument be a cover for an external resolution of a basic substantive dilemma, on the other hand, participation in a free market as equal bargainers will increase the gap between the weak and the strong. A scholarship and legal practice which encourages the myth of procedural neutrality reinforces the belief of the less fortunate that the legal system will liberate them.

Rather than elaborating the arguments of discourse with a view to resolving the dilemmas of doctrine, we should turn our attention to elaboration of the transformational rules governing discourse for hints about the structure of the dilemma which lies beneath. Rather than propounding ever more elaborate answers to the questions of source, strength and effect posed by the common model, theoreticians might focus on the dilemma itself and on the connection between its appearances in theory and practice. Such scholarship might then be able to develop the language and tools with which practitioners could confront the basic dilemmas of international social life.

Contents

Comments

RAINER LAGONI: Antarctica: German Activities and Problems of Jurisdiction over Marine Areas 392

IGNAZ SEIDL-HOHENVELDERN: Zum Urteil des Schiedsgerichtshofes für das Abkommen über deutsche Auslandsschulden zur Young-Anleihe 401

Documentation

Entscheidung des Schiedsgerichtshofes für das Abkommen über deutsche Auslandsschulden in Sachen Regierung des Königreichs Belgien, Regierung der Vereinigten Staaten von Amerika, Regierung der Französischen Republik, Regierung des Vereinigten Königreichs von Großbritannien und Nordirland, Schweizer Bundesrat gegen Regierung der Bundesrepublik Deutschland, vom 16. Mai 1980 414

Im Ergebnis abweichende Meinung der Herren Robinson, Bathurst und Monguillan 453

In der Begründung abweichende Meinung von Professor Arndt 486

Reports

HANS-JOACHIM SCHÜTZ: Die Tätigkeit der International Law Commission im Jahre 1979 488

HANS-JÖRG CONZELMANN: Die Tätigkeit des Europarates im Jahre 1979 510

MICHAEL H. BECKER: Die Europäischen Gemeinschaften im Jahre 1979 533

WULF HERMANN: Die Tätigkeit des Nordischen Rates im Jahre 1979 556

Book Reviews