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DEATH OF THE LAYMAN: THE LEGACY OF DECONSTRUCTION AND THE PHILOSOPHY OF INTERNATIONAL LAW

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In what would become his last interview, Jacques Derrida posed the question of the legacy of his work.[1] What would happen to deconstruction after his death? Derrida offered two contradictory hypotheses:

> *"[J]'ai simultanément, je vous prie de me croire, le double sentiment, d'un côté, pour le dire en souriant et immodestement, on n'a pas commencé à me lire, que s'il y a, certes, beaucoup de très bons lecteurs (quelques dizaines au monde, peut-être), au fond, c'est plus tard que tout cela a une chance d'apparaître ; mais aussi bien que, d'un autre côté, quinze jours ou un mois après ma mort, il ne restera plus rien. Sauf ce qui est gardé par le dépôt légal en bibliothèque. Je vous le jure, je crois sincèrement et simultanément à ces deux hypothèses."*[2]

How does one begin to read these two hypotheses? That there are two principal strategies for dealing with one's intellectual legacy or, in economic terms, one's accumulated intellectual capital? That just as this capital may be re-invested in a new undertaking that over time may produce interesting intellectual gains, it may also be simply conserved as such by depositing it on a savings account – a *dépôt légal* – where it remains secure but is bound to attract only limited (legal) interest? In other words, that one may adopt an entrepreneurial or a conservative investment strategy, aware that one is riskier than the other. While an investment in a new undertaking may promise more interesting intellectual gains, the risk exists that the invested capital is consumed and wasted before any gains are in fact realized, without attracting any substantial interest. Conversely, while the interest attracted by a

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[1] *Le Monde*, 18 Aug. 2004.

[2] *Id.*

savings account may be low, it nonetheless tends to better secure the accumulated intellectual capital.

In the same interview, Derrida indicated that he was himself a risk-taker and that he preferred the entrepreneurial investment strategy. Indeed, he suggested that at least part of his legacy should be invested in the development of a new concept of European international law, or a new European concept of international law:

> *"L'Europe se trouve sous l'injonction d'assumer une responsabilité nouvelle. Je ne parle pas de la communauté européenne telle qu'elle existe ou se dessine dans sa majorité actuelle (néolibérale) et virtuellement menacée de tant de guerres internes, mais d'une Europe à venir, et ce qui se cherche. En Europe ('géographique') et ailleurs. Ce qu'on nomme algébriquement 'l'Europe' a des responsabilités à prendre, pour l'avenir de l'humanité, pour celui du droit international – ça c'est ma foi, ma croyance. Et là, je n'hésiterai pas à dire 'nous les Européens.' Il ne s'agit pas de souhaiter la constitution d'une Europe qui serait une autre superpuissance militaire, protégeant son marché et faisant contrepoids aux autres blocs, mais d'une Europe qui viendrait semer la graine d'une nouvelle politique altermondialiste. Laquelle est pour moi la seule issue possible.*
>
> *Cette force est en marche. Même si ses motifs sont encore confus, je pense que plus rien ne l'arrêtera. Quand je dis l'Europe, c'est ça : une Europe altermondialiste, transformant le concept et les pratiques de la souveraineté et du droit international."*[3]

While Derrida did not translate his suggestion into deconstructive action, such an undertaking was posed as a question, as a possibility, as a challenge. This was not an isolated incident. Derrida's interest in transforming, revolutionizing if you will, the concept of international law became a recurring theme in his work and formed part in the shift of his philosophical interest that took place in the course of the 1980s and 1990s – a shift from reading philosophical and literary texts to legal and political

[3] *Id.*

issues.[4] This shift was not a coincidence in the radical sense of this concept, *i.e.* in the sense that this new field of deconstructive inquiry did not only not coincide with the field in which deconstruction developed – philosophy and literature. It was also not a coincidence in the sense that this encounter between deconstruction and law was not preceded by a deconstruction of the concept of law itself. Indeed, it appeared as if Derrida sought to *apply* the lexicon of the old project of deconstruction in his newly chosen field, without thereby fundamentally deconstructing this field's own conceptual hierarchies. No doubt Derrida was aware that the *problématique* of law and deconstruction was not exhausted – as suggested by his last interview.

If the decision were taken to invest a portion of the legacy of deconstruction in the development of a new concept of European international law, or a new concept of international law based on the predominantly "European" – that is, European in a cultural rather than geographical sense – tradition of the Enlightenment,[5] these appear to be the questions that must be examined: What is the relationship between the concept of literature and the concept of (positive) law? Is there any difference? If there is a difference, where is it located, precisely? Is this difference itself part of literature or part of positive law? Must one not, in order to apply the deconstruction of philosophical and literary texts in the field of international law, translate the language and problematic of deconstruction into the language and problematic of international law, and not simply apply it? Assuming such an undertaking were undertaken, what would happen to the legacy of deconstruction in the course of this translation? Would it produce any new intellectual gains, or would its intellectual capital be simply consumed without any profit, without any interest? Would the undertaking be overtaken by an undertaker – and buried alive on a *dépôt légal* like its predecessors?

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[4] *See, e.g.,* the following texts: JACQUES DERRIDA, ROGUES: TWO ESSAYS ON REASON (Pascale-Anne Brault & Michael Naas trans., Stanford University Press, 2005); GIOVANNA BORRADORI, PHILOSOPHY IN A TIME OF TERROR: DIALOGUES WITH JURGEN HABERMAS AND JACQUES DERRIDA (The University of Chicago Press, 2003); JACQUES DERRIDA, ON COSMOPOLITANISM AND FORGIVENESS (Routledge: London, 2001); JACQUES DERRIDA, SPECTERS OF MARX : THE STATE OF THE DEBT, THE WORK OF MOURNING AND THE NEW INTERNATIONAL (Peggy Kamuf trans., Routledge: London, 1994); JACQUES DERRIDA, L'AUTRE CAP (Les Editions de Minuit: Paris, 1991); Jacques Derrida, *Force of Law: The "Mystical Foundation of Authority,"* in JACQUES DERRIDA, ACTS OF RELIGION (Gil Anidjar ed., Routledge: London, 2004) at 228. (English translation provided if available.)

[5] For a deconstruction of international law against a common-law *problématique* see VEIJO HEISKANEN, INTERNATIONAL LEGAL TOPICS (Finnish Lawyers' Publishing Co.: Helsinki, 1992).

The purpose of this brief paper is to conduct a preliminary study to explore these – obviously purely hypothetical – questions. Hypothetical, that is, without prejudice and without actual expenditure of any intellectual capital.

I

Is the conceptual distinction between international and domestic law not the founding concept of any theory of positive law? Is this distinction not structured like any (other) opposition of metaphysical concepts, *i.e.* as a conceptual hierarchy rather than a neutral distinction? Should the deconstruction of the concept of law not start from a strategic intervention in this founding distinction of the theory of law?

> "Very schematically, an opposition of metaphysical concepts (e.g., speech/writing, presence/absence, etc.) is never the confrontation of two terms, but a hierarchy and the order of subordination. Deconstruction cannot be restricted or immediately pass to a neutralization: it must, through a double gesture, a double science, a double *writing* – put into practice a *reversal* of the classical opposition *and* a general *displacement* of the system. It is on that condition alone that deconstruction will provide the means of *intervening* in the field of oppositions it criticizes and that is also a field of nondiscursive forces."[6]

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[6] Jacques Derrida, *Signature Event Context,* in JACQUES DERRIDA, LIMITED INC (Samuel Weber & Jeffrey Mehlman trans., Northwestern University Press: Evanston, 1988) at 1, 21 (emphasis in original). *See also* JACQUES DERRIDA, POSITIONS (Alan Bass trans., The University of Chicago Press, 1981) at 41 ("What interested me then, that I am attempting to pursue along other lines now, was, at the same time as a 'general economy,' a kind of *general strategy of deconstruction.* The latter is to avoid both simply *neutralizing* the binary oppositions of metaphysics and simply *residing* within the closed field of these oppositions, thereby confirming it. Therefore we must proceed using a double gesture, according to a unity that is both systematic and in and of itself divided, a double writing, that is, a writing that is in and of itself multiple, what I called, in '*La double séance,*' a *double science*. On the one hand, we must traverse a phase of a *vis-à-vis,* but rather with a violent hierarchy. One of the two terms governs the other (axiologically, logically, etc.), or has the upper hand. To deconstruct the opposition, first of all, is to overturn the hierarchy at a given moment. To overlook this phase of overturning is to forget the conflictual and subordinating structure of opposition. Therefore one might proceed too quickly to a *neutralization* that *in practice* would leave the previous field untouched, leaving one no hold on the previous opposition, thereby preventing any means of *intervening* in the field effectively. We know what always have been the *practical* (particularly *political)* effects of *immediately* jumping *beyond* oppositions, and of protests in the simple form of *neither* this *nor* that.") (emphasis in original; footnote omitted)

More specifically, is the distinction between international and domestic law not structured like the metaphysical opposition of writing and speech? Does it not go almost without saying that the distinction between international and domestic law is not a simple opposition but a conceptual hierarchy in which the concept of domestic law represents the higher and the more developed form of law to which the concept of international law is subordinated? In order to deconstruct this conceptual opposition – and in order to translate the problematic of deconstruction into the language of international law – could one not simply replace writing by international law and speech by domestic law in the writings of deconstruction?

> "*[T]he history of (the only) metaphysics* ... has, in spite of all the differences, not only from Plato to Hegel (even including Leibniz) but also, beyond these apparent limits, from the pre-Socrates to Heidegger, always assigned the origin of the truth in general to the logos: the history of the truth, of the truth of the truth, has always been ... the debasement of [international law] [writing], and its repression outside [full-fledged domestic law] ['full' speech]."[7]

The strengths and advantages of domestic law are analogous to those of speech. Just as speech is more natural and authentic as a form of communication than writing because it takes place in the living presence of the speaker and thus embodies the speakers' real intentions, his meaning-intention (*vouloir-dire, Bedeutung)*, domestic law is enacted in the living presence of the people – by the people for the people, for themselves – and, as such, embodies their common sense (*bon sens, gesunder Verstand)*. It is for this reason that domestic law is more natural and authentic and therefore more legitimate than international law: unlike international law, which – like writing – is artificial and mediated in the sense that it is not made democratically, by the people, but by their legal (diplomatic) representatives, domestic law constitutes the model of proper law because it is the proper law of the people, made by the people for themselves. Unlike in international law, in domestic law there is an immediate proximity of subject and object, a subject-object or a sovereign – there is no one in between the one who enacts the law and the one for whom the law is enacted. In this

[7] JACQUES DERRIDA, OF GRAMMATOLOGY (Gayatri Chakravorty Spivak trans., The Johns Hopkins University Press: Baltimore, 1974) at 3 (emphasis in original).

sense, just as speech represents the ideal form of communication because it embodies the identity of sense and intention, domestic law represents the ideal of democracy and democratic law-making because it embodies the identity of law and common sense. This embodiment is the result of a perfect coincidence of the one who legislates – the people – and the one to whom the legislation is addressed – the people. This coincidence, and this absence of distance, is the essence of the sovereignty of the people.

> "Why is [the domestic statute] [the phoneme] the most 'ideal' of [rules] [signs]? Where does this complicity between [laws] [sound] and ideality, or rather, between [legislation] [voice] and ideality, come from? ... When [we] [I] [legislate] [speak], it belongs to the phenomenological essence of this operation that *[we legislate for ourselves] [I hear myself] at the same time* that [we legislate for others] [I speak]. The [enactment] [signifier], [legitimated] [animated] by [our] [my] [vote] [breath] and by the [common sense] [meaning-intention] ..., is in absolute proximity to [us] [me]. The [legal] [living] act, the [legalizing] [life-giving] act, the *Lebendigkeit,* which [legitimates] [animates] the body of the [enactment] [signifier] and transforms it into a [valid] [meaningful] [statute] [expression], the soul of [law] [language], seems not to separate itself from itself, from its own [positivity] [self-presence]. It does not risk death in the body of a[n] [enactment] [signifier] that is given over to the world and the visibility of space. It can *show* the ideal object or ideal [common sense] *[Bedeutung]* connected to it without venturing outside ideality, outside the interiority of [the positive sovereignty of the people] [self-present life]. ... The [positivity] [self-presence] of the [legitimating] [animating] act in the transparent spirituality of what it [legitimates] [animates], this inwardness of [the people] [life] with itself, which has always made us say that [domestic law] [speech] is alive, supposes, then, that the [people themselves] [speaking subject] [legislate for themselves] [hears himself] [their own positive law] [in the present]. Such is the essence or norm of [domestic law] [speech]."[8]

[8] JACQUES DERRIDA, SPEECH AND PHENOMENA AND OTHER ESSAYS ON HUSSERL'S THEORY OF SIGNS (David B. Allison & Newton Garver trans., Northwestern University Press: Evanston, 1973) at 77-78 (emphasis in original).

But although domestic law is generally full-fledged and, as such, self-sufficient, it does condone and accommodate, to a limited degree, the concept of international law. While international law is clearly the junior partner in this hierarchy, the relationship between international and domestic law is more complex than a simple hierarchy. It could be characterized as one of *supplementation*.

> "The verb 'to supplant' or 'to complement for' [*suppléer*] defines the [application] [act] of [international law] [writing] adequately. ... If supplementarity is a necessarily indefinite process, [international law] [writing] is the supplement par excellence since it marks the point where the supplement proposes itself as supplement of supplement, [rule of rule] [sign of sign], *taking the place* of a [domestic law] [speech] already [enacted] [significant]: it displaces the *proper place* of the [legal rule] [sentence], the unique time of the [legal rule] [sentence] pronounced *hic et nunc* by an irreplaceable [people] [subject], and in return enervates the [legislation] [voice]. It marks the place of the initial doubling."[9]

Is it not the case that, just as writing is seen in the Western tradition of metaphysics as a supplement to speech, international law is seen in the philosophy of law as a mere supplement to domestic law? A supplement, that is, without which the domestic law can exist and survive, even thrive, since international law adds nothing vital to the concept of (domestic) law, which is self-sufficient and complete as such and can exist in its own (domestic) sphere without any additions from international law; but also supplementing domestic law in its absence, outside its own domestic sphere, outside its proper scope of application. In the former sense, international law is essentially superfluous; in the latter sense, it is simply a substitute, or a replacement, that is, a law applied (only) in the absence, and because of the absence, of domestic law.

But although international law is essentially supplementary to domestic law and thus subordinated to it, it is also *necessary* and as such, potentially *dangerous*. This is what may be dangerous about international law: as it substitutes for domestic law in

[9]JACQUES DERRIDA, OF GRAMMATOLOGY, *supra* note 7, at 280-81 (emphasis in original).

its absence, in its outside, it reveals a lack, a deficiency, in domestic law and thus, by extension, in the very body of the concept of law. It is implicit in the concept of international law that there is an area – an outside – that cannot be mastered by domestic law and that therefore remains outside its proper field of application and jurisdiction.

> "[International law] [writing] is dangerous from the moment that representation there claims to be [positive law] [presence] and the [rule] [sign] of the [law] [thing] itself. And there is a fatal necessity, inscribed in the very functioning of the [rule] [sign], that the substitute make one forget the vicariousness of its own function and make itself pass for the plenitude of [domestic law] [speech] whose deficiency and infirmity it nevertheless only *supplements.* For the concept of the supplement – which here determines that of the representative image – harbors within itself two significations whose cohabitation is as strange as it is necessary. The supplement adds itself, it is a surplus, a plenitude enriching another plenitude, the *fullest measure* of [positive law] [presence]. It cumulates and accumulates [positive law] [presence]. ... But the supplement supplements. It adds only to replace. It intervenes or insinuates itself *in-the-place-of;* if it fills, it is as if one fills a void. If it represents and makes an image, it is by the anterior default of [positive law] [presence]. ... The second signification of the supplement cannot be separated from the first. ... Each of the two significations is by turns effaced or becomes discreetly vague in the presence of the other. But their common function is shown in this: whether it adds or substitutes itself, the supplement is *exterior,* outside of the positivity to which it is super-added, alien to that which, in order to be replaced by it, must be other than it. ... [T]he supplement is an '*exterior addition*' ... ."[10]

It is this relationship with the exterior – the relationship with the others; those outside the home of domestic law – that is left for regulation by international law. To the extent that the obligations imposed by international law are consumed in their entirety outside domestic jurisdiction, they have no relevance in the domestic sphere and

[10] *Id.* at 144-45 (emphasis in original).

therefore add nothing to it; however, occasionally international law does impose obligations that can only be consumed within domestic jurisdiction and therefore have to be transformed or incorporated into domestic law. Once transformed and incorporated, these obligations do not essentially differ from those imposed by domestic law; however, this process of transformation and incorporation is not without dangers. Just as written text can be spoken – read aloud – international law can be transformed into domestic law; but just as speech is most natural and effective when delivered live, spontaneously and not slavishly from notes, domestic law is most legitimate and effective when it grows spontaneously and without an external script out of the people's common sense – by the people and for the people. But international law is different; it can never become quite like domestic law. International law does not grow organically out of the people, or out of their common sense; it is a foreigner, an outsider, and as such does not fit comfortably within domestic jurisdiction. International law, even when transformed and incorporated into domestic law, runs the risk of reversing the natural order of things – the legal order between domestic and foreign, natural and artificial, subject and object, speaker and writer, father and son, Socrates and Plato, the former and the latter.[11] Just as writing may corrupt live speech by making it dependent on writing as a memory aid, international law may corrupt the creation of domestic law by making it dependent on an external script – on *external dictation.*

> "Such will be, in its logical outlines, the objection of the king to [international law] [writing]: under pretext of supplementing [tradition] [memory], [international law] [writing] makes one even more forgetful; far from increasing knowledge, it diminishes it. ... If [international law] [writing] ... produces the opposite effect from what is expected ... it is because ... it doesn't come from around here. It comes from afar, it is external or alien: to the living, which is the right-here of the inside, to [the people] *[logos]* as the

[11] *See* JACQUES DERRIDA, THE POST CARD: FROM SOCRATES TO FREUD AND BEYOND (Alan Bass trans., The University of Chicago Press, 1987). The dominant theme in this book is the reversal of a conventional sequence, the revelation that time and logic move in opposite directions – although historically cause precedes effect, logically effect precedes cause and is seen and understood before its cause becomes known. As noted by Alan Bass, "[o]ne of the main concerns of *The Post Card* is the possible subversion of what is usually taken as a fixed sequence – e.g., Socrates before Plato, the passing of an inheritance from a prior generation to a succeeding one, the death of the old before the young. What if the usual and seemingly fixed sequence were reversible?" *Id.* at ix.

> *zoon* it claims to assist or relieve. ... Knowing that he can always leave his thoughts outside or check them with an external agency, with the physical, spatial, superficial marks that one lays flat on a tablet, he who has the *tekhne* of [international law] [writing] at his disposal will come to rely on it. ... What Plato is attacking in sophistics, therefore, is not simply recourse to [tradition] [memory] but, within such recourse, the substitution of the mnemonic device for live [tradition] [memory], of the prosthesis for the organ; the perversion that consists in replacing a limb by a thing, here, substituting the passive, mechanical 'by-heart' for the active re-animation of knowledge, for its reproduction in the present. The boundary (between inside and outside, living and non-living) separates not only [domestic law] [speech] from [international law] [writing] but also [tradition] [memory] as an unveiling (re-)producing of presence from re-memoration as the mere repetition of a monument; truth as distinct from its sign, being as distinct from types."[12]

Like writing, international law is artificial – a prosthesis rather than a live organ that has developed organically, spontaneously, as part of the living tradition of the people, out of their common sense. This is what is odd or even strange about international law: it has not been created by the people, for themselves, or by their democratically elected representatives, but rather by their legal (diplomatic) representatives, that is, by *representatives of representatives*. International law is strange because it comes afar; it is an alien – an artifact, or a *tekhne*, like writing. Indeed, just as writing is defined in Western metaphysics as the sign of the sign – as representation of speech – international law may be defined as the law of the representatives of representatives. As such, it is artificial: just as writing lacks the natural bond between the sense and the senses, or the sense to the sound, international law is law in disguise because there is no direct, immediate, spontaneous, natural and authentic bond between international law and the common sense of the people.[13] If the artificial character of international law is forgotten, there is a great danger that the natural order of the two legal orders is reversed and domestic law becomes to be seen simply as a representation of international law, as its *application*. As a result, the logical and

[12] JACQUES DERRIDA, DISSEMINATION (Barbara Johnson trans., The University of Chicago Press, 1981) at 100, 104, 108-09.
[13] JACQUES DERRIDA, OF GRAMMATOLOGY, *supra* note 7, at 36.

natural order of domestic law and international law, and the sovereignty of the people as the authentic source of law, would be lost.

> "What is intolerable and fascinating is indeed the intimacy intertwining image and thing, *graph, i.e.,* and phone, to the point where by a mirroring, inverting, and perverting effect, [domestic law] [speech] seems in its turn the speculum of [international law] [writing], which 'manages to usurp the main role.' Representation mingles with what it represents, to the point where one [makes domestic law] as one [makes international law], one thinks as if the represented were nothing more than the shadow or reflection of the representer. A dangerous promiscuity and a nefarious complicity between the reflection and the reflected which lets itself be seduced narcissistically. In this play of representation, the point of origin becomes ungraspable. There are things like reflecting pools, and images, an infinite reference from one to the other, but no longer a source, a spring. There is no longer a simple origin."[14]

In order to be proper, the proper law of the people, the law must embody the common sense of the people and be enacted by the people for the people, in their presence. The common sense *(bon sens, gesunder Verstand)* of the people is the metaphysical *logos* of the theory of positive law which, if only technically possible, would rather create the law authentically, without representation, without any representatives, without any supplementation; this is the translation into the language of law of the thematic of the Western metaphysics of presence.[15] Just as soliloquy – thinking – is the model of perfect communication in the tradition of Western metaphysics because the fact that there is no difference, no distance and therefore no representation between the subject that communicates and the object that hears, appears to guarantee full certainty and perfect understanding of the intended meaning of the speaker, direct democracy is the ideal of Western political philosophy because the fact that there is no representation, no go-between between those who legislate and those who are

[14] *Id.*

[15] JACQUES DERRIDA, SPEECH AND PHENOMENA, *supra* note 8, at 99 ("The[] common matrix [of the founding concepts of phenomenology] is being as *presence*: the absolute proximity of self-identity, the being-in-front of the object available for repetition, the maintenance of the temporal present, whose ideal form is the self-presence of transcendental *life*, whose ideal identity allows *idealiter* of infinite repetition. The living present, a concept that cannot be broken down into a subject and an attribute, is thus the conceptual foundation of phenomenology as metaphysics.") (emphasis in original)

bound by this legislation, appears to ensure, with positive certainty, that the sense of positive laws perfectly and harmoniously coincides with the common sense of the people.

In practice, of course, this ideal of immediacy and self-proximity can only rarely be realized, if at all. Since in practice, domestic law is not, in fact, made by the people themselves, for themselves, but by their *representatives*. Representatives are a necessary evil in any democracy and, as such, are required solely for purposes of *external* communication: just as speech is properly understood only if the hearer's understanding perfectly coincides with the intended meaning of the speaker, the laws enacted by the representatives of the people are legitimate only to the extent that they embody and coincide with the common sense of the people. This is the revolutionary founding condition and presentation of the democratic legitimacy of laws – the present of the revolution to the people and the presentation of the people to their representatives. If this founding condition is not met – if the representatives do not represent what the people presented to them, *i.e.* if they do not enact laws that coincide with the common sense of the people – the people need not respect and obey the laws and may engage in civil disobedience.

But it is this representation, this delegation of the function of communication to an external agent, that also relativizes the distinction between domestic law and international law, just as it relativizes the distinction between speech and writing. Just as the communication of intention requires the *logos* – the thinker – to speak, to express his intended meaning in a spoken sign, *i.e.* in the form of representation – the expression of the common sense of the people requires the people to delegate the function of expression and communication of their common sense to their representatives. This alienation of the function of external expression and communication is a deeply ambiguous and ambivalent act. It not only makes domestic law less immediate, less organic and less authentic – and thus more like international law. It is also the conceptual root cause of the ever-present danger of role reversal in a democracy: just as writing may dull memory and therefore risks becoming the dictator of speech, the representatives of the people may usurp the power of the people to enact their own laws and convert democracy into a dictatorship; this is the logical structure of a counterrevolutionary *coup d'état.*

Dictator is not one who tells others to write, or what to write, but one who speaks from a script – one who reads from his script without listening, or without listening to *others*, that is, without listening to what the people presented to him, that is, their common sense, hearing only himself (speak). Dictator is a usurper because he reverses the natural order of speaking and writing, presenting and representing, and thus corrupts it: he does not speak first (spontaneously) and then write (to memorize what is said), and he does not represent (to the people) what the people presented to him (their common sense); he reads from his own script and presents to the people what he – the dictator himself – represents, *i.e.* what makes sense to him. The dictator presents himself *as* the people.

This danger is the other side of the coin of democracy, its downside. Since, paradoxically, dictator not only corrupts the revolutionary founding condition and presentation of democracy; he also embodies the perfect coincidence of two fundamental Western ideals – the metaphysics of presence and democracy without representation; these two fundamental Western ideals come true in the head of one man, in a one man's democracy. Since a dictator is a man who, while speaking (reading) by himself and for himself – thus hearing (only) himself (speak) and therefore perfectly understanding what he himself intends to mean, also dictates the laws of the people for the people, simultaneously and without any representation, *as if* he were the people. There is *no difference*, no distance, no representation here between speaking and hearing, subject and object, speaking and legislating, the legislator and the people; all these ideals coincide in the head of a one man, in a soliloquy, without any difference or representation that would corrupt the realization of the ideals of authentic understanding and democracy without representation – and thereby absolutely corrupting them. The dictator is the people: the ultimate realization of their ideals and the ultimate corruption of those ideals, simultaneously and without difference. This is why representation – delegation of the function of expression and communication of the common sense of the people to their representatives – is not only the ultimate danger of democracy but also its ultimate protection. It is the ultimate danger of democracy because it creates the risk of usurpation by an external dictator of the people's sovereign power to legislate themselves for themselves; but it is also the ultimate protection of democracy because it prevents the two ideals of Western metaphysics – the metaphysics of presence and

the metaphysics of democracy without representation – from coming true. In other words, representation – the alienation to representatives of the people's sovereign right to legislate themselves for themselves – is not only the root cause of the inherent corruptibility of democracy, but also its necessary protection – the sole remedy that can protect democracy from itself, from its inherent corruptibility.

Thus, even domestic law, the model of all law, is made and must be made, like international law, by representatives. In this sense, domestic law, like international law, is inherently corruptible – it is not made immediately and authentically by the people and for the people, but – *in the first place* – by and for their *representatives*. This is what is so strangely familiar about international law: international law is not, in the end, unlike domestic law: the difference between them is not really a qualitative difference, or a difference between two qualitatively different laws; it is merely a difference in degree. There is no law made immediately, proximately and authentically by the people for the people. *The people is never present.* The people is never present since there *is* no people. There *are* only people. The difference between international and domestic law is nothing but a difference between laws made by representative of representatives and those made by representatives of a certain metaphysical ideal – the people.

> "What do these limits and presuppositions signify? First that [the theory of law] [linguistics] is not *general* as long as it defines its outside and inside in terms of *determined* [theoretical] [linguistic] models; as long as it does not rigorously distinguish essence from fact in their respective degrees of generality. The system of [international law] [writing] in general is not exterior to the system of [law] [language] in general, unless it is granted that the division between exterior and interior passes through the interior of the interior or the exterior of the exterior, to the point where the immanence of [law] [language] is essentially exposed to the intervention of forces that are apparently alien to its system. For the same reason, [international law] [writing] in general is not 'image' or 'figuration' of [law] [language] in general, except if the nature, the logic, and the functioning of the image within the system from which one wishes to exclude it be reconsidered. [International law] [writing] is not [the law of representatives of representatives] [a sign of a

> sign], except if one says it of all [rules] [signs], which would be more profoundly true."[16]

While the greater distance between the metaphysical ideal – the people – and the law does create a greater risk that international law does not fully coincide with the common sense of the people, it is also this greater distance between the people and the law that in fact makes international law less dangerous, less susceptible to usurpation by an external dictator, and therefore also less susceptible to corruption. As the creators of international law – the legal (diplomatic) representatives, or the representatives of representatives – represent different peoples, and not only those from the West, who share the fundamental Western ideals of the metaphysics of presence and democracy without representation, a would-be global dictator faces a much harder, if not an impossible task. Indeed, it seems highly unlikely that the representatives of representatives – given the differences of opinion between them and between their different "peoples" – will ever be able to agree that these fundamentally Western ideals – or any other, more traditional ideals for that matter – should be adopted as the basis of the international system, thereby creating the risk of usurpation by a global dictator of the power of the people. These differences are the real source of the power of the people – their best protection against a global tyranny. God bless them.

Thus, on closer inspection – or rather, on closer deconstruction – it seems that the traditional hierarchy of legal philosophy has no philosophical justification. In the end, and contrary to conventional common sense, international law seems in fact not only less dangerous and thus less risky as a target of intellectual investment than domestic law, but also the more "real" law – unlike domestic law, international law at least represents real people – the representatives of the people – and not only an abstract metaphysical ideal that is never present – the people. But this is not all, as a matter of fact. Since like writing is more durable as a means of communication than speech, international law is also, as a matter of fact, that is, as a law, the more durable law: like writing survives and can be read after the death of the speaker, international law survives and remains applicable after the death of the state. While a state may fail

[16] JACQUES DERRIDA, OF GRAMMATOLOGY, *supra* note 7, at 43 (emphasis in original).

and die, and its domestic law with it, international law survives the death – the failure – of the state. International law will survive and live on precisely because it is not dependent on any particular state; because it has not been monopolized by any particular state or super-state and therefore is not tied to the fate and vicissitudes of the life of the state. Thus, when a state dies, its law dies; but when a particular regime or context of international law ceases to exist – and these contexts may be and often are temporary, *ad hoc* regimes created for a particular purpose – international law, as a "system," will survive. In other words, international law continues to live on even after its *own* death.[17]

Thus, from the point view of both theory and practice, and law and fact, international law does, in the end, seem not only less risky but also more real and more durable – in short, more interesting – as an object of legal philosophy than domestic law and consequently an undertaking worthy of investing a fair amount of intellectual capital. Indeed, it is arguable – if one wished to re-invest a portion of the legacy of deconstruction in such an undertaking – that just as semiology remains dominated and governed by linguistics and therefore must be replaced – provisionally and strategically – by grammatology, or the study of writing, the philosophy of law must be replaced – provisionally and strategically – by the philosophy of international law, in order to liberate the project of the philosophy of law from the repression of (domestic) law as its model.

> "The advantage of this substitution of [philosophy of law by philosophy of international law] [semiology by grammatology] will not only give to [the theory of international law] [the theory of writing] the scope needed to counter [common-sensical] [logocentric] repression and the subordination to [philosophy of domestic law] [linguistics]. It will liberate the [legal-philosophical] [semiological] project itself from what, in spite of its greater theoretical extension, remained *governed* by [domestic law] [linguistics],

[17] JACQUES DERRIDA, DISSEMINATION, *supra* note 12, at 104-05 ("[Writing] will represent [the one who writes] even if he forgets them; they will transmit his word even if he is not there to animate them. Even if he is dead, and only a *pharmakon* can be the wielder of such power, *over* death but also in cahoots with it. The *pharmakon* and writing are thus always involved in questions of life and death.")

> organized as if [domestic law] [linguistics] were at once its center and its telos."[18]

Indeed, is it not precisely this – the slow emergence of international law as the law of the laws, or as the law of global reference – what we have been witnessing during the last sixty years or so? Is it not in fact the case that international law is no longer seen simply as a secondary source of legal obligation, but as the law that comprehends all domestic laws, or as the law on the basis of which all domestic laws may be comprehended?

> "By a slow movement whose necessity is hardly perceptible, everything that for at least some twenty centuries tended toward and finally succeeded in being gathered under the name of [law] [language] is beginning to let itself be transferred to, or at least summarized under, the name of [international law] [writing]. By a hardly perceptible necessity, it seems as though the concept of [international law] [writing] – no longer indicating a particular, derivative, auxiliary form of [law] [language] ... , no longer designating the exterior surface, the insubstantial double of a major [law] [signifier], *the [law of the lawyers] [signifier of the signifier]* – is beginning to go beyond the extension of [law] [language]. In all senses of the word, [international law] [writing] thus *comprehends* [law] [language]. Not that the word ['international law'] ['writing'] has ceased to designate the [law of the lawyers] [signifier of the signifier], but it appears, strange as it may seem, that ['the law of the lawyers'] ['signifier of the signifier'] no longer defines accidental doubling and fallen secondarity."[19]

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[18] JACQUES DERRIDA, OF GRAMMATOLOGY, *supra* note 7, at 51 (emphasis in original). *See also* Jacques Derrida, *Signature Event Context, supra* note 6, at 21 ("[D]espite the general displacement of the classical, 'philosophical,' occidental concept of writing, it seems necessary to retain, provisionally and strategically, *the old name.* ... There is no concept that is metaphysical in itself. There is a labor – metaphysical or not – performed on conceptual systems. Deconstruction does not consist in moving from one concept to another, but in reversing and displacing a conceptual order as well as the nonconceptual order with which it is articulated. ... To leave to this new concept the old name of writing is tantamount to maintaining the structure of a *graft,* the transition and indispensable adherence to an effective *intervention* in the constituted historical field.") (emphasis in original)

[19] JACQUES DERRIDA, OF GRAMMATOLOGY, *supra* note 7, at 51 (emphasis in original), at 6-7.

II

While the philosophy of (domestic) law has traditionally managed to subordinate the concept of international law to domestic law with relative ease, the relation of international law and municipal law – as domestic law is strategically termed within the discipline of international law – has been the source of debate and cause of controversy in international legal theory since the dawn of the discipline. Indeed, for a long period of time, until at least World War II, this question was seen as *the* question of international legal theory, and enormous intellectual efforts were invested in attempts to answer it. But the question proved too hard to be resolved – or the answer too elusive – and no consensus was reached.[20]

As the various efforts to answer the question ultimately failed, international legal scholarship was forced to look for other solutions. Indeed, the story of modern international law largely reads as a story of the various attempts made by international legal scholarship to pose and answer – and, once it turned out that it cannot be answered – to suspend the question of the relationship between international law and municipal law. In the end, after much intellectual energy was consumed, an understanding was reached on how to pose the question – it should first be deposed and then begged. An almost uniform consensus currently exists among international legal scholars that the question of the relation of international and municipal must be addressed pragmatically, and not theoretically, or in the abstract, and that accordingly it can be reduced to the simple question of the applicability of international law within domestic jurisdiction.[21] An even more uniform consensus exists within the discipline that the proper place for discussion of this question in textbooks and treatises is not in

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[20] *See, e.g.,* Ferrari-Bravo, *International Law and Municipal Law: The Complementarity of Legal Systems,* in THE STRUCTURE AND PROCESS OF INTERNATIONAL LAW: ESSAYS IN LEGAL PHILOSOPHY, DOCTRINE AND THEORY 715 (R. Macdonald & D. Johnston, eds., Nijhoff: The Hague, 1983) ("About a century ago, legal scholars started discussing the relationship between international and municipal law; better, they 'discovered' the problem. Such discussion became intense in the period after World War I and continued so until World War II. Supporters of the so-called 'monistic' approach as well as those advocating the 'pluralistic' one were often identified with a particular view of the political organization of the international community as a whole. This dispute between them became at times a bitter one, with reciprocal political accusations. In various countries, notably Germany and Italy, the issue was at times considered a central one of the entire legal philosophy relating to international relations, and the amount of international literature grew accordingly. ... This 'war of religion' started to cool down in the 1950s with a sharp decline of scholarly contributions to the subject matter.") For further discussion see HEISKANEN, *supra* note 5, at 1-4 and accompanying references.

[21] HEISKANEN, *supra* note 5, at 5-36.

the beginning, as the first and foremost question of the discipline, but *after* the discussion of the sources of international law – and not only after, but *immediately* after. The consensus that exists among international legal scholars on this issue can be characterized as no less than remarkable: practically uniformly, practically in every textbook of international law, the discussion of the sources of international law not only precedes the discussion of the relation between international and municipal law, but it precedes this question *immediately* – no other topic can be discussed between these two; they must be bound together as if one could not be discussed without the other. As if they were – literally – an odd couple, one always taller and higher in ranking than the other, one clearly the master and the other immediately following, pliant and compliant, as a faithful follower, like a beggar – begging, begging the question, that is, itself, but at the same also begging for recognition as the preliminary question of the whole discipline of international law. This odd coupling – this familiar dialectic of master and slave – is easily verifiable, without actually having to read any international law textbook or treatise, as it is immediately visible in the tables of contents of virtually all standard international law textbooks and treatises, almost without exception.[22]

While the rhetoric of the sources of international law is a relatively recent formation, its status as the master topic of the discipline is now firmly established and, as David Kennedy notes, is so well developed that "further commentary seems unnecessary."[23] The function of sources rhetoric and its placement in textbooks and treatises immediately before the question of the relation between international and municipal law, is twofold. First, the rhetoric of the "sources" of international law creates, in effect, international law as an intellectual discipline. This it does by focusing, precisely, on the formal and abstract identification and enumeration of the "sources" of international law rather than on the *substance* of the law that may in fact be found in those sources.[24] As a consequence, by focusing on international law's formal and

[22] *Id.* at 1-10 and the sources cited therein.
[23] DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (Nomos: Baden-Baden, 1987) at 12.
[24] *Id.* at 29 ("The sense that hierarchy needs explaining, like the sense that the abstract boundaries of enumerated sources need elaboration, reveals the shared sense that sources discourse is meant to delimit abstractly and authoritatively the norms which bind states in such a way that they might remain free to establish and disagree about the content of those norms as their interests or a natural order might dictate. Discussions of both the extent and hierarchy of sources produce doctrines which do not rely on the content of the norms whose source they identify. Each of these types of discussion suggests that

abstract boundaries rather than on its substance, sources rhetoric not only displaces – in effect, suspends – the discussion of substantive issues of international law; it also creates a space within which international lawyers may freely disagree on these issues, thus enabling a consensus to emerge among international legal scholars on the intellectual boundaries of the discipline – as these boundaries are formal and abstract, they are entirely without prejudice to substance. The intellectual space so delimited and created by sources rhetoric is, precisely, the space of international law or, in more technical terms, *international jurisdiction itself.* In other words, international jurisdiction, as a jurisdiction separate and independent from the space of domestic law, or domestic jurisdiction, is the very effect, or the very product, of the rhetoric of the sources of international law in deed – even if this is not what it says it seeks to achieve in words. In other words, the establishment of international jurisdiction is an unintended effect of sources rhetoric rather than its express intention, or its *vouloir-dire.*[25]

Apart from establishing international jurisdiction, albeit obliquely, sources rhetoric also serves another important function: it provides international law with a sense of *positivity* – a sense of a law that actually exists, and not only in philosophy and legal literature, but also in the "real world," out there. Although sources rhetoric does not specify the substance of international law – and this cannot even be expected since this is not its purpose – it does suggest that substantive international law does in fact exist, as a matter of positive law, that is, as a law separate and independent from municipal law. If international law has its own sources, then it must exist; it can be found in those sources, as and when necessary and, once found, can be applied to resolve any question of international law – including the question of the relation between international and municipal law. As a result, this question, which once was considered the central jurisprudential question of the whole discipline of international law, is now treated like any other question of international law, as a question among many other questions. There is nothing unusual or dangerous about the question of

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the problem which sources doctrine addresses is the abstract definition of the authoritative set of norms binding states.")

[25] *See* HEISKANEN, *supra* note 5, p. 144-46.

the relation between international and municipal law; nothing that would threaten international law's positive identity and normative authority.[26]

How is this sense of positive identity and normative authority created? It is created simply as a rhetorical – metaphorical – effect of reordering of international legal topics. For if the discussion of the sources of international law in textbooks and treatises not only precedes, but immediately precedes, the discussion of the relation between international and municipal law, it follows – or rather, it *appears* to follow – that municipal law is subject to international law, and that it is international law that provides the answer to this question and not municipal law. By implication, if it is international law that answers this question rather than municipal law, then international law surely must exist as a body of law separate and independent from municipal law. While the rhetoric of the sources of international law is without prejudice to its normative substance – the answer provided by the sources to the question of the relation between international and municipal law may in any given instance be in favor of international law or municipal law, *i.e.* provide for the applicability of one or the other – the implication is, perforce, that like any other question of international law, the question of the relation of international and municipal law can be answered, and that the answer to this question can be found within the discipline of international law, in its sources. For the purposes of sources rhetoric it is not necessary to spell out or specify, *what* this answer is, in concrete normative terms; it is sufficient to suggest that the answer can be found, if and when necessary, in the sources of international law.[27]

Why all these rhetorical maneuvers? What purpose do they serve? Since if it is accepted, as one must, that what is generally referred to as the "sources" of international law has in fact nothing to do with substantive international law but is simply a doctrinal elaboration of the bases of international jurisdiction – the legal grounds on the basis of which international jurisdiction may be invoked and, if shown to exist, established – why not call the spade the spade and refer to this doctrine as the doctrine of the bases of international jurisdiction rather than – somewhat mysteriously – as the doctrine of the "sources" of international law? If it is indeed the case that the

[26] *Id.* at 37-42.
[27] *Id.* at 39.

question of the relation of international and municipal law – this live controversy – is the key to understanding the whole discipline of international law, why must it be hidden and buried in textbooks in a place where its proper value as the preliminary question of the whole discipline – and its immense pedagogical and professional value – cannot be properly understood and appreciated? Why beg the question – and why force this question to beg for recognition like a beggar – if this question sheds light on the whole discipline of international law, if understanding it makes us better understand the tradition of international law – in short, if understanding it makes us better international lawyers? What is it that is so unsettling about the difference between international and municipal law that international legal scholarship must deny it recognition as the preliminary question of the whole discipline of international law?

The problem with the question of the relation between international and municipal law is that, if this question is recognized, accepted and admitted as the preliminary question of the whole discipline of international law, one will also have to recognize, accept and admit that international law is not based on an agreement, or a convention, or a consensus. *One would have to recognize, accept and admit that the whole discipline of international law is based on a difference, a difference of opinion, a scholarly dispute – a differend.* In other words, one would have to recognize that international law is not *positive* in the radical sense of this term. One would have to recognize that there is, at the source of international law, no preliminary agreement, no preliminary consensus, but a difference, and therefore *no positive certainty, or certainty of positive law.* To recognize that international law is not based on a source of (positive) law but on differences, or *differends,* or disputes, would be tantamount to recognizing that international law does not exist as a positive law, as an undertaking different from philosophy, literature and other forms of art. Nothing – no scholarly convention, no positive law – would constrain the exercise of creativity at the very source of law. International law – indeed all law – would be open to questioning, and open to challenge, to begin with, at the source. If this difference were admitted within the realm of law, what would then be the justification for distinguishing between the concept of literature and the concept of positive law, or the laws of fiction – which presumably must be fiction – and the laws of the "real world?" Or, in other words,

what would then be the justification for distinguishing between international law – or indeed any law – and fiction?

III

The uneasiness of international legal scholarship with the difference between international and municipal law strikes us oddly familiar – as if it were a translation into the language of international law of a more philosophical problematic. Since is it not the case that the resistance of international legal scholarship to the question of the relation of international and municipal – or *intra*national – law is analogous, if not identical, to the resistance of Western metaphysics to difference and deferral – *différance* – as the mechanism of signification?[28] Is it not the case that, just as *différance* resists the metaphysical distinction between the sensible and the intelligible, the question or the controversy of the relation – or the difference – between international and intranational law resists the distinction between law and fact?

> "[T]hat the difference marked in the 'differ( )nce' between [international and intranational law] [the *e* and the *a*] eludes both [intelligence and sense] [vision and hearing] perhaps happily suggests that here we must be permitted to refer to an order which no longer belongs to [the order of facts] [sensibility]. But neither can it belong to [the order of law] [intelligibility], to the ideality which is not fortuitously affiliated with the objectivity of *theorein* or understanding. Here, therefore, we must let ourselves refer to an order that resists the opposition, one of the founding oppositions of [law] [philosophy], between [fact] [sensible] and [law] [intelligible]. The order which resists this opposition, and resists it because it transports it, is announced in the movement of *différance* (with an *a*) between two differences or two letters, a *différance* which belongs neither to the [domestic law] [voice] nor [international law] [writing] in the usual sense, and which is located ... *between* [intranational law] [speech] and [international law] [writing], and

[28] *See* Jacques Derrida, *Différance,* in JACQUES DERRIDA, MARGINS OF PHILOSOPHY at 1 (Alan Bass trans., The Harvester Press: Brighton, 1986).

> beyond the tranquil familiarity which links us to one or the other, occasionally reassuring us in our illusion that they are two."[29]

The difference between international law and intranational law – neither international law nor intranational law but the difference, the conflict of laws between them; the question or the issue of their relationship – is the *différance* – neither law nor fact. It is for this reason – for this initial difference and deferral – that the particular question of the relation between international and intranational law cannot be answered and mastered by any general code. Just as the movement of *différance* places limits on the mastery of signification, the difference between international and intranational law – and not only between international and intranational law, *but also more generally, the differences, or the conflicts, between different intranational laws* – places limits on the mastery of general legal codification, and marks those limits.

> "I would say, first off, that *différance,* which is neither a word nor a concept, strategically seemed to me the most proper one to think, if not to master – thought, here, being that which is maintained in a certain necessary relationship with the structural limits of mastery – what is most irreducible of our 'era.'"[30]

The various attempts to answer the question of the relation between international and intranational law has not resulted in a *mastery* of this question; they have resulted in its deferral, or suspension and, ultimately, its begging. This difference between international and intranational law, this difference at the source, this still live controversy between the founding fathers of the discipline, *is* the law – to the extent, if any, that a difference can *be* in the first place. Since it cannot be law in the traditional sense of *positive* law. It cannot be positive because it is not settled, not agreed, not covered by a convention or consensus. It is not positive because it is a *question,* an *issue* – the source of law in the sense of absence of a (settled) law, the source out of which the law is issued, promulgated and disseminated, in writing, issue after issue. It is the reading between the lines of writing, the source of the law's initial undecidability and, as such, the source of the life of the law – the difference

[29] *Id.* at 5 (footnote omitted, emphasis in original).
[30] *Id.* at 7.

that keeps international law relevant and, thus, alive, and without which it would die, and die without an issue, as such and in itself, since there would be no issue.

The difference between international law and intranational law and the difference between intranational laws in general, or this difference between "inter" and "intra" *within* the concept of law, is *différance*. It questions and destroys – deconstructs – the possibility of a unified or uniform concept of positive law, the law as it presently stands, and consequently its unquestioned normative authority:

> "1. One could no longer include [the difference between 'inter' and 'intra'] [*différance*] in the concept of the [rule] [sign], which always has meant the representation of a [positive law] [presence], and has been constituted in a system (of [law] [thought or language]) governed by and moving towards [positivity] [presence].
>
> 2. And thereby one puts into question the authority of [positive law] [presence], or of its simple symmetrical opposite, absence or lack. Thus one questions the limit that has always constrained us, which still constrains us – as inhabitants of a [law] [language] and a system of thought – to formulate the meaning of [the legal system] [Being] in general as [positive] [presence] or [de ferenda] [absence], in the categories of [system or systematicity] [being or beingness] (*ousia*). Already it appears that the type of question to which we are redirected is, let us say, of the Heideggerian type, and that *différance* seems to lead us back to the [difference between law and fact] [ontico-ontological difference]."[31]

There is no settled, positive law that is unaffected by the difference between international and intranational law and the conflict between different laws – the conflict of laws – in general. This difference is itself the "source" of the very *relevance* of international law and indeed all law – without this difference, and more generally, without differences, *differends,* differences of opinions, conflicts and disputes – there would be no law. There would be no law because – in the absence of

[31] *Id.* at 10 (emphasis in original).

difference – law would have no relevance, that is, no function. The difference between international law and intranational law is simply an instance of these differences between different laws, these conflicts of laws. International law – in the wide sense of the term, *i.e.* in the sense of both international law and conflict of laws, or private international law – is the *arche-law* or the proto-law, the common root of all laws. This *arche-law,* or this trace, has no determinable or fixed origin and no presence, *i.e.* no positivity. Since how can one distinguish, with any positive certainty, between inter-national law – or the law between (not outside, or above, but *between*) intra-national laws – and intra-national law *and* conflicts of law, or the law between the various intra-national laws? Is there, can there be, a difference between these differences – the differences between inter-national and intra-national laws, on the one hand, and the differences between the various intra-national laws, on the other? Are they not, in fact – or in law – the *same* difference? That is, a *global* difference?

> "Where does [international law] [writing] begin? When does [international law] [writing] begin? Where and when does [international law] [the trace], [international law] [writing] in general, common root of [domestic law] [speech] and [international law] [writing], narrow itself down into ['international law'] ['writing'] in the colloquial sense? Where and when does one pass from one [international law] [writing] to another, from [international law] [writing] in general to [international law] [writing] in the narrow sense, from the trace to the *graphie*, from one graphic system to another, and, in the field of a graphic code, from one graphic discourse to another, etc.? ... [International law] [the trace] is *nothing*, it is not an entity, it exceeds the question *What is?* and contingently makes it possible. Here one may no longer trust even the opposition of fact and principle, which, in all its metaphysical, ontological and transcendental forms, has always functioned within the system of *what is.*"[32]

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[32] JACQUES DERRIDA, OF GRAMMATOLOGY, *supra* note 7, at 74-75 (emphasis in original). *See also id.* at 92 ("Ever since [nationalization] [phoneticization] has allowed itself to be questioned in its origin, its history and its adventures, its movement is seen to mingle with that of science, religion, politics, economics, technics, law, art. The origins of these movements and these historical regions dissociate themselves, as they must for the rigorous delimitation of each science, only by an abstraction that one must constantly be aware of and use with vigilance. This complicity of origins may be called [international law] [arche-writing]. What is lost in that complicity is therefore the myth of the

Just as there would no function of signification without differences, there would be no function of law without differences. These differences between the different laws – the laws that differ or the differing laws – is the *différance,* the mechanism that provokes all other differences within the body of law and the mechanism that also *defers* those differences – including the difference between international and intranational law – pending the creation of a competent jurisdiction, that is, pending the invocation of the relevant sources of law, or the relevant bases of jurisdiction. *Différance* – that is, the difference between different laws – is this mechanism of provoking differences while simultaneously deferring – or *pending* – them, and *vice versa*, this mechanism of pending differences and thereby *provoking* them. This mechanism – if this is indeed the proper term – is the very *entrance* of the law and the very *entrance* to the law – in all senses of this word.[33]

> "In a [law] [language], in the *system* of [law] [language], there are only differences. ... What is written as *différance*, then, will be the playing movement that 'produces' – by means of something that is not simply an activity – these differences, these effects of difference. This does not mean that the *différance* that produces differences is before them, in a simple and unmodified – indifferent – [positivity] [present]. *Différance* is the nonfull, nonsimple, structured and differentiating [source] ['origin'] of differences. Thus, the name [source] [origin] no longer suits it."[34]

It is not the rhetoric of the sources of international law, but this "original," un-settleable and unsettling difference between international and intranational law – this instance of differences between different laws or this particular instance of conflicts

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simplicity of origin. This myth is linked to the very concept of origin; to speech reciting the origin, to the myth of the origin and not only to myths of origin.")

[33] *See, e.g.,* Encyclopedia Britannica, http://www.britannica.com ("entrance [noun]: 1. power or permission to enter: admission; 2. the act of entering; 3. the means or place of entry; 4. the point at which a voice or instrument part begins in ensemble music; 5. the first appearance of an actor in a scene; entrance [verb]: 1. to put into trance; 2. to carry away with delight, wonder, or rapture;") *Cf.* the etymology of trance in http://www.etymonline.com ("trance: c. 1374, 'state of extreme dread or suspense,' later 'a dazed, half-conscious or insensible condition' (c. 1386), from O.Fr. *transe* 'fear of coming evil,' originally 'passage from life to death' (12c), from *transir* 'be numb with fear,' originally 'die, pass on,' from L. *transpire* 'cross over' (see **transient**). Fr. *trance* in its modern sense has been reborrowed from Eng.")

[34] Jacques Derrida, *Différance, supra* note 28, at 11 (emphasis in original).

of laws – that is, in a different sense, the real "source" of international law – indeed of all law. Neither law nor a fact but the global difference between them.

IV

While the rhetoric of the sources of international law has managed to beg the question of the relation of international and municipal law and thereby create the impression that the positivity of international law is established, it has not managed to resolve the deeper identity crisis of international law in its relation to domestic law. Perhaps precisely because the solution provided by sources rhetoric is purely rhetorical – suppression, or begging, of the question rather than a concrete normative solution – self-doubt has remained the dominant theme of international legal theory. All theorizing about international law still poses this question as one of the founding questions of the theory of international law: Is international law really law? Hegel, already, defined international law as "*äusseres Staatsrecht,*"[35] but the theme has survived until recent times. H.L.A. Hart in his "Concept of Law," while arguing for a broader concept of law that would include international law, is nonetheless compelled to acknowledge that the case of international law presents particular problems:

> "[T]hough it is consistent with the usage of the last 150 years to use the expression 'law' here, the absence of an international legislature, courts with compulsory jurisdiction, and centrally organized sanctions have inspired misgivings, at any rate in the breasts of legal theorists. The absence of these institutions means that the rules of states resemble that simple form of social structure, consisting only of primary rules of obligation, which, when we find it among societies of individuals, we are accustomed to contrast with a developed legal system. ... These differences are indeed striking and the question 'Is international law really law?' can hardly be put aside."[36]

[35] G.W.F. HEGEL, GRUNDLINIEN DER PHILOSOPHIE DES RECHTS (Suhrkamp: Frankfurt am Main, 1976) at 497-503.
[36] H.L.A. HART, THE CONCEPT OF LAW (Oxford University Press, 1961), at 209 (emphasis added).

While Hart answers the question in the affirmative, his acceptance of international law as law remains subject to reservations. In developing his concept of law, he focuses almost exclusively on domestic law; the treatment of international law is limited to one single chapter – which, he emphasizes, is in fact generous:

> "Though we shall devote to it only a single chapter some writers have proposed an even shorter treatment for this question concerning the character of international law. To them it has seemed that the question 'Is international law really law?' has only arisen or survived, because a trivial question about the meaning of words has been mistaken for a serious question about the nature of things: since the facts which differentiate international law from municipal law are clear and well-known, the only question to be settled is whether we should observe the existing convention or depart from it; and this is a matter for each person to settle for himself. But this short way with the question is surely too short. It is true that among the reasons which have led theorists to hesitate over the extension of the word 'law' to international law, a too simple, and indeed absurd view, of what justifies the application of the same word to many different things has played some part. The variety of types of principle which commonly guide the extension of general classifying terms has too often been ignored in jurisprudence. Nonetheless, the sources of doubt about international law are deeper, and more interesting than these mistaken views about the use of words."[37]

What are these "clear and well-known facts," or these "deeper" sources of doubt, that differentiate international law from municipal law? Hart identifies two of them:

> "We shall consider two principal sources of doubt concerning the legal character of international law and, with them, the steps which theorists have taken to meet these doubts. Both forms of doubt arise from an adverse comparison of international law with municipal law, which is taken as the clear, standard example of what the law is. The first has its roots deep in the conception of law as fundamentally a matter of orders backed by threats and

[37] *Id.* at 209-10.

> contrasts the character of the *rules* of international law with those of municipal law. The second form of doubt springs from the obscure belief that states are fundamentally incapable of being the subjects of legal obligation, and contrasts the character of the *subjects* of international law with those of municipal law."[38]

The first "form of doubt" is related to a defect routinely noted in textbooks of international law and scholarly writings – the absence from the system of international law of centrally organized sanctions. This lack is seen as one point of "adverse comparison with municipal law, the rules of which are taken to be unquestionably 'binding' and to be paradigms of legal obligation."[39] In seeking to give this argument "the benefit of every doubt," Hart explores the facts of the international system. He agrees with the critics and acknowledges that the two attempts to establish a centralized sanctioning system in international law have fallen short of making international law comparable to domestic law. Neither Article 16 of the Covenant of the League of Nations nor Chapter VII of the United Nations Charter has managed to introduce into international law "anything which can be equated with the sanctions of municipal law."[40] Given the structural weaknesses of the international system – in particular the right of veto of the permanent members of the Security Council – the law enforcement provisions of the Charter are likely to be paralyzed by the veto and "must be said to exist only on paper."[41] The centralized sanctioning system of international law has remained pure writing, existing only on paper; there is no system one can speak of.

The second form of doubt identified by Hart relates to state sovereignty. How can a state, which is itself sovereign and as such a subject *of* law, be also subject *to* law, specifically in its relations with other states? As Hart acknowledges, this doubt, or source of skepticism, is "even more extreme than the objection that international law is not binding because it lacks sanctions."[42] Hart explores the various theories that have sought to answer this question, including "voluntarist" theories, or theories of

[38] *Id.* at 210-11 (emphasis in original).
[39] *Id.* at 212.
[40] *Id.*
[41] *Id.* at 212.
[42] *Id.* at 215.

"auto-limitation," which have sought to reconcile state sovereignty with the existence of binding international law by treating international legal obligations as self-imposed, or as arising out of a *promise*. Hart acknowledges that these theories may have a point, but notes that "this could only be the case if the *rule* that promises, etc., create obligations is applicable to the state independently of any promise."[43] Nor do the facts support the autolimitation theory – in many instances, like in the case of new states – international obligations appear to arise and bind the state without its specific consent, *i.e.* without its explicit sovereign consent to be bound.[44]

Hart concludes that while international law may be considered law because of the substantive similarities between the rules of international law and those of domestic law, it is obviously not as advanced as municipal law; it does not constitute a *legal system* but only a *set of rules*. In *form*, although *not in substance*, international law resembles a simple regime of *primitive law*, or a regime of law that exists without any "basic norm" and therefore falls short of forming a system of law.

> "There is indeed something comic in the efforts made to fashion a basic rule for the most simple forms of social structure which exist without one. It is as if we were to insist that a naked savage *must* really be dressed in some invisible variety of modern dress. ... Again once we emancipate ourselves from the assumption that international *must* contain a basic rule, the question to be faced is one of fact. What is the actual character of the rules as they function in the relations between states? Different interpretations of the phenomena to be observed are of course possible; but it is submitted that there is no basic rule providing general criteria of validity for the rules of international law, and that the rules which are in fact operative constitute not a system but a set of rules, among which are the rules providing for the binding force of treaties. ... Perhaps international law is at present in a stage of transition towards acceptance of this and other forms which would bring it nearer in structure to a municipal system. If, and when, this transition is completed the formal analogies, which at present seem thin and elusive, would acquire substance, and the skeptic's last doubts about the legal 'quality' of

[43] *Id.* at 220 (emphasis in original).
[44] *Id.* at 220-21.

> international law may be laid to rest. Till this stage is reached the analogies are surely those of function and content, not of form."[45]

International law is thus not a full-fledged, mature legal system; it is underdeveloped, a work-in-progress, in form (although not in substance) *primitive* law. It constitutes a simple *set* of rules and not a *system* of rules. There can be no system because there is no basic norm. The attempts to fashion a basic norm for international law is as comic *"as if we were to insist that a naked savage must really be dressed in some invisible variety of modern dress."*[46]

International law is thus, in reality, naked like a savage; unlike the emperor of domestic law, she has no clothes.

What is it that is so primitive about the lack of a basic norm? Or, in other words, what is it that makes a law that lacks a basic norm primitive?

It is the lack of a *taboo*: like nakedness is not a taboo to a savage, the absence of a basic norm is not a taboo to international law.[47] Unlike domestic law, international law has no taboo. And since there is no taboo, there can be no sense of violation of a taboo – where there is no taboo, there can be no violation. In the absence of a taboo, states can behave under international law freely, without any sense of embarrassment, without any sense of shame of the use of their naked powers, as if they were still in a state of nature. This does not mean that there are no legal rules in international law; it simply means that the violation of these rules is not a taboo.

But if this is the nature of state in international law – if international law is still in a state of nature – how is it different from the nature of state in domestic law? Is there, as a matter of fact, any difference? How is the difference between international and domestic law created? According to Hart, the difference between them is not a matter of *substance*; it is a matter of *form* only. This formal difference is not seen, and

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[45] *Id.* at 230-31 (emphasis in original).
[46] *Id.* at 230 (emphasis added).
[47] SIGMUND FREUD, TOTEM AND TABOO (A.A. Brill trans., Vintage Books: New York, 1918) at 26-97 (discussing the definition of taboo as an embodiment of opposites – as an object that is both sacred *and* profane).

cannot be seen, precisely because it is formal – because it is enveloped in the emperor's invisible clothes. But although it cannot be seen, it is this formal, invisible difference – this veil or this hymen – that establishes the difference between raw nakedness and invisible clothing – the "invisible variety of modern dress."[48] The invisible inscription that this formal difference hides – envelopes – in its clothing, in the body of its text, is the original si(g)n, the first fiction and the first writing – the bold and revealing statement that *in truth, in reality, there is no difference between international and domestic law. The difference between them does not exist in reality; it is a matter of fiction.*

Thus the formal difference between international and municipal law not only hides the truth by establishing a difference that does not exist in reality; it also exposes the truth by revealing that this difference does not exist in reality. The first truth is thus *iconographic*: it is first inscribed in the form of fiction and then revealed in writing. Fiction both hides and reveals the reality – and thus produces it by revealing itself as fiction. Truth is the creation of fiction. It would not exist without fiction.

V

If the difference between international and municipal law is neither a matter of law nor a matter of fact, but rather a matter of form, *i.e.* fiction, what are the consequences of this iconographic revelation in terms of the concept of law? In order to answer this question, one will have to revert to the formal criteria that create the difference between international and municipal law. For if international law is characterized by what it is *not* – by a lack or absence – rather than by what it *is,* then – assuming that the difference between international and municipal law is a matter of fiction –

[48] HART, *supra* note 36. For an analysis of the concept of veil or hymen – a transparent, formal difference, or a difference without any sensible or visible difference – see Jacques Derrida, *The Double Session,* in JACQUES DERRIDA, DISSEMINATION, *supra* note 12, at 173, 212-13 ("[T]he hymen, the confusion between the present and the nonpresent, along with all the indifferences it entails within the whole series of opposites ..., produces the effect of a medium (a medium as element of enveloping both terms at once; a medium located between the two terms). It is an opposition that *both* sows confusion *between* opposites *and* stands *between* the opposites 'at once.' What counts here is the *between*, the in-between-ness of the hymen. The hymen 'takes place' in the 'inter-,' in the spacing between desire and fulfillment, between perpetration and its recollection. ... The hymen is thus a sort of textile.") (emphasis in original)

municipal law must be characterized, *in reality although not in form*, by an identical or analogical lack or absence. Thus, by examining international law – or rather, what international law *lacks,* what it is *missing* – we will also be examining municipal law. What international law lacks, domestic law also lacks – in reality (although not in form, *i.e.* as a matter of fiction).

According to Hart, there are two formal criteria that create the difference between international and municipal law: the absence of a centralized sanctioning system; and the absence of a basic norm. How are these two formal differences established? Since they do not exist in reality – the difference between international and domestic law is a matter of form only – they must be established by fiction, *i.e.* by a narrative.

What is this narrative? What does it tell us?

The traditional narrative tells us that domestic law is a mature system of law because, unlike primitive law, it imposes the prohibition of self-help as its basic norm. The function of the centralized sanctioning system is, precisely, to maintain and guarantee the exclusion of self-help – to ensure that self-help remains outside the system, banned and ostracized. International law remains deficient and questionable, *i.e.* primitive, as a system of law because, unlike domestic law, it has not been able to establish this basic norm. In a decentralized system such as international law, self-help cannot be definitively or systematically excluded – in the last instance, in an extreme case where all other avenues, including diplomacy and other peaceful means have been exhausted, self-help remains the sole means to enforce one's legal rights. While international law in principle advises against self-help, it cannot systematically – as a legal system – sanction non-compliance. As a result, self-help keeps returning as the ultimate option in each case of institutional failure, or the failure of collective enforcement – in particular for purposes of self-defense, but also for purposes of law enforcement.[49]

[49] *See Legality of the Threat or Use of Nuclear Weapons,* 1996 I.C.J. 1, 30 (Advisory Opinion of 8 July) ("[T]he Court cannot lose sight of the fundamental right of every State to survival, and thus its right to self-defence, in accordance with Article 51 of the Charter, when its survival is at stake. Nor can it ignore the practice referred to as 'policy of deterrence,' to which an appreciable section of the international community adhered for many years. ... Accordingly, in view of the present state of international law viewed as a whole, ... the Court is led to observe that it cannot reach a definitive

Why is self-help a primitive means of law enforcement, or a primitive sanction? Self-help is a primitive sanction because it is too uncertain, too ambivalent in its consequences, to be able to sustain a legal order. Self-help is *pharmakon* – as a sanction, it is both a legal remedy and a political poison.[50] It is a legal remedy to the extent that recourse to self-help results in effective enforcement of international law – to the extent that the state seeking to compel compliance by way of self-help manages to compel the state that has failed to voluntarily comply with its international obligations to comply with those obligations. But self-help is also dangerous, and not only because it allows each state to take the law in its own hands and thus suspends any attempt to establish a centralized sanctioning system. The danger with self-help is that, again in the absence of central sanctioning power, there is no guarantee that the state that seeks to enforce international law will in fact prevail in the sanctioning process – that it is the sanctioning power, and not the target state, that prevails in the end of the process. In other words, self-help provides no guarantee that the rule of law prevails over the law of rule. Such a guarantee can only be provided by a centralized sanctioning system.[51]

As recounted by Hart, modern international law has made two sustained efforts to replace the international law of rule with the international rule of law – first, in the form of Article 16 of the Covenant of the League of Nations and second, in the form of the collective security system embodied in Chapter VII of the United Nations Charter. Both of these attempts ultimately failed. Just as the sanctioning system of the Covenant of the League of Nations proved less than automatic and ultimately collapsed, the collective security system envisaged in Chapter VII of the Charter, and

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conclusion as to the legality or illegality of the use of nuclear weapons by a State in an extreme circumstance of self-defence, in which its very survival would be at stake.")

[50] *Pharmakon* is one of many deconstructive concepts that harbors opposite meanings in the body of its text. For discussion of *pharmakon* see JACQUES DERRIDA, DISSEMINATION, *supra* note 12.) Sanction is literally a *pharmakon* as it harbors within itself two opposite meanings – to accept, ratify, make sacred, and to punish or penalize. For definition see, e.g., Wikipedia, http://www.wikipedia.org ("Depending on the context, a sanction can be either a punishment or a permission. The word is a contronym."); and for etymology see, e.g., http://www.etymonline.com ("1563, 'confirmation or enactment of a law,' from L. *sanctionem* (nom. *sanctio*) 'act of decreeing or ordaining,' also 'decree, ordinance,' from *sanctus*, *pp. of* sancire 'to decree, confirm, ratify, make sacred' (see **saint**). Originally especially of ecclesiastical decrees. The verb sense of 'to permit authoritatively' is from 1797. *Sanctions,* in international diplomacy, first recorded in 1919, from *sanction* (n) in the sense of 'part of a clause of a law which spells out the penalty for breaking it.' (1651).")

[51] HEISKANEN, *supra* note 5, at 294-305.

in particular in Article 43, never materialized.[52] The member states never agreed to transfer permanent authority over their military forces, or over a portion of them, to the United Nations. As a result, the United Nations was never able to create its own military force, and Article 43 of Charter remains a dead letter, an arrangement that exists only on paper – that is, mere writing, like international law.

As a consequence of this aborted birth, or death at birth, international law has remained weak, a law without central authority, a law without centralized sanctioning powers, an immature law, that is, a child without a father, or an orphan with a dead father. It is for this reason that international law remains a savage: in international law the violation of the fundamental prohibition of the law – recourse to self-help – is not a taboo. It may be ill-advised, but it is not a taboo – the violator is not socially ostracized. There is no social organization to sanction self-help; there is no centralized sanctioning system, no totem pole standing in the middle of the body of law that would represent and embody the taboo and foretell the consequences of its violation.[53] It is this *lack,* this missing piece in the middle of the body of the law, that explains the weakness of international law's sanctioning power and its inability to sanction self-help. In other words, international law is weak because it has a distinctly feminine character; its body of law is characterized by lack rather than being, absence rather than presence, difference rather than identity.[54]

Unlike domestic law, international law has no taboo and therefore no story to tell. The placement of the rhetoric of the sources of international law in textbooks and

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[52] Art. 43 of the Charter provides:

> "1. All Members of the United Nations, in order to contribute to the maintenance of international peace and security, undertake to make available to the Security Council, on its call and in accordance with a special agreement or agreements, armed forces, assistance, and facilities, including rights of passage, necessary for the purpose of maintaining international peace and security.
> 2. Such agreement or agreements shall govern the numbers and types of forces, their degree of readiness and general location; and the nature of the facilities and assistance to be provided.
> 3. The agreement or agreements shall be negotiated as soon as possible on the initiative of the Security Council. They shall be concluded between the Security Council and groups of Members and shall be subject to ratification by the signatory states in accordance with their respective constitutional processes."

[53] *See* FREUD, *supra* note 47, at 5 (discussing the two features of a totem: the sacred obligation not to kill (or destroy) the totem, and the automatic punishment that follows any violation of the prohibition).

[54] As noted by MARTTI KOSKENNIEMI, THE GENTLE CIVILIZER OF NATIONS: THE RISE AND FALL OF INTERNATIONAL LAW 1870-1960 (Cambridge University Press 2001).

treatises before the question of the relation between international and municipal law is a feeble attempt to fabricate such a story; an attempt to erect the normative authority of international law by suppressing any difference, that is, any dissent, that would question the legal order between international and municipal law. In the absence of a basic norm, the legal order so established remains weak and questionable, open to critical challenge and radical questioning.

But such a story – a story of a basic norm that silences, with terrifying normative authority, any dissent before the Law – does exist in domestic law. This story was foretold by Kafka in his *Vor dem Gesetz.*

> "Before the Law stands a doorkeeper. To this doorkeeper there comes a countryman and prays for admittance to the Law. But the doorkeeper says that he cannot grant admittance at the moment. The man thinks it over and then asks if he will be allowed in later. 'It is possible,' says the doorkeeper, 'but not at the moment.' Since the gate stands open, as usual, and the doorkeeper steps to one side, the man stoops to peer through the gateway into the interior. Observing that, the doorkeeper laughs and says: 'If you are so drawn to it, just try to go in despite my veto. But take note: I am powerful. And I am only the least of the doorkeepers. From hall to hall there is one doorkeeper after another, each more powerful than the last. The third doorkeeper is already so terrible that even I cannot bear to look at him.' These are difficulties the countryman has not expected; the Law, he thinks, should surely be accessible at all times and to everyone, but as he now takes a closer look, at the doorkeeper in his fur coat, with his big sharp nose and long, thin, black Tartar beard, he decides that it is better to wait until he gets permission to enter. The doorkeeper gives him a stool and lets him sit down at one side of the door. There he sits for days and years. He makes many attempts to be admitted, and wearies the doorkeeper by his importunity. The doorkeeper frequently has little interviews with him, asking him questions about his home and many other things, but the questions are put indifferently, as great lords put them, and always finish with the statement that he cannot be let in yet. The man, who has furnished himself with many things for his journey, sacrifices all he has, however valuable, to bribe the doorkeeper. That official accepts

> everything, but always with the remark: 'I am only taking it to keep you from thinking you have omitted anything.' During these many years the man fixes his attention almost continuously on the doorkeeper. He forgets the other doorkeepers, and this first one seems to him the sole obstacle preventing access to the Law. He curses his bad luck, in his early years boldly and loudly, later, as he grows old, he only grumbles to himself. He becomes childish, and since in his yearlong contemplation of the gatekeeper he has come to know even the fleas in his fur collar, he begs the fleas as well to help him and to change the doorkeeper's mind. At length his eyesight begins to fail, and he does not know whether the world is really darker or whether his eyes are only deceiving him. Yet in his darkness he is now aware of a radiance that streams inextinguishably from the gateway of the Law. Now he has not very long to live. Before he dies, all his experiences in these long years gather themselves in his head to one point, a question he has not yet asked the doorkeeper. He waves him nearer, since he can no longer raise his stiffening body. The doorkeeper has to bend low towards him, for the difference in height between them has altered much to the countryman's disadvantage. 'What do you want to know now?' asks the doorkeeper. 'You are insatiable.' 'Everyone strives to reach the Law,' says the man, 'so how does it happen that for all these many years no one but myself has ever begged for admittance?' The doorkeeper recognizes that the man has reached his end, and to let his failing senses catch the words roars in his ear: 'No one else could ever be admitted here, since this gate was made only for you. I am now going to shut it.'"[55]

The story foretells the countryman's – the layman's – terrifying problem with the Law: the Law does not say what it means; it remains silent on whether it prefers compliance or non-compliance and, as a result, sanctions both – and in both senses of this term. The layman will not gain access to the Law by complying; this effectively amounts to begging and will only reduce his chances – make him smaller in the eyes of the Law, as time goes by. The Law is indifferent to compliance – if the layman complies with the Law, there is no non-compliance, which is obviously sanctioned by

[55] Franz Kafka, *Before the Law,* in FRANZ KAFKA, THE COMPLETE STORIES (Sheckon Books: New York, 1971), at 3-4.

the Law, and therefore no need to gain admission to the Law. The other alternative – taking the Law in one's own hands and challenging the doorkeeper – would not help either; it would effectively amount to self-help, which is severely sanctioned by the Law. The layman therefore has only two options: either to comply and keep begging, and see his access deferred *ad infinitum*, or to take the law in his own hands and face the consequences. In other words, the layman's choice is that between compliance and non-compliance with the taboo – the prohibition that stands in front of the Law; the basic norm that sanctions both compliance and non-compliance, simultaneously and without any difference, that is, with noble indifference.

Is there any way out of this double bind?

Yes, there is – although not for the layman. Kafka's prophecy only foretells the options available to the countryman – the layman (*profane*). The layman has no direct access to the Law. In order to gain direct access to the Law, the layman would have to become a lawyer; in other words, a doorkeeper. Since the lawyer is a doorkeeper and the doorkeeper is a lawyer: as a doorkeeper, the lawyer's function is to ensure that only the lawyers, or the professionals – those who profess their faith in the Law by excluding the laymen – *les profanes* – from the Law – are allowed to appear in front of the Law. There is no universal access to the Law: only the lawyers, the professionals of the Law, are authorized to speak, authoritatively, of the Law, represent the layman before the Law, and speak on his behalf for the Law. There is no universal access to the Law. The layman is admitted before the Law only if he first professes his faith in the Law – only if he first is initiated as a lawyer, as a professional (*un initié*) – and then confesses his profession by excluding (other) laymen. But conversely, as soon as the layman is initiated as a lawyer, he no longer qualifies as a layman. The birth of the lawyer is the death of the layman.

This is in effect what Kafka's prophecy foretells us, quite literally. In the end, the layman dies, before the Law, in front of the bar, without admission to the bar. He must die, in order to gain admission. The death of the layman is the end of the story and the beginning of the Law.

This is where Derrida, the layman, in the end left us, before the Law. In his reading of Kafka's *Vor dem Gesetz* as well as in his last interview.[56] Since the prophecy foretold by Kafka is not a prophecy of the law to come – a story of a future law. Nor is it a story of positive law, or the law as it presently stands. It is a history – that is, not a story of the layman and the lawyer *in front of* the Law but *before* the Law (*vor* dem Gesetz), *i.e.* a difference not in terms of *distance* but in terms of *time*. It is a story of medieval law – a story of the law in the era of darkness, in the era before the Enlightenment – indeed, *right before* the dawn of the Enlightenment: in the end, towards the end of his days, the layman finally becomes aware of the radiance – the light of the Enlightenment – that streams "inextinguishably from the gateway of the Law." But it was too late for the layman to see the light; he died just before it dawned to him that he would gain access to the Law only if he made a deal with the doorkeeper and retained him as his legal representative. This deal was right there, waiting wide open like the gate, waiting to be closed.

As it was.

Since in the end, this deal was closed. But this is another story. It is a story of positive law, or the law as it presently stands. It is this story: it is this deal, this unholy alliance of the countryman and the doorkeeper, or the layman and the lawyer – that is the founding pact, the *contrat social* – of the modern, enlightened concept of civil law. Under this pact, both the layman and the lawyer make a common promise, a *compromis*, *i.e.* a compromise, in which both waive their unconditional positions and obtain a special privilege in return: while the layman waives his right of direct access to the law, he reserves exclusive access to lawmaking – the exclusive right of the people to legislate by themselves for themselves; and while the lawyer reserves the exclusive right to authoritatively interpret and apply the law, he waives his right to claim any professional privilege in law-making because of his professional expertise. As a result of these exclusions, the layman manages to ensure that the substance of the law will reflect and embody the common sense of the people, while giving up his right to say – authoritatively – what the law he himself enacted in fact means. Similarly, the lawyer ensures that the interpretation and application of the law will

[56] *See* Jacques Derrida, *Before the Law,* in ACTS OF LITERATURE (Routledge, Derek Attridge ed. 1992) at 181.

remain a rational and technical, *i.e.* professional exercise, while giving up his right to participate in law-making in his professional capacity – including in the course of his professional interpretation and application of the law. This pact, this compact of reciprocal privileges and exclusions, is the founding pact of the *civil society*; the compact founding code of civil law. As such, it also embodies the profound taboo of modern, enlightened law: it establishes the Law both as profane (it can only be created by the layman and not by a lawyer) and as sacred (it is directly accessible only to the lawyer and not to the layman).

This reciprocal promise of the layman and the lawyer not to interfere with the domain reserved exclusively to the other, while reserving exclusive access to one's own reserved domain, covers only the relationship between the layman – the people – and the lawyer – the legal profession, *i.e.* it only covers the civil society that it itself creates. The emperor – the state – is not a party to this pact. The state remains a third party, but nonetheless a party that is not entirely disinterested in the legal arrangements of the civil society. The state is an *interested* third party, the guarantor of the pact: it is the state that maintains the centralized sanctioning system that guarantees the binding force of the social contract – and thus the rule of law. The state has an interest in maintaining the social contract and ensuring its binding force, since the deal between the people and the legal profession sanctions the exclusion of self-help and thus does not threaten the state's sovereign authority in any way; quite the contrary, the exclusion of self-help confirms and legitimates this authority by centralizing and monopolizing all sanctioning power in the hands of the state. It is for this reason that the state agrees to become the guarantor of the social contract: the arrangement sanctions and establishes the state's natural monopoly and exclusive sovereign authority in law enforcement.

As a third party to the social contract, the state remains outside the civil society and outside the civil law established by this pact. While the state agrees to guarantee the binding force of the pact and thus to maintain the rule of law, the legal obligation created by this guarantee is based on a sovereign consent and thus has the legal nature of a unilateral *promise*; the social contract does not create any reciprocal rights and obligations for the state *vis-à-vis* the parties to the contract. The state's exclusive sovereign authority in law enforcement and the unilateral nature of its commitment to

the rule of law is not only the conceptual root cause of the deep-seated distinction in civil law between private (or civil) and public law; it is also the root cause of civil law's preoccupation with constitutionalism. The fundamental legal arrangements of the civil society – the social contract and the state's unilateral commitment to the rule of law – do not prevent the possibility of abuse by the state of its sovereign authority; there is no state above the state, no super-state, to sanction the state if it fails to comply with its unilateral promise to enforce the rule of law. The story of the development of civil law over the past two hundred years is the story of the sustained effort made by the civil society to bring the conduct of the affairs of the state under the rule of law – to establish a *Rechtstaat (Etat de droit)* where also the state, and not only the members of the civil society, is bound by the law. The concept of *Rechtstaat* is the embodiment of this conceptual project of auto-limitation; of this attempt to clothe the state in the form of law by bringing it under a formal basic norm (*Grundnorm*) – a formal promise to comply with and to enforce the rule of law.

The task faced by the civil society in its effort to bring the state under the rule of law in the conduct of its domestic affairs is analogous to the attempts made by international legal scholars to bring the state under the rule of law in the conduct of its foreign affairs. In this sense there is no real difference between international and domestic law: both are engaged in a similar effort to contain the state's monopoly to power and its exclusive sovereign authority to maintain the rule of law. There is no real difference between the binding force of constitutional law and international law: in either case, there is no guarantor of the state's promise to comply with its legal obligations; like the constitutional arrangements of the *Rechtstaat,* the state's conduct of its foreign affairs falls outside the social contract. The difference between constitutional law and international law is only *formal,* that is, fiction. While the basic norm of the constitution brings the state formally under the rule of law, there is no higher normative authority, no super-state, that can guarantee the state's compliance with the rule of law. Like international law, constitutional law is in reality based solely on the state's unilateral consent to comply with the law. The constitutional arrangements of the state only barely hide the actual state of affairs: in the conduct of its affairs, and in particular in the conduct of its foreign affairs, the state is still the emperor. Like the emperor, the state remains free to conduct its foreign affairs as it sees fit, without any normative constraints. While the state may

agree in its constitution to comply with its international obligations, such commitments are irrelevant under international law. They create no obligations *vis-à-vis* other states, nor can these other states invoke them *vis-à-vis* the former state.

The province of foreign affairs covers, in particular, decisions involving war and peace. While the emperor may or may not seek the consent of his people before going to war, and while he may seek legal advice from his lawyers, under international law he has no obligation to do so – he is not a party to the social contract, nor are the state's constitutional arrangements, which may or may not require such consent, of any relevance under international law. In the conduct of his foreign affairs, the emperor is, in essence, *outside* the law – naked power, uncovered by the invisible clothing of his constitutional promise to comply with the rule of law. Herein lies the primitive nature of international law: the state's conduct of its foreign affairs falls not only outside the social contract but also outside the constitutional basic norm. The conduct of foreign affairs remains – as before, *i.e.* as before these fundamental arrangements of the modern law – the exclusive privilege of the emperor. International law is still primitive – or rather, *medieval* law. In other words, international law is *still before the Law*. It is still in history. It *is* history. It is a story that never became true, a future that never arrived.

VI

This is where Derrida's call for a new concept of international law intervenes. While he left us prematurely, before the Law, his call for a new European concept of international law still resonates forcefully and reaches us from before the Law, beyond the concept of modern law, calling for repetition:

> *"L'Europe se trouve sous l'injonction d'assumer une responsabilité nouvelle. Je ne parle pas de la communauté européenne telle qu'elle existe ou se dessine dans sa majorité actuelle (néolibérale) et virtuellement menacée de tant de guerres internes, mais d'une Europe à venir, et ce qui se cherche. En Europe ('géographique') et ailleurs. Ce qu'on nomme algébriquement*

> *'l'Europe' a des responsabilités à prendre, pour l'avenir de l'humanité, pour celui du droit international – ça c'est ma foi, ma croyance. Et là, je n'hésiterai pas à dire 'nous les Européens.' Il ne s'agit pas de souhaiter la constitution d'une Europe qui serait une autre superpuissance militaire, protégeant son marché et faisant contrepoids aux autres blocs, mais d'une Europe qui viendrait semer la graine d'une nouvelle politique altermondialiste. Laquelle est pour moi la seule issue possible.*
>
> *Cette force est en marche. Même si ses motifs sont encore confus, je pense que plus rien ne l'arrêtera. Quand je dis l'Europe, c'est ça : une Europe altermondialiste, transformant le concept et les pratiques de la souveraineté et du droit international."*[57]

In his call for a new Europe and a new European concept of international law, Derrida not only called for a transformation of the concept of international law; he also remained standing right in front of it, but without seeing it:

> *"Quand je dis l'Europe, c'est ça: une Europe altermondialiste, transformant le concept et les pratiques de la souveraineté et du droit international. Est disposant d'une véritable force armée, indépendante de l'OTAN et des USA, une puissance militaire qui, ni offensive, ni défensive, ni préventive, interviendrait sans tarder au service des résolutions enfin respectées d'une nouvelle ONU (par exemple, de toute urgence, en Israël, mais aussi ailleurs)."*[58]

This is a call for a transformed use of force in international law – neither offensive, nor defensive, nor preventive. In other words, use of force not for the purpose of self-help or self-defense, or domination, but for the purpose of – helping the *other*. In other words, unselfish use of force, use of force in a professional manner, without metaphysical or political passion or emotion, use of force without the force of fiction, without prophecy. Use of force for *clinical* purposes, based on a technical, professional diagnosis of the problem at hand – in other words, treating self-help and

[57] *Le Monde,* 18 Aug. 2004.
[58] *Id.*

other forms of international violence as a crisis, or as a disease, rather than as a moral wrong that must be severely punished and sanctioned. Also de-centralized use of force – use of a force that would be available on an *ad hoc* basis, as necessary. In other words, a decentralized force that is decentralized at the source, without ever having been first centralized, *i.e.* without ever having degraded from any original, metaphysical whole or integrity.

How would such a future decentralized, professionally managed international crisis clinic look like?

The future is already here; it has already arrived. There is no primitive totem in international law – no centralized sanctioning system; the two attempts to create one have already failed. Just as Article 16 of the Covenant of the League of Nations was honored mainly in breach, Article 43 of the United Nations Charter has never been applied. Article 43 stands as a symbol of our failed attempt to set up a totem, to make international law look like our image of domestic law – a social contract guaranteed by an interested third party, a global sovereign. Article 43 of the Charter embodies the stillborn idea of an international centre – or a *logos* – around which international sanctioning powers would gather and assemble, to animate, *i.e.* to legitimate themselves,[59] to dress themselves in the invisible clothing of the basic norm, ready for deployment as necessary to maintain the taboo, to sanction self-help, to punish the wrongdoer. But, as we all – including the laymen – know, this plan to create a centralized international military force to enable the Security Council to take military action on its own, as an interested third party and guarantor of the international legal order, never became a reality.[60] Article 43 of the Charter remains a dead letter, a

[59] In this sense, the aborted attempt of international sanctioning powers to assemble or gather around Art. 43 of the UN Charter effectively brings to an end the era of modern philosophy as a metaphysics. *See* Martin Heidegger, *The End of Philosophy and the Task of Thinking,* in MARTIN HEIDEGGER, BASIC WRITINGS (David Farrell Krell ed., Harper & Row: New York, 1977), at 373, 374-75 ("[W]hat we say about the end of philosophy means the completion of metaphysics. However, completion does not mean perfection as a consequence of which philosophy would have to have attained the highest perfection at its end. ... The old meaning of the word 'end' means the same as place: 'from one end to the other' means from one place to the other. The end of philosophy is the place, that place in which the whole of philosophy's history is gathered in its most extreme possibility. *End as completion means gathering.*") (emphasis added)

[60] Art. 42 of the Charter provides that "[s]hould the Security Council consider that measures provided for in Article 41 [economic sanctions] would be inadequate or have proved to be inadequate, it may take such action by air, sea, or land forces as may be necessary to maintain or restore international

symbol of an idea and of an ideal, of a future that never arrived because it was born dead, stillborn, and as such remains living proof of the arrival of a future international law – of a legal order without a center, that is, without a totem.

> "[The structure or the structurality of structure] has always been neutralized or reduced, and this by a process of giving it a center or of referring it to a point of presence, a fixed origin. The function of this center was not only to orient, balance and organize the structure – one cannot in fact conceive of an unorganized structure – but above all to make sure that the organizing principle of the structure would limit what we might call the *play* of the structure. By orienting and organizing the coherence of the system, the center of a structure permits the play of its elements inside the total form. And even today the notion of a structure lacking any center represents the unthinkable itself."[61]

The absence of an absolute prohibition of self-help is the other side of the coin of international law: a totem – a centralized system of sanctions – can exist only if it is supported by a taboo, by an absolute prohibition of self-help – and *vice versa*.[62] While most international lawyers advise, in principle, against the use of self-help as a legal remedy, there is no formal prohibition of self-help in international law; on the contrary, use of force for purposes of self-defense is specifically authorized in writing.[63] There is therefore nothing in international law that prevents the realization of Derrida's call for a new concept of international law: both sides of the coin are empty. There is neither totem nor taboo in international law; there is nothing that prevents the coinage of a new concept of international law – of a concept of international law *as is* – or rather, is as it is *not,* as a *different* law, as a law without a centralized sanctioning system and without absolute prohibition of self-help, as a law

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peace and security. Such action may include demonstrations, blockade, and other operations by air, sea, or land forces of Members of the United Nations."

[61] Jacques Derrida, *Structure, Sign and Play in the Discourse of the Human Sciences,* in JACQUES DERRIDA, WRITING AND DIFFERENCE (Alan Bass trans., The University of Chicago Press, 1978), at 278-79 (emphasis in original).

[62] FREUD, *supra* note 47, at 5.

[63] I.e. Art. 51 of the United Nations Charter. For discussion of self-help see HEISKANEN, *supra* note 5, at 296 (esp. note 78 and the sources cited therein).

without a totem and without a taboo.[64] In a system without a totem there can be no taboo, no basic norm that is so fundamental, so *central*, to the existence of the system that its violation would shake – solicit – the foundations of the whole system. The "system" of international law is unshakable because it has no center, no basic norm, no foundation that would be so essential, so central and so fundamental to the system's existence that it could not survive without it. In the absence of a centralized sanctioning system, international law is fragmented – deconstructed – to begin with, at the source: it has no metaphysical center, no metaphysical anchorage, no metaphysical h(e)aven. The lack of a centralized sanctioning system makes this bare truth fully visible to the naked eye; even a layman can see it: in international law, the state may, and often does, take the law in its own hands, without any automatic sanction or severe punishment. There is no metaphysical narrative, or metanarrative, no basic norm that would cover and hide this fundamental reality in its texture; no hidden message, no hidden meaning, no fundamental truth that could be revealed. The reality of international law is *no revelation*. There is no need for a lawyer to spell this out: the violation of international law is not absolutely prohibited.

That there is no formal, absolute prohibition of self-help in international law does not mean that there is, in international law, a blanket authorization to engage in self-help – self-help remains, in principle, ill-advised in international law. Although there is no social contract in international law, nor a centralized sanctioning system to guarantee compliance, there is an emerging informal understanding, if not a new social deal, among experts and professionals – and not only among legal experts and professionals – which, while admitting self-help within the realm of law, retains the rational core of the exclusion of self-help, that is, its non-metaphysical, mundane sense – its sense as a *problem*.[65] This new international law does not absolutely ban self-help, or strictly outlaw it, banish it outside the international community, expel it from the system or ostracize it as an outcast. International law retains self-help within the system, not as

[64] This new concept is already out there, current, albeit in limited circulation. *See, e.g.*, Veijo Heiskanen, *Introduction,* in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS (Jean-Marc Coicaud & Veijo Heiskanen eds., United Nations University Press: Tokyo, New York & Paris, 2001), at 1.

[65] For preliminary discussion see Veijo Heiskanen, *The Rationality of the Use of Force and the Evolution of International Organization,* in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS (United Nations University Press, Jean-Marc Coicaud & Veijo Heiskanen eds. 2001) at 155-85. For further discussion see Veijo Heiskanen, *Virtually from Scratch: An Outline of an Alternative Philosophy of Global Governance,* 17 FIN. Y.B. INT'L L. __ (2006) (forthcoming 2007), available as a working paper at http://www.helsinki.fi/oik/globalgovernance/Mallisivusto/tutkimus/publications.htm.

a taboo that must be severely sanctioned, but as unadvisable, as unhelpful – as problematic, as a *problématique* – as a problem that must be dealt with. This rationale, or *raison d'être,* of the new international law – the admission of self-help within the system of international law under reservation, that is, as a problem, in order to be able to deal with it – remains mundane rather than onto-theological – devoid of any metaphysical or political passion. This descension of international law from its metaphysical heights, its soft landing on the face of the earth – its globalization or *mondialisation,* or rather, this *mundialization,* of international law – is an effort to deal with the problem by dealing with it rather than by denying it or by banning it. For this new concept of international law, violent self-help – whether by a state, any other entity, or an individual – remains a problem that needs to be dealt with, but in a professional and technical manner rather than in a political, *i.e.* emotional or passionate manner. When faced with a difficult problem – and self-help is a problem *par excellence*, indeed, the problem itself – an expert or a professional knows that passion does not help. A professional knows that, if one really wants to help, letting emotions and passions guide is not only unhelpful and unprofessional; it also multiplies the risk of failure. This is in particular the case with self-help, which, as a problem *par excellence,* can never be technically and professionally fully mastered. It cannot be fully mastered precisely because the one that one tries to help – the other – is engaged in self-help; in an emotional and passionate effort not only to help himself, but also to engage the one that seeks to help, to help himself. The more passionate this invitation is, the more difficult it is to resist and the more intense the temptation to reciprocate, to engage in self-help oneself. By the compelling force of its own logic, self-help tends to attract both sides in a reciprocal process of violent self-help – and therefore, by implication, in an unintended but unavoidable reciprocal recognition and legitimation of self-help itself, *in flagrante.*[66]

VII

[66] The logic of war – violent self-help – is masterfully set out in CARL VON CLAUSEWITZ, ON WAR (M. Howard & P. Paret trans., Princeton University Press, 1984). For discussion see Heiskanen, *The Rationality of the Use of Force and the Evolution of International Organization, supra* note 65.

If these are the consequences of accepting international law as is or rather, as it is *not*, as a *different* law, what are the consequences of this hypothetical endorsement – this signature under reservation – in terms of the concept of law in general? Would it not mean, in effect, the adoption of a more "civilized" concept of law than the concept of modern law? Since in the end, is it not true that at the very core of the concept of modern law lies the fundamentally primitive system of the totem and the taboo? In the end, is it not true that in labeling international law as primitive, the concept of modern law only reveals its own (repressed) primitive core? Is it not implicit in the fundamental arrangements of the modern law – the social contract and the basic norm – that these arrangements are sustainable only if they are supported and animated by the fundamentally primitive ideas of absolute prohibition of self-help and centralized sanctioning powers – the primitive system of the totem and the taboo? Is it not the case that the characterization of self-help as a problem and its clinical treatment accordingly, as a social condition if not as a disease, is a more civilized approach than labeling the wrongdoer as an outlaw and a social outcast, or his severe sanctioning for the violation of the taboo? And finally, is it not the case that the characterization of self-help as a social problem – as a problem that must be dealt with in a professionally and technically competent manner while recognizing that, in many instances, the problem may be too serious or the disease too terminal to be fully mastered – is likely to be economically the more efficient and socially the more sustainable approach – at least in the long term – than engaging in an all-out war against the wrongdoer and thereby indirectly recognizing the legitimacy of his primal violence?

Does one really have to ask?

Since while a problem *par excellence,* self-help is only one of the many problems of international law. Therefore, what applies to self-help, should also apply, *ex hypothesi*, to other problems of international law – the treatment of these problems, precisely, as problems rather than as norm transgressions that must be severely sanctioned and punished. The regulatory philosophy of the new international law generally – and not only the regulation of the problem of self-help – should, *ex hypothesi,* be based on the (in theory) mundane but (in practice) more than ambitious goal of problem solution – solving global social, economic and environmental problems. Just as it is not necessary to erect a centrally organized sanctioning system

to regulate the problem of self-help, it is no more necessary to establish a global legislator to regulate these other – no less serious – problems. Just as the centralization of international sanctioning powers serves no rational purpose, there is no rational need to establish a centralized legislature; it is, *ex hypothesi,* more rational, more effective and more sustainable to tackle the many global social, economic and environmental problems in their context, in the concrete context of each individual problem, rather than in the formal and abstract context of global legislation.[67]

Is this a realistic utopia? Why not. Since again, as in the case of self-help, the future has already arrived – and if not only because there is effectively no choice. In the absence of a centralized global legislature, the international regulatory function remains "fragmented" and "decentralized" to begin with – without ever having been centralized or idealized and therefore by implication, without ever having degraded from its pure integrity – and can only be exercised in a multitude of contexts, outside a totalizing scheme, outside a context of all contexts.

> "Every [rule] [sign], [legal or otherwise] [linguistic or nonlinguistic], [domestic] [spoken] or [international] [written] (in the current sense of this opposition), in a small or large unit, can be *cited,* put between quotation marks; in so doing it can break with every given context, engendering an infinity of new contexts in a manner which is absolutely illimitable. This does not imply that the mark is valid outside of a context, but on the contrary that there are only contexts without any center or absolute anchoring."[68]

If international regulatory function is exercised for purposes of problem-solution rather than for purposes of codification or universalization of political and metaphysical ideals, the birth of a new concept of international law also means, *ex hypothesi,* the birth of a new concept of democracy. In this new democracy, the exercise of the regulatory function is no longer the exclusive privilege of the layman. Rather in this new universal – but not centralized or uniform – democracy there are only experts and professionals and no laymen since instead of exercising the

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[67] For a tentative outline for global trade regulation see, e.g., Veijo Heiskanen, *The Regulatory Philosophy of International Trade Law,* 38 J. WORLD TRADE 1 (2004).
[68] Derrida, *Signature Event Context, supra* note 6, at 12.

regulatory function in their capacity as laymen – as representatives of certain metaphysical and political ideals – experts and professionals will exercise the regulatory function, precisely, in their capacity as experts and professionals, that is, as representatives of certain scientific knowledge and certain professional skills. If the purpose of the global regulatory function is problem solution rather than the realization of political and metaphysical ideals, there is no rational reason to believe that laymen would be better qualified to solve the many global social, economic and environmental problems that we face today than experts and professionals. Why would they? If one were to tackle these problems seriously – *i.e.* in practice and not only in theory – common sense – which is always the common sense of the layman – must be replaced, *ex hypothesi,* by an enlightened expert opinion and the best professional judgment.[69]

Would this not be "anti-democratic"? Not necessarily, or rather, quite the contrary. First, there is no pure layman; every layman is, *at least potentially,* also an expert or professional in his or her own right. If this is not yet the case in reality, is it not more enlightened as a global goal of education to strive to make each layman an expert or a professional in his or her own right rather than leave as many as possible without proper education, as pure laymen? This would, and should, not mean making each and every layman a pure professional or expert; it would only mean making each and every layman capable of acting *in the capacity* of an expert or professional. Nor does the delegation of the regulatory function to experts and professionals necessarily result in the creation of an exclusive club of experts and professionals who are entitled to participate to the exclusion of others, *i.e.* to the exclusion of other experts and professionals. Quite the contrary, in the absence of a centralized global legislature, the delegation of the regulatory function from laymen to experts and professionals opens the door, *ex hypothesi*, for every expert and professional to participate in the exercise of the regulatory function. As this function is not exercised in a centralized and therefore abstract manner but in a concrete context, there is no expert or professional that is *a priori* excluded from the exercise of this function. Thus, it is arguable that such a decentralized "system" is in fact *more democratic* than the

[69] For a preliminary discussion of this concept of cosmopolitan or technocratic democracy see Heiskanen, *Introduction,* in THE LEGITIMACY OF INTERNATIONAL ORGANIZATIONS, *supra* note 64, at 8-14.

centralized form of legislation. Unlike the modern system of legislation, which must in practice be delegated to representatives, regulation by experts and professionals is potentially always open, without delegation, to each and every expert and professional in his or her technical or professional capacity – an exercise in codification that remains *ex hypothesi* open to technical and professional input from all disciplines, a code with an open source. In other words, a realization of the ideal of direct democracy without its dangers.

Last and also least, just as there is no need to establish a centrally organized sanctioning system or a global legislature, there is no real need to establish a compulsory system of international jurisdiction. International courts and tribunals are not really designed, and need not be designed, to deal with global *problems,* in the technical of this term; this is the function of contextual regulation. The function of international courts and tribunals is to deal with *disputes* – differences that arise between two or more parties and that these parties have agreed in advance, or after the dispute has already arisen, on an *ad hoc* basis, to submit to international jurisdiction for legal settlement. This is the ordinary mechanism, and if this ordinary mechanism is not adequate – if the parties cannot settle the dispute as between themselves, by negotiation, and do not agree to its submission for settlement by an international court or tribunal – the problem is not with the international legal "system" as such, that is, that there is no "compulsory" dispute settlement mechanism. The problem in such a case is rather that the dispute is not really a *dispute* – a problem of everyday psychopathology that can be handled by the parties as between themselves, through the ordinary means of negotiation or dispute settlement – but indeed a *problem,* that is, a more serious – pathological – matter, or a crisis, that therefore calls for intervention and assistance by third parties and, if necessary, contextual regulation. In other words, insofar as the exercise of international jurisdiction is concerned, there is really no problem that international jurisdiction cannot deal with, and precisely because *problems* is not what it is designed to deal with it in the first place.

Of course, in such a decentered international "system" there would be no guarantee, nor any certainty, that self-help can be dealt with, that global regulatory problems will be addressed, or that international legal disputes will be satisfactorily settled. But if there were such an absolute certainty, what would be the point of international law

and regulation? Is there not, in all law and regulation, a built-in possibility of getting it wrong, an inherent risk of failure? If this is indeed the case – if a risk of failure is indeed radically unavoidable – should one not rather see this – the lack of absolute certainty, or the absence of complete security – as yet another possibility, as yet another opportunity, as yet another challenge? Even –

As an ode to joy?

> "[The other side of the thinking of play] ... would be the Nietzschean *affirmation*, that is the joyous affirmation of the play of the world and of the innocence of becoming, the affirmation of a world of [rules] [signs] without fault, without truth, and without origin which is offered to an active interpretation. *This affirmation then determines the noncenter otherwise than as loss of the center.* And it plays without [certainty] [security]. For there is a *sure* play: that which is limited to the *substitution* of *given* and *existing, present,* pieces. ... [This other interpretation], which is no longer turned towards origin, affirms play and tries to pass beyond man and humanism, the name of man being the name of that being who, throughout the history of metaphysics or of ontotheology – in other words, throughout his entire history – has dreamed of full [positivity] [presence], the reassuring foundation, the origin and the end of the play."[70]

[70] Jacques Derrida, *Structure, Sign and Play in the Discourse of the Human Sciences, supra* note 61, at 278, 292 (emphasis in original).