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# *Ethics, Morals and International Law*

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## **Abstract**

*In April 1998 a large interdisciplinary conference on 'The Turn to Ethics' took place at Harvard University. The conference investigated such phenomena as the recent establishment of courses in ethics in numerous academic institutions, the explosion of literature on the subject, and the use of the rhetoric of ethics in public life at large. Our aim in this article is to bring the international legal discipline into contact with this overall phenomenon and to relate the interdisciplinary discussion reflecting on it to international law. To start, we offer a broad sense of the critical views on ethics that enliven the contemporary discussion. We then apply these views to international legal scholarly trends, revisiting formalist, idealist and what we call strategic stances towards international legal work. In the third part, we illustrate in two case studies how legal opinions of the ICJ and of individual judges can be understood in the light of this discussion. In concluding we suggest what a turn to ethics may and may not mean for the international lawyer and how the various 'turns' may be negotiated.*

Ethics is a classic topic of reflection, though recently it has emerged as a hot-selling category for books and articles. On-line library information systems are awash with 'the ethics of ...' titles. The Harvard library system, for instance, has over 500 such titles, including the ethics of divorce, deconstruction, democracy, and so forth. On the Internet, keen ethics scholars can join in an 'ethics chat-line'. And Newt Gingrich has published a book on his weight and the crisis with the Select House Committee on Ethics, the popularity of which, however, will undoubtedly be quickly surpassed by works on President Clinton's ethics. At conferences in any of the humanities one is bound to hear sentences along the lines of 'the de-centring of the subject has brought about a re-centring of the ethical', 'ethics is a dialectic and a dialogue, rather than an answer', or paraphrasing Wittgenstein, 'were a complete book on ethics ever written it would, with an explosion, destroy all other books'.<sup>1</sup> But what is ethics? And how

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<sup>1</sup> Paraphrasing Majorie Garber's introductory speech at the 'Turn to Ethics' conference at the Centre for Literary and Cultural Studies at Harvard University, April 1998.

does it sustain and interplay with law, or, more specifically for the purposes of this paper, international law?

## 1 The Question of Ethics and the International Legal Context

Intuitively we may think of ethics as something closely personal and only very uneasily juxtapose it with a calling to something as broad and abstract as the discipline of international law. Moreover, as ethics has become increasingly fashionable it has turned into a mantra, a high-minded centre of theory which freely slides and sloshes around, ubiquitous and of such broad meaning as to be almost meaningless, except in certain specific professional fields, such as the field of legal ethics, where it has coalesced into a niche of canonized disciplinary self-consciousness. Thus, while ethics can be discussed and debated on many different levels, perhaps only the narrow realm of professional ethics seems 'legal' in any sense, but even this is at the cost of distance from any personal moral responsibilities which we recognize in our 'other life'. This article proposes that there are no such 'other lives' where we might take refuge after working hours, looking there for meaning and moral responsibility. Its simple thesis is that issues of responsibility and ethics run right throughout our lives, without compartments or bright lines making divisions between our professional and personal identities. Identities are little more than social roles backed with an individual's persistence in consistency; yet the key to ethics is that it fails to fulfil its function if conceived of as a mere consistency-backing code.<sup>2</sup>

In international law we encounter an open system *par excellence*, rendering any consistency-backing code necessarily less than complete. The same is true to an even greater extent of our lives as a whole. An open system is one whose boundaries cannot be drawn, the variables not counted, and whose future patterns can only be predicted to a very limited extent. International law is open, because it does not exist independently of either the human person or the human society; in other words, it is not (a system) of nature but *of culture*.<sup>3</sup>

In the modern era, we have come to embrace a social conception of law, law as a

<sup>2</sup> Our minds are not so divided that they would manage to keep our different roles and different sets of consistencies (e.g. personal moral choices or professional ethical choices in their every small everyday variety) separate and independent. Neither are our minds merely computerized calculators which would manage a consistency in the whole of our behaviour. We shall come back to this later. For discussions on identity relevant to professional ethics, see e.g. D. Parfit, *Reasons and Persons* (1984); M.-R. Ollila, *Moraalin tuolla puolen* (1997), at 154–159; D. Danielsen and K. Engle (eds), *After Identity: A Reader in Law and Culture* (1995). It should also be noted that we pre-emptively reject the idea according to which law could have any moral content only through the semantic contents of its rules (or an underlying 'moral design'). On the contrary, our claim is that the ethics of law come from the input of legal actors.

<sup>3</sup> A more extensive discussion on the *natura-cultura* distinction and its impact in international legal work has been developed by Korhonen, in O. Korhonen, *International Law Situated: The Lawyer's Stance towards Culture, History, and Community*, Ch. II, dissertation, Harvard Law School, 1999, referring to a variety of issues derived from human rights, feminist critiques, and Hobbesian conceptions of social life to modern ideas about the clashes between civilizations, cosmopolitanism and cultural rights.

cultural construct, rather than one of natural law.<sup>4</sup> Simultaneously, true to our humanist traditions, we maintain that the human agent is a locus of unending growth, development and any other kind of transformation. Therefore, the human agent introduces an infinite number of variables, open boundaries and the possibility of surprise and unpredictability into any system which depends on her. This applies to any society and any social institution, including law. Such an argument does not mean to say that international legal predictability is hopeless and the ascertainment of norms meaningless. Rather, an observer, by accepting the inevitable human condition, is better guided in making sense of the system of international law and in assessing his own predictions and determinations.

In international law, openness via the human element is quite clear. International legal norms are applied and interpreted within a multicultural diaspora comprising its mix of subjects and actors (regimes, institutions, organizations, transnational corporations, states, individuals), and influenced by the uncontrollable complexity of environment, both in its meaning as *situation* and as unpredictable nature. Within the diaspora there are different cultures with their accompanying cornucopia of historical narratives, perspectives and viewpoints, which exist in tension but which different peoples and international actors rely on, endorse in their day-to-day international enterprises, draw case studies from about the nature of law, and perhaps use to quell anxieties over the homogenization and governance of the world.<sup>5</sup>

These differences, tensions and crossovers manifest themselves in *different interpretations* concerning positive law, international judicial awards, international incidents, and the different tellings of international legal history.<sup>6</sup> The mix of subjects and actors creates these different interpretations in the multi-level interactions between and within international legal regimes, institutions, organizations, transnational corporations, states and individuals. The place of ethics may be difficult to set in the multicultural diaspora, since this diaspora is just an abstract (imaginary) concept attempting to frame, for the sake of discussion, the unframeable complexity of the international legal world. On the experiential level, however, transnational and inter-regime interaction is just people meeting with other people in different rooms

<sup>4</sup> The understanding of international law as a social conception seems so self-evident to modern international lawyers that they do not think twice about it. However, it is important to see, for the ethical discussion that follows, the difference of the idealism of a modernist and that of a natural law proponent. To see the difference one needs to contemplate the emergence and adoption of the social conception. This contemplation is written out exquisitely by Martti Koskenniemi in *From Apology to Utopia, The Structure of International Legal Argument* (1989), at 187–191. '(W)hat modern doctrines have in common is . . . a social conception of law. They believe that the law is determined by social events, that is, treaties, customs, precedents, policies, "authority" or more general patterns of history. . . . They believe the law to be a "social fact" and that an accurate concept of law is one which accurately describes those "facts".' *Ibid*, at 188.

<sup>5</sup> Kennedy, 'New Approaches to Comparative Law: Comparativism and International Governance', 2 *Utah L. Rev.* (1997) 545, discussing critically the 'competing' cultural and governance-oriented sides of legal comparativism today. See also Frankenberg, 'Stranger than Paradise: Identity and Politics in Comparative Law', 2 *Utah L. Rev.* (1997) 259.

<sup>6</sup> The narrative possibilities and their meaning in the international legal world have been studied extensively and with great insight by Nathaniel Berman and David Kennedy.

and, perhaps surprisingly often, they find agreement in these encounters as to the meaning and significance of matters at hand. The larger context of international law with all its accoutrements is rooted in such personal encounters, which are perhaps more visible than in domestic law precisely because of the variegated nature of the international context and the greater difficulty (though by no means impossibility) of deferring responsibility to an overarching authority which ‘made me do it’. It is in these constant and all important personal encounters that the juxtaposition of ethics and law finds an intersection, or better yet, a common ‘ground’.<sup>7</sup>

We intend the terms ‘ground’ and ‘grounding’ to (also) carry their meanings as used in the phenomenological tradition of philosophy critical of traditional metaphysics and emphasizing the importance of ontological inquiry into such phenomena as, for instance, ethics. We shall thus follow philosophy in separating two related phenomena in what is generally referred to as ‘ethics’: the first, and perhaps more usual, use of ethics is on the level of moral philosophy, as a study of social values and norms as well as their different manifestations. For an international lawyer, both in his role as lawyer and more widely as person, this conception of ethics sharing the plane of morality implies discussion on a generalizable, definable level, a level on which an actor can ascertain whether agreement exists or not. This is the level of morality, politics, law — the level of the social. It embraces a conception of ethics as shared operating principles, whether in the form of some Habermasian metaphor or in the form of common goals such as dispute settlement, maintenance of peace, or the fuelling of economic development. Such shared operating principles often involve a union between *is* and *ought*, where *oughtness* is given salience without fixing what the *ought* is, and without determining its precise relation to the *is*, thereby maintaining the possibility of a claim to universality as, for instance, in the case of the anti-corruption measures by the World Bank which often result in the marginalization of any local initiative.

Ethics as moral philosophy would also include discourse on professional conduct and professional codes, often in the space between morality and the particular profession at issue, such as, for example, legal ethics. This is ethics as defined in pocket dictionaries. Part of the frequency with which the term ethics has been encountered recently is perhaps due to the various critiques of moral philosophy which have worn down the term ‘morality’. The moral philosopher thus covertly seeks refuge in a turn to the moral orthopaedics of ethics, the meaning of which term is broad enough and vague enough to mean precisely morality, or some space between morality and the law or any profession, between morality and aesthetics, or more generally between society and the actor within it. For ease of reference, we will refer to this first conception as social-ethics.

The second phenomenon with which we understand the term ‘ethics’ to be pregnant is easier to juxtapose against the social plane above than to define

<sup>7</sup> For an example of ‘grounding’ in philosophy, see e.g., Heidegger’s analysis of Dasein as an inquiry into what is generally meant by Being and ‘the human condition’. See our discussion based on Heidegger, Buber, Gadamer, etc. *infra*.

categorically. It is something much closer to the individual, but in a way that is more primordial than the detachment of the self from its world; it is closer than societal manifestations, such as morality, law or even language, and thus inherently difficult to define. It is something more 'authentic' and experiential than codes, canons or social orders (morality, law, religion) or other relatively stable value systems of right and wrong, good and evil. This phenomenon is sometimes referred to by the aphorism 'ethics as first philosophy'. Intuitively we may understand this in the vein of Martti Koskenniemi when he argues that the prohibition of the 'Killing of the Innocent' is not to be subjected to legal argumentation, even in the mode of justification, because this prohibition is *a priori* already stronger and clearer than any, however ingenious, legal argument.<sup>8</sup> Whereas the near-morality conception of ethics above was on the level of the social, this second is on a deeply individual level often missing in the social discourse; its absence in the moral philosophy debate often makes morality fail, or allows it to fall into ideals as does, for instance, discussion of Habermasian ideal communities. The absence of the individual actor forces morality and the moral conception of ethics to remain an ideal and only an ideal by failing to apply to any particular conflict that a person faces at a particular time. Although interesting in the abstract, it leaves the actor facing a conflict, the judge facing a hard case, or the lawyer facing an ambiguous and discordant choice wishing that there were only one clear master-ideal under which the conflicting ideals would align themselves, wishing for the easy case. She is left thinking that 'if this were the ideal situation, I know what I'd do and how I'd do it', but frustrated by the inability to address the other, by the fact that the issue is far from being reducible to law (e.g., nuclear weapons opinion, see *infra*) or by the obstinate refusal of the conflicting ideals (let alone the conflicting legal rules) to even speak in the same terms.

In a philosophical sense, this ethics is about an individual's search for 'authenticity' in his life, in light of which every choice is an ethical one bringing the person either closer to or further from an authentic life. In what follows, we will thus call this second phenomenon 'life-ethics' attempting to follow the German *Lebensphilosophie* and *Lebenswelt* as used in the philosophical hermeneutic tradition of philosophers concerned with the life-world.<sup>9</sup> Both the words 'individual' and 'authenticity', however, are used here in ways requiring clarification. By 'authenticity' we mean<sup>10</sup> that feeling which resists description, which can be easily deconstructed if brought into a debate, but which nevertheless many of us have had when we sense something to be significant, such as the prohibition of 'the killing of the innocent'. Not always so valuable, important or good, but *significant* in the way that one thinks back upon life at the point of death and remembers certain things as significant with the space between these points as absence. Such significant things can be a loved one, an act, a day, a

<sup>8</sup> Koskenniemi, 'Faith, Identity and the Killing of the Innocent: International Lawyers and Nuclear Weapons', 10 *Leiden J. Int'l L.* (1997) 140–141, 153, 155.

<sup>9</sup> For more on *Lebensphilosophie* and *Lebenswelt* see, e.g., Husserl, Heidegger, Gadamer, Merleau-Ponty, Levinas, Bergson, Kierkegaard.

<sup>10</sup> Following M. Heidegger, *Being and Time* (1926).

relation or any possible moment of existential clarity/angst which, when viewed by our everyday, busy, analytic, mind, is nevertheless easily brushed off as somehow 'odd' or out of place. In contraposition to it would be an inauthentic life, the subject of which 'is lived' in a hollow scaffolding of imposed anonymous codes, values and standards which we have done nothing to establish or even verify.<sup>11</sup> It is a life which has been absorbed into the stream of the social and for which this second conception of ethics, and thus the question of a making a personal ethical choice, become deeply meaningless.

It is important, however, to distinguish between unquestioning absorption into the social and the relation of the 'individual' with his world which is at the heart of authenticity and life-ethics. Life-ethics can be pictured as a relation between the 'individual' subject and some object in the world, but a relation so primordial that it antedates any separation of the 'I' from the world. This is in sharp contrast to social-ethics which has a world and a subject acting upon each other, although at its extreme the discrete subject is reabsorbed into the social, it is managed, controlled, yet still discrete while in abeyance. In other words, life-ethics is a relation as sectionless union rather than as an aggregate of I and the object to which the I is relating. The purest example (i.e., the most 'natural' union) is the relation which exists between a prenatal baby and its mother's womb, where the horizon of the world is the extended body of the baby. Martin Buber uses, as a 'transitional' example,<sup>12</sup> the relation of the baby with its shaggy teddy bear, the inanimate collection of fabric and foam which is imbued with living activity and a personality by the baby from the baby's own fullness. The baby creates the teddy bear, although the teddy bear was already independently there, in a paradox reminiscent of Kant's moral law, which comes from within but was there before. It would be meaningless to ask the baby 'did you conceive of this bear, or was it presented from without?' because there is no separation between the baby and the bear. At the same time, however, the bear opens up a space for experience by the I-consciousness of the baby which is at first inexorably woven into the bear, as part of the I-bear relation, but which through repeated experiences comes closer and closer to the surface until one day it turns upon itself and sees a discrete 'subject'. This detached subject is transformed, 'reduced from substantial fullness to the functional one dimensionality of a subject that experiences and uses objects'<sup>13</sup> which she starts to experience as aggregates of attributes/qualities rather than in their exclusivity, reciprocity and relation to her. Such aggregates of attributes hint at measurability, at commensurability, at the possibility of ordering, of placing objects within the world into a context of space, time, causality and conditionality. These measurable commensurables are the tools of moral, legal, religious and 'ethical' codes; only the social can be put in order.

<sup>11</sup> George Steiner, *Heidegger* (1978).

<sup>12</sup> The example of the teddy bear, and much of this discussion, is borrowed from M. Buber, *I and Thou* (1937). The notion of a 'transitional object' was discussed by Barbara Johnson in her presentation on 'Using People' at the 'Turn to Ethics' conference at the Centre for Literary and Cultural Studies at Harvard University, April 1998.

<sup>13</sup> Buber, *supra* note 12, at 80.

Yet indeterminacy, deconstruction and conflict are increasingly showing any such order to be an illusion. It is inevitably an illusion because things, especially people(-things), are not aggregates of their attributes, and because the social to be ordered and then expressed in social language cannot recognize the individual relation with the world which is prior to any detachment of the subject from his world, which is after the detachment becomes 'objects'. Social orders can only conceive of the social element within a human (that is, his intersubjectively imaginable attributes) and, in order to transmit rules and standards, must inevitably picture him as an abstract (imaginary, non-existent) subject interacting with a world full of objects, upon which interactions these social orders set their guidelines. We recognize, however, that this fundamental assumption in our paper — namely that people are more than the aggregates of their attributes — is 'merely' experiential, and thus un-proveable. This is in keeping with the intransitive (i.e., non-social) nature of life-ethics, and our only possible response to a critic of this assumption would be to say 'look at yourself, add up your attributes, and ask yourself whether that is really the you that is looking at those attributes'. For it is the you that is deciding about whether those qualities are you which makes all your ethical choices.

For an adult in a world where the subject and her world are generally seen as discrete phenomena, ethics as relations between these phenomena can be defined in their widest sense as 'response-ability'.<sup>14</sup> In short, life is a series of 'responses' (including omission and refusal to respond) to the world, to others and to ourselves in situations where no-one seems to know how to tackle the hardest cases. It thus also implies an ability to take on the contradiction, plurality and ambiguity of the hard cases. Ethics is about that ability to respond, not so much about the content of the response. In other words, ethics is about what happens when openness occurs and there is no ready-to-hand answer in codes or standards.<sup>15</sup> Thus, it is also about the decision regarding whether to apply a given code or standard in particularized circumstances.

The ethical task is to encounter the problems of life as they come: open, indeterminate, uncontainable, irreducible. 'Authenticity' in this pragmatic world is about facing the problems in their full complexity, without simplification or abdication of responsibility to higher unverified authorities, ideals or standards, in a manner which builds a relation of significance between what we do, both in terms of our work and our personal actions, and what we are and currently want to be as people. This might be interpreted as a call to consistency if one assumes that different parts of people tend to add up easily. We believe that they tend not to. More importantly, however, identifying the harmony between actions and existence as a

<sup>14</sup> Although we think this concept should be intuitively clear and descriptive, more on its philosophical ethical roots can be read in e.g. M.-R. Ollila, *The Ethics of Rendezvous* (1993), and Ollila, *supra* note 2.

<sup>15</sup> Thus, seen narrowly, our argument concerns those (maybe the most significant cases) which fall outside the 'routine' or 'core' of normative ascertainment, however large or small one conceives it to be; seen broadly our argument extends to all those cases where ethical codes have lost their appeal to the professional and do not mean anything to them in practice, nor are they seen to be violated as long as laws are not.

fetishization of consistency misses the level of the discussion even more than the substance. The open system that is the human person changes constantly: physically, cells degenerate and regenerate; mentally, one matures, grows and learns; situationally, identities are always at least partially a function of their context, which is ever changing. Thus a consistency ethic would always attempt to harmonize actions to an existence not of here and now but of then and there; it would, in a sense, only be authentic to a person who has been left in the past and who no longer exists. It would thus be inauthentic for the particular actor in his particular situation.

The argument has been made that the function of law, particularly the rules of evidence and procedure, is to fix the substance of the case to a certain point. There are critical dates, critical facts, freezing of the clock and intertemporal determinations of the meaning of critical concepts or documents. Their function is to create settlements of disputes and thus maintain social peace. Our purpose here is not to dispute or even question that function, but merely to add to it. For it is often the case that these fixed points break and the settlements do not hold. In fact, fixed settlements may increase the risk of social upheaval, for instance, most notably perhaps the Treaty of Versailles (1919). At such points, it is often thought that law and ethics are defeated by a Hobbesian human greed and the uncontrollably evil nature of man. If, however, the life-ethics conception is accepted, one can see in these breakdowns quite different forces at work — the forces of complexity and dynamism. In our view, it is much easier and more agreeable to work with them than to combat the persistent myths of the Hobbesian man and Leviathan.

Admittedly, our use of the term ‘authentic’ may seem vague, if not ethereal. This is both deliberate and inevitable, for by its nature authenticity is not something that can be delineated in advance, even for one person to himself (for not even the ‘I’ can be posited in advance), let alone transmitted from author to reader. The corollary to this is that life-ethics, too, cannot be transmitted, at least directly in the sense of imperatives, through language. Authenticity, I, and ethics are all intensely personal in a way which includes *presence* (understood both temporally and situationally), but through presence there is also a relation to the entire world, into the definition of the person.

Thus, after having cloven a divide between life-ethics and morality, we bring them back together again. No person is a solipsistic monad. Our personhood is shaped, among other things, by our situation, our environment and our past. The latter two substantives, and perhaps even the former, go a long way towards adding up to something like culture, and they are all woven within the social. Together, multiplied and statistically bevelled, they form what we call ‘the social’. The weaver and the woven, the cause and effect, run in so many directions as to leave an uninterpretable tangled skein. What remains, however, is that the morality of the social forms a part of the person and her life-ethics, but albeit only a part. It is a part which cannot in any way be delineated or disentangled from the whole. Thus, although the person is shaped by social morality, this morality can nevertheless never be codified. It has always melted into the person and her activities as whole.

Although personal, uncodable or unidealizable life-ethics may not be legally



pronounceable — at least in any conventional way,<sup>16</sup> such ethics are nevertheless not outside of international law, unless one believes that law can be cut loose from its symbiotic partner, the human person, and the person's everyday, which is her opening to infinite possibilities in life — her *carpe diem*. Unlike a code book, a person's ethical ability cannot be left to idle or shut down for any period of time, except perhaps to the extent that the 'self' can fall into abeyance within the social; it seems not only disingenuous to cover up such significant ability under a compartmentalization of a person's identities or roles into a work-sphere and a personal-sphere, but it also seems inauthentic and unethical.

As an example of the inadequacy of code ethics, recent discussion on professional ethics of administration and management offers the so-called *whistle-blowing* phenomenon, in which an individual (officer or employee of an organization) feels compelled to 'blow the whistle', i.e. publicize the confidential operations of the organization, whose member he is, in contravention of the organization's rules.<sup>17</sup> The whistle-blower compromises his professional responsibility and loyalty in favour of his personal ethical choice to try to mobilize public support for halting or criticizing a particular operation or practice of that organization. This example has been enthusiastically discussed at least since the *Dreyfus affair*. It has been used to demonstrate that the belief in the sufficiency of code ethics has been receding and has even prompted some writers to claim that professional ethics will inevitably always fail.<sup>18</sup> The reason for the failure is that professional ethical codes often try to delineate reality in ways in which it resists delineation. Elsewhere, however, the insufficiency of code ethics has prompted others to design equitable considerations and provisions of openness to complement the finite professional codes.<sup>19</sup>

## 2 Problems of Code-based Ethics

We propose that ethics is the most concrete, most practical part of existence and action in the human reality, professional, personal or whatever. Any action or lack of it is an ethical choice. Moreover, the mere acknowledgement of the existence of other persons and the rest of the world around oneself is an ethical position upon which everything else, starting from knowledge and behaviour, builds. As implied above, 'ethical' is not synonymous with 'virtuous'. In other words, to make an ethical choice does not mean to make the right choice; it simply means to engage one's ethical

<sup>16</sup> Koskenniemi, *supra* note 8, at 149, 152–153, 161.

<sup>17</sup> See, e.g., Williams, 'Whistle Blowing in the Public Service', B. Williams *et al.* (eds), *Politics, Ethics and Public Service* (1985), at 11, 14.

<sup>18</sup> See Ollila, *supra* note 2, at 87.

<sup>19</sup> Whistle-blowing is the making public of confidential information by an individual official or worker against his/her professional code when s/he according to his/her own convictions needs to reveal that information in order to avoid an ethical wrong. See Williams, *supra* note 17, at 14. Jay, 'Pontius or Ponting: Public Duty and Public Interest in Secrecy and Disclosure — A Suggested Framework of Ethics and Law for Public Servants', in Williams, *supra* note 17, at 69.

capacity. If one decides to dump toxic waste in the Baltic Sea, it is an ethical choice; one might experience it as right or wrong or even mid-way, but one recognizes oneself as an agent doing something unto someone/something other. Virtues are righteous qualities and virtue ethics discusses them.<sup>20</sup>

Whereas virtue ethics are *prêt-à-porter* ideal labels attached to categorized behaviour, the life-ethics we are presenting are both more general and more particular; in other words, custom-made for each situation. Some scholars claim that moral value has no place in law, for instance, because efficiency or economic analysis will enable better legal analysis and because morals are futile for that purpose. They believe either that morality can be disentangled from the rational market actor (i.e., human) or that the personhood of the actors who make up the market can somehow be taken out of the social in its incarnation as 'market'. Although such a denial of morality and personhood amounts to a near-complete immersion of the person within the social/market, according to the view presented in this article such a denial is already a very concrete ethical decision about the role of the self *vis-à-vis* the world, thereby reflecting a certain type of world-view, as well as a moral decision reflecting a hierarchy of values where economic efficiency is preferred.

Taking a broad stance on ethics might seem like a reversion of many lawyers' intuition. We are simply suggesting, however, that before a lawyer ever conceived of the whole abstract idea of legal systems with their complex, non-tangible, institutional relationships and professional ethics, he had already conceived of his surroundings in the world, and thus taken a basic ethical position in relationship to them.<sup>21</sup> If so granted, it is obvious that we cannot reduce away this basis of all intellectual activity from the work of lawyering.

The unreduced conception of ethics is sometimes also criticized for its complexity, since it forces decision-makers to address so many further considerations and therefore pushes away closure from already complex controversies. We argue that the complexity is inevitable because the world, and particular situations within it, are complex. The only difference is whether this complexity is made explicit or hidden as we argued above in connection with the problem of fixing critical points of time and fact and settling disputes. To demonstrate the emptiness of this criticism and the inevitable complexity we shall point to the following fictional rules of ethics for international public service:

*Rule Model 1.* The unauthorized communication of official information is prohibited. This duty is unconditional. If the public servant cannot consciously

<sup>20</sup> For a sophisticated modern discussion of virtue ethics, see the famous work of Alistair MacIntyre, e.g., *After Virtue: A Study in Moral Theory* (1981). In this article we have no intention to preach any particular ethical virtues to anyone; we only aim to bring out the presence of the ethical in its widest sense in the international lawyer's everyday life and practice.

<sup>21</sup> We shall not look into the moral philosophies or their application to law. Therefore, the discussion will not concern virtue ethics, theories of will, authority ethics, religious ethics, ethics of state (Hegel), radical ethics (Nietzsche), humanist ethics (Kant) or numerous others. Our inquiry shall focus much more simply on the situation of the international lawyer when she faces a question to which there seems to be no readily generalizable or rationally arguable answer.

administer it, she should consult a superior officer. Thereafter, the public servant must do as she is told or resign — and even then she must preserve official confidences.

*Rule Model 2.* An international public servant is first a human being, second a citizen, and third a public servant (etc.). As such he is morally accountable for all the reasonably foreseeable consequences of his free actions. If and when he feels that his professional obligations and other duties conflict, it is his responsibility to take fully into account the precedent-setting and confidence-eroding effects of the violation of a professional ethic, as well as all the other consequences of the act he contemplates, before deciding what to do.<sup>22</sup>

The first model lists a set of technical rules of professional ethics. It treats the problem in an on/off fashion without any reference to the input of the individual(s) in a particular case. At first sight it may seem clearer and simpler in its rigidity and thus some would prefer it by virtue of its appearance of giving a straightforward answer. Upon closer examination, however, the vagueness and ambiguity of terms such as ‘unauthorized’ and ‘consciously’ defeat this clarity: Whose ‘authorization’ is needed? Whose interests count in determining how many and what level authorizations should be acquired? And what exactly is ‘conscious’ administration of something which is on the verge of being ‘unauthorized?’ What is ‘conscious administration’ of dumping leaking toxic bombs into the Baltic Sea or launching a nuclear weapon? Taking these problems into account, one notices that there is actually very little difference between the first and the second model. In fact, the second just seems to spell out the questions which the first covers up. Therefore, it becomes unintelligible to claim that only the first rule is law, whereas the second must be excluded from it.

In what follows, we shall describe several different (theoretical) styles through which ethics are at times understood. The styles are different ways of understanding coherence and relatedness in the things lawyers perform. First, we shall look at Formalism and Idealism as applied to ethics, and illustrate their failings, and then we will probe the alternatives. We prefer, however, to conceptualize these approaches as ‘styles’ rather than ‘isms’ by way of recognition that very few real life people approach any ethical problem exclusively Formally or Ideally, but rather as some combination. Thus, to have a ‘style’ does not require a deliberate subscription to some theory or another, but rather a tendency to approach one’s material from a certain angle. Most lawyers naturally have several angles.

### ***A The Technical-formalist and the Idealist***

A formalist style and technical-professional ethics go hand in hand; both understand the law-likeness of legal work, its nomological attribute, to emanate from formal rules, standards, determinate relationships between them, and determinable modes of reasoning. The standard definition for professional ethics in its narrowest technical form is the professional code, and in its broadest form ‘the laws, rules and ethical and moral principles which govern the manner in which lawyers practice their

<sup>22</sup> Based freely on Peter Jay’s analysis of ethics and law in public service. Jay, see *supra* note 19, at 76.

profession'.<sup>23</sup> In both the narrow and the broad variety of technical-professional ethics, however, the rules, principles and codes are considered accountable, determinable and finite. Therefore, we call them 'technical', a term which entails that their command can be learned and transmitted from one person to another, i.e., as a technical skill.

To believe in finite rules and principles means to believe that there shall always be a reasonably ascertainable right answer to any dilemma. The ethical consequence is that if no right answer can be found, the actor (lawyer/judge) has no professional responsibility. In the whistle-blowing cases, for instance, the technical-professional ethics unequivocally denies unauthorized publicizing, but correspondingly, whatever ethical problem may result from inaction is not attributable to the official. This strictly formal view of professional ethics is of course in stark contradiction with, for instance, the Nuremberg principles and the ideal 'commands of humanity', which demand that officials look beyond a code (i.e., 'blow the whistle' and disobey) at least in the most extreme cases. There is no clear rule or single ideal specifying which cases are 'extreme enough', although there is much literature about the need for action when the case is extreme enough. Nor does the strictly formal view sit well with the recent developments towards assessing equities 'with particularity to the particular circumstances of an instant case' in addition to the general principles.<sup>24</sup>

Thus, the oscillation between formalism and idealism in legal argument also has its place in ethics. To take another example, a rule that a judge of the International Court cannot take part in any proceeding in which she has participated previously as an agent, adviser or attorney of a party, as a judge or member of a commission or any other comparable manner (ICJ Statute 17(2)) is a typical rule of professional ethics, establishing a shared ethical command for the profession. If we take it formally we can quite easily find its counter-rule in the ICJ rule allowing for ad hoc judges (ICJ Statute 31). As we know from decades of legal theory such a position always has the risk of resulting in an insurmountable formal conflict and in fact it often does. Questions of 'how often' such formal conflict occurs, 'to what degree' and 'with what significance to the system' have been debated *ad infinitum*.<sup>25</sup> What is important to the ethical discussion is primarily that this irresolvable debate about formal conflict proves at the very least that some other kind of ethics is needed in order to regain response-ability

<sup>23</sup> The latter is taken from an ABA booklet introducing American lawyers to the requirements of their Multistate Professional Responsibility Examination (1997).

<sup>24</sup> *Case concerning the Continental Shelf (Libya v. Malta)*, ICJ Reports (1985), at 39, para. 45.

<sup>25</sup> See, e.g., W. Simon, *The Practice of Justice, A Theory of Lawyers' Ethics* (1998), at 1–4, 195–196, *passim*. In illustrating the need for legal ethics to catch up with law in accepting occasions of formal failure, however, Simon also illustrates the inclination to understand ethics only as a part of the social realm, in deference thereto. In his final chapter, he calls for the institutionalization of ethics and their implementation both as a disciplinary regime enforced by a regulatory authority and as a set of voluntary commitments subject to private formal and informal enforcement. Although Simon's book has been seen as aiming to reconceptualize the entire subject of legal ethics, it does not go much further than to acknowledge the experientially obvious fact that all lawyers also have an element of judge within their roles, and that they too must constantly make ethical decisions.

and confidence in answers to ethical dilemmas. Moreover, in ethics it is even more difficult than in general law to use the virtues of predictability in order to slide out of the dilemma by claiming that the existence of a clear rule is more important than its substance.

The idealist would resolve the formal opposition by shifting levels. Let us assume that a formalist debate on the above question — whether it is formally ethical to have ad hoc and national judges sit in cases in which they may have previously participated in their pre-judgeship functions as government officials or diplomats — leads to an opposition between two codes. The technical formalist's dilemma is which rules to read broadly, which narrowly: whether no-one should be judge in their own case or whether everyone should have a right to have their case tried by judges of their own choice and, thus, to perceived objectivity. The idealist's addition may be that

[t]he justification for the presence especially of judges ad hoc is to be placed on more general and psychological grounds connected with the nature of international relations and the special function performed in that context by international litigation: it is not to be sought in any strained concepts of legal theory [*read: 'consistency'*], with which indeed it may conflict.<sup>26</sup>

This addition, however, has not provided the final word. As the debates of legal theory have shown, each opposing idealist can argue that his justification is better: because it fits more rules, it justifies more rules, it is more elegant, or it makes law work with fewer exceptions. None of the opposing parties could ever definitively count the rules (where does one rule end and the other start? Are some 'heftier' than others? etc.) or define 'elegance' in a way that would *prove* the others wrong. This is because any developed system of legal norms is complex and open, and rules are not quantifiable or easily commensurable. Instead of just one Hercules,<sup>27</sup> we would have Orpheus, Hector, Prometheus, Minerva, Antigone and many others, each with their own meta-ideal, not to mention their individual situations, their human imperfections and their often tragically intertwined missions. All of the idealists, and their demi-gods, further their underlying rationale by practical choice. At the end of the day, the idealists do not choose the same ideals any more than the formalists choose the same fits in their rule puzzles. As a conclusion, there is no way to say which one is 'the common ethical choice' without sounding grossly culture-imperialistic, hegemonic and unethical.

### **B The 'Disillusioned' Approaches: Strategy, Narratives, Interpretation**

After disillusionment by formal failure and ideal conflict, several approaches to international legal questions remain; these take into account the problems of repetition, (in)consistency and (de)legitimation of post-realist international law, but still carry a strong ethical tenet in their argumentation. Accepting the difficulties of proceeding from the stalemates of formalism and idealism in the post-realist era and burying the fantasy of universalism on that level, there is still much left for common

<sup>26</sup> S. Rosenne, *The World Court. What It Is and How It Works* (1989) 70.

<sup>27</sup> See in this context Dworkin's idealist judge, who finds the one right legal answer. R. Dworkin, *Taking Rights Seriously* (1977).

international legal interest. The question of ethics is not defeated when we say that the world can share neither a common code nor common ideals. Ethical tasks await everywhere and in interpersonal encounters we often find agreement which is the more solid the fewer illusions we have regarding its context. Here are some attempts to respond to the situation without forgetting this *caveat* of disillusionment, along with a brief inquiry into their ‘ethicality’.

First, there is the *strategic* response to the failures of formalism and idealism. Strategists see their ethical task to be a positively manipulative one. They seek to achieve more progressive results in practice by seeing law’s mechanisms from a more progressive angle. These lawyers are internal critics of the discipline. They pay close attention to the structures and patterns of how international legal argument works and creates visions, persuasion, justification and rationalization. They hope that whatever they consider ‘important’ in the world will be realized through a strategy, often a strategy of deconstructing the foundations of the ‘other side’ in the debate and replacing it with an (at times admittedly) essentialized structure brought in from an ostensibly wider circle of justification. For example, often what a strategist considers important is imported from the spheres of politics or sociology into the tightly nomological sphere of traditional jurisprudence after the paradoxes within this legal domain are deconstructed and a space is prepared for a more ‘just’ (broader) construction.

There are several types of strategists, each with their own inner paradoxes. These include, *inter alia*: *Strategic Essentialists*, like feminists who want to get rid of gender-basis in entitlement allocation, but do so through a strategy which uses gender as its own basis.<sup>28</sup> They aim to break the chains of ‘gendered structures’, but by requiring international actors to invite women writers and speakers and to appoint women representatives, making the female gender an attribute of these invitations and appointments. *Strategic Formalists* include those who advance some norms or practices because social circumstances, policy concerns or some higher source of authority commands it. They advance the non-chosen norm by making the appropriate rule consistent with the entire corpus of international law through a complex operation of their rule and ideal manipulation techniques; but these rules and ideals derive their usefulness from the very agnosticism which makes them equally malleable to the opposite authority. *Strategic Culturalists* are those who by means of anthropological or ethnic studies seek to find common ground and increase hegemonic ideals by increasing participation avenues beyond the Western world, but find that to do so they must mould their subjects into inherently Western international legal forms of participation and entitlement as they existed *ex ante*, thus pushing these subjects into *our* Western idea of international society which *they*

<sup>28</sup> The inventor (G. C. Spivak) of the concept of ‘strategic essentialism’ now wants to draw it back, because it has been so widely abused as a general (intellectual) licence for maintaining the essentialization chains (binding women even tighter to their gender rather than strategically liberating them from it). In other words, whilst intended as a heuristic tool, it has often collapsed into apology. See G. Spivak, *Outside in the Teaching Machine* (1993).

(non-Westerners) did not share before. Finally, there are the *Situational Critics*, who take one legal practice or area of scholarship at a time and meticulously expose its inner contradictions in detail (e.g., the CLS). They examine one area of the law after another, getting into it like a psychotherapist and exposing the area's 'sub-conscious' problems and 'denials' to its practitioners, mostly to the latter's dismay or indifference.

All of these strategic approaches have abandoned the search for a universal ideal within the law itself, but nevertheless generally share an underlying purpose of furthering some extra-legal (socio-political) ideal. They are not so far from the idealist. As was the case with the idealists, the strategists differ in what is considered the appropriate goal; what is important. The difference lies in their acknowledgement that the choice of 'the important' is strategic rather than universal. Also, the 'important' is often not express. The strategists may only have a hunch of a direction or they may have clear goals, but the 'important', at least in its intermediate sense, is very dependent on the shifts of social or other power balances. The strategists are sensitive to changes, because their success depends on timing and localizing, i.e., they are anti-universalists: a feminist does not want to declare that gender should matter in a negative sense, for instance in the selection of special officers of the UN peace operations, but she wants it to be considered as a positive matter when countries are appointing their next ICJ judgeship candidates. Yet in the light of the ultimate 'important' goal (or if in some local context the numbers were advantageous), she would do best arguing *against* gender essentialization (i.e. making gender an essential issue) altogether.

The problem in strategic shifting is that the 'important' becomes the by-product of the strategic work, that what is 'ultimately' important often conflicts with what is important in the intermediate sense which is always more concretely present. The meaning of the work is left in the background when one is fighting for the number of women (feminist), rule N (formalist), a UN committee discussion group on the lack of cultural documents on the unnamed paradise island on 170+ longitude west (culturalist), and the inner conflicts of the latest 200 treatises on foreign securities scholarship (situational 'crit'). Through thus making 'the important' a by-product, ethics becomes a sheer implication and, in fact, there is no time really to think about it, since the most effort is spent in manipulating a paradoxical means. In ethical terms, it is necessary to ask ourselves what it portends to breathe significance into our lives from by-products, what it does to our ethical sensibilities to have our everyday choices shaped by 'intermediate' considerations so fundamentally in opposition to the purported 'ethical' goal which thus recedes ever further into futurity and abstraction. Even in moral terms, however, if one follows Aristotle and Gadamer, it seems that such strategic expediency should not enter considerations about what furthers moral ends. In Gadamer's words, 'the consideration of the means is itself a moral consideration and it is this that concretizes the moral rightness of the end'.<sup>29</sup> Here we include the 'moral' argument because Gadamer's use of 'morality' exemplifies what

<sup>29</sup> H.-G. Gadamer, *Truth and Method* (2nd ed., 1975), at 322.

we mean by ethical ‘authenticity’, by his refusal to abstract and deracinate morality, and his union of ends, means, and (later) situation.

Another response to formalism/idealism is to retrace the narrative of international law. The idea is to demystify the ‘progress narrative’ of international legal work. The *Narrativist style* presumes that too often the number of alternative choices seems more restricted than it actually is. The international lawyer feels too often that her situation is a product of an inevitable progress of history and that the same progress will keep on wheeling forward in the same consistent direction. Furthermore, often she will not give full airing to as many alternatives as she could or she will not consider the consequences of certain choices fully and independently, because she has internalized the narrative too well.

The narrativist style is inspired by Thomas Kuhn’s history of science, Roberto Unger’s legal theory, Michel Foucault’s archaeology and others, who have shown the power of the illusion of consistent progress. Correspondingly, by breaking the idea of the ‘false necessity’<sup>30</sup> one may encourage international legal practitioners to make choices out of other concerns than the compulsion to conform or to be consistent with a body of law which — on closer look — unravels its inconsistency and complexity. By showing the illusion of either the necessary consistency or the necessary progress in the narrative of international law, the narrativist offers for view the marginalized alternatives and choices which seem to question our self-assured satisfaction of having ‘overcome’ history.<sup>31</sup> Better yet, he induces lawyers to courageous independent thinking and more careful inspection of history. Especially, this teaches lawyers to guard against the inevitability argument: ‘if you don’t do this, the law and the whole international society is going to collapse’.

The narrative style derives its material from the life-experiences of people who may not have been heard. Many feminists, for instance, aim ‘to provide ... the material, internal, phenomenological, subjective story of women’s experience and present reality of the Rule of Law.’<sup>32</sup> The narrativist’s implicit message is first that international law can ‘handle’ much more imaginative and independent choices than one thinks and, secondly, that international law is no Titanic which aims to transport us to the haven of future but which will immediately sink if it crashes into an iceberg, taking us with it. The narrative style recounts international law, its history and structure, so as to create space for a wider array of practical choices, for an experience of mental freedom to move — into the ‘imaginary domain’.<sup>33</sup> As Druscilla Cornell explains, this space would produce better outcomes because it would be more equal and fair according to the principles of the Rawlsian ‘original position’. The closer to an ‘original position’ one gets, however, the more abstract and hypothetical the narrativist approach becomes. The narrativist ethics is an ethics of life in a world which once was or could be — often the ‘true’ democracy, which some feel is now

<sup>30</sup> See R. Unger, *False Necessity: Anti-Necessitarian Social Theory in the Service of Radical Democracy* (1987).

<sup>31</sup> See *ibid.*

<sup>32</sup> West, ‘Jurisprudence and Gender’, 55 *Univ. Chicago L. Rev.* (1988) 1, at 63.

<sup>33</sup> D. Cornell, *Imaginary Domain* (1995); *Idem*, *Sexual Freedom and Justice* (forthcoming).



within reach on the international level.<sup>34</sup> To the extent, however, that the narrativists concern themselves with what could have been or what could be, their approach has little to do with 'ethics' in the life-ethics sense. Although valuable as a tool for breaking out of false inevitability somnambulism, and to that degree an ethical task of breaking away from simplifying illusions, there can be no life-ethics of an imaginary state. An abstracted 'imaginary domain' has no grounding or roots, no situation, no temporality and no existence; it is a mirage which itself inevitably simplifies and in which no real person lives who could have an authentic relation to it. To the extent that the construction is imaginary, it is ethically inauthentic and *insignificant*. In this respect the narrativist falls into a paradox similar to that of the strategist, albeit again one which is often acknowledged: any alternative narrative will repeat the problems of representation found in the mainstream telling of international legal history. Once the narrativist approach reaches the 'more equal and fair' style argument of Cornell or Rawls it becomes perhaps more socially moral but less ethical in its counter-factual creativeness.

The style that emphasizes the significance of interpretation could be called interpretationist. To a greater or lesser degree, this style is based on the idea that everything turns on interpretation. By interpretation the *interpretationist style* does not understand exclusively the situation in which the international lawyer comes across a rule and starts checking its meaning by the canons of the 1969 Vienna Convention on the Law of Treaties rule 31 (and 32). Rather, it comprises interpretation as to facts, rules, principles, participation, alternatives, identities, roles, preconceptions, prejudices, and ideas of law and society. All of these things come to the international lawyer everyday and by acting in a certain way she implicitly interprets them to have quite specific meanings. As Karen Knop illustrates in the context of self-determination:

The interpretation of self-determination relates to identity because its texts, like all legal texts, *assume and create a world*. . . . In resolving the issue of what self-determination means, an author also validates or authorizes a theory of the interpretation of international law. The choice of an interpretative theory determines how to talk about the meaning of self-determination: *it endorses one kind of reasoning and invites one kind of response to argument*. In defining the *sort of conversation* we can have in international law about self-determination, an interpretive theory also contemplates and advantages a certain *sort of speaker*.<sup>35</sup>

Korhonen has illuminated elsewhere the significance of interpretation for international law in the light of a continental hermeneutic tradition.<sup>36</sup> The basic relevance of the hermeneutic discussion is, for example, in Gadamer's view that nothing is

<sup>34</sup> See, e.g., Thomas Franck's recent work, among others, *Fairness in International Law and Institutions* (1995).

<sup>35</sup> Karen Knop, talk given on her new book (29 April 1997) (footnotes omitted, emphasis added): *The Making of Difference in International Law: Interpretation, Identity and Participation in the Discourse of Self-Determination* (forthcoming). In the discussion on texts, legal translation, rhetoric and legal imagination Knop relies on J. B. White's work.

<sup>36</sup> See O. Korhonen, *Kansainvälisoikeudellinen tulkinta ja dialogisuus* (1995); *Idem*, 'New International Law: Silence, Defence, or Deliverance', 7 *EJIL* (1996) 1.

understood before the creation of an interpretative relationship to it, i.e., before it has been taken as a part of the subject's experience. Consequently, no new initial interpretative relationship can exist in our minds independent of everything we have already understood during our lives, career, education and personal history at large. Our mind is not made of isolated compartments. Instead, all the 'perennial dilemmas' of the human condition and questions of significance and consequence influence the creation of interpretive relationships and their results both in international legal work as well as in everyday life. The 'perennial dilemmas', as we use them here, are Philip Allott's description for considerations of identity, power, will, social order, and dynamism (continuous social change),<sup>37</sup> the foundational questions with which a thinking person implicitly or explicitly wrestles while interacting in the social reality.

Thus understood, interpretation also conveys a place for ethics. It is in this interpretation that the fundamental ethical choice is made. As Knop says, every legal text both assumes and creates a world: it defines the sort of discourse, the sort of speaker, the sort of reasoning and response we are able to relate to. Ethically speaking, this 'assuming' and 'creating' are the places where one can go most astray and where ideals or forms do not yet exist to guide the international lawyer. It is in this initial interpretative space that the ethical choice is made about whether (and how) real, particularized, and situated problems are to be tailored to fit into formal structures, ideals, or strategies, or whether they are to maintain their ethical complexity. This choice is itself inevitably within the ethical domain, for it is in itself complex and without possibility of abdication to an 'authority'. It is only the interpretation itself which takes the complex input and simplifies, compartmentalizes and bevels it. It is in this initial interpretative moment that every choice contains its ethical dimension, and it is because of the priority of this interpretation that a person's ethical capability can never lie fully idle.

Although every interpretation assumes and creates a world, there are nevertheless greater and lesser extents to which this is done, greater and lesser degrees to which the assumptions and creations must go in the absence of some extant categories to which one can abdicate the ethical anxiety-filled decision. One cannot have a code-rule solving the issue of participation before one has ever thought of its vague possibility, as for instance in Vitoria's times in the question of the status of the 'savages' or later in the international status of slaves;<sup>38</sup> their rights cannot be protected within law unless they are preconceived and recognized as a category within law. Nor can a group gain access to a set of rights by virtue of a legal ideal, e.g. 'equal protection', before anyone has ever interpreted a group as a possible candidate for rights and recognition. The familiar example of state recognition is a similar case of the circular problem of which

<sup>37</sup> P. Allott, *Eunomia. New Order for a New World* (1990), at 56, 66, 79; discussed in this context in Korhonen, *Kansainvälisoikeudellinen*, *supra* note 36, at 65.

<sup>38</sup> In Vitoria's times the question was whether God's order was such that a sovereign quality was vested in different peoples whatever their social life style; in the slave trade/slavery period the question shifted to whether any such rights were vested by an international order — positive rather than natural. See, e.g. A. Nussbaum, *A Concise History of the Law of Nations*; and Kennedy, 'Primitive Legal Scholarship', 27 *Harv. Int'l L* (1986), 1; see also, e.g., *The Antelope Case*, 23 U.S. (10 Wheaton) 66 (1825).

comes first — de facto existence as a state or *de jure* recognition as a state (declaratory or constitutive meaning). All that follows is dependent on the initial interpretative choice. For the interpretationist the ethical task is to avoid the mistakes which happen *before* legal principles and rules take hold, since such mistakes would taint the rest of the work and most likely straightjacket its ethical issues into the formalist/idealist dilemmas. The question of what constitutes a ‘mistake’ in these terms, however, is difficult. For some, what is a mistake and what is the ‘correct’ interpretation is a purely strategic task, with some important ideal imported from the socio-political or moral spheres. As with narrativists, there is always this danger of interpretation being used as a strategic tool, thereby transforming itself into little more than another subcategory of strategy. The temptation of dogmatism and simplification is ever present. To the extent that the interpretationist style points out the primal importance of the initial interpretation in shaping the entire world of conceivable choices, however, it is a crucial step to making the social template of unexamined compartmentalization and obscuration, if not transparent, at least translucent. The narrativist and interpretationist styles are related, but whereas the narrativist tells a story which has been socially created to explain how legal interpretations of facts and laws (applications) cohere with each other, the interpretationist disentangles an interpretive situation to show how in an individual’s mind the perennial dilemmas, the facts, laws and the rest of her relevant understandings of reality come to compose the pediment of applications and choices which she makes. The search for the meaning of international law in any interpretative situation is tightly intertwined with the overall search for meaning in one’s life and work as an international lawyer. The interpretationist style is concerned with the ethics of the individual. Moreover, the translucency which the style enables permits the underlying ethical choices to be seen from underneath the social scaffolding. In this sense it is already ‘authentic’ in that it admits complexity and thereby permits the questioning which makes existence substantive and significant rather than being absorbed in the neuter anonymity of personally unverified social or statistically approved values.<sup>39</sup>

### 3 Legitimacy

After strategy, narration, interpretation and the idealist stalemate, it is necessary to consider briefly what has happened to ideals. After all, the paradigmatic figure of an international lawyer is one of a zealot for peace, a missionary for free trade and international cooperation, and a liberal idealist. As the discipline has lost, one by one, its great sources of legitimacy, its underlying rationales, however, this image has become more and more incorporeal: first natural law/order was defeated by

<sup>39</sup> By the ‘they’ in ‘they-values’ we mean, following Heidegger, the impersonal neuter German ‘*Das Man*’ which, unfortunately, has no direct English translation. We mean to use it in the sense (taught by English grammarians as incorrect) of the ‘they say that you shouldn’t do that . . .’ or perhaps better as the ‘one’ in ‘one shouldn’t do that’. It is the they/one which represent society’s values without allowing any responsibility for the selection of those values.

positivism, then realism slew rule-formalism, then the third and the second worlds challenged the Western liberal values of international law and now different critical schools keep ‘blowing the whistles’ on the rest and we have heard different sorts of cries announcing the end of history.<sup>40</sup> It seems that although this narrative is usually told from the perspective of the winners as the progress of our discipline, it is more important to see that every time some source of legitimacy — God/transcendental reason, purity/neutrality of form and text, universal values, or bipolarity — has been disqualified in international law, it has made the system limp. Repeatedly it has been necessary to reinvent the same source in some sort of a disguise,<sup>41</sup> if only for strategic reasons. This is also the pattern followed by the covert cloaking of morality in its turn to ‘ethics as moral orthopaedics’, or what we described as ‘social-ethics’, and goes far toward explaining much of the recent popularity, or ‘earnest noise’,<sup>42</sup> of ethics and the millenarianism.

Despite the re-inventions, however, the problem of overall legitimacy often remains a chronic undercurrent within the profession. The anxiety created by this legitimacy question allows international law to present a clearer example of the insufficiency of code-ethics than does domestic law, which latter law can better maintain a blanket of common socio-political values to grant temporary relief from the existential angst and provide a temporary foundation for law — until one asks for a justification of Western democracy. Most international jurists are aware of the difficulty of building on ‘ideas’, especially in the absence of a domestic law type justification or foundation. Nevertheless, they think that it is better to go on building on quicksand ‘for the sake of the society’ than to try to face the ontological questions of international justice. After all, many American international lawyers declare with relief the transition to a post-ontological era in the discipline. Such a choice, however, infuses the profession with a chronic feeling of not being grounded and relegates many questions to taboo. To be optimistic about international law does not allow asking ‘for the sake of whose society, whose international’<sup>43</sup> do we have this system. Yet one cannot but see the practical manifestations and acknowledge the diagnoses of the salient problems which the choice to build without foundations produces. At least in private, having chosen this profession and attempting to find significance within it, one cannot but wonder how to respond to the large questions.

The re-introductions of defeated sources of justification create paradoxes. Writers argue against formalism, but end up formalists, point out the faults of narratives by

<sup>40</sup> There are several strands of scholarship deriving motivation from the idea that ‘history’ as we know it with all its imperfections and mistakes has been overcome somehow and we can start anew — ‘our sins forgiven’ (at least to a large extent). See Francis Fukuyama and the discussion which followed his essay, ‘The End of History?’, *National Interest* (Summer 1989) 16; see also the New Liberalism, e.g. Anne-Marie Slaughter’s and Fernando Téson’s work.

<sup>41</sup> See generally on the dynamics of legitimation Koskenniemi, *supra* note 4.

<sup>42</sup> Laurence Buell described one aspect of ethics as ‘earnest noise’ in a presentation at the ‘Turn to Ethics’ conference at the Centre for Literary and Cultural Studies at Harvard University, April 1998.

<sup>43</sup> See Kennedy, ‘A New World Order: Yesterday, Today and Tomorrow’, 4 *Transnational Law & Contemporary Problems* (1994) 329.

presenting narratives, or write against privileging a gender/culture over another, but end up endorsing the one side.<sup>44</sup> In trying to point out the paradoxes without falling prey to them, they end up accused of leaving empty spaces in the places where there was once a justification.<sup>45</sup> It seems that rather than a post-ontological we have arrived to a post-justification situation. The world around us seems similar: post-bipolarity, post-superpower order, post-socialist, post-modern, post-realist, post-structural, post-identity ... ever repeating the old orders in different forms but with the implicit authorization that the old tools can now be combined and manipulated as strategies, since the old borders have been struck down. The writing on the bottom of a painting in the office of CLS professor Duncan Kennedy says it all: 'everything is flippable' (placed upside down). Whether for reasons of strategy or desperation, some international lawyers have returned to the beginning: maybe the legal, properly nomological response should be formalist after all?

From the point of view of international legal ethics this is not quite right. We do not disagree with a tragic analysis of the 'post-situation', but we think we still have to find a way to meaningfully live and work in it.<sup>46</sup> Choices still have to be made in those rooms where the international lawyers are sitting, and it is we, the international lawyers as people, who are making these choices. The choices do not make themselves, nor is it the neuter abstract impersonal 'they' who make them. But with both formal and ideal failure, with narration and interpretation 'useful' only in helping us see complexity and avoid too-easy simplifications, what is there to guide our choices within this complexity?

#### 4 Relationship, *Dienst*, and *Sorge*?

Ethics, like justice, is about a continuity of problems and dilemmas which evolve from living together in a common world. To solve the issue of ethics or of justice once and for all would be a contradiction in terms. As lawyers, however, we have an obsessively strong proclivity to technical knowledge (*tekhne*) which can be taught and which maintains its force regardless of who is subject to learning it or hearing it, so long as this listener has the technical ability to understand. This proclivity is so strong that some would maintain that this *tekhne* is in fact the only form of knowledge. Life-ethics, in the sense we have been using it, is not a technical knowledge, and no thickness of code books could 'teach' it. Instead, it is a deeply personal deliberation, a relationship

<sup>44</sup> We shall demonstrate this in the next section. But see also cultural studies, e.g. Gayatri Chakravorty Spivak's work (influenced by Derrida, etc.). Spivak, 'Revolutions That As Yet Have No Model: Derrida's "Limited Inc"', in D. Landry and G. MacLean (eds), *Spivak Reader* (1995), at 75.

<sup>45</sup> This is the criticism commonly advanced against new approaches to international law writings, where it is claimed that the NAIL work lacks 'political commitment', 'refuses to take stances', is nihilist and does not offer anything (reconstructive) in the place of the structures which it exposes as inadequate (concluding that therefore these structures are adequate and should not be criticized).

<sup>46</sup> On the concept of a tragic situation and international legal thought, see Korhonen, 'New International Law', *supra* note 36.

which links the person (again, including his presence, temporality, and situation) with his actions as an international lawyer or as any other role. Ethics cannot be used dogmatically. In Gadamer's words:

[W]e are dealing here with a fundamental relationship. It is not the case that extending technical knowledge would obviate the need for moral knowledge, this deliberating with oneself. Moral knowledge can never be knowable in advance like knowledge that can be taught. The relation between means and ends here is not such that one can know the right means in advance, and that is because the right end is not an object of knowledge either. There can be no anterior certainty concerning what the good life is directed towards as a whole. Hence Aristotle's definitions of phronesis have a marked uncertainty about them, in that this knowledge is sometimes related more to the end and sometimes more to the means to the end. In fact this means that the end toward which our life as a whole tends and its elaboration in the moral principles of action described in Aristotle's *Ethics* cannot be the object of a knowledge that can be taught. . . . Thus knowledge of the particular situation (which is nevertheless not a perceptual seeing) is a necessary supplement to moral knowledge.<sup>47</sup>

The type of knowledge of the particular situation that is necessary for the possibility of ethics (moral knowledge) is an un-interpretative (i.e., undistorted), un-simplifying, and un-deferred relationship between the situated subject and his situation. In other words, it is about an authentic relationship between the subject and himself in his presence, such that he maintains the ability to respond to his situation authentically. In terms of legal work, ethical knowledge is an authentic relationship between the person, his professional identity, and his actions. It is a form of grasping oneself in the stream of the ambiguous, impersonal social and its public interpretation, and *caring* (*Sorgen*) for the situation in all its complexity by concretizing it as a significant part of oneself — this is what we mean by response-ability. In Heideggerian terms, authenticity comes from caring about the situation in its fullness, as a part of oneself, as it really exists; ethics is simply the search for this kind of authenticity in life. Ultimately, the legal meaning is for the life-ethical lawyer what the teddy bear is for the small child. It comes from without but is nevertheless indivisible from the identity of the lawyer. Without the legal problem at hand the lawyer and case would not be who/what they are any more than the baby and the bear would be who they are without a world which includes both baby and bear.

For Gadamer, the greatest ethical challenges for the lawyer follow from his observation that the self-understanding of legal work is one of '*keine Herrschafts- sondern eine Dienstform*' (no master but rather a servant form).<sup>48</sup> The lawyer and the judge must be both servants of the law and of the situation (of which they are a part), but at the same time they must be servants of neither. In the legal context, ethics is about maintaining this difficult relationship and through it a sympathetic willingness to search for the truth and authenticity without taking the easy way out into

<sup>47</sup> Gadamer, *supra* note 29, at 321–322. Please note that Gadamer's use of moral knowledge is closer to our sense of life-ethics than our use of morality, in that he does not consider moral knowledge to be prescribable or transferable in the abstract.

<sup>48</sup> H.-G. Gadamer, *Wahrheit und Methode. Grundzüge einer philosophischen Hermeneutik* (1965), at 293–295; Korhonen, 'New International Law', *supra* note 36, at 11.

Formalism, Idealism or Realism. Obviously, blind adherence to written ethical codes would be as un-ethical as blind adherence to authority. The exemplary character of legal interpretation, for Gadamer, evolved from the practicality of the tasks — the servience to practical life and reality. Respectively the gravest danger flows from false masters — not just political authorities but also the calcifications of the lawyer's (ethical) sense. In his words, 'the opposite of seeing what is right is not error or deception but blindness'.<sup>49</sup>

The sense of *Dienst* lends an air of modesty and subordination to international legal work. Following Gadamer, *Dienst*-sense is the prerequisite of forming ethical and undistorted interpretative relationships with the world and coming up with just applications of law and fact. Yet as many a moral philosophy has demonstrated, it is more than evident that this humanist *Dienst*-sense can be easily warped to something else, as has happened in several cases of totalitarian regimes taking charge of liberal legal systems. This possibility of moral warping of *Dienst* presents a good example for clarifying the difference in terms of levels between ethics and morality, as Aristotle does by presenting a naturally debased version of moral knowledge (ethics), the *deinos*:

... this natural counterpart to *phronesis* is characterized by the fact that the *deinos* is 'capable of anything'; he uses his skills to any purpose and is without inhibition. He is *aneu aretes*. And it is more than accidental that such a person is given a name that also means 'terrible'. Nothing is so terrible, so uncanny, so appalling, as the exercise of brilliant talents for evil.<sup>50</sup>

Life-ethics is about an authentic unmediated relationship between the person and her situation. As mentioned earlier, the constitution of that person includes moral and social elements that are outside the question of ethics and in the realm of social morality constructed by each society for itself. Ethics is not about good and evil.

Nevertheless, a poignant ethical problem does arise when the *Dienst*-sense changes into deference. The international legal discipline has been identified as one always insecure even about its own existence, humble to politics, silent when faced with critical challenges, and deferential when it is demanded to stand its ground.<sup>51</sup> Unlike the *deinos*, who although evil maintains an authentic, unmediated and full relationship between his self and his acts, the lawyer who defers to extant social structures which he refuses to examine, whether they be a code, an authority, or strategy, because he is afraid of other people's opinions, of what 'the system' will do to him, or of not living up to standards which he has done nothing to verify, falls into the stream of the impersonal and inauthentic. His deferral is unethical.

The question in the lawyer's mind should always be: if law is the servant, who is the master? And if this is the particular inside the general principle, how is the general created and sustained? Gadamer's idea about service to the life-world is often forgotten and, worse yet, mistakenly understood as service to power, to politics, to any

<sup>49</sup> Gadamer, *supra* note 29, at 320.

<sup>50</sup> *Ibid.*, at 323–324.

<sup>51</sup> Korhonen has discussed the effects of these critiques and doubts in a critical evaluation of new liberal international law, O. Korhonen, *Liberalism and International Law: A Centre Projecting a Periphery* (1996), at 482–484.

authority that claims to be closer to the life-world (more ‘practical/pragmatic’) or more in the control or in charge of it than law or any sense of justice.<sup>52</sup> As a consequence, the history of international law includes many instances where apparent injustices are not responded to in law and the issues are being deferred elsewhere; colonialism, slave practices, human rights violations, totalitarianisms, different aspects of war, women’s inequality, inadequate protection of children and slum-dwellers, or large-scale environmental criminality. The legal profession in different contexts has understood its *Dienst* as deference more than often. An example of such deference is the jurisprudence of the early 19th century US courts regarding the issue of slavery, and in particular the question of whether slaves were human.<sup>53</sup> Often with great dismay the judges bowed their heads and pronounced their legal decisions upholding the principle of slaves not being human in deference to an odd mix of formalism and politics, adding that ‘the most stupid must feel and know [that these principles of slaves not being humans] can never be true’.<sup>54</sup> Judge Riffin went on to provide an insight into the internal conflict faced by such a judge:

The struggle ... in the Judge’s own breast between the feelings of a man and the duty of a magistrate is a severe one. ... It is useless however to complain... I most freely confess my sense of the harshness of this proposition [the uncontrolled power of the master over the slave] ... And as a principle of moral right, every person ... must repudiate it.<sup>55</sup>

Judge Riffin may have been a good man in that he did not share this morality of slavery but, to the extent that he abdicated responsibility through the formalist strategy or easy exit of ‘the law made me do it’, he was also unethical. The unethical element lay in the bracketing away of the strong ‘feelings of a man’ out of deference to the societal conception of magistrate as an abstract applier of dehumanized codes. There was perhaps also an ethical component, however, in that the bracketing was not complete, in that the recognition of the personal dissonance caused by his conceptions of man and magistrate still made its way into his judicial opinion. Nevertheless, the law survived, *State v. Mann* was overruled a few years later, and the law was perfectly able to perform its *Dienst*, to the better, when lawyers stopped deferring the ‘important’ issues.

<sup>52</sup> E.g., during the Cold War it was always the East–West interests and the power balance which needed to be serviced, and more recently it has been the financial institutions and their interests as well as the ‘international economy/trade’ at large to whose needs international legal projects need to be tailored in the Third World and elsewhere. These entities reach almost a level of mystified deference in situations of severe economic crises and breakdowns.

<sup>53</sup> See for instance a great critical article in the narrativist style by Genovese, ‘The Hegemonic Function of the Law’, in R. Jordan (ed.), *The World the Slaves Made* (1974).

<sup>54</sup> *State v. Mann*, 2 Devereux 263, 264, 256–57 (N.Car.Supr.Ct. 1829).

<sup>55</sup> *Ibid.* Similar rhetoric about the conflict between natural rights and legal rights and the magistrate’s duty can be found in Judge Marshall’s dicta in the *Antelope* case, see *supra* note 38.



## 5 Illustrations: The International Court of Justice

In the last part of this paper, we will illustrate briefly the gravest ethical problems of the above presented styles by linking them to the ICJ Advisory Opinion on the *Legality of the Threat or Use of Nuclear Weapons* (8 July 1996), and attempt to allude at a practical example of life-ethics using the much older *Guardianship of Infants* case (1958). In one guise or another, whether under the that of formalism, idealism or strategy, much of the simplifying away of fundamental ethical choices, what we have called inauthenticity, takes the form either of deferring these 'important' choices elsewhere, as in the *Nuclear Weapons* opinion, or of covering them up under the socio-legal scaffolding, as in the *Infants* case.

If we imagine, for instance, a feminist strategic essentialist response to the nuclear arms opinion, again we can see that the formal/ideal paradoxes recreate themselves in these recent trends as well. A strategist-feminist may argue that the Court's problem was that it refused to reform the norms to incorporate or to read in them a human value of 'nurturing' because international adjudication is male-gendered and it excludes such important values which it regards as 'domestic/private', 'feminine', or 'marginal' as opposed to the 'hard core' of sovereignty and self-defence. But a feminist might claim that, if interpreted in the light of the general principle of nurture, the law would have clearly and overwhelmingly prohibited the use and threat of nuclear arms. For instance, the issues of paragraph 30 of the Opinion could have been reversed; instead of saying that

the issue is not whether [environmental treaties] are or not applicable . . . but rather whether [these] obligations were intended to be obligations of total restraint during military conflict. The Court does not think that the [environmental treaties] could have intended to deprive the State of the exercise of its right to self-defense . . . because of its obligations to protect the environment . . .<sup>56</sup>

the Court should have argued that the nurturing of the living environment is the essence of the preservation of any life on Earth and therefore a superlative form of self-defence, and as such overrides any right to use weapons with widespread, long-lasting and/or severe effects. Paradoxically, however, while making heard the principle of nurture, the feminist here defers to the structure of legal argument, its gendered principles and criticisms, and generally defers to gender as a basis of difference.<sup>57</sup>

Similarly, imagine a strategic formalist who cannot escape the problem of deference either. The strategic formalist may be arguing that since the Court must have foreseen the uneasy result, it should have protected the anti-nuclear project from it. She may further argue, for instance, that the right formal rule would have been one of inadmissibility: the Court should have thrown the request out in the preliminary phase. Again, the strategist may manage to construct ICJ Statute rules 65(1) and 36(1) such that they cohere with customary law in a result of inadmissibility, but

<sup>56</sup> *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion (8 July 1996), ICJ Reports (1996) 226.

<sup>57</sup> This problem has been generally discussed in its entire breadth in the so-called subaltern studies inspired by such cultural thinkers as Gramsci or Spivak.

simultaneously she defers to manipulative textualism and formalism, because she cannot legally pronounce her ethics (nuclear disarmament) in any other way.

Consider further the dilemma of the situational critic, who may oppose the entire institution of an international court and embark on showing the straightjacket in which such an institution inevitably wrestles in hard cases like the *Nuclear Weapons Opinion*. He may set out to textually deconstruct the opinion. Yet, his strategy ends up engaging the institution just the same and possibly even serving a whole multitude of formalists by providing a road map to the Court's intellectual treasury.

The ethical problem of the post-realist styles can similarly be seen to degenerate from *Dienst* to deference as any of the more conventional styles. All the strategists want to serve the world in some way which they think is 'important' or meaningful, but they often end up in deferring to a paradoxical means frustrating the very meaningfulness in the present. The ultimate response is not forthcoming from the narrativist and interpretationist styles, which are not free from deference either. The narrativist style is in the service of liberating the 'social consciousness' at large. A hypothetical narrativist may thus tell a different story about the policy of deterrence, upon which the *Nuclear Weapons Opinion* relied so heavily. He might dig up numerous documents where state officials argue how useless such a policy is and how economic constraints, etc. work much better. The narrativist might then argue that, given this knowledge, the judges would have seen what an illusion the *opinio juris* in favour of deterrence is and they would have seen that there is room to find illegality. Yet, as his ethical dilemma, the narrativist recognizes that this roominess may indeed work against the point of his project, if the audience/judges think that such open room weakens international law. There is no way to convince a judge that just because space seems to open up, she should use it. In fact, she might strive to gain closure even harder. Thus, the narrativist recognizes that he defers to the open-mindedness of others. He recognizes his own 'romanticism' in simply deferring to the possibility that by hearing alternatives international lawyers will start using them.

Finally, the interpretationist style tries to bring the ethical concern to every interpretative relationship. Thus, a hypothetical interpretationist may argue that each judge should have considered the 'killing of the innocent',<sup>58</sup> as Martti Koskenniemi puts it, as a real life phenomenon which it ultimately is. Simultaneously, she should have considered the 'perennial dilemmas' (of identity, power, will, social order and change) which she inevitably has already incorporated into her world-view in one way or another anyway (by accepting an authority or forming her more or less own understanding). The perennial dilemmas together with the failures of formal and ideal legal responses may have convinced her that international law is an open system with openings where legal reasoning just does not hold ground. At these points, something will be decided — even the choice to ignore is such a decision, and *before* the legal decision there is always already an initial interpretative choice, which may be wrong but which also may be checked. The interpretationist style defers to the international lawyer's ability to keep checking her response.

<sup>58</sup> Koskenniemi, *supra* note 8.

An older case which serves well to demonstrate the ethical manifestations of these different styles is the *Guardianship of Infants* case (ICJ Reports (1958) 55). The case was one of Sweden against Holland and related to the infant Marie Elizabeth Boll, a Dutch national born in Sweden to a Dutch father and Swedish mother but who had lived all her life in Sweden, spoke only Swedish and was affected by a Swedish law on protective upbringing of children. The Netherlands argued that under a 1902 Convention regarding the guardianship of infants, Sweden did not have the right to do so, but rather had to send the child to Holland. This case is of interest primarily due to the juxtaposition of the ICJ's opinion and the concurrence of Sir Hersch Lauterpacht. They came to the same substantive result, that Marie Boll could be subject to Sweden's protective upbringing laws, but through radically different arguments.

The reasoning of the Court was formalist; whether it was strategically so or 'honestly' so is, unfortunately, undecipherable. The Court's reasoning was as follows:

The Court is not concerned with the incidental effects of the Law on Protective Upbringing but with its nature and purpose. Guardianship and protective upbringing are wholly different institutions. The former is concerned with the interests of the minor, the latter with the interests of society. Guardianship is in the sphere of private law. Protective upbringing is in the sphere of public law.<sup>59</sup>

Therefore the protective upbringing law did not violate the Convention, even as applied to Dutch citizens. The Court, in a move familiar to all who have read legal cases, hung its hat on a wholly artificial distinction between public law and private law, as well as between the nature of a law and its 'incidental' effects and came to a conclusion which was good for Marie Boll. She was born in Sweden, after all, spoke only Swedish, resided there with her Swedish grandfather, and had never even been to Holland. It was merely a formality, as far as she, her life experience, and her identity were concerned, that she was 'in fact' Dutch rather than Swedish.

Yet the Court could not merely see through the formality. Instead, it fought formality with formality, clove law into finer categories and tailored a fit, albeit awkward, which would allow Marie Boll to stay protected in Sweden. The cost of this manipulation, however, was that it permitted a semantic difference of classification to cover up a substantive conflict between international treaty and domestic legislation — precisely the scenario which the treaty was trying to avoid. As Lauterpacht points out in his concurrence, '[a]n identical provision which in the law of one country forms part of a law for the protection of children may, in another State, be included within the provisions relating to guardianship'.<sup>60</sup>

The Court could have been otherwise constituted or disposed. As we proposed above in reference to the *Nuclear Weapons* Opinion, different styles offer a variety of alternatives in a hard case. In short, a nurture argument for the essential values involved in Marie Boll's growing up in the country of her early years and her mother is readily available for a feminist essentialist. For a strategic formalist a number of

<sup>59</sup> ICJ Reports (1958) 55, at 79.

<sup>60</sup> *Ibid*, at 81.

choices between different doctrines can be demonstrated; our example of Lauterpacht's *ordre public*-exception argument, *infra*, can be seen as one such quite ingenious strategic and formal reading of a major doctrine. To imagine the situational critics take on Marie's problem could produce an argument against the jurisdiction of the Court. Indeed, the strategic formalist could join in this critique: to see the Court's jurisdiction — public and international in nature — as *de facto* determining a young girl's life and identity can be contrasted to the Court's objects and purposes. A public/private distinction could be invoked to shelter Marie's fate from the anomalous consequences of public international law treaty interpretation in an organ where she can hope for no *locus standi*. Although such a distinction between the public and the private spheres easily collapses to critique, yet the construction of legal forms, e.g. the jurisdiction of an international public law court, is based on it. A narrativist may add that, as implied in the pleadings, the *animus* of the treaty is, in fact, either in total contradiction with this kind of application or, if she favoured the Dutch side, in harmony with it. She could go back to the *travaux préparatoires*, to underlying rationales and purposes in order to tell the story of the treaty which would set the text and the intentions behind it within their social context. As an example of an interpretationist stance, one can again refer to Lauterpacht's dissent. One can take *ordre public*, as he did, or an available human right, to be the field in which the dispute must be located. The idea is thence to remove it from the realm of treaty interpretation to something else. In other words, to tinker with the pre-assumption or pre-interpretation of the dispute as one involving questions of, e.g., *ordre public*, *jus cogens*, human rights, group rights or something else apart from those leading to the result which obviously leaves the judges and/or a large part of their audience with an uneasy experience.

Lauterpacht, in his dissent, was unwilling to hide beneath the artificial distinctions between private and public law or between nature and effect of the laws. In his concurrence, he uncovers honestly and analyses meticulously the unstable artificial construction that the Court uses to leave the child to its grandfather.

Assuming that there is a technical difference [between the Swedish law and the treaty], it may still be considered undesirable that a dispute between two Governments shall be decided by reference to a controversial technicality in a case relating to significant issues of substance — a technicality which, if acted upon generally, would introduce confusion, or worse, in the law of the operation of treaties. Once we begin to base the interpretation of treaties on conceptual distinctions between actually conflicting legal rules lying on different planes and for that reason not being, somehow, inconsistent, it may be difficult to set a limit to the effects of these operations in the sphere of logic and classification. . . . [A]n essentially doctrinal classification and distinction provides a doubtful basis for judging the question of the proper observance of treaties . . . . The rights of the parties, especially in an international dispute, ought not to be determined by reference to the controversial mysteries of the distinction between private and public law.<sup>61</sup>

<sup>61</sup> *Ibid.*, at 82–84.

By excavating the unstable foundations of the Court's construction, however, Lauterpacht finds himself in a difficult position. For basic moral and ethical reasons he feels that the child's interests are best protected by Sweden. He must concur, but he is still functioning within the social scaffolding of the law and the ICJ. He still cannot merely say that 'it's better for the child so we'll ignore the treaty', or even 'the child is closer to being Swedish despite legally having only Dutch nationality so the treaty does not apply'. What Lauterpacht does is base his decision on ethics and morality, but by rephrasing these concerns in legal language under the concept of *ordre public*.<sup>62</sup> It is noteworthy to recall that in his Hague General Course in 1937 he expressed views against the construction of an international *ordre public*.<sup>63</sup> Obviously, such views must sometimes be qualified. Thus, he argues that a country is allowed, under international law, to use *ordre public* as an exceptional justification for deviating from *pacta sunt servanda*. He has as much difficulty in precisely defining *ordre public* as we have had in 'defining' life-ethics. He separates the areas in which the use of *ordre public* is justified, with the first being easier to articulate: it includes and is implied by certain spheres of law, such as territorial laws, criminal laws, police laws, laws relating to national welfare, health and security, and the like. But, in his words: 'Secondly, [*ordre public*] is resorted to as embracing, more generally, fundamental national conceptions of law, decency and morality.' It is that ethical and moral element of law which underlies all of a particular society's legal codes, which codes try to encapsulate but can never quite succeed. He recognizes that in a world of positive law, such an undelineated, uncompartamentalized and gelatinous protoplasm of law presents a danger through its lack of constraint. But he also goes on to say that it is an essential ingredient of law without which law would not be law.

Admittedly, the notion of *ordre public* — like that of public policy — is variable, indefinite and occasionally productive of arbitrariness and abuse. It has been compared in this respect, not without some justification, with the vagueness of the law of nature. Admittedly also, it has often been the instrument or the expression of national exclusiveness and prejudice impatient of the application of foreign law. . . . [Nevertheless], it is, on its own merits, part and parcel of the entire doctrine and practice of private international law almost from its very inception; the two are inseparable, not only as a matter of history but also of necessity; they have grown together in a mutual interaction and compromise . . . there is an obvious element of simplification in the view that the law of a State should be deemed to have consented or that it should reasonably be expected to consent in advance to the application of foreign law without any limitations, in any circumstances whatsoever, without a safety valve, without a residuum of contingencies in which, because of the very nature of its structure and the fundamental legal, moral and

<sup>62</sup> Lauterpacht compares the term *ordre public* to public policy in the opinion: 'It may be stated in the present context that although in this Opinion the French term *ordre public* is mainly used, it is not used as implying a substantial difference between it and the notion of public policy in common law countries such as the United Kingdom or the United States of America — although probably the conception of *ordre public* is somewhat wider. It is used here for the reason that it is current in the law of two States which are parties to the dispute.' *Ibid.*, at 90–91.

<sup>63</sup> By 1953, he had recognized the exception. See, e.g., Dupuy's notes on this change in Lauterpacht, see R.-J. Dupuy, *La communauté internationale entre le mythe et l'histoire* (1986) 153.

political conceptions which underlie it, it should be able to decline to apply foreign law.<sup>64</sup>

Lauterpacht qualified his use of the *ordre public* conception because he recognized the tension between the surface of legality and its ethical underpinnings. International legal scholarship usually employs this doctrine only in rare cases and even there the references tend to be distanced and vague, as Lauterpacht describes. One manifestation of this distancing and of the recognition that the exception is meant to be somehow deeper than the general analytic surface of legal argument, is that it is generally presented in a foreign language. When embedded in an English language opinion, the doctrine is referred to as ‘*ordre public*’, whereas in a French-language text we read of the same as ‘public policy’, usually italicized.<sup>65</sup> The foreignness permits an element of mystery to remain undeconstructed. Recognizing the dangers of this conception of *ordre public*, Lauterpacht then tried to stress that it is a rare exception but that it is justified when parties are willing to submit their disputes to international adjudication. This is extremely problematic since the ICJ would then in effect be stepping in as an appellate court reviewing domestic judiciaries — *ergo* in violation of its own Statute. Moreover, there was no real review of the issues since Sweden, the hypothetical proponent of the *ordre public* exception in this case, did not present any substantive evidence that the *ordre public* exception would have been applicable and the Court did not, *proprio motu*, ask for it. As pointed out in Judge Winiarski’s dissent, no Swedish court had relied on *ordre public* when applying the Swedish law on protective upbringing. A further problem is that Lauterpacht declares himself ‘bound to assume’ without any evidence that the Swedish child protection authorities did not misapply *ordre public*, that they knew best, that their judgments regarding the welfare of the child should not be ‘lightly disturbed’ or second-guessed. Thus, uniquely on the basis of this ‘assumption’, he concludes that the rare exception may be granted.

The Court’s, and especially Lauterpacht’s, difficulties illustrate well the occasional awkwardness of attempting to fit into legal constructions what is, with ethical clarity, the morally right thing to do. Ethically, neither the judges in the plurality nor Lauterpacht feel that they would be true to themselves as human beings if they allowed legal technicalities to convince their judge-selves to take this child away from what is ‘obviously’ her home and consign her to a life as a stranger in a country which is foreign to her in every sense except the legal. Yet they are nevertheless judges, and the legal is the arena in which they are ‘supposed’ to be functioning. The Court responds with classic legal reasoning and covers up the moral dilemma driving the issue, objectifying it into a simple question of doctrinal classifications — but with the morally ‘correct’ result. Lauterpacht, equally moral, concurs. But, perhaps out of a paradoxically greater respect for the law, or perhaps out of a greater ethical relationship to not only this particular case but to his life-role as judge, he refuses to take the easy, and at the same time moral, way out presented to him by the compromised majority opinion. He insists on recognizing the ethical/moral dimension

<sup>64</sup> ICJ Reports (1958) 55, at 94–95 (emphasis added).

<sup>65</sup> See, e.g., Dupuy, *supra* note 63, at 153, 155.

within law even over and above code-style positive law. He ethically forces it into the legal scaffolding of categories and compartments — as a result he risks breaking down some of this scaffolding and, in his attempt to contain the ‘damage’ which this dimension could do to the body of positive law as a whole, he gets himself into some analytic tight corners such as his insistence that he is ‘bound to assume’ the correctness of the Swedish decision even absent evidence, the production of which he first properly emphasizes as the precondition of the entire *ordre public* exception.

As we have tried to argue from the outset, the question of what a life-ethical decision would have been, in either of these cases, is nearly nonsensical. Although being with Others, and being within a society and a world, is an inalienable part of who we are, we are all, our personhoods, our lives, and our situations, ultimately deeply our own; so too with life-ethics. Nevertheless, to us, the general language of Lauterpacht’s opinion as opposed to that of the Court, seems to illustrate the general feel of life-ethical application in law, if as nothing more, then at least as a direction. Lauterpacht’s legal mind was, by all accounts, very sharp. He could have made the moral decision to keep Marie Boll in Sweden by either using the path already opened up by the Court’s perhaps ‘strategic’ use of a formalist split between private and public law, or he most likely could have come up with some alternate legal justification. What he did instead, however, was acknowledge the moral nature of the question, *albeit* in legal language as ‘*ordre public*’. The life-ethical aspect, to the extent that we can be so bold as to delve into his existence as if it were our own, was in acknowledging the nature of the question, rather than in the morality of the result. It is ethical not simply because of its honesty, at least not *only* what is usually meant by honesty, but in his attempt to maintain authenticity in his role as judge, in his striving for a relationship with the law such that his acts of judging would be *significant*. Through that relationship, he also gave the law a greater degree of depth, significance and contact with his, and Marie Boll’s, human reality. To do this, he needed a certain insensitivity to the extant socio-legal structures to which he was surely as attuned as the Court, but by which he was not swept away to the extent that they were. It is a testament to his ethical sensibilities and his ability to *care*, in the existential rather than merely psychological sense of the word, that he was unwilling to defer to a socio-legal fabric(ation) which had become too far removed from real lives, and a testament to his legal skill that he was able to reweave this fabric such that it would not suffocate its own, and by extension *his* own, moral and ethical underpinnings. This unwillingness to defer, this ability to not be swept away, is the closest abstract definition to authenticity and life-ethics which we can articulate in a transitive manner. A less neighbourly definition of authenticity and ethics, but one which rings most on point with us, is simply to say ethics is *care*.

## 6 Conclusion

If ethics is deeply personal care, intransitive responsibility, and openness, what role is left for law, one might ask. This question is one which, when asked from an ethical

standpoint, also has no absolute or even adequate answer. Nevertheless, it cannot be denied that law is real, that it influences and impacts lives. It determined where Marie Boll ended up. Lauterpacht, after all, does not step outside the nomological circle when rendering his decision, but rather digs deeper into its foundations. As he himself has written, the very nature of law lies in externally imposed obligations and codes. Law, as the medium through which society channels its ideals into the real, has a function of inserting the common interests of society into the particulars of individual lives. It carries the structures of society from the past into the future and thereby sets the limits for the future possibilities of society.<sup>66</sup> In this manner, law itself has a choosing dimension which is shaped, but not completely controlled, by its human actors.

Law, by its nature, seems societal, intentionally and necessarily transitive. In may very well be that one function of law is that of a veiling device through which deeply incommensurate ethical problems are covered over so that society can move on and resolve its problems. Such an analysis, and an acceptance of such a role for law, does not, however, require the bracketing of the ethical and existential questions in order to 'move on'. Even the decision to assume a rule-utilitarian approach to law, following Bentham for example, is made not once in advance for all time, but rather is re-made every time the lawyer is faced with the need to balance the integrity of the rule against the justice of a particular case, a balancing which often takes the form of 'does this rule apply here?' This balancing is inevitably done on the fulcrum of the lawyer's personal ethics, of her *Lebenswelt*. The ethical task is to undertake and sustain responsibility for the full range of complexity which every such choice entails; such choices are grounded in their human actors, who themselves are grounded in their lives, their worlds and their ethics.

The ethical dimension is present, whether explicitly or implicitly, in every decision to follow, break, determine, interpret or re-interpret the law. The question of what is the function of law is not only part of every decision of how to apply it, but it is part of the individual's ethical task for which no general or abstract answers can be provided in a meaningful way. Our intention has been to elaborate on the complexity of the inquiry, not to confuse it or declare it futile. It is not our intention to dispute the importance of evidentiary and procedural rules or imply that they can be done away with any more than wigs, costumes and lighting should be done away with in a theatre. Both law and theatre have a veiling element, but both are media, structures, languages through which society exposes, reflects on and mediates problems. Both see an important function in inducing social change. Yet, in law as in good theatre, one cannot separate the inside and the outside. The best actors do not artificially 'play' their characters but bring their deepest *Lebenswelt* into the character to connect it with the social reality. That connection is the difference between good and bad performance, it 'is a willingness to be naked, whether you have your clothes on or not, to strip away those parts of you that stand in the way of the truth of any individual'.<sup>67</sup>

<sup>66</sup> Talk by Philip Allott at Harvard Law School, 19 November 1998.

<sup>67</sup> H. Shaver, *Photoplay*, March 1987.



The function of the theatre is that of a critic, an indicator of abuses, and a mediator between struggles among segments of society. To conceive of theatre as a masquerade is the same as constructing law as merely a veiling project. Of course, as the theatre uses masks and robes, the law uses its forms. Both, however, still try to influence the inadequacies of the social order by becoming part of life and by drawing from life. Both lawyers and actors, even while working within externally imposed systems and roles, simultaneously and constantly create structures of ideas into which society flows.

The ethical task of the lawyer is to maintain personal responsibility and care for every engagement with legal problems. This responsibility does not preclude or in any way denigrate the use of legal forms. On the contrary, the legal forms are the tools and language of the lawyer and the judge. But the lawyer and the judge are no more simply the instruments of the socio-legal structure than an actor is merely the instrument of an abstracted character. It is not simply the case that the conception of lawyer as instrument divorced from the underlying person is morally wrong or unadvised. Rather, it is philosophically nonsensical — the character cannot exist without the actor — and the analytic pretence that one can is an unethical abdication of responsibility and care.