

**CHANGE IN INTERNATIONAL LAW AS
EXEMPLIFIED BY THE PROBLEMATIC OF
INTERVENTION**

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‘Living is no laughing matter:
you must live with great seriousness
like a squirrel, for example’

ABSTRACT

This study examines the *concept of change in international law* from a range of different perspectives. The main thesis put forward in this study is that international lawyers both in their practical and theoretical works actively create knowledge about how international law changes.

The thesis, in Part I, starts with an inquiry into what ‘change’ means for the discipline of international law. It investigates the intellectual terrain that explains international legal change. This examination does not present international legal theories about legal change in terms of their closeness to truth, but in terms of their genesis. The study focuses in greater depth on the ‘discipline’ of international law and the ‘community of international lawyers’ as the driving force behind a meta theoretical conception of the terms and conditions of change in international legal theory.

With the aim of concretising how the discipline actually negotiates the boundaries of the limits and potentials of change in international law in practice, the study in Part II is organised around the case study of the contemporary law of intervention. The aim of this part is to investigate how theories, doctrines, precedents, analogies, and uses of international legal language meet and diffuse into each other at a point when a norm is regarded by many as under *a condition of metamorphosis*.

The thesis, in short, aims to take a still picture of constantly-in-the-making international law and identify how, in contemporary international legal culture, change is theorised, resisted and advocated with specific reference to the law of intervention.

1. INTRODUCTION

The question of change stands at the heart of an effective legal inquiry, practical as well as theoretical. All international jurists¹ are concerned with change when they argue that a law is no longer valid, that the scope of a law is broadened or limited or that law has completely transformed. As legal advisors to states or organisations, as lawyers or as scholars, international jurists find themselves arguing for or against the change of the current state of law at most times of their career. Many of the international legal arguments are constructed around ‘changes’ that might affect the future of international legal argument. These may be grand events like that of the end of wars, signing of multinational treaties, groundbreaking decisions of international courts or simply violations of current international law. Change in international law is also advocated by pointing to ‘outside’ reference points. We often hear about the structural changes, changes of power configurations, taking place in international politics and their impact or possible impact on international law. It is common to read that international law is either accused of falling behind these changes, is called to adapt itself to existing situations or is called upon to resist the ‘outside’ forces. Calls for international law to live up to the standards of (a) morality are also commonplace. A general intuition to the concept of change in international law points out that the question of change is not a simple one, but in fact an aggregate of a variety of questions.

¹ I use the term international jurist inter-exchangeably with the term international lawyer referring to the encompassing community of people who are dealing with the theory and practice of international law at all levels.

Even though when put this way, ‘change’ or ‘change talk’ is everywhere in international law scholarship, the concept of change has not come to be seen as a problematic in its own right, as something to be theoretically studied. It is rather taken as a simple, obvious and inevitable fact of international legal life. It may even be questionable whether there is available space in international legal thought to undertake a study of the concept of change.

There seem to be two traditional spaces in which change of international law is understood and studied in international legal thought, which take their cue either from a formalist or an instrumental approach to change². Formalist approaches to change strip the question of change from any social determinism and see it as formally determinable by way of resorting to formal rules developed ‘inside’ international law. Instrumental approaches, on the other hand, attribute ‘change’ to somewhere outside of international law (in turn accepting a social, political, or moral determinism for change) and study how it can be reflected inside the law.

Formalism is, then, centrally about studying change in positive international law. The task of the formalist is conducting a meticulous survey of legally relevant documentation (comprising, for example, diplomatic correspondence, statements of government officials, records of inter-governmental meetings, United Nations documents) which may evidence a change in the habitual behaviour of states and their *opinio juris*, which may point to a fresh interpretation of a treaty clause, which may suggest that a treaty is suspended or terminated, which may suggest that a new custom supersedes an

²For a cogent analysis of formalism and instrumentalism in legal theory using the French judiciary as the point of departure, see P. Bourdieu, ‘The Force of Law: Toward a Sociology of the Juridical Field’, (Richard Terdiman trans.) 38 *Hastings Law Journal* (1987) 814.

old treaty. Formalism is only interested in ascertaining the change in positive laws. Its method is collection and analysis of legally relevant data. The legally relevant data are 'hard' documents that are rooted in the formal consent of states in explicit or implicit forms. The autonomy of law is such an upheld presupposition that the question of change is reduced to a technical research that is often incomprehensible to observers outside the discipline. In this framework change can come from anywhere into the international legal world, the origin of change is not of concern to the international lawyer. The primary preoccupation is the way in which the change is formally reflected in the legally relevant material.

Instrumentalism, on the other hand, holds that there exists a strong relationship between international law and its infinite others such as international politics, ethics or morality. It denies that international law has only contingent connections to its outside. Change of international law, then, should be studied whilst bearing in mind that international law is an interdependent part of the 'outer' world, which is the determinant source for change. It has to respond to the requirements of that 'defined' outside. Instrumentalist approaches value the harmony of law in keeping up with the outside world over the autonomy of law in explaining change.

Positivist theories of change in international law in this respect can then be understood as formalist. Naturalist, policy oriented theories of international law, on the other hand, are instrumentalist change theories, since they address the way in which morality and policy choices inform the law. While formalism aims to isolate change in international law within the sealed walls of the discipline, instrumentalist approaches suggest the opposite: the walls of international law

should be as transparent as possible to the referred outside, be it morality or politics.

These two traditional modes of theorising, which can be characterised as rivals, occupy all the available space in international legal thought to study change. Any ‘new’ theory of change within this traditional space ought to emphasise either of these sides in explaining change at a *theoretical level*. Practical reasoning with regards to determinations of change in particular international laws, however, reveals a mid-way solution, what is generally referred to as the ‘eclectic’ approach: international jurists aim to ‘balance’ the dose of formalism and instrumentalism to create a *persuasive* account of change, which aims to make many, if not all, content with the outcome of an argument on change. There are, of course, as the long-standing doctrinal debates have shown, many shades of formalisms and instrumentalisms.³ Giving in too much to formalism –that is, losing touch with the outside reality- or too much to instrumentalism – that is, eliminating the independence of law- is an all too common response to any account of change. Even though, for every concrete moment of decision, it may be observed that a dose of formalism and a dose of (an) instrumentalism feed into the dictum on change, the phenomenon of change itself cannot be *conclusively* explained by either of these theoretical frameworks.

Critical theories of international law – taking their cues from various forms of contemporary social theory such as feminism, post colonial theory,

³ On formalism, P. Weil, ‘Towards Relative Normativity in International Law?’ 77 *American Journal of International Law*, (1983) 413 and U. Fastenrath, ‘Relative Normativity in International Law’, 4 *European Journal of International Law*, (1993) 305. For a naturalist instrumentalist account, see, J. Tasiulas, ‘In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case’, 16 *Oxford Journal of Legal Studies*, (1996) 85. For a policy-oriented (legal realist) instrumental approach, on the other hand, W. M. Reisman, ‘International Law Making: A Process of Communication: The Harold D. Lasswell Memorial Lecture’, 70 *American Society of International Law Proceedings*, (1981) 103.

linguistics, or third world studies- have to a great extent contributed to the understanding of the shortcomings of the grandiose formalist and instrumentalist approaches to international law in general by demonstrating that international law cannot categorically be amoral or apolitical or it cannot be categorically in touch with (a) morality or policy because it only represents a dominant view of the international legal configurations.⁴ It may follow from this argument that studying change within the formalist theories of international law, solely questioning change by using technical analysis, is not in itself as autonomous an inquiry as it may seem. Conversely, instrumentalism, in principle, cannot be an objective effort to enable law to be in conformity with an ‘outside world’, since there are a multiplicity of ‘outside worlds’.

Even though these theories, taken as a whole, have not offered grand theories of international law, -and perhaps caused confusion and rejection among the traditional scholarship⁵- they still suggest that space can be made for

⁴ ‘Demystification’ of the neutrality of the formal inquiry to international law has been conducted from many fronts in recent international law scholarship. On the subjective nature of the 19th century conception of sovereignty and the colonial face of international law, A. Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’, 40 *Harvard International Law Journal*, (1999) 1; D. Kennedy, ‘International Law in the Nineteenth Century: History of an Illusion’, 65 *Nordic Journal of International Law* (1996) 385; N. Berman, ‘Beyond Colonialism and Nationalism? Ethiopia, Czechoslovakia and ‘Peaceful Change’, 6 *Nordic Journal of International Law* (1996) 421; on the discussion of the universality of international law as a particular liberal claim, M. Koskeniemmi, *From Apology to Utopia: The Structure of International Legal Argument* (1989); D. Otto, Subalternity and International Law: The Problems of Global Community and the Incommensurability of Difference, 5 *Social and Legal Studies*, (1996) 337; on the male dominant nature of international legal concepts and law making, Chinkin and Charlesworth, *The Boundaries of International Law: A Feminist Analysis*, (2000); A. Orford ‘Muscular Humanitarianism: Reading the Narratives of the New Interventionism’, 10 *European Journal of International Law*, (2000) 665; on the effects of a single superpower to international law, S. Marks, ‘Big Brother is Beeping Us with the Message that Ideology does Not Matter’, 12 *European Journal of International Law*, (2001) 109; on conceiving international law as a Euro-centric imperial project dominating the third world, M. Mutua, ‘What is Third World Approaches to International Law (TWAIL)?’ 94 *ASIL Proceedings* (2000) 31; K. Mickelson, ‘Rhetoric and Rage: Third World Voices in International Legal Discourse’, 16 *Wisconsin Journal of International Law* (1998) 353.

⁵ I. Scobbie, ‘Towards the Elimination of International Law: Some Radical Scepticism about Radical Scepticism’, LXII *British Yearbook of International Law* (1991) 339; R. Mullerson, *Ordering Anarchy: International Law in International Society*, (2000) at 49-66.

theoretical openings *within the discipline* of international law that question, challenge and go beyond the traditional spaces that have long dominated the production of legal knowledge in international law. This new, albeit multifaceted, critique of how international law is theorised may also have consequences for the ways in which the concept of change is understood and theorised in international law.

Given this background, this thesis is an attempt to create such a space for consideration of the concept of change in international legal theory. My aim is twofold. The first aim is to move towards an elaborated understanding of the traditional space in international legal theory, which limits the question of change to either an assertion of the autonomy of international law or its potential to constantly update itself in tandem with the changing world. This requires *changing* the way we think about change in international legal theory. By thinking differently, the concept of change can be seen as a legal theoretical inquiry in its own right, rather than as a factual phenomenon in international legal life.

Second, I aim to develop the way in which this new conception of change in international law is applied to a particular subject matter within the discipline, which by the majority of members of the international legal community is regarded to be in a period of change. Basically, the objective is to develop arguments about the usefulness of a new conception of change by presenting it through the lens of a case study entailing a contemporary changing subject matter. The two parts of the thesis mirror these two aims, although the first part of the thesis constructs the conditions of the second part.

1.1 Expectations from and Potentials of Change

The main concern of this thesis is to develop a ‘formal’⁶ framework which addresses the terms and conditions of change in the disciplinary space of international law. Three general issues arise from this concern, which apply to the entire study and should be clarified from the outset.

First, I hold that the disciplinary space of international law emerges from the interaction of competing conceptions of law and *the international*. International jurists utilise legal theories to form their conceptions of law. They then turn to conceptions of *the international* to delimit the subject matter of their legal inquiry. In other words, however simple an international legal argument may seem, if looked carefully, one can trace a concept of law and a perception of *the international* forming this statement. An international lawyer, too, carries the characteristics of both a *lawyer* and an *internationalist*, however these may be defined. When addressing change in international law, we may expect to see various combinations of theories both about *the law* and about *the international* at work. We shall also expect that confronting questions of change in international law raise the issue of what kind of a lawyer and an internationalist one imagines to be as an international lawyer.

Second, the usage of change in any general context has an important commonplace connotation. It creates an expectation about the end of change. As Gellner elaborates in the *Thought and Change*:

A large proportion of moral philosophies and physiologies insist on seeing (change) from outside, ex post as it were, from the view point of the crisis overcome, the transformation completed, the correct or the ultimate or

⁶ The usage of ‘formal’, here is different from what I have referred to as ‘formalism’. Formal, here, means an inquiry not about the substance of change, but about how change takes place.

preferred identification determined. To do this of course is to prejudge the issue faced by the society in transition.⁷

For the discipline of law, the effort of seeing change from the outside is a problem of particular importance. Law's foremost claim in any society is its ability to regulate behaviour, to offer *stabilising* guidelines for the functioning of the society of which it forms a part. International law's claim is then to offer regulation for the functioning of international society, regardless of how the content of this society is defined. The consequence of this perceived mission of law is the tendency among jurists to resolve any questions of change, preferably, as soon as possible. This does not necessarily refer to a fixed period of time, but instead to the general desire of the jurist for certainty, when faced with the possibility of change. International lawyers' general attitude towards change, too, is a determination to solve the problem that is caused by change. The impatient bells for a call for stability start ringing soon enough for the international jurist demanding to learn from what to what international law changes (or does not change) and how that change is explained. This is what I propose to call the 'metamorphosis condition' once again resorting to Gellner's articulation:

The general consequences of a metamorphosis are both obvious and well known: disorientation and bewilderment, a sense of chaos and contradiction, and an attempt to restore some kind of order and direction.... Under favourable circumstances this situation can lead to the attempt to set up systemic criteria for what should and should not be admitted into the restored order, to identity regained.⁸

What this thesis primarily aims to investigate is this 'condition of metamorphosis' in international law.⁹ Defining the main framework of the thesis

⁷ E. Gellner, *Thought and Change*, (1969) at 52.

⁸ *ibid.*

⁹ Throughout the thesis I will use the terms, 'metamorphosis'; 'period of change'; 'period of

as the study of *metamorphosis* requires accepting a point of *stability* in the law that is widely shared within the discipline. It does not, however, require accepting or proposing a second point of stability after the claims of change have been settled. By pointing out this positioning of the thesis explicitly from the outset, I aim to prevent the reader from reading the rest of the work in anticipation of finding out what has changed from what to what and whether there exists a competent explanation of this change in this thesis. It must be admitted that it is not easy to distance one self from that expectation. It may further be questioned whether there is any ‘usefulness’ to a study of change in international law which leaves the final judgement of the outcome of the change in law in the air, as it were.

I would like to clarify my position to this challenge from the outset. I propose that the condition of metamorphosis, in fact, functions as a mirror of any point of stability in international law. Disagreements on the source of obligation, the nature, limits and exceptions of the law in process of change continue to be relevant even in periods of perceived stability. The point that there has been a consensus on a new point of stability does not suggest that the root causes of change disappear. It only points out that discussion on the change of a specific law has been brought to a stage of relative closure among the community of international lawyers.

What induces international lawyers to determine that the law has changed/is changing/resists change is a *majoritarian* agreement among international lawyers that a new point of stability (the outcome of the change) fits the facts ‘better’ when the facts are viewed from that perspective. In turn, there is untold

transition’; ‘being in transition’ interchangeably. All these terms ultimately shall refer to the

competition among a variety of theories offering a new point of stability, until one is accepted by many and others are *marginalised* and reduced to a *minority opinion*. This argument should hold both for larger changes and minor modifications. The agreements within the community are always temporary, even though some might last longer than others might since international law is constantly in the making. However, upon application of the new point of stability to concrete cases, it should be expected that the problems of application of the new law are those of the dilemmas originally faced during the transition period. Questions such as defining the scope of the law, delimiting the exemptions and exceptions to it, or qualifying the facts of a new case in relation to the law will mirror the tensions apparent during the condition of metamorphosis. In short, the closure of the discipline (that the man has turned into a beetle in Kafka's way¹⁰) does not suggest that the metamorphosis is long forgotten. Far more of the crisis of change is preserved in the new point of stability than anyone may be willing to admit.

The third general issue is the potential that 'change' uniquely does offer to this study. In very rough terms, the metamorphosis condition in international law can be characterised as a stage when the international lawyer is neither precisely inside nor outside the discipline. Periods of change in international law, in this respect, are periods of increasing tolerance with regards to the modes of production of legal knowledge. International lawyers who approach the question of change formally find the need to revise the most fundamental concepts of international law for an answer. Doctrines of custom formation, treaty interpretation, the relationship between treaties and custom may need to be

¹⁰'condition of metamorphosis' as explained in the Introduction.

reworked. International lawyers with a more instrumental approach, on the other hand, are more likely to venture into interdisciplinary investigations to align international law with the envisaged requirements of change. International ethics, morality and politics are the most probable disciplines to turn to for guidance. Consequently, the boundaries between the inside and the outside of international law become blurred. I argue that this is a potential offered by a study of ‘change’ in international law. Opening new spaces for theoretical thinking, re-examining the relationship between theory and practice of international law, proposals for change in the interpretation or the content of positive laws can be more easily put into the agenda of the discipline as a common problematic rather than separate compartments of analysis. Furthermore, there would be an increase in the number of international jurists who would be interested in all of these issues at the very same time since the metamorphosis brings a confusion about the very nature of the work involved in studying or practicing international law. Consequently, change offers a potential for the enrichment of the intellectual inquiry into the issues of international law noted above.

The blurring of the inside/outside conceptions of the discipline can be observed at all levels of international legal argument, varying from the abstract conceptions of international law to the practical representation of positive rules. The relationship between the outside and inside of international law is never absolute as supposed -although for different reasons- by both the formalist and instrumentalist inquiries. International law as an intellectual enterprise is neither autonomous from nor a mirror of the international societies’ other governing systems. However, the anticipated challenge to international lawyers is to be

¹⁰ F. Kafka, *Metamorphosis; Die Verwandlung* (translated by Willa and Edwin Muir), (1968).

able to present the outside as being already part of the inside. In other words, formulations of change which offer a comfortable answer to the majority of the international law community are likely to be the successful answers for international legal change.

Perhaps this last proposition needs further explanation: I do not suggest that a widely agreed solution on change is the 'right' one in an absolute way. It is not a matter of qualitative conviction, but a quantitative conviction that explains change. The success of the qualitative conviction not only depends on a coherent theory explaining change, but also on the attractive presentation of this theory to a broad audience of international lawyers. A successful theory, then, is more likely to be produced by authoritative members of the community who are sensitive to the need for stability for the reformulation of positive laws. Seeing change as a matter of a *majoritarian qualitative* conviction among international lawyers rather than a 'normative' change in an objectively identifiable international law reveals three major underlying assumptions with regards to the philosophical position of the thesis.

The first underlying assumption is with regards to the philosophical worldview of this study. I begin the analysis of the concept of change in international law by assuming that international law does not have an inherent meaning, which can be verified in an objective fashion. Concepts of international law do not have 'neutral', 'absolute', meanings as such, but instead their meanings are a product of historically specific systems of rules.¹¹ These systems

¹¹ This position is certainly informed and draws conceptual resources from the 'linguistic turn' in philosophy and social sciences that has been taking place following Ferdinand de Saussure's study in linguistics, which investigates the meaning of words in terms of how they appear in sentences (structures). Saussure, *Course in General Linguistics*, (1960). In a wide array of disciplines ranging from literary theory, cultural studies, political theory, international relations

of rules can be traced from the practices and meanings shaping the community of international lawyers. These practices and meanings materialise as international legal theories, legal positions, legal decisions within the discipline. They explain international law by drawing boundaries around it, deciding what it includes and what it does not include, articulating and leaning on many ‘others’ of international law such as history, culture, or morality, political thought, and economy in various ways.¹² Once we are *in* the discipline of international law, we are within a world of contingent practices and objects constructed by a particular community of social actors: international lawyers. In this respect, change in international law is a matter that is negotiated *within* the discipline, it is not a factual, empirically verifiable phenomenon that comes from the outside world.

This worldview of international law does not undermine the significance of international law or its existence as a discipline in its own right, but only alters the way international law is perceived in the final analysis: to see international

and law, the insight that objects do not have independent and sterile meanings, but that those meanings are created by discourses and practices has started an open-ended and evolving questioning of the theories of knowledge with claims to objective, rational and universal presuppositions. See for the travel of this ontology to political theory, E. Laclau, *Emancipations* (1996); to social sciences D. Howarth, *Discourse* (2000); to international relations D. Campbell, *Writing Security: United States Foreign Policy and the Politics of Identity* (1992); to law, D. Cornell, M. Rosenfeld and D. G. Carlson (eds.), *Deconstruction and the Possibility of Justice* (1992); M. Davies, *Delimiting the Law* (1996); to international law, M. Koskeniemmi, *From Apology to Utopia* (1989); to human rights law, U. Baxi, *The Future of Human Rights* (2002).

¹² Carty suggests that ‘all knowledge is historically based, not merely that history is an aspect of understanding of ourselves’. This perspective locates all knowledge i.e. culture, morality and political thought within the sphere of historically based knowledge. It follows that it is not possible to discuss any phenomenon independent from history. History informs all the phenomena even if we are aware of it or not. See, Carty, ‘Why Theory? Implications of International Law Teaching; in *Theory and International Law: An Introduction*, Allot, Carty, Koskeniemmi and Warbrick (eds.), (1991) at 85-86. Cf. Carty, *The Decay of International Law: Limits for International Legal Appraisal*, (1989). Korhonen, on the other hand, suggests that concepts of history, culture and community are separable aspects, which influence the structure of international legal argument. Cf. Korhonen, *International Law Situated: An Analysis of International Lawyers Stance towards Culture, History and Community*, (2000). Here, I follow Korhonen’s position in the sense that disciplines regarded as ‘external’ to law can be treated as

law as bearing an objective meaning *per se* is not an intrinsic requirement to realise the existence or importance of international law. I may understand the purpose of international law, for example, not as a universal and neutral superstructure based either on positivism or naturalism, but as a tool for conversation among states and peoples, which is constantly in the making through diverse theoretical positions created during this conversation. I may also see it as an evolving platform of domination/subordination of identities, where particular worldviews are constantly universalised at the expense of others. What I simply recognise is that there exist multiple possibilities of understanding what international law is and what purpose it serves. At the same time, this worldview enables me to assert that every consensus on the meaning and function of international law(s) is a temporary result of a provisional hegemony, which manifests itself as stability. Any consensus, on the other hand, always entails some form of exclusion. International law both as theory and in its positive law manifestations is still important and significant: what is devalued is the traditional and homogenous understanding of it.

My *second assumption* is closely related to the first one. I submit that international lawyers compete with each other to offer dominant explanations of what the law is and what may be qualified as relevant legal facts through the international legal language. International legal language consists of historically constructed concepts such as sovereignty, consent, interpretation of treaties, customary international law, general principles of law, *ius cogens*, obligations *erga omnes*, equity, proportionality and the like. Furthermore, all the sub fields of international law have their own set of specialised language. Even though this

separate categories analytically since international jurists themselves in their arguments draw

language can be criticised because of its static¹³, gendered¹⁴ or colonial¹⁵ qualities and because the meanings of concepts such as humanitarian intervention, domestic jurisdiction, or sustainable development can easily be contested, it is crucial for the distinct terrain of the inquiry into international law to remain within the territory of this language. Once the language of international law is abandoned, ‘one can expect to lose one’s audience’.¹⁶ Furthermore, for international lawyers, the utilisation of the language, while articulating the legality of an international legal problematic is as important as the outcome of the analysis.¹⁷ The use of common language creates a sense of common identity among international lawyers, which makes the community sensitive to how ‘well’ the language is used.

Kratochwil uses ‘technique’ (*ars legis*) to point to the importance of the language, when he addresses the criteria for explaining the selection of certain fact descriptions over others.¹⁸ International lawyers learn this technique. It is

artificial lines between historical, moral, political aspects of a legal phenomenon.

¹³ D. Cass, ‘Navigating the New Stream: Recent Critical Scholarship in International Law’, 65 *Nordic Journal of International Law*, (1996) 341; D. Kennedy, ‘When Renewal Repeats: Thinking against the Box’, 32 *New York University Journal of International Law and Policy*, (2000) 335.

¹⁴ K. Engle, ‘Female Subjects of Public International Law: Human Rights and the Exotic other Female’, 26 *New England Law Review* (1992) 1509; A. Orford ‘Muscular Humanitarianism: Reading the Narratives of the New Interventionism’, 10 *European Journal of International Law*, (1999) 665; Chinkin and Charlesworth, *The Boundaries of International Law: A Feminist Analysis*, (2000)

¹⁵ A. Anghie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law’, 40 *Harvard International Law Journal*, (1999) 1; N. Berman, ‘Modernism, European Nations States and International Law’, in *After Identity*, Danielsen and Engles (eds.), (1995) 229.

¹⁶ Carty, *supra* note 12, at 84.

¹⁷ P. Allot, ‘Language, Method and the Nature of International Law’, XLV *British Yearbook of International Law* (1971) 79.

¹⁸ Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Affairs*, (1989) at 237-241. Korhonen uses the Aristotelian term ‘*tekne*’ in a similar manner. As she explains it, ‘*Tekhne* is a human knowledge of certain skill. *Tekhne* is a generalisation acquired through empirical inquiry. Its possession means to know how to achieve a goal. *Tekhne* is learned. Knowledge of international norms and their application is a *tekhne*. *Tekhne* does not concern the origins or the significance of

transmitted to following generations via the teaching of international law. It not only has a temporal continuity, but also a spatial continuity, even though the meanings of the concepts and their interpretations vary across time and space.¹⁹ New additions are made along the way. This language and the subsequent technique learned to use it trains the mind of the student of international law to view the facts of international relations differently from that of a political scientist or a moral philosopher. The language is flexible and adaptable to various assessments of the facts. International law internalises changes through the language and the technique: New concepts might be introduced, old concepts might be interpreted in a different way, one rule might be preferred over another, a precedent might be overruled, one source might be preferred to the others and the like. Viewed from this angle, there is a two-level translation at work. The first level of this translation is the processing of developments in the world 'outside' of them in a way accessible to international lawyers by articulating them as theories or, more traditionally, as doctrines.²⁰ This processed knowledge is authoritative knowledge. It is professional knowledge of the discipline which brings together attitudes and preconceptions about law and about international matters.

international law.' in Korhonen, 'New International Law Defence of Deliverance', 7 *European Journal of International Law* (1996) 1.

¹⁹ A recent colloquium on International Law textbooks in England, France and Germany demonstrates that even though the international legal traditions in these countries understand the foundations of international law in considerable different ways due to the particular political philosophies emerging from these geographies, still, the very same language of international law is invoked to give meaning to these understandings. See, 'A Colloquium on International Law Textbooks in England, France and Germany', 11 *European Journal of International Law*, (2000) 615.

²⁰ For the internalisation of the natural law tradition and the liberal analogy of the state and the individual, see the excellent study of J. Briery, *The Law of Nations*, (1928), especially at 1-48. Also on the doctrinal formulations of the analogy between the individual and the state, see, H. Lauterpacht, *Private Law Sources and the Analogies of International Law* (1970) L. Henkin, 'The Mythology of Sovereignty' 21 *Proc. Canadian Council on International Law* (1998) 15

The second level, on the other hand, is the stage when international legal theories or doctrines inform and provide guidelines to concretise the sources of international law on a specific issue. As will be seen in Chapter 3, different accounts of intervention suggest different interpretations of the relevant treaty law, as well as what may be the relevant state practice and *opinio juris* in establishing the customary international law on intervention. One may assume that there may be as many interpretations of the sources of international law as the number of theories available for this subject matter.

This brings me to my *third assumption*, dealing with the question of how one goes about determining what kinds theories contribute to change. What are the criteria to include or exclude international legal theories, which play a part in the transformation of the language of international law? My approach to this question is pragmatic rather than normative. I argue that the international legal theories, which play a significant role in periods of change, are the *problem-solving theories* of the given subject matter. I define the problem-solving theories as the theories which claim to offer justifiable solutions to international law problems.²¹ These theories are interested in the *immediate* knowledge of things and claim to be able to offer sound answers to concrete questions such as ‘Is the law of humanitarian intervention changing?’, or ‘What is the regime applicable to the status of political prisoners during internal armed conflicts in the light of the recent state practice?’ The problem-solving theories see international legal questions as puzzles to be solved and moreover they are confident of solving them. It follows that they compete in giving the right answers to the questions

²¹ R. Cox, ‘Social Forces, States and World Orders: Beyond International Relations Theory’, 10 *Millennium*, (1981) at 128-9, cf. S. Marks, *Democracy: The Riddle of All Constitutions* (2000), at 121-146; Koskeniemmi, *From Apology to Utopia* (1989) at 9-20.

posed and aim to dominate the interpretation of facts. Critical theories, however illuminating they may be, do not contribute to a period of transition unless they produce an alternative explanation of facts which can subsequently be formulated in international legal language. This claim does not suggest that the critical theories do not contribute to the knowledge of the matter in question. It may even be the case that a critical knowledge of the past is the immediate knowledge of today. However, what matters for change in the law *at a fixed time*, is the ability to produce spontaneous knowledge, which the international lawyer presents to its community as the (correct) answer. After this point there is a process of weighing, which is a process of conviction/persuasion. The diversity of the available factual guidelines is pivotal to a broader discussion of the content of change. In other words, the smaller the variety of international theories offering guidelines as to the content of change, the more limited will be the outcome of change.

The diversity of problem-solving theories aimed to provide spontaneous knowledge is not only pivotal to understanding what may be the outcome of a 'change talk', but also to how questions of change are initially formulated. In other words, questions about change do not suddenly arrive to the international legal discipline from an outside world. Problem-solving theories simultaneously formulate questions and solutions about change in international law. Rejecting the merit of the question asked leads to the refusal of offering immediate solutions to it. This consequently leads to the exclusion of some worldviews from the effort of problem-solving. Over a longer time span, it can be argued that 'change' occurs at the level where the battle is about the questions, not about the

solutions to international legal phenomena.²² My aim in this thesis is to focus on an already established question of international law and to explore the terms and conditions of change with regards to this established question. In this respect, it limits the inquiry into understanding the concept of change to *here and now*, to a particular question of international law and through a concrete moment of decision.

1.2. The Case Study: Why intervention?

Before moving on to the outline of the main chapters of this thesis, some explanation needs to be made on the selection of the case study: the law on intervention. I have two main reasons, one of general and one of particular character, for choosing such a temporally immediate case to present a thesis on the formal framework of change in international law.

First, a discussion of the question of how international law changes *a priori* requires substance. The question of change only becomes meaningful when it is particularised. An abstract treatment of the concept of change as such is in a way a theoretically isolated –as well as difficult- exercise since ‘change’ is not self-explanatory unless there is substance to it. Furthermore, a case study in the form of a question of substantive law is an attempt to link the relationship between the theory and practice of international law. It aims to demonstrate that abstract and concrete analyses of law do not take place in separate compartments

²² For a study offering a map of the change in the questions within the international legal discipline between 1870-1960, see M. Koskeniemmi, *The Gentle Civiliser of Nations: The Rise and the Fall of International Law 1870-1960* (2002).

of the legal mind, but that it is a relationship which moves constantly back and forth between them.

When one talks about change *in abstracto*, it is still the case that there exists a reference point, which the audience is not explicitly informed about. We all, after all, do not produce knowledge isolated from our cultural, historical, moral as well as political environments and identities.²³ Moreover, I argue that an inquiry into the concept of change, which I have aimed to introduce in the above sections, can best be conducted within a framework that is regarded by many as changing, or which might change. A historical case in this regard is too distant to isolate oneself from the consensus on the new point of stability that has been agreed upon within the community. A real sense of metamorphosis can best be studied when it is a shared stance that we are in metamorphosis. Therefore, with the approach that I develop in this thesis I aim more to explain *change* and international law rather than *change of* international law from a new point of stability. Consequently, a search for a metamorphosis condition, a problem defined, but which has not yet reached full closure, which causes unrest and tension among the international law community, which is not sealed with a juridical dictum have been the main motives for choosing the case study of intervention.

International law on intervention²⁴ is the subject of ongoing, heated debates. The efforts to determine the current state of law are voluminous.

²³ O. Korhonen discusses how history, culture and community informs and shapes the international lawyer's analysis of concrete cases in *International Law Situated: An analysis of Lawyer's Stance Towards Culture, History and Community*, (2000).

²⁴ 'Intervention' throughout this thesis is taken to mean 'dictatorial interference' in its narrowest sense in international law. See, I. Brownlie, *International Law and the Use of Force by States*, (7th edition, 1991) at 44. As Greenwood puts it, narrowly defined intervention is 'action involving the use or threat of force, in the sense that the intervenor deploys armed forces, and at the least makes it clear that it is willing to use force if its operation is resisted' against the territorial

According to some international scholars, unilateral military intervention in the internal affairs of a state is strictly prohibited by international law and the sole legal basis for Security Council authorisation to intervene is traditional collective security.²⁵ According to others, protecting human rights, or putting a halt to humanitarian catastrophes are desirable and, as long as the Security Council authorises the intervention for these ends, military intervention in the internal affairs of another state is lawful.²⁶ Some on the other hand argue that international law has always permitted intervention, even unilaterally, when gross violations of human rights take place in a state.²⁷ Others disagree, but argue that the practice of humanitarian intervention has emerged sometime in the 1990's. If the Security Council is unable to take action, this constitutes defence of necessity and states can then also intervene unilaterally.²⁸ Another group argues that the law of intervention is in the process of changing at this very moment.²⁹ While, on the other hand, there has emerged another position suggesting that a unilateral intervention may be illegal, but nevertheless

integrity or political independence of a state in Greenwood, 'Is There a Right of Humanitarian Intervention', *The World Today*, February (1993) at 34.

²⁵ I. Brownlie, 'International Law in the Context of the Changing World order' in *Perspectives on International Law*, Jasentuliyana (ed.), (1995) at 50-61.

²⁶ M. R. Hutchinson, 'Restoring Hope: UN Security Council Resolutions for Somalia and Expanded Doctrine of Humanitarian Intervention', 34 *Harvard International Law Journal*, (1993) 624; V. G. Debbas, 'The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace and Maintenance', 11 *European Journal of International Law*, (2000) 361.

²⁷ F. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, (1998); V. P. Nanda, T. F. Muther, and A. E. Eckert, 'Tragedies in Somalia, Yugoslavia, Rwanda and Liberia – Revisiting the Validity of Humanitarian Intervention under International Law- Part II', 26 *Denver Journal of International Law and Policy*, (1998), at 827.

²⁸ C. Greenwood, 'International Law and Intervention in Kosovo: Memorandum submitted to the Foreign Affairs Committee of the House of Commons', 49 *International and Comparative Law Quarterly*, (2000) 929.

²⁹ A. Cassese, 'Ex iniuria ius oritur: Are we moving towards International Legitimization of Forcible Humanitarian Countermeasures in the World Community', 10 *European Journal of International Law* (1999) 23; Glennon, 'The New Interventionism' (1999) 78 *Foreign Affairs* 1; R. Zaklin, *Beyond Kosovo: The United Nations and Humanitarian Intervention* (2000).

legitimate and that international lawyers ought to turn a blind eye to this in very exceptional circumstances.

The intervention of NATO in the Federal Republic of Yugoslavia has not brought consensus, but more debates to the issue.³⁰ More than that, the questions of whether the law on intervention has changed, is changing or will change and, if so, how this change can be addressed have increasingly caught the imagination of many international lawyers.³¹ Interventionism and change have become a pair,

³⁰ The debate on intervention in general and on Kosovo in particular is, of course, not limited to the confines of the discipline of international law. The question of intervention is of interest to a wide diversity of disciplines. On accounts of Kosovo and intervention, 'outside' of international law, see generally, N. Chomsky, *A New Generation Draws the Line: Kosovo, East Timor and the Standards of the West* (2001); H. Clark, *Civil Resistance in Kosovo*, (2000); P. Hammond and E.S. Herman, *Degraded Capability: The Media and the Kosovo Crisis*, (2000); T. Judah, *Kosovo: War and Revenge*, (2000); T Ali (ed.), *Masters of the Universe? NATO's Balkan Crusade*, (2000); N. Wheeler, *Saving Strangers: Humanitarian Intervention in International Society*, (2001); M. Ignatief, *Virtual War: Kosovo and Beyond*, (2000); I. H. Daadler and M. E. O'Hanlon, *Winning Ugly: NATO's War to Save Kosovo*, (2000); J. Mertius, 'Legitimising the Use of Force in Kosovo', 15 *Ethics and International Affairs* (2001) 133.

³¹ International law journals are overwhelmed by the articles on Kosovo. For a selection of these, see P. Allot, 'Kosovo and the Responsibility of Power', 13 *Leiden Journal of International Law*, (2000) 83; S. Balanzio, 'Nato's Actions to Uphold Human Rights and Democracy', 23 *Fordham International Law Journal*, (1999) 291; A. Casesse, 'Ex iniuria ius oritur: Are we moving towards International Legitimization of Forcible Humanitarian Countermeasures in the World Community', 10 *European Journal of International Law* (1999) 23; J. Charney, 'Anticipatory Humanitarian Intervention in Kosovo', 93 *American Journal of International Law*, (1999). ; J. Duursumma, 'Justifying NATO's Use of Force in Kosovo', 12 *Leiden Journal of International Law*, (2000) 287; V. Epps, 'Self Determination After Kosovo and East Timor', 6 *ILSA Journal of International and Comparative Law*, (2000) 445; R. Falk, 'Kosovo, World Order, and the Future of International Law' 93 *American Journal of International Law* (1999) 847; Feature: Eastern Europe after Kosovo, 8 *East European Constitutional Review*, (1999); J. Fitzpatrick, 'Temporary Protection of Refugees: Elements of a Formalised Regime', 94 *American Journal of International Law*, (2000) 279; K. Guicherd, 'International Law and the War in Kosovo', 41 *Survival*, (1999) 19; L. Henkin, 'Kosovo and the Law of Humanitarian Intervention', 93 *American Journal of International Law* (1999) 824; N. Krisch, 'Unilateral Enforcement of the Collective Will: Kosovo, Iraq and the Security Council', 3 *Max Planck United Nations Yearbook*, (1999) 59; D. Kritsiotis, 'The Kosovo Crisis and NATO's application of Armed Force against the Federal Republic of Yugoslavia', 49 *International and Comparative Law Quarterly*, (2000) 330; M. E. O'Connell, 'The UN, NATO and International Law after Kosovo', 22 *Human Rights Quarterly*, (2000)57; H. Quane, 'A Right to Self Determination for the Kosovo Albanians?', 3 *Leiden Journal of International Law*, (2000) 219; H. J. Richardson, 'A Critical Thought on self-determination for East Timor and Kosovo', 4 *Temple International and Comparative Law Journal*, (2000) 101; S. Sharp, and G. Walter, 'Operation Allied Force: Reviewing the Lawfulness', 23 *Maryland Journal of International Law*, (2000) 295; B. Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *European Journal of International Law* (1999) 22; A. D Sofaer, 'International Law and Kosovo', 36 *Stanford Journal of International Law*, (1999) 1; N. Tsagourias, 'Humanitarian Intervention After Kosovo and Legal Discourse', 3, *Leiden Journal of International Law*, (2000) 11; J. C. Yoo, 'The Dogs that didn't Bark: Why were International Law Scholars MIA on Kosovo?', 1 *Chicago Journal of International Law*, (2000)149; S.

where the efforts of the international lawyers are channelled to determine how the law on intervention is situated towards 'change'. Is the law on intervention resistant, uninterested, or eager to change? How can one understand whether law is changing or not? Despite the criticisms, which hold that the way in which the questions on intervention are formulated is incorrect in the first place³², this point is regarded as marginal and unhelpful. International lawyers see the problem of the 'changing laws on intervention' as persistent for the discipline and in need of deliberation and clarification.

The temporal immediacy of the 1999 intervention in Kosovo contributes to the pressing nature of the status of interventions in international law.³³ Furthermore, since international lawyers regard the issue of contemporary intervention as an immediate problematic to be dealt with, the recent case of Kosovo is regarded as instrumental in 'solving the problem' of whether the law on intervention is changing/has changed.³⁴ Another aspect, of course, is that even the judges of the International Court of Justice are actively involved in assessing the importance of the case of Kosovo via the Legality of the Use of Force case brought before the Court by the Federal Republic of Yugoslavia.³⁵

Bouwhuies, 'Kosovo: The Legality of Intervention?', 6 *Australian Journal of Human Rights*, (2000) 57

³² A. Orford, 'Locating the International: Military and Monetary Interventions after the Cold War', 38 *Harvard International Law Journal*, (1996) 443.

³³ See for example, *The Responsibility to Protect, The Report of the International Commission on Intervention and State Sovereignty*, (2002) <http://www.iciss-ciise.gc.ca/report-e.asp>.

³⁴ For a book length review of the impacts of the case Kosovo on the law of intervention see, S. Chesterman, *Just War or Just Peace*, (2001); C. Tomuschat (ed.), *Kosovo and the International Community: A Legal Assessment* (2001); M. Glennon, *Limits of Law, Prerogatives of Power: Interventionism After Kosovo* (2001).

³⁵ On 29 April 1999, the Federal Republic of Yugoslavia instituted proceedings before the Court against Belgium, Canada, France, Germany, Italy, Netherlands, Portugal, Spain, United Kingdom and United States of America, accusing those States of bombing Yugoslav territory in violation of their international obligations.

In its Applications, Yugoslavia pointed out that the above-mentioned States had committed "acts . . . by which [they] have violated [their] international obligation[s] banning the use of force against another State, not to intervene in the internal affairs of [that State]" and "not to violate

The very contemporariness of the subject matter, its perceived immediate pressing nature, its 'popularity' within a broad audience of international lawyers, make the law on intervention a strong case study for this thesis. A diversity of actors are participating to bring an end to the lack of an authoritative dictum on the law of intervention in general and the Kosovo case in particular. It is precisely the invested interest of this greater audience to join the debate of closure that increases the value of this debate for the purpose of this study.

1. 3 Outline of the Thesis

Now that the scope of the thesis is clarified, I will give an outline of the individual chapters. The thesis is organized in two parts. Part I consists of Chapter 2, while Part II is composed of Chapters 3 and 4. Chapter 5 is the

[its] sovereignty"; "[their] obligation[s] to protect the civilian population and civilian objects in wartime [and] to protect the environment"; "[their] obligation[s] relating to free navigation on international rivers"; "[their] obligation[s] regarding fundamental human rights and freedoms"; and "[their] obligation[s] not to use prohibited weapons [and] not to deliberately inflict conditions of life calculated to cause the physical destruction of a national group". Yugoslavia requested the Court to adjudge and declare inter alia that the States referred to above were "responsible for the violation of the above[-mentioned] international obligations" and that they were "obliged to provide compensation for the damage done".

On the same day Yugoslavia also filed, in each of the ten cases, a request for interim measures of protection (provisional measures), asking the Court to order the States involved to "cease immediately [their] acts of use of force" and to "refrain from any act of threat or use of force against the Federal Republic of Yugoslavia". Hearings on provisional measures were held on 10 to 12 May 1999 and the Court handed down its decision in each of the cases on 2 June 1999. In two cases (Yugoslavia v. Spain and Yugoslavia v. United States of America), the Court concluded that it manifestly lacked jurisdiction and it accordingly ordered that the cases be removed from its List. In the other eight (Yugoslavia v. Belgium; Yugoslavia v. Canada; Yugoslavia v. France; Yugoslavia v. Germany; Yugoslavia v. Italy; Yugoslavia v. Netherlands; Yugoslavia v. Portugal; Yugoslavia v. United Kingdom), the Court found that it lacked prima facie jurisdiction - which is one of the prerequisites for the indication of provisional measures - and that it therefore could not indicate such measures; the Court, however, added that it remained seized of those cases and stressed that its findings, at that stage, "in no way prejudge[d] the question of the jurisdiction of the Court to deal with the merits" of the cases and left "unaffected the right of the Governments of Yugoslavia and [of the respondent States] to submit arguments in respect of those questions". The time limits for the filing by Yugoslavia of the written statements on the preliminary objections is extended until April 2002.

concluding chapter and aims to discuss the interrelated arguments of Part I and Part II.

In Part I, I set aside the case study of the thesis, the formal framework of change within the context of intervention, and turn to the more general question of the theoretical framework, understanding the terms and structure of change in international law. The overall aim of this part is to introduce the traditional space available for studying change and discuss on what grounds and how a new space can be created.

In Part I, I shall first outline how ‘change’ appears in international legal argument. The main argument of this Part is that the ways in which international lawyers conceive legal change is dominated by their preconceptions about law in general. Therefore, by using the legal conceptual tools of *is* and *ought*, the discussion of how the formal framework of change is formulated in international legal discipline will follow. Under the conceptual scheme of *is* and *ought*, four different articulations of the terms and conditions of change in international law are identified: **the unity of *is* and *ought*; the dichotomy of *is* and *ought*, the fallacy of *is* and *ought* and the indeterminacy of *is* and *ought***. In Part I, I aim to locate these categories within the broader framework of western modern thought and legal theory and explore how they appear in contemporary international legal argument.

In the last section of this Part, I shall then present the formal framework of change that I deploy in this thesis and explore its relationship with the previous discussions put forward. The focus of this section is on the **discipline of international law** as the explanatory framework of understanding change. I argue that the discipline actively engages in negotiating to what extent

international laws change. Problem-solving theories of a particular international subject-matter lay the ground for normative justifications advocating or resisting change. They, at the same time, make use of the legal categories discussed in the previous section to present their positions towards change within a cognisable disciplinary framework.

Part II is composed of Chapters 3 and 4 where I examine how the formal framework of change can be addressed in the area of the law of intervention by focusing on the discipline of international law as the explanatory framework. Chapter 3 is devoted to the first leg of the case study. This chapter focuses on the normative aspects of the subject matter and aims to identify the contemporary international legal theories which have a claim to comprehensively explain how and on what grounds the positive laws on intervention can be identified.

In this chapter, I shall first discuss the nature of the theories in the discipline, which have a claim to produce immediate knowledge in periods of transition. I shall, next, move to the analysis of such theories. In Chapter 3, in the area of the law on intervention, I identify four problem-solving theories that offer comprehensive and general frameworks with regards to the assessment of contemporary interventions. These theories are organised under the titles of **traditional positivism, modified positivism, Kantian international law** and **liberal international law**. In order to determine in what ways the guidelines of these theories offered to the practitioners of international law differ for the law on intervention, the analysis of these theories is organised in three clusters: a) their onto-legal presuppositions and interdisciplinary counterparts, b) the way they use the narration of history (both distant and recent) c) the way they interpret the sources of international law in relation to the law of intervention.

Chapter 4 comprises the second leg of the case study, where the focus is on the relationship between a concrete event and normative theories during periods of transition. In bringing the discussion to the assessment of facts, I want to argue that the concept of change that is advanced in this thesis has practical as well as theoretical implications. Exploring the links between theories presented in Chapter 3 and their reflections to the factual assessment of the concrete ‘case of Kosovo’ aims to reveal the proximity of practice to theory in international law, particularly under a condition of metamorphosis.

Even though the expected solutions to the assessment of this concrete case are stating whether the action is lawful or unlawful, the justifications for the lawfulness and the unlawfulness are not by all means uniform. The questions of why event A is given a fact status, while B is regarded as insignificant or why C is regarded as determinant and D is not cannot be answered without taking into consideration the possible world views that inform these judgements. What the problem-solving theories do in practice is to create a value consensus among the community of international law (be it scholars, statesmen, judges or practitioners) within the limits of the lawful/unlawful permissible/impermissible binary logic. Therefore, the theories favouring the lawfulness of intervention and unlawfulness of this intervention create a certain ‘value overlap’ among each other, notwithstanding the diversity of reasons they provide for lawfulness/unlawfulness. Consequently, various intersecting positions espoused by diverse groups provide sufficient support for a persuasive determination of facts and rules.

Finally, in the concluding chapter I make a general assessment of the concept of change that I develop in this thesis. I argue that travel of knowledge

from a broader framework of social theory is an important component of international law, especially in periods perceived as transition periods. Different kinds of theories make use of different disciplines in order to make sense of this transition. However, not much of this theoretical diversity is reflected in the language and technique of international law if it is not presented in an accessible format to the broader audience of international law. The conclusion will also focus on the value consensus that is offered by the international legal theories on the issue of intervention. I critically discuss what kind of a consensus the contemporary theories on intervention offer and the limits of the choices we have on understanding the change in the law on intervention in contemporary international legal theory and practice.

Part I

CHANGE AND INTERNATIONAL LAW

2. CONCEPT OF CHANGE IN INTERNATIONAL LAW

Law must be stable yet it cannot stand still. Hence all thinking about law has struggled to reconcile the conflicting demands of the need of stability and the need of change.³⁶

2.1 Introduction

The purpose of this chapter is to inquire into the concept of change in international legal theory. ‘The concept of change in international legal theory’ *per se* is not a topic that has found extensive treatment by scholars of the discipline; this concept is theoretically understudied if studied at all. The questions that scholars have traditionally concentrated on have generally been the procedural or substantive dimensions of change. Procedural questions, such as how an international treaty provision is amended, or how international custom changes, or how custom can change a treaty or vice versa or how *jus cogens* can change, have repeatedly been answered *in abstracto* by scholars of the discipline, mostly using a solid technical professional language and sophisticated doctrines.³⁷ Different doctrines afford various explanations as to how the above-

³⁶ Pound, *Interpretations of Legal History*, (1922) at 1.

³⁷ On the doctrinal assessments of how treaty and customary international law change, see J. Brierly, *The Basis of Obligation in International Law and Other Papers*, Selected and edited by Sir H. Lauterpacht and C. H. M. Waldock, (1958); C. Parry, *The Sources and Evidences of International Law*, (1965); Baxter, *Treaties and Custom*, RdC, Vol. 129, (1970); Akehurst, ‘The Hierarchy of Sources in International Law’, *British Yearbook of International Law*, (1974-1975) 1; I. Brownlie, *Principles of Public International Law*, (1998); G. Danilenko, *Law Making in the International Community*, (1993), Degan, *Sources of International Law*, (1997); N. Kontou, *The Termination and Revision of Treaties in the Light of New Customary Law*, (1994); Villiger,

mentioned changes can be determined or established.³⁸ The other context in which change has been addressed is in relation to the scope and content of international law and how that changes. These accounts consider change as a substantive issue and attempt to see it from the outside, setting an agenda to explain how international law has historically changed from point A to point B. This type of analysis has involved looking at particular international laws or the whole structure of international law and identifying trends for the future of international law, both as a normative and a positivist project. In this context, change is usually used as a form of progressive or developmental discourse, where the structure of international law improves, i.e. enlarges in terms of the areas it covers, deepens in terms of the way it regulates behaviour. Wolfgang

Customary International Law and Treaties: A Manual on the Theory and Practice of the Interrelation of Sources, (1997); B. de Witte, 'Rules of Change in International Law: How Special is the European Community?', *Netherlands Yearbook of International Law*, (1994) 299; Chaier, *Des Changements et Continuité au Droit International*, RdC, Vol. 195, (1985) 9; G. Danilenko, 'International Ius Cogens: Issues of Law Making' 2 *European Journal of International Law* (1991) 42; P. M. Dupuy, *Perspectives du Droit Public au seuil du XXIe siècle: L'unité de L'ordre Juridique International*, RdC (2000, forthcoming).

³⁸ On specifically how customary international changes, see for example, in generally chronological order, ILA Committee on Formation of Customary General International Law, Final Report (2000); ALI, Restatement of the Law, Third, The Foreign Relations Law of the United States (1987), §102; Bin Cheng, *Opinio Juris: A Key Concept in International Law that Is Much Misunderstood*, in Sienho Yee & Wang Tieya (eds.), *International Law in the Post-Cold War World: Essays in Memory of Li Haopei* (2001), chp. 1; Michael Byers, *Custom, Power, and the Power of Rules* (1999), 129-65; Maurice Mendelson, *The Formation of Customary International Law*, 272 RCADI (1999), 155-410; Ian Brownlie, *Principles of Public International Law* (1998), 7; Anthony D'Amato, *Customary International Law: A Reformulation*, *International Legal Theory* (1998); id., *The Concept of Custom in International Law* (1971); Fernando R. Tesón, *A Philosophy of International Law* (1998), 89-91; Olufemi Elias, *The Nature of the Subjective Element in Customary International Law*, 44 ICLQ (1995), 501; A. Vaughan Lowe, *Do General Rules of International Law Exist?*, 9 *Review of International Studies* (1983), 207; Michael Akehurst, *Custom as a Source of International Law*, 47 BYIL (1974), 1; H.W.A. Thirlway, *International Customary Law and Codification* (1972); Paul Guggenheim, 1 *Traité de droit international public* (2d ed., 1967), 104-05; *ibid.* (1st ed., 1953), 46-48; id., *Les deux éléments de la coutume en droit international*, in 1 *Les techniques et les principes du droit public: Etudes en honneur de Georges Scelle* (1950), 275; Max Sorensen, *Principes de droit international public*, 101 RCADI (1960-III), 47; id., *Les sources du droit international. Etude sur la jurisprudence de la Cour Permanente de Justice Internationale* (1946), 105; Hans Kelsen, *Principles of International Law* (1952) 307; *The General Theory of Law and State* (1945); id., *Théorie du droit international coutumier*, 1 *Revue internationale de la théorie du droit* (Nouvelle Série) (1939), 253; Kopelmanas, *Custom as a Means of the Creation of International Law*, 18 *British Yearbook of International Law* (1937) 127.

Friedmann's celebrated book, *The Changing Structure of International Law*, for example, had identified a change from a law of co-existence to a law of co-operation in international law in 1964.³⁹ Recently, namely since the beginning of nineties, works which relate recent developments in international politics with a form of structural change towards an even wider and deeper international law have gained pace in scholarship. Thomas Franck, for example, has identified a new manifestation of co-operation in international law from the beginning of the 1990s, which he formulated as an 'emerging right to democratic governance' in international law.⁴⁰ Bruno Simma has elaborated a change from bilateralism to community interests in international law.⁴¹ Dupuy has pointed to a change from co-operation to 'globalization'.⁴² Koh, on the other hand, has suggested that the domestic systems were rapidly integrating with international systems in the 1990s.⁴³ The Annual Meeting Committee of the American Society of International Law for 2002 has invited international lawyers to evaluate contemporary change in international law under the slogan of 'the legalisation of international relations and internationalisation of legal relations'.⁴⁴ The

³⁹ W. Friedmann, *Changing Structure of International Law*, (1964), see also Friedmann, 'General Course on Public International Law', *Recueil des Cours*, Vol. 127, (1969-II). At around the same time J. L. Kunz also provides a changing picture of international law in his *Changing Law of Nations*, (1968). Kunz, writing in 1968, views international law as entering into a bipolar era, which includes elements of anti-colonial rebellion and the threat of nuclear warfare. He further places these changes in a larger crisis of the occidental culture of which international law forms a part.

⁴⁰ T. Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law*, (1992) 46, *Fairness in International Law and Institutions*, (1995) and *The Empowered Self: Law and Society in the Age of Individualism*, (1999).

⁴¹ B. Simma, 'From Bilateralism to Community Interest in International Law', *Recueil des Cours*, *Collected Courses of the Hague Academy of International Law*, Vol. 250, (1997) 221.

⁴² P. M. Dupuy, *Perspectives du Droit Public au seuil du XXIe siècle: L'unité de L'ordre Juridique International*, *Recueil des Cours*, (2000, forthcoming).

⁴³ H. Koh, 'Why Nations Obey International Law?', 106 *Yale Law Journal*, (1997) 2604.

⁴⁴ American Society of International Law Newsletter, July-August 2001, at 12.

propositions or analysis of structural changes have also been taken up, refined by and debated hotly in recent international law scholarship.⁴⁵

In this chapter, I am not primarily interested in doctrinal explanations of how treaty or customary international law changes or in theoretical formulations of the direction towards which international law as a whole is/might/should be changing. I am instead interested in the concept of ‘change’ itself and how the terms and the structure of this concept can be explained within the framework of international law scholarship. This requires a theoretical structure that goes beyond questions of technique and of grand substantive analyses of change. While a technical approach to change is manifestly limited, the analyses of substantive change offer a subjective account of what has changed from what to what.⁴⁶ Neither the detached formalism of the former nor the subjective instrumentalism of the latter offers any clues about the terms and structure of change in international law. These accounts are not offered in a vacuum, but are by-products of a form of translation of the *outside* of international law (be it politics, morality, or history) into the *inside* of it. In this chapter, I am primarily interested in the ways in which this translation is formulated in order to amount to legal change. I seek to answer three main questions: How do international legal theories address the concept of change? What is the relationship between the content of change and the formal framework under which change is

⁴⁵ For critical elaboration of the emerging change towards a right to democratic entitlement in international law, see S. Marks, *Democracy: The Riddle of All Constitutions*, (2000); B. Roth, *Governmental Illegitimacy in International Law*, (1999). For general analyses of the substance of contemporary international law, see, Arend, *Legal Rules and International Society*, (1999); R. Mullerson, *Ordering Anarchy: International Law in International Society*, (2000), S. Yee (ed.), *International Law in the Post Cold War World*, (2001).

⁴⁶ Subjective analyses often do have a claim of objectivity. In other words, international lawyers assessing the grand changes in international law present their analyses to the audience as being the universal state of affairs. For a critical discussion of the projection of the particular as universal in international law, see M. Koskeniemi, *The Gentle Civilizer of Nations* (2001) at

represented? Is it possible to give a coherent overall theoretical account of the concept of change within the boundaries of international law?

2.2 Meta-theoretical Approach

Meta-theory in sociology or philosophy is commonly used to mean a theory about theories or a secondary account of theories in a given area. It is an exploration of what a wide range of theories has to say on a given subject.⁴⁷ Meta theory of a broad range of theories can be used in a pragmatic way, especially in applied sciences, to analytically compare different methods or theories and try to determine the most effective theory for analysing a problematic. It can also be used to combine different theories in order to reach a more effective theory. A focus on meta-theory can stem from an interest in the theory of knowledge. In this case, the motive could be to reach a theory of/about theories. This kind of approach to meta- theory also means that there can be a meta theory of meta theories and so on.

In this chapter, two functions of meta-theory (meta theory as a secondary account of theories and meta-theory as a higher level of theory) are utilized in order to conceptualize change in international law in a new and comprehensive way. These two functions of meta-theory overlap with the two steps of new conceptualization explained by Kratochwil: ‘new ways of conceptualization

480-494.

⁴⁷ For an explanation of the ordinary meaning of meta theory, see for example, D. Jary and J. Jary, *Collins Dictionary of Sociology*, (1995). For various uses of the concept of meta theory in social sciences and humanities see illustratively H. White, *Metahistory: The Historical Imagination in Nineteenth Century Europe*, (1973); R. Bernstein, *The Restructuring of Social and Political Theory*, (1978); Q. Skinner (ed.), *The Return of Grand Theory in the Social Sciences* (1985); D. Fiske and R. Shweder (eds), *Metatheory in Social Science: Pluralisms and Subjectivities* (1986); A. Wendt, ‘Bridging the Theory-Meta-Theory Gap in International

presuppose two steps: one of *unlearning* by deconstructing the problem and one of construction by utilizing new conceptual tools in the analysis.’⁴⁸ The unlearning step includes classifying the ‘old’ information in a new way, which facilitates going beyond the traditional ways of analysis. New classification of information creates space for new questions and also enables reconsideration of issues which have previously been taken for granted.

Accordingly, I first examine how the concept of change is traditionally understood in international legal theory by conducting a secondary account survey. International legal theories are not designed to answer the legal philosophical question of ‘what is change’ *per se*. However, throughout the process of delimiting the boundaries of the ‘legal space’ that the theory creates, the question of what is change and how legal change occurs are built into theoretical frameworks. It should be recognised that there may be diverse conceptions of change in international legal theory. Instead of giving an analytical account of a list of disciplinary, (and perhaps interdisciplinary or cross disciplinary) theories and approaches about international law and then looking at what they say about change, the approach taken here is to identify some fundamental conceptions of change in legal theory that have been internalised and widely utilised in international legal theory. Following this, I aim to demonstrate how the diversity of positions on the question of change gives only a partial account of international legal change when the substantive and technical arguments about particular laws are taken into consideration.

Relations’, 17 *Review of International Studies* (1990) 383.

⁴⁸ F. V. Kratochwil, ‘How do Norms Matter?’ in Michael Byers (ed.) *The Role of Law in International Politics: Essays in International Relations and International Law*, (2000) at 45. Kratochwil draws insights from the work of Rorty when he discusses the ‘new conceptualisation’. See also, Rorty, *Contingency, Irony, Solidarity*, (1989).

The next step of reconceptualisation is one of construction by way of using new conceptual tools. Accordingly, meta-theory is used to explain the concept of change beyond the epistemologies of already established theories. In other words, it is argued that the concept of change in international law requires a meta theory, which by way of using a different epistemology, redefines the concept of change. Thus, in the last section I propose a meta theoretical conception of change which I shall then employ in the following two chapters dealing with the case study of the normative and concrete aspects of the ‘changing’ law on intervention.

In sum, meta theory undertakes two functions in the course of the conceptualization of change: it has an internal function to give a critical secondary evaluation of how the concept of change is understood by various international legal theories. It also has an external function to introduce insights from –as yet- ‘outside’ of the discipline to provide an explanation for the concept, independent from the secondary accounts previously discussed.

2.3. Disciplinary Conceptions of Change

The discipline of international law is traditionally distinguished from other disciplines by a central set of problems, the viewpoints taken to explore these problems and a set of credible possibilities of argumentation to study these problems. This may be called ‘the text book’ approach to international law. When one is to go through a standard textbook of public international law, it is easy to obtain a unique sense of the discipline by going through the topics in the book. It is immediately recognisable that, in terms of the subject matter covered,

such as the sources of international law, the definition of a state, the resolution of inter-state disputes, or the laws of war, international law is different from any category of domestic law. The international flavour that the issues entail separates international law from any other branch of law. The discipline is also distinctly recognizable among its social sciences and humanities counterparts dealing with the *international* such as international relations, politics, or ethics, since its foremost focus is on the ‘legally relevant’, ‘law-related’ aspects of the international. Through creating a negative relationship (i.e. emphasizing how different it is from other kinds of law on the one hand and international studies on the other) international lawyers create a unique disciplinary space for themselves.⁴⁹ Such a schematic way of defining the boundaries of international law produces closed and specialised knowledge. This type of knowledge is directed more towards defining international laws and their application procedures in practice than identifying the origins of concepts and how these have travelled into the international legal field.

Aside from defining the discipline by its subject matter (i.e. legal regimes applicable to issues which fall beyond domestic laws) and limiting the boundaries of it to what it is not (i.e. it is not morality, or politics), international law can also be understood as an intellectual, political and cultural tradition whose way of finding knowledge is grounded in (modern) western thought in general and legal theory in particular. As Brierly puts it:

Rules, which may be described as rules of international law are to be found in the history both of the ancient and medieval worlds; for ever since men ever began to organize their common life in political

⁴⁹ It is from this disciplinary space that international law scholars venture into ‘interdisciplinary’ studies. For example studying how their discipline might have similarities with domestic law or exploring the relationship between international law and international relations or ethics scholarship.

communities they have felt the need of some system of rules, however rudimentary, to regulate their inter-community relations. But as a definite branch of jurisprudence the system which we now know as international law is essentially modern, dating only from the sixteenth and seventeenth centuries, for its special character has been determined by that of the European state system, which was itself shaped in the ferment of the Renaissance and Reformation.⁵⁰

This statement holds its validity as vividly as it did in 1928 and furthermore points to the importance of being aware of the onto-legal foundations of international law.⁵¹ Compared to the schematic way of conceiving international law, it creates an open knowledge of the discipline. This is, of course, not to say that international legal theory is merely a reflection of western thought or legal theory. It is to say, however, that international legal theoreticians have reworked and re-articulated the fundamental conceptions of modern western thought and legal theory in order to create the theoretical foundations of their own discipline.⁵² Therefore, disciplinary conceptions of change, which will be discussed here, can neither be regarded as unique to the discipline, nor a simple second copy from elsewhere. They are internalised categories rooted in western philosophical and legal history, which have been translated to illuminate the central set of problems defined by the discipline.

The internalisation of theories of knowledge from western philosophy and legal theory occurs in the form of theoretical breaks within the discipline. The later thought always emerges as a reaction to what has gone before but also

⁵⁰ J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, (1928) at 1. On recent studies of International Law as part of western modern thought, see generally, A. Carty, *The Decay of International Law*, (1986); D. Kennedy, *International Law and the 19th Century: A History of Illusion*, 65 *Nordic Journal of International Law*, (1996) 385; M. Koskeniemmi, *The Gentle Civilizer of Nations*, (2001).

⁵¹ The onto-legal foundations here refer to the underlying presuppositions about the nature and existence of international law, which cannot be explained by resorting to formal modes of analysis.

⁵² As rightly pointed out, this re-articulation has, for a considerable amount of time, been

carries within itself more than it claims to reject.⁵³ It is from this perspective that I seek to map the disciplinary conceptions of change.

The disciplinary conceptions of change that are discussed in the next section all depart from the presupposition that the focus of investigation is the *Law*. Law, even though formulated in different ways, is studied as an entity, which exists in its own right. The question then becomes one of how a valid law can be singled out among competing propositions of what the law is and ought to be in periods of change. This formulation centers the object, the Law, at the heart of the inquiry into change. Therefore, the formal framework of change is simultaneously a search for the valid law among competing propositions. However, the role of the jurist and questions of method –the link between international law and the jurist- keep constantly appearing as common tensions in these formulations.

I outline four categories for understanding the formal frameworks of change in the Law in international legal theory by using the notions of *is (lex lata)* and *ought (lex ferenda)*⁵⁴: **1) the unity of is and ought, 2) the dichotomy of is and**

conducted by white, male, (and probably upper class) Europeans.

⁵³ This point is cogently discussed by Gadamer in *Truth and Method* when he investigates the concept of ‘tradition’ in philosophy. As he observes, ‘even where life changes violently, as in the ages of revolution, far more of the old is preserved in the supposed transformation than anyone knows, and it combines with the new to create a new value’ in *Truth and Method*, (1998) (first published in 1960) at 281.

⁵⁴ The notions of *is* and *ought* are not used in any substantive sense in this thesis. They are merely formal descriptions of the epistemological ‘moves’ in international legal theory in understanding how the Law changes. The dichotomic representation of the objects of inquiry as ideal and worldly can be traced back to Plato. Plato’s system of thought understood “reality” as residing in his Eternal “Forms” -- Truth, Justice, Beauty, Piety, for example -- and everything on earth -- law, government, beautiful people, pious observances, etc. -- were just pale imitations of these Forms. This theme was central to the Allegory of Cave. Plato, *Republic*, (edited by G. R. F. Ferrari, translated by T. Griffith) (2000). This binary division of the object has had much resonance in modern thought. Hume followed this dichotomy and suggested that factual and moral assertions are of two distinct types. His main claim was that moral assertions cannot be derived from factual assertions. Hume, *Enquiries Concerning the Human Understanding and Concerning the Principles of Morals*, Reprinted from Posthumaus ed. Of 1777, (1963). See also, W. D. Hudson, *The Is-Ought Questions: A Collection of Papers on the Central Problem in Moral Philosophy*, (1969); J. L. Mackie, *Ethics: Inventing Rights and Wrongs*, (1997). This division

ought, 3) fallacy of *is* and *ought*, 4) the indeterminacy of *is* and *ought*. From a chronological point of view, these positions enter into the discipline in the foregoing order. As reflected in the titles, these categories grow out of dissatisfaction with aspects or the entirety of former positions. Therefore, they all aim to critique and reform their predecessors on how we may understand change. These critiques do not, however, lead to the extermination of former positions, but, on the contrary, include traces of each other. Adherents of the four positions exist among international lawyers, who consequently do not agree on a formal framework of how international law changes.

These positions are internal to international legal theory in the sense that they are aimed at shaping the ways in which international lawyers perceive the

between *is* and *ought* has been determinant in dividing the disciplines along sharp lines. Natural sciences separated from theology on these grounds. Any discipline that aspired to study factual assertions broke away from its moral component: political science and political theory, legal theory and legal science, international relations and international ethics are examples closer to home. Discussions of the relationship between *is* and *ought* have also taken the forms of descriptive and prescriptive, the factual and the normative. Social sciences are divided in accepting or rejecting these distinctions. Max Weber, for example, endorses this distinction. Weber, *The Methodology of Social Sciences*, (1949). For a criticism of this position, see Gouldner, *For Sociology*, (1973). Also see Habermas on the objectivating and norm conformative statements representing different modes of social action, Habermas, *The Theory of Communicative Action*, (1986). International relations theory is also divided in terms of how the relationship between *is* and *ought* is understood. While the rationalist theories endorse this distinction, the constructivist theories are arguing the opposite. Keohane, for example as a rationalist, talks about a dichotomy between instrumentalist and normative theories of international relations. While the former category of theories deals with the question of how states calculate and advance their interests, the latter deals with the question of what states ought to do. Cf. Keohane, *After Hegemony: Co-operation and Discord in the World Political Economy*, (1984). Constructivist international relations theory, on the other hand, criticises this distinction and instead argues that identities and interests are socially constructed and hence the distinction drawn between the world out there and the world we see is misleading. Cf. Katzenstein, *The Culture of National Security*, (1996), A. Wendt, 'Constructing International Politics' 20 *International Security*, (1995) 73. In general legal theory, the distinction between *is* and *ought* has become all the more significant since this debate has dominated the question of where to draw the line with regards to the validity of laws. The relationship between *is* and *ought* has become a relationship between competing sets of normative assertions. First, the descriptive-prescriptive gap has been thought of as a gap between man-made law and natural law. With the secularisation of legal thought, the 'ought' category expanded to include all propositions that are regarded as presently not in effect. Therefore, the *ought* propositions of law do not necessarily have to make a reference to a moral set of values even though they can also do so. They can also be informed by any other extra-legal phenomenon such as political, ideological, cultural, or gendered concerns, or simply a lack of conviction with regards to the law in effect. In other words, the category of *ought* has come to comprise *might be* or *can be*.

concept of change. At the same time, they are inevitably linked to discussions in legal theory, since the question of how law changes, regardless of the content of law (i.e. domestic or international), is common to any legal theory. The historical contexts of the positions are relevant in order to understand the circumstances under which these positions have flourished. They can, however, also be seen as ahistorical categories in terms of the discussion about the concept of change in contemporary everyday applications of international law. It is the latter aspect and not the former that I shall focus on.

2.3.1. The Unity of *is* and *ought*

The unity of *is* and *ought* as a comprehensive formal framework of change is introduced to the discipline by natural law theories of international law. Natural law tradition is, in essence, a part of the theory of knowledge dominant in western thought prior to the Enlightenment, which can be understood as the tyranny of the object, that is an order of the world pre-determined by the object – i.e. the nature or the Divine⁵⁵. It has been thought under this epistemology that the object encompassed everything, the universe, the life, the existence, the ways of human governance including the subject, i.e. the human, the self, the sovereign. Cognition occurs when the object influences the subject –i.e. when God influences the human. The subject has no say in how this order may change, but is solely regarded as existing in accordance with it, within the harmony of the natural law. The concept of destiny in major religions, suggesting that individuals live a pre-determined life, which they cannot change,

may be regarded as a remnant of this epistemology still affecting many in understanding the human condition.

International lawyers have long lost faith in the sole existence of the object –the natural law- in dominating the production of legal knowledge. This theory of knowledge may be regarded as of historical interest since its epistemological foundations date back to the pre-modern era. As Brierly explains:

Modern legal writers, especially in England, have sometimes ridiculed the concept of law of nature, or they have recognized its great historical knowledge, but treated as superstition which the modern world has rightly discarded.⁵⁶

Having pointed out the loss of authority this position as a comprehensive framework for explaining change, traces of this conception still inform international human rights law, international humanitarian law, and concepts such as ‘basic human needs’, ‘crimes against humanity’, ‘minimum requirements of humanity’, ‘common heritage of mankind’, or ‘international society’. At present, natural law’s conception of change is regarded to be almost indefensible as a self-contained epistemology to explain change in international legal discipline. It is, however, in particular contexts and by particular participants that the unity of *is* and *ought* haunts us, as I argue later in this section with regards to the judgement of the International Tribunal for Former Yugoslavia in the *Tadic* case.

This position, in essence, overcomes the question of change by *not* conceptualizing it in the final analysis. It proposes that there exists an ultimate

⁵⁵ K. E. Tranoy, ‘Thomas Aquinas’ in *a Critical History of Western Philosophy*, (1965) and also E. Gilson, *History of Christian Philosophy in the Middle Ages*, (1980).

⁵⁶ Brierly, *The Law of Nations*, at 9.

level of law that does not change. The position holds that some legal propositions are really *true* and when a proposition is regarded as really true, changing it does not seem ever to be required. Law is unchanging over time, and also across space. It does not differ across societies. It is universal and absolute. The unity of *is* and *ought* simply means that at a given time there can be, and accordingly there is, only one set of propositions, which are the true law. It can be called either *is* or *ought*, this does not necessarily matter since '*is*' is *ought* and *ought* is '*is*'. The *ought* set of propositions are incorporated into the *is* set. This position, of course, does not suggest that at a given time there will be competing propositions about what the law is. However, the problem is to establish which one is the 'true' law since among the others since only one can be right. There is no question of changing one law for another. Furthermore, along with the unity of *is* and *ought*, there exists a complementary unity of private morality and public duty. The conduct of public international law is regarded as inseparable from the requirements of private morality. There is only one 'just' law, which, in principle, should not discriminate between public and private spheres. Domestic and international affairs are also not clearly demarcated. The unchanging universal law regards its subjects as a whole, not divided into nationals, asylum seekers, and foreigners, for example.

The problem of finding the 'true' or the 'just' laws has been the main preoccupation of natural law theoreticians throughout the history of legal theory. Although naturalists⁵⁷ have different conceptions as to where the natural laws

⁵⁷ For a cogent analysis of different schools of naturalism, see, A. Verdross and H. F. Koeck, 'Natural Law: The Tradition of Universal Reason and Authority', in Macdonald and Johnston eds., *The Structure and Process of International Law*, (2nd edition, 1996) 17, J. Finnis ed., *Natural Law, The International Library of Essays in Law and Legal Theory*, Volumes I and II, 1991, cf. Finnis, *Natural Law and Natural Rights*, (10th edition, 1999).

may be derived from, they agree in general terms that the law *per se* does not exist because authorised human beings make the law, but rather that it originates from some principles of justice, which have universal validity.⁵⁸ The roots of the principles of justice can be traced back to a divine origin (i.e. to religious texts, by subscribing to a teleological view of human life). It can also be grounded in the secular traditions, (i.e. a consequence of the collective life of human beings, as a rule of reason). Consequently human beings or sovereign states cannot change the natural law code; they exist within it.⁵⁹

Following this position, the concept of law as a whole is static. It is assumed that a normative code pre-exists positive laws. Lawmakers and enforcers are expected to deduce it by reason. The test of finding *the law* is based on an external criterion, which is the question of whether the law is just or unjust. The notion of justice is defined by the natural code of a natural theory. Disputes about what the law is/ought to be in a natural law context take place on a single analytical level. Since the dichotomy of what the law is and ought to be does not exist, all the conflicting claims may be formulated as *lex lata* only. As Friedmann points out,

...even in Grotius' time, the perennial dilemma of natural law philosophy, the postulation of permanent and absolute values in a world deeply divided by conflicts of national interests and social values, became

⁵⁸ See for example, T.M.C. Asser Institut (ed.), *International Law and the Grotian Heritage*, (1983), T. Meron, 'Common Rights of Mankind in *Gentili, Grotius and Suarez*', 85 *American Journal of International Law*, (1991) at 110-117.

⁵⁹ As Kennedy explains it: 'In secularizing natural law, Grotius does not create a legal sphere either grounded in sovereign authority or which is not also binding as a matter of morality. This is apparent from his treatment of sovereign promises. To the traditional positivist, sovereign consent provides the origin of international law's binding force. To Grotius the obligation to fulfill the terms of promise arises from the conformity of natural law with the principles of right reason upon which sovereign authority rests. Although the sovereign may bind himself in matters not touched by divine or natural law these obligations, based in his authority neither derogate from natural law and divine law nor limit the sovereignty which he exercises as a matter of natural and divine law. These promises moreover are themselves binding only as a matter of natural and divine practice, expressive of law itself.' D. Kennedy, 'Primitive Legal Scholarship', 27 *Harvard International Law Journal*, (1986) at 81.

obvious. While the Dutchman, Grotius, at a time when Dutch were the first maritime nation, stipulated the freedom of seas as a principle of natural law, the Englishman Selden sought to demonstrate that natural law permitted private and public domain over the seas.⁶⁰ (footnotes omitted)

In a contemporary context, the conception of change within the unity of *is* and *ought* framework enables a textual interpretation of laws, principles and facts without discriminating between descriptive and prescriptive aspects of law. The effort of an international lawyer sympathising with the natural law tradition is directed towards arguing the ‘is’ state of law as close as possible to the ‘ought’ designated by a system of natural law.⁶¹ In contemporary practice, this may work both for arguing for a change in the law or supporting the status quo of the law in periods of change. If the existing positive law is regarded as unjust, the natural law oriented lawyer might become a strong advocate of change. Conversely, if the status quo is perceived to be in conformity with a higher code of justice, the struggle will be towards resisting change. The doctrines on the sources of international law are instrumental in this respect. Interpretation of treaty provisions, flexible or rigid presentations of international custom, weighing the significance of state practice or *opinio juris* in accordance with a threshold of justice, or resorting to equity are all ways of representing the changing/unchanging state of positive law in as much conformity as possible with what the law ought to be.

⁶⁰ W. Friedmann, *The Changing Structure of International Law*, (1964) at 75.

⁶¹ Stammer addresses the relationship between is and ought in a more relativist fashion, arguing that natural law can aim to find out what is ‘relatively’ just instead of ‘absolutely’ just. The search for ‘relatively’ just requires the natural law theoretician to take into consideration the changing times, places, identities and cultures. As C.K. Allen notes, this is termed ‘natural law with variable content’. The relativisation of the just somewhat departs from the faith in the universal and absolute values and paves the way for practical and eclectic approaches to international law. See C.K. Allen, *Law in the Making*, (1958) at 23-27.

By way of a concrete example, the state of criminality applicable to internal conflicts and the particularities of the inaugural case at the International Criminal Tribunal for Former Yugoslavia⁶² can be read as adopting the unity of *is* and *ought* position in determining the changing status of law.⁶³ The limited scope of positive laws addressing individual criminal responsibility during internal conflicts (as opposed to international wars) on the one hand, and the natural reasoning which suggests that war crimes regardless of the artificial, man-made distinction between internal and international wars, should not go unpunished on the other, informs the determination of change in the law in this case.

Positive international humanitarian law defines the criminal element in times of war by drawing a distinction between international and non-international armed conflicts.⁶⁴ While general offences committed during both international and internal conflicts can have a basis for universal jurisdiction if the crimes fall into the categories of ‘crimes against humanity’ or ‘genocide’ (whose roots are also of natural law origin), ‘war crimes’ are defined as a type of crime

⁶²International Criminal Tribunal for the Former Yugoslavia, Prosecutor v. Dusko Tadic a/k/a ‘Dule’: Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction, Decision of 2 October 1995 in Case No. IT-94-1-AR72, 35 *International Legal Materials* (1996) 32. The indictment of the Tribunal charged Tadic with ‘a grave breach of wilfully causing great suffering, under article 2c of its Statute or in the alternative (ii) cruel treatment under Article 3 of the Statute and with (b) rape, as a crime against humanity under Article 5(g) of the Statute. The defendant challenged the decision of the trial chamber on the grounds that the Tribunal had not been lawfully established, the primacy over national courts which Security Council Resolution 827 purported to give to the Tribunal was unlawful, and that the Tribunal lacked sufficient subject-matter jurisdiction in respect of the charges laid against the defendant.

⁶³ For a multi-dimensional analysis of this decision, see Alvarez, ‘Rush to Closure: The Lessons of the Tadic Judgment’, 98 *Michigan Law Review*, (1998) 2031. See also, C. Greenwood, ‘International Humanitarian Law and the Tadic Case’, 7 *European Journal of International Law* (1996) 265.

⁶⁴ See generally, Gasser, ‘Internationalised Non-international Armed Conflict: Case Studies of Afghanistan, Kampuchea and Lebanon’, 33 *American University Law Review* (1983) 145; Rowe, ‘Liability for War Crimes during a Non-International Armed Conflict’, XXXIV *Revue de Droit Militaire et de Droit de la Guerre* (1995) 149; Graditzky, ‘Individual Criminal Responsibility for Violations of International Humanitarian Law Committed in Non-International Armed Conflict’, 322 *International Review of the Red Cross* (1998) 29; A. Cassese, ‘On the Current Trend Towards Criminal Prosecution and Punishment of Breaches of International Law’, 9 *European*

committed only during international conflicts,⁶⁵ both in treaty and customary international law. The fourth Hague Convention of 1907, which codified the principal laws of war and served as the core for the war crimes prosecutions after World War II, addresses only international wars. The ‘grave breaches’ provisions of the 1949 Geneva Conventions and Protocol I are also directed at international wars. The treaty-based sources for internal armed conflict, namely Common Article 3 of the Geneva Conventions, Additional Protocol II of 1977 and Article 19 of the 1954 Hague Convention for the Protection of Cultural Property in the Event of Armed Conflict refer neither to ‘war crimes’ nor to ‘grave breaches’. This, from a unity of *is* and *ought* standpoint, signifies injustice, since ‘there is no moral justification, and no truly legal persuasive reason, for treating perpetrators of atrocities in internal conflicts more leniently than those engaged in international wars’⁶⁶.

In the *Prosecutor v. Tadic* case, the defendant challenged the jurisdiction *ratione materiae* of the Tribunal, among other things under Article 3 of its Statute⁶⁷, which enables the Tribunal to adjudicate over war crimes as defined by

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⁶⁵ T. Meron, ‘War Crimes in Yugoslavia and the Development of International Law’, 88 *American Journal of International Law* (1994) at 80.

⁶⁶ T. Meron, ‘International Criminalization of Internal Atrocities’, 89 *American Journal of International Law*, (1995) at 561.

⁶⁷ The other challenges were regarding the illegal foundation of the International Tribunal and wrongful primacy of the International Tribunal over national Courts as well as Articles 2 and 5 of the Statute.

Article 3 of the Statute declares the International Tribunal Competent to adjudicate violations of laws or customs of war. The provision states: ‘The International Tribunal shall have the power to prosecute persons violating the laws and customs of war. Such violations shall include, but not limited to:

- a) employment of poisonous weapons or other weapons calculated to cause unnecessary suffering;
- b) wanton destruction of cities; town; villages, or devastation not justified by military necessity;
- c) attack or bombardment, by whatever means, of undefended town, villages, dwellings, or buildings;
- d) seizure of, destruction or wilful damage done to institutions dedicated to religion, charity, education, the arts and sciences, historic monuments and works of art and science;
- e) plunder of public or private community

the laws or customs of war. The Appeals Chamber of the Tribunal in its dictum, without characterising the war in the former Yugoslavia as an international war, still went on to state that the category of war crimes is applicable in internal wars.⁶⁸ In so doing, the Chamber found that customary law had changed to include the category of war crimes in internal conflicts. As the Chamber states ‘a number of rules and principles governing the international law of armed conflicts have gradually been extended to apply to internal conflicts.’⁶⁹

This statement clearly argues that the law has changed in the direction of supporting the *lex ferenda* proposition that war crimes ought to be criminalised irrespective of the conflicts’ classification. Such a dictum requires a selective and favourable description of the change in customary law as opposed to the interpretation of the treaty laws governing the matter. This gradual extension of custom is justified by examples of state practice, which are favourably interpreted. These examples include the Spanish Civil War and the Biafra Conflict in Nigeria.⁷⁰ The contrary state practice is neither discussed nor weighed against the supportive examples of state practice. International reaction to the allegations that Iraq used chemical weapons against Kurdish insurgents during the 1980’s is also given as a basis for the existence of *opinio juris* in the community of states. However, the silence of states in response to crimes committed in many other internal conflicts is omitted from the analysis.⁷¹

⁶⁸ With regards to Article 2 of its Statute concerning grave breaches, however, the Appeal Chamber states that the grave breaches are confined to persons and property protected by Geneva Conventions. That is, it cannot be considered as applying to situations covered by Common Article 3 of the Geneva Conventions. According to the Chamber, ‘a change in customary international law concerning the scope of the grave breaches system might gradually materialise’. *Supra* note 64, para. 83.

⁶⁹ *ibid.*, para. 126.

⁷⁰ *ibid.*

⁷¹ *ibid.*

Further evidence relied as in support of this developed custom are the UN General Assembly Resolutions 2444 (1968) and 2675 (1970), even though the role of General Assembly resolutions in modification of customary rules is a constantly debated and unresolved problem of international legal doctrine.⁷²

The outcome of this decision can be understood as the presentation of a *lex lata* argument within the boundaries of the proper language of international law, what may as well be qualified as a *lex ferenda* argument. In other words, what the Chamber does is try to bring the present law as close to (an) ideal law, by arguing a change in the content of the positive law. Change in customary international law becomes the strategy to overcome the limited scope and language of the treaty laws as well as the custom that might be thought to reflect them. Technical criteria such as demanding more and consistent state practice over a longer period of time, extensive and implicit indications of *opinio juris*, as well as the weighing of contrary practice and *opinio juris*, do not restrict the assertion of the Chamber that customary international law ought to and does include war crimes in internal conflicts.

Consequently, what we observe in contemporary international law is the possibility of the penetration of the *is* and *ought* position on change, dressed in the positive language of international law. Contemporary international lawyers may not openly and definitively argue that Man simply cannot change some fundamental international laws with due process. Instead, however, the merging of *is* and *ought* may still be realised through the effective usage of custom, treaty and general principles favouring a designated natural law outcome.

⁷² For a critical examination of how the Court finds its custom, see, Separate Opinion of Judge Lee on the Defence Motion for Interlocutory Appeal on Jurisdiction, at <http://www.un.org/icty/tadic/appeal/decision-e/51002723.htm>, accessed 13.12.2000.

2.3.2 The dichotomy of *is* and *ought*

The dichotomy of *is* and *ought* represents an epistemological break from the natural law way of understanding international law, replacing it with positivist theories. This break in its origins can be read as part of a larger turn in the theory of knowledge.

The Enlightenment and its aftermath are known to overthrow the tyranny of the object in understanding the world by creating a space for the subject in the theory of knowledge. The subject –i.e. the self, the sovereign- emerges as an equally independent entity *vis a vis* the object. Descartes' famous explanation *cogito ergo sum* –'I think therefore I am'- represents the 'I' -the subject- as the basis of cognition, in contrast to the natural law approach, in which man simply existed *within* the natural order. The subject of the Enlightenment is complete and rational. Kant, with his groundbreaking and influential epistemology, for example, bases the theory of knowledge on the assumption that the object- the known- is formed by the subject's –the knower- way of experiencing it.⁷³ While the object is still understood as the phenomenon that comprises the matter of change, the subject emerges as the self that is to establish to what extent the object changes. Kant himself called this the 'Copernican Revolution' in philosophy since, after Kant, the perception of the life-world had changed. Philosophers held that the subject is revolving around the object in the creation of knowledge –analogous to how the earth was then known to be revolving around the sun.

This development leads to the redefinition of objects as artificial social constructs and results in the establishment of disciplines in natural and social studies, which all define an ‘object’ of study, breaking away from the concept of unity of all existence under the rubric of natural reason. In liberal political theory, for example, the collection of individuals (even though at first only male and bourgeois) is construed as the source of political legitimacy and as the foundation of state. In *Leviathan*, the state rises above the natural order:

The Sovereign of a Commonwealth, be it an Assembly or one Man, is not subject to the Civil Lawes. For having the power to make, and repeale Lawes, he may when he pleaseth, free himself from that subjection, by repealing those Lawes that trouble him, and making of new.⁷⁴

Subsequently, the state, becomes the creator of international law in the seminal work of Vattel in *Le Droit des gens* (1758). In this respect, positivism in international law replaces the God, the natural, with the State, the sovereign, as the ultimate source of validity.

In the picture of co-existence of the object and the subject, as Fish puts it: ‘the landscape is dominated by two discrete and independent entities –the world of objects, in all of its details, and the perceiving self- and mediating between them is some vocabulary or methodology by means of which what is perceived is given a discursive form.’⁷⁵

Consequently, objects (state made international law) can change and the form in which the subject (the jurist) perceives the change becomes the *main question* about change. It is taken for granted that the subject (the jurist) has the ability to

⁷³ Kant, *Critique of Pure Reason*, (translated by Norman Kemp Smith), (1929); G. Bird, *Kant's Theory of Knowledge*, (1962).

⁷⁴ Thomas Hobbes, *Leviathan, or The Matter, Forme, and the Power of a Commonwealth Ecclesiastical and Civil*, (edited by C. B. Macpherson, 1972) at 313.

⁷⁵ S. Fish, *Doing What Comes Naturally, Change, Rhetoric and the Practice of Theory*, (1989), at

understand the changes in the object (law). What is at issue is finding the right method is. From this presupposition stem various and lengthy discussions on the method used for explaining change. The dispersing of the scientific method to all branches of human knowledge, including social sciences and humanities, is a direct consequence of this epistemology. In this respect, the binary divide of the object and subject creates another tyranny: the tyranny of method. The absolute understanding of change which suggests that it is the object that changes and the subject that verifies it has been the most dominant philosophical epistemology in modern thought as well as in modern law.

In legal theory, the dichotomy position is identified with legal positivism (herein after positivism), which covers a broad range of theories.⁷⁶ It replaces the naturally found unchanging Law with socially constructed and changing Law. Contrary to natural law theories' formal representation where the unity of *is* and *ought* leads to the ultimate unchanging nature of laws, the dichotomy of *is* and *ought* redefines the terrain of legal inquiry for investigation of what the law is.⁷⁷

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⁷⁶ See H.L.A Hart, *The Concept of Law*, (2nd edition, 1994) at 253, U. Fastenrath, 'Relative Normativity in International Law', 4 *European Journal of International Law*, (1995) 305; T. Nardin, 'Legal Positivism as a Theory of International Society', in Mapel and Nardin (eds.), *International Society, Diverse Ethical Perspectives*, (1998) 17.

⁷⁷ Three positivist legal theoreticians (Austin, Kelsen and Hart) have been most influential in delimiting the boundaries of law to what the law is. J. Austin introduced the criterion of enactment of laws directly or indirectly by the sovereign of that system to be regarded as valid law. Cf. J. Austin, *Lectures in Jurisprudence or the Philosophy of Positive Law*, (5th edition, 1954).

Kelsen aimed to establish what the law is by the condition of authorization by the basic norm. His theory argued that the quest for the validity of the norm leads not to reality or justice as such, but to another norm from which the first norm is derived. The norm, which cannot be derived from a superior norm, is a basic norm. The completeness of the system is constructed by relying on the *grundnorm* which would then be the ultimate validation of the law as it is. The hypothetical validity of the basic norm is a way of constructing an autonomous existence of law. Cf. Kelsen, *General Theory of Law and the State*, (translated by Anders Wedberg), (1961), especially at 115-117.

Hart, on the other hand, argued that a law is a part of the legal system when it is recognized according to the rule of recognition of that system. He distinguished between secondary and primary norms and the norms of adjudication. The secondary norms sustain the formal unity of law. The primary norms comprise the material unity of law and should be produced in

Freed from *the ought* component, the content of the law can change over time and space. ‘Speculations’ about what the law ought to be do not stand in the way of the changing character of law by the sovereign. Law declares its independence from morality and concentrates on the business of ascertaining the right methods to verify change.

In international legal theory, the separation between natural laws and positive laws leads to the definition of what the law is as a description of habitual state behaviour and *opinio juris*. The unchanging natural law framework is then replaced with the changing practice of states. The death of the God in dictating the Law is replaced with the birth of the State, which is capable of changing the laws it is bound by. Therefore, the object is redefined as state-made law. States make international law by reaching consent on the content of international norms. This consent can be either explicit, by way of treaties, or implicit, by way of custom. In turn, how and when international law changes is reduced to an investigation of interpreting the will of states by examining the practice of states.⁷⁸ As Oppenheim aptly states:

accordance with secondary norms. These three versions of positivism offer three distinct ways to draw the boundaries between legal and pre-legal and extra-legal: by the enactment of the sovereign, by the existence of a basic norm which determines the validity of all the other laws or by rules of recognition, which serve as a visa to enter into the territory of law. Hart defends the independence of law on two different levels of analysis. On the first level, law *per se* is distinguished from morality. Morality is relevant to law to the extent that *‘the law has itself incorporated moral criteria for the identification of law’*. On the second level, law creates its own rules for deciding what the law is. These two levels are closely interrelated, and read together, construct both the internality of law for the legal community and the externality of non-legal phenomena. Cf. Hart, *The Concept of Law*, (2nd ed., 1994), especially at 269.

Positivism constructs a completeness of law by making it only internally accountable. Law can be made, found and applied neutrally using legal positivist logic and technique in its various forms. It need not necessarily be connected to any external element. Thus, the positivist position, in its various forms, is based on the assumption that a separation between law and any other phenomena ought to be artificially constructed.

⁷⁸ The doctrinal debates and the literature on the consent theory of international law are voluminous. For a variety of discussions, see generally, J. L. Brierly, *The Law of Nations: An Introduction to the International Law of Peace*, (1936); A. Cassese and J. H. H Weiler, (eds.), *Change and Stability in International Law Making*, (1988); Danilenko, *Law Making in the International Community*, (1993); K. Wolfke, *Custom in Present International Law*, (2nd ed.,

The law of nature has played its part. We know nowadays that it is impossible to find a law which has its roots in human reason only and is above legislation and customary international law...And therefore it is that the place of the theory of the law of nature is no longer in our textbooks, law schools and universities, but in museums where scientific tools are preserved with which former generations did their best to lay the foundation of our present scientific knowledge.⁷⁹

The role given to the international lawyer in this framework is one of a distant sterile observer. States change the law and what the international lawyer does is to meticulously study the legally relevant data to verify that change. Working in the mode of a notary, the international lawyer needs to ascertain how to establish the changing rules. However, since there can be no involvement by the international lawyer in changing the laws, the procedure of deciding how the law may have changed becomes a question of method. By applying the right methods of textual and factual interpretation, the lawyer establishes an opinion on the end result. The international lawyer is constantly reminded that it is the state made law which he ought to observe.⁸⁰ Any other exercise is deemed to be *ultra vires*.

1993); M. E. Villiger, *Customary International Law and Treaties: A Manual on the Theory and the Practice of the Interrelation of Sources*, (1997); M. Bos, 'The Identification of Custom in International Law', 25 *German Yearbook of International Law*, (1982) 9; P. Weil, 'Towards Relative Normativity in International Law?', 77 *American Journal of International Law* (1983) 413; G. Danilenko, 'The Theory of Customary International Law', 31 *German Yearbook of International Law*, (1988) 9; Johnston, D., 'Theory, Consent and the Law of Treaties: A Cross Disciplinary Perspective', 12 *The Australian Yearbook of International Law*, (1992) 109; A. Pellet, 'The Normative Dilemma: Will and Consent in International Law Making', 12 *Australian Journal of International Law*, (1992) 22; O. Elias, 'The Nature of the Subjective Element in Customary International Law', 44 *International and Comparative Law Quarterly*, (1995) 501; I. M. Lobo de Souza, 'The Role of State Consent in Customary Process', 44 *International and Comparative Law Quarterly*, (1995) 521; I. Lukashuk, 'Customary Norms in Contemporary International Law' in Makarczyk, J., (ed.), *Theory of International Law at the threshold of the 21st Century, Essays in Honor of Krzysztof Skubisewski*, (1996) 487; M. H. Mendleson, 'The Formation of Customary International Law', *Recueil des Cours, Collected Courses of the Hague Academy of International Law*, Vol. 272, (1998) 159.

⁷⁹ Oppenheim, 'The Science of International Law: Its Task and Its Method', 2 *American Journal of International Law* (1908) at 329.

⁸⁰ Throughout this thesis, I use the gender classification of nouns and related words (i.e. he/she, his/her) inter-exchangeably.

However, in practice, the results of an analysis of changing laws are mostly contested. The problems that ‘change’ poses to the determination of laws persist even where a strict formal method of analysis is pursued. Akehurst admits the difficulties that are faced specifically when a rule of customary international law is undergoing change, even though he is well known for his authoritative elaboration of a positivist sources doctrine:

Not only is it difficult to say at what point a rule of international law, especially a customary one, has ceased to be valid, but it is even more difficult to say when a new practice has hardened into law. Between these two stages lie many transitory ones when an old practice, once universal law but gradually abandoned by a large part of international society, fades away and a new practice has not yet spread sufficiently or become definite into a rule of law.⁸¹

Each time a jurist considers a concrete question of whether a specific international law is changing or not, he may find either that it is or it is not. Techniques for countering an affirmative answer to change by another jurist in this framework may consist of accusing the other party of not using the positivist method correctly, of dressing an ought proposition as an is proposition, of reading into the law more than is intended by the states parties, or of exceeding the role of a distant observer and assuming the role of the legislator himself.⁸²

⁸¹ M. Akehurst, ‘Custom as a source of international law’, 47 *British Yearbook of International Law* (1979) 1.

⁸² The positivist dichotomy of *lex lata* and *lex ferenda* is not only used in *abstracto* but also as a functioning principle in concrete situations. One of the examples of this endorsement is the decision of the International Court of Justice in the *North Sea Continental Shelf Cases*. The Court dismissed the arguments of Netherlands and Denmark, when they argued that the equidistance principle had been created as a rule of customary international law by the work of the International Law Commission, stating that their arguments were based on *lex ferenda*, but not on *lex lata*. The Court not only created jurisprudence suggesting arguments whereby *lex lata* and *lex ferenda* must and can be separated, but also with regards to the conditions for the creation of a customary rule in international law using this dichotomy. *North Sea Continental Shelf Cases*, International Court of Justice Reports, (1969) at 3, 38. Similarly, in the *South West Africa* case, the Court, by stating that ‘Rights cannot be presumed to exist simply because it might seem desirable that they should’, locates the role of the jurist in only establishing laws in the positive realm. *South West Africa Case*, *ICJ Reports* (1966) at 48. On the necessity of distinguishing *lex lata* and *lex ferenda*, in *abstracto* see Oppenheim, ‘The Science of International Law: Its Task and

An argument favouring the status quo, on the other hand, can also face similar criticisms.

The arguments presented in the *Timor Gap* case before the International Court of Justice by Portugal and Australia at the admissibility stage may illustrate this point. In this case, Portugal instituted proceedings against Australia in relation to the conclusion on 11 December 1989 of a treaty between Australia and Indonesia, which created a zone of maritime co-operation between 'the Indonesian province of East Timor and Northern Australia'.⁸³ In the litigation before the ICJ, Portugal alleged that Australia had breached obligations founded on international law by entering into the Timor Gap Treaty.⁸⁴ Portugal's complaint requested the Court to declare that Australia was under an obligation to respect the rights of the People of East Timor to self-determination, territorial integrity, unity and permanent sovereignty over their wealth and natural resources, and to defer to the duties, powers and rights of Portugal as the administering power of the territory of East Timor.⁸⁵

Its Method' , 2 *American Journal of International Law* (1908) at 335, R.Y. Jennings, 'An International Lawyer Takes Stock', 39 *International and Comparative Law Quarterly* (1990) 513, at 514, M. Akehurst, 'Custom as a Source of International Law', *British Yearbook of International Law* (1974-1975) 1 at 5.

⁸³ Treaty between Australia and the Republic of Indonesia on the Zone of Co-operation in an Area between the Indonesian Province of East Timor and North Australia, Application Annex 2, Text of the Agreement of 11 December 1989, <http://www.icj-cij.org/icjwww/icasess/ipa/ipaframe.htm>, entered on 07.12.2000.

⁸⁴ The validity of this act was also questioned without success in the Australian High Court. See *Horta v. Commonwealth* 123 *Australian Law Review*, (1994) 1; see also Brian F. Fitzgerald, *Horta v. Commonwealth: The Validity of the Timor Gap Treaty and its Domestic Implementation*, 44 *International and Comparative Law Quarterly*, (1995) 643.

⁸⁵ East Timor Case, ICJ Reports, http://www.icj-cij.org/icjwww/icasess/ipa/ipa_ijudgements/ipa_ijudgement_19950630.pdf

With respect to the rights of East Timor, Portugal asked the Court to declare that Australia's negotiation and ratification of the Timor Gap Treaty, subsequent negotiations with Indonesia on the delimitation of the continental shelf in the Timor Gap, and continued exploration and exploitation of the subsoil resources of the sea in the Timor Gap, actions all conducted in the absence of Portugal, were infringements of the East Timorese People's rights to self-determination and permanent sovereignty over its wealth and natural resources.

Portugal advanced its argument by suggesting that the case had not been brought against Australia and Indonesia, but in response to the unilateral actions of Australia due to Australia's violation of its own international obligations. Therefore Indonesia should not be regarded as a party to the case. The UN Security Council as well as the General Assembly have not recognised Indonesia as having authority over the territory of East Timor⁸⁶ and have repeatedly urged all states to respect the right of self determination of the East Timorese people. Therefore, Australia was not only failing to observe the UN Charter obligations, but also the customary norm of right to self-determination in accordance with General Assembly Resolution 1514 (XV). Portugal also submitted that the right to self-determination is not only a general norm but also an obligation *erga omnes* on which the Court should ground its jurisdiction to consider the merits of the case.

Australia, on the other hand, claimed that the Court did not have jurisdiction in this case firstly because there was no real dispute between Portugal and Australia. Secondly it was argued that the application would require the Court to determine the rights and obligations of the third state –Indonesia- in the absence of a third state.⁸⁷

Here, notwithstanding Portugal's demands in relation to the specific treaty above, what was being asked from the Court in the broader context can be read as the determination of whether the rules of interpretation of its own jurisdiction, especially with regards to the effects of obligations *erga omnes* of the right to self determination, at the admissibility stage have changed. It is interesting in this

⁸⁶ See among other Resolutions, UN Security Council Resolution 384 of 22 December 1975 and UN Security Council Resolution of 22 April 1976.

⁸⁷ This argument is based on the decision of the ICJ on *The Monetary Gold Removed from Rome*

sense that, in positive theory terms, the Court was asked to observe, before going into the merits of the case, whether international law had changed the way in which the Court should understand the basis of its own jurisdiction. Portugal demanded the Court at the admissibility stage to draw a distinction between the unlawfulness of a bilateral treaty and the unlawfulness of the conduct of a party to the treaty. Portugal did not demand that the Timor Gap treaty be declared unlawful, but wanted the Court to address the unlawful conduct of Australia in entering into that treaty, thereby violating its duty to respect the *erga omnes* right to self determination.⁸⁸

The Court, considering the *erga omnes* character of the right to self-determination, agrees that this claim is irreproachable as part of international law. Nevertheless it concludes that this claim does not have the effect of providing the Court with a basis for jurisdiction. Indonesia's rights and obligations would constitute the very subject matter of such a decision and, in the absence of the consent of Indonesia, the Court cannot therefore find any legal basis for jurisdiction to go into the merits of the case. This is justified by the so called Monetary Gold Principle⁸⁹ which stands against any adjudication determining the rights and obligations of a third state without their consent. This principle is presented as the only mode of analysis for determining the jurisdiction of the Court.

This decision of the Court places the Portuguese claims outside the realm of *lex lata* with regards to the determination of the rules of jurisdiction. This

in 1943 Case, ICJ Reports, (1954).

⁸⁸ Judge Weeramantry agreed to this demand in his dissenting opinion. He also suggested that 'the acts of a contracting state such as decision to sign, the decision to accord de jure recognition, the decision to ratify, the decision to implement, the decision to legislate are all unilateral acts upon which the Court can adjudicate' at supra note 81.

confines the effect of *erga omnes* obligations as a basis for jurisdiction to mere speculation even if it may be a plausible argument as a part of substantive general international law for the case of self-determination. Therefore, this argument is stripped of its relevance, and hence of its power to effect change. On the other hand, the Monetary Gold Principle, emerges as a stable representation of what the law is, unchallenged by an ‘ought’ proposition.

In contested cases involving a question of change, the positivist framework may throw the question of change outside the boundaries of law.⁹⁰ For the positivist international lawyer, any case which is characterised as unprecedented, unexpected and undecided, where there seem to be equally competing answers, and where it is not possible to establish which one is *lex lata* and which one is *lex ferenda*, is a contested or *hard* case. If the method does not allow the jurist to decide what the law is, she is given the right to refuse to give a legal decision on the matter. In other words, the question posed might be considered as legal, but there may exist no legal answers for it in the realm of *lex lata*.⁹¹ Let me again

⁸⁹ Supra note 87.

⁹⁰ The question of the ‘undecidable’ is a problem of general positive theory. Hart, for example, regards the indeterminacy as an exception to the rule, for example, and he suggests ‘sometimes we just have to wait and see’. H.L.A. Hart, *The Concept of Law*, (1994) at 51. Dworkin also tackles this problem. His suggestion first makes a conceptual distinction between two notions: uncertainty and indeterminacy. The problem of uncertainty suggests that the answer to a disputed problem is either A or B, but the decision-maker is uncertain which one, -in other words there are two conflicting assertions about what the law is. On the other hand, the problematic of indeterminacy accepts that at a given time there might not be any legal truth at all. As he puts it, ‘the no right answer claim about law is a legal claim’ Thus, the number of options for the decision-maker increases from two to three. The answer to a legal dispute can be either A, B or C. Dworkin suggests that the problem of indeterminacy of law is not an external problem outside the sphere of positivist thinking, on the contrary it is an internal problem, which can be solved with positivist skepticism. This internal skepticism requires the acceptance of the indeterminacy of law as a positivist claim. The theorist needs to allow a margin of interpretation of positivism in order to accommodate this assumption. R. Dworkin, ‘Indeterminacy and Law’ in *Positivism Today*, Stephen Guest (ed.). (1996) 1.

⁹¹ There may of course be answers to the question, however, these answers are not regarded as being in the realm of law, but in the realm of morality or politics. Therefore, the jurist is trained to be silent on these answers.

illustrate this appearance and application of the dichotomy of *is* and *ought* with a concrete example.

On 8 July 1996, the ICJ responded to two separate requests received from the World Health Organization (WHO) and the United Nations General Assembly for an advisory opinion on the legality of the threat or use of nuclear weapons.⁹² The Court ruled that it was unable to comply with the request of WHO⁹³, but found itself competent to respond to the request of the United Nations General Assembly.

The Court in its famous dictum concludes:

In the view of the current state of international law, and of the elements of fact at its disposal, the Court cannot conclude definitively whether the threat or use of nuclear weapons would be lawful or unlawful in an extreme circumstance of self defence in which the very survival of a State would be at stake.⁹⁴

In this instance, the lack of an express ban on the use or threat of nuclear weapons by States in cases of self-defence meant that the judges, with positivist conceptions of change, were faced with the prospect of changing the ‘absence’ (or lack) of law in this area. For the dichotomy of *is* and *ought*, the most difficult cases of determining change in the law occur when the jurist is put in a position to point to the existence of law, where clear positive laws are lacking. It is easier to point out a change in a law which already exists, since there is a positive,

⁹² Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, *ICJ Reports*, (1996).

⁹³ On September 1993, the World Health Organisation requested an advisory opinion from the ICJ on the following question: ‘In view of the health and environmental effects, would the use of nuclear weapons by a State in war or other armed conflict be a breach of its obligations under international law including WHO’s constitution?’ The Court ruled that, although the WHO is duly authorised under the UN Charter to request advisory opinions from the ICJ and the question asked involved a legal question, the request did not relate to a question arising within the scope of the activities of that organisation as required by Article 92(2) of the UN Charter. Therefore, the Court concluded that there was insufficient connection between the request and the functions of the WHO to support the Court’s jurisdiction. See *ibid*, para. 11-3.

verifiable point of reference. The positivist jurist, however, is uncomfortable relying on a lack of explicit consent to infer a clearly stated prohibition since this impairs the ‘distant observer’ role given to the judge. As in the words of *Lotus*, ‘restrictions upon states cannot be presumed’ and that international law leaves states ‘a wide measure of discretion which is only limited in certain cases by prohibitive rules’.⁹⁵ The judge in the positivist conception of change denies any participant role. Participation may mean confusing the law with morality or politics and this is precisely the reason for supporting the formal autonomy of law within the framework of positivist conceptions of change.

Therefore, the question of whether the ‘inherent right to self defence’ was limited by a prohibition of the threat or use of weapons is answered inconclusively by the Court. The ‘undecidable’ area is the area where the international lawyer claims no authoritative presence with the motivation in mind that law’s autonomy and independent completeness should be preserved at any cost. Consequently, the international jurist interprets the sources and evidence of international law in a way in which the question of change is thrown outside the boundaries of international law, perhaps located in a sphere of morality (killing of the innocent ought not to be permitted) or politics (states have a right to self defence no matter at what cost). The positivist conception of law must be silent on this issue. However, it should be noted that declaring a legal question to be ‘undecidable’ is still a legal answer to the question, by admitting that there may be gaps in the law.

When it comes to the articulation of this position in international legal language, the Court’s interpretation of norms and facts point to the lack of clarity

⁹⁴ Ibid para 105 (E)

and authority at every level. The Court, for example, held that existing treaties concerning nuclear weapons does not have any provisions regarding the legality or illegality of nuclear weapons even though they might signal an awareness or concern about nuclear weapons.⁹⁶ It also decided that customary international law does not prohibit the use of nuclear weapons, because there are ‘profound’ divisions among the world community on this issue and the General Assembly resolutions dealing with nuclear weapons fall short of creating custom.⁹⁷ While addressing the applicability of humanitarian principles, namely the protection of civilian population and civilian objects, the prohibition of the use of weapons incapable of distinguishing between combatants and non-combatants, and the prohibition on causing unnecessary suffering to combatants, the ICJ found the conclusions drawn from the application of these principles to the use or threat of nuclear weapons to be ‘controversial’⁹⁸. Consequently the Court could not find a ‘lex lata’ statement either on the legality or the illegality of the threat or use of nuclear weapons in cases when a state is waging a war of survival.⁹⁹

This advisory opinion has faced many criticisms both within the Court and in a broader international law circle.¹⁰⁰ What is interesting for the purposes of this study is that the position of indeterminacy is invoked by the Court in order not to be involved in causing change in positive laws. It should, of course, be noted that

⁹⁵ *Lotus Case*, PCIJ Series A, No. 10 at 18-19.

⁹⁶ *Supra* note 92, paras. 59-63.

⁹⁷ *Ibid* paras 64-73.

⁹⁸ *Ibid* para. 90.

⁹⁹ Within more specific contexts the Court declared the use or threat of nuclear weapons as illegal. In *ibid* para 105 (C) and (D) the Court unanimously decided that a threat or use of force by means of nuclear weapons that is contrary to article 2 paragraph 4 of the UN Charter and that fails to meet all the requirements of article 51 is unlawful and a threat or use of nuclear weapons should also be compatible with the requirements of international law applicable to armed conflict, particularly those of the principles and rules of international law, as well as specific obligations under treaties and other undertakings which expressly deal with nuclear weapons.

¹⁰⁰ For a full overview of the Advisory Opinion see Boisson de Chazournes and Sands (eds.),

this decision could have been very different if it were not an advisory opinion dealing with the law hypothetically but a case with concrete facts –i.e. compare with the Tadic case where the judges in the ICTY were probably deeply shocked by the atrocities committed in the former Yugoslavia.¹⁰¹ It can also be contested on the grounds that the Court's role should have been to take into account the political context, where there is an ongoing effort for the non-proliferation of nuclear weapons. The Court should be expected to make a contribution to these efforts.¹⁰² Another solid ground of criticism may be the interpretation of humanitarian law principles of unnecessary suffering, indiscriminate use, proportionality and even military necessity. How can a weapon with such destructive power harming generations of human and ecological life ever be proportionate? The decision can be criticized simply by arguing that nuclear weapons ought to be unlawful and the Court had the means to establish that it also is. Why was the Court not willing to derive sufficient *opinio juris* to amount to custom from the General Assembly resolutions, as it did in the *Nicaragua* case?¹⁰³

Answers to these questions can partly be found in the pervasive effects of the positivist conception of change on the voting majority of judges. As discussed, the positivist conception of change frees the law from notions of justice, but subjects it instead to a rigorous technical analysis aimed at establishing what states consent to. This analysis leads the international lawyer to give decisions on the change of laws which will not harm the autonomous existence of law from

International Law, The International Court of Justice and Nuclear Weapons, (1999).

¹⁰¹ See, M. Koskeniemmi, 'The Silence of Law/The Voice of Justice', *ibid.*, at 488-511.

¹⁰² See, M. Reisman, 'The Political Consequences of the General Advisory Opinion', *supra* note 100 at 511-520.

¹⁰³ *Military and Paramilitary Activities in and against Nicaragua (Merits)*, *ICJ Reports*, (1986)

other systems governing human/inter-state conduct. The perceived need to preserve this autonomy conditions the international lawyer to resist 'soft' and 'loose' interpretations of change. It may in theory be used both for resistance to and support for change. However, in practice, it is more likely to materialise as resistance to change until very concrete steps are taken to actually change laws.

2.3.3. The Fallacy of *is* and *ought*

The fallacy of the *is* and *ought* position is a reflection of a larger empirical trend in philosophy (pragmatism) and legal theory (legal realism). This trend locates the Truth of the object not within itself, but in the way it appears in practical relations.¹⁰⁴ The object of legal inquiry, the Law, then only exists in its practical dimensions and its purpose. The understanding of Law as a means to serve for social ends has direct consequences for the understanding of the formal framework of change.

First, if the law is conceptualised to serve a purpose in practical experiences, it cannot be static. It should, on the contrary, be a dynamic process and flexible to change at every practical experience. At a given time, there are many propositions of *is* and *ought* existing alongside each other to the extent that it is fallacious to try to distinguish among these approaches. The concentration on *is* and *ought* is unnecessary, but also misleading in understanding the character of law.

Second, the jurist cannot assume the role of a passive observer of law. She has to take over an active role in determining the status of law for every

practical experience. This role takes the jurist beyond the function of distant observer and guardian of rules. The jurist has to take into consideration the policy implications, the purpose of law and the desired social ends. Thus, the fallacy of *is* and *ought* imagines a constantly changing law and an active jurist.

The meeting of legal realism and international legal theory can best be exemplified by the inquiry of McDougal and Lasswell, which develops a process approach to international law.¹⁰⁵ This approach is the first critique and reform program in international legal theory directed at the fundamental pre-suppositions of positivism in general and its understanding of change in particular. The process approach's first reaction to positivism has been to assert that law is not only rules, it is a dynamic process, of which rules form only a part. Therefore qualifying certain rules as *lex lata* and others as *lex ferenda* is inadequate for giving a comprehensive account of international law. As McDougal describes, 'international law is most usefully conceived, not as a pre-existing body of rules, but as a comprehensive process of authoritative decision in which rules are continuously made and remade.'¹⁰⁶ This recreation of international law occurs not in isolation, but within the realm of social and political processes. The purpose McDougal attaches to the international law process is 'the maximization of values within the limits of capability.'¹⁰⁷ It is

¹⁰⁴ Dewey, 'Logical Method and Law', 10 *Cornell Law Quarterly*, (1924) 17.

¹⁰⁵ See M.S. McDougal, *Studies in World Public Order* (1960); McDougal, 'Some Basic Theoretical Concepts about International Law: A Policy-Oriented Framework of Inquiry', 4 *Journal of Conflict Resolution* (1960) 337; McDougal, Lasswell and Reisman, 'Theories about International Law: Prologue to a Configurative Jurisprudence', 8 *Virginia Journal of International Law* (1968) 188; and McDougal and Reisman, 'International law in Policy-Oriented Perspective', *Structure and Process of International Law*, McDougal and Johnston (eds.), (1983) 103. See also R. Higgins, 'Policy Considerations and the International Judicial Process', 17 *International and Comparative Law Quarterly* (1968) 58 and R. Falk, 'The Validity of the Incidents Genre', 12 *Yale Journal of International Law* (1987) 376.

¹⁰⁶ McDougal, 'A Footnote' 57 *American Journal of International Law* (1963) 383.

¹⁰⁷ McDougal and Lasswell, *The Identification and Appraisal of Diverse Systems of Public*

suggested that there are certain common values, which will be employed as a means or pursued as an end in the decision making process. These values are categorized as power, respect, enlightenment, wealth, well being, skill, affection, and rectitude.¹⁰⁸ They are required to sustain the security and the dignity of human beings.¹⁰⁹ International law is presented as a sub-process, which functions under the world power process, and is aimed at the promotion of human dignity.

The rule-centred terminology of positivism is dropped by the process approach. The notions of *authority* and *control* are the most important concepts of the new vocabulary. These notions not only establish an identity for international law but also help to distinguish international law from other processes: The process is one of international law when the decision is both authoritative and controlling. ‘Decisions made in conformance with community expectations and by proper decision makers, as distinguished from decisions based on mere naked power’, are said to be authoritative.¹¹⁰ *Control* is established if the decision determines an actual outcome. The actual outcome, on the other hand, can only be ascertained by having clear policy choices about what the outcome should be. The process approach seems to place a great confidence in the ability decision-makers and international lawyers to determine the right policy outcomes. The authoritative decisions are not always controlling and vice versa. The task of the international lawyer is to determine which decisions are authoritative and controlling.

Order, reprinted in *International Law Essays*, McDougal and Resiman (eds.), (1981) 20

¹⁰⁸ *ibid.*

¹⁰⁹ The idea of attaching the a priori condition of promotion of human dignity to law is argued to be highly subjective. As Kratochwil puts it ‘even if we agree that human dignity is of overarching importance, it is rather questionable whether such a teleological conception of human actions can provide us with standards sufficiently precise to come to a consensus as to what count as law.’ in F. Kratochwil, *Rules, Norms and Decisions*, (1989) at 187.

¹¹⁰ J. N. Moore, ‘Prolegomenon to the Jurisprudence of Myres McDougal and Harold Lasswell’,

The most important and enriching concept that the process approach brings to international legal theory is the notion of contextual interpretation. This concept is especially crucial when we seek to analyse transition periods. While rules are an important part of international law, they cannot be divorced from the context in which they are created, changed or applied. The proposition that international law consists solely of accumulated past decisions is rejected. Furthermore it is argued that international law cannot treat all cases alike. From these two propositions flows the argument that power should not be seen as hostile to law, but as an integral element of law. The process approach recognizes that there can indeed be competing claims of what the law is at any given time and the question is not one of finding what the law is by applying a test using the formal sources of law, but one of making choices in relation to the context. That is the fundamental distinction between describing international law as rules or process and how it changes.¹¹¹

Furthermore, in cases when explicit (prohibitive) rules do not exist, the rule approach, as previously discussed in relation to the *Nuclear Weapons Advisory Opinion*, might argue that international law has nothing to say the issue in question. The process approach will have a different answer: ‘There are still tools for authoritative decision making on the problem (by the use of analogy, by reference to context, by analysis of alternative consequences) notwithstanding

54 *Virginia. Law Review*, (1966) 666.

¹¹¹Scholars who see international law as rules often accept the fact that rules are created by a process. What they disagree with is defining international law as a process. Arend, for example, rejects the notion that international legal rules are a process in themselves and he argues that the legal rules are the outcome of a process or a discourse. It seems that in this argument the problem is one of semantics or the confusion of terminology. At first sight the statement that ‘rules cannot be a process’ sounds logical. However, the difference between these two approaches is beyond this semantic paradox. The process approach defines international law as a process due to the fundamental position that rules cannot be found or applied objectively just because they are rules. The contextual interpretation is not an exception, but it is the norm. Arend, *Legal Rules and*

the absence of a precise rule which must be applied.’¹¹² According to Higgins, a critical adherent of the process approach, the process approach ‘entails harder work in identifying sources and applying norms, as nothing is mechanistic and context is always important’.¹¹³

This argument is criticized, on the basis that the process approach is a slippery slope, which may indeed serve as a means to justify the ends.¹¹⁴ This criticism is mainly due to the fact that what is identified as ‘legal’ *per se* is fundamentally different in the process approach than in natural law or positivism. Rather than isolating legal questions from those of politics, the process approach proposes to integrate them. It is proposed that the need to make preferences among competing policy choices need to be dealt with systematically and openly by the international lawyer. As Higgins explains;

Dealing with them systematically means that all factors are properly considered and weighed, instead of the decision maker unconsciously narrowing or selecting what he will take into account in order to reach a decision that he has instinctively predetermined is desirable. Dealing with policy factors openly means that the decision maker himself is subjected to the discipline of facing them squarely (instead of achieving unconsciously desired policy objectives by making a particular choice, which is then given the label of ‘the correct legal rule’). It also means that the choices are made open to public scrutiny and discussion.¹¹⁵

The process approach does not place the dichotomy of *lex lata* and *lex ferenda* at the center of its reasoning. The aim of the approach is not to seek to separate these propositions. When a norm is said to be undergoing a change, in order to define what the state of law is the process approach treats *lex lata* and

International Society, (1999) at 27.

¹¹² Higgins, *Problems and Process: International Law and How We Use It* (1994) at 10.

¹¹³ *ibid* at 8.

¹¹⁴ To be more specific, the legal realist position in international law has been regarded as disguised justifications of American foreign policy, where this position first emerged.

¹¹⁵ *ibid* at 5.

lex ferenda equally. Apart from the codified rules or custom, claims, counter claims, state practice, decisions of the diversity of decision-makers, and the jurisprudence of the ICJ are to be taken into account. Consequently the process approach lawyer makes a choice, openly admitting the fact that the outcome of that choice is not necessarily objective. The attempt is not to convince the audience that the decision is neutral, but that it is valid. As Higgins further asserts,

The further one moves away from positivism and rules, the less important becomes the distinction between *lex lata* and *lex ferenda*- the law as it is and the law as it might be. If law as rules requires the application of outdated and inappropriate norms, then the law as process encourages interpretation and choice that is more compatible with values we seek to promote and objectives we seek to achieve. But it is only to a rule based lawyer that this is to be classified as 'law as it ought to be', standing in contrast to law as it is. To the law as process, this is in large measure a false dichotomy, a cleavage that we can ourselves banish from existence.¹¹⁶

The significance of the process approach is the assumption that what the law is, and what the law ought to be, need not and cannot be distinctly separated. This viewpoint argues that questions about law should not focus on this dichotomy, but should instead consider all possible relevant factors contributing to the legal process. In this respect, legal realism redefines change by expanding the formal positivist criteria to ascertain the validity of laws in a particular context by explicitly including policy factors in the analysis.

Change in international law ought to occur by establishing what needs to be done at the right time and at the right place in 'real' life. As I discussed in the previous sections, the real life for the naturalist is the one that is pointed out by universal reason. The real world of a positivist, on the other hand, is confined to

finding rules to which states have consented. The process school refers to a different dimension of the real: the real world consists of the concrete cases in international legal affairs, which demand solutions from international lawyers. The process approach invests full confidence in the ability of the international jurist to deal with policy matters as well as rules.

The fallacy of *is* and *ought* position expects the international jurist to perceive its role differently to that of a positivist jurist. It is important to establish the practical importance of ascertaining a change in the law, to associate the law with the ‘real’ world by looking at the empirical evidence stemming from policy considerations. The jurist is expected to ‘freeze the law’ at a given point and context in time, openly deliberating how and why this process takes place. If I may go back to the *Nuclear Weapons Advisory opinion*, advocates supporting the fallacy of *is* and *ought* position are frustrated by the indecisiveness of the Court.

As Reisman points out:

Analysed in terms of ordinary canons of interpretation, parts of the Court’s opinion appear to be ‘good’ law or as some would say positive normative evolution. Experts will then triumphantly carry off a sentence here, a paragraph there as an indication of a major advance in their areas of specialisation. But assessed in terms of its aggregate consequences on world order, the opinion, its good intentions notwithstanding, actually undermines the most urgent programmes in the maintenance of minimum order in contemporary international politics: non-proliferation.¹¹⁷

Here, Reisman precisely points out how the conception of international law as rules misses the point of the dynamics of the nature of law as constantly open to change in accordance with good policy decisions. International law is not for undermining non-proliferation, it ought not therefore a priori read the rules in

¹¹⁶ *ibid.* at 10.

¹¹⁷ M. Reisman, ‘The Political Consequences of the General Assembly Advisory Opinion’, in *International Law, International Court of Justice and Nuclear Weapons*, Chazournas and Sands

ways in which that may serve this purpose. Law changes –and should be changed actively by international lawyers- in order to allow for this accommodation. Consequently, the concept of change lies at the heart of the realist policy-oriented inquiry into international law.

2.3.4 The indeterminacy of *is* and *ought*

The indeterminacy of *is* and *ought* position represents the last turn in the critique of conceptions of change in international legal theory. This critique, however, has not, perhaps yet, translated into a total agenda for reform as in the case of positivist or realist positions. This position, at this stage, rather than providing a comprehensive explanation of how change occurs in international law, aims to demystify the already existing dominant conceptions of change. The unity, dichotomy and fallacy positions all hold that there is an objective entity called law. They offer grand systematic frameworks to establish what the law is and how it may change. The indeterminacy position, on the other hand, does not offer a universal solution to the question of change, but seeks to critically address the solutions offered so far, by inquiring into the *language in which*, concepts of change have been formulated. This is neither a high theory of reform for a new understanding of change in the way that positivists emerged after the naturalists, nor a proposal of a new grand method the way realists contrasted with positivists. It is a fundamental questioning of the common sense of things in the previous inquiries from *within*.

The indeterminacy position questions the legacy of the pre-existing, naturally-changing object (law) and the rational self that is competent to account for changes in the object (the jurist) by de-centering the starting point of analysis all together. It rejects the idea that the very language in which we use to communicate our positions is transparent. Therefore, the main focus of this position is to understand the language of international law in which any concept of change finds its meaning.

The conceptual resources for this position can be traced to the theories of knowledge offered by structuralism and post-structuralism which have played a powerful role in understanding the social world during the 20th century.¹¹⁸ The work of the Swiss linguist Ferdinand de Saussure, who has put forward the proposition that meanings are created within language, contrary to modern philosophy's fundamental assumption that meanings precede the language, has inaugurated a new ontology of understanding knowledge in general.¹¹⁹ In this seminal work on linguistics, Saussure asserted that language does not simply consist of words that refer to objects in the world.¹²⁰ The meanings occur entirely *within* the language itself. He furthermore put forward that the way we understand the world is based on structural patterns of dualistic relationships between meanings. The meaning of a 'word' (in Saussure's terminology 'sign') emerges from a contrasting meaning (sign), which it is not. Languages thus are made from differences and relationships, in which meanings are created. For instance, the word law derives its meaning not by virtue of its reference to a pre-existing phenomenon, but because it is differentiated from what Law is not (i.e. it

¹¹⁸ For a concise introduction to structuralism and post-structuralism, see, D. Howarth, *Discourse* (2000)

¹¹⁹ F. de Saussure, *Course in General Linguistics*, (1960).

is not tradition, morality, or politics). The word Law acquires a meaning only when it is differentiated from and situated in relation to its 'Others'.

This insight has led many to assume that, if meanings are created *within* language, there is a clear analogy between language and the way we create knowledge. French linguist and philosopher Derrida has taken this analysis a step further by showing that binary oppositions which create meaning function within a power hierarchy of domination (Standard) and subordination (its Other).¹²¹ Within a binary opposition, one of the pair is always preferred to the other by the dominant mode of production of knowledge. He has also pointed out that the meaning of one side of the pair depends on the existence of the other. Objective analysis, for example, is valued over subjective analysis in modern western scholarship. However, objectivity relies on and only gains its meaning via the subordination of the category of subjectivity.¹²² Two core assumptions flow from this analysis: first, even if the meanings that are created seem coherent in the first instance, they are *substantively* indeterminate. Second, if we exist in a seemingly coherent, but substantively indeterminate life-world, there are no *ultimate* foundations of meanings. There exists a *temporary consensus* on meanings, which results in the domination of one meaning and subordination of others.¹²³

This turn in linguistic philosophy has encouraged legal theorists in general¹²⁴ and international legal theorists in particular, to set out to understand

¹²⁰ Saussure (1960) at 65.

¹²¹ J. Derrida, *Of Grammatology*, (1974).

¹²² Descriptive/Prescriptive; Public/Private International/Internal; Developed/Underdeveloped; Autonomy/Community; Change/Stability; Intervention/Non-intervention; Hard Law/Soft Law; Binding/Non-binding, for example, are dichotomies we constantly use in international practice.

¹²³ See on this point, C. Mouffe (ed.), *Deconstruction and Pragmatism* (1996).

¹²⁴ J.M. Balkin, *Deconstructive Practice and Legal Theory*, 96 *Yale Law Journal*, (1987) 743; J. Boyle, 'Ideas and Things and the Prison House of Language', 26 *Harvard International Law Journal*, (1985) 327; R. M. Unger, *The Critical Legal Studies Movement*, (1986); P. Fitzpatrick, *The Mythology of Modern Law*, (1992); Schank, *Understanding Postmodern Thought and Its*

law not as a form of representations of meanings, but *as a language* in which the legal meaning is created.¹²⁵ This is not to suggest that law does not exist or is not important as sometimes claimed¹²⁶: law as argumentative practice is thought to be as significant as law as representation of pre-existing meanings.¹²⁷

In accordance with this fundamental alteration, *lex lata* and *lex ferenda* does not represent two different levels of normativity. They are merely arguments designed to highlight or suppress one politically and historically determined argument over the other. A proposition *lex lata* only gains its full meaning when it is contrasted with propositions *lex ferenda*. Since, law *a priori* is not understood as a verifiable object but as a discursive practice, what the law is can be dressed as what the law ought to be, and vice versa, in international legal argument. This underlies the main thesis of the indeterminacy position: there cannot be an objective representation of change, any essentialist representation of change will be substantively indeterminate, since the legal language itself is substantively indeterminate. International lawyers are ‘thrown into’¹²⁸ a world of meaningful, but substantively indeterminate, discourses about

Implications for Statutory Interpretation; 65 Southern California Law Review, (1992) 2505; Duncan Kennedy, *Fin de Siecle: A Critique of Adjudication*, (1996); M. Davies, *Delimiting Law: Postmodernism and the Politics of Law*, (1996); P.Fitzpatrick and J. H. Bergeron (eds.), *Europe's Other: European Law between Modernity and Postmodernity*, (1998).

¹²⁵ The ‘linguistic turn’ in international legal theory has gone beyond the internal investigation of the indeterminacy of international laws. The Derridean insight into the power hierarchy of domination and subordination has encouraged international legal theorists to investigate what other perspectives and experiences the dominant presentation of international law subordinates. A significantly growing literature points to the subordination of colonised countries, (looking at colonialism as the Other of sovereignty doctrine) women, (reading international law as a masculine project imposed on women), groups such as indigeneous populations who were treated as non-existent by the inter-state system, the presentation of political theory of states as a unified model (arguing that all states come from the same origin). Such studies are likely to change the way in which the history of international law is written and also perhaps the way it is practiced in daily lives, if disseminated widely in the international law community.

¹²⁶ I. Scobbie, ‘Towards the Elimination of International Law: Some Radical Scepticism About Radical Scepticism’, *British Yearbook of International Law*, (1991) 339.

¹²⁷ David Kennedy, ‘A New Stream of International Legal Scholarship’, 7 *Wisconsin Journal of International Law*, (1988) 1.

¹²⁸ This is the German philosopher Heidegger’s terminology for explaining the existence of the

international law, and it is this world that enables them to identify and engage with the pieces of international law related material they encounter. International lawyers who have taken up this point, have set themselves two tasks, first to uncover the binary oppositions of the whole terrain of international argument, second to inquire into the patterns of domination/subordination in international law.

The early works of David Kennedy and Martti Koskeniemmi are inaugural studies, which aim to map the underlying dual oppositions of international law.¹²⁹ Kennedy, in his early works, does not use the language of *is* and *ought*, but distinguishes between soft and hard rhetoric. Soft rhetoric may be observed in positions that are not based on the explicit consent of states. Hard rhetoric, on the other hand, emphasises a version of ‘is’ which is evidenced by the existence of concrete rules. He locates many long lasting rivalries within the binary opposition of hard and soft rhetoric (just to name a few: positivism/naturalism; dualism/monism; hard law/soft law; court based adjudication/ mediation, conciliation, good offices; formal equality/affirmative action; self-determination/minority protection; *uti posseditis*/secession; sovereign autonomy/international community; non-intervention/intervention; treaty/custom)¹³⁰. Kennedy suggests that it is always possible to argue a given position both with a hard and a soft rhetoric and ‘because neither of the

human condition. M. Heidegger, *Being and Time*, (1962) especially, at 91-148.

¹²⁹ D. Kennedy, *International Legal Structures* (1986); M. Koskeniemmi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

¹³⁰ For a more detailed map of these dichotomies, D. Kennedy, ‘What is New Thinking in International Law?’ 95 *ASIL Proceedings* (2000) 104.

arguments can be convincing by itself and neither can trump the other, argument within this structure could go endlessly without resolution'.¹³¹

This argument is very closely followed by Koskeniemmi, who introduces another binary opposition: apology and utopia.¹³² The former emphasizes state autonomy, the role of consent in law making, and concreteness, and the latter points to the concepts of justice, community and normativity. He contends that 'an argument about concreteness is an argument about the closeness of a particular rule, principle or doctrine to state practice. But the closer to state practice an argument is, the less normative and more political it seems, the more it seems just another apology for existing power. An argument about normativity on the other hand, is an argument which intends to demonstrate the rule's distance from state, will and practice. The more normative a rule, the less political it seems, because it is less possible to argue it by reference to social context. It seems utopian and –like theories of natural justice- manipulable at will'.¹³³ The international lawyer may then be understood as a person trapped in these binary oppositions of argumentation. Since concreteness and normativity, the state sovereignty and international society, are concepts dependent on each other one cannot definitely triumph over the other.¹³⁴

Another aspect of the indeterminacy argument goes beyond the analysis of the rhetorical structure of international law and locates the indeterminacy of international law as a continuation of the indeterminacy of liberal political theory. Koskeniemmi, for the most part, traces the existence of the binary

¹³¹ D. Kennedy, *International Legal Structures*, (1986) at 31.

¹³² M. Koskeniemmi, *From Apology to Utopia*, (1989).

¹³³ M. Koskeniemmi, 'Politics of International Law', 1 *European Journal of International Law* (1990) 4.

¹³⁴ These points are in conformity with Derrida's work of unearthing the 'binary oppositions' in

dichotomy of state autonomy and community interests to liberal political theory, from which contemporary international law draws conceptual resources. In other words, the dilemma of preserving the autonomy (i.e. of individuals, of states) while at the same time enabling a collective existence (i.e. of liberal states, international community) is inherent in any liberal theory. This, in turn, manifests itself in the form of the concrete/normative; is/ought; sovereignty/international community dichotomies, which are inconclusive and at the same time, indeterminate.¹³⁵

Yet another aspect of the indeterminacy argument traces the indeterminacy of international law to its subordination to international politics. Consequently, ‘ norms, whether extracted from texts or social behaviour, are of necessity indeterminate and ... the most down to earth pragmatic analyses of diplomatic behaviour or treaty texts are conditioned by conceptual matrices which are the arena of political struggle’.¹³⁶ There cannot be any criteria to establish any sustainable conclusive relationship between *is* and *ought*. It is argued that international law is not autonomous from the political and ideological battles within international society. This is different from legal realism since legal realists hold that international law process coexists with other processes, whereas for the indeterminacy position international law may be understood as politics, spoken in a different language.

Therefore, the indeterminacy position in its rhetorical, liberal and political dimensions maintains the argument that ‘change of law’ is not a phenomenon that can be explained by establishing an objective set of criteria

Western thinking. See J. Derrida, *Dissemination* (1981) at 109.

¹³⁵ Koskeniemmi, *supra* note 77, pp. 52-73.

¹³⁶ Martti Koskeniemmi, ‘Introduction’ in Koskeniemmi (ed.), *International Law*, (1991), p. xii.

with reference to law. International law is internally indeterminate, not only at times of ‘change’, but also at times of ‘stability’. The indeterminacy position does not believe that international law has a foundation from the perspective of which change can be explained. Unity, dichotomy and fallacy positions cannot, even if they claim to, objectively explain how international law changes. This position does not believe that an explanation of an autonomous sphere of ‘laws’, which may then ‘change’ can be constructed at a level of *high theory*. This position attacks the definition of change as change in the object (law) determined by the subject (the jurist). In this respect, it takes issue with all the above-discussed positions, which perceive that change of international law can be objectively explained. The impossibility of the existence of a theoretical scheme, which explains how international laws change, is part of the theoretical framework of the indeterminacy position. In other words, the theoretical honesty of the indeterminacy position requires a rejection of formulating some universal method to ascertain ‘change’.

When the self-contained explanation of change is removed from the picture, it seems that the indeterminacy position does not offer –and is not particularly concerned with- a formal explanation of change. Both from formalist and instrumentalist perspectives, this aspect of the indeterminacy position is not satisfying and is found as ‘nihilist’ by some of the practitioners –and also theoreticians- of international law. This understanding of law does not offer clear guidelines to the international lawyer as to how to locate change, even if it offers a deeper understanding of how politics and morality are located *within* the law itself and in its argumentations, and not just outside of it. Therefore, the theory leaves a big margin of ethical responsibility to those who are located in

the power structures of international law and are able to affect the ways in which law is understood and practised. Since the indeterminacy position loses faith in the objective existence of law, it turns to the ethical existence of the lawyer aware of the indeterminacy of the technical, political, and moral indeterminacy of international law for maintaining the stability as well as the quality of it.¹³⁷

It may be stipulated that within the indeterminacy position of *is* and *ought*, a formal explanation of the concept of change should be understood as a ‘self-refuting ideal’, since the very moment of its realisation at the same time may coincide with its destruction. A ‘concept of change’ should always be left open, so that the potential for further change remains. Indeterminacy of a formal framework is precisely the opportunity for keeping the framework open to substantive change. Any closure of the formal framework of change within the discipline limits the rhetorical, political and personal opportunities to engage in substantive normative projects of transforming international law. As Kennedy states, referring to the binary oppositions embedded in international legal argument, ‘if you seek to improve and update the ambivalent vocabulary with which international lawyers argue for modest reforms, we know where to send you. But new thinking, thinking outside the box, for that so far about all we can say is that sometimes we know it when we hear it.’¹³⁸

¹³⁷ On the question of ethics in the international law context, see generally, A. Boldizar and O. Korhonen, ‘Ethics, Morals and International Law’, 10 *European Journal of International Law*, (1999) 279.

¹³⁸ D. Kennedy, ‘What is New Thinking in International Law?’ 94 *ASIL Proceedings* (2000) at 125.

2.4. Discipline as the Explanation of Change

To claim a break with tradition is perhaps the most traditional gesture.¹³⁹

Law is natural, law is positive, law is a process, law is indeterminate. All the disciplinary conceptions of change that I have outlined here have dealt with the Law with a capital L. At first, the international jurist was characterised as a devoted seeker of the True law, second she has become a distant and detached observer, third she has been encouraged to involve herself in making choices for the right social ends, and, lastly, she is a person responsible for emancipation in the midst of the games of language and political struggle. All these jurists set out with the determination to say something about how international law really changes within a formal framework. The aim has been the ultimate closure of a formal theory of change, which can be applied to substantive issues of law. None of these positions claimed to be talking about change in another field, for example, in politics or morality of the international, but aimed to define it at the centre of international law. In so doing, they have engaged in a transformative dialogue with the theories of knowledge which were contemporary in their time, and have introduced concepts that would illuminate the relationship between international law and international lawyers.

The application of each position to concrete issues yields different results on the changing content of laws. The knowledge they produce in this respect is relative and, if coherent, only within the confines of their own ontology. Therefore, when the formal framework of change is addressed among

international lawyers with different theoretical inclinations, none of these positions is definitively able to explain exactly how change occurs. International lawyers may choose from any of the conceptions of change discussed above, independent of the historical evolution of a particular philosophical position, which these concepts emanate from. They may not even be consistent in using these conceptions. In practice, conceptions of change merely become tools to assert one's position towards change, supporting it, denying it or trying to remain outside of it. These conceptions, which start to explain change in its totality, merely become strategies for argumentation capable of resulting in incommensurable outcomes about the content of change. And, paradoxically enough, international law as we know it always keeps changing.

The quote from Davies at the beginning of this section characterises the search for contemporary knowledge, in general, and what I set out to do in this thesis, in particular. In other words, I continue the tradition of breaking away from tradition, by suggesting that we need to continue to engage ourselves in dialogues with theories of knowledge that would better enable us to theorise and practice international law and how it changes. New engagements are usually based on undermining the old, and aim to replace it with a more enhanced understanding of law. Perhaps to a certain extent contrary to this, I do not suggest that the conceptions of change that are discussed in the previous sections (which aim to undermine the validity of each other) must at the present time simply be rejected in favour of yet another approach. What I offer is a formal structure that conceptualises change inclusive of the disciplinary conceptions of

¹³⁹ M. Davies, *Delimiting the Law*, (1996) at 146.

change discussed above. Consequently, the issue is not to ‘reject’ positivism, or to reinstate ‘enlightened naturalism’.

In this section, I offer to move away from the Law as the centre of knowledge in explaining change in international law, and instead suggest that the formal framework of change can best be understood in terms of people, us, members of the discipline of international law at large, who create the ideas of change in the first place. This move from the explanation of change with theories about Law to the explanation of change with ideas, theories, and projects created by groups of people in the international legal discipline traces the formal understanding of change to the people who create it. The naturalist, positivist, realist, and critical conceptions of change exist precisely because there have been generations of international lawyers who have supported these conceptions to underpin various substantive change projects. This is the ultimate ‘formal framework of change’ that I present in this thesis.

2.4.1 The Significance of the Discipline

A framework which understands change in terms of the people behind the theories of law, rather than abstract representations of law, is a reflection resulting from a dialogue with a broad range of contemporary studies, which investigate knowledge as a product of the members of a discipline. In many areas of knowledge, this search has come into being as a result of peculiar problems that could not be answered by abstract theories about the object of the knowledge and it had a rather irregular impact on many disciplines. Terms such

as ‘interpretative communities’¹⁴⁰, ‘paradigms’¹⁴¹, ‘judicial field’¹⁴², ‘discipline’¹⁴³ are used to refer to the nature of knowledge which is strongly patterned by tradition, education, and the daily experience of the members belonging to a community which produces knowledge.

For example, as Fish explains, in literary theory,

The notion of ‘interpretative communities’ was originally introduced as an answer to a question that had long been seen as crucial to literary studies. What is the source of interpretative authority: is it the text or the reader? Those who answered ‘the text’ were embarrassed by the fact of disagreement. Why, if the text contains its own meaning and constrains its own interpretation, do so many interpreters disagree about that meaning? Those who answered ‘the reader’ were embarrassed by the fact of agreement. Why, if the meaning is created by the individual reader from the perspective of his own experience and interpretative desires, is there so much disagreement about? What was required was an explanation that could account for both disagreement and agreement, and that explanation was found in the idea of an interpretative community, not so much about a group of individuals who shared a point of view, but a point of view or a way of organising experience that shared individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of difference and irrelevance were the content of community members who were therefore no longer individuals, but, insofar as they were embedded in community’s enterprise, community property.¹⁴⁴

The concept of interpretative community in literary studies, as explained by Fish, correlates with the usage of ‘paradigms’ in the seminal work of Thomas Kuhn in the area of philosophy of natural sciences. Kuhn, dissatisfied with the narrative of science as a constantly progressing linear line, revealed that scientific knowledge is situated in the context of historical and social practices, which define natural science in a particular time and space. In his view, there is

¹⁴⁰ Stanley Fish, *Doing What Comes Naturally, Change, Rhetoric and the Practice of Theory in Literary and Legal Studies*, (1989).

¹⁴¹ Thomas Kuhn, *The Structure of Scientific Revolutions*, (3rd edition, 1996) (first published in 1969).

¹⁴² P. Bourdieu, ‘Force of Law: Towards a Sociology of the Judicial Field’, 38 *Hastings Law Journal*, (1987) 805.

¹⁴³ M. Foucault, *Discipline and Punish: The Birth of the Prison*, (1977).

¹⁴⁴ Supra note 140 at 141.

simply no universal scientific method in terms of which the achievements of science can be presented in abstract general form. The ‘truth’ of a scientific statement is only relevant to those who share the belief system upon which such ‘truths’ are based. Kuhn identifies such belief systems which comprise a dominant set of rules as ‘paradigms’.

In his most influential work, *The Structure of Scientific Revolutions*, Kuhn advances a general and historical account of science. This account starts with a pre-paradigmatic stage, in which a range of approaches compete to be the dominant explanatory power. At the next stage, one approach matures into the status of a paradigm, dominating the production of knowledge in its area of inquiry. A scientific paradigm is that ‘some accepted problems, examples of actual scientific practice –examples which include law, theory, application and instrumentation all together- provide models from which spring particular coherent traditions of scientific research’.¹⁴⁵ The scientific research conducted under the reigning paradigm is called ‘normal science’ and Kuhn likens this to puzzle solving within an established set of principles and methodological procedures.¹⁴⁶ At a point in time, the normal science is faced with problems or anomalies which cannot be adequately explained by the paradigm of normal science. The anomalies lead to a crisis within the discipline and a period of revolutionary change commences. Previously established belief systems are

¹⁴⁵ *ibid.* at 10. Kuhn in his postscript to the *Structure of Scientific Revolutions* (1969) further acknowledges that he uses the concept of paradigm in two different ways: the first one is a broader meaning, referring to the entire constellation of beliefs, and values shared by the members of a given community, the second one on the other hand encompasses a narrower, yet deeper meaning referring to ‘concrete puzzle solutions’ which are employed as models. *Ibid.* p. 174. The first and broader meaning of paradigm is similar to the concept of ‘problematique’ of Althusser and Balibar in *Reading Capital*, (1968) and the concept of ‘episteme’ of Foucault in *The Archaeology of Knowledge*, (1972).

¹⁴⁶ *Ibid.* at 36-39.

overturned by this change. Change comes with one scientific paradigm being replaced by another.

Kuhn discusses the paradigm change within the context of physics. He identifies Newton's mechanics as a paradigm in physics, with workable principles for the development of further scientific laws and the identification of facts. However, by the middle of the 19th century, anomalies emerge when Newton's laws are applied to astronomical objects. By the 1890s, these anomalies accumulate into a state of crisis. When a scientist working in a paradigm is faced with facts which are contrary to the epistemological theory of the paradigm, this either initiates a crisis or deepens a crisis that is already existent.¹⁴⁷ As Kuhn explains it:

Confronted with anomaly or with crisis, scientists take a different attitude toward existing paradigms and the nature of their research changes accordingly. The proliferation of competing articulations, the willingness to try anything, the expression of explicit discontent, the recourse to philosophy and to debate over fundamentals, all these are symptoms of a transition from normal to extra-ordinary research.¹⁴⁸

The extraordinary research leads to the creation of a new paradigm. In the case of physics, this is the paradigm of Einstein's theory of relativity. Of course, in the beginning the new paradigm will not be very popular among the scientific community, however, as time goes by, and if the new paradigm is able to provide answers to those questions that are seen as being of great importance, supporters of the paradigm will increase. Soon enough, the new paradigm evolves from its revolutionary character into a normal science paradigm. The ones who choose

¹⁴⁷ Ibid at 78.

¹⁴⁸ ibid at 91. In normal science research as Kuhn previously suggests at 88 'to the extent that normal research work can be conducted by using the paradigm as a model, rules and assumptions need not be made explicit' and therefore 'normal science usually holds creative philosophy at

not to support it, and insist on resisting it, will be regarded as ‘illogical and unscientific’¹⁴⁹ and will be regarded as ‘ipso facto (having) ceased to be a scientist’¹⁵⁰. The world outside of it also changes with the paradigm. ‘Paradigm changes do cause scientists to see the world of their research engagement differently. In so far as their recourse to that world is only through what they say and do, we may want to say that after a revolution scientists are responding to a different world.’¹⁵¹

Kuhn’s main reason for introducing the term ‘paradigm’ and subsequently explaining the way it changes is to draw attention to the fact that science is not merely a reduction of abstract theories, but very similar to other social phenomena studied by historians and social scientists. Thus, knowledge is a social product and, as such, changes as the society changes. A shared paradigm provides membership of a specific scientific community and, in turn, would be supported by its members and *‘paradigms gain their status because they are more successful than their competitors in solving a few problems that the group of practitioners have come to recognize as acute. To be more successful is not however to be either completely successful with a single problem or notably successful with a large number.’*¹⁵² (emphasis added.)

This account of scientific knowledge sees paradigms as incommensurable. In the strict sense identified by Kuhn, they are assumed to succeed one another rather than compete, although competition between alternatives may occur in the relatively short periods of crisis and revolution.

arms length and probably for good reasons’.

¹⁴⁹ Ibid. at 159.

¹⁵⁰ Ibid.

¹⁵¹ Ibid. at 111.

¹⁵² Ibid. at 23.

Kuhn sees normal science to be the standard, and the crisis of science as short periods. This account of scientific knowledge is criticized on the grounds both that it promotes philosophical relativism and that it is not relative enough. Critics, who argue that Kuhn's approach promotes relativism, hold that Kuhn denies the possibility of progress of science and knowledge, since it does not envisage an organic continuity of scientific knowledge.¹⁵³ Relativists, such as Feyerband, on the other hand, argue that there is no fine line between 'normal science' and 'revolutionary periods', and that it is impossible to identify a basis for defining one form of knowledge as 'superior' to another form at any point in time (this is precisely what the indeterminist position in international law points out).¹⁵⁴ However, Kuhn's account of change, as I read it, points to the particular universality of authoritative knowledge. The dominant paradigm is still relative, but accepted as the authoritative way of producing knowledge at a given period of time.

2.4.2 The Legal Discipline

To come a little closer to home, Bourdieu studies the 'judicial field'¹⁵⁵ within the context of the French judiciary, as informing the production of legal knowledge. In parallel fashion to Fish and Kuhn, Bourdieu suggests that law (as literary texts, or science) is not what is objectively presented by lawyers as law, but that

¹⁵³ I. Lakatos, *Criticism and The Growth of Knowledge* (1970), esp. at 91-195.

¹⁵⁴ On rejection of universal method and the discussions of objectivism and relativism in this context see, Feyerband, *Against Method: Outline of An Anarchistic Theory of Knowledge*, (1975) and *Science in a Free Society*, (1978) also Bernstein, *Beyond Objectivism and Relativism*, (1981), Stephan Amsterdamski, *Between History and method: Disputes about the Rationality of Science*, (1992), K. Popper, *All Life is Problem Solving*, (1999).

¹⁵⁵ Supra note 140 at 807.

it is a product of power relations existing within the juridical field on the definition of law. Furthermore, Bourdieu argues that the miscognition of law's objective character is a necessary element for the existence and continuity of the 'judicial field'.¹⁵⁶

Legal scholars (thus) have an easy time convincing themselves that the law provides its own foundation, that it is based on a fundamental norm, a 'norm of norms' such as the Constitution, from which all the lower rank norms are in turn deduced. The *communis opinio doctrum* (the general opinion of the professionals), rooted in the social cohesion of the body of legal interpreters, thus tends to confer the appearance of a transcendental basis on the historical forms of legal reason and on the belief in the ordered vision of the social whole that they produce.¹⁵⁷

The 'judicial field' is what every lawyer enters to gain the identity of a lawyer. Starting to analyse society in terms of lawfulness is informed by a tacit acceptance of the internal laws of the field by the members, including its dominant forms of factual representations and specialised use of ordinary language. Since the identity of the lawyer is a direct consequence of the existence of the field of law, disagreements among lawyers take the form of structured debates from previously determined premises: it does not turn into a chaotic noise. The judicial field is 'like a magnet', it processes any new knowledge brought into the discipline and turns it into a formally represented premise. To put it differently, the judicial field is likely to reject any new knowledge that is not compatible with the mainstream terms and conditions. It is when the critical is widely accepted as mainstream that it gains the status of

¹⁵⁶ Bourdieu suggests that the same proposition is true for every field of production of knowledge. For the reproduction of the social order, the dominant group has to argue for the validity of the knowledge they produce as objective. This statement is not in conflict with Derrida's understanding of binary oppositions where one pair in the duality undermines the other to assert its validity.

¹⁵⁷ Supra note 140 at 818.

credible knowledge.¹⁵⁸ Therefore, the judicial field constantly determines what is credibly-represented legally-relevant knowledge and what is knowledge that belongs to some other place such as political, moral or, philosophical fields.

As Bourdieu explains, the judicial field exercises an institutional monopoly over its members. This monopoly first defines who is inside and who is outside the discipline. An outsider's intuition about law is naïve, while the lawyer is a professional, trained guardian of the law (of course at the same time the guardian of the judicial field and his professional identity.) Within the discipline, there also seem to occur a division of labour between the theoreticians and practitioners of law. The theoreticians are given the role of long term thinkers about law, who may situate themselves at the borders of the field, monitoring events taking place 'outside' and planning responses to them. Practitioners of law, on the other hand, are situated in the middle, dealing with concrete cases occurring in daily life and looking for guidance from the theoretician when faced with an undecidable, unexpected 'hard case'.

¹⁵⁸ The inclusion of liberal feminism in mainstream international law and the exclusion of what is rather pejoratively called 'radical feminism' as irrelevant to international law is a good example of this characteristic of the discipline. The liberal feminist theories do not challenge the liberal worldview of the international legal system, but see the public international institutions as a 'male monopoly'. Accordingly it suggests that women should be invested with the same opportunities as men and the problems that women face should also be addressed in international law-making. This approach, with some initial resistance, is widely acknowledged and accepted in the discipline. See H. Charlesworth et. al., *Feminist Approaches to International Law*, 85 *American Journal of International Law*, (1991) at 1991. For some initial liberal resistance, A. D'Amato, *Human Rights of Women: National and International Perspectives*, 89 *American Journal of International Law*, (1995) at 840. 'Radical' feminism on the other hand, argues that the whole international legal system is based on a masculine perception, which subordinates female experiences of the world. Women continue to live under a masculine system, regardless of their increased participation in international decision-making processes or the increase of international conventions addressing the problems of women. Therefore, the present system should be criticised and attempts should be made to alter it, not to physically participate in it. A. Orford, 'Muscular Humanitarianism: Reading the Narratives of the New Interventionism', 10 *European Journal of International Law*, (2000) 665. This perspective so far met with silence from the centre of the discipline since for the parameters defined by the discipline, this is not, at the moment, legally relevant knowledge. It attacks directly to the heart of it.

As in Kuhn's competing paradigms, ascertaining the objective representation of the valid law is a product of competition among the members of the discipline. The authoritative interpretations of the change in the law rise to the objective representation of law. Competition does not only take place among hostile groups, but also among complementary groups, whose ultimate explanation of change may differ from each other. In this respect, the judicial field is a political field with a small *p*. Members of the judicial field ultimately decide what gets changed, when and how. These questions inherently point to a political activity within the judicial field since politics in this sense is the process of allocation of things of value.

David Kennedy's later works on international legal theory also point to the move from abstract theories of international law to groups of international lawyers in explaining the significance of international law and how it changes. Kennedy, departing from Bourdieu's explanation of the judicial field as being behind the force of laws, sets out to investigate the international legal field –what he calls international legal discipline- within the context of the international law community in the United States of America.¹⁵⁹ In similar vein to the discussions above, Kennedy presents:

International law as a series of professional performances rather than as an edifice of ideas, doctrines, and institutions, recasting the discipline's intellectual tools as a lexicon for argument about reform and disciplinary renewal, as well as for professional affiliation and disaffiliation. For international lawyers, the performances of renewal, criticism, and reform are central to professional identity and competence, and for more than a century, these (American) lawyers have shared an argumentative terrain which can be analysed using the tools of structural or semiotic analysis that have now been applied to the doctrinal terminology of various other legal fields.¹⁶⁰

¹⁵⁹ D. Kennedy, 'The Disciplines of International Law and Policy', 12 *Leiden Journal of International Law*, (1999) 9.

¹⁶⁰ D. Kennedy, When Renewal Repeats: Thinking Against the Box, 32 *New York University*

Kennedy further deepens his analysis of the international legal discipline by locating it within the skeletal binary opposition of sovereign autonomy and international community. Accordingly, Kennedy maps the history of the US international legal discipline as generations of international lawyers constantly playing these oppositional pulls against each other in order to reach a theory of international law that will be the dominant basis of practical reasoning.¹⁶¹ The inherent tensions between sovereign autonomy and international community, hard law and soft law, formal law and informal law constantly re-appear in the realignment of the arguments and interpretation of doctrines.

The re-organisation of the vocabulary of the international legal discipline among the groups competing to dominate the valid production of legal knowledge is precisely what holds the discipline together. Critique and change in the discipline occur within this all too familiar professional vocabulary. Delivery of the analyses of change within this vocabulary also demarcates the limits of

Journal of International Law and Policy, (2000) 337.

¹⁶¹ As Kennedy maps the turning points of the discipline: 'One might quibble about the dates (there would surely be precursors and lags), but the broadly liberal and internationalist, or cosmopolitan, discipline we know today has developed in broad waves of critical anxiety and enthusiastic reform. The last half of the nineteenth century saw a self-confident period of invention and renewal of what was then thought to have been a long-established tradition. This period lasted from roughly 1871, through the Hague conferences of the late 1890s until the First World War, and consolidated much of what we now think of as "new thinking" about international law. The Great War was followed by a period of confusion, anxiety, rethinking, and disputation, which lasted from 1914 through the mid-1920s. And then, until the outbreak of the Second World War, we find a second period of renewal and consolidation, reaffirming many of the eclectic, interdisciplinary, and often idiosyncratic gestures we still think might lead us from our current disciplinary confusion and malaise. The outbreak of war in 1939 initiated another period of confusion and anxiety, invention, and disputation, which persisted through the early Cold War years. After about 1960, the field entered a third period of self-confident renewal, consolidating an updated, pragmatic, and liberal internationalism. This post-1960 consolidation repeated much from the periods 1870-1914 and 1920-1939, and lasted until the end of the Cold War. We are now midway through another period of confusion, anxiety, and rethinking. The leading members of the discipline call out for consolidation and renewal, offering methodological commitments which they hope will take us back to the self-confidence of the discipline's best years. In many ways, the 1990s ended like the 1860s, the 1910s, and the 1950s'. *ibid* p 340-1.

disciplinary change. International legal language simultaneously offers the potentials and limits of change.

This mode of analysis explains the relationship between international law and its Others –most significantly politics and morality- in a transparent way. The relationship between law, morality and politics need not be explained by resorting to universal abstract formulations. The issue is not that international law is a part of morality, or totally distinct from it. It is also not that international law is subordinated to international politics. What constitute these relationships are the presuppositions of the dominant theories of knowledge in international legal discipline over time and space. For example, a theory, assuming that law and morality are inseparable, will hold that its conception of morality is universal and that it overrides positive international laws which are not in conformity of that morality. From a theory, which regards the nature of international law as functional, we will get a functional interpretation of sources. Indeed, what we have learned as international law, as Brierly points out in 1929, has been the evolution of eurocentric conceptions of international law. This, however, does not undermine the existence of international law theory and practice. What it does is to particularise the knowledge that is presented as universal –it could not have been the purpose of the dominant theories of international law to particularise themselves.

2.4.3 Particular Universality of the International Legal Discipline

Possibly, the most crucial issue at this stage is whether one can talk about a universal international legal discipline, if not about a universal theory of

international law, which forms a common platform for all international lawyers. As seen, Bourdieu bases his assumptions on the concept of legal field on the French experience, while Kennedy focuses on the American international lawyers and how international law in US scholarship has been one of criticism and renewal, rearranging the emphasis given on the concepts of sovereign autonomy and international community. In a world of international lawyers, who come from different parts of the world, from different cultural backgrounds and identities, and with different political agendas, is it possible to present the notion of contemporary international legal discipline as a universal magnet? May there be more than one discipline?

These questions can best be answered positively from a historical perspective. Since the 19th century, starting from the inclusion of the Ottoman Empire and China into the European international law system¹⁶² (previously both of these empires had claimed absolute superiority to any other legal system), the particular universalisation of the international legal discipline has been complete. In the third edition of *Elements of International Law* (1846) Wheaton succinctly describes the universalisation of European international law moving back and forth between its natural law and state sovereignty foundations:

The more recent discourse between the Christian nations in Europe and America and the Mohammedan and Pagan nations of Asia and Africa indicates a disposition, on the part of the latter, to renounce their peculiar international usages and adopt those of Christendom. The rights of legation have been recognised by, and reciprocally extended to, Turkey, Persia, Egypt, and the States of Barbary. The independence and integrity of the Ottoman Empire have been long regarded as forming essential elements in the European balance of power, and as such, have recently become the objects of conventional stipulations between the Christian

¹⁶² For a history of the Europeanisation of legal systems, see J., Onuma, 'When was the Law of International Society Born?', 2 *Journal of the History of International Law* (2000) 1; L. Liu, 'Legislating the Universal: The Circulation of International Law in the Nineteenth Century' in L. Liu (ed.) *Tokens of Exchange: The Problem of Translation in Global Circulations* (1999) 127.

states of Europe and that Empire, which may be considered as bringing it within the pale of public law of the former.

The same remark may be applied to the recent diplomatic transactions between the Chinese Empire and the Christian nations of Europe and America, in which the former has been compelled to abandon its inveterate anti-commercial and anti-social principles, and to acknowledge the independence and equality of other nations in the mutual intercourse of war and peace.¹⁶³

In the same way in which new states were and are accepted to become members of the international society of states on the condition that they accept the existing eurocentric rules, international lawyers from these states, too, have entered into the discipline by accepting the already existing institutional and social structure of the discipline.¹⁶⁴ International lawyers of different national origins did not constitute separate disciplines, they only offered competing accounts of the meaning and application of already existing European international laws. International lawyers, identifying themselves more closely with their states' policies, and the legal advisors of states produced arguments on the validity of their governments' international policies within the Western European international legal matrix. They did so by resorting to the pre-existing lexicon of the discipline. Acceptance of the internal rules of the discipline has functioned as a threshold for affiliation or disaffiliation with the international law discipline. To argue within the same lexicon as the Western colleagues who founded the discipline served as a visa to enter the cosmopolitan world of international lawyers. The non-western international lawyer, for the most part,

¹⁶³ H. Wheaton, *Elements of International Law* (3rd edition, 1846) at 22.

¹⁶⁴ By way of personal experience, what I learned as the structure and fundamentals of international law at a Turkish University did not differ from what I have learned at a British University. Also in the Hague Academy of International Law in the Hague, together with a big group of international lawyers almost from all over the world, I have not learned anything about international law that was fundamentally different from my previous knowledge. The only

did not challenge fundamental premises of the discipline, but aimed at producing the best arguments supporting the position of his nation-state within the discipline.¹⁶⁵ Even the Soviet theoreticians of international law, who founded their theory on premises incommensurable with western liberal theory, argued their cases within the confines of the international legal discipline. By rejecting any pre-existing obligation on behalf of the Soviet Union and Eastern Bloc, their theory was based on absolute explicit consent¹⁶⁶ –a position adopted by positivists in the 19th century.¹⁶⁷

Similarly, international lawyers from the ‘third world’, coming from newly de-colonised states after 1945, have aimed to change the accepted law-making modes in international law in favour of more egalitarian ways facilitating meaningful economic justice, also within the discipline. The introduction of equitable general principles to law was envisaged to come into effect by a series of UN General Assembly Resolutions. Consequently, international lawyers from those countries and others who had sympathy with this project have argued for the law-making character of General Assembly resolutions.¹⁶⁸ This proposition, although hotly debated in the 1970s, had lost its significance at the epicentre of the discipline by the 1990s.¹⁶⁹

difference was the degree of emphasis given to particular issues, cases and interpretations of doctrines.

¹⁶⁵ International Law Academies, such as the Hague International Law Academy, founded in 1923, have served the purpose of providing cosmopolitan fora for international lawyers. These institutions are regarded as highly prestigious, and membership and attendance are regarded as a desirable event for all international lawyers. On the function of this Academy’s Annual General Course on Public International Law, see for example, M. Koskeniemi, ‘Repetition As Reform: Georges Abi Saab, Cours Général de Droit International Public’ 9 *European Journal of International Law* (1998) 405.

¹⁶⁶ G. Tunkin, *Theory of International Law*, (1974) cf. Higgins, *Conflict of Interests: International Law in a Divided World*, (1965).

¹⁶⁷ P. Malanzcuk, *Akehurst’s Modern Introduction to International Law*, (1998) 233-240.

¹⁶⁸ M. Bedjaoui, *Towards a New International Economic Order*, (1979).

¹⁶⁹ D. Otto convincingly argues that the reason that this particular project failed can be explained with the lack of a fundamental critique of modern international law on the part of third world

With the collapse of the Soviet Union, the international legal discipline seems ever more consolidated. There exists a universal international legal discipline and a common vocabulary to address international legal problems, but, still, dominant schools of international legal thought are firmly based in Western countries, theorising about the international law and how it changes. Consequently, when questions of whether an international norm is changing arise, if one wants to understand the inherent dynamics and framework of that change, this could only be located within the dominant *metropolitan* theories that are competing to explain that change. Therefore, analysing the international lawyers who theorise the resistance to and the promotion of change becomes the ultimate formal framework of understanding the concept of change in a particular international law. This understanding of change is clearly from within the discipline. It concerns itself with the expert literature produced for developing proposals for and against change in a particular area of international law.

The community of international lawyers forms the '*ultimate tribunal for truth*' in the investigation of changes in international law. The need for stability and closure within the discipline paves the way for new realignments of understanding contemporary legal phenomena. However, given the continuity of eurocentrism over time and space in international law, theories of knowledge of western thought and legal theory continue to inform how different explanations of change are produced.¹⁷⁰ Consequently, the statement that there is a universally

international lawyers. Their vision aimed to reform international law from *within*, but this vision proved naïve and was subsequently marginalised in Western capitals. D. Otto, 'Sublaternity and International Law: The Problems of Global Community and the Incommensurability of Difference', in P. Fitzpatrick (ed.), *Laws of the Postcolonial*, (1998) 145.

¹⁷⁰ Having said this, it may be argued that the theory and practice of human rights offers an opportunity to transcend the dominant western modern perception of the world, if it is recognised, as Baxi puts it, that 'the authorship of human rights rests with communities in the struggle against illegitimate power formations and politics of cruelty' and that it is the site of

existing community of international lawyers is the outcome of what it is supposed to prove: the universal acceptance of eurocentric international law.

2.4.4 Practical Reasoning during Metamorphosis

Moving away from a supposition of the objective existence of international law to an understanding which defines valid international law as a reflection of the dominant theories, and their authoritative interpretations of what the valid law is also requires rethinking of how concrete international laws are found and applied to concrete events. How are Court decisions, legal opinions and scholarly writings on constantly developing international events are produced? How does theory meet practice and how do laws meet facts in periods of transition?

Practical legal reasoning can be defined as an inquiry concerned with establishing links between particular cases and general laws in the form of formal legal arguments.¹⁷¹ Practical legal reasoning is the translation of life experiences -be it in the form of disputes, cases or simply questions- into the legal sphere. Whoever wants to address an international legal question ought to reason in an acceptable and credible style within the discipline. Therefore it *a priori* requires training in knowing the relevant international legal texts, doctrines and the specialised meanings of the legal language. This requires being able to analytically link the normative and the concrete together and to be able to

local struggles, not universal principles, that give full meaning to the enjoyment and implementation of human rights. This outlook requires much harder work in establishing what are human rights, since, for every instance, the decision has to be made and remade to ensure that not only power, but also universal human rights do not violate *human rights*. For further discussion of this point, see U. Baxi, *The Future of Human Rights* (2002).

¹⁷¹ For treatments of this broad topic, see generally, McCormick, *Legal Theory and Legal Reasoning*, (1979); Panu Minkkinen, 'The Juridical Matrix', 6 *Social and Legal Studies*, (1997) 425; S. J. Stoljar, *Moral and Legal Reasoning*; A. Aarnio and D. N. McCormick (eds.), *Legal*

argue and provide reasons for which facts and which rules, norms, and principles are relevant in a concrete case. The terrain of practical legal reasoning deals precisely with how this match takes place. Practical reasoning in international law can also be characterised as normative problem-solving. This activity is what the majority of international lawyers perform as an everyday function.

In the final analysis, assuming the objective and neutral existence of international law locates questions of legal reasoning in the relationship between laws and facts. There are objectively existing ‘laws’, on the one hand, and observable and verifiable ‘facts’, on the other. The issue then becomes concerned with the framework of ‘fitting’ these two separate categories together in order to reach legally relevant answers to particular questions. The significant dilemma is then to ask which takes priority over the other: do the general laws or the particular facts have more to say on the lawfulness of cases? This dilemma persists not only in periods of change, but also in periods of perceived stability in legal reasoning. Comparative legal theory is known to be divided into two in accordance with this dilemma. While the accounts of civil law tradition, which emanate from the Continental European experience, are regarded to give priority to laws and their statutory interpretation, the common characteristic of common law tradition is to determine the particular facts first in order to establish the applicable law.¹⁷² The first approach suggests a move from the general to the

Reasoning, (1992); L. A. Alexander, *Legal Rules and Legal Reasoning*, (2000).

¹⁷² This oversimplified description of the difference in legal reasoning between continental legal tradition and the Anglo-American legal tradition is, of course, embedded in diverse political theories that have emerged in these geographies. To put it crudely, the liberal idea of the primacy of the individual vis a vis the polity paves the way for the principle that the individual is free to do everything unless it is prohibited. The individual has no emotional attachment to the state and should even reserve the right to ‘take up arms’ against the state to protect itself from it in the extreme manifestation of this outlook. The judge needs to look at every case from the perspective of the primacy of the individual, hence from the point of view of the facts and not the law. However, the Continental tradition regards the state as a conjunction of wills (France) where the

particular and is therefore deductive. The second approach, on the other hand, suggests a move from the particular to the general and is inductive.

The deductive approach is most strongly put forward by Kelsen. As he forcefully articulates, ‘in the realm of law there is no fact in itself, no immediately evident fact; there are only facts ascertained by the competent authorities in a procedure determined by law’.¹⁷³ In turn, the jurist is guided to know the ‘law’ first and then to legally qualify the facts in hand. In practical reasoning, change in the law is not regarded as being affected immediately by the facts, but understood as taking place primarily in the autonomous zone of law. In other words, change first takes place in the realm of law and is subsequently applied to factual events that take place after the change.

The common law tradition, on the other hand, suggests the opposite approach. The valid law is ascertained on a case by case basis, taking into consideration precedents and general principles of law. The jurist is instructed first to fully understand the facts of a case and then to determine the legality of the situation. Therefore, change in the facts is understood to take place independently and before any change in the law. Without first understanding the particularities of an event, the legality of the situation cannot be determined. Contrary to civil law tradition, facts pre-exist the laws.

Even though these two authoritative and rival *formal* understandings of legal reasoning seem to divide the legal culture of western legal theory, the

volk (Germany) refers to more than the sum of the individuals. The individual, by becoming part of the people/*volk*, should be governed by the laws to which it initially consents, hence the continental judge goes from the laws to the facts. For the former perspective, see, T. Paine, *Rights of Man* (edited by Henry Collins, 1977) and for the latter, G. W. F. Hegel, *Philosophy of Right* (translated by T. M. Knox). Cf. H. Berman, *Law and Revolution: The Formation of the Western Legal Tradition* (1983); C. Vanga, *Comparative Legal Traditions* (1992).

¹⁷³ H. Kelsen, *Principles of International Law* (ed. and rev. by R. M. Tucker), 1966, at 388.

common law and civil law traditions, or more generally deductive and inductive forms of legal reasoning, have more in common than it first seems. First, both forms depend on a scientific, disciplined administration: demonstration of proof is the main target. Second, they both presuppose that norms and facts are separable from each other and assume that norms and facts can be objectively discovered. In both civil and common law traditions, legal reasoning is thought to function in three different compartments: a) the law is found and interpreted b) facts are classified c) relevancy of facts and norms are established by deciding what rules are relevant to what facts. The disagreement occurs about the order of these compartments. While the civil law tradition holds that law should be known prior to the facts, the common law tradition suggests that facts exist independently and prior to laws. Third, the role of the jurist in both of these schemes is the role of a visitor entering into the realm of social relations, having the ability to reason in an impartial fashion in matching the laws and facts (or vice versa) of a particular case.

Leaving aside this insistence on the objective existence of international law, and instead suggesting that consensus on the nature of international law is reached through disciplinary mechanisms, also has consequences for the way in which practical reasoning can be understood and theorised. The traditional space looks either to induction or deduction as the ultimate formal explanation of practical reasoning. Understanding international law as a discipline paves the way for regarding these two forms of legal reasoning as representations of tacit disciplinary consensus on how international lawyers should reason. In other words, induction or deduction in normative problem-solving are not ends in themselves, but function as thresholds of formality in a broader background of

reaching a *persuasive account* of how a legal picture of a particular event can be drawn.

International lawyers, coming from different backgrounds of formal training, are judged on the merits of *persuasiveness* and not on the fact that they profess inductive or deductive accounts of a particular event. In this respect, scientific demonstration of proof is secondary and complementary to the background of persuasiveness in the process of normative problem-solving. At times, insisting solely on what the law says despite the facts of a hard case may be more persuasive. At other times, however, legally-qualified facts may be understood as overriding what the general law is, and the community of international lawyers may welcome that account. Whether the events of a particular case point to a violation or a precedent is negotiated within the context of persuasion. Inevitably, while in periods of stability most cases can be seen as ‘easy’ cases, in periods of transition every case is a ‘hard’ case. The negotiation of whether these ‘hard’ cases are violations of the existing law or precedents for an emerging law is actively engaged in the process of transition. In a state of metamorphosis, then, all international lawyers, both theoreticians and practitioners, are actively involved in determining the outcome of the metamorphosis.

The persuasiveness threshold, in this respect, traces the roots of practical reasoning in a broader horizon than that of method of demonstration of proof, as a form of practical reasoning within the classic rhetorical tradition. Rhetoric here does not refer to style or technique¹⁷⁴ of delivery, but more broadly to the investigation of ‘the way in which ideas undergo modification and

organisation'.¹⁷⁵ The rhetorical tradition more accurately exposes the relationship between international legal argument and its disciplinary foundations than the scientific mode of reasoning.

The rhetorical tradition, exemplified by Aristotle,¹⁷⁶ revitalised by Chaim Perelman¹⁷⁷ in legal theory, and more recently discussed with relevance to international law by Frederich Kratochwil,¹⁷⁸ opposes itself to the methods of demonstration of proof by taking issue with the fundamental pre-suppositions of this mode of legal reasoning. The rhetorical philosophical tradition allows us to understand legal reasoning not as demonstrative, but as dialectical. Consequently, the aim of an international legal argument is not to *produce outcomes in an inductive or deductive fashion, but to convince, persuade the audience about a state of legality by using specialised rhetorical techniques*. As Kratochwil states the rhetoric of Aristotle *'is not interested in the physiological ephiphenomena of persuasion'*¹⁷⁹, but rather in the terms and the structure of practical reasoning which occurs within the context of 'persuasiveness'. Unlike a logical argument, the conclusion of a legal argument is not determinative: it is widely accepted among the audience through a process of persuasion. Understanding international legal argument in this manner does not diminish the significance of law or undermine the unique terrain inquiry into law; however, it fundamentally re-organises the way one relates to it. The 'persuasiveness' context understands international legal argument not as an individual effort of

¹⁷⁴ For a discussion of the changes in the function and meaning of rhetoric, see Wilbur Samuel Howell, *Logic and Rhetoric in England 1000-1700*, (1971).

¹⁷⁵ Perelman and Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, (1969) at 65. (Originally published as *La Nouvelle Rhétorique: traité de l'argumentation*, 1958)

¹⁷⁶ Aristotle, *Treatise on Rhetoric* (translated by Theodore Buckley), (1995).

¹⁷⁷ *Supra* note 175.

¹⁷⁸ Kratochwil, *Rules, Norms and Decisions: On the Condition of Practical and Legal Reasoning in International Relations and Domestic Affairs*, (1989).

‘finding the law and applying it to facts’, but as a process which occurs between the arguer and his audience with the aim of persuading.

There are two aspects of the rhetorical tradition that enable the exploration of legal reasoning in a more transparent way: the starting points and presuppositions that enable an argumentation to start (commonplaces) and the uses of technique throughout the argumentation. These two components of rhetoric are intrinsically inter-related. The technique of reasoning involves using general tools such as analogy, precedent, specialised language, reference to international legal texts such as treaties, court cases, and legal opinions.¹⁸⁰ The rhetorical tradition, on the other hand, also recognises that the delivery of an argument is closely related to the theories that enable that argument to ‘start’ in the first place. As Perelman puts, it practical reasoning commences at the point of an agreement on presuppositions:

The unfolding as well as the starting point of the argumentation presuppose the agreement of the audience. Analysis of argument is concerned with what is supposed to be accepted by the hearers. On the other hand, the actual choice of premises and their formulation, together with the adjustments involved, are not without argumentative value. When a speaker selects and puts forward the premises that are to serve as the foundation of his argument, he relies on his hearer’s adherence to the propositions from which he will start.¹⁸¹

Commonplaces are the silent presuppositions of specialised discourses and the contributors of the discourse need to rely on their ‘shared’ nature. The role of commonplaces in legal reasoning is all the more important since international law is a discipline of closure. It aims at stabilising certain judgements and

¹⁷⁹ Ibid at 215.

¹⁸⁰ For a discussion of the technique and the commonplace of international law with reference to the distinction raised by Aristotle, see Korhonen, ‘New International Law Defence of Deliverance’, 7 *European Journal of International Law* (1996) 1.

¹⁸¹ Supra note 175, at 165.

prevents them from being discussed anew.¹⁸² Only when technical arguments seem to exhaust any chance of persuasion or when an event regarded as of enormous importance takes place, such as a disciplinary reform or a ‘paradigmatic shift’; are international lawyers willing to inquire into the commonplaces. However, at other times, international law tries to be a discipline, which is able to close discussion by providing reliable guidelines for behaviour, immediate answers to questions and solutions to problems.¹⁸³

In international legal discipline, the theoreticians guard the commonplaces or the starting points of arguments. Practitioners, on the other hand, are more focused on the technical delivery of the argument. This may, at first, seem to be a perfect division of labour. It may be argued that as long as international lawyers are able to establish a starting point and a persistent commonplace to sustain international legal reasoning, there is then no need to inquire into the nature of the commonplace. In other words, the formal nature of the consensus on the commonplace overrules the questioning of the content of the commonplace. The discipline, which has a claim to sustain communication between states, peoples of different languages, political, cultural, and historical experiences should constantly think about the nature and the various dimensions of the commonplaces of international law. The insistence on the universal, objective and perfectly unproblematic commonplaces of international law is the ‘dark side’¹⁸⁴ of international law that needs to be confronted in search of a better

¹⁸²Ibid at 105.

¹⁸³ See for example, I. Brownlie, *Principles of Public International Law*, (1998).

¹⁸⁴ M. Foucault, *Discipline and Punish: The Birth of the Prison*, (1979) at 194, 222. There is a contemporary, rich and diverse literature on international law, which aims to expose, understand and ‘bring back in’ the dark side of international law using a broad range of theoretical tools and concentrating on a broad range of international legal issues. For a rich compilation of this literature, see *New Approaches to International Law: Bibliography*, (European Law Research Centre, Harvard Law School), (1999).

understanding of the limits and potentials of the discipline. It might be the case that the commonplaces will never be perfect and law will always square the circle, but this should not be a conceptual impasse before familiarising oneself with and understanding the commonplace.

When practical reasoning is located, not within the discussion of whether facts or laws or relevant policy or moral considerations determine the outcome, but within the way in which the discipline produces authoritative interpretations in accordance with the dominant theories at hand, we have a different picture of legal decisions. In periods of stability, where the dominant account of what the law is does not face grand challenges, it would be expected that the nature of the commonplaces or the theories of law do not come into question. The ‘application’ of law seems to be the mode of international law.

In concrete cases during periods of change, however, the challenging theories of law materialise as the conflicting starting points of argument. They become part of the legal reasoning as much as the technical delivery of the legal decision. International law language, the medium of communication that is used by both theoreticians and practitioners of international law, reflects the competing poles of the dominant theories. The interpretation of relevant treaty provisions, presentation of state practice and *opinio juris*, references to authoritative cases, international documents, interpretation of consent, silence, protest on behalf of states or putting into context general principles of international law such as equity or reasonableness may then host conflicting interpretations in accordance with the diversity of starting points. This language, while serving to preserve a relatively consistent legal culture and facilitating a unity of legal discourse during periods of stability, becomes the focal point of

‘rethinking’ in periods of change. Competing theories’ conception and presentation of change in international law inform technical formulations of change with regards to positive laws.

In a state of metamorphosis, the international legal discipline then becomes the ultimate tribunal for change, both at the level of theory and practice. While the theoreticians compete to provide the most persuasive account of how international law changes, the practitioners employ insights from those theories to provide the most persuasive account of how this change can be formulated within the international law language. In analysing a change in a particular norm, then, the availability of the theories, their perception of what the law should include/exclude and how these exclusions/inclusions may be adopted into the legal language should be at the centre of the inquiry.

2. 5 Conclusion

My inquiry into the concept of change in international law has reached its limits. It may be the case that, at some point, this understanding of change will be challenged, critiqued and reformed. However, I cannot foresee the parameters of that challenge, perhaps in the same way that a natural law theoretician of the 14th century could not have foreseen the advent legal positivism.

My understanding of the formal framework of change in this Part started with an investigation of the space that has already been filled by natural, positivist, realist and post-modern theories of international law. These theories, while formulating change, are at the same time explorers of the emerging theories of knowledge in modern philosophy and legal theory of their times and are therefore rooted in fundamental philosophical divergences. While following each other in a chronological order, they do not eliminate their predecessors in an absolute fashion. With increasing and decreasing numbers of supporters, they maintain their presence as ways of understanding change in international law in general, as well as in particular circumstances. The education of international lawyers, as practitioners and theoreticians, plays an important role in how change is formally understood. The traditional schools of thought dominant in national law faculties (did somebody say positivism?) is tantamount to how international law practitioners and theoreticians understand change.

This epistemological move from abstract theories of law to the community of international lawyers to understand change does not undermine the significance of law, it only fundamentally alters the way questions of change

appear. When international law, in abstract or concrete applications, faces the question of change, the relevant questions about change become about the responses to these questions by the community of international lawyers. The question is then not whether the law is changing, but about the international lawyers who talk about change: Who are these people? How do they understand international law? What kind of philosophical, political, cultural, gendered and even personal characteristics do they have? Which positions do they advocate in their understanding of change? What areas of knowledge do they consult in formulating change? What methods, or sources of law do they advocate, prefer, or suggest for explaining change? As it is clear from the prominent existence of international law as a discipline that is highly relevant to the works of national governments, international organisations, and, increasingly, non-governmental groups, the answers to these questions do not represent an unrecognisable chaos. The international legal discipline sustains the unity of itself by presenting one explanation for change as close to universal acceptance, while marginalising others. The authoritative interpretations are valued over less- authoritatively presented ones.

In its broadest sense, therefore, the explanations provided for changing international laws are a 'political' activity. This is not the politics of politicians, but politics within the international legal discipline, conducted within the limits of discipline's own set of rules and specialised language. The formal framework of change and its manifestations in particular laws are invested within the boundaries of the discipline. Both the potentials and limits of change are rooted in the contemporary dominant views flourishing in international law.

In Part II, I take up the concept of change that is developed in this chapter to investigate how change in contemporary international law on intervention can be addressed. In so doing, my focus is on the **dominant problem-solving theories** in international law that have emerged to give a disciplinary account of the contemporary law on intervention. It is only by identifying such theories that it is possible to understand under what conditions the law of intervention is undergoing a period of transition, both at the normative and at the concrete levels of analysis.

In Chapter 3, I identify the leading theories that address the problematic of intervention in its contemporary form, suggesting whether it is/it is not, it ought/ought not be lawful to intervene in the internal affairs of another state.

In Chapter 4, I present the case of Kosovo as an anomaly in the law of intervention, and demonstrate how the language of international law, under the influence of dominant theories, is adapted in order to accommodate resisting or supporting views to change in a concrete situation. This chapter is also indicative of how a single event may transform into a site of struggle to negotiate the scope of change in international law in periods of change.

PART II

THE CASE STUDY: CHANGE AND THE LAW OF INTERVENTION

3. THE NORMATIVE

3.1. Introduction

In this chapter, the law on intervention is presented as a legal problem that international law practitioners and scholars have come to recognise as acute in contemporary international law. In the light of the conception of change, which is laid out in the preceding Part, the aim of this chapter is to identify and discuss the contemporary theories, which offer competing normative guidelines for dominance as to how international lawyers should conduct their normative and factual assessments of the law on intervention. In the following chapter, which forms the second leg of Part II, I shall take up the case of ‘Kosovo’ to investigate how the guidelines provided by these theories affect the validation of law in a concrete situation.

3.2 Problem-Solving International Legal Theories

I shall limit myself to those theories which offer guidelines and problem-solving tools to the community of international lawyers on the law of intervention. By the term ‘problem-solving’ I simply mean that the accounts that will be discussed in this chapter have a strong claim to explaining the legal framework of

intervention within the discipline of international law. These explanations can be descriptive or prescriptive or both. For any given intervention, these theories provide a general theoretical explanation, a convincing world view of legal phenomena and, in turn, a guideline to use the tools, i.e. as the sources of international law, available to international lawyers to determine whether an intervention is lawful or not. This is the ultimate purpose of the problem-solving theories. Problem-solving theories are, in this sense, grand theories; they are not interested in particularities, but in general answers. They do not question the ways in which legal knowledge is produced, but aim to suggest more effective ways of grappling with legal issues. And indeed this is the strength of these theories. They appeal to the practitioners' common sense with accessible language and easily comprehensible principles. They are often categorised as 'mainstream' theories as opposed to 'critical' or as recently called 'new stream' theories of international law due to their interest in the immediate legal knowledge of things rather than the critical knowledge.¹⁸⁵ I do not insist much on the distinction between mainstream or new stream theories. What is of more interest, here, is the problem-solving orientation of international legal theories in general and the respective implications of this orientation for a particular legal problem. Some problem-solving theories can also see themselves as critical in a

¹⁸⁵ See for example Koskeniemmi, 'Pull of the Mainstream', 88 *Michigan Law Review*, (1990) 1946 where T. Meron's treatment of human rights and humanitarian principles as customary international law is qualified as a mainstream problem-solving mode of analysis. For a cogent summary of the differences between 'mainstream' and 'new stream' international legal theory see, D. Cass, 'Navigating the New Stream: Recent Critical Scholarship in International Law', 65 *Nordic Journal of International Law*, (1996) at 341. For a rejection of any meaningful distinction between mainstream and new stream scholarship see Mullerson, *Ordering Anarchy: International Law in International Society*, (2000). For a discussion of how any general mainstream legal theory serves to conceal ideologies and power relations see, Duncan Kennedy, *A Critique of Adjudication: Fin de Siecle*, (1997) esp. at 150. For a proposal of how mainstream ideas should be rethought and reworked by drawing conceptual resources from ideology critique, see S. Marks, *Democracy: The Riddle of All Constitutions*, (2000).

narrow sense since they often criticise what is commonly termed the ‘traditional’ analysis of an international legal issue. However, immediately following this critique is a proposal for reform, innovation, or change in the ‘paradigm’.

What distinguishes a problem-solving theory from other modes of theorising is where its priority of knowledge production lies. A problem-solving theory always has the practitioner of international law in mind as an audience which needs professional, definite and clear guidance in the immediate future.¹⁸⁶ Problem-solving (and often mainstream) theories provide this guidance by giving a universal and comprehensive account of the nature of international law, and creating a legal matrix in order to identify the valid laws and legally relevant facts. Problem-solving theories tell us on what issues to focus and what to regard as legally irrelevant, what is inside and what is outside the discipline. While producing comprehensive and universal solutions to problems, they eliminate other possible solutions that may disturb the legal matrix. Furthermore, problem-solving theories tell us what our legal problems are/should be.

These theories compete for the central role in their specific subject-area of international law. They aim to provide *the authoritative interpretation* of a given piece of law and how that law interacts with facts. The reason that I give a ‘paradigmatic’ status to these accounts is not a subjective evaluation on my side, but a subjective evaluation on their side. These theories have a hegemonic approach while informing the audience about what laws/facts are, which laws/facts do matter and which laws/facts do not. They seek to provide more answers than criticisms –except that they criticise each other to undermine the

¹⁸⁶ David Kennedy, ‘When Renewal Repeats: Thinking against the Box’, 32 *New York University Journal of International Law and Policy*, (2000) at 335.

relevance of the other. These theories are candidates to shape the dominant discourses in international law.

Defining problem-solving theories in the above manner serves as a threshold of exclusion for omitting certain approaches from the framework of analysis. That is, I do not pose the question of what all the possible theoretical approaches may say about the law of intervention. It may indeed be possible to make a list of theories, approaches and explore how they approach the legality of intervention. Such an evaluation may be a study along the lines of a ‘jurisprudence of intervention’.¹⁸⁷ I am instead interested in how the dominant theories understand the law and the way it changes since I locate the formal framework of change at the heart of disciplinary realignments for the authoritative accounts of change. Therefore, even though the approaches excluded here do offer insights into the problem of intervention, they do not yet offer encompassing grand theories of a universal explanation of the law on intervention, satisfying the immediate needs of the ‘practitioner’ for general and encompassing answers.¹⁸⁸

Another exclusion takes place by not adopting a historicist perspective towards the classification of problem-solving theories. I do not start from, say, the 19th century and try to rewrite the law on intervention and how its theorized up until the contemporary times.¹⁸⁹ My interest lies in the theories that exist *here*

¹⁸⁷ For a study conducted along these lines, see, for example, N. Tsagourias, *The Jurisprudence of International Law: The Humanitarian Dimension*, (2000).

¹⁸⁸ It is indeed possible to investigate how feminist legal theories, post-colonial theories, race theories, law and economics, law and society, Latin American Critics of law, post-modern legal theories, law and literature, Islamic legal theories, to name a few, for example, understand and theorise the law of intervention. However, such a study is beyond the scope of this thesis, since the main inquiry of this study is to locate the contemporary problem-solving theories that are actively engaged in offering a comprehensive solution to the problematic of ‘change and the law of intervention’.

¹⁸⁹ For such a comprehensive account of intervention, see S. D. Murphy, *Humanitarian*

and now, even though they may be reminiscent of theories in the time scale.¹⁹⁰ In this respect, I have a pragmatic approach in classifying and analysing the problem-solving theories on intervention. My interest lies in the contemporary grasp of dominant problem-solving theories of intervention and how they position themselves towards ‘change’.

3.3 Locating Contemporary Problem-solving Theories on Intervention

Legality of intervention debate in international law is a structured debate. The change in international law on intervention centres around whether non-intervention is the basic rule that may allow a limited number of exceptions to it, or whether certain forms of interventions themselves are competing basic rules with the principle of non-intervention. This framework draws the boundaries of the dominant ways of production of legal knowledge and is fundamentally informed by theories of liberalism in international legal theory.¹⁹¹ Liberalism(s) in international legal theory in this thesis refers only to one limited aspect of the broad and all encompassing liberal tradition¹⁹²: that is, the presupposition made about the main agents (subjects) of international law. The question of intervention involves demarcating the ultimate indivisible complete subject, which should be protected from harm. The law is founded upon protecting this

Intervention: The United Nations in an Evolving World Order, (1996).

¹⁹⁰ See for example, Section 3.3.4 on Kantian international law and the parallels between natural law theories.

¹⁹¹ For an elaborate discussion of liberalism(s) and international law, see G. Simpson, ‘Two Liberalisms’, 12 *European Journal of International Law* (2001) 537.

¹⁹² On the liberal tradition in general, see, H. J. Laski, *The Rise of European Liberalism* (1962); M. Sandel, *Liberalism and Its Critics*. For a contemporary liberal theory, Rawls, *The Law of Peoples* (2000).

central subject¹⁹³. Becoming a subject of international law opens the gateway to safeguards against forceful intervention.

This chapter argues that the question of change in the law of forceful intervention in the internal affairs of a state is a clash between two co-existing forms of liberalism in contemporary international law which either take the state or the individual as the nucleus – and therefore the main subject- of its liberal theory.¹⁹⁴ Thus, the main issue in the changing laws of intervention is whether international law should side with the state or the individual in this debate. Siding with the state requires the legal protection of the state from intervention. Siding with the individual, on the other, theoretically supports the principle of ‘non-intervention’ with respect to individuals, whilst opening the doors of intervention to the internal affairs of a state. It is precisely this clash of *liberalisms* that initiates the period of metamorphosis in this area of international law. Thus, right at the outset, the question of change is limited to the parameters defined by these particular worldviews that present themselves as the universal way of understanding the fundamental problems lying at the root of the change in the law of intervention. I take the location of this knowledge as given: to enter a discipline is to accept to work with the pre-existing concepts of the discipline.

I shall identify four accounts of contemporary law on intervention. These accounts are **traditional positivism, modified positivism, Kantian**

¹⁹³ This logic, in this sense, is not unique to the intervention debate, all modern law is based on protecting its subject (i.e. the legal persons such as the property owner, diplomatic staff, shareholder, civilian, prisoners of war) from outside intrusion by regulating their legal rights and duties, and rejecting to grant protection to other entities by refusing to grant them the status of a legal subject (i.e. to a certain extent the indigenous people, colonised lands).

¹⁹⁴ That is why the contemporary theories of intervention exclude other possible conceptual grounds for intervention from discussion, for example intervention to protect collective polities such as a nation, a people, a minority, a class, a race, a gender specific community, or children.

international law and **liberal international law**.¹⁹⁵ As it will be demonstrated in the course of this chapter, these four accounts provide universal guidelines for when and why interventions are legal or illegal in international law. The traditional positivist account of the law on intervention, which takes the state as the nucleus of international law, is the theory which has successfully sustained the stability of the discipline to questions of change in the law of intervention prior to 1990s despite the challenges raised against it previously.¹⁹⁶ That is why it is qualified as ‘the traditional account’. The other three accounts, on the other hand, emerge as the challengers to the closure of law sustained by the traditional positivism in the contemporary era, by suggesting a shift from the state to the individuals living in that state as the competing onto-legal foundations of international law in understanding the law of intervention. They are ‘new’ theories in the sense that they have been articulated in the 1990s, but they are old in the sense that they resemble previous challengers, which were marginalised by the traditional account.

The genesis of the traditional positivist account of intervention can be traced back to the European positivist international legal tradition, which centres on the egalitarian plurality of states at the core of its analysis. The three challenging accounts emanate from the other side of the Atlantic –the USA-. That is to say, while the circulation of traditional positivism in the discipline has started in Europe, it is the American international law thought where the circulation of new conceptual resources initiates. This is, of course, not to say

¹⁹⁵ The titles of these accounts are attributed by the author. For further discussion see the relevant sections.

¹⁹⁶ See, generally, Lillich, *Humanitarian Intervention and the United Nations* (1973) and Franck and Rodley, ‘After Bangladesh: the Law of Humanitarian Intervention by Military Force’, 67 *American Journal of International Law* (1973) 275.

that all international lawyers educated in the European tradition are traditional positivists and all international lawyers educated in the American tradition subscribe to challenging contemporary accounts on intervention. The point, here, is more about the origin of the theories, which then makes its way around the globe as universal and abstract theories.

All three challenging accounts instrumentally use the *is* and *ought* categories discussed in Part I to account for the changes introduced to law. Modified positivism explains change within the framework of the positivist dichotomy of *is* and *ought*. Kantian liberalism opts for the natural unity of *is* and *ought* and liberal international law favours the fallacy of *is* and *ought* as a meta-theoretical framework for explanation of change in the law of intervention.

In terms of pinning down the fundamental framework of traditional positivism I shall refer to the works of many positivist international law scholars.¹⁹⁷ I will discuss the ‘modified positivism’ approach by relying on the

¹⁹⁷See generally the positions in, I. Brownlie, *Principles of Public International Law*, (5th ed., 1998); I. Brownlie, ‘International Law in the Context of Changing World Order’, in *Perspectives on International Law*, Jasentuliyana (ed.), (1995) 49; I. Brownlie, *International Law and the Use of Force by States*, (1991); I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, (1998); I. Brownlie, ‘Thought on Kind-hearted Gun Men’, in *Humanitarian Intervention and the United Nations*, Lillich (ed.), (1973) 139; T. Farer, ‘Intervention in Unnatural Humanitarian Emergencies: Lessons of the First Phase’, 18 *Human Rights Quarterly*, (1996) 1; T. Farer, ‘Humanitarian Intervention: The View from Charlottesville’, *Humanitarian Intervention and the United Nations*, Lillich (ed.) (1973) 149; L. Henkin, *How Nations Behave*, (1968); L. Henkin, *International Law: Politics and Values*, (1995); H. Kelsen, ‘Collective Security and Collective Self-Defense under the Charter of the UN’, 42 *American Journal of International Law*, (1948) 783; V. Lowe, ‘The Principle of Non-intervention: Use of Force in *Lowe V* and *Warbrick C.* (ed.), *The United Nations and the Principles of International Law*, (1994) 66; E. Lauterpacht, (ed.), *International Law: Being in the Collective Papers of Sir Hersch Lauterpacht*, (1978); P. Malanczuk, ‘The Kurdish Crisis and Allied Intervention in the Aftermath of the Second Gulf War’, 2 *European Journal of International Law*, (1991) 114.; P. Malanczuk, *Akehurst’s Modern Introduction to International Law*, (1997); P. Malanczuk, *Humanitarian Intervention and the Legality of the Use of Force*, (1993); O. Schachter, *International Law in Theory and Practice*, (1991); O. Schachter, ‘The Decline of the Nation State and its Implications for International Law’, 36 *Columbia Journal of Transnational Law*, (1997) 7; O. Schachter, ‘Self Defense and the Rule of Law’ 83 *American Journal of International Law*, (1989) 307; O. Schachter, ‘The Legality of Pro-democratic Intervention’, 78 *American Journal of International Law* (1984) 645; B. Simma, (ed.), *The Charter of the United Nations: A Commentary*, (1994).

works of Thomas Franck,¹⁹⁸ the ‘Kantian’ approach on the basis of the works of Teson¹⁹⁹ and the ‘Liberal International Law’ approach on the basis of the works of Slaughter²⁰⁰.

In the following sections of the chapter, I critically discuss these contemporary problem-solving accounts. The aim is to discover a) to what kinds of fundamental theoretical foundations they can be traced back, b) how they use and represent distant and recent history of interventions in their paradigms, and c) what kinds of law identifying or creating methods they most rely on in order to guide the practitioner in terms of establishing the legality of particular interventions. Finally I shall discuss how these theories stand in relation to each other.

The ‘theory’, ‘history’ and ‘sources of law’ aspects of these four accounts demonstrate how stable and credible accounts of resistance to or promotion of change are produced in international legal language. This three-faceted analysis also makes it possible to see how these four accounts differ from and resemble each other, both in general and in detail. Fundamental theoretical foundations

¹⁹⁸T. M. Franck, ‘Is Justice Relevant to the International Legal System’, 64 *Notre Dame Law Review* (1989) 945; T. M. Franck, ‘The Emerging Right to Democratic Governance’, 86 *American Journal of International Law* (1992) 46; T. M. Franck, *Fairness in International Law and Institutions*, (1997); T. Franck, *The Empowered Self: Law and Society in the Age of Individualism*, (1999).

¹⁹⁹ F. R. Teson, ‘Humanitarian Intervention: An inquiry into law and morality’, (1997); Teson, *A Philosophy of International Law*, (1998); F. R. Teson, ‘Collective Humanitarian Intervention’, 17 *Michigan Journal of International Law*, (1996) 323; F. R. Teson, ‘International Abductions, Low Intensity Conflicts and State Sovereignty: A Moral Inquiry’, 31 *Columbia Journal of Transnational Law*, (1994) 551.

²⁰⁰ A. Burley Slaughter, ‘Law and the Liberal paradigm in International Relations Theory: International Law and International Relations Theory: Building Bridges’, 86 *ASIL Proceedings*, (1992) 180; A. Burley Slaughter, ‘International Law and International Relations Theory: A Dual Agenda’, 87 *American Journal of International Law*, (1993) 205; A. M. Slaughter, ‘International law in a World of Liberal States’, 6 *European Journal of International Law*, (1995) 503; A. M. Slaughter, ‘Liberal International Law Theory and International Economic Law’, 10 *American University Journal of International Law and Policy*, (1995) 717; A. M. Slaughter and A. Tulumello and S. Wood, ‘International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’, 92 *American Journal of International Law*, (1998) 367; A. M. Slaughter, ‘A Liberal Theory of International Law’, 94 *ASIL Proceedings* (2000) 240.

refer to the worldview that informs the interpretation of positive laws. They highlight how law is linked and differentiated from political and moral accounts, how interdisciplinarity is used to negotiate what is accepted into law and what is identified as outside of it. In this respect, the ‘theory’ behind the law has an important part to play in qualifying ‘violations’, ‘exemptions’, and ‘exceptions’ to international law.

In the widest sense, all international legal theories use ‘history’ to support the conceptual framework that the theory creates to analyse facts. There is a mutual and dynamic relationship between history and theory in terms of a particular question of international law. As Korhonen explains, the ‘international jurist is not situated in any middle ground towards history. She uses and abuses history in different ways, negotiates continuity and change.’²⁰¹ This instrumentalist use of history is significant when international lawyers offer a grand narrative of where the law comes from and where it goes. In periods of change, the role of the representation of history becomes even more significant because one way of changing what the law says is changing the interpretation of history. As Morgan puts it, ‘one can be persuaded of an alternative doctrinal past and future, because there are multiple possibilities embedded in the doctrinal past’.²⁰² If one starts to change the way in which past cases and events may be understood, the understanding of the present state of legal affairs is also bound to change.

²⁰¹ Korhonen, *International Law Situated: An Analysis of the Lawyers Stance Towards Culture, History and Community*, (2000). See, also, P. Allot, ‘International Law and the Idea of History’ 1 *Journal of the History of International Law* (1999) 1.

²⁰² E. Morgan, ‘Reconsidering the History of International Law: From Marienbad to Worse in International Law’, 13 *Hague Yearbook of International Law*, (2000) at 10.

The representation of history in the area of intervention is also of particular importance since the law on intervention heavily relies on analogy and precedent to sustain the unity of law in this area. Uses of unilateral and multilateral forces in distant and recent history are analysed in terms of pre-Charter period²⁰³, post Charter period²⁰⁴ and post Cold War period²⁰⁵ in the discipline. The ways in which the problem-solving theories connect these three periods are instructive in explaining which events are qualified as precedents, and what kinds of analogies may be drawn between various interventions, both temporally and spatially. In this respect, linking a series of interventions within a matrix of international law leads the international lawyer to create a disciplinary account of the history of intervention. This account is independent from the historical accounts that are created by historians and may even be in contradiction with these accounts. The ultimate reference point, here, is the legal matrix, and not any historical matrix. Therefore, the representation of ‘history’ can effectively be used both as a resistance to change and a promoter of change by problem-solving theories.

²⁰³ The most common pre-Charter period interventions studied as having legal significance involve the shrinking of the Ottoman Empire in the nineteenth century and the interventions carried out by the Concert of Europe powers in favour of Christian peoples of the Ottoman territory. International lawyers consider the British, French and Russian intervention in the Greek uprising (1827); French intervention in Syria (1860); Russian intervention in Bulgaria and Bosnia Herzegovina (1877) as instances of legal significance. The American intervention in Cuba (1898) is also sometimes added to the list.

²⁰⁴ Post Charter period usually refers to the interventions of Israel in Uganda (1976); Tanzania in Uganda (1979); French intervention in Central Africa (1979); intervention of India in East Pakistan (1971); intervention of the USA in Grenada (1983) as possible candidates for having legal significance.

²⁰⁵ Post-Cold War period interventions usually includes the ECOWAS intervention in Liberia (1990); Coalition of Allied powers intervention in Iraq (1990); Intervention of US, UK and Canada in North Iraq (Operation Provide Comfort) (1991), interventions in the Federal Republic of Yugoslavia from 1992 to 1995 (up to Dayton Peace Agreements of 1995); intervention in Somalia (1992); intervention in Rwanda (1994); intervention in Haiti (1994); intervention in Albania (1999); intervention in Kosovo/Federal Republic of Yugoslavia (1999); intervention in East Timor (1999); ECOWAS intervention in Sierra Leone (1999).

Finally, the uses of ‘sources’ refer to the ways in which international treaty law –in this case exclusively the UN Charter- customary international law, the general principles of law, jurisprudence, and restatements of law are used to present what the law is in the area of intervention.²⁰⁶ As will be discussed, the theory and interpretation of history becomes ‘hard law’, ready for the use of the practitioner, only in its manifestations as the interpretation of treaty law and general international law supported by subsidiary sources. The uses of sources of international law by problem-solving theories concern themselves both with law ascertainment and law creation.²⁰⁷ A definitive account of change is not complete until it is presented persuasively within the legal lexicon. A legal analysis of change has to point out where in the positive laws this change can be accounted for by making credible professional statements about the law. The problem-solving theories, in this respect, provide tools of practical reasoning and inform international lawyers on how to deliver value judgements in a technical form. The moment of legal decision on intervention includes, all at the same time, inherent theoretical presuppositions, a legal-historical construction of interventions and their manifestations as interpretations of treaty law and customary international law.

²⁰⁶ Article 38 of the ICJ Statute of the International Court of Justice, which was initially designed as a procedural guideline for the Permanent Court of International Justice is referred to as the authoritative list of the sources of international law. As this well-known Article states:

‘The Court whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

(a) International conventions whether general or particular, establishing rules expressly recognised by the contesting states;
 (b) International custom as evidence of a general practice as accepted as law;
 (c) The general principles of law recognised by civilised nations;
 (d) Judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of the rules of law.’

²⁰⁷ On how traditional sources doctrine grapples with this twin question of law verification and

3.3.1 The Traditional Positivist Account of Intervention

Legal positivism is very commonly used as a label for a very wide spectrum of theories, which are constantly in the process of reconstructing themselves.²⁰⁸ As also discussed in Part I, the starting point of a positivist analysis is the law, or, more precisely, the valid law which can be established through the formal sources proscribed in a given legal system. In international law, positivism is the study of law, the validity of which can be traced to the consent of states in explicit or implicit forms. Positivism, in turn, manifests itself in international law both as a theory of substance and a theory of form.

The sovereign state is the foundation of the substantive positivist project. International law rests on the consent of states and consists of rules, which states agree to apply in their relations with one another. For the substantive theory of positivism, the principle of non-intervention is a natural by-product of this fundamental substantive premise. The formal theory of positivism, on the other hand, sees consent in a more instrumental form. In this respect, states may also consent to intervention in the internal affairs of a state. The formal aspect of positivism is not based on *a priori* absolute principles *per se*, but on locating the

law creation, see R. Y. Jennings, 'What is International Law and How do we tell it when we see it', 37 *American Journal of International Law* (1981) 59.

²⁰⁸ For the most affluent formulations of legal positivism, see H.L.A. Hart, *The Concept of Law*, (1961); Kelsen, H., *Principles of International Law* (revised and edited by Robert F. Tucker, (2nd edition, 1966). For recent discussions of legal positivism in general theory of law, see, V. Villa, 'Legal Theory and Value Judgments' 16 *Law and Philosophy*, (1997) 447; H. M. De Jong, W. G. Werner, *Continuity and Change in Legal Positivism*, 17 *Law and Philosophy*, (1998) 233. For various ways of application of legal positivism to international law, see, G. Scharwarzenberger and E.D. Brown, *A Manual of International Law*, (6th edition., 1976); R. Jennings, 'The Identification of International Law' in *International Law: Teaching and Practice*, Cheng (ed.), (1982) 3; P. Weil, 'Towards Relative Normativity in International Law', 77 *American Journal of International Law*, (1983) 413; B. Simma and A. Paulus, 'The Responsibility of Individuals for Human rights Abuses in Internal Conflicts: A Positivist View', 93 *American Journal of International Law*, (1999) 302; P. M. Dupuy, *The Unity of International Law: General Course on Public International law*, Recueil des Cours, 2000 (forthcoming).

principles in respect of which consent is given. There is an inevitable conflict between substantive and formal positivism, since while the former puts greater emphasis on the upholding of the principle of non-intervention as the *grundnorm* of international law, the latter is more interested in a careful study of the actual behaviour of states, which may also prove to change the principle of non-intervention. As will be discussed below, substantive positivism has been more dominant than formal positivism in evaluating the legality of intervention in the traditional analysis.

The positivist project of international law is now widely understood as a projection of the growth of liberal thought in the 19th century on to the international plane. As Krasner explains, ‘The classic model of international law is a replication of the liberal state. The state treated at the international level as analogous to the individual at the national level. Sovereignty, independence and consent are comparable with the position that the individual has in the liberal theory of state.’²⁰⁹ With regards to the law on intervention, the liberal ‘analogy’²¹⁰ drawn between the individual and the state leads to the understanding that international law is based on the equality and consent of states. This establishes the core of the traditional positivist account. The state in positivism is the individual in the liberal theory.²¹¹ The notion of state predates

²⁰⁹ S. D. Krasner, *Sovereignty: Organised Hypocrisy*, (1999) at 14.

²¹⁰ In general see, J. Bodin, *On Sovereignty*, (1992), T. Hobbes, *Leviathan*, (1968); M. Wight, *Systems of States*, (1977), H. Bull, *The Anarchical Society*, (2nd ed., 1995); R. Jackson, *Quasi States: International Relations and the Third World*, (1990); J. Bartelson, *The Genealogy of Sovereignty* (1995).

²¹¹ For a discussion of the ‘liberal analogy’ see, H. Lauterpacht, *Private Law Sources and Analogies of International Law* (1970); Koskeniemi, *From Apology to Utopia*, (1989); G. Simpson, ‘Imagined Consent: Democratic Liberalism in International Legal Theory’, *Australian Yearbook of International Law*, (1995) 103. See also the analogy that Kratochwil establishes between sovereignty and private property rights under Roman private law, Kratochwil, ‘Sovereignty as *Dominium*: Is There a Right of Humanitarian Intervention?’ in Lyons and Mastanduno (eds.), *Beyond Westphalia? State Sovereignty and International Intervention*,

international law as a moral and political entity.²¹² International law, then, regulates relations between already existing states. The founding text of Emerich Vattel (1714-1759) still has an authoritative contemporary presence for the way in which traditional positivism is understood in international law:

Nations being comprised of men naturally free and independent, and who before the establishment of civil societies lived together in the state of nature; nations or sovereign states must be regarded as so many free persons living together in the state of nature; and since men are naturally equal, so are states; strength and weakness produce in this regard no distinction.²¹³

Many fundamental principles of international law can be traced back to this analogy. As the freedom of an individual cannot be invaded, the state also has a core zone of freedom, which is immune from external intervention. Violence in domestic law is replicated by the use of force in international affairs. As harm to an individual is unacceptable in liberal thought, violating the unity (territorial and political) of a state is intolerable in international law. The right to self-defence for states implies the existence of an autonomous personhood of the state as the self.

The traditional positivist theory maintains this fundamental analogy at two-levels. The first level is the single state level, where the traditional account sets out what a single state and its rulers should regard as inadmissible and illegal in

(1995) 21.

²¹² As discussed in Chapter 2, positivist theory of international law is a fundamental break from the naturalist theories of international law, which regards the state as born into a system of international law that predates the state and governed by principles of natural law.

²¹³ Vattel, *Introduction*, reproduced in Brierly, *The Law of Nations: An Introduction to the Law of Peace*, (1929) at 30. Compare this statement for example, with a more recent restatement made by L. Henkin, 'With much *mutandis mutandis*, states are to be seen like individuals in the state of nature. Like all men (and women), all states are equal, equal in status and rights (as well as duties). Like individuals, states have 'personhood' including moral status and 'will'..... A State has a right to liberty, to internal autonomy, and to be let alone...A state also has the right to property, including its territory, which implies territorial integrity'. L. Henkin, 'The Mythology of Sovereignty' in *The Challenge of a Changing World*, 21 Proc. Canadian Council on

their conduct of international affairs. Decisions of self-defence and self-preservation are given subjectively by states themselves. The state is the sole decision-maker in protecting itself both physically and physiologically from external and internal threats. The second level is the level of the international legal order as a whole, where non-intervention becomes a principle which all states should respect in their relations with each other, and furthermore protest the breach of, even if they are not directly affected by that breach. The protection and preservation of the state has been objectively institutionalised by the advent of the UN Charter in 1945. The UN Charter aims to effectively remove the protection of the liberty of states from the hands of states themselves and articulates it as an objective international legal principle governed and guarded by international law. The principle of non-intervention, and the right to self-defence still exist as the fundamental principles of the liberal analogy, however the states' discretionary power to use these rights when they deem necessary is limited by an institutional framework.²¹⁴

The tension between the state level (subjective evaluation) and the international legal order level (objective evaluation after the UN Charter) of traditional positivism has not been exhaustively resolved in the theory or practice of positivism (neither is it resolved in liberal theory itself).²¹⁵ The allocation of value to state sovereignty and the recognition that it should be protected from

International Law (1992) at 18.

²¹⁴ See for example the duty to report to the Security Council upon the exercise of the right to self-defence and the time limitation put on the exercise of self defence as 'until the Security Council has taken measures necessary' as enshrined in Article 51 of the UN Charter.

²¹⁵ I. Berlin in his classical essay, *Two Concepts of Liberty* discusses this inherent tension of liberalism. He poses two distinct and at the same time interrelated questions: 'What is the area within which the subject—a person or a group of persons—is or should be left to do or be what he is able to do and be, without interference by other persons?' and 'What or who, is the source of control or interference, that can determine someone to do or be, one thing rather than another?' I. Berlin, *Two Concepts of Liberty* (1958) at 6.

outside intrusion flows naturally from a positivist conception of the state as constituting the main object of international law. However, the positivist conception of sovereignty cannot definitively guarantee that this principle will not be abused by states themselves. An institutional regulation of this principle, on the other hand, poses the danger of limiting the inherent liberty of states. In the liberal framework, too much law may always run the risk of being bad law. Even the text of the UN Charter hosts these tensions as exemplified by codifying the right to self-defence in article 51 of the UN Charter as well as recognising its ‘inherent’ nature.²¹⁶ Positivism operates in the midst of the tension posed by the virtues of lack of regulation and merits of regulation.²¹⁷

In the traditional positivist theory of international law, sovereignty is the legal condition of states.²¹⁸ This normative logic of international legal sovereignty requires a basic prohibition on foreign intervention. Brierly identifies the basic norms of sovereignty as ‘self- preservation, independence, equality, respect and intercourse’.²¹⁹ These basic norms divide the world into territorial units that are functionally and juridically independent from each other. According to these basic norms, the emphasis is rather on the external sovereignty of states. Sovereign states need to be in order to be independent from

²¹⁶ The crucial question here is whether the UN Charter can ever effectively regulate a right which it itself recognises as an ‘inherent’ right, therefore leaving the room open for subjective evaluation on the ways in which this right can be exercised?

²¹⁷ This could be why the 75 year-old judgement in the *SS Lotus Case* has captured the imagination of many international lawyers. When the Court in this case decided that Turkey had jurisdiction to prescribe and enforce criminal law in relation to a French officer when a French merchant vessel struck to a Turkish vessel on the high seas killing a number of Turkish nationals, its reasoning suggested that states are free to act when there are no prohibitive rules of international law. In other words, this case is the materialisation of freedom of action in the absence of explicit prohibition and absence of prohibition without explicit consent. The *SS Lotus Case*, *PJIC Reports Series A, No 10 (1927)*.

²¹⁸ In this aspect positivism shares the common foundational assumption with many of the theories of international relations, such as realism and insitutionalism. For a discussion of this similarity, see Section 3.3.5.

²¹⁹ Brierly, *The Law of Nations*, (1938) at 40.

each other. The normative logic of ‘constitutional independence’²²⁰ requires that sovereign states should not intervene in the internal affairs of each other.

The general prohibition on intervention is the other side of the coin for the sovereignty doctrine, on which substantive traditional positivism is based. It should however be mentioned that traditional positivism has a negative conviction about the lack of any other credible framework for understanding intervention as much as it has a positive conviction on the primacy of the principle of non-intervention. The positive support is drawn from the liberal analogy. States, and only states, are full and complete subjects of the law and should be protected from outside intervention. The negative support, on the other hand, refers to the lack of any other alternative to this theoretical framework. Formulating competing principles of intervention would only lead to chaos and more violence on the international level. In the state of nature, that is the lack of a central world government, states cannot be trusted to intervene solely out of legal obligation. Their political motives cannot be inseparable from principled lawful intervention. That is to say, traditional positivism does not regard itself as a theory doing injustice to individuals. The principle of non-intervention is a safeguard for political abuse, double standards and the possibility of counter interventions. It indirectly protects the individuals by preserving a world order centred around the principle of non-intervention.

²²⁰ A. James, *The Practice of Statehood in Contemporary International Society*, 47 *Political*

3.3.1.1 The Rule and the Exceptions Matrix

The traditional positivist account *prima facie* favours the principle of non-intervention in the internal affairs of states. This principle constitutes the foundation of the theoretical outlook on international law. It is not merely a law to be found by analysing the practice of states. Therefore, non-intervention is the norm, and any form of intervention can only be discussed within a framework of 'exceptions'. Following this line of thought, any proposition arguing for a legality of some form of intervention would be subject to rigorous tests (i.e. whether it is a lawful exception) and debates among subscribers to the traditional approach. If the suggested tests are not met successfully, the proposition will be marginalised, qualified as *de lege ferenda*²²¹, 'minority opinion'²²² or simply false by the supporters of this account.

Understandably, the traditional theory is not keen on having many exceptions to its principal rule. The problem with exceptions generally is the great risk of abuse, the countless attempts to enlarge the exception, various ways of interpretation and the danger of the frequent recourse to exception harming the normativity of the general rule itself. The most commonly proposed theoretical exceptions to non-intervention within the framework of the traditional account have been intervention by invitation, self-defence, intervention to protect one's own nationals and humanitarian intervention. Among these exceptions, the traditional theory of positivism seems to be more comfortable with the

Studies, (1999) 457.

²²¹ See for example, P. Malanczuk, *Humanitarian Intervention and the Legitimacy of the Use of Force*, (1993) at 31.

²²² I. Brownlie, *The Rule of Law in International Affairs: International Law at the Fiftieth Anniversary of the United Nations*, (1998) at 206.

exceptions of intervention by invitation and self-defence; the other two proposed exceptions are *theoretically* more problematic. Intervention by invitation ought to be defended by the theory due to the primary status of state consent. Self-defence on the other hand is the natural consequence of the primacy of self-preservation and protection.

Intervention by invitation is a strongly supported exception, since if a state invites another state to intervene in its domestic matters, this act does not qualify as an intervention as such. If understood that way, intervention by invitation can be regarded more as a rule-based exemption. The traditional account is more concentrated on establishing the authenticity of the invitation and the authorities that extended the invitation than the idea of invitation itself.²²³ Thus, if it is proven that the legitimately established government makes the invitation, the intervention of the invited government is thought to be legal. Of course, even though the theory supports this position, the practice of this exception is often problematic and open to abuse by intervenors as suggested by the literature on the legality of interventions such as the Soviet military intervention in Hungary (1956), Czechoslovakia (1968), and Afghanistan (1979)²²⁴ and American military intervention in the Dominican Republic (1965)²²⁵ or Grenada (1983)²²⁶.

²²³ It has been brought to the attention of international lawyers that invitation has also been sought or extended even in cases where the Security Council has authorised enforcement actions under Chapter VII of the UN Charter. The twin existence of both an invitation and a Security Council authorisation also leads the question of whether the intervention is governed by the UN collective security mechanism or by the principles of collective self-defence of individual states. In the case of the response to the invasion of Kuwait by the coalition powers, it has been debated whether this action ultimately derived its legitimacy from the invitations by Kuwait for collective self-defence or UN Security Council enforcement action. In the cases of Somalia (SC Resolution 733; 794), Haiti (SC Resolution 940); Albania (SC Resolution 1101), the invitation of the government is represented as a supplementary base for legitimacy, even if it is not needed for Chapter VII interventions.

²²⁴ R. Mullerson, 'Intervention by Invitation' in *Law and Force in the New International Order*,

Self-defence is the next theoretical exception since sovereign states have the right to protect themselves. This again is not seen as a form of intervention itself, but as a reaction to unlawful intervention, mostly phrased as aggression. Ideally, states do not need to resort to self-defence since an armed intervention in their affairs is legally an unexpected phenomenon. Even though, as in the case of intervention by invitation, this exception is a natural extension of the traditional positivist theory itself, in practice it faces difficulties of application. The theory is required to give sustainable answers to questions such as under what conditions self-defence starts, how it can be carried out and when it ends. Conceptual categories such as anticipatory self-defence, preventive self-defence, or collective self-defence are all by-products of the search for clarification of the boundaries of the right. The theory also needs to clarify whether the right to self-defence may apply when a state invokes it in defence of its nationals and property outside its territory and when it is invoked against a non-state entity. The right to self-defence has the potential to make many different forms and magnitudes of intervention legal, and the role of the traditional account is to strike a 'balance' in the process of legitimising interventions in the guise of self-defence.²²⁷

Damrosch and Scheffer (eds.), (1991) 127.

²²⁵ J. Carey (ed.), *Dominican Republic Crisis 1965*, (1967).

²²⁶ W. Gilmore, *The Grenada Intervention: Analysis and Documentation*, (1984); M. Levitin, 'The Law of Force and the Force of Law: Grenada, the Falklands and Humanitarian Intervention', *27 Harvard International Law Journal*, (1986) 621; S. Chesterman, 'Rethinking Panama: International Law and the US Invasion of Panama, 1989', in *Reality of International Law*, Guy, Goodwin- Gill and Talmon (eds.), (1999) 57.

²²⁷ Schachter, 'Self Defence and the Rule of Law' *83 American Journal of International Law*, (1989) 307; Alexandrov, *Self-defence against the use of force in International Law*, (1996); Arend and Beck, *International Law and the Use of Force*, (1993); Brownlie, *International Law and the Use of Force by States*, (1963); Butler, W. E., (ed.), *The Non-use of Force in International Law*, (1989); Cassese (ed.), *The Current Legal Regulation of the Use of Force*, (1993); Y. Dinstein, *War, Aggression and Self Defense*, (1994).

Intervention for the protection of nationals abroad without the consent of the host government is another articulated category of exception. In effect, this is a category that stands between self-defence and humanitarian intervention. The theory itself does not offer clear guidelines as to whether this exception can be seen as part of self-defence, which requires emphasising the link between the state and the people who are rescued, or as ‘humanitarian’ intervention, which requires the emphasis to be placed on the nature of the operation. Since the theory is not clear, the international lawyer, for every case that occurs in practice, has first the task of justifying or denouncing the exception itself. Secondly, if the argument favours the existence of the exception, it needs to be proved whether the specific instance is lawful in accordance with the exception or not.²²⁸

The last proposed exception to non-intervention is humanitarian intervention, which is defined as intervention to halt the human suffering of the nationals of another state –and in its contemporary formulation to put an end to gross human rights violations without the consent of the host state. The core question is whether protecting human rights of the nationals of another state does ‘issue a general licence’²²⁹ for intervention. The traditional positivist theory, in essence, is silent on the issue of how this question can be answered. Unlike intervention by consent or self-defence, the conceptual category of humanitarian intervention does not have a self-explanatory character within the limits of the theory. In other words, humanitarian intervention is a problematic outside the boundaries of the theory, since traditional positivism is not designed to openly

²²⁸ M. Akehurst, ‘Humanitarian Intervention’, in *Intervention in World Politics*, Bull (ed.), (1984) 99; N. Ronzitti, *Rescuing National Abroad Through Military Coercion and Intervention on Grounds of Humanity*, (1985); C. Warbrick, ‘Protection of National Abroad’, 37 *International and Comparative Law Quarterly*, (1988) 1002; R. B. Lillich, ‘Forcible Protection of National Abroad: The Liberian Incident of 1990’, 35 *German Yearbook of International Law*, (1990) 205.

address questions that requires making judgements about the domestic affairs of a state. Any problem involving the ‘domestic’ first needs to be ‘translated’ in a manner relevant to the state-based language of international law (i.e. states are the only subjects of international law, but they can create new subjects themselves²³⁰; human rights can be protected internationally only if states undertake international obligations to protect these rights). Therefore, international lawyers are in a position to interpret the silence of the theory on this issue, either by strongly opposing it or by re-interpreting the theory.

Whether humanitarian intervention is compatible or not with the traditional theory is a question that can be answered both ways. The argument for humanitarian intervention tries to maintain ground by arguing that the rationale for this type of intervention does not harm the principle of non-intervention. The legal category of humanitarian intervention is suggested as an *extremely exceptional category* and *almost as stepping outside of traditional positivism for an instant*. This understanding suggests that efforts should be directed to carefully confine the parameters of such an exceptional category. The opposite approach, on the other hand, argues that there ought not to be an exception for humanitarian intervention because this exception betrays the very fundamentals of traditional positivist theory. The tension between these two approaches cannot be theoretically resolved. Even though they exist within the same theoretical framework, they are incommensurable and as I argue in the following section, the first opinion leads to a new theory, which I call *modified positivism*. The reason that these two positions have been accommodated within the same school of thought is that the argument for humanitarian intervention has been

²²⁹ R. J., Vincent, *Human Rights and International Relations*, (1986) at 152.

outnumbered by the arguments against it. By marginalising the alternative position, the theory maintained a unified position²³¹ favouring the lack of any lawful basis for humanitarian intervention.

3.3.1.2 Substantive Legal Positivism as the Traditional Account of Intervention

What does it mean to call a theory traditional? The ordinary understanding of the term tradition as explained by Krygier refers to an authoritative presence of a continuously transmitted past.²³² The rise of traditional positivism and its gradual replacement of naturalism as a way of understanding international law dates back to the middle 18th century, where Vattel and his *Le droit des gens*²³³ (1758) emerged as the late naturalist, early positivist figure.²³⁴ The central elements of this late 18th, and solidly 19th century principles, namely, sovereignty and non-intervention, today are still seen by many as the governing principles of contemporary international law.²³⁵ The theory is constantly transmitted by

²³⁰ *Reparations Suffered in the Service of the United Nations Case*, [1949] ICJ Rep at 174.

²³¹ The style of Brownlie while arguing for the illegality of humanitarian intervention is a good example of the ‘outnumbering’ approach: See, I. Brownlie, ‘Humanitarian Intervention’, in *Humanitarian Intervention and the United Nations*, Lillich (ed.) (1973); and more recently, I. Brownlie, ‘Kosovo Crisis Inquiry: Memorandum on the International Law Aspects’, 49 *International and Comparative Law Quarterly*, (2000) 878.

²³² M. Krygier, ‘Law as Tradition’, 5 *Law and Philosophy*, (1986) 237.

²³³ Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law Applied to the Conduct of State Affairs of Nations and of Sovereigns*, (trans. Charles G. Fenwick) (1916).

²³⁴ For various discussions of Vattel in general and his formulation of the principle of non-intervention in particular, see A. Nussbaum, *A Concise History of the Law of Nations*, (1954) at 156-164; N. Onuf, ‘Global Law Making and Legal Thought’ in Onuf (ed.), *Law Making in the Global Community*, (1982) at 1-8; A. Carty, *The Decay of International Law: A Reappraisal to the Limits of Legal Imagination in International Affairs*, (1986) at 87-107.

²³⁵ For a discussion of the 19th century and legal positivism, A. Angie, ‘Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law’, 40 *Harvard Journal of International Law*, (1999) 1; A. Carty, *The Decay of International Law: A Reprisal to the Limits of Legal Imagination in International Affairs*, 1987; D. Kennedy, ‘International Law at the 19th Century: A History of an Illusion’, 65 *Nordic Journal of International Law*, (1996) 385.

teaching it to succeeding generations of international lawyers all over the world, not as a matter of theory, but as a matter of positive law and moreover as a matter of fact.²³⁶ The continuously transmitted past is perceived to be authoritative within international legal circles. The traditional positivist account of non-intervention presents itself as the theory describing the current state of law. It is a theory of *lex lata*.

The most illustrative indication of the authority of this theory lies in the phenomenon that traditional positivism is not regarded as a theory, but as a matter of observable fact. Brownlie, for example, suggests that theory plays no role in international law.²³⁷ This approach is due to a conviction that the traditional positivist vision of the world represents the reality. The philosophical position behind this is that the international lawyer 'simply looks at what happens' without attempting to construct a prescriptive theory about it. Thus, there is no need to resort to some theory to explain what is happening in the real world. Many traditional accounts of the law on intervention do not refer to the theoretical background of their analysis, but go directly into the explanation of sources of international law and the practice of states. The interpretation of sources and state practice is seen as sufficient to support the validity of the presented positions.²³⁸ Traditional theory concentrates on the technique of legal

²³⁶ For instance, Carty's comparison of French and German textbooks of international law identifies that even though the international law traditions of these countries fundamentally differ when they address the relationship between the nation and the state and the role and the form of consent in international law making, they nevertheless agree on the principle of non-intervention as a principle of international law. Carty, 'Convergences and Divergences in European Law Traditions', 11 *European Journal of International Law*, (2000) 713.

²³⁷ I. Brownlie, 'International Law in the Context of Changing World Order', in *Perspectives on International Law*, Jasentuliyana (ed.), (1995) at 49 and also Brownlie, 'International Law at the 50th Anniversary of the United Nations: General Course on Public International Law, RdC, (1995) at 30.

²³⁸ See for example, E. Y. Benneh, 'Review of the Law on Intervention', 7 *African Journal of International and Comparative Law*, (1995) 139; C. Greenwood, 'Is there a Right of

argument rather than the content of it. The lack of reference to theory, either assuming that there is a tacit consensus as to what the theory is, or rejecting the existence of it, makes it often difficult to distinguish the discussions of the sources from the discussions of the fundamentals of the theory itself.²³⁹

The authority of traditional positivism is accepted by a diverse variety of actors in international law. This account has not only been popular among international law scholars, but also widely among judges and government officials of many states, especially small and newly independent states entering the web of inter-state relations after waves of de-colonisation and the disintegration of the Soviet Union. Since 20th century struggles of independence are re-articulations of European modern thought on sovereignty and the right to self-determination, the principle of non-intervention is strongly embraced by the political elite of young states. The principle is also regarded as a safeguard of the weak against the strong and in most cases, against former colonisers and regional powers. The Decision of the International Court of Justice in the *Nicaragua* case²⁴⁰ is an illustrious example of the impact of the traditional positivism on the understanding of the World Court with regards to the law on intervention. In its well known and widely quoted dictum, the Court almost declares a manifesto of the traditional account by stating that the principle of non-intervention in the domestic affairs of a state is not only a treaty obligation, but also a customary law obligation, which mirrors the legal positivist interpretation of the UN Charter

Humanitarian Intervention?, The World Today, February, (1993) 34; M. E. O'Connell, 'Regulating the use of force in the 21st century: The Continuing Importance of State Security', 36 *Colombia Journal of Transnational Law*, (1997) 473; A. C. Ofodile, 'The Legality of ECOWAS Intervention in Liberia', 32 *Colombia Journal of Transnational Law*, (1994) 381.

²³⁹ Perhaps the works of the leading positivist theoreticians are exceptions to this observation. See for example, Kelsen, *Principles of International Law*, 2nd ed., (rev. and ed. by Tucker), (1968) at 58-87; Brierly, *The Law of Nations*, (5th ed., 1955) at 309-10.

²⁴⁰ *Military and Paramilitary Activities in and Against Nicaragua (Nicaragua vs. United States of*

itself.²⁴¹ While rejecting the justification of collective self defence advanced by the United States of America (together with El Salvador), the Court states that in the absence of this qualified exception, the United States had violated the obligations imposed by customary international law not to intervene in the internal affairs of another state, not to use force against another state, not to infringe the sovereignty of another state (and also not to interrupt peaceful maritime commerce). In relation to the occurrence of interventions despite the normative rule of non-intervention, the Court presents the rule-exception matrix as a justification of the existence of the rule:

If a state acts in a way prima facie incompatible with a recognized rule, but defends its conduct by appealing to exceptions or justifications contained within the rule itself, then whether or not the State's conduct is in fact justifiable on that basis, the significance of that attribute is to confirm rather than to weaken the rule.²⁴²

The decision of the World Court reinforcing the principle of non-intervention has been both a reflection of the tradition and a powerful force for the continuance of it. The articulation by the Court of how the law should be verified sets a strong precedent for the tradition. One important aspect of legal tradition is the authoritative weight given to the decisions of judicial organs in order to determine what the law is. Therefore, having a group of jurists sharing a common outlook about how the law should be verified regarding intervention leads to the continuous transmission of the tradition: non-intervention is the rule, the Court verifies that it is the rule, what the Court states is the rule therefore non-intervention is the rule.

America), *ICJ Reports* (1986).

²⁴¹ *Ibid.*

3.3.1.3 Narration of History: Sameness and Difference

The ways in which historical events are interpreted are of crucial importance in terms of establishing a legal position on intervention within the traditional theory. The traditional theory's historical narration undertakes two simultaneous tasks: to underline the continuity of the non-intervention principle in history and to emphasise the significance of 1945 and the UN Charter as drawing the framework in which the principle should be canvassed in proper contemporary legal terms. Contemporary accounts of history are conditioned by the dichotomy of pre Charter/post Charter periods.²⁴³ The 'historical' non-intervention principle implies a basis for *lex lata* customary practice of international law. The post 1945 era, on the other hand, implies the supremacy of treaty law and its subsequent effect on understanding customary international law today. The overall aim of history in this context is to demonstrate that, either as customary law or treaty law, non-intervention exists as the governing principle of international law. The overlapping of custom and treaty contributes to the authority of the principle and in turn to the theory of it.

Even though the principle of non-intervention is a product of the 19th century, it is in relation to that century that international lawyers most debate about the firmness of the principle itself and the limits of its exceptions. The discussion over the issue is mainly concentrated on whether 'humanitarian intervention' was lawful or not in the period which is mostly referred as the 'pre-Charter period'. The significance of this question for the international lawyer

²⁴² Military and Paramilitary Activities in and against Nicaragua, *ICJ Reports*, (1986) 14 at 98.

²⁴³ Ulrich Beyerlin, 'Humanitarian Intervention', *Encyclopedia of International Law*, Vol. II, (1997) 926-933; Sean D. Murphy, *Humanitarian Intervention: The United Nations in an*

lies in the potential for this matter to affect the present analysis of intervention, not in the ‘historical value’ of a study of interventions as such. The supposition of the existence of a customary right of humanitarian intervention before 1945 leads to two possible arguments: either this customary right still exists, (outside of or in accordance with the UN Charter),²⁴⁴ or it ceased to exist after the Charter period but it has a potential to be revived.²⁴⁵ The rejection of the existence of a customary right to humanitarian intervention prior to 1945 links the 19th century to the post World War II period. The abuse of the principle of non-intervention during the pre-Charter period is used as a precedent to stress the importance of the UN Charter and the reasonable unwillingness to have humanitarian intervention as an exception.²⁴⁶

The historical analysis conducted by international lawyers is a unique mode of analysis since the tools that international lawyers use and the type of evidence looked for are distinct from that of a historian. As Franck and Rodley put it, ‘the results of an historical survey are likely to depend on which instances the survey includes: whether he accepts reasons stated by the intervenor at face value or *cum grano salis*, and also whether he includes or excludes the more numerous cases of a state intervening to save the lives or (usually) the property of its citizens residing as aliens abroad’²⁴⁷. Thus the history of legality of (non)-intervention is a patchwork, which consists of cases divorced from their

Evolving World Order (1996).

²⁴⁴ R. Lillich, *Forcible Self Help by States to Protect Human Rights*, 53 *Iowa Law Review*, (1967) 325; F. Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, (1997).

²⁴⁵ V. Nanda, *Tragedies in Northern Iraq, Liberia, Yugoslavia and Haiti- Revisiting the Validity of Humanitarian Intervention Under International Law - Part I*, 20 *Denver Journal of International Law & Policy*, (1992) 305.

²⁴⁶ See especially, Franck and Rodley, ‘After Bangladesh: The Law of Humanitarian Intervention by Military Force’, 64 *American Journal of International Law* (1974) 275 and also S. Chesterman, *Just War, Just Peace*, (2001).

²⁴⁷ Franck and Rodley, ‘After Bangladesh: The Law of Humanitarian Intervention by Military

contextual political environment. There is a list of cases which the international lawyers consider, ranging from the interventions of the Concert of Europe in the Ottoman Empire from 1827 to 1887 (Greek Independence War, 1827; Cretan Uprisings, 1866; Serbian Independence War 1875-1877, Bulgarian Independence 1877), United States intervention in Cuba in 1898, to the European Powers' intervention in Syria, 1860-1861. The international lawyer's matrix for qualifying these interventions as humanitarian or not is independent from the history of the 19th century as a whole in general²⁴⁸ and the studies of colonialism, imperialism and international law in particular.²⁴⁹ There is no a unified common view as yet on the 19th century military interventions and any further study to be conducted by international lawyers is bound to be constrained by the problematic nature of the framework of inquiry. The views held by the authoritative authors of the traditional paradigm range from totally ruling out the existence of any humanitarian intervention²⁵⁰ to limiting the genuine cases to only a few²⁵¹ or accepting the customary right to humanitarian intervention, but totally denying its relevance to the present.²⁵² The scholars leave a 'margin of debate' for the customary international law status of intervention in the pre-Charter period.

The relative indeterminacy of the customary right to humanitarian intervention before the advent of the UN Charter enables the international lawyer

Force' 64 *American Journal of International Law* (1974) at 279.

²⁴⁸ See, E. Hobsbawn, *The Age of Empire: 1875-1914*, (1987); M. Kent, *The Great Powers and the Ottoman Empire* (1984); W. W. Haddad and W. Ochsenwald, *Nationalism in a Non-National State: The Dissolution of the Ottoman Empire* (1977).

²⁴⁹ A. Angie, 'Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law', 40 *Harvard International Law Journal*, (1999) 1; N. Berman, 'In the Wake of Empire' 14 *American University International Law Review* (1999) 1515.

²⁵⁰ I. Brownlie, *International Law and the Use of Force by States*, (1963) at 338-340

²⁵¹ This reading of the nineteenth century interventions understands 'genuine' in the sense of authentic, but not necessarily legal or if so only because the use of force in the this century was not illegal. Ulrich Beyerlin, 'Humanitarian Intervention', *Encyclopaedia of International Law*, Vol. II, (1997) 926-933; also Franck and Rodley, *supra* note 249.

to start the history of the ‘modern’ principle of non-intervention with the UN Charter more assertively. It is assumed that non-intervention is a historical principle, which turns into a codified rule in 1945. Conferring a ‘rule’ status to non-intervention has wide implications. As Koskeniemmi explains ‘*rules (which) guide the solution of normative problems in that if they are applicable, they must be applied and their application exhaustively solves the case*’.²⁵³ When the discussion is focused on the meaning of Charter provisions, the ‘history’ of the pre-Charter period becomes of secondary importance. Thus, once the arguments about the 19th century’s influence on the state of law are not taken into consideration, the UN Charter becomes the reference point for the history of intervention, and not the opposite. Consequently, every intervention that has taken place after 1945 is an instant that can be fitted in to the matrix of the UN Charter. Traditional positivism would admit that the decolonisation, Cold-War and post Cold-War developments in international relations have changed the political picture, however the legal picture is still captured in the UN Charter. Winds of politics may blow in all kinds of directions, but the compass of law always points to the UN Charter.

3.3.1.4 Sources: The UN Charter as the Determining Source

The UN Charter is the determinant source for locating the law on intervention. That is why, in international legal discourse, scholars sometimes refer to the

²⁵² A Verdross and Bruno Simma, *Universelles Volkerrecht, Theorie und Praxis*, (3rd edition, 1984).

²⁵³ Koskeniemmi, *From Apology to Utopia*, at 21.

concept of ‘Charter paradigm’²⁵⁴, which refers to the analytical task of interpreting the UN Charter to establish the parameters of intervention and the use of force. The interpretation of the UN Charter provisions in traditional positivism is not simply interpretation of a treaty. It also informs how customary international law is understood, how World Court decisions are put into context, how the succeeding state practice and *opinio juris* may be analysed, as well as how the principle of non-use of force is an *ius cogens* obligation. Therefore, the interpretation of the UN Charter is, in effect, the interpretation of the general international law on intervention. Furthermore, the explanatory power of the teachings of publicists is also determined by their interpretation of the Charter. For the traditional positivist lawyer, it is very difficult to envisage, let alone justify, a law on intervention that does not refer to the UN Charter. Thus, the Charter is the determinant source for the traditional positivist to locate the law as well as to understand the history of law after 1945.

The identification of the law on intervention in the traditional paradigm conditions the international lawyer to find and emphasise the principle of non-intervention. Intervention can legally be qualified only as an exception to the general norm of non-intervention. The way in which the legal question is formulated is whether and under which conditions it is permitted under international law to intervene –or threaten to intervene- by armed force in another state? Since non-use of force and non-intervention against the territorial integrity and political independence of a state are made positive law in the United Nations Charter, the task of the international lawyer seems now to be easier: to uphold the fundamental principles of the UN Charter. The theory

²⁵⁴ Arend and Beck, ‘International Law and Recourse to Force: A Shift in Paradigms’, 27

informs a particular interpretation of the meaning of the UN Charter. Traditional method treats the provisions of the UN Charter as reflecting the state of law on intervention. This is also reflected in how the rest of the sources are utilised to explain the law of intervention. As Rodley indicates:

The principles contained in Charter articles 2/(4) (non-use of force against a state), 51 (right to self defence) and 2(7) (non-intervention in internal affairs) are commonly and authoritatively held not only to be what they are *prima facie*, that is rules laid down by a particular treaty (by the Charter itself), but also reflect customary rules of international law, binding on all states of the international community. Indeed they may well be rules of *ius cogens*, that is, rules of customary international law that may not be varied by special agreement between states in the international community.²⁵⁵

The body of international law on intervention is built upon the UN Charter. Even though customary international law is said to exist independent from the treaty provisions, evaluation of customary international law is not conducted independent of the UN Charter provisions. The judgment of the World Court in the *Nicaragua* case is of considerable importance since it confirms the position of the traditional account. The 1965 UN General Assembly Declaration on Intervention²⁵⁶ and the 1970 Declaration of Principles of Friendly Relations among States²⁵⁷ reaffirm the principle of non-intervention as set out in the UN Charter. It is only the study of general principles of law that is left out from the doctrinal analysis. Consequently, the determination of law is directly or indirectly dominated by the interpretation of Charter provisions.

Stanford Journal of International Law, (1991) at 40-45.

²⁵⁵ N. Rodley, 'Collective Intervention to Protect Human Rights and Civilian Populations: The Legal Framework', in Rodley (ed.), *To Loose the Band of Wickedness*, (1992) at 16.

²⁵⁶ Declaration on the Inadmissibility of Intervention in the Domestic Affairs of States and the Protection of Their Independence and Sovereignty 1965 – adopted by 109 votes to nil with one abstention (UK), GA Resolution 2131 (XX).

²⁵⁷ Declaration on Principles of International Law Concerning Friendly Relations Among States in Accordance with the Charter of the United Nations 1970, GA Resolution 2625 (XXV).

Any traditional analysis to determine the status of law in the area of intervention starts with a clarification of articles 2(4), 51, 2(7) and 39 of the UN Charter. The evaluations of the meaning of the wordings of Article 2(4) article 2(7) and article 39 are at the centre of all debates. These articles state:

Article 2(4)

All members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.

Article 51

Nothing in the present Charter shall impair the inherent right of individual or collective self defence if an armed attack occurs against a Member of the United Nations, until the Security Council has taken measures necessary to maintain international peace and security.

Article 2(7)

Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the members to submit such matters to settlement under the present Charter; but this principle shall not prejudice the application of enforcement measures under Chapter VII.

Article 39

The Security Council shall determine the existence of any threat to the peace, breach of the peace, or act of aggression and shall make recommendations, or decide what measures shall be taken in accordance with Articles 41²⁵⁸ and 42²⁵⁹, to maintain or restore international peace and security.

The traditional approach creates a legal matrix by using these four articles. The analytical reasoning aims to isolate the issues from each other by creating separate categories for legal analysis. The first distinction is drawn between

²⁵⁸ Article 42: The Security Council may decide what measures not involving the use of armed force are to be employed to give effect to its decisions, and it may call upon the Members of the United Nations to apply such measures. These may include complete or partial interruption of economic relations and of rail, sea, air, postal, telegraphic, radio and other means of communication, and the severance of diplomatic relations.

²⁵⁹ Should the Security Council consider that measures provided for in Article 41 would be inadequate or have proved to be inadequate it may take such action by air, sea or land forces as may be necessary to maintain or restore international peace and security. Such action may

unilateral intervention and interventions authorised by the Security Council. While unilateral interventions are governed by Articles 2(4) and 51 of the Charter, the Security Council action is regulated by Articles 2(7) and 39. Unilateral actions are discussed under the heading of use of force or self-defence, while Security Council action is a matter of ‘collective security’. Stated in such a manner, there are two separate regimes regulating the use of force, that of self-defence and that of collective security. These two comprise the orthodox exceptions to use of force and consequently to intervention.

When conceptual categories are defined in this manner, there is no regime governing intervention in the UN Charter as such. It is for this reason that any deliberation of possible legal forms of intervention is squeezed in between the interpretation of the wording of the Article 2(4).²⁶⁰ The traditional positivists who suggest that in extremely exceptional circumstances it may be possible to

include demonstrations, blockade, and other operations by air, sea, or land forces of the Members of the United Nations.

²⁶⁰ See for example, Brownlie, *International Law and the Use of Force by States*, (1963); Brownlie, ‘Thought on Kind-hearted Gun Men’, in *Humanitarian Intervention and the United Nations*, Lillich (ed.), (1973) 139-48; T. Farer, ‘Humanitarian Intervention: The View from Charlottesville’, *Humanitarian Intervention and the United Nations*, Lillich (ed.) (1973) 149-66; Franck and Rodley, ‘After Bangladesh: The Law of Humanitarian Intervention by Military Force’, 67 *American Journal of International Law*, (1973) 275; Chilstrom, ‘Humanitarian Intervention under Contemporary International Law’, 1 *Yale Studies in Public World Order*, (1974) 93; Behuniak, ‘The Law of Unilateral Armed Force: A Legal Survey’, 79 *Military Law Review*, (1978) 157; Fairley, ‘State Actors, Humanitarian Intervention and International Law: Reopening Pandora’s Box’, 10 *Georgia Journal of International and Comparative Law*, (1980) 29; Chimni, ‘Towards a Third World Approach to Non-Intervention: Through the Labyrinth of Western Doctrine’, 20 *Indian Journal of International Law*, (1980) 243; Chatterjee, ‘Some Legal Problems of the Support Role in International Law: Tanzania and Uganda’, 30 *International and Comparative Law Quarterly*, (1981) 755; Akehurst, ‘Humanitarian Intervention’, in *Intervention in World Politics*, Bull (ed.), (1984) 95; Higgins, ‘Intervention and International Law’, in *Intervention in World Politics*, Bull (ed.), (1984) 29; Schacter, ‘The Legality of Pro-democratic Intervention’, 78 *American Journal of International Law*, (1984) 645; Ronzitti, *Rescuing Nationals Abroad through Military Coercion and Intervention on Ground of Humanity*, (1985); Verwey, ‘Humanitarian Intervention under International Law’, 32 *Netherlands International Law Review*, (1985) 357; Bowett, ‘The Use of Force for the Protection of Nationals Abroad’, in *The Current Regulation of the Use of Force*, Cassese (ed.), (1986) 39; D’Amato, *International Law: Process and Prospect*, (1987), Levitin, ‘The Law of Force and the Force of Law: Grenada, the Falklands and Humanitarian Intervention’, 27 *Harvard International Law Journal*, (1986) 621; Moore, ‘Toward and Applied Theory for the Regulation of Intervention in Law and Civil

step outside the law have concentrated on proving this position by reading it into Article 2(4). This reading put forward that if an intervention is not against the territorial integrity or the political independence of a state, then it should not be an unlawful use of force contrary to Article 2(4) of the Charter.²⁶¹ Accordingly, the interventions which are carried out for the protection of one's own nationals –such as the Entebbe Airport operation of Israel in Uganda in 1976- and short-term interventions to relieve human suffering in a state without the consent of that state can also qualify as limited exceptions to the principle of non-intervention and the ban on unilateral use of force. This reading is then supported by the provisions of the UN Charter in relation to the protection and promotion of human rights. Protection of human rights, it is argued, is an equally important purpose of the UN as stated in Articles 1(3), 55 and 56 of the Charter²⁶². Therefore, forcible humanitarian intervention is below the 'threshold' of article 2(4) as long as it is strictly limited, temporary and consequently does not threaten the 'territorial integrity or political independence' of the target state.

War' in *The Modern World*, Moore (ed.) (1974) 3; T. Farer, 'Intervention in Unnatural Humanitarian Emergencies: Lessons of the First Phase', 18 *Human Rights Quarterly*, (1996) 1.

²⁶¹ See illustratively Lillich, *Humanitarian Intervention and the United Nations*, (1973); Bazylar, 'Re-examining the Doctrine of Humanitarian Intervention in the Light of the Atrocities in Kampuchea and Ethiopia' 23 *Stanford Journal of International Law*, (1987) 547; M. Reisman, 'Sovereignty and Human Rights in Contemporary International Law', 84 *American Journal of International Law*, (1990) 866; Teson, *Humanitarian Intervention: An Inquiry into Law and Morality*, (1988), Teson, 'Collective Humanitarian Intervention', 17 *Michigan Journal of International Law*, (1996) 323; W. Michael Reisman, Humanitarian Intervention and Fledgling Democracies, 18 *Fordham International Law Journal* (1996) 794; R. Falk, 'The Complexities of Humanitarian Intervention: A New World Order Challenge', 17 *Michigan Journal of International Law* (1996) 491; Gene M. Lyons and Michael Mastanundo, 'International Intervention, State Sovereignty, and the Future of International Society', in *Beyond Westphalia?* G. M. Lyons and M. Mastanundo (eds.) (1996).

²⁶² Article 1(3): The purposes of the United Nations charter are...[t]o achieve international co-operation in... encouraging respect for human rights and for fundamental freedoms for all without distinction as to race, sex, language or religion.

Article 55: [T]he United Nations shall promote... (c) universal respect for, and observance of, human rights and fundamental freedoms for all.

Article 56: All Members pledge themselves to take joint and separate action in co-operation with the Organization for the achievement of the purposes set forth in article 55.

The above reading of the UN Charter provisions has been marginalised by the majority of traditional positivists prior to 1990s. The unconvincing premises of the humanitarian intervention exception is demonstrated by recourse to the *travaux préparatoires* of the Charter, stating that the founding fathers would have never intended to weaken the ban on the use of force or the principle of non-intervention. On the contrary, the wordings of ‘territorial integrity’ and ‘political independence’ are contained in Article 2(4), precisely to strengthen this provision. Furthermore, the UN General Assembly Resolutions²⁶³ and the Judgement of the ICJ in the *Nicaragua case*²⁶⁴ also suggest that Article 2(4) exists, not to leave an open door for exceptions to the principle of non-intervention, but to emphasise the principle of non-intervention.²⁶⁵ The traditional positivist theory has resisted divergence from the initial premises of the theory by the expansionist interpretations of the UN Charter. There is only one correct interpretation of the Charter, which is dismissive of the modification of the original theory by way of ‘new’ technical constructions.

The right to self-defence is traditionally discussed, not in the context of intervention, but in the context of unilateral use of force (*ius ad bellum*).²⁶⁶ The

²⁶³ See for example Declaration on Principles of International Law Concerning Friendly Relations and Co-operation Among States in Accordance with the Charter of the United Nations, approved by the UN General Assembly in Resolution 2625 of 24 Oct. 1970. The Eighth preambular paragraph states ‘The practice of any form of intervention not only violates the spirit and letter of the Charter, but also leads to the creation of situations which threaten international peace and security’. Also the definition of aggression in Article 3(a) of the Definition of Aggression, approved by the UN General Assembly by Resolution 3314 (XXIX) of 14 Dec. 1974 (‘The invasion or attack by the armed forces of a State of the territory of another State, or any military occupation, however temporary, resulting from such invasion or attack’).

²⁶⁴ *Sir Hersch Lauterpacht*, *Oppenheim’s International Law*, Vol. II, (1952) at 154; Schwebel, *Aggression, Intervention and Self Defence in Modern International Law*, *Recueil des Cours*, Vol. II, (1972) 41; Randelzofer, in Simma (ed.), *The Charter of the United Nations: A Commentary*, (1994) at 123-124.

²⁶⁵ *Military and Paramilitary Activities in and against Nicaragua*, *ICJ Reports*, (1986) 14 at 98.

²⁶⁶ Schachter, ‘Self Defense and the Rule of Law’, 83 *American Journal of International Law*, (1989) 307; Alexandrov, *Self-defence Against the Use of Force in International Law*, (1996); Arend and Beck, *International Law and the Use of Force*, (1993); Brownlie, *International Law*

logic behind the right to self defence assumes an unlawful forceful military intervention taking place, or an unlawful war being waged against a state, which 'inherently' has a right to defend itself. Thus, the right to self-defence assumes the violation of article 2(4). The right is 'inherent' since states have always had this right and what the Charter does is to simply codify an existing right. The right to self-defence, however, is not decentralised as it has been in customary international law. States have the right up until the Security Council takes over the role of combating the aggression. As is indicated in article 51, the right can be used unilaterally or collectively. When the circumstances occur for a state to exercise self-defence, an invitation can also be extended to other states to defend the country collectively. When understood in a restrictive manner, self-defence becomes not an exception to any form of intervention, but an exception to the use of force in broader terms. Even though the category of self-defence is kept analytically separate from the discussion of intervention, the indeterminacy of the definition of 'armed attack' coupled with the 'collective right to self defence' do produce outcomes which are more similar to intervention than to self-defence. However, legal analysis would qualify these as illegal, or debatable uses/abuses of the right to self-defence.²⁶⁷ The more expansively the right to self-defence is invoked, the more likely it is that it will be analysed as an unlawful intervention within the framework of traditional positivism.

and the Use of Force by States, (1963); Butler, W. E., eds., *The Non-use of Force in International Law*, (1989); Cassese (ed.), *The Current Legal Regulation of the Use of Force*, (1993); Y. Dinstein, *War, Aggression and Self Defence*, (1994).

²⁶⁷ For a recent book-length treatment of this issue see, Christine Gray, *Use of Force in International Law*, (2001). Cf. Cassese (ed.), *The Current Legal Regulation of the Use of Force*, (1993); J. Lobel and M. Ratner 'Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime' 93 *American Journal of International Law*, January (1999) 124.

The collective security system of the United Nations is a widely researched and extensively discussed area of international law, which, besides the measures articulated in Article 39 of the Charter, deals with a broad range of issues from good offices of the UN Secretary General, the role of the General Assembly to traditional peacekeeping operations conducted under the auspices of the UN²⁶⁸. The later activities fall into the state consent-based activities of the UN. Article 39, however, deals with determination of the ‘threat to peace, breach of the peace or act of aggression’, in the event of which the Security Council is empowered to take action, including, in appropriate cases, enforcement action. Article 2(7) of the UN Charter clearly presents this as an exception to non-intervention in the domestic affairs of states by the United Nations.²⁶⁹

According to traditional positivism, the powers conferred on the Security Council do not stem from some fundamental theoretical principles. Provisions provided in Chapter VII of the UN Charter form part of a treaty-based institutional framework. They are not part of general international law as such, but instead are/should be governed by general international law. Therefore the traditional theory digests the interventions authorised by the Security Council by referring to the initial consent of State parties to the UN Charter. The UN Charter confers primary responsibility for the maintenance of international peace and security to the Security Council under Article 24. UN member states, under Article 25 of the Charter, accept that the decisions of the UN Security Council

²⁶⁸ See generally, N. D. White, *Keeping the Peace: The United Nations and the Maintenance of International Peace and Security*, (1995); Damrosch, *Enforcing Restraint: Collective Intervention in Internal Conflicts*, (1993); Durch, W. (ed.), *The Evolution of UN peacekeeping: Case studies and Comparative Analysis*, (1993); F. Hampson, ‘States’ Military Operations Authorized by the United Nations and the International Humanitarian Law’, (1995).

²⁶⁹ For a cogent discussion of the Article 2(7) of the UN Charter, See, Ermacora, ‘Article 2(7)’, in *The Charter of the United Nations: A Commentary*, B. Simma (ed.), (1994) 139-154.

are binding on member states. Article 103 of the UN Charter provides the supremacy of obligations stemming from the UN Charter over other international obligations in cases of conflict. Therefore, even if the Security Council is empowered within the UN Charter framework to authorise and conduct interventions, it is still required to act in accordance with the purposes of the Charter and the general international law principles of necessity and proportionality.²⁷⁰ Even if the Security Council has the autonomy to determine the scope of its own competence,²⁷¹ according to traditional positivism, the Security Council's interventionary power should not rise above how the principle of non-intervention is originally theorised by this account.

The decisions of the Security Council are not 'legal' decisions according to the traditional point of view. The Security Council is a political organisation, which has legal authority to make decisions when it determines that there is a 'threat to international peace and security'. The content of the threat to international peace and security is also political.²⁷² In accordance with this position, the international lawyer need not link the content of the actions of the Security Council with the non-intervention principle. These two are subject to different domains of law, since the collective security system of the UN Charter is categorically different from the principle of non-intervention, which is the governing principle of *inter-state* relations.

This position accepts the fact that the framework of defining situations as a 'threat to the peace' has been used to encompass a variety of situations:

²⁷⁰ N. Rodley, 'Collective Intervention to Protect Human Rights and Civilian Populations: The Legal Framework' in Rodley (ed.), *To Loose the Band of Wickedness* (1992) at 40.

²⁷¹ T. M. Franck, 'The Powers of Appreciation: Who is the Ultimate Guardian of UN Legality', 86 *American Journal of International Law*, (1992) at 519.

²⁷² Malanczuk, *Humanitarian Intervention*, (1993) at 26

aggression²⁷³, humanitarian disasters, refugee flows²⁷⁴, massive human rights violations, violations of international humanitarian law, dictatorial governments persecuting minorities, the need for prompt delivery of humanitarian assistance²⁷⁵ and protection of humanitarian aid workers and supply systems²⁷⁶, repression of a civilian population²⁷⁷, systemic violations of civil liberties by an illegal *de facto* regime²⁷⁸. However, many political motives as well as ‘humanitarian’ ones motivate the authorisations of the Security Council. Threat to international peace and security is not exclusively linked to gross human rights violations, but also to factors such as massive refugee flows. The Security Council does not need an exclusive doctrine of humanitarian intervention to authorise a peacekeeping, peace enforcement or enforcement operation. Thus, the traditional position is more inclined to see the various authorisations of the Security Council as an expansive interpretation of the ‘threat to international peace and security’ clause rather than steps towards formulating new exceptions to the principle of non-intervention. The Security Council can confer legitimacy

²⁷³ For example, Security Council Resolution 660 of August 1990 on the invasion of Kuwait.

²⁷⁴ For example, Security Council Resolution 688 of 5 April 1991 on the refugee flow from Kurdish populated areas of Iraq.

²⁷⁵ For example, Security Council Resolution 757 of 30 May 1992 on the delivery of humanitarian assistance to Bosnia-Herzegovina.

²⁷⁶ Resolution 1011, authorising the Italian led multinational force, Operation Alba, in Albania.

²⁷⁷ Security Council Resolution 688 has its own novelties since there is an absence of a specific reference to Chapter VII and it does not authorize a military force directly, but ‘insists that Iraq allow immediate access by international humanitarian organizations to all those in need of assistance in all parts of Iraq and to make available all necessary facilities for their operations’. Thus, in North Iraq the ‘safe havens’ began with military action by the US and allies, with only very limited and indirect authority from the Security Council.

²⁷⁸ In the case of Haiti (SC Res. 940), the Security Council takes note of the letter from the *legitimately* elected president of Haiti and does not seek *de facto* consent of the military coup that controls the territory. In the case of Somalia (Res. 794), where a legitimate government does not even exist, the Security Council mentions the demand of the permanent representative of Somalia in the UN for such action.

and community approval upon many different modes of action²⁷⁹ whose rationale is constantly in changing nature.

This account hesitates to link Security Council actions to general international law relating to a 'right to intervention in cases of human rights and humanitarian law violations' or 'intervention to restore democracy', since the Security Council is not a legislative body, but a political organ of the United Nations. However, the possibility of the Security Council influencing the process of customary international law and the process of subsequent authentic interpretation of the Charter is not totally overruled. But the burden of proof for establishing such a link is regarded as considerably demanding, if not impossible. It is, therefore, not surprising that such a theoretical and methodological outlook will concentrate its efforts more on the limits of Security Council authorisations²⁸⁰, the abuses of Security Council authorisations to justify illegal forms of intervention and use of force²⁸¹. The Security Council is not a body that is able to transform the whole body of general international law towards creating permissible interventions to the principle of non-intervention, but an organ of the United Nations, whose competence is limited by the UN Charter and general international law. Its actions are *ad hoc*, case-specific and politically motivated. The fact that the Security Council authorises and franchises interventions to

²⁷⁹ For an extensive survey of the Security Council action see D. Sarooshi, *The UN and the Development of Collective Security: The Delegation UN by the Security Council of its Chapter VII Powers*, (1999).

²⁸⁰ G. Nolte, 'Limits of the Security Council's Powers and Its Functions in the International Legal System', in M. Byers (ed.) *Role of Law in International Politics: Essays in International Law and International Relations*, (2000) 315-26; S. Lamb, 'Legal Limits to United Nations Security Council Powers', in Guy, Goodwin-Gill and Talmon (ed.), *The Reality of International Law*, (1999) 361-388; N. Blokker, 'Is the Authorization Authorized? Powers and Practice of the UN Security Council to Authorize the Use of Force by 'Coalitions of the Able and Willing'', 11 *European Journal of International Law* (2000) 541.

²⁸¹ J. Lobel, and M. Ratner, 'Bypassing the Security Council: Ambiguous Authorizations to Use Force, Cease-fires and the Iraqi Inspection Regime' 93 *American Journal of International Law*

protect human rights, deliver food, broker peace deals, or form transitional governments does not necessarily suggest that the principle of non-intervention regulating inter-state relations is losing its normativity at the expense of an expanded category of exceptions.

In sum, the traditional positivist theory suggests a legal assessment of facts, which sees military intervention in the internal affairs of a state within the exception matrix of self-defence and collective security. The traditional framework resists the formulation of new exceptions either by reinterpreting the UN Charter or through the development of customary international law in contradiction to the UN Charter. This resistance is reflected in requiring a high threshold of 'state practice' and 'opinio juris' to satisfy new exceptions. In our specific context, this is resistance to *change*. More importantly the resistance is not dictated primarily by the 'facts' not being properly determined, but by the worldview that the traditional positivist theory provides for the international lawyer. The commitment of traditional positivism in the area of intervention lies in the majoritarian pluralism of the international society formed by individual states. This commitment demands that the international lawyer draw a clear distinction between law, politics and morality. It identifies the defence of the rule of law with the defence of the principle of non-intervention with limited exceptions. Defences of expansive interventionist trends, however, are clearly located in the spheres of politics and morality, which a traditional positivist international lawyer should not involve or concern himself in his disciplinary practice.

3.3.2 Modified Positivist Account of Intervention

Modified positivism is a contemporary theory. The emergence of this theory can be dated to the beginning of the 1990s. The American international lawyer Thomas Franck has offered the most detailed and rigorous theoretical treatment of modified positivism, arguing on what grounds formalist virtues of traditional positivism should be preserved and substantive pre-suppositions of traditional positivism should change and are changing.²⁸² Franck's treatment of the law on intervention accepts the authority of traditional positivism on this issue prior to 1990s in international law, assumes the positivist dichotomy between *is* and *ought* in explaining legal change and aims to clear the ground for the argument that some *ought* propositions (which are politically and morally desirable) are in the process of hardening into *is* propositions in international law with regards to the law on intervention.

3.3.2.1 Theory: Traditional Form, Progressive Substance

As I discussed in the previous section, positivism in international law has more than one face. It is about substance as much as it is about form.²⁸³ The formal

²⁸² T. Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law*, (1992) 46; T. Franck, 'Fairness in the International Legal and Institutional System', General Course on Public International Law, Recueil des Cours, Vol. 240 (1993-III), pp. 256-257; T. Franck, *Fairness in International Law and Institutions*, (1997); T. Franck, *The Empowered Self: Law and Society in the Age of Individualism*, (1999); T. Franck, 'Legitimacy and Democratic Entitlement' in *Democratic Governance and International Law*, Gregory H. Fox and Brad R. Roth (eds.), (2000) 29; T. Franck, 'When, if Ever May States Deploy Military Force without prior Security Council Authorisation?', 5 *Washington University Journal of Law and Policy* (2001) 81.

²⁸³ For an illuminating discussion of different forms of positivism, see T. Nardin, 'Legal Positivism as a Theory of International Society' in *International Society: Diverse Ethical Perspectives*, Mapels and Nardin (eds.), (1998) at 17-20.

construction of positivism is based on explaining what the law is by technically locating the law in the consent of states, whilst substantive positivism is *a priori* based on the liberal analogy of sovereign individuality of states and the principle of non-intervention. Consent is a derivative of these principles in substantive positivism. Modified positivism is ‘positivist’ in the formal sense and not necessarily in the traditional substantive sense. In other words, the primary focus of modified positivism is on locating the ‘consent’ within a formal style of delivery without assuming the state as the indivisible subject of international law. When the ‘consent’ is freed from its reference to some first order principles, such as sovereignty and non-intervention, it becomes a ‘value-free’ concept and states can potentially consent to anything, including intervention. It is at this point that Franck provides guidance as to what direction the contemporary consent points towards and in what ways substantive positivism gets ‘modified’.²⁸⁴ Thus, modified positivism upholds the consensual theory of international law, but initiates a process of modification in the traditionally governing principles of international law.

Modified positivism is a liberal theory of international law, which argues that the liberalism of traditional positivism, insensitive to the domestic

²⁸⁴ Most scholars locate the consent *vis a vis* a right to democratic governance in international law arguing that there is a growing consensus among states leading to the emergence of this norm. See G. Fox, ‘The Right to Political Participation in International Law’, 17 *Yale Journal of International Law*, (1992) 539; J. Crawford, *Democracy in International Law*, (1994); C. Cerna, ‘Universal Democracy: An International Right or the Pipe Dream of the West?’, 27 *New York University Journal of International Law and Politics*, (1995) 289; Fox and Nolte, ‘Intolerant Democracies’, 36 *Harvard Journal of International Law*, (1995) 1; C. Schreuer, ‘The Waning of the Sovereign State: Towards a New Paradigm for International Law?’, 4 *European Journal of International Law*, (1993) 447. For a compilation of old and new essays written on democracy and international law after 1990, see G. Fox and B. Roth (eds.), *Democratic Governance and International Law*, (2000). For a critical analysis of the contention that a ‘norm of democratic governance’ is emerging, Sean D. Murphy, ‘Democratic Legitimacy and the Recognition of States and Governments’, 48 *International and Comparative Law Quarterly*, (1999) 545; B. Roth, *Governmental Illegitimacy in International Law*, (1999). For an ideology critique of this literature, S. Marks, *Democracy: The Riddle of All Constitutions* (2000).

composition of states, is 'gradually' and 'progressively' replaced by a newly 'emerging' liberalism. This emerging form of liberalism is based on the consensual evolution of realisation of democratically elected regimes and protection of human rights for all states and the people of the world. As Simpson observes 'this is not the dry, libertarian liberalism of sovereign self regulation exemplified by the Lotus decision, but a kinder gentler liberalism in which rights, democracy and fairness can flourish'.²⁸⁵ Modified positivism sees the liberal thought, based on the autonomy of the individual, compatible with the liberal analogy, which has conceived the state as the individual of the international system. The traditional analogy drawn between the state and the individual still remains and state consent is still the principal mode of law making. However, modified positivism breaks the silence of traditional positivism on the status of individuals in international law. Accordingly, self-governance of people by democratically elected governments and protection of human rights is becoming the universal norm in governing the relationship between states and its citizens. As Simpson puts it, 'the old positivism based on the consent of states has been replaced and extended by a theory of international law based on the dual consent of states and individuals.'²⁸⁶ This 'dual consent' is presented as a process, which is constantly improving in favour of individual consent. The establishment of democracy and human rights for all the citizens in the world is what the contemporary states are increasingly consenting to. Moreover, how the state is ruled (human rights) and who rules it (democracy) are seen as 'emerging' fundamentals of a 'new' international order.

²⁸⁵ G. J. Simpson, 'Is International Law Fair?', 17 *Michigan Journal of International Law*, (1996) 618.

²⁸⁶ G. J. Simpson, 'Imagined Consent: Democratic Liberalism in International Legal Theory'

These new fundamental legal principles may or may not coexist with the principle of non-intervention. In cases where there is a conflict, the modified positivist is asked to consider the protection of human rights and democracy as well as the principle of non-intervention as substantive first order principles.²⁸⁷ The logic of this analysis is different from that of the traditional positivist account. Modified positivism does not try to create an exception to the rule of non-intervention, or a breakaway from the principle of non-intervention, but aims to create competing substantive principles of international law, which have *equal weight* with the principle of non-intervention.²⁸⁸ Modified positivism does not envisage these two principles to be in constant conflict, neither is it a manifesto for interventionism. But if there is a conflict, the principle of non-intervention *a priori* does not have the primary role in the assessment of the current state of law. For every emerging situation, the modified positivist has to consider the equal relevance of protection of human rights and meaningful self-governance of the individuals *vis a vis* the principle of non-intervention.

This account is based on a dynamic theory in the sense that it is founded on a strong assumption that the world is changing, that it is, as we speak, in a 'transition' period. This outlook gives the modified positivist a legal space for reflection on the 'changing' phenomena. It, at the very same time, frees him from the burden of defending the stable account provided by traditional positivism in the name of positivism. In turn, the theory enables flexibility, suited to give a

Australian Yearbook of International Law, (1994) at 118.

²⁸⁷ M. Halberstam, 'The Copenhagen Document: Intervention in Support of Democracy', 34 *Harvard International Law Journal*, (1993) 163. (arguing that the Copenhagen document allows international lawyers to choose promotion of democracy at the expense of the principle of non-intervention, provided that an established democracy is outlawed by force within the OSCE area.)

²⁸⁸ For an analysis of the logic and the practice of competing principles of international law. see, V. Lowe, 'The Politics of Law Making: Are the Method and Character of Norm Creating

descriptive, but also a prescriptive account of the state of law. That is why the law is either in the process of emerging (*in statu nascendi* e.g. collective humanitarian intervention) or declining (in desuetude e.g. absolute principle of non-intervention). The changing character of the law enables the international lawyer to argue, for example, that the international validation of election of governments is a practice supported by many states and it is possibly emerging as a norm of customary international law. Similarly, interventions carried out to restore democracy or halt gross human rights violations may qualify to be emerging practice of states, since these substantive principles are in the process of becoming relevant factors of international legal reasoning.

Modified positivism assumes that protection of human rights and democratic self-governance are ‘good’ norms, irrespective of their progressive emergence in positive international law. That is why Franck suggests simultaneously that a norm is a dream and an emerging practice:

We are witnessing a sea change in international law, as a result of which the legitimacy of each government will one day be measured definitively by international rules and processes. We are not quite there yet, but the outlines are emerging of such a new world, in which the citizens of each State will look to international law and organisation to guarantee them fair access to political power and participation in societal decisions. For some people this will be no more than an embellishment of existing rights already protected by domestic institutional order. For others it will be a dream come true.²⁸⁹

Modified positivism is optimistic about this perceived transition: the substance of international law is both expanding and deepening for the good of humankind.²⁹⁰ Franck suggests that ‘like any maturing legal system, international

Changing?’ in Byers eds., *The Role of Law in International Politics: Essays in International Relations and International Law*, (2000) 177.

²⁸⁹ Franck, (2000) at 29.

²⁹⁰ Franck, (1997) at 6.

law has entered its post- ontological era. Its lawyers need no longer defend the very existence of international law. Thus emancipated from the constraints of defensive ontology, international lawyers are now free to undertake a critical assessment of its content²⁹¹. Modified positivism invites and encourages international lawyers to discuss subject matters, which are traditionally seen as part of domestic matters, such as human rights and democracy, as a *lex lata* part of international legal inquiry. This is a call for the internationalisation of many of the domestic issues, but most importantly the validation of democratic rule and protection of human rights.

This account does not offer a total rejection of traditional positivism. It does not challenge the traditional principles *per se*, but it argues that the time has come to go beyond the traditional (substantive) theory of sovereign individuality for positivists. It is a progressive discourse with a conviction that the perceived changes in the international system can best be reflected in international law by preserving the form but modifying the substantive principles of positivism. As a consequence the totality of this account is concentrated on demonstrating that international law is ‘developing its own reasons integral to its normative goals’²⁹² in order to advance transition from a traditional theory based on state consent to a modified theory of positivism based on state and individual consent.

Franck aims to overcome the rigidity of sovereign individuality by resorting to a re-articulation of the main purpose of international law. According to Franck, the main question of the contemporary international law should not be whether international law sustains order in inter-state relations. Contemporary international lawyers should instead ask themselves whether international law, as

²⁹¹ Ibid.

we know it today, is promoting *fairness*.²⁹³ As Franck puts it:

Now is the time for international lawyers to focus on the issue of fairness in the law. The new maturity and complexity of the system calls out for a critique of law's content and consequences. Its extensive coverage and its audacious incursions into state sovereignty demand a new emphasis on the system's values, aims and effects.²⁹⁴

The concept of fairness advanced by Franck has two aspects, which serve the purpose of negotiating continuity and change in positive international laws. The first aspect is legitimacy, which Franck also refers to as 'procedural fairness'.²⁹⁵ The second aspect is distributive justice, which is also called 'moral fairness'.²⁹⁶ For Franck, legitimacy of international laws means application of 'right process'. Legitimacy is a procedural requirement, which stresses the importance of positivist formalism. If a particular rule of international law is changed in an illegitimate fashion, that is disrespectful of the established procedures of international law, it falls short of the 'fairness' analysis. Distributive justice, on the other hand, concerns itself with the substance of international laws. For a positive international law to be just, it should reflect the moral requirements of the contemporary world (such as the protection of human rights or democratic self-governance), even if these moral requirements challenge the sovereignty of states. Similarly, a positive international law, even if it fulfils the requirements of 'right process', cannot be fair if it is in stark contradiction with the notions of distributive justice.²⁹⁷ Franck asserts that in contemporary international law, traditional positivism is helpful to the extent that it informs our judgements on

²⁹² Gregory H. Fox, *ASIL Proceedings*, (1997) at 362.

²⁹³ The international community is ripe for a discussion of fairness since there exists 'moderate scarcity' and a 'community' –two preconditions of a fairness discourse. T. M. Franck, (1997) at 10.

²⁹⁴ Franck (1997) at 9.

²⁹⁵ *Ibid* at 25-46.

procedural fairness. However, procedural fairness, alone, cannot explain compliance with or the substance of international law in the age of democracy and human rights. Franck admits that the relation between legitimacy and justice, at times, may prove to be potentially adversary, legitimacy representing order and justice the need for change.²⁹⁸ The task of the contemporary international lawyer is always to strike ‘a negotiated balance’ between these two.²⁹⁹

The concept of fairness also appears not only in relation to the means of practical analysis, but also to the end in this account. Franck argues that ‘the most important instrument for fairness discourse is domestic electoral politics. And the most important instrument for developing overlapping consensus is the voting booth. Attention therefore must be paid to democracy as a right protected by international law and institutions.’³⁰⁰ Fairness in international law, according to Franck, can be substantially established only if democracy becomes the ruling system of domestic politics. Even though the formal fairness of any rule of international law can be measured by using twin tests of legitimacy and justice, substantive fairness is incomplete without the international recognition of democracy as the governing regime of all states. At this point it is interesting to point to the similarities of the analytical logic between traditional positivism and modified positivism. Traditional positivism would argue that positivism is incomplete if the autonomy and equality of all states is not preserved by the positivist mode of law-making. Modified positivism, on the other hand, argues that international laws in their present forms might have a degree of fairness, but

²⁹⁶ Ibid at 22.

²⁹⁷ Ibid at 8-9.

²⁹⁸ Ibid at 23

²⁹⁹ *ibid* .

³⁰⁰ *ibid* at 83.

the ultimate aim should be establishing democratic political regimes respectful of human rights, which would enable a maximum realisation of the fairness discourse in international law.

However, loyalty to positivism as a theory of form prevents the modified positivist from making radical claims about substantive fairness. This theory holds that international law is transforming itself, it is not being transformed by coercion. This is a consensual process that will lead to the progression and eventually maturation of the fairness discourse.³⁰¹ In this respect, an authorised forceful intervention into the internal affairs of a state may be regarded as lawful and fair, where the previously democratically elected government is overthrown by a military coup, where a repressive government is conducting systematic and gross violations of human rights nullifying the individual consent given to that government, or when the structure of a state completely fails, leading to civil chaos and the silencing of the will of the individuals. The emerging international law of intervention in the modified positivist account focuses on the protection and restoration of an already existing self-government. That is to say, this account does not justify collective interventions against states where the culture of democracy and human rights have not flourished. The modified positivist international lawyer is not a missionary of democracy, he is a protector of it.

³⁰¹ That is why the authors put greater emphasis on easy and immediate observable phenomena such as international validation of elections, defining international standards for free and fair elections and electoral assistance, the need to immediately stop violations of civil and political rights, which are more visible than economic, social or cultural rights. This newly emerging law –which requires democracy to validate governance- is applicable to all states and is implemented through global standards, with the help of regional and international institutions. Validation of a democratic governance revolves mostly around elections. There is not a full consensus on how much positive international law has internalised at present. Alongside Franck, scholars such as Fox and Nolte consider that this is as much as customary law will support at this stage. On these discussions, see generally, Fox and Roth (eds.), *Democratic Governance and International Law* (2000); S. Marks, *The Riddle of All Constitutions: International Law, Democracy and the Critique of Ideology* (2000); Roth, *Governmental Illegitimacy in International Law* (2000).

However, if the legitimacy threshold is not met (i.e. if the intervention is not authorised by a legitimate international organ), modified positivism does not regard this as a lawful intervention and may share a common position with traditional positivism. As Franck states:

It... appears that there is increasing support (even, or perhaps, especially, among former totalitarian States) for the proposition that the democratic entitlement, abetted by links with other basic human rights and the accompanying international monitoring of compliance, have trumped the principle of non-interference. What validly remains of past inhibitions against interference in national sovereignty is a concern that such intervention be, and is seen to be, bona fide aid to democratic self-governance. Thus, actions to reinforce or reinstate democratic rule taken on behalf of the international system and in accordance with legitimate collective decision-making procedures are likely to be generally welcomed, whereas unilateral acts by a State, unauthorised by its global (or regional) peers, will be treated with deserved suspicion and alarm.³⁰²

Therefore, modified positivism is not against the principle of non-intervention *per se*: its project is not directed towards the elimination of the principle of non-intervention. However, it is prepared to create a legal theoretical space for intervention in terms of humanitarian intervention and intervention for restoration of democratic rule. There is no controversy about the existence of a legal idea of intervention when it fulfils the criterion of 'right process'.

Modified positivism does not offer a *carte blanche* for intervention to protect democracy and human rights under any circumstance even though intervention on these grounds are a priori justified through the lens of fairness. The legitimacy component of this account insists that the decisions to intervene are authorised by an appropriate body and that they are not governed by *ad hoc* political calculations, but by a principled outlook to protect human rights and democracy. The modified positivist is convinced that a norm of collective

intervention to restore democracy and human rights is emerging. ‘Nevertheless, the international regional systems have gone some distance towards legitimating such intervention provided the need to use force is made to, and accepted by, a representative jury of governments, and not by any possibly self-interested regime acting on its own. Such jurying is imperfectly yet best performed by the UN Security Council, sometimes in co-operation with a regional organisation’³⁰³.

The theory of modified positivism enables the international lawyer to conceive the law of intervention from a perspective where state sovereignty and individual sovereignty have an equal legal footing in legal analysis. The emergence of the individual sovereignty is explained not only as a matter of moral requirement, but as a matter of positive law. In turn, the central argument focuses on the fact that the progressive development of international law, in contemporary times, is leading to acceptance by states, that principle of non-intervention is not an absolute prohibition. States, in addition to the exceptions of intervention provided in traditional positivism for their own protection, have also been increasingly consenting to newly emerging forms of intervention to protect the inherent rights of individuals.

3.3.2.2 Narration of History: Endogenous Progress

The narration of history undertakes two interrelated tasks in reinforcing modified positivism. Firstly, it lays the ground for the ‘need’ to modify positivism. Secondly it is used to give a sense of continuity and precedent to the normative

³⁰² Franck, (2000) at 46.

rules that are of fundamental value to international law, namely the right to democratic governance and protection of human rights. Marks describes the ways in which history is used by Franck as ‘a progressivist notion of history, coupled with a conceptualisation of history’s telos in terms of liberalism’.³⁰⁴ Perceiving history’s end as liberalism in itself justifies the timing of the assessment of the democratic entitlement and its spill over effects to the whole corpus of international law. The progressive narration is aimed at giving the audience the simple message that the universal right to democracy as well as human rights are well founded in history and positive international law. These substantive principles, in turn, might, at times, be in contradiction with the principle of non-intervention strongly upheld by traditional positivism.

Modified positivism places great importance on a progressive narration of contemporary world politics. The history of modified positivism is a linear one, which sees contemporary international law as slowly, but constantly improving. It is as if history has a designated target which international law seeks to achieve despite the setbacks it confronts.³⁰⁵ For modified positivism the history of the 19th century is not central to establishing what the law is today on intervention. Modified positivism is more interested in telling the history of (the right) to democratic entitlement and the diminishing importance of the *domaine reserve* of states than the history of intervention. Accordingly what explains the law on intervention today is not whether humanitarian intervention existed or not in the

³⁰³ Franck, (1999), at 273.

³⁰⁴ S. Marks, ‘The End of History: Reflections on Some International Legal Theses’, 3 *European Journal of International Law*, (1997) at 467.

³⁰⁵ Two of the set backs are identified as the ‘dictatorship of the proletariat’ and ‘modernisation’ theory originating in fascist European dictatorships of the 1930s and being taken up by the post colonial countries. Discussed in T. Franck, ‘The Emerging Right to Democratic Governance’, 86 *American Journal of International Law* (1992) at 49.

past, but the history of the possible justifications for intervention for the future.

For Franck there are three phases, which follow each other in the progressive development of international law. These are called three generations.³⁰⁶ The process of the evolution of the norm of democratic governance begins in the period following World War I in Europe, when the first efforts to articulate the right to self-determination take place. Self-determination of the early 20th century is presented as the historic root of democratic entitlement. The Versailles Peace Conference with its plebiscite requirements and popular consultations and Wilson's proposed principle of self-determination to rearrange the boundaries of the Ottoman Empire are regarded as giving birth to the idea that 'a people organised in established territory has the right to determine its collective political destiny in a collective democratic fashion'³⁰⁷. The next stage in the development is the international recognition of human rights after World War II. This period, starting with the Universal Declaration of Human Rights, is regarded as the period of international standard-setting. Universal rights to freedom of opinion and expression, peaceful assembly and association, periodic and genuine elections by universal and equal suffrage and secret ballot established by the Universal Declaration and affirmed by 1966 Covenant on Civil and Political Rights are particularly important for the proliferation of the universal concept of democracy. By these international instruments as well as a wide array of other international and regional institutional procedures, many core prerequisites for democracy become legal

³⁰⁶ Franck. (1992) at 52.

³⁰⁷ *ibid.*

rights, awaiting their implementation.³⁰⁸

Finally, the end of the Cold War starts the era of the third generation, when the norm of democratic governance begins to emerge. The collapse of communism creates a real chance to implement the positive right to democratic governance, which has been codified for two generations in international fora. Furthermore, the scope of the right deepens through further regional developments in Europe via the work of international organisations such as the Organisation for Security and Co-operation in Europe, the European Union and the Council of Europe. According to this progressive discourse, now is the time to implement and, if disturbed, restore the universal right to democratic entitlement.³⁰⁹

This is not a history of intervention as sketched by traditional positivism. Reading the history of international relations from 1919 until contemporary times in the way described above suggests to the practitioner that the principle of non-intervention is not alone in the category of higher principles. Under any framework (unilateral or collective) the decisions to intervene and not to intervene are required to be assessed by taking into consideration the democratic entitlement and the protection of human rights in the contemporary setting. These historically constructed criteria are complementary to the thresholds of collective security and self-defence in analysing contemporary interventions.

³⁰⁸ For a similar tone of argument see, C. Schreuer, 'The waning of the sovereign state: Towards a new paradigm for international law?', 4 *European Journal of International Law* (1993) 447 and also M. Halberstram, 'The Copenhagen Document: Intervention in Support of Democracy', 34 *Harvard International Law Journal*, (1993) 163.

³⁰⁹ Franck, (1999) at 267-275.

3.3.2.3 Sources: Emerging State Practice

One of the aims of modified positivism is to increase the role of international law and shift the balance between national organisation and international organisation in favour of the *international*.³¹⁰ This general outlook towards international law leads modified positivism to make use of all the sources of international law available, and furthermore adopt a more expansive attitude towards the interpretation of sources in compared to traditional positivism. The fundamental principle of the theory is democratic entitlement and human rights for all peoples of the world, (both as an emerging and a proposed project) and thus, all the evidence that seem to support the existence of these principles are invoked as evidence of law.

Modified positivism constantly reminds the practitioner to take into consideration the (right to) universal democratic entitlement and the primacy of the protection of human rights, while reading the text of the UN Charter, looking for *opinio juris* of states, and weighing the importance of the amount of state practice, the international court decisions as well as the impact of regional and national practices to international law. For instance, the *Nicaragua* judgement of the ICJ or the General Assembly Resolutions of 1965 and 1970 on the primacy of non-interference are not exclusively controlling precedents to understand the law as of today, because they are seen as part of the Cold War history. However, other General Assembly resolutions such as ones declaring the principle of

³¹⁰ J. Crawford, J and S. Marks, 'The Global Democracy Deficit: An Essay in International Law and Its Limits' in *Re-imagining Political Community: Studies in Cosmopolitan Democracy* D. Archibugi, D. Held, and M. Kohler, (eds.), (1998).

periodic and genuine elections³¹¹ can be regarded as more significant for understanding the current state and future direction of international law. Similarly, UN election monitoring in member states, regional mechanisms (political and legal) which endorse the right to democracy and commitment of universal protection of human rights are regarded as a strong component of both *opinio juris* and state practice.³¹²

The practitioner (the academic employing this theory), while determining what concepts such as recognition or domestic jurisdiction mean and what kinds of interpretation of these concepts should be given preference, can use a solid technical language (thus without compromising its formal positivist premises), but at the same time change the traditionally understood substance radically. The assumption that law is already changing, and we are only witnessing it, creates the effect of merely certifying the change in the law as international lawyers and not to a claim of subjectively changing it.

Modified positivism's reading of the UN Charter also reflects the progressive analysis of international law. For modified positivism, the ban on the unilateral use of force as codified in Article 2(4) of the Charter is still of paramount validity. Article 2(7) of the Charter, should now be read against the background of the progressive developments in international law. That is, the main purpose of the UN is no longer confined to protecting international peace and security in inter-state relations, but is equally supplemented with the protection of human rights as stated in article 36 of the Charter and securing

³¹¹ See for example, UN GA Res. 43/157 (18 December 1988); UN GA Res. 46/137 (17 December 1991); UN GA Res. 52/119 and 52/129 (12 December 1997).

³¹² According to Franck, the OSCE member states are 'formally linked' to the right to democratic governance. Furthermore, 'although they speak for a region, the extent of the *opinio juris* which they express is not limited geographically' in Franck (1997) at 114.

meaningful democratic governance peoples as evidenced by growing state practice.³¹³ This statement is put forward as *lex lata*. It is what the law is, as evidenced by state practice supported also by the practice of the United Nations.

In a modified positivist reading of the UN Charter, unilateral or collective interventions of states justified on grounds other than self-defence cannot automatically qualify as unlawful interventions. They need to be measured up to the equally competing principles of protection of human rights and democratic self-governance before a judgement is passed on the legality of a specific intervention. It will be recalled that an expansive interpretation of the UN Charter provisions on intervention was also put forward in the 1970s, within the traditional positivist canon. Those arguments suggested that the ‘instant and rapid alleviation of human suffering in exceptional cases’ was not contrary to the UN Charter. Modified positivism, however, does not put forward an already existing right, but an ‘emerging right’ to intervene on grounds other than self-defence. This reading of the UN Charter is informed by the developments occurring here and now and envisages the lawfulness of intervention in a more comprehensive fashion than the ones solely based on alleviating human suffering.

Modified positivism aims to draw a framework of lawful interventions for the whole corpus of international law, for which the ‘right process’ and ‘substantive fairness’ are equally paramount. Therefore, interventions authorised or carried out by the United Nations, cannot be lawful solely because a Chapter VII mandate is secured. It needs to be questioned whether they are carried out for

³¹³ The Secretary General of the UN, Kofi Annan, can also be regarded as an adherent of modified positivism. In this official capacity, Annan promotes the idea that the UN is now the guardian of state sovereignty as well as individual sovereignty. See, K. Annan, ‘The Legitimacy

the promotion of the central purposes of the United Nations, that is the sustainable protection of the rights of the individuals. Similarly, interventions not authorised by the Security Council, even if they meet the substantive fairness criterion, cannot be qualified as lawful.

Contrary to traditional positivism, this account invites the Security Council to actively engage in interventions. This is regarded as a way of fostering the substantive fairness of international law. The provision in article 39 of the Charter allowing to determine ‘a threat to international peace and security’ to authorise action can and should indeed be read as an opportunity for the Security Council to endorse interventions to protect individuals under serious oppression and democratically elected regimes. Modified positivism encourages a reading of the Charter which downplays the domestic interference clause at the expense of the universalising effect of democracy and human rights. Simultaneously, the Security Council emerges as the most powerful legitimating organ of the present international community. This understanding aims to transform the ‘political’, ‘subjective’, ‘ad hoc’ initiatives of the Security Council with ‘quasi legal’, ‘objective’, ‘principled’ actions.

Since modified positivism a priori suggests that intervention in limited cases can be fair, the emphasis on deciding when the intervention is lawful is concentrated on the legitimacy of it. Modified positivism sees the UN Security Council and its authorisation to intervene in cases of humanitarian emergencies, overthrown democracies, or collapsed state structures as the most important tool of legitimisation. The emphasis on collective action rather than unilateral action is informed by a commitment to multilateralism. As Franck puts it ‘today just

wars are those fought by forces authorised by the UN Security Council or by states credibly acting in individual or collective self defence'.³¹⁴ Moreover 'in future one might reasonably expect to see UN peacekeeping and peace enforcing contingents largely pre-empt the right to justly engage in war. All other war will be unjust'.³¹⁵ Modified positivism supports the view that the UN should be the agent to design humanitarian interventions and intervention to restore democracies. When the foundational problem of justifying intervention is resolved, modified positivists focus their research instead on operational questions such as democratic accountability of the international forces engaged in intervention, legal regime of the civilian/military control of the interventions.³¹⁶

Authorisation of intervention by the Security Council is the primary aim of modified positivism. The lack of a Security Council authorisation forces the practitioner to make a difficult subjective assessment, which requires weighing the just and legitimate components of the modified positivist account against each other. If the 'just' component overrides the legitimacy component, the legitimacy threshold can be adjusted. New formulations such as authorisation by a regional organisation, or transparent action by a large group of states might be suggested as satisfying the legitimacy test of 'right process', if the substantive justifications of intervention are well in place. Again, these new formulations need not be suggested as mere propositions, but may be viewed as 'emerging

³¹⁴ Franck, (1997) at 313.

³¹⁵ Ibid.

³¹⁶ For a detailed survey of democratic accountability of international forces and legitimacy of collective intervention, see Charlotte Ku and Harold K. Jacobson, *Accountability for Use of Military Forces: International Law and Institutions*, Presentation Prepared for the Lauterpacht Research Centre for International Law, Cambridge, University January 26, 2001, <http://www.law.cam.ac.uk/RCIL/friday1.htm>, accessed on 20.01.2001.

practice' by states seeing, for example, the ECOWAS interventions in Liberia and Sierra Leone³¹⁷ and Operation Provide Comfort in North Iraq as precedents. The more the legitimacy of an intervention is ambiguous, the more rigorous the analysis of the substantial justifications is required. However, it is likely that the modified positivist will protest the illegitimate interventions as unlawful, in order to not to devalue the threshold of Security Council authorisation, until this argument is unable to be defended to due to the impossibility of obtaining such authorisation.

In cases when the legitimisation of interventions by the Security Council proves to be impossible, modified positivism suggests that there is an emerging, yet extremely limited, customary right to humanitarian intervention and intervention to restore democratic governance in international law. In a cautious recognition of an emerging practice of humanitarian intervention, Franck states: Again a pragmatic escape from conundrum posed in a 'hard case' requires application of a rule of reasonableness. The strict application of article 51 is reasonable, in almost all cases. An exception may be made however where effective government has ceased to exist in the place where the danger to the lives has arisen. In that event however other normative practice has also become relevant. A modern customary norm of humanitarian intervention is beginning to take form which may condone action to protect lives, providing it is short and results in fewer casualties than would have resulted from non-intervention. This practice does not distinguish between rescuing persons who are citizens of the intervening state, other aliens or citizens of the state

³¹⁷ K. Nowrot, and E. W. Schabacker, 'The Use of Force to Restore Democracy: International Legal Implications of the Ecowas Intervention in Sierra Leone', 14 *American University International Law Review*, (1998) at 321.

in which intervention occurs. A state which purports to intervene to prevent danger to its own citizens but ignores the need of others would be in violation of the new customary norm it seeks to invoke. Moreover as with anticipatory self-defence, the State which acts in violation of the general prohibition on intervention has the onus of demonstrating the existence of a genuine immediate and dire emergency which could not be addressed by means less violative of the law. The emerging practice also requires an exhaustion of the multilateral remedies established by the Charter system.³¹⁸

Contrary to a traditional positivist reading of the sources, modified positivism suggests that there is definitely legal space for lawful interventions in the internal affairs of a state for alleviation of gross human rights violations and restoration of democracy (these two are regarded as mostly co-existing). The lawfulness of interventions, provided that they are substantively just, is categorised from easier to harder cases. The easiest cases comprise of situations where the intervention is conducted or authorised by the United Nations. The less easy cases may occur when other international or regional institutions provide legitimisation for collective action, *only if* the Security Council is unable to do so. The hardest cases take place when a state or a group of states self-appoint themselves to further the causes of substantive fairness. The modified positivist international lawyer, for every single case, must question how the form and substance of positivism can be negotiated.

³¹⁸ T. M. Franck, 'Fairness in the International Legal and Institutional System', General Course on Public International Law, Recueil des Cours, Vol. 240 (1993-III), pp. 256-257.

3.3.3 Kantian International Law Account of Intervention

I shall discuss Kantian international law on the basis of the works of Fernando Teson, who developed this theoretical framework towards the late 1980's and the beginning of the 1990s.³¹⁹ Teson espouses Kantian liberalism in international law in a systematic fashion. Most international law scholars influenced by the Kantian legacy³²⁰ prefer to have positivism as their professional working theory and concede that the idea of a world federation of republican states is inspirational to positivist international law.³²¹ Kantian philosophers who are not international law scholars, on the other hand, do not communicate their versions of the Kantian legacy and international society through the medium of international law. Contrary to these, Teson is an international lawyer who presents his version of the Kantian legacy as a working theory for international lawyers.

³¹⁹ F. Teson, 'Realism and Kantianism in International Law', 86 *ASIL Proceedings*, (1992a) 113; F. Teson, 'The Kantian Theory of International Law', 92 *Columbia Law Review*, (1992b) 53; F. Teson, 'International Abductions, Low Intensity Conflicts and State Sovereignty: A Moral Inquiry', 31 *Columbia Journal of Transnational Law*, (1994) 551; F. Teson, 'Collective Humanitarian Intervention', 17 *Michigan Journal of International Law*, (1996) 323; F. Teson, *Humanitarian Intervention: An inquiry into law and morality*, (1997); F. Teson, *A Philosophy of International Law*, (1998a); F. Teson, 'Kantian International Liberalism' in *International Society: Diverse Ethical Perspectives*, Mapel and Nardin eds., (1998b)

³²⁰ In the years since the end of the Cold War, many students of international studies have put forward the idea that the international system can and ought to be re-conceptualised, however, imperfectly, to resemble the liberal vision of a political society within the state. This has been most commonly defined as the 'Kantian legacy'. However, the proliferation of the numbers of people who have based their work on the 'Kantian legacy' have led to competing *Kantian legacies*. Teson's work, in a greater framework, should be read as one version of Kantian legacy. On the question on competing Kantian legacies, see, generally, J. Bartelson, 'The Trial of Judgement: A Note on Kant and the Paradoxes of Internationalism', 39 *International Studies Quarterly* (1995) 259; D. Archibugi, 'Immanuel Kant, Cosmopolitan Law and Peace', 1 *European Journal of International Relations* (1995) 429; A. Franceschet, 'Sovereignty and Freedom: Immanuel Kant's Liberal Internationalist 'Legacy' ', 27 *Review of International Studies* (2001) 209; G. Cavallar, 'Kantian Perspectives on Democratic Peace: Alternatives to Doyle' 27 *Review of International Studies* (2001) 229.

³²¹ P. Laberge, 'Kant on Justice and the Law of Nations', in *International Society: Diverse Ethical Perspectives*, Mapel and Nardin eds., (1998) 82; G. Cavallar, *Kant and the Theory and Practice of International Right*, (1999).

3.3.3.1 The Theory: The Unity of Law and Morality

Kantian liberalism shares the same epistemology as the natural law tradition.³²² Teson's approach 'attempts to incorporate political philosophy as an integral part of international legal discourse.'³²³ This attempt is not due to some form of intellectual curiosity or philosophical exercise. It is argued that it is due to necessity. Moral philosophy is not the 'other' or the 'helper' of international law, but it is 'necessarily a part of the articulation of legal propositions'³²⁴ themselves. There is no distinction between '*is* and *ought*' as positivist epistemology argues: *is* and *ought* propositions are and should be one unified proposition. In turn, the role of the international law scholar is to provide guidance as to what the '*ought*' propositions are and how they can be appropriately formulated as '*is*' in contemporary international law.

Any modern theory which rejects *a priori* the positivist epistemology (the dichotomy between *is* and *ought*, between law and morality) has to be hostile to positivism. One cannot agree with the positivist dichotomy of *is* and *ought* and at the same time argue that moral theory is a part of legal theory, these two positions are incommensurable. Therefore, the effort of founding a modern naturalist theory cannot only undertake the task of laying the foundations of a new theory but, at the same time, must constantly seek to undermine the positivist conception of law. Accordingly, Teson aims to argue simultaneously

³²² Indeed Teson calls to go back to the earlier tradition of Grotius and Vattel, himself. Teson, (1997) at. 317.

³²³ Teson, (1997) at 6

that Kantian international law is the ‘right’ moral and legal theory of international law and that positivist theories of international law are not only legally insufficient³²⁵, but also morally ‘bad’ theories.

This task is undertaken by closely identifying the project with Kantian moral philosophy. That is, using (a) moral philosophy as the counterpart discipline to provide credibility for the arguments put forward in international legal discipline. ‘Philosophy’, then, becomes an instrumental tool to re-articulate the content of international law and also to draw the boundaries of it. Teson explains his program as ‘an attempt to defend philosophy against the political scientists’ and international lawyers’ traditional dislike for philosophy’.³²⁶ ‘Philosophy’, in this context, specifically refers to a Kantian moral liberalism, which Teson translates into a contemporary working theory of international law. As he puts it, ‘the thrust of the argument is that governments and states exist only to protect our rights against internal and external deprivations. When governments fail to do so they are no longer morally or legally justified.’³²⁷

The Kantian account of international law constitutes itself by means of a twofold distinction. On the one hand, it emerges as a reaction against traditional positivism (which Teson also calls ‘statism’) and its principles of non-intervention and ‘the view that established governments necessarily represent the people over whom they rule’.³²⁸ It attacks the domestic analogy at the heart of traditional positivism, which bases international law on the sovereign individuality of states. This leg of Kantian liberalism can be qualified as anti-

³²⁴ *ibid.* at 7.

³²⁵ Teson, (1997) at 8.

³²⁶ Teson, (1997) at 316.

³²⁷ Teson, (1997) at 316.

³²⁸ Teson, (1998a) at 39.

positivist. At every opportunity, Teson sets up his arguments in contradiction to positivism and aims to undermine it. The attack on positivism is not only at the level of theory, but also at the level of the technical delivery of international law arguments. Teson is equally interested in undermining the doctrinal explanations of custom, interpretations of treaties and World Court decisions produced in the canon of positivism.

Secondly, Kantian liberalism argues that the theory of international law must be based on notions of justice in general and a Kantian notion of justice in particular. However, the Kantian theory of international law that Teson seeks to promote is in essence a Tesonian reconstruction of Kant's views on international law. Teson explains the way in which he allocates values to Kant for the contemporary analysis of international law:

One can distinguish two ways of approaching the work of a philosopher. One is to clarify what the philosopher is saying. This is an enterprise of philosophical exegesis –the classic task of the scholar. The other is to reconstruct the philosopher's view, so as to provide a coherent and rationally defensible interpretation of that view. The difference is important because the reconstructive approach implies sometimes disagreeing with the philosopher and improving upon his or her arguments. The first approach asks 'what did X-mean?', while the second asks 'what coherent and defensible system of thought can be devised using X's main insights?'³²⁹

What does Teson's Kantian international law offer to the international lawyer? Teson's Kantian view departs from the traditional positivist account of international law in two aspects: the definition of the state and, in turn, the definition of international law. Both of his definitions are based on the liberal vision of domestic political society, where the highest of all goals is individual freedom. In order to understand the definition of state in this Kantian account,

the international lawyer has to be committed to normative individualism, which states that the individual, not the state, is the primary normative unit in international law.³³⁰ The emphasis on the ‘normative’ stems from another basic assumption; that is, it is not a matter of a choice between the state, the group or the individual to qualify as the primary unit of the international legal order. The individual is the centre of this theory because this is the *only morally right choice*. In this account an organisational unit can be named as a ‘state’ only if it is the outcome of the consent of the individuals living in that state and only if it protects, benefits and serves the human beings within its jurisdiction. ‘The reason for creating and maintaining the governments is precisely to ensure the protection of the rights of the individuals’.³³¹ Any other state, which does not meet these criteria is not *legitimate* and not a state proper. From these basic assumptions Teson depicts a ‘modern’ version of the first definitive article of Perpetual Peace. Instead of Kant’s requirement that ‘civil constitution of every nation should be republican’³³², Teson suggests the requirement that ‘states be liberal democracies’³³³.

Since the state is merely derivative of the rights and interests of individuals, the traditional positivist focus on the rights and duties of states is to be abandoned. International law, as all other law, exists for the protection of the rights of the individuals and the development of the capacity of human beings. According to Teson’s reading of Kant, since the individual is the only right primary unit of the domestic and international system, an alliance of liberal

³²⁹ Teson, (1998b) at 103.

³³⁰ Teson, (1998a) at 1-38.

³³¹ Teson, (1997) at 118.

³³² Kant, ‘To Perpetual Peace: A Philosophical Sketch’ (1795), in *Perpetual Peace and Other Essays*, (Ted Humphrey trans.), (1983) at 112.

democracies is the only *just* international arrangement for the international legal order.³³⁴ It follows that the co-existence of liberal and illiberal states can only be regarded as an *intermediate* stage. In the end all states ought to be liberal democracies. At this point, Teson departs from other liberal theoreticians such as Rawls³³⁵ (and also Franck), since he does not think that a pluralist society, where different forms of governance –liberal and illiberal- may co-exist, is tolerable.

The intermediate nature of the existence of liberal and illiberal states has direct consequences for understanding the law of intervention in Teson's Kantian account. As discussed in the previous sections, the matrix of understanding intervention whether in the traditional or in the modified version of positivism has been within the boundaries of the state-consent based language. This language is criticised by Teson suggesting that the 'moral autonomy' of the state is a 'Hegelian myth'.³³⁶ Even in the case of self-defence, the presumption of the moral autonomy of the state is committed to the protection of the 'state', not the individuals,³³⁷ whereas Teson sees lawful use of force as a matter of moral decision taken by individuals (in democratic liberal states) in order to defend themselves or other individuals in other parts of the world. In other words, 'force

³³³ Teson, (1998a) at 3.

³³⁴ Ibid . Cf. Teson, 'Kantian International Liberalism' in Mapel and Nardin (eds.), (1998) at 107-109.

³³⁵ Kantian theoreticians such as Rawls hold that the liberal and illiberal regimes can co-exist together and liberal thinking ought to allow space for 'constitutional pluralism'. Rawls in his *The Law of Peoples* (2000) divides peoples into three categories: liberal peoples (committed to normative individualism), decent peoples (emphasis on community than on the individual) and people living under outlaw regimes. While the first two categories are qualified as well-ordered peoples and the absolute principle of non-intervention should govern their interrelations, the outlaw regimes can be subject to exclusion, sanctions and, in extreme cases of human rights violations, intervention by liberal peoples. The constitutional pluralism is the underlying principle of both the traditional positivism and modified positivism. Rawls' moral formulation of the law of peoples and just war fits rather comfortably with modified positivism's legal formulation of intervention. Cf. Pierre Laberge, 'Kant on Justice and the Law of Nations', in *International Society, Diverse Ethical Perspectives*, Mapel and Nardin eds., (1998), at 82-102. See also, Teson, (1998) at 105-127 for his critique of the Rawlsian position.

³³⁶ Teson, (1997), 115.

can only be used in defence of persons, not of states as such'.³³⁸

When viewed from this angle, 'lawful intervention' is an act that can only be carried out by the individuals of liberal democracies. Individuals living in liberal states have a duty to help other individuals who are denied their basic human rights. 'Human rights accrue to every human being, regardless of history, culture or geographical circumstance'³³⁹ and this is the authentic source of mandate for intervention. A tyrant does not have the legitimacy to protect the human rights of the individuals of another state, since he does not represent the will of the individuals of his own state. Self-defence of individuals against aggressors and humanitarian intervention are the only just causes for use of force. A state cannot claim a right to self-defence, or a right to humanitarian intervention if it is not a *just* state in the first place. Protection of human rights at home and abroad lies at the crux of the intervention thesis of the Kantian account.

In Teson's Kantian account, intervention against a fully legitimate state (that is a state protecting and upholding human rights) is unlawful under any circumstance since the main justification of international coercion is the defence of human rights.³⁴⁰ Intervention is then justified when it is conducted against illegitimate governments, who violate the rights of their citizens, and against illegitimate states, where the state structures have collapsed. Under such circumstances, there are moral and legal constraints on liberal democracies exercising their right to intervention. Since the aim of (humanitarian) intervention is putting an end to human rights violations, the first requirement is

³³⁷ Teson, (1997), at 119-120.

³³⁸ Teson (1998b), at 111.

³³⁹ Teson (1998a) at 55.

³⁴⁰ Ibid. 60-61.

disinterest of the liberal states.³⁴¹ As a result of the intervention dictatorial governments can be overthrown, but ‘non-humanitarian motives should not reduce or impair the first paramount objective of the intervention’.³⁴² The interventions should be inspired more by liberalism than by democracy.³⁴³ Two kinds of guidelines to distinguish situations which call for intervention are introduced: The first requirement is a quantitative one: ‘human rights deprivations must be extensive, although they do not need to reach genocidal proportion’³⁴⁴; second, qualitatively only the violation of civil and political rights warrants forceful intervention.³⁴⁵ Civil rights include the right to have a democratic government if the undemocratic government is denying its citizens the right to participate in political affairs.³⁴⁶ If a government is protecting these rights but violating economic or social rights, the intervention does violate the territorial integrity and political independence of the state³⁴⁷. Liberty of the individual is the crux of the Kantian account of intervention, the backwardness of the economic and social situation of the individuals, however unwanted those

³⁴¹ Teson, (1997) at 121.

³⁴² *ibid.*

³⁴³ Liberal and democratic traditions are not the same. Freeman gives a cogent summary of the fundamental differences in logic between these two traditions: ‘ Liberalism is grounded on individual related values, such as autonomy or human rights, whereas democratic theory is a view of legitimate power, and locates such power in the people rather than in an elite. Liberalism places limits on the legitimate power of governments, whether they are democratic or not, whereas democracy grants power to the people whether it is liberal or not, and is reluctant to limit the power of democratic governments. Liberalism emphasises the rights of the individuals, whereas democratic theory gives priority to the will of the people. The popular will does not necessarily respect individual rights. Liberal democratic theory seeks to show either that liberal premises about individual values entail democratic political conclusions or that the collective value of democratic politics entails liberal conclusions. The two different approaches can lead to different policy conclusions. Liberal democrats, for example, tend to favour the constitutional protection of individual rights against the decisions of popular majorities, whereas democratic liberals prefer disputes about rights to be settled by democratic procedures with the final decision resting with elected assemblies rather than with un-elected judges. Michael Freeman, ‘The Right to Self-Determination in International Politics: Six Theories in Search of a Policy’, 25 *Review of International Studies*, (1999) at 362.

³⁴⁴ Teson, (1997), at 123.

³⁴⁵ *Ibid.*

³⁴⁶ Teson, (1997), at 125.

may be, does not provide a moral/legal ground for forceful intervention. The final criterion is that the victims of the oppression must welcome the intervention.³⁴⁸

In Kantian liberalism, intervention is analysed from the prism of permissibility. Non-intervention is stripped of its legal authority, since it is a principle that protects the state and not the individual. Kantian liberalism forcefully argues for a principle of intervention in international law, which is not based on the positivist method of state consent (contrary to traditional and modified positivism), but derives its legal authority from the moral/legal primacy of the individual.

3.3.3.2 Narration of History: The Revival of Morality

There are two aspects to the narration of history by the Kantian theory of intervention. The first aspect is a general ‘celebratory’ tone and ‘end of history’ confidence which persists in all the liberal theories of international law trying to create an alternative account to traditional positivism.³⁴⁹ The second aspect, on the other hand, is a more specific one, where Teson uses the strategy of ‘changing’ the traditional positivist history of international law. I will briefly address the first aspect since this will also be discussed with respect to liberal international law’s usage of the narration of history.

For Kantian international law the end of the two-polar world system enables international law to uphold and strongly defend the moral discourse of

³⁴⁷ Ibid.

³⁴⁸ *ibid* at 126.

³⁴⁹ S. Marks, ‘The end of history? Reflections on some international legal theses’, 3 *EJIL*, (1997)

Kant. A Kantian international law has been long due in the sense that Kant has provided the blueprint for a universal and just international order, but ‘the joint rise of nationalism and positivism changed both the cosmopolitan universalism and the unity between law and morals embedded in the Grotian tradition.’³⁵⁰ What is to be done now is to revitalise the essential truth both about domestic and international justice and to change international law accordingly. Teson admits that it is difficult to leave behind the (bad) habits: ‘although it is understandably hard for lawyers to forsake statist assumptions of classic international legal discourse, new times call for fresh conceptual and ethical legal language.’³⁵¹ From this point of view, the history of the 19th and 20th centuries is regarded as an obstacle to the Kantian notions of justice (to disseminate), while the post-Cold War developments bring an end to the neglect of the long overdue normative primacy of the individual.

At a more particular level, Teson aims to create a history of intervention, more specifically humanitarian intervention, which conflicts with the version offered by traditional positivism. This narration offers exactly the opposite history to that of traditional positivism. The way Teson narrates the history suggests that a) a unilateral right to humanitarian intervention has existed continuously since the 19th century in practice, b) it was not interrupted by the advent of the UN Charter and this argument can be supported by subsequent state practice and c) with the end of the Cold War there now also exists a collective right to humanitarian intervention authorised by the Security Council or another appropriate regional body.

449.

³⁵⁰ Teson, (1997) at 317.

³⁵¹ Teson, (1997) at.1.

First, with regards to the debate of whether humanitarian intervention was a customary principle of international law or not in the 19th century, Teson takes the position that the right to humanitarian intervention indeed existed. Secondly, in relation to the controversy about whether the unilateral right to humanitarian intervention had survived the UN Charter, Teson, again, maintains an affirmative position. It is not only the theory or the right to intervene that survives the UN Charter, the practice of humanitarian intervention has also continued. Accordingly, the Tanzanian intervention in Uganda (1979), the French intervention in Central Africa (1979), the Indian intervention in Pakistan (1971) and the US intervention in Grenada (1986) constitute precedents for the existence of the right after the advent of the UN Charter.³⁵² Thirdly, the cases of Northern Iraq (1991), Somalia (1992-93), Haiti (1994), Rwanda (1994) and Former Yugoslavia (1995) constitute evidence of state practice for a collective right to humanitarian intervention in the post-Cold War setting.³⁵³ All these cases are historically constructed to represent an uninterrupted continuity of the existence of the right of humanitarian intervention. The presupposition that a right to humanitarian intervention exists leads Teson to draw analogies among different cases, which reveal striking dissimilarities.³⁵⁴ Through the list of events, presented as ‘cases’ of humanitarian intervention, the morally *right* is validated by history and state practice.

³⁵² Teson, (1997)

³⁵³ Teson, (1996)

³⁵⁴ For the role of analogies in creating ‘cases’ and in establishing a (partial equality) among compared phenomena, see Kratochwil, *Rules, Norms and Decisions: On the Conditions of Practical Reasoning in International Relations and Domestic Affairs*, (1989) at 223-227.

3.3.3.3 Sources: A Complete Reconstruction

For the Kantian international law account of Teson, the sources of international law do not pose an obstacle to conceptualising the lawfulness of intervention in defence of individual freedom. The issue at stake is not to call for changes in the law, but to interpret the positive laws in accordance with the basic premises of the Kantian account. As Teson explains:

The thrust of my analysis is the meaning and the scope of the prohibition of article 2/4 and the best meaning of the subsequent state practice can only be determined in the light of an appropriate moral theory of international law and relations. From a conventional view of separation of law and morals, my task should be conceived of as a challenge to both the legal proposition that the right of humanitarian intervention is not the law and the moral proposition that it 'should not be the law.'³⁵⁵

In this scheme of thought, the practitioners of international law are invited to make sense of the legal sources from the point of view of the requirements of Kantian morality and to disturb the account of sources provided by traditional positivism. In practice this leads to argue that the right to collective and unilateral humanitarian intervention in extreme cases of violation of human rights is consistent with the UN Charter and is positively supported by state practice.³⁵⁶ The utilisation of the sources of international law serves merely a representational function to assert that what the law is overlaps with what the law ought to be. The dilemma posed by humanitarian intervention in positivist terms is not a real one, but 'it is purported by value free analysis of state practice and treaty texts'.³⁵⁷ Here 'value' stands for Teson's account of Kantian international law, which centres international law around the normativity of the individual.

³⁵⁵ Teson, (1997), at 9.

³⁵⁶ Teson, (1997), at 313.

State practice and treaty texts must and can be interpreted by de-centring the focus from the state to the primacy of the individual in international law. This can only be done by confronting moral problems prescribed by the uneasy relationship between human rights and state sovereignty.³⁵⁸ Teson holds that since the assertion of a right of humanitarian intervention is the *best* moral position, it also provides the best guidelines for the interpretation of legal materials of the past and present.³⁵⁹ The legal texts as such shall not constrain the international lawyer to assert the existence of just laws. As Teson explains, ‘I cannot see much consequence to the proposition that an act is illegal but morally permitted, or obligatory, as contrasted with the proposition that the act is legally permitted, or obligatory, in those rare instances. This is so because moral reasons are overriding. If anti-interventionists can agree on the kind of cases where the international community morally can or must intervene, their protests that the intervention is nevertheless illegal do not enjoy much credibility.’³⁶⁰

In accordance with this framework, Teson interprets the language of the UN Charter and customary international law as both allowing a right to intervention when a state loses its legitimacy by not respecting or becoming unable to respect the civil and political rights of the individuals living in that state.

With regards to the UN Charter, Teson holds the view that the wording of article 2(4) of the UN Charter does not automatically support a total prohibition on the use of force. The article requires refraining from use of force only when the use of force is against the territorial independence and territorial integrity of

³⁵⁷ Teson, (1997) at 15

³⁵⁸ *ibid.*

³⁵⁹ *ibid.*

states or 'in any other manner inconsistent with the purposes of the UN'. This suggests a very narrow interpretation of the prohibition on use of force and non-intervention. Since 'a genuine humanitarian intervention does not result in territorial conquest or political subjugation'³⁶¹ and protection of human rights is the main purpose of the United Nations, humanitarian intervention is in effect a legal right provided by the Charter.³⁶² Furthermore, 'it is a distortion to argue that humanitarian intervention is prohibited by article 2(4)'³⁶³. When the legitimacy of a state or a government is no longer defensible, article 2(4) does not prohibit intervention. In other words, article 2(4) prohibits use of force only among legitimate states in international law.

In a similar vein, Teson links the doctrine of custom with moral theory and argues that 'identifying custom relies on a value judgement.'³⁶⁴ or 'at least in the areas of use of force and human rights the determination of custom in international law presupposes a value judgement'³⁶⁵. Therefore, arguing that a customary right to intervene in international law does not exist is pre-judged by upholding the moral supremacy of the state vis a vis the individuals. Teson asserts that it is indeed possible to interpret the instances of state practice after 1945 as evidence of an existing right to humanitarian intervention. By providing an alternative reading of the facts of the intervention of Tanzania in Uganda (1979); French intervention in Central African Republic (1979); Indian intervention in East Pakistan (1971) and the US intervention in Grenada (1981), Teson argues that the traditional positivist accounts of these events do not do

³⁶⁰ Teson, (1996) at 337.

³⁶¹ Teson, (1997) at 151.

³⁶² Teson, (1996) at 341.

³⁶³ Teson, (1996) at 15.

³⁶⁴ Teson, (1997) at 11.

justice to the human rights cause of these interventions.³⁶⁶ He instead suggests that these events, however imperfect, can be regarded as precedents for an existing customary right.

In evaluating the practice between 1945 and 1990, traditional positivism puts a greater emphasis on the *Nicaragua* judgment affirming their position on the principle of non-intervention. For Teson, the authoritative value given to the *Nicaragua* judgment of the World Court can also be contested. In Teson's view, in the *Nicaragua* case 'the facts of the particular case were not persuasive enough for the court to make the value judgement that the United States' intervention in *Nicaragua* on the whole was morally justified'³⁶⁷. Therefore, it is possible to diminish the value given to this dictum by interpreting it narrowly as declaring only the illegality of disproportionate forcible intervention. The *Nicaragua* case should be read as addressing neither the issue of lawfulness of intervention in more serious widespread human rights violations nor that of non-forcible proportionate countermeasures to enforce human rights.³⁶⁸

Interventions authorised by the Security Council since the 1990s are seen as developments that confirm the Kantian position. Teson points out that 'some may find the concerns of the anti-interventionist persuasive enough to severely limit or reject the lawfulness of unilateral humanitarian intervention. But those concerns have little force against humanitarian intervention properly authorized by the United Nations Security Council.'³⁶⁹ Interventions, such as the ones in Northern Iraq, Somalia, Bosnia, Haiti and Rwanda, authorised by the Security

³⁶⁵ Teson, (1997) at 14.

³⁶⁶ Teson, (1997)

³⁶⁷ Teson, (1997), at 14.

³⁶⁸ Teson, (1997) at 271.

³⁶⁹ Teson, (1996) at 343.

Council can comfortably qualify as ‘collective humanitarian interventions’. The requirement that the Security Council has to determine ‘a threat to international peace and security’ under Article 39 does not pose a problem for the actual authorisation of humanitarian interventions. For the Kantian account, ‘it is intolerably formalistic to cling to the view that Security Council is not authorising humanitarian intervention’³⁷⁰, solely because the Council uses the language of the ‘threat to the peace’ or the ‘breach of the peace’. It should instead be openly admitted by international lawyers that the Security Council in extreme cases of serious human rights violations has the legitimate power to authorise humanitarian intervention under the UN Charter.

Consequently, from a Kantian international law reading of the sources on the law of intervention, the threshold question of a right to humanitarian intervention receives a positive answer. This is not, however, an emerging right in international law since the beginning of the 1990s. It is instead presented as an already existing right in international law, both with regards to UN Charter law and customary international law. The question of whether the law governing intervention has changed is a question that positivists have to answer for themselves. For the Kantian international law reading of the sources, the question itself is only a matter of false-consciousness.

3.3.4 Liberal International Law Account of Intervention

Liberal international law is the last account that will be discussed as a ‘problem-solving theory’ in the field of intervention. Liberal international law also

³⁷⁰ Ibid.

redefines the relationship between the individual and the state, providing a challenging competitor to the traditional account of intervention. For liberal international law, the analysis of the changing laws of intervention should be conducted by studying under which conditions interventions are useful. If intervention in the internal affairs of a state is furthering international peace and security, international lawyers are invited to support it and define current positive laws accordingly. I will discuss liberal international law with specific reference to the works of Slaughter.³⁷¹

3.3.4.1 The Theory: The Science behind the Law

Liberal international law leans on the discipline of international relations. It uses a method that is coined as the ‘International Law/International Relations (IL/IR)’ method, which refers to the necessity of relying on a theory of international relations in order to theorise and practice international law.³⁷² IL/IR thinking is presented as international relations theories informing international lawyers with

³⁷¹ A. Burley Slaughter, ‘Law and the Liberal paradigm in International Relations Theory’, *International Law and International Relations Theory: Building Bridges*, *ASIL Proceedings*, (1992a) 180; A. M. Burley, Slaughter, ‘Law among Liberal States: Liberal Internationalism and the Act of State Doctrine’, 92 *Columbia Law Review*, (1992b) 1907; A. M. Burley Slaughter, ‘International Law and International Relations Theory: A Dual Agenda’, 87 *American Journal of International Law*, (1993a) 205 ; A. M. Burley, ,and W. Mattli, ‘Europe before the Court: A Political Theory of Legal Integration’, 47 *International Organisation*, (1993b) 41; A. M. Slaughter, ‘Liberal International Law Theory and International Economic Law’, 10 *American University Journal of International Law and Policy*, (1995a) 717; A. M. Slaughter, ‘International law in a World of Liberal states’, 6 *European Journal of International Law*, (1995b) 503; A. M. Slaughter, M., Tulumello, A. and Wood, S., ‘International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship’, 92 *American Journal of International Law*, (1998) 367; A. M. Slaughter, *ASIL Proceedings*, (2000a); A. M. Slaughter, Liberal International Law, *Hague Public International Law Seminar*, (2000b)

³⁷² For the foundational qualities of IL/IR thinking, Abbott, K. W., “Elements of a joint discipline”, *International Law and International Relations Theory: Building Bridges*, *ASIL Proceedings*, (1992) 167. IL/IR thinking as a method of international law, see Abbott, K. W., ‘International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts’, 93 *American Journal of International Law*, (1999) 361.

regards to policy problems, functions and the structure of international institutions in the international arena. It is suggested that international lawyers for the most part have been transforming this ‘international’ knowledge into ‘legal’ knowledge. Therefore IL/IR thinking supposes that the ways in which we understand international law are a consequence of flows of knowledge from theories of international relations to international law.³⁷³ It is taken for granted that there has been a ‘gap’ between international law and international relations studies and that international lawyers ought to be aware of how international relations theories inform the theory and practice of international law.³⁷⁴

The IL/IR method, first, translates the theories of international relations into a ‘simpler’ and more accessible language for the audience of international lawyers.³⁷⁵ This accessible form of narration of international relations theories prepares the base for asserting which theory of international relations may be preferred for analyses of particular areas of international law. Even though one is able to choose among a given set of theories, the scholars who promote this method choose liberal international relations theory as their reference point in

³⁷³ IL/IR thinking holds similar fundamental assumptions about the nature of international law as the process approach. Both of the theories see law and policy as interrelated and it is not possible to do law without making policy decisions. However, the method used to realize this is considerably different. As I have briefly outlined in Chapter II, process approach uses a test of authority and control in order to make open and legitimate policy choices to determine what the law is. IL/IR thinking on the other hand suggests to identify policy choices by selecting a normative guidance partner from the discipline of international relations.

³⁷⁴ On contemporary works on international relations and international law, see R. Keohane, R., ‘Compliance with International Commitments: Politics within a framework of Law’, *International Law and International Relations: Building Bridges, ASIL Proceedings*, (1992) 176; R. Keohane, ‘International relations and international law: two optics’, 38 *Harvard International Law Journal*, (1997) 487; W. Aceves, ‘Institutionalist Theory and International Legal Scholarship’, 12 *American University Journal of International Law and Policy*, (1997) 227; B. Kingsbury, ‘The Concept of Compliance as a Function of Competing Conceptions of International Law’, 19 *Michigan Journal of International Law*, (1998) 345; M. Byers, *Custom, Power and the Power of Rules*, (1999).

³⁷⁵ Slaughter maintains that ‘the political scientists would find the versions (of international relations theories) presented here overly simplified and distilled’, (1995b) at 507.

analysing contemporary international law.³⁷⁶ Therefore, even though the IL/IR method offers a range of (American) international relations theories to choose from, this method, for the most part, is used to explain how a particular liberal international relations theory informs a liberal international law thesis.³⁷⁷

Slaughter argues that in order to use the IL/IR method, international lawyers first need to make normative choices about the nature of the international system. These normative choices are informed by how an international lawyer sees the world. According to Slaughter's account there are three established international relations traditions of conceiving the international system: as a realist, as an institutionalist, or as a liberal. These views are presented as paradigms within the broader meaning of the word. These paradigms are 'mental maps',³⁷⁸ which international relations theories makes explicit and 'anyone who thinks about foreign policy or international relations must have such a map to guide her thinking'.³⁷⁹ It is assumed that the student of international relations is *forced* to choose one of these maps to conduct research and propose policies.

Slaughter observes that most contemporary international lawyers see the world either with the maps provided by realism³⁸⁰ or institutionalism.³⁸¹ Both of

³⁷⁶ See generally, supra note 154 and 155 and also W. J. Aceves, *Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Universal System of Transnational Law Litigation*, 41 *Harvard International Law Journal*, (2000) 129.

³⁷⁷ For a cogent criticism of the interdisciplinary project of liberal international law theory, see O. Korhonen, 'Liberalism and International Law: A Centre Projecting a Periphery', 65 *Nordic Journal of International Law*, (1996).

³⁷⁸ Slaughter (1995a) at 719; Slaughter (1995b) at 506.

³⁷⁹ Slaughter (1995a) at 719.

³⁸⁰ For realist theory of international relations, the important unit of social collectivity is the state and the determinant factor of the course of international relations is the power of states. One only needs to find out who are the most powerful states in order to foresee the future of international relations. In this equation norms and institutions are ephiphenomenal. While classic realism is designed to determine the foreign policy of a single state, structural realism gives an account of the international system from a realist perspective. Structural realism sees the nature of the system as an international anarchy. States have the ability to hurt each other and they can never

these theories conceive the state as the primary and unitary actor of international relations. While realism holds that states always do act out of self-interest in the state of nature, institutionalism hold that states' interests may converge and materialise as international institutions. These institutions, in turn, might have an effect on how states define their interests. The traditional positivist account of international law confirms the realist worldview of international relations. It, too, relies on the primacy of the state as the sole actor in international relations. The state cannot be constrained against its will. For positivism, law can only emanate from the consent of states: there is no law, as there is no power, above the state. Institutionalism corresponds to the interest of international lawyers to increase the number of international institutions to constrain state behaviour. Many modern international lawyers maintain that there should be more internationalisation of decision-making and that the number of institutions in the international arena should be increased. For instance, Slaughter suggests that the UN Charter is an institutionalist response to regulating state power.³⁸² While the UN Charter maintains that states are the primary actors of international relations,

be sure about others not hurting them. Structural realism is logical and states have to think strategically about how to survive. Therefore analysing power relations is equal to analysing international relations. For IL/IR account of realism see, Slaughter, (1995a); Slaughter (1995b); Slaughter (1998); Slaughter (2000b). For the elaboration of classic international relations realism, see H. Morgenthau, *Politics Among Nations: The Struggle for Power and Peace*, (4th edition 1967); R. Niebuhr, *Moral Man and Immoral Society: A Study in Ethics and Politics*, (1932); Randall Schweller, 'New Realist Research on Alliance: Refining, Not Refuting, Waltz's Balancing Proposition', 91 *American Political Science Review*, (1997) 927; K. Waltz, *Theory of International Politics*, (1979); B. Buzan, C. A. Jones and R. Little, *The Logic of Anarchy: Neorealism to Structural Realism*, (1993).

³⁸¹ Institutionalism is presented as essentially a form of realism that makes room for the independent impact of international law. States pursue power but they also pursue prosperity. States for example, recognise that you should not destroy the oceans, that air-control should be regulated, that international mail should be delivered. There are conflicting interests but also co-operating interests, which express themselves in the form of institutions. As opposed to realists, institutionalists believes that the 'presence of institutions modify the organising principles of anarchy' and therefore can change the behaviour of states. According to Slaughter institutionalism is the international relations' way of saying international law.

³⁸² Slaughter (1998) at 727.

it also creates a collective security mechanism, which aims to limit the unilateral exercise of power by individual states.

Slaughter proposes that contemporary international law should neither be informed by realist nor institutionalist ‘maps’, but instead by the liberal theory of international relations. For Slaughter, the underlying reason to start to understand international law from the perspective of liberal premises is because liberal international law fits the facts of the contemporary world better than realism and institutionalism.³⁸³ It is argued that once the world is seen through the eyes of liberal international relations theory, we will make better sense of the contemporary world. Realist (and traditional positivist) premises of international law will, then, become irrelevant and consequently be replaced by ‘liberal’ premises of international law. Therefore, changing international law is founded upon changing the international relations theory on which the ‘traditional inquiry’ is based.

Slaughter’s liberal international law is based on a particular liberal international relations theory developed by Andrew Moravcsik³⁸⁴. Moravcsik’s liberal theory of international relations puts forward three core assumptions: a) individuals and groups (not states) operating in national and transnational society are the primary actors of international relations. These individuals are rational people who want to promote their interests.³⁸⁵ b) States (or other political institutions) represent some sub-set of individuals and groups, who determine the priorities of the state in the international system.³⁸⁶ c) States are still very

³⁸³ Slaughter (2000a) at 240.

³⁸⁴ Andrew Moravcsik, ‘Taking Preferences Seriously: A Liberal Theory of International Politics’, 51 *International Organisation*, (1997) 513.

³⁸⁵ *Ibid* at 516.

³⁸⁶ *Ibid.* at 518.

important actors since individuals act through the states. The preferences of the state determine state behaviour. These preferences are interdependent.³⁸⁷ A state cannot realise what it prefers at all times.

This liberal international relations theory is a grand theory in the sense that it aims to explain the international system as a whole. It asserts its relevant strength *vis a vis* its rivals (realism and institutionalism).³⁸⁸ When realists look for the most powerful states, or institutionalists concentrate on the areas in which states can increase co-operation, liberals focus on how individuals and groups function and which groups put pressure on their governments for what kinds of preferences. While realists focus on autonomous decision making processes within states, liberals examine the 'nature of domestic representation as the decisive link between societal demands and state policy'.³⁸⁹ Viewed from this angle, liberal theory is not talking about states, but about their governments. While the realist emphasis is on state power, liberal international relations see international relations in terms of preferences. Power is not given, its meaning cannot be understood without the purpose of it. Some governments represent at least a majority of people, some represent major economic interests, some a family, some a powerful religious group. To find out what states want, one needs

³⁸⁷ *Ibid.* at 520.

³⁸⁸ Slaughter relies explicitly on the liberal theory of international law developed by Moravcsik. Moravcsik, too, when setting out the core assumptions of liberal theory relies on the shortcomings of the other theories. 'A theoretical statement should expose anomalies in existing work, forcing reconsideration of empirical findings and theoretical positions. This (Moravcsik's) restatement of liberal theory meets this criterion by revealing significant methodological biases in empirical evaluations of realist theories of 'relative gains-seeking' and constructivist analyses of ideas and international relations due to the omission of liberal alternatives' in Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', 51 *International Organisation*, (1997) at 516. Consequently, while liberal international relations theory asserts that it is the 'right' theory to analyse the current world affairs, liberal international law theory asserts that liberal international relations theory is the 'best' theory to recommend policy choices for international law.

³⁸⁹ Andrew Moravcsik, 'Taking Preferences Seriously: A Liberal Theory of International Politics', 51 *International Organisation*, (1997) at 513.

to know the group it represents and what they want. Consequently, the preferences of a totalitarian government and a liberal state are different from each other. Liberal international relations theory suggests studying domestic regime types in order to analyse state behaviour in international relations.

Liberal international law, similar to liberal international relations theory, is a grand theory. It aims to fundamentally alter the traditional positivist conception of international law. Liberal international law demands that all international law needs to be rethought and rearranged in accordance with the basic assumptions of liberal international relations theory.³⁹⁰ It does not see the state as a unitary actor, but as a collection of institutions. Accordingly, not the unitary state, but all the institutions of the state should be represented (i.e. administrative, judicial and legislative) internationally.³⁹¹ There is interdependence in the international system. The domestic, international and trans-national levels of interaction should not be treated as separate analytical categories, but only parts of the whole web of individual and group interaction. Since what is domestic directly affects what is international the *domain réservé* concept of traditional positivism is abandoned all together. International law is *all law* that contributes to the international system. Liberal international law is presented as a bottom up view rather than a top down one in terms of pinning

³⁹⁰ For the application of liberal international law theory to a) the role of national and supranational courts for the promotion of the rule of law, L. Helfer and A. M. Slaughter, 'Toward an Effective Supranational Adjudication', 107 *Yale Law Journal* (1997) 273; b) World Trade Organisations' dispute settlement procedures, A. M. Slaughter, *Liberal International Law*, Recueil des Cours, (2000, forthcoming); c) participation of NGOs in international organisations, A. M. Slaughter, Recueil des Cours, 2000, (forthcoming); d) transnational law litigation: W.J. Aceves, 'Liberalism and International Legal Scholarship: The Pinochet Case and the Move Toward a Transnational Law Litigation', 41 *Harvard International Law Journal* (2000) 129.

³⁹¹ In this respect, Slaughter's work put a great emphasis on transnational government networks for the consolidation of a liberal international order. She studies transnational judicial networks, transnational regulatory co-operation and the co-operation between executives and parliaments as indicators of a liberal order. On this point, see generally, A. M. Slaughter, 'Government

down what international norms are. Since the state is a transparent set of relationships, voluntary codes of conduct of multinational corporations or NGOs, private international law, extra-territorial law, constitutional law are as much international law as treaty law and custom. Actually, since public international law has the least effect on individuals, the impact of it on liberal international law is also regarded as relatively small compared to other law.³⁹²

This mode of theorising has significant consequences for public international law, since it marginalises its role and importance in international relations. As Slaughter puts it, ‘liberal international relations theory not only supplies a different ontology of the international system, in terms of changing our conception of relative actors and activity; it also provides the foundation for a theory of international order that *reorders* the relative impact of these different bodies of rules’.³⁹³ Liberal international law diminishes the importance given to concepts such as state consent and sovereignty, or non-intervention. The concepts of violation of sovereignty, territorial integrity or political independence are stripped of their normative importance. For liberal international law, violation can only be committed against individuals, groups, and institutions, not against states as such. Traditional norms of public international law centred around protecting the state and hierarchically favouring the concept of state need to be abandoned. Government representatives are only one out of many actors in international relations.

For the liberal theory of international law, concepts such as sovereign equality, non-use of force, or non-intervention are not given pre-legal concepts.

Networks at the Heart of Liberal Democratic Order’ in *Democratic Governance and International Law*, Fox and Roth (eds.), (2000) 199.

³⁹² Slaughter (2000a) and Slaughter (2000b).

They are merely final outcomes of a set of preferences informed by theories of international relations. For non-intervention there are strong realist arguments. In the realist world, unitary and self-interested states can potentially harm each other and that is why a principle of non-intervention is preferred to maintain international peace and security. Realists are sceptic about the observance of the principle of non-intervention but they think that it is the best rule to have. International disorder is regarded as disruptive of domestic order since realists argue that intervention will breed counter-intervention. Institutionalists believe that the UN and its collective security system can make a contribution to international order. States will use the UN to signal their intentions to each other, on the one hand, and collective action to maintain international peace and security can be legitimised through the Charter mechanism on the other. These approaches are regarded as choices among many to achieve international peace and security by liberal international law. A rule of intervention is simply another option.

Liberal international law sees the concept of intervention as a value-free tool, which can be used to protect individuals and groups. Since a hierarchical separation between domestic, international and trans-national spheres is rejected, the normative impulse to uphold the principle of non-intervention in the domestic affairs of a state is not necessary, if not undesirable. Given that international law is about promoting and sustaining peace and security, if security at the domestic level is threatened, this may also affect security at the international level. Therefore the liberal theory of international law regards intervention as

³⁹³ Slaughter (2000a) at 245.

permissible when the domestic security within a country is regarded to be under considerable threat.³⁹⁴

Liberal international relations theory sees intervention as a way of conflict prevention at the international level. When a government causes or cannot contain domestic instability or threatens to become a 'failing' state, liberal international law prescribes intervention to solve the problem at its roots. Consequently, intervention does not have to be an exception to the rule as in realism (traditional positivism), or collective policing of common values as in institutionalism (modified positivism), but it can be understood as a relative concept which is at the service of international law to maintain international peace and security. As opposed to Teson's moral justification for interventions, arguing that interventions should be carried out to protect civil and political rights of the individuals, for liberal international law what matters is the international security implications of the security crisis in a state. Since domestic structures determine the behaviour of states internationally, root causes of international conflict can in some cases only be prevented by intervention. Liberal international law sees this as the strongest legal and policy justification to intervene. As Slaughter explains:

Many international lawyers are deeply worried about the move away from the 'classicist' doctrine of non-intervention. However, from a liberal IR perspective, the legitimisation of humanitarian intervention is a natural concomitant of human rights law. It is necessitated by some radical breakdown in the functioning of domestic institutions –the failure of a state to provide essential services such as food and shelter to its citizens or the active mass oppression of its citizens. In such circumstances international action is justified to substitute for and in some cases even rebuild basic state institutions to the extent that such efforts have a reasonable chance of success. Again, the justification is not moral,

³⁹⁴ Slaughter (2000b).

although it can certainly be, but instrumental, in terms of the likely impact of the humanitarian disaster on other states.³⁹⁵

This account also goes a step further than the other challenging accounts by arguing implicitly that if the intervention takes place, the intervenors should also change the domestic structure of that country, for example, by removing the dictator and initiating liberal democracy building.

The increase in the number of liberal democracies is regarded as minimising the domestic and hence international disorder. Slaughter explains that ‘the best documented empirical distinction between different types of states by scholars working in the liberal paradigm concerns the frequency of war among liberal states, as compared to war between liberal and non-liberal states alone. Liberal states are states with some form of representative democracy, a market economy based on private property rights, and constitutional protection of civil political rights. These states are far less likely to go to war with one other than they are to go to war with non –liberal states, giving rise to what some scholars have termed ‘liberal peace’.³⁹⁶

The democratic peace research³⁹⁷ aspect of liberal international relations theory suggesting that ‘liberal states rarely go to war with each other’ informs the judgement of which domestic structures are more prone to intervention. Liberal

³⁹⁵ Slaughter (2000a) at 246.

³⁹⁶ Slaughter (1995b) at 509.

³⁹⁷ The democratic peace theory, inspired by Kant’s normative arguments for peace in *Perpetual Peace*, investigated whether liberal states behave differently from other regimes not only domestically but also internationally. The empirical data that the democratic peace researchers put together suggests that liberal states are capable of having peaceful relations with each other. For empirical literature on this issue, see generally Doyle, ‘Kant, Liberal Legacies and Foreign Affairs’, 12 *Philosophy and Public Affairs*, (1985) 205; B. Russett, *Grasping Democratic Peace*, (1993); N. Gleditsch, ‘Democracy and Peace’, 29 *Journal of Peace Research*, (1992) 369. The democratic peace thesis has also investigated whether democratic states are more pacific in general and whether they use force to compel others to become democratic. The findings of these part of research is at the least controversial. See generally, Kegley and Herman, ‘How

international law not only chooses (a) liberal international relations theory's basic assumptions as the underlying worldview of international law, but it, furthermore, chooses the empirical findings of democratic (liberal) peace theory as an indication of the desirability of liberal domestic systems as opposed to other domestic systems as a way of promoting international peace and security. Following this, the liberal international law of Slaughter indicates a normative choice towards favouring liberal democracy as the *preferable* regime to establish following an intervention. Liberal democracies are less likely to go to war with each other. Therefore, international law's aim should be redefined to promote a world of liberal states replacing the realist and institutionalist emphasis on a 'black box' approach to the state that sees states as unitary entities.

3.3.4.2 Narration of History: Progressiveness

Liberal international law uses the narration of history to assert two points. Firstly it is argued that liberal analysis of international law is the 'most preferable' mode of analysis of contemporary international law. Secondly, increasing the number of 'liberal democratic states' is the 'most preferable' option to promote international peace and security.

When Slaughter addresses the relationship between international law and international relations from a historical perspective, the relevance of international law in mainstream international relations theories is described as an ever-improving phenomenon. The dual relationship between international relations

theory and international law has been steadily increasing.³⁹⁸ While during the times when realism has been the dominant theory in international relations, international relations theory and international law co-existed without much interaction, the other two prominent theories of international relations (namely institutionalism and liberalism) invest increasing amounts of interest in international law. Therefore, the history of international relations theory in relation to international law is a progressivist account.³⁹⁹

International law, from the point of irrelevance in the realist paradigm, reaches the stage of being an equal partner to international relations in the prevention of war and the promotion of peace. The perception of irrelevancy is due to the legacy of the realism that has dominated international relations theory since the end of World War II and its reflection as traditional positivism in international law. The rise of liberal theory in the 1980s, in general along with the liberal's focus on the concept of democratic peace, in particular, aims to break with the realist legacy. It is not only the relationship between international law and international relations theory that is improving. The disciplines are separately advancing their conceptual resources as well. The liberal international relations theory and liberal international law are presented as offering the best explanation of the contemporary international phenomena in both disciplines

³⁹⁸ For a comprehensive account of analysis and literature review (mainly US literature dominated) of the role of international law in international relations, see Anne-Marie Slaughter Burley, 'International Law and International Relations: A Dual Agenda', 87 *American Journal of International Law*, (1993) at 205, Burley, "International Law and International Relations Theory: A New Generation of Interdisciplinary Scholarship", 92 *American Journal of International Law*, (1998) 367. *International Rules: Approaches from International Law and International Relations*, (1996) edited by Beck, Arend and Lugt is another book that seeks to bridge between international law and international relations referring to the status of international rules in different schools of approaches. Michael Byers on the other hand uses regime theory and institutionalism to explain the customary international law process in *Custom, Power and the Power of Rules*, (1999).

³⁹⁹ Anne-Marie Slaughter Burley, 'International Law and International Relations: A Dual

separately. Liberal international relations theory claims to offer the most competent explanation of the Post Cold War world, while liberal international law claims to be the vision of international law that can fully integrate human rights law, individual criminal responsibility, and globalised interrelationships between groups and individuals in the world economy. Among all international relations theories, which are presented as the outcomes of a progressive development of humankind, liberalism stands out as the most advanced theory. As Slaughter proclaims, we have finally arrived ‘in a post ontological era...free of existential limbo of the decades since 1950 (which) took its toll in many ways, from the open disdain of public figures, to deeper damage to the discipline itself.’⁴⁰⁰ (original footnotes omitted)

This progressive narration of history is in contradiction with the first assumption of the value free IL/IR method that one is free to choose between a realist, an institutionalist or a liberal worldview in analysing international law. In effect, liberal international law conditions one to assume that realism is ‘history’, institutionalism is ‘yesterday’ and liberalism is ‘today’.

Slaughter also puts a special emphasis on liberal democracies as being ‘empirically’ more peaceful among each other. This is the starting point to make a normative choice with regards to which domestic system international law should prefer and promote in order to maintain international peace and security. This approach strips the liberal democracies of their social and historical genesis and presents liberal democracy as an ahistorical and objective solution to the question of world peace. Traditional positivism’s faith in the principle of non-intervention as a precondition to promote peace and order is falsified by the

Agenda’, 87 *American Journal of International Law*, (1993) at 205.

empirical studies of the ‘democratic peace’ theory. It is, therefore, at least, only for the sake of peace that the liberal international lawyer must favour liberal democracies over other regime types and promote the legality of intervention in cases of domestic disturbances threatening international security. A normative judgement is based on a proposed positive judgement. Liberal international law’s premises recalls the fallacy of *is* and *ought* position argument about conceiving international law with regards to its effectiveness in grasping the world.

The liberal international law account concerns itself only with the present and the future. The post-historical explanation for the preference of liberal democracies overcomes the question of universality for liberal international law. Even though, at present, there is a diversity of domestic regimes, these are regarded as matters to be ‘fixed’ when disorder in these regimes reaches the level of disrupting the international order. By situating itself as the theory grounded in empirical phenomena here and now, liberal international law is disinterested in the controversial and competing accounts of interventions in the past.

3.3.4.3 Sources: Customary International Law in the Making

Liberal international law is the only problem-solving theory which does not aim to justify its position by translating its core presuppositions into the international legal lexicon. Liberal international law is in a sense more preoccupied with identifying the policy considerations than a representation of the current state of law. It is not particularly engaged in the particulars of the technique of delivery, but more concentrated on establishing a link between the right policy choices and

⁴⁰⁰ Slaughter, (1993) at 205.

the law. Law is regarded as a means in advancing the policy choices grounded in liberal international relations theory. What matters most, then, is to identify the right policy choices. International legal language can then be tailored accordingly.

The UN Charter collective security system is only a product of an insitutionalist policy choice in the eyes of liberal international law. Once the liberal foundations of international law are laid, the whole body of disciplinary literature on the UN Charter and the subsequent interpretations of the Charter provisions governing the law on intervention cease to have authoritative control over for what international law is and should be. To avoid disturbance at international level may require intervention in exceptional circumstances. To establish liberal democratic structures following intervention is the way to secure further occurrence of disturbance. Liberal international law extends an invitation to the practitioners of international law to evaluate the sources of international law in accordance with this assumption. This means to drop any argument or source of law which does not fit comfortably with the proscribed policy choices, and pragmatically advance those sources which can be more persuasive in advancing the liberal international law account.

For liberal international lawyers, identifying the domestic security threat is at the core of the legal justification of interventions. Security Council authorisations for interventions might overlap with this aim, however, if it is not possible to obtain such an authorisation, this should not suggest that the interventions carried out unilaterally are illegal. When the regime of non-use of unilateral force (Article 2/4) and collective security in the UN Charter system (Article 39) is not capable of addressing the liberal interventionist policies, they

should not be regarded as legal constraints against interventions. Instead of reconstructing what the UN Charter permits or not, liberal international law suggests that the UN Charter can be violated. If violations of the UN Charter serve the right policy choices as set out by liberal international law, the international legal discipline should not resist to qualify these violations as unlawful merely in order to side with the wording of the UN Charter.

Liberal international law, therefore, is more willing to see the interventionist practices of (liberal) states in extreme circumstances, not as flagrant violations of the UN Charter, but as a way of creating new custom. It recognises the doctrine that the change in international law may also occur by violations of the existing law. Since existing law is regarded as non-authoritative and outdated with respect to contemporary international affairs, its violations do not disturb the international order, but consolidate the coming of a new era based on a new set of presuppositions of what international law is/should be. Therefore non-compliance is, in fact, a way of law creation in the area of intervention.

Consequently, liberal international law relies on the dynamics of customary international law for the explanation of international legal change. As Slaughter suggests, 'within the next two decades, we will have new rules for intervention. State practice is changing and international law will keep pace with it.'⁴⁰¹ This vaguely emerging customary law of intervention does not draw distinctions between Security Council authorised or unilaterally conducted interventions. It confers the authority to intervene upon liberal democracies. The categorical differences between self-defence, enforcement action or humanitarian intervention are also blurred in this account. The only threshold that is to judge

the legality of interventions is to establish whether a domestic situation is likely to disturb the international order. Interventions in the liberal world, then, are always conducted with multiple aims. Every intervention has to have humanitarian, democratisation, and state building components in it even if it initially starts as a security driven operation. Liberal international law perceives contemporary international law in the making in contemporary times. Every case of intervention in the 1990s is a law-making precedent for the blue prints of a law yet to emerge.

⁴⁰¹ Slaughter (2000b).

3.5 Conclusions

This chapter has drawn together and described under the label of ‘contemporary theories on intervention’ four problem-solving theories which provide guidelines for the assessment of the lawfulness of interventions in contemporary international law. The problematic of intervention is a politically and morally loaded social reality that keeps occurring in international affairs. Problem-solving theories of the law on intervention aim to translate this phenomenon into de-politicised operational universal legal matrixes. As discussed, the starting point of this translation is to assess interventions within a binary logic: an intervention, whatever its motives, however its conduct may breed further questions of lawfulness with regards to the conduct of intervention, is to be regarded as either lawful or unlawful in principle. By way of resorting to first order theoretical assumptions, which appear to have a power of rationality, by representing a coherent legal historical narrative, and finally by delivering these within the international legal language, problem-solving theories aim to ‘close’ the social world. They aim to create authoritative legal knowledge on the law of intervention.

I have argued in this Chapter that the premises (commonplaces) of the contemporary problem-solving theories are informed by liberal visions of international law.⁴⁰² While traditional positivism draws its conceptual resources from an ‘analogy’ of liberalism to assert its position, the three challenging

⁴⁰² Koskeniemmi, *From Apology to Utopia*, (1989); A. Carty, *The Decay of International Law*, (1990); James Thuo Gathii, ‘International Law and Eurocentricity’, 9 *European Journal of International Law*, (1998) 184.

theories aim to break away from this analogy and realise their own new version of liberalism in understanding the law of intervention. Even though there are four separate accounts with distinct premises, it appears that the three challenging accounts share a minimum level of consensus when it comes to abolishing the liberal analogy in public international law in understanding the law of intervention.

Modified positivism, Kantian international law and Liberal international law, albeit in various ways, disturb the non-intervention/intervention dichotomy in favour of intervention. Their common conceptual resource is the centrality of the liberal view of the individual in understanding international law against the legacy of *state as the individual*.

Traditional positivism is the sole account which is cautious of defining substantive legal criteria *for* intervention. For the traditional positivist account, all unilateral interventions and all collective interventions not authorised by the Security Council are unlawful. Under extreme circumstances of human suffering, some traditional positivists suggest that stepping outside the law for an instant can be tolerable. The other three accounts form a rather heterogeneous block favouring in principle the lawfulness of various forms of interventions outside the traditional matrix. Modified positivism regards collective interventions as lawful when legitimised by an appropriate authority (Security Council or other). When democratic governments are overthrown or human rights violations reach an intolerable level, modified positivism suggests that interventions are substantially justified in contemporary international law. When such interventions lack authorisation by an appropriate organ, they might be regarded as unlawful, but they can also constitute precedents leading to emerging

customary international law. Kantian international law invests the power of legitimacy not in a manmade authority, but in the moral and legal responsibility to act when human rights violations reach an excessive level in what he terms as already 'illegitimate states or governments'. For liberal international law, it is not a moral duty but a rational choice to intervene when the situation of human rights violations in illiberal states poses a threat to international security. Common to all three challenging accounts is the identification of the central obstacle before change: the rigidity of the principle of non-intervention provided by the traditional account.

With the aim of overcoming this rigidity, the challengers employ two strategies: a rearrangement of the traditional positivist premises or taking interdisciplinary excursions. Modified positivism favours a re-examination of the traditional account in loyalty to formalism and progressively aims to de-centre the telos of international law to the democratic self-governance of individuals. Kantian international law seeks to create an organic relationship between moral philosophy and international law to assert that moral necessity to uphold individual freedom is the basis of law. Liberal international law seeks to harmonise international law in accordance with the policy choices derived from liberal international relations research. In this case it is the necessity of policy that governs the law.

These rethinking and interdisciplinary enterprises undoubtedly do bring a diversity and multiplicity of legal considerations to the inquiry into intervention. However, even in the midst of this diversity, within this particular context, the conceptions of change discussed in Part I re-enter the stage coupled with a wide array of liberal theories of individuality. The three challenging paradigms use

three disciplinary strategies of change while they assert their claims on the threshold of contemporary intervention. Modified positivism uses the dichotomy of *is* and *ought*, arguing that contemporary international law is in the process of a smooth and gradual transition from traditional positivist international law to a more enlightened international law, as reflected in state consent. Kantian liberalism resorts to the unity of *is* and *ought*, maintaining that when the civil and political rights of the individuals in a state are violated, intervention is lawful because it is just. Liberal international law, on the other hand, suggests that there is a fallacy between *is* and *ought*. The international jurist has to place its priorities with the right policy choices in determining the lawfulness of interventions and should not be restrained by the question of what the rules are.

The insights from the indeterminacy of *is* and *ought* position are not accommodated in any way while approaching the problematic of intervention. All three of the challenging accounts are critical of the traditional positivist paradigm, but they are also at one in refusing the indeterminacy position's critique of international law. They are strongly committed to the defence of an Archimedean point –such as individual liberalism- that could guarantee the possibility of the advancement of international law. The holders of the indeterminacy position would have been *theoretically* unconvinced with any project that replaces one foundation (the state) with another (the individual) since they hold that foundations of any kind have a potential camouflage existing power relations. In this respect, the pre-given category of the individual can be as problematic as the category of the state. The challenging theories seem to be unmoved by this critique and, in turn, the indeterminacy position is excluded in explaining change in the laws of intervention in a problem-solving mode.

Even though modified positivism, Kantian international law and liberal international law accounts of intervention diverge on the issue of the circumstances under which an intervention is lawful, they all, however, agree that some form of intervention for protection of human rights and democracy *must not* be immediately overruled. International law should not be read as restraining the law on intervention, but as having the ability to accommodate it. Another common point that has emerged is that all these theories hold that the traditional positivist paradigm cannot hold the fortress for long within the discipline. It is this consensus among a diversity of problem-solving theoreticians which creates the broader effect among the community of international lawyers that the law on intervention may be under a condition of metamorphosis.

Traditional positivist theory of non-intervention has emerged from the bedrock of international law, the European nation-state and increased and consolidated its adherents universally in the aftermath of decolonisation. The three contemporary challengers, however, emerge from the other side of the Atlantic, from the new metropolis of the production of dominant knowledge. In this respect, the disciplinary battle is among the old and the new liberals of international law and the law of intervention provides a crucial site in this battle.

In Chapter 4, I shall turn from the abstract level of ‘change and intervention’ to the particular level. In the next Chapter, my main concern is how the concept of disciplinary change appears in the process of concrete assessment of facts and the ways in which particular cases play a role in resistance to or advocacy of change in international law.

4. THE PARTICULAR

4.1. Introduction

The preceding chapter has discussed how international law on intervention is theorised in a problem-solving fashion by contemporary scholars. It showed that competing accounts of understanding the lawfulness of intervention are offered for concrete assessment of cases and legal qualification of facts. In so doing, these theories have in mind as the audience ‘the practitioner’, who is to give legal judgments, decisions or opinions in concrete cases.

As discussed in Part I, one of the characteristics of a discipline is to create a division of labour between theoreticians and practitioners. The theoretician provides a background, a context in which to situate international law, and commonplaces. He identifies current problems, offers solutions and negotiates cross-disciplinary excursions. The practitioner, on the other hand, is oriented towards the ‘instant’ of legal-decision making and solving legal puzzles which occur in the course of developments in international affairs. Practitioners need not be a separate group of people: a person can also be a ‘practitioner’ and a ‘theoretician’ at the very same time. The dividing line between these two roles is the perceived task of the practitioner of dealing with ‘real’, ‘concrete’ and ‘immediate’ issues, disputes, cases, events or facts which demand an immediate legal solution, opinion, or judgement, or a proposal. The profile of the international law practitioner has expanded its scope in recent years. Alongside international legal scholars and legal advisors of states, the staff of inter-

governmental organisations as well as international non-governmental organisations, members of International Courts, Tribunals and Committees provide a greater pool of actors who have invested interest in the practice of international law.

This chapter sets out to investigate how and in what ways normative theories limit international lawyers' understanding and evaluation of concrete cases as practitioners in periods of transition. To what extent do normative prescriptions affect the way we understand a concrete case and how then might a concrete case affect the way we understand the normative issues involved, when the overall atmosphere is one of metamorphosis?

The case of 'Kosovo' represents two dimensions of how international legal discipline functions in periods of change. The first dimension is the effect of normative and abstract formulations of law to identify what 'Kosovo' means for the community of international lawyers. The international legal discipline, through the dominant normative theories discussed in Chapter 3, redefines and re-articulates the significance of this event for the discipline of international law. The second dimension, on the other hand, is 'Kosovo' as an event formative of the law of intervention itself. In this regard, the issue is not that the case of Kosovo is subordinate to the law on intervention, but that it is formatively contributing to a disciplinary consensus on what the law is. These two dimensions are not easily separable from each other. How this event is characterised in the first place and what kinds of consequences may flow from the event simultaneously reinforce each other. Concrete cases in periods of change contain both of these elements. Resistance to change tends to characterise the 'case' as any other in order to prove the validity of general law over a

particular situation. Support for change, on the other hand, is more likely to point to the unprecedented nature of the ‘case’ and its power to affect how the validity of general law is modified through a particular event.

The first section of this chapter aims to clarify what is meant by the ‘case of Kosovo’ in international legal discipline. As will be discussed, any narrative aiming to explain what happened in Kosovo and its international legal significance is bound to be limited by the *a priori* presuppositions of such an evaluation. The second section focuses on how the competing theoretical guidelines on intervention function throughout the assessment of this concrete case. One of the main arguments of this chapter is that what is diagnosed as the problem and how it is aimed to be solved are inextricably related to each other. A concrete case such as that of Kosovo is a battle ground for the competing theories to claim present authority, and to reinterpret the history as well as sources of international law on the law of intervention.

4.2 The Case of Kosovo

The presupposition to start from when seeking to understanding the ‘Kosovo case’ is that international lawyers do not see and interpret events in the same way as, for example, a political historian or a foreign policy analyst. What matters to an international lawyer is to be able to extract a legally relevant picture of what has happened and to present that picture within the framework of international legal language. The legal ‘reality’ that is constructed around events is the product of an internal disciplinary logic. As Debbas points out, ‘law imposes on social reality its own ‘map of misreading’. It has the paradoxical position of being both

open because society –with its teleology and value content– is reinterpreted and closed because events are ‘misread’ in legal context according to a specific legal matrix.⁴⁰³ The international lawyer strives to know what has happened before it happens. International law aims to ‘freeze’ the event from the perspective of the legal matrix and define it legally by declaring the relevancy and irrelevancy of events for the ‘legal’ dimension. In this respect, the case of Kosovo is a finished affair for the international lawyer interested in the lawfulness of the intervention. Its analysis of lawfulness is ready to take its place alongside other interventions such as the ‘cases’ of Liberia, Northern Iraq, Bosnia Herzegovina, Somalia, Rwanda, Haiti, East Timor, or Sierra Leone and will be related to future interventions such as the ‘case’ of Afghanistan.⁴⁰⁴

With regards to the contemporary accounts of the law on intervention, as discussed in Chapter 3, there is not one single matrix, but competing matrixes which, in turn, are capable of creating their own maps of locating events. Therefore, offering a grand legal narrative of the Kosovo case is an inherently difficult task. There is no essential stable point that can enable the international lawyer to claim an indisputable level of objectivity in understanding the legal implications of this case. There are instead multiple narratives, a plurality of claims to objectivity and a battle for authoritative interpretations of the case. The discipline is striving for a central account of the international legal explanation of

⁴⁰³ V. G. Debbas, ‘The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance’, 11 *European Journal of International Law*, (2000) at 383. On how lawyers construct ‘legal reality’, see also, P. Allot, ‘Making Sense of the Law: Lawyers and Legal Philosophy’, 108 *The Cambridge Review* (1987) at 15-18.

⁴⁰⁴ For an international legal analysis of ‘cases of intervention’, see illustratively, S. Murphy, *Humanitarian Intervention: The United Nations in an Evolving World Order*, (1996); D. Sharooshi, *The United Nations and the Development of Collective Security: The Delegation by the UN Security Council of its Chapter VII Powers*, (1999); F. K. Abiew, *The Evolution of the Doctrine and Practice of Humanitarian Intervention*, (1999); C. Gray, *International Law and the Use of Force* (2000).

this case, not only to explain the case, but also to explain the law *itself*.⁴⁰⁵

This phenomenon can be easily observed by conducting a modest literature survey. Since May 1999, a large group of international lawyers have published books, articles, declarations, opinions, and reports and debated broadly under the title of the Kosovo Case in various fora. The Federal Republic of Yugoslavia brought proceedings against ten NATO member states⁴⁰⁶ before the International Court of Justice.⁴⁰⁷ Some articles have appeared immediately before or following the NATO bombing of the Federal Republic of Yugoslavia, concentrating on ‘international law on a given day’⁴⁰⁸, others have appeared later

⁴⁰⁵ Even though every case can be understood as recreation of the law, only in periods of change is this regarded as a problematic phenomenon by the majority of members of the discipline. At other times, the broad disciplinary consensus as to what the law is makes the law appear as if it exists before the case, before the decision.

⁴⁰⁶ Namely, The United States of America, the United Kingdom, France, Germany, Italy, the Netherlands, Belgium, Canada, Portugal and Spain.

⁴⁰⁷ Proceedings in this case started on 29 April 1999. On 2 June 1999, in two cases (Yugoslavia v. Spain and Yugoslavia v. United States of America), the Court concluded that it manifestly lacked jurisdiction and it accordingly ordered that the cases be removed from its List. On, 22 March 2002. The International Court of Justice has extended by another year the time-limits originally fixed for the filing by Yugoslavia of written statements of its observations and submissions on the preliminary objections raised by the eight respondent States in the cases concerning Legality of Use of Force (Yugoslavia v. Belgium) (Yugoslavia v. Canada) (Yugoslavia v. France) (Yugoslavia v. Germany) (Yugoslavia v. Italy) (Yugoslavia v. Netherlands) (Yugoslavia v. Portugal) (Yugoslavia v. United Kingdom).

⁴⁰⁸ See, illustratively, B. Simma, ‘NATO, the UN and the Use of Force: Legal Aspects’, 10 *European Journal of International Law*, (1999) 1; A. Casesse, ‘Ex iniuria ius oritur: Are we moving towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?’, 10 *European Journal of International Law*, (1999)10; J. Charney, ‘Anticipatory Humanitarian Intervention in Kosovo’, 93 *American Journal of International Law*, (1999) 834; R. Falk, ‘Kosovo, World Order, and the Future of International Law’ 93 *American Journal of International Law*, (1999) 847; K. Guicherd, ‘International Law and the War in Kosovo’, 41 *Survival*, (1999) 19; L. Henkin, ‘Kosovo and the Law of Humanitarian Intervention’, 93 *American Journal of International Law* (1999) 824; S. Balanzio, ‘Nato’s Actions to Uphold Human Rights and Democracy’, 23 *Fordham International Law Journal*, (1999) 291; S. Sur, L’Affaire du Kosovo et Le Droit International: Points et Contrepoints’, XLV *Annuaire Francais de Droit International*, (1999) 280; A. Pellet, ‘La Guerre du Kosovo: Le Fait Rattrape par Le Droit’, 1 *International Law Forum du Droit International*, (1999) 160; J. Duursuma, ‘Justifying NATO’s Use of Force in Kosovo’, 12 *Leiden Journal of International Law*, (2000) 287; D. Kritsiotis, ‘The Kosovo Crisis and NATO’s application of Armed Force against the Federal Republic of Yugoslavia’, 49 *International and Comparative Law Quarterly*, (2000) 330; M. E. O’Connell, ‘The UN, NATO and International Law after Kosovo’, 22 *Human Rights Quarterly*, (2000) 57; H. Quane, ‘A Right to Self Determination for the Kosovo Albanians?’, 3 *Leiden Journal of International Law*, (2000) 219; H. J. Richardson, ‘A Critical Thought on self-determination for East Timor and Kosovo’, 4 *Temple International and Comparative Law Journal*, (2000) 101; S. Sharp and G. Walter, ‘Operation Allied Force:

focusing on the international law of intervention after Kosovo.⁴⁰⁹ There are, as of October 2001, book length treatments of international law on intervention after Kosovo.⁴¹⁰ Furthermore, even scholarship that does not directly address the questions of law with regards to Kosovo treats it as a ‘critical date’⁴¹¹ for the history of international law, which is expected to have impacts, beyond the law on intervention, on the normative order of the international system. The Kosovo case, furthermore, is not only regarded as a disciplinary anomaly or a hard case with regards to the law on intervention. It also involves many other aggregated

Reviewing the Lawfulness’, 23 *Maryland Journal of International Law*, (2000) 295; A. D. Sofaer, ‘International Law and Kosovo’, 36 *Stanford Journal of International Law*, (2000)1; C. J. Yoo, ‘The Dogs that didn’t Bark: Why were International Law Scholars MIA on Kosovo?’, 1 *Chicago Journal of International Law*, (2000) 149; S. Bouwhuies, ‘Kosovo: The Legality of Intervention?’, 6 *Australian Journal of Human Rights*, (2000) 57; P. Weckel, ‘L’emploi de la force contre la Yougoslavie ou la Charte fautive’, 104 *Revue Générale de Droit International Public*, (2000) 19; J. Mertus, ‘Reconstructing the Legacy of Humanitarian Intervention: Lessons From Kosovo’, 41 *Wm&Mary Law Review*, (2000) 1243; P. Hiphold, ‘Humanitarian Intervention: Is There a Need for Legal Reappraisal?’, 12 *European Journal of International Law*, (2001) 437.⁴⁰⁹ See, generally, N. Tsagoruias, ‘Humanitarian Intervention after Kosovo and Legal Discourse: Self Deception or Self Consciousness’, 13 *Leiden Journal of International Law*, (2000) 11; P. Allot, ‘Kosovo and the Responsibility of Power’, 13 *Leiden Journal of International Law*, (2000) 83; A. Cassese, ‘A Follow Up: Forcible Humanitarian Counter Measures and Opinio Necessitatis’, 11 *European Journal of International Law*, (2000) 23; V. G. Debbas, ‘The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace Maintenance’, 11 *European Journal of International Law*, (2000) 361; A. Pellet, ‘Brief Remarks on the Unilateral Use of Force’, 11 *European Journal of International Law*, (2000) 385; N. Krisch, ‘Unilateral Enforcement of the Collective Will: Kosovo, Iraq and the Security Council’, 3 *Max Planck United Nations Yearbook*, (1999) 59.

⁴¹⁰ See, for example, C. Gray, *International Law and the Use of Force*, (2000); N. Wheeler, *Saving Strangers*, (2000); S. Chesterman, *Just War or Just Peace: Humanitarian Intervention and International Law*, (2001); A. Orford, *The New Interventionism*, (2001); A. Schnabel and R. Thakir (eds.), *Kosovo and the Challenge of Humanitarian Intervention: Selective Indignation, Collective Action, and International Citizenship*, (2001); C. Tomuschat, (ed.), *Kosovo and the International Community: A Legal Assessment* (2001).

For treatment of intervention in Kosovo from various other perspectives, see, M. Weller, *Crisis in Kosovo, 1989-1999: From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities*, (1999); J.A. Mertus, *Kosovo: How Myths and Truths Started a War*, (1999); H. Krieger, *The Kosovo Conflict and International Law: An Analytical Documentation, 1974-1999*, (2000); N. Chomsky, *The New Military Humanism: Lessons from Kosovo*, (1999); Slavoj Zizek, *NATO as the Left Hand of God*, (1999); International Independent Commission on Kosovo (ed.) *The Kosovo Report: Conflict, international Responses, Lessons Learned*, (2000); M. Ignatieff, *Virtual War: Kosovo and Beyond*, (2001); K. Booth ed., *The Kosovo Tragedy: The Human Rights Dimensions*, (2001); J. Krause, *Kosovo: Humanitäre Intervention und Kooperative Sicherheit in Europa*, (2000).

⁴¹¹ S. Schieder, ‘Pragmatism as a Path towards a Discursive Open Theory of International Law’ (using Kosovo as a case study), 11 *European Journal of International Law*, (2000) 663.

questions of international law, such as international humanitarian law⁴¹² (especially military targets and the use of weapons), post-conflict governance by international organisations,⁴¹³ right to self-determination,⁴¹⁴ secession, state responsibility,⁴¹⁵ the legal status of UN interim administrations.⁴¹⁶ International legal discipline, as exemplified by the voluminous literature and documentation, shares a tacit consensus at present that any metamorphosis of international law will have a strong memory of Kosovo.

While mapping the legal qualification of this event, I do not first aim to offer a grand narrative of what has happened. On the contrary, I aim to expose the plurality of narratives of this event which lead to competing outcomes about the lawfulness of the action taken. The selection of the title of the case itself is instructive in this regard. This event may as well be categorised as the intervention (or more boldly the bombing) by NATO in the Federal Republic of Yugoslavia. Titling the event ‘the Kosovo case’ may instead suggest that one version of the narrative (i.e. the intervention was carried out to save the Kosovars) is preferred over the others (i.e. the territorial and political integrity of Federal Republic of Yugoslavia was violated).⁴¹⁷

⁴¹² See generally the non-admissibility decision of the Grand Chamber of the European Court of Human Rights, *Bankovic and Others v. Belgium and 16 Other Contracting States* (2001); also M. Bothe, ‘The Protection of the Civilian Population and NATO bombing on Yugoslavia: Comments on a Report to the Prosecutor of the ICTY’, 12 *European Journal of International Law*, (2001) 531.

⁴¹³ O. Korhonen, *Post Conflict Governance by International Organisations*, Eric Castren Institute of International Law Report, (2000).

⁴¹⁴ See, H. J. Richardson ‘A Critical Thought on self-determination for East Timor and Kosovo’, 4 *Temple International and Comparative Law Journal*, (2000) 101; V. Epps, ‘Self Determination After Kosovo and East Timor’, 6 *ILSA Journal of International and Comparative Law*, (2000) 445.

⁴¹⁵ A. Pellet, ‘Brief Remarks on the Use of Force’, 11 *European Journal of International Law*, (2000) 385.

⁴¹⁶ M., Ruffert, ‘The Administration of Kosovo and East Timor by the International Community’, 50 *International and Comparative Law Quarterly*, (2001) 613.

⁴¹⁷ Competing international legal titles of events are a very common problem faced by international lawyers. The general title attached to an event has greater implications for the

Even though I am aware of the connotations that this title may entail, I use this title simply for practical purposes: this is the most common usage found in the discipline. This term, on the other hand, also points to the continuous nature of the intervention and its ongoing relevance for international law. At the time of writing, Kosovo is governed by the United Nations Interim Administration Mission in Kosovo (UNMIK) whose mandate is defined by Security Council Resolution 1244.⁴¹⁸ The aim of UNMIK is to ‘provide transitional administration while establishing and overseeing the development of provisional democratic self-governing institutions to ensure conditions for a peaceful and normal life for all inhabitants of Kosovo’.⁴¹⁹ This mandate does not address the question of whether Kosovo will remain an autonomous province of the Federal Republic of Yugoslavia or become an independent state or join Albania after the end of the transition period. In effect, Kosovo is independent from Yugoslavia in terms of fiscal, monetary, trade, and development policies, civil administration and judiciary.⁴²⁰ In a sense, the future of Kosovo as an

applicable legal regime that the event is subjected to. The way in which an event is titled reflects the tensions between competing clusters of regimes and principles in international law as reflected in the competing categorisations such as: rebel groups as terrorists or freedom-fighters, conflicts as internal or international; use of force, as self defence or collective security action; international operations as peacekeeping or enforcement etc.

⁴¹⁸ UN Doc. S/RES/1244 (1999)

⁴¹⁹ The mandate of UNMIK is in harmony with the justifications put forward for the intervention in this case. While the proposed motives for intervention were violations of gross human rights violations, that is individual human rights of the inhabitants of Kosovo, the mandate of the transition mission is precisely to undo these violations. This framework ignores or delays the deliberation of the question of self determination of the Kosovar Albanians, which may claim to secede from Yugoslavia or annex Albania or aspire to establish a greater Albania in the region. The justification for the intervention and the subsequent interim mission, which is to undo the suffering of the population from an oppressor state, also may have been the cause of failure to protect the non-Albanian (mostly Serbian) population living in Kosovo.

⁴²⁰ Independent International Commission on Kosovo’s Report that studied the Kosovo conflict, suggests that Kosovo, which has been under an interim UN administration since June 1999, should be given "conditional independence". The Commission said that they came to the conclusion that it was not realistic or justifiable to expect the Albanians in Kosovo to accept rule from Yugoslavia, especially considering the ethnic cleansing by the Serb forces and the human rights violations which took place in Kosovo during the conflict last year. In order to achieve peace and legitimacy for the province, the Kosovo Serbs and other minorities, among others the

international political entity shares the being-in-transition situation of the law, which claims to govern the intervention that has initiated the metamorphosis of Kosovo.

The narratives of the Kosovo intervention in international law are based on the dominant, yet competing, paradigms' understanding of the international legal world. There are two dimensions of this event that are regarded as legally relevant for the international lawyer in creating a legal narration. The first dimension comprises a tendency towards positivist analysis: what states do and say, prior, during and after the intervention takes place, whether unilaterally or under the auspices of international organisations. The second dimension is how the international lawyer weighs the relevance of human suffering, translated into the legal sphere as gross violations of human rights in Kosovo and the repressive, undemocratic practices of the Serbian regime in this province. The international law story of Kosovo is thus confined to a two-headed story of liberalism: one head being the state and the other, the individual(s).

The narratives of intervention start with the day of the action taken by NATO member states. On 24 March 1999, NATO begins operations against the Federal Republic of Yugoslavia with cruise missile defence attacks on Yugoslav air defences from UK warships and US bases in the Adriatic. This air-bombing operation lasts until 10 June 1999, the date when, by the UN Security Council Resolution 1244, the Interim Administration Mission in Kosovo (UNMIK) is

Roma, have absolute rights to protection to be able to live peacefully in Kosovo. Due to the ethnic tensions, the Commission proposes what they call "conditional independence". The conditional independence would mean that Kosovo should become independent, subject to a number of conditions that would likely take many years to fulfill. Other conditions are that Kosovo have "an acceptably democratic constitution" and sufficient assurances that the Serb, Roma and other minorities could live in absolute safety, with protection for their human rights, and those who were forced to leave Kosovo should be able to return with those assurances. On the work of the Commission, see <http://www.kosovocommission.org> , accessed on 05.05.01

established. Following this, a NATO-led multinational force is deployed to Kosovo to provide an international security presence. However, even though the lawfulness of the intervention is supposed to deal with international law on the given day, it is never possible to fit the story into an account of the few minutes when the bombs start falling or a 90 day account until they stop falling. The ‘past’ and the ‘aftermath’ of the day of the intervention is constantly fed into the account of the day of the intervention in order to provide the most persuasive legal account of this intervention. This day may stretch as far into the past as to include the Battle of Kosovo in 1389 and into an unlimited future which it is not possible to foresee at present. When new interventions are carried out, the story of Kosovo is likely to be retold to explain that intervention.⁴²¹ What follows is an account of events that have been mostly regarded as legally relevant facts to variable degrees in the legal narratives of the Kosovo case.⁴²²

The intervention of NATO immediately follows the collapse of the Rambouillet peace talks between the Belgrade government and the Kosovo Liberation Army, which formally started on 6 February 1999. The peace talks are aimed at having the two parties agree on a peace deal prepared by the ‘contact group’, which comprises the US, UK, France, Germany, Italy and the Russian Federation. The US, and the UK unilaterally, as well as the NATO collectively, use the threat of use force against Yugoslavia as a means to bring an end to the conflict in Yugoslavia and to bring the parties back to the peace table on several

⁴²¹ This can be in similar vein to the constantly appearing re-articulations of Operation Provide Comfort in Northern Iraq in 1991 (relying on a Security Council Resolution 688, which does not authorise the use of force); the ECOWAS intervention in Liberia (endorsed by an ex-post facto Security Council Resolution 788).

⁴²² This account does not claim to be exhaustive. The constant inclusion and exclusion of facts from any picture of the event is regarded as an inherent characteristic of narrative formation.

occasions.⁴²³ On 22 March 1999, two days before the ‘collapse of talks’, NATO countries provide the NATO Secretary General with the authority to launch air strikes at will. Next day, on 23 March 1999, when the US representative announces the failure of negotiations with Milosevic, the NATO Secretary General directs his generals to begin air operations against Yugoslavia.

The UN Security Council’s deliberation on Kosovo starts with Resolution 1160 of 31 March 1998, when the Council protests the use of excessive force by the Serbian army and terrorist action by the Kosovo Liberation Army. An arms embargo is imposed on the parties in accordance with article 41 of the UN Charter. The Security Council is promoting a midway solution, which means the simultaneous commitment for the preservation of territorial integrity and greater autonomy for the Kosovar Albanians to resolve the ‘conflict’ and the human rights violations stemming from it. On 23 September 1998, resolution 1199 is adopted which affirms that the ‘deteriorating situation in Kosovo constitutes a threat to international peace and security in the region’ and demands a cease-fire and action to improve the ‘humanitarian situation’. The Security Council puts emphasis on the monitoring of the conflict by international organisations, the return of refugees and displaced persons, access to humanitarian assistance and ‘rapid progress’ towards a political solution.⁴²⁴ The last resolution of the Security Council, before the intervention (Resolution 1203) takes place, comes on 24 October 1998. It endorses the verification mission of the OSCE in Kosovo, which is a result of an agreement between the Yugoslav authorities and the

⁴²³ *Kosovo Chronology March 1998-March 1999*, British Foreign and Commonwealth Office Information Brief of 02 August 1999.

⁴²⁴ UN SCR 1199 (1998), para. 4.

OSCE,⁴²⁵ and the air verification component of this mission as agreed by the NATO and the Federal Republic of Yugoslavia.⁴²⁶ This resolution furthermore calls for compliance by the parties to the conflict with previous resolutions, and notes that the OSCE is ‘considering arrangements to be implemented in co-operation with other organisations’ and affirms that ‘in the event of an emergency, action may be needed to ensure the (verification mission’s) safety and freedom of movement’.⁴²⁷ Both China and Russia abstain from voting on this resolution and emphasise that the resolution does not authorise military intervention in the Federal Republic of Yugoslavia.⁴²⁸ This is the final resolution before the intervention.

On the first day of the intervention, the Security Council is called into an emergency session where Russia, China, and Belarus oppose the action as a violation of the UN Charter’s prohibition on the use of force.⁴²⁹ The United States, Canada and France, on the other hand, point out that the Federal Republic of Yugoslavia is in violation of its obligations as laid out in resolutions 1199 and 1203. The Netherlands and the UK argue that the action is legal since it is a response to a humanitarian catastrophe. On 26 March 1999, a draft resolution demanding the cessation of NATO hostilities in Yugoslavia is rejected by twelve votes to three.⁴³⁰ Only Russia, China and Namibia support the draft resolution. The discussions in the Security Council also play the non-intervention principle and the need to respond to the human rights violations and humanitarian catastrophe against each other. The next Security Council involvement comes at

⁴²⁵ OSCE Verification Mission Agreement, 16 October 1998, OSCE Document CIO GAL/65/98.

⁴²⁶ UN Doc S/1998/991 Annex.

⁴²⁷ UN SCR. 1203 (1998) para. 9.

⁴²⁸ UN Doc. S/PV.3937 (1998) 12 (Russia) 14-15 (China)

⁴²⁹ UN Doc. S/PV.3988 (1999)

the end of the bombing on 10 July 1999. Resolution 1244 establishes UNMIK authority in Kosovo without any reference to the bombing that has taken place for the previous two months.

The reactions of states to the intervention are mixed, both in the UN Security Council and the General Assembly sessions and in their official declarations. China, India, Namibia, Iraq, Libya, Chile, Ukraine, Cuba, Mexico, and Belarus have been quick in declaring that the action was unlawful.⁴³¹ All NATO countries as well as Slovenia, Argentina, Bahrain, and Sweden declare that they support the intervention.⁴³² The Group of 77 in their New York Declaration of December 1999 rejects any legal right to humanitarian intervention.

Responses to the intervention come in the form of support, and protest, but mostly in the form of silence from the majority of states. In making a formal assessment of the responses of states, international lawyers need to go back to the fundamentals of the theories of sources of international law. Are the responses of the 'international community' at all relevant for an assessment of legality? How many states are required to protest or support an action and to what extent do these reactions affect the determination of lawfulness? Are the habitual behaviour and *opinio juris* of some states more important than those of other states? Is the proper way of assessing the responses majoritarian positivism or qualitative positivism? Should the international lawyer take into account the responses of intergovernmental organisations, and perhaps non-governmental organisations, explicitly in her framework of analysis?

⁴³⁰ UN Doc. S/PV.6659 (1999)

⁴³¹ UN Doc. S/PV.6657 (1999) and S/PV.6659 (1999).

⁴³² *ibid.*

The human rights violations dimension of Kosovo cuts across all narratives of the lawfulness of the intervention. This narrative is distinct from that of the positivist analyses of state behaviour. Its aim is to try to assess whether what happens on the ground can legally justify the intervention. However, the 'ground' is analysed in terms of the violations of the rights of the individuals forming a collective group of victims, not in terms of the claims of the collective *per se* to a right to self-determination or secession. Therefore, the human rights violations narrative is based on the *international legal rights* of the individuals and the lawful necessity to halt the gross violations of these rights. Here, the international legal reality is not interested in analysing the historical and political context of the suffering or the identification of the extent of the responsibility of actors.

The question, here, is whether the Serbian state's well documented perpetration of widespread and serious human rights violations can legally be qualified as justification of NATO intervention, either as an exception or as a matter of principle. Widespread gross human rights violations take place frequently, if not always, under authoritarian regimes and in civil wars where one ethnic group is trying to dominate another or is trying to break away from another. The international human rights law logic functions by holding the state authorities accountable for these violations. The state not only has the responsibility not to violate the rights of its citizens, but also the duty to protect them in cases of police and military operations carried out to arrest 'terrorists'. The main legal order to provide remedies for human rights violations is the state. When the state effectively regards its citizens as potential enemies undermining its very self-existence, the relevant legal inquiry is whether other states or

international organisations can by-pass the sovereign states' immunity and take action to halt these violations at their own discretion. An affirmative answer to this question requires fighting against the state and taking sides in the conflict in favour of the identified victims of gross human rights violations. The moment of justification of intervention in this framework does not focus on the collective claims of the victims, but on the notion that individuals, for whatever reason, have become the 'victims' of improperly functioning state authority.

The Kosovar Albanian demands to join with Albania date back to the end of World War I and this claim surfaces on various occasions, leading to confrontations with the ruling authority of Kosovo in post World War I history.⁴³³ The human rights violations dimension, on the other hand, focuses on documenting and creating public awareness of the oppression of the Serb authorities and paramilitary forces after the autonomy of Kosovo (as well as Vojvodina) is lifted by the Serbian central government in 1989, by an amendment in the Serbian Constitution.⁴³⁴ Both the repressive policies of the government and their documentation at the international level increases in the 1990s.⁴³⁵

In January 1998, the Kosovo Liberation Army (KLA) officially declares that it is the armed force of Kosovo and will fight for unification with Albania.⁴³⁶

⁴³³ For an illuminating account of the history of Kosovar Albanians and their political and territorial claims, see 'Select Chronology: Kosovo and Yugoslavia, 1918-1998' in J. A. Mertius, *Kosovo: How Myths and Truths Started A War*, (1999) 285-313.

⁴³⁴ Constitutional Amendments of the Socialist Republic of Serbia, 1989, Official Gazette of the Socialist Republic of Serbia, No. 11/89, Reproduced in (English) M. Weller, *The Crisis in Kosovo 1989-1999: From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities*, (1999) at 59-60.

⁴³⁵ Helsinki Watch, *Yugoslavia: Human Rights Abuses in Kosovo 1990-1992*, (New York: Human Rights Watch/ Helsinki Watch, 1992)

⁴³⁶ Cited in the *Chronology* compiled by M. Weller, in *The Crisis in Kosovo 1989-1999: From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities*, M. Weller (1999) at 20.

The fighting intensifies in Kosovo during that year and the Serbian police and paramilitary forces are reported to deliberately target civilians, conduct mass deportation of the population and orchestrate mass killings. Between February 1998 and March 1999, what takes place in Kosovo falls into the international legal framework of an internal armed conflict, between two unequal parties. The conflict on the ground increasingly produces grave violations of both international human rights law and international humanitarian law. That is, the conflict on the ground itself is not carried out within a legal framework taking into consideration international human rights and humanitarian law standards. It is the outsider who tries to make sense of the conflict in those terms. The gross human rights violations and violations of law and customs of war, in turn, are on a dramatic increase as the war continues.⁴³⁷ The public authorities are able to escape from legal restraints in their actions at a domestic level, but the international human rights regime reports and documents these violations internationally.

Many intergovernmental and non-governmental bodies address the violations of human rights and humanitarian law, as well as ethnic cleansing amounting to genocide in Kosovo. Whilst the international governmental bodies in their various capacities address the situation in Kosovo,⁴³⁸ non-governmental

⁴³⁷ For the documentation of the violations of human rights law and international humanitarian law, see *Kosovo/Kosova –As Seen as Told*, OSCE, Vienna, (1999); *Kosovo Report, Conflict, International Response and Lessons Learned*, Independent International Commission on Kosovo, (2000).

⁴³⁸ An illustrative list of this involvement, after 1998, may be seen below. The UN General Assembly Resolution 53/163, Situation of Human Rights, 9 December 1998; UN General Assembly Resolution 53/164, Situation of Human Rights in Kosovo, 9 December 1998; The Report of the Secretary General, 30 October 1998; The UN Human Rights Commission Resolution 1998/79, Human Rights in the Former Yugoslavia, 22 April 1998; Concluding Observations of the Committee on the Elimination of All Forms of Racial Discrimination: Yugoslavia, 19 March 1998; Conclusions and Recommendations of the Committee against Torture: Yugoslavia, 6 November, 1998; the ICTY; the Council of Europe; the OSCE are

organisations, too, provide detailed accounts of violations,⁴³⁹ which constantly worsen as the fighting intensifies. By the beginning of 1999, the situation in Kosovo is firmly placed in the pervasive nexus of non-intervention/intervention in all its political, moral and legal dimensions, with the extensive treatment that the event receives among governmental, non-governmental and media circles in the international sphere. The amount of documentation of the atrocities in Kosovo is not possible to disregard. However, the international lawyer is faced with the question of how to fit this into a 'legal matrix', (not into a moral, political or strategic one), which by the emergence of challenging accounts to traditional positivism in the 1990s sends conflicting signals to the practitioner of international law in assessing the law of intervention.

4.3. Legal Qualification of Facts in the Kosovo Case

This section draws together elements from the previous chapters. As I have discussed in Chapter 3, the disciplinary accounts of the law on intervention allow particular perspectives to be written into the law, as the law itself. Dominant theories of the discipline on this issue focus on making an ultimate choice about whether the nucleus of international law is the state or the individuals living in the state. While, for the traditional account, sovereign states are the ultimate reference point for the law, modified positivism, Kantian liberalism and liberal

amongst the international bodies who address the issue besides the UN Security Council.

⁴³⁹Mertus & Mihelic, *Open Wounds: Human Rights Abuses in Kosovo*, (Helsinki Watch, 1994); *Systematic Rights Abuses Reported in Kosovo*, New Europe On-Line, Aug. 28, 1998, at WL 24015766, Federal Republic of Yugoslavia: Humanitarian Law Violations in Kosovo, 10 *Human Rights Watch Report* 9(D) (1998) <http://www.hrw.org/reports98/kosovo/>; Reports of the International Crisis Group, to be found at <http://www.intl-crisis.group.org/projects/sbalkans/kosovo.htm#reports>

international law identify the ultimate reference point as the individual, even though their justifications for this focus differ from each other.⁴⁴⁰ This division runs deep in contemporary international legal discipline and cannot be unpacked to ‘re-imagine’ how international law may speak otherwise on the Kosovo case. Disagreements flowing from this division is what the practitioner is left with as the ‘real’ problems faced in giving a decision on the *lawfulness* of the Kosovo case. In other words, conflicting positions on the lawfulness of the Kosovo case, even though they are rooted in the internal conflicts of a modern liberal understanding of international law, are what we have as the problems with the law and the determination of the lawfulness of this case.

This division, which creates a spectrum of positions, ranging from inter-state based accounts to individual based accounts of international legal liberalism, leads to a further division in practical reasoning. The lack of one dominant theory informing the practitioner causes a split in considering the procedural and substantive aspects of the law. The proliferation of accounts challenging traditional positivism paves the way for a professional suspicion about the substance of law which existing formal rules intend to guard. The contemporary multiplicity of what the substance of positive laws on intervention is produces three routes of practical reasoning for the concrete assessment of this case. They are respectively, illegal and illegitimate, illegal, but legitimate and legal and legitimate. What I refer here as legitimacy is a judgement of rightness that is made in relation to this particular case. In the course of the split consideration between the substance and the form of the law, the action itself

⁴⁴⁰ Modified positivism emphasises that states are increasingly consenting for the individual to be the reference point of international law. Kantian liberalism offers a moral justification, while liberal international law opts for an empirical explanation. For more detailed elaboration, see

may be considered legal, illegal, legitimate, or illegitimate, however, for different reasons leading to diverse images of the Kosovo case in relation to the future of law on intervention.

The illegal and illegitimate position is the material manifestation of the resistance to change in understanding the law of intervention. The illegal, but legitimate, position, however, locates the law in a condition of metamorphosis. The law may indeed change and the case of 'Kosovo' may serve as a strong precedent for this change. Lastly, the legal and legitimate position holds that the law has already changed and this particular case is governed by the new law as opposed to the old one.

The Kosovo case is formative of the law of intervention, because all three routes continually aim to conclude the questioning about the law so that its authority for future decisions may continue. The Kosovo case becomes the site of construction and reconstruction of the law. It has an undeniable authority, precisely because it is not an abstract opinion, but a concrete determination of a 'real' case, involving 'real' people. The following sections aim to map how these positions emerge as a mixture of selection of norms and facts in the course of deciding and providing reasons, and how different routes may reach the same conclusions.

4.3.1.1. Illegal and Illegitimate

The position arguing that the intervention in Kosovo is clearly unlawful and unjustified is a restatement of the traditional account of the law on

intervention.⁴⁴¹ This case becomes an important opportunity to reassert the validity of the claims of the traditional account, while at the same time providing an authoritative analysis of the facts of the case *vis a vis* the emerging rival accounts of the matter. The *illegal* and *illegitimate* argument starts the analysis from the firmness of international law on intervention rather than the special circumstances of the concrete case. This position prefers the deductive mode of legal reasoning while suggesting that there is no conflict between the substance and the form of the law on intervention. In this ‘legal matrix’, the case of Kosovo is simply a violation of current international law and is short of any law-modification authority. The unlawfulness argument resists the representation that either suggests that the Kosovo case is ‘unique’ or has the potential to ‘change’ the law on intervention.

The unlawfulness argument can be sketched as follows: the UN Charter is clear on the law of intervention.⁴⁴² There has never been consistent state practice or *opinio juris* regarding unilateral or collective intervention in customary international law for whatever reason.⁴⁴³ Therefore, the current state of customary international law overlaps, and is consistent, with the UN Charter. General international law, governed by the UN Charter, requires either invoking an individual or collective right to self-defence under article 51 of the Charter or the *explicit* authorisation of Security Council for the use of force under article 39.

⁴⁴¹ See generally, S. Chesterman, *Just War Just Peace* (2000); M. E. O’Connell, ‘The UN, NATO and International Law after Kosovo’, 22 *Human Rights Quarterly*, (2000) 57.

⁴⁴² C. Gray, *International Law and the Use of Force*, (2000); cf. V. G. Debbas, ‘The Limits of Unilateral Enforcement of Community Objectives in the Framework of UN Peace and Maintenance’ 11 *European Journal of International Law*, (2000), at 361-383.

⁴⁴³ This argument is advanced in meticulous detail by I. Brownlie providing citations from the ICJ and the highly qualified publicists of international law. I. Brownlie, ‘Kosovo Crisis Inquiry: Memorandum on the International Law Aspects’, 29 *International and Comparative Law Quarterly*, (2000) at 884-894. See also on the lack of persuasiveness of the arguments advancing a right to humanitarian intervention, S. Chesterman, *Just War or Just Peace*, (2000) at 45-88 and

The individual self-defence argument must be discarded at the outset since there has not been an armed attack or a threat of an armed attack to any of the member states of NATO, who initiated the unlawful attack. The collective self-defence argument also needs to be immediately ruled out since Kosovo –on whose behalf the intervention is carried out- is not a state, which may have had the right to inherent individual or collective self-defence, but a province of the Federal Republic of Yugoslavia.⁴⁴⁴

The legal focus, in terms of the other provisions of the UN Charter, is then limited to the lack of a Security Council resolution for the particular action. The traditional account regards *explicit* Security Council authorisation as the sole power for legalising and legitimating the use of force under UN auspices. Following this, facts such as the prior Security Council resolutions determining a threat to peace in the area do not have a sufficient legal significance⁴⁴⁵ since they do not authorise under Chapter VII of the Charter the use of ‘all necessary means’ in general or resort to air strikes in particular. The importance attached to the prior Security Council resolutions in practical reasoning is attaching a legal significance to the acts of a political body, who is only capable of producing political effects, unless the collective security mechanism provided for the Charter is openly invoked by that body. Consequently, the argument that a resolution would have been vetoed by Russia and China is not regarded as a relevant legal fact. On the contrary, this is viewed as a sign of bad faith on behalf

also 112-163.

⁴⁴⁴ The intervention in Kuwait after the Iraqi invasion has brought the discussion of whether the US and her allies conducted an enforcement action under the authorisation of Security Council or resorted to collective self-defence subsequent to the invitation of Kuwait. This, of course, had implications for the legal and political control and accountability regarding the conduct of operations. See for example, Rostow, ‘Until What? Enforcement Action or Collective Self Defence?’ 85 *American Journal of International Law* (1991) at 63.

⁴⁴⁵ UN SCR 1199 (1998) and UN SCR 1203 (1998).

of the NATO member states in abusing the UN Charter and causing the danger of possible abuse by other states.

This position is also able to find further signs of bad faith, pointing to a lack of resort to an institutional arrangement similar to that of the Uniting for Peace Resolution of 1950⁴⁴⁶. In this resolution, the General Assembly decided that in the absence of unanimity in the Security Council, the General Assembly could make *recommendations* to member states to take collective actions to maintain international peace and security. If the General Assembly were not in session, there would be an emergency session within twenty-four hours at the invitation of any seven members of the Security Council or by a majority of the members of the UN.⁴⁴⁷ This position condemns the fact that NATO member states not only refrained from trying to obtain an explicit Security Council resolution, but also did not seek to involve the General Assembly in the decision making process. This can only be qualified as a violation of the rule of law.

The 'reverse veto'⁴⁴⁸ that is exercised with respect to the draft Security Council resolution of 26 March 1999 sponsored by China, Namibia and the Russian Federation, demanding the cessation of hostilities by the rest of the twelve Security Council members, is regarded as another attempt by power to silence the rule of law on this matter. The refusal of the twelve members of the Security Council to view the bombing as an aggression cannot be regarded as legitimating the action itself since any deliberation of the Security Council other

⁴⁴⁶ General Assembly Resolution 377 (V), November 3, 1950; G.A.O.R., 5th Sess., Supp. 20, at 10.

⁴⁴⁷ The General Assembly had an emergency special session and acted under the Uniting for Peace Resolution for example in Korea (1950), Suez (1956), Congo (1960), Pakistan Civil War (Bangladesh) (1972), Afghanistan (1980), Namibia (1981), Occupied Arab Territories (1982).

⁴⁴⁸ This term is first coined by D. Caron, 'The Legitimacy of the Collective Authority of the Security Council', 87 *American Journal of International Law*, (1993) at 556.

than its actions under Chapter VII is of a political nature. Article 25 of the UN Charter does not bind the member states of the UN by the political discussions held in the Security Council. The intervention in Yugoslavia, then, can neither be legally justified by prior resolutions nor by the alleged political impossibility to obtain an authorisation from the Security Council.

This account also resists attempts to *ex post facto* justify the intervention with reference to Resolution 1244, which establishes the UN transitional authority in Kosovo. Here, the argument is twofold. First, Resolution 1244 neither refers to the events taking place in Kosovo, nor does it endorse the action taken by NATO. Even if it had referred to it, it would still be questionable whether an *ex post facto* resolution can legalise a violation of the non-use of force.

This assessment, however, does not suggest that the law can never change and indeed accepts that the violation of present law is one way of changing it. But the burden of proof ought to rest with the violators, not with the guardians of law. As Brownlie puts it:

There can be no doubt that the United Nations Charter can be modified by the congruent practice of the Member States, crystallising as a new principle of customary law. But there is a burden of proof upon proponents of a change in the customary international law. The central point is the absence of evidence of a change of view by a majority of states. The assertions of legality made by the British and other governments in relation to the military operations against Yugoslavia were unaccompanied by any particulars of supporting state practice.⁴⁴⁹

The unlawfulness positions' threshold for new customary international law changing the present authoritative law is high and demanding. The question of how custom changes is a perpetual search towards scientific deductive

administration in international legal doctrine.⁴⁵⁰ However, it has always been difficult to succeed in creating a solid blueprint since the questions of what is state practice, what is *opinio juris*, and how much state practice and *opinio juris* are needed to change custom, do not offer straight jacket-guidelines for every particular case⁴⁵¹ and vary with regards to the topical issues concerned.⁴⁵²

The illegality position's argument articulating change in custom demands the fulfilment of two criteria: first, the violator states clearly need to pronounce that they are violating the existing law with the conviction that their practice and *opinio juris* will amount to new law. They have to justify their action on new legal grounds. Their raw violation of the existing law cannot automatically be given the value of precedent. Secondly, even if the violators base their action on a new body of law, such claims need to be weighed against the reactions of the rest of the states. In a detailed study of the Kosovo case, Chesterman finds that among NATO member states 'only the Netherlands and the United Kingdom argued that the action was a legal response to a humanitarian catastrophe.'⁴⁵³ He further states that 'while the US, France and Netherlands have argued that the previous Security Council Resolutions on Kosovo implied the coercive use of

⁴⁴⁹ I. Brownlie, *supra* note 443 at 894.

⁴⁵⁰ For a contemporary analysis of the doctrinal debates, see S. Yee, 'The News that *Opinio Juris* "Is Not a Necessary Element of Customary [International] Law" Is Greatly Exaggerated', 43 *German Yearbook of International Law*, (2000) 227.

⁴⁵¹ The international legal doctrine seems to suffer from definitional problems as well as doctrinal coherence on the question of custom formation. On the definition of state practice (that it only includes acts, but not statements of states) see D'Amato, *The Concept of Custom in International Law* (1971), cf. Wolfke, *Custom in Present in International Law* (1993); for a broader definition of state practice inclusive of statements of central organs of the state, K. Zemanek, 'What is Custom and How do we know it when we see it?' in Beyerlin (ed.) *Recht zwischen Umbruch und Bewahrung, Festschrift fur R. Bernhardt*, (1995) 289.; on the role or lack of the role of *opinio juris* in custom formation, see M. Mendelson, "The Subjective Element in Customary International Law", LXVI *British Yearbook of International Law*, (1995) 177; for the rearticulation of *opinio juris* as shared expectations of the international community); M. Byers, *Custom, Power and the Power of Rules*, (1999).

⁴⁵² See for example the discussions of 'instant custom' in the case of space law, B. Cheng, *International Law, Teaching and Practice* (1982)

force, other members of NATO such as Canada, Italy and Portugal did not offer any clear legal justification'.⁴⁵⁴ It is also pointed out that while NATO officials and member states very often referred to a 'humanitarian catastrophe', the more legal phrase of 'humanitarian intervention' has been generally avoided.⁴⁵⁵ In a similar vein, Matheson, legal advisor to the US State Department, explains that the NATO offered 'a pragmatic justification designed to provide a basis for moving forward without establishing new doctrines or precedents that might trouble individual NATO members or later haunt the Alliance if misused by others'.⁴⁵⁶ The core point of this perspective is, then, how one can legally justify a case, or can argue that this is customary international law in the making, when the case itself has not in effect been legally justified by the violators and has been deliberately presented not as a precedent, but as a 'unique combination of factors'.⁴⁵⁷

Secondly, the violation of the law should be positively welcomed by other states in their legal responses to this case. The silence of the majority of the states in the aftermath of the intervention should not be taken all too easily to suggest acquiescence. The test for modification of custom is based on demanding a majoritarian test. It demands clear articulations of state practice and *opinio juris* on behalf of the violators and corresponding recognition of this act on

⁴⁵³ S. Chesterman, *Just War or Just Peace* (2000) at 212.

⁴⁵⁴ *Ibid* at 213.

⁴⁵⁵ I. Brownlie, 'Kosovo Crisis Inquiry: Memorandum on the International Law Aspects', 49 *International and Comparative Law Quarterly* (2000) 878 at 882.

⁴⁵⁶ M. Matheson, 'Justification of the NATO Air Campaign in Kosovo', 94 *ASIL Proceedings* (2000) at 301.

⁴⁵⁷ *Ibid*.

behalf of the other states. 'Silence' may not be allocated a value of positive recognition.⁴⁵⁸

A further argument advanced for the unlawfulness of this intervention is the violation of a peremptory norm of international law. The doctrine of peremptory norms is as contested as the doctrines of custom⁴⁵⁹, that is the formation, change and invalidity of peremptory norms face similar doctrinal difficulties to that of the creation and modification of customary international law. However, since peremptory norms create a 'higher' level of normativity than international treaties and custom, they can *only* be modified, changed, or invalidated by the emergence of another peremptory norm.⁴⁶⁰ Mere state practice cannot change a norm of *ius cogens*. The characterisation of the prohibition of the use of force as a peremptory norm, and its subsequent violation in the Kosovo case creates an even higher threshold for the custom-modification power of this event. A peremptory norm can only be replaced by another peremptory norm. The *ius cogens* status of non-use of force requires almost unanimous consensus for changing or modifying the law on the use of force. In the absence of such a consensus, violation of a *ius cogens* norm requires action to assertively combat the violation. This case should be protested even more strongly since it has the potential to harm the highest principles of the international community.

⁴⁵⁸ G. Nolte, for example suggests that 'silence' of states should not be interpreted in acquiescence in the era of a single military and economic super power. The states' lack of reaction to the actions of the superpower should not suggest that they are supporting these actions. Of course, what Nolte suggests is shifting the balance in custom formation from formalism to instrumentalism, however still presupposing a negative relationship between power and law. G. Nolte, 'The Single Superpower and the Future of International Law' 94 *ASIL Proceedings* (2000) 64.

⁴⁵⁹ For an extensive treatment of the doctrine of peremptory norms, see L. Hannikainen, *Peremptory Norms (Jus Cogens) in International Law, Historical Development, Criteria, Present Status*, (1988).

⁴⁶⁰ This doctrine is tautological since it suggests that it must be determined before a peremptory norm comes into effect that it is a peremptory norm.

This account of the Kosovo case also has consequences for establishing analogies with previous and future cases. The Kosovo case is a flagrant violation of general international law and should not be analytically categorised alongside interventions authorised by the Security Council. For example, the case of East Timor, which took place in the same year, is legally different from that of Kosovo. Furthermore, this case should also not be added to a list of post-Cold War interventions stretching from Northern Iraq to Sierra Leone in international law terms. In the international legal narration of history, international lawyers should refrain from placing the case of Kosovo in the already contestable category of ‘Post-Cold War humanitarian, pro-democracy interventions’. The analogous events lie somewhere else. As Lobel states, ‘viewed in isolation, the Kosovo operation might be read to signal a transformation of international law. In the context of the two other US military actions in 1998-1999, a very different picture emerges – of a superpower simply ignoring the relevant law. The military attacks against Iraq, Afghanistan and Sudan, and Kosovo, shared the common characteristics of apparent illegality under the UN Charter, of United States argumentation based on the necessity of thwarting evil, and Security Council acquiescence in the aftermath of the attack’.⁴⁶¹

Since the Kosovo case neither fulfils the criteria of clear intentions of creating new custom nor the majority of states agreeing with it, it is a violation of international law, short of having an effect on the present analysis of intervention. Therefore, it is an isolated violation to be condemned at every opportunity. It is the ‘power’ of NATO member states overriding the

⁴⁶¹ J. Lobel, ‘The Benefits of Legal Restraint’ 94 *ASIL Proceedings* (2000) at 305.

fundamental principles of international law. It is not only illegal, but also illegitimate lacking any quality to be justified on any lawful ground.

As seen, this position does not resort at all to the particular 'human suffering' or 'violation of human rights' narrative at any stage as legally relevant phenomena. This should however, not be read as a lack of compassion by this position towards human suffering. It, solely, resists the legal allocation of value to it. Political or moral arguments may advance the legitimacy of this action, but the law should remain autonomous, even if the cost is the marginalisation of international law in decision-making processes. Therefore, the illegality and illegitimacy of the intervention internally makes its own political and moral choices. These choices are not only limited to this particular intervention, they also redefine what international law stands for in contemporary international relations.

4.3.1.2 Legal and Legitimate

The position that argues for the lawfulness of the intervention in Kosovo draws on the entire array of problem-solving theories. However, as is to be expected, the justifications that these theories provide for the lawfulness of the action vary considerably. This is also reflected in the ways in which factual assessments of this particular case are carried out. One common feature among the pro-lawfulness accounts, however, are their starting-points. The starting-point of the pro-lawfulness positions presupposes the legal permissibility of interventions, even though the framework of this permissibility has a variable content. They do not see any contradiction between the procedural and substantive aspects of the

law, arguing that the formal representations of the law make room for substantive claims for intervention. The pro-lawfulness positions can be differentiated from each other either in terms of their adherence to a long or short authoritative past, or of whether they regard intervention as a rule or as an exception applied to the Kosovo case.

The argument based on a long authoritative past would argue that there has always been a right to unilateral humanitarian intervention in international law, which also has survived the coming into force of the UN Charter. This position can either manifest itself as a weak thesis or a strong thesis. As discussed in Chapter 3, in the traditional account of intervention, there has always been a group of international lawyers, who have argued for a *limited* right of unilateral humanitarian intervention under *very* exceptional circumstances in international law under the rubric of defence of necessity. This position has been in conformity with all the other traditional premises with regards to intervention, but has also argued for an extremely exceptional lawfulness of unilateral humanitarian intervention, alongside self-defence and UN Security Council authorised enforcement actions. This view has been marginalised by the dominant traditional account of intervention, and has been regarded as lacking credibility, and as mixing law with morality or policy choices of strong states.⁴⁶²

The weak thesis does not aim to disturb the main premises of the traditional account. However, it suggests that under very limited conditions a need may occur to step out of the traditional paradigm for a very short period of time to avert a greater harm. This 'stepping out' is explained by the doctrine of 'defence of necessity'. As, Reisman, an adherent of this position, puts it:

...No lawyer, whatever his or her conclusion as to the lawfulness of NATO's action in Kosovo, can look back to the incident without disquiet. While some in our profession will strain to weave strands from various resolutions and *ex cathedra* statements of UN officials into a retrospective tapestry of authority (unintentionally contributing to bases for other claims and actions), all appreciate that NATO's action in Kosovo did not accord with the legal design of the United Nations Charter. The question is whether Kosovo comes under the 'suicide pact' rule, the *exceptio* for that very small group of events that warrant or even require unilateral action when the legally designated institution or procedure proves unable to operate'.⁴⁶³

The weak thesis strictly regards the intervention in question as an exception, which does not have the capacity to change the law. It looks for evidence of the senseless, brutal and irrational behaviour of the oppressor state, and has to establish that all peaceful inter-state means to resolve the issue have come to an end and that the UN collective security mechanism has been unable to address the problem. In this regard, the immediacy of action to end the suffering of the Kosovar population, the neglect of the deteriorating situation in Kosovo during and after the 1992-1995 Balkan wars, the collapse of the Rambouillet agreements,⁴⁶⁴ and the veto of the draft resolution by the twelve Security Council member states become significant legal facts pointing to the unique and exceptional circumstances present in this case. Security Council Resolution 1244, on the other hand, would be regarded as a legal document normalising the exceptional legal circumstances, certifying that the 'stepping out' of the law has ceased. The weak thesis does not rely on analogies or precedents to justify its argument. It should precisely be the incomparable nature of the case of Kosovo to any other event that should make the intervention tolerable in international law.

⁴⁶² See generally, Lillich, *Humanitarian Intervention and the United Nations*, (1973).

⁴⁶³ M. Reisman, 'Kosovo's Antinomies', 93 *American Journal of International Law* (1999) 860.

⁴⁶⁴ Weller, M., *Crisis in Kosovo, 1989-1999: From the Dissolution of Yugoslavia to Rambouillet and the Outbreak of Hostilities, International Documents and Analysis*, Vol. 1, (1999).

The strong thesis for the legality of the action, as argued in principle by Teson in his Kantian account, on the other hand, does not regard humanitarian intervention as an instant of breaking the law under exceptional circumstances. This thesis argues that humanitarian intervention has always been a lawful principle. The principle of non-intervention is credible as long as the individuals living in a state consent to the existence of that state. Once the state starts committing gross violations of human rights and the citizens themselves are asking for help, there is a duty on the liberal states to intervene on behalf of the oppressed citizens. Therefore, the emphasis of this position is on the illegitimacy of the Belgrade regime, not on the illegitimacy of NATO to intervene since the illegitimacy of the state is the sole basis for the justification of intervention. The reaction to the intervention, very much contrary to the traditional legality or illegality positions, would be that intervention took place too late, did too little.

The strong thesis considers all the legal and, furthermore overlapping, moral conditions for humanitarian intervention to be in place in the case of Kosovo. It is politics, not law, that is falling short in this case. The strong thesis' logic is reveals a tendency to support punitive actions against illegitimate, 'enemy' states in favour of the victims of gross human rights violations. The norms are in place (the right to humanitarian intervention in cases of gross human rights violations), but there is a problem of effective implementation. Seen from this perspective, the lack of Security Council authorisation is of marginal importance as a legal fact. The human rights violations narrative is more authoritative than the state-based positivist narrative.

The second stream of arguments for the lawfulness of the intervention, on the other hand, relies on a more recent authoritative past. The case is not that

international law has always permitted legal grounds for interventions other than self-defence. But, since the end of the Cold War, there has been an emerging practice in support of interventions for humanitarian purposes, either by the authorisation of the Security Council or by its subsequent endorsement of the interventions carried out unilaterally. In other words, the legality of the interventions is explained with a narrative which regards post-Cold war developments as the significant turning point for international law.

From this perspective, interventions by the US, the UK, the Netherlands and Canada in the aftermath of Resolution 688 in Northern Iraq in 1990 and the endorsement of the intervention of ECOWAS in Liberia by Security Council Resolution 788 in 1992 are the starting points of an emerging custom.⁴⁶⁵ The threshold for custom creation is not as demanding as the assessment forwarded by the pro-unlawfulness position. In lieu of a qualitative majoritarian pluralism, this position refers more to the consent of the ‘international community’ to the alleged custom-formation. As discussed in the previous Chapter, all three challenging problem-solving accounts subscribe to the historic importance of the post-Cold War era in understanding international law on intervention. Both modified positivism and liberal international law theses encourage the practitioner to look at the law of intervention anew after the 1990s. For Kantian international law, the end of the cold war is only revealing the suppressed truth about the lawfulness of intervention. The legal and legitimate position makes full use of this celebratory post-Cold War narrative, downplaying state

⁴⁶⁵ C. Greenwood, ‘International Law and Intervention in Kosovo: Memorandum submitted to the Foreign Affairs Committee of the House of Commons’, 49 *International and Comparative Law Quarterly*, (2000) at 929.

sovereignty at the expense of the primacy of human rights of individuals entitled to live in democratic states.

The analogical reasoning plays an important part in this argument, since the interventions starting from Liberia and continuing with North Iraq, Somalia, former Yugoslavia, Haiti, Rwanda, Albania, and Kosovo are all parts of a progressive chain. They signify the willingness of the ‘international community’ to intervene in cases of gross human rights violations committed by the oppressor regimes, or due to the failure of state structures or military regimes interrupting democratic rule. Therefore, Kosovo is not an isolated case, but yet another intervention, which should be analysed in accordance with the ‘coherent’ state practice that has been a product of post 1990s developments. As Greenwood puts it:

In the case of humanitarian intervention, the logic of the principles on which the international law is based and the preponderance of modern practice strongly favours the view that such right is part of contemporary international law. It is noticeable that many of the expressions of opinion hostile to the existence of a right to humanitarian intervention pre-date the important practice of the 1990s, such as the Liberian and Iraqi interventions.⁴⁶⁶

Accordingly, the analysis of the Kosovo case proceeds from the premise that there was an overwhelming necessity to intervene for the protection of the rights of the individuals in Kosovo as a matter of principle. This starting point puts greater emphasis on the reports of human rights violations, number of displaced persons and refugees, deportations and killings perpetrated by the Yugoslav army in Kosovo. The profound nature of the situation coupled with the facts which point out that the Security Council was jammed and the Yugoslav

⁴⁶⁶ Ibid. at 930.

government had no intention of resolving the situation gives the green signal of the legality as well as the legitimacy of this intervention.

Based on the proposition of the permissibility of intervention in extreme circumstances, this position takes for granted the fact that the UN Charter system was unable to operate. Departing from this, the Kosovo case emerges as the invocation of an exceptional customary rule of the defence of necessity.⁴⁶⁷ Unlike traditional positivism's 'defence of necessity' doctrine, this position locates the defence of necessity inside the law, not outside of it. This fundamentally affects the legal qualification of the facts at hand and also assigns authority to the particular case to qualify as another precedent, strengthening the customary law of intervention at the expense of the provisions of the UN Charter. The legal and legitimate position becomes a way of asserting law's relevance and its ability to adapt. Law does not establish a negative relationship with power, but a positive one assuming that this intervention is carried out in good faith. The rule of law has not been impaired by NATO, on the contrary, it has been strengthened.

4.3.3 Illegal, but Legitimate

The illegal, but legitimate position is commonly shared by those practitioners who share a strong commitment to the formal requirements of the law of intervention, but at the same time are not convinced that the substantive claims are properly dealt with under the present procedural legal framework. It is mostly during periods of transition that this third option emerges and is forcefully

argued in practical reasoning. It manifests itself either as legal, but illegitimate (when the present law is of permissive nature) or illegal but legitimate (when the present law proscribes prohibition). In the case of Kosovo, this ‘third way’ position argues for the illegality, but at the same time legitimacy of the intervention. It argues that NATO *a priori* suffers an absence of title, but its action cannot be conclusively ruled out as illegitimate. This position can be located in the midst of the opposite pulls of traditional positivism and its contemporary challengers.

The legitimacy, here, can be understood as the international lawyer’s concern with being regarded as over formalistic. There is a professional danger of being marginalised by not keeping up with the emerging substantive grounds for lawful intervention. This is the point of undecidability on the lawfulness of this particular event, since lawfulness requires an overlap between substance and form. The international lawyer supporting this position is compelled by the legitimate requirement of helping the victims of gross human rights violations in Kosovo, but regards himself as short of sufficient legal arguments to support this compulsion. Such a position can only be taken on a case by case analysis. It represents the grey area between inductive and deductive forms of legal reasoning where the international lawyer cannot match the normative to the particular. The illegal, but legitimate argument cannot hold for a long period of time. In newly emerging cases, it has to swing towards either the anti-lawfulness or pro-lawfulness position. As Pellet sums up:

there can be no doubt that the NATO action in Kosovo can (and must) be seen as legitimate, while on the other hand jamming of the Security

⁴⁶⁷ M. Reisman, ‘Kosovo’s Antinomies’, 93 *American Journal of International Law* (1999) at 861.

Council by China and Russia cannot. The actual lawfulness of the initiative, however is more debatable, even though arguments based both on the UN Charter and the law of state responsibility can be made in its favour and indeed become persuasive when seen together with, and in light of, Resolution 1244 (1999) of the Security Council.⁴⁶⁸

Legitimacy argument is based on the human rights violations narrative of the case. The problem-solving theories, aiming to de-centre international law in favour of the primacy of the individual, establish the premises of this perception. In other words, it is the progressive emergence of the importance of individual liberties (modified positivism) or the ahistorical normative centrality of the individual (Kantian international law) or the increasing amount of states being organised on the basis of human rights and democracy (liberal, empiricists) that gives legitimacy to the intervention in Kosovo. The unified block of liberal theories, in opposition to the traditional liberal analogy, creates the effect that there exist legitimate grounds for (humanitarian) intervention in contemporary international law. Therefore, this position recognises liberal individualism as the legitimating theory of interventions. There may be three argumentative routes to this conclusion.

The first route suggests that legitimacy of the action does not affect the illegality of it. It is an instant of stepping outside the law due to the tension between legality and legitimacy in this specific case. To this effect, Simma argues that there is a 'thin red line' which separates the legality and legitimacy of the intervention in the Kosovo case:

The lesson, which can be drawn from (the use of force by NATO) is that unfortunately there do occur 'hard cases' in which terrible dilemmas must be faced, and imperative political and moral considerations may appear to

⁴⁶⁸ A. Pellet, 'Brief Remarks on the Unilateral Use of Force', 11 *European Journal of International Law* (2000) at 385.

leave no choice but to act outside the law'.⁴⁶⁹

This contrast between illegal, but legitimate action is solved in favour of choosing traditional positivism as the governing principle, but the intervention in Kosovo as an exception outside of law, which can be justified elsewhere. This position is slightly different from the 'suicide pact' argument, because it is not prepared to argue that traditional positivism has always allowed an extreme exception to the principle of non-intervention. It resists to the argument that a legitimate exception can elevate to the level of a legal exception. NATO member states have committed a violation of international law, but they can be granted an absolute discharge for their offence.

This argument is simultaneously loyal to the traditional positivist reading of the UN Charter and the modified positivist interpretation of the post-Cold War developments. It aims to strike a balance between procedural fairness and substantive fairness, without upsetting either of them. The procedural fairness requiring the authorisation of an intervention by the Security Council should not be traded for substantive fairness that is driven by the motive of averting immediate and overwhelming suffering of the victims of most basic human rights violations. While the action should be praised for its contribution to the material unity of law, it should at the same time be contested for its disruption of the formal unity of law. International lawyers who can be located in between traditional positivism and modified positivism are the ones sharing the liberal

⁴⁶⁹ B. Simma, 'NATO, the UN, the Use of Force and Legal Aspects', 10 *European Journal of International Law*, (1999) at 22.

aspirations in the name of the individual and at the same time are loyal to the positivist technique of formalism.⁴⁷⁰

The second route aims to solve the dichotomy between legality and illegitimacy in favour of the legitimacy of the action. It, therefore, may argue that if it is determined that the intervention is legitimate it should soon thereafter modify the present law. The Kosovo case can then be regarded as a ‘moment of crystallisation’ towards creating new custom. The requirements of custom in this position are, however, less strict than those of the illegal and illegitimate position. As Wedgwood states

The lack of any single source of rules or ultimate arbiter of disputes in international affairs means that state practice remains the key to the shaping of legal norms. When an action is deemed morally urgent by a majority of states—even an action involving the use of force- it is likely to shape a legal justification to match. The war over Kosovo may mark the end of SC Classicism—the common belief that all necessary and legitimate uses of force outside the Council’s decision can necessarily be accommodated within the paradigm of interstate defence. It may also mark the emergence of a limited and conditional right of humanitarian intervention.⁴⁷¹

Accordingly Kosovo becomes the manifestation of a direct challenge to the traditional dominant account of intervention, which has been regarded as the authoritative account since 1945. The consent of sixteen NATO states, (democratic and accountable to their governments, this position may note) to the operation and active participation of thirteen of them ought to be qualified as legally significant facts. The fact that some non-NATO states also do agree with the intervention, the rejection of the draft Security Council resolution condemning the action as an aggression, and the lack of extensive protest at the

⁴⁷⁰ T. Franck, ‘Lessons of Kosovo’, 93 *American Journal of International Law*, (1999) at 857; cf, P.M. Dupuy, *Cours General de Droit International*, Recueil des Cours, (2000).

⁴⁷¹ R. Wedgwood, ‘Nato’s Campaign in Yugoslavia’ 93 *American Journal of International Law*

UN General Assembly may all be regarded as contributions to the law-formation effect of the Kosovo case.⁴⁷² Furthermore, the establishment of the UN interim administration following the intervention can serve as a blue print for *ex post facto* justification of non-UN authorised interventions. Given the cumulative global reaction, it is not credible to argue that the law cannot change with this incident. Even though it is the first collective intervention without prior Security Council authorisation, one has to take into consideration the rarity of interventionary practices and thus regard the case of Kosovo as a law-shaping incident. This position, moreover, may list Kosovo as supporting the emerging practice towards a limited right to humanitarian intervention outside of the UN system, in similar vein to the cases of Liberia and Northern Iraq.

This route suggests a fresh consideration of the parameters of humanitarian intervention in general international law rather than trying to resist the re-interpretation of the UN treaty law and customary international law. Once there is a consensus on the law-shaping nature of the Kosovo case, international lawyers are encouraged to talk about innovative interpretations of the UN Charter for possible future interventions. A new interpretation of article 52/1 of the Charter regarding regional organisations and their role in the maintenance of peace and security, for example, can be read to confer responsibility on these organisations if (only) the Security Council is unable to act.⁴⁷³ Opting for an implicit signal establishing a situation as a threat to peace and security instead of insisting on an absolute requirement of explicit authorisation of use of force by

(1999) at. 828 and 830.

⁴⁷² A legal reasoning along these lines is provided by M. Glennon in *Limits of Law, Prerogatives of Power: Interventionism after Kosovo* (2001) esp. at 198-199.

⁴⁷³ S. D. Murphy, 'The Intervention in Kosovo: A Law Shaping Incident?', *ASIL Proceedings* (2000) 302; cf. C. Walter, 'Security Council Control over Regional Action', 1 *Max Planck*

the Security Council is also another option.⁴⁷⁴ In this case, as Krisch reservedly observes, what is being suggested is the ‘unilateral enforcement of collective decisions’.⁴⁷⁵ Similarly, Henkin suggests, ‘the NATO action in Kosovo and the proceedings of the Security Council may reflect a step toward a change in the law, part of the quest for developing ‘a form of collective intervention’ beyond veto bound Security Council.’⁴⁷⁶

This position also regards the ‘illegal, illegitimate’ arguments’ threshold on the formation of custom as ‘irrational’. To insist on almost arithmetical criteria for the formation of new custom through the violation of old law is not realistic. It is simply insisting that the practice be in line with a theory which has lost touch with practice. On the contrary, with all its imperfections, the law needs to make sense of the case of Kosovo. Pursuing an argument which holds that this intervention is in violation of the law, and also lacking *opinio juris*, is regarded as too artificial and rigid. As Franck argues there is an ‘unmistakable’ trend of *opinio juris* which regards internal conflicts, disturbances, and oppressive state policies jeopardising human rights as a legitimate cause for intervention.⁴⁷⁷ This *opinio juris*, furthermore, is derived

United Nations Yearbook, (1997) at 129.

⁴⁷⁴ On implicit authorisation with regards to the threat or use of force against Iraq, see N. D. White, ‘The Legality of the Threat of Force Against Iraq’, 30 *Security Dialogue*, (1999) at. 75; J. Lobel and M. Ratner, ‘Bypassing Security Council: Ambiguous Authorisations to Use Force, Cease-fires and the Iraqi Inspection Regime, 93 *American Journal of International Law* (1999) 124. On the reproduction of implicit authorisation argument, US Representative’s statement before the International Court of Justice, International Court of Justice, CR 99/24 of 11 May 1999.

⁴⁷⁵ N. Krisch, ‘Unilateral Enforcement of the Collective Will: Kosovo, Iraq and the Security Council’, 3 *Max Planck UN Yearbook*, (1999) at 102.

⁴⁷⁶ L. Henkin, ‘Kosovo and the Law of Humanitarian Intervention’ 93 *American Journal of International Law* (1999) at 828; cf. D. Kritsiotis, ‘The Kosovo Crisis and NATO’s application of Armed Force against the Federal Republic of Yugoslavia’, 49 *International and Comparative Law Quarterly*, (2000) 330.

⁴⁷⁷ T. M. Franck, ‘Lessons of Kosovo’ 93 *American Journal of International Law* (1999) at 858.

from the ‘international community’,⁴⁷⁸ which is regarded not merely as the sum of nation states, but as a notion beyond that, also including intergovernmental and non-governmental organisations. Under these circumstances, international lawyers must not overrule the lawfulness of interventions just because they may be abused. There is space in international law to argue that ‘intervention is permissible or, at least, it is not prohibited by international law’⁴⁷⁹ after the case of Kosovo.

There is also one last and peculiar route in deciding that the intervention in Kosovo was legitimate, but illegal. The third route leading to the conclusion that the Kosovo case was legitimate, but illegal argues that the reason for the illegality of this case is not based on the violation of the principle of non-intervention, but on the miscarriage of the humanitarian intervention itself. This argument can only be forwarded with reference to Kosovo *ex post facto*, that is, not prior to the intervention, but during or after it. This route does not regard the international law on the use of force (*ius ad bellum*) and the laws of the conduct of wars (*ius in bello*) as two separate legal regimes as traditionally understood, but as one single regime.⁴⁸⁰ Therefore, a legitimate action in the

⁴⁷⁸ A. Cassese, *Ex injuria ius oritur: Are we moving towards International Legitimation of Forcible Humanitarian Counter Measures in the World Community?*, 10 *European Journal of International Law*, (1999) at 26.

⁴⁷⁹ S. D. Murphy, ‘The Intervention in Kosovo: A Law Shaping Incident?’, *ASIL Proceedings* (2000) at 304.

⁴⁸⁰ See generally on the relationship between *ius ad bellum* and *ius in bello*, C. Greenwood, ‘The Relationship between *ius ad bellum* and *ius in bello*’, 9 *Review of International Studies* (1983) 221. Greenwood’s position on this relationship is close, but not identical to the ‘third route’. As he states at 233, ‘*Ius ad bellum* and *ius in bello* are closer today than they have been for over two centuries. Both are aspects to the same problem in that they both seek to impose legal restraints upon international violence. Whereas in the past they operated at different stages, they now apply simultaneously so that international law now applies to all aspects of armed conflict. Nevertheless, they remain distinct branches of international law, not merely for historical reasons but because they are logically independent from each other, operate in different ways, with different degrees of precision and different sanctions. They are separate, both complementary systems of rules, which are capable of being studied and applied separately, but which must both be considered in evaluating the legality of a state’s use of force’.

sphere of *ius ad bellum*, cannot be fully qualified as lawful if it does not fulfil the requirements of *ius in bello*.

An intervention carried out for halting the violations of humanitarian law and human rights law may be permitted in international law, *only if* it is itself carried out in accordance with the standards of international humanitarian law and human rights law. Subjecting the lawfulness of the action to the actual conduct of it and not to the question of whether intervention is *a priori* permissible, has two consequences. First, this argument accepts that there may be legitimate grounds for intervention in international law with or without Security Council authorisation. Second, for the factual assessment of cases in practical reasoning, it is insisted that *ius in bello* ought to contribute to the lawfulness assessment in the sphere of *ius ad bellum*. Therefore, rather than denying the permissibility of interventions in general, this route aims to affect the rules governing the legality of interventions for the future. It seeks to create limiting and controlling checks and balances for the law of intervention in international law. As Bothe puts it:

Do traditional considerations of military necessity and military advantage have a legitimate place in a conflict the declared purpose of which is a humanitarian one, namely to promote the cause of human rights? The thought would deserve further consideration in such a conflict, more severe restraints would be imposed on the choice of military targets and of the balancing test applied for the purposes of proportionality principle than in a 'normal' armed conflict.⁴⁸¹

This approach, then, focuses on the ways in which the NATO operation is conducted, the use of weapons and the selection of targets, rather than the

⁴⁸¹ M. Bothe, 'The Protection of the Civilian Population and NATO bombing of Yugoslavia: Comments on a Report to the Prosecutor of the ICTY', 12 *European Journal of International Law* (2001) at 535.

situation of the Kosovar population. It aims to hold the NATO accountable for the action it took in this respect.⁴⁸² The intervention, even if legitimate, may be qualified as illegal following the assessment of the conduct of operations. As Mertus puts it:

To the extent that the bombing campaign was viewed as necessary for ending human rights abuses and returning deported civilians, the action was within the scope of international law. Yet, the action became questionable when it became apparent that the legitimate targets were not effectively advancing military objectives and the impact of the bombing was felt mainly by Serb civilians.⁴⁸³

Facts such as the bombing of the Chinese Embassy, the Belgrade TV station, the use of weapons (such as B52s, cluster bombs and depleted uranium ordinance)⁴⁸⁴, the damage caused to the environment (especially heavy damage

⁴⁸² The Bankovic case, brought before the European Court of Human Rights for example does not target the lawfulness of the intervention *per se* (*ius ad bellum*), but the lawfulness of the conduct of operations (*ius in bellum*), *Bankovic and Others v. Belgium and 16 Other Contracting States*, (52207/99) ECHR (declared inadmissible, 19.12.2001)

⁴⁸³ J. Mertus, 'Assessing the NATO intervention under the UN Charter', 94 *ASIL Proceedings* (2000) at 310.

⁴⁸⁴ A voluminous body of standards continually emanating from custom, treaty law and soft law from international humanitarian law, environmental law as well as human rights law are available on the conduct of operations and uses of weapons which may prove it to be a hard task to distinguish between two separate legal regimes of *ius ad bellum* and *ius in bello* for the assessment of concrete cases. See generally, *The Petrograd Declaration*, of 1868; Convention with Respect to the Laws and Customs of War on Land, The Hague, July 29, 1899 - (Hague II); Convention Respecting the Laws and Customs of War on Land, The Hague, October 18, 1907 - (Hague IV); Annex to the Convention, Regulations Respecting the Laws and Customs of War on Land, Section II, Chapter I, Article 22: "The right of belligerents to adopt means of injuring the enemy is not unlimited."; Protocol for the Prohibition of the Use in War of Asphyxiating, Poisonous or Other Gases, and of Bacteriological Methods of Warfare, Geneva, June 17, 1925; Convention Relative to the Protection of Civilian Persons in Time of War, Geneva, 1949; Declaration of the United Nations Conference on the Human Environment, Stockholm, 1972; Convention on the Prohibition of the Development, Production and Stockpiling of Bacteriological (Biological) and Toxin Weapons, and on their Destruction, 1972; Protocol Additional to the Geneva Conventions of 12 August 1949, and Relating to the Protection of Victims of International Armed Conflicts (Protocol I of 1977) prohibits employment of "weapons, projectiles and material and methods of warfare of a nature to cause superfluous injury or unnecessary suffering" (Article 35, paragraph 2), as well as employment of "methods or means of warfare which are intended, or may be expected, to cause widespread, long-term and severe damage to the natural environment" (Article 35, paragraph 3; also: Article 55). The use of DU weapons also violates provisions of the same Protocol, regarding the protection of civilian population against effects of hostilities (Article 48; Article 51, paragraphs: 1, 4-c, 5-b; Article 57, paragraph 2-a-ii); Rio Declaration on Environment and Development (Report of the United Nations Conference on Environment and Development, Rio de Janeiro, 3-14 June 1992, Annex I); United Nations Sub-Commission on the Promotion and Protection of Human Rights (the

to water supplies) are then legally relevant facts to assess the lawfulness of this particular intervention. This position may argue that the intervention was unlawful following an inductive mode of reasoning: it is the customary principles of proportionality, necessity, discriminate use of weapons and targeting, and adherence to non-derogable human rights norms by the intervening parties that governs the illegality of an intervention. Accordingly, had the intervention in Kosovo been carried out in full observance of international humanitarian law, - perhaps with a few disputed incidents-, it then could have been regarded as lawful⁴⁸⁵ in the sphere of *ius ad bellum*. It is not solely a matter of arguing for the lawfulness of the grand idea of ‘humanitarian intervention’, but also how the intervention is carried out that can render the action unlawful.

former Sub-Commission on Prevention of Discrimination and Protection of Minorities) Resolution 1996/16 (E/CN.4/Sub2/Res1996/16) condemning the use of weaponry containing DU together with the use of other weapons of mass destruction and with indiscriminate effect.

⁴⁸⁵This is similar to the legal reasoning which may treat favourably the *Entebbe* raid of the Israeli special forces in Uganda in 1976. Even though there was no prior consent to the operation from Uganda authorities, the Israeli forces had entered Uganda’s territory and saved their nationals in a considerably short amount of time and left. Even though this is an intervention, it has been received by many to be ‘acceptable’ due to the conduct of the operation.

4.4 Conclusion

This chapter aimed to show how the theory and practice of international law and norms and the facts of a concrete case are related to each other and that during the course of legal reasoning they become constitutive of each other. Scientific methods, which may be called ‘the conventional doctrinal’ analyses of legal reasoning in international law, are not fully able to discipline the legal qualification of facts, especially in periods of transition. There is a multiplicity of routes to reach the same conclusions with regards to lawfulness in a concrete case. Furthermore, there is a multiplicity of legal opinions as to what the law is.

As seen in the Kosovo case, the same facts have different legal significance for positions, adopting different starting points for analysis of particular events. Moreover, doctrines of international law, with regards to the interpretation of treaty law, formation and modification of customary international law and their relationship, are also interpreted in different ways. The doctrines of treaty interpretation and formation of new customary international law are re-articulated in various forms in order to reach a ‘reasonable’, ‘credible’ and ‘legally sound’ opinion in the eyes of the universal audience of the practitioners of international law. Starting-points of reasoning put emphasis on particular facts (and not others), which, in turn, shape how the sources of international law are understood. Arguments are neither deductive nor inductive proper, but they are moving up and down between facts and doctrines based on the chosen starting points. In a way, legal reasoning in periods of change shows the use and abuse of facts and doctrines in international law for the ultimate purpose of presenting a *persuasive* account.

The accounts of intervention laid down in Chapter 3 have informed the legal qualification of facts in the Kosovo case in various ways. Traditional positivism emerges as the only account that enables to argue in favour of *the illegal* and *illegitimate* position. The Kantian account of intervention provides the strongest account for the *legality* and *the legitimacy* of the intervention. Modified positivism and liberal international law both endorse the *legitimacy* of the action. There are, however, many other shades in between. It is possible to subscribe to the historical narrative of one account, but to the elaboration of the sources of law of another. The legal qualification of facts emerges from the interaction of competing accounts which send conflicting signals to the international lawyer.

Concrete cases in periods of transition have lower thresholds for ‘reasonableness’, ‘credibility’ and ‘legally sound’ opinions, since the options for reaching a persuasive decision are more flexible. The international lawyer is able to push the boundaries of the traditional use of technical lexicon and doctrines without regarded as being functioning ‘outside’ the law. Particular cases also offer an opportunity to re-examine and perhaps change the theoretical worldviews for the international lawyer, since an argument not based on the traditional legal account does not definitively undermine the credibility of the legal account or lead to the exclusion or the marginalisation of the practitioner. A non-traditional perspective may become an ‘equally valid’ position due to the lack of the unchallenged dominance of a single problem-solving theory. Competing narratives of events and the law undermine traditional account’s authoritative presence with regards to the given field of law.

In periods of stability, even though there may also be competing narratives of a concrete case, the disciplining effect of international law excludes these narratives with labels such as ‘political’, ‘irrational’, ‘moral’, ‘irrelevant’, or ‘minority opinion’. These labels of exclusion are relatively waived in the concrete assessment of cases in periods of transition. There exists instead a ‘plurality’ of credible legal arguments.⁴⁸⁶ As seen with the mapping of the arguments in the Kosovo case, there are a variety of routes and conclusions. This variety is the consequence of an attempt by the members of the discipline to internalise the effect of this intervention *within* the discipline. The discipline needs to sustain stability, be it in the form of declaring the Kosovo case as a ‘violation’, as a ‘law shaping incident’, or as ‘lawful’. Even though these three positions have very diverse legal consequences, they all serve to reach a point of ‘closure’.

Legal reasoning creates a world of its own. Within the space of international law journals, World Court decisions, reports of inter governmental and non-governmental organisations, resolutions, recommendations and official declarations of states, as exemplified in the Kosovo case, there occurs a competition for determining the legal effects of a concrete case. In periods of change, concrete cases may also be used as decorative devices to further the advancement of or resistance to change. A solid example of this would be the emphasis given to the intervention of the USA in Nicaragua and the extensive authority adhered to the decision of the International Court of Justice in the *Nicaragua Case*.⁴⁸⁷ This Court judgment has been widely used by international

⁴⁸⁶ There is, of course, at all times a plurality of legal arguments, but not all of them are regarded as credible.

⁴⁸⁷ The Military and Paramilitary Activities in and against Nicaragua (Merits), *ICJ Reports*,

lawyers to resist and exclude the arguments arguing for the lawfulness of intervention for democracy or human rights. The case of Kosovo might also become such a ‘paradigm case’, which may be extensively used by the international legal discipline to assert a new contemporary legal basis for intervention.⁴⁸⁸ This, however, ultimately depends on which problem-solving theories of intervention will be perceived as the dominant authoritative accounts in the long term. In other words, Kosovo cannot become a ‘paradigm case’ unless it is made one through a pervasive reification within the discipline.⁴⁸⁹ It remains to be seen how the judges of the ICJ will contribute to the period of transition through the ongoing *Legality of the Use of Force in Federal Republic of Yugoslavia* case. Their dictum, on jurisdiction and merits, will also simultaneously engage with the concepts of change in international law and the problem-solving theories on the law of intervention, while matching ‘facts’ and ‘laws’ of the case to each other.

I have argued that legal reasoning in periods of change occurs within a space that is less restricted by the disciplining effects of periods of stability. This, however, does not suggest that there is an ‘anything goes’ atmosphere. The discipline, through the problem-solving theories, provides a basic framework for legal reasoning. Problem-solving theories on intervention aim to set the parameters of the practical reasoning in the Kosovo case. These parameters confer a degree of ‘credibility’ on even the most *avant garde* regarded legal positions given that they are compatible with the problem-solving theories. In

(1986).

⁴⁸⁸ A. Cassese, ‘A Follow-Up: Forcible Humanitarian Counter Measures and *Opinio Necessitatis*’, 10 *European Journal of International Law*, (1999) 791.

⁴⁸⁹ Consider for example the impact of the reification of the Treaty of Westphalia for identifying the limits and potentials of the discipline. Cf. J. Boyle, ‘Ideals and Things: International Law in

other words, for the practitioner, only knowledge that is ‘translated’ and accessibly presented is relevant ‘legal’ theoretical knowledge. Problem-solving theories set the boundaries of inclusion/exclusion of knowledge for the discipline. While, for example, a Kantian moral liberal account, or an international relations empirical liberal account is readily made compatible with the international legal language, the practitioner who may wish to argue for the unlawfulness of the Kosovo intervention from, say, a Marxist⁴⁹⁰, or post-modern perspective, is not equipped with the tools to do so. The emergence of individual based liberalism as the common point of all challengers also excludes the civic republican theories,⁴⁹¹ which envisage the state as formed by a people (*volk*), not by a collection of individuals. We do not see any *legal* justification of the intervention in the Kosovo case to support the right of self-determination of the Kosovar people from oppression. Instead, lawfulness, if argued, is centred around the suffering groups of individuals. Therefore, what is, in effect, a particular clash between state-based and individual-based liberalism becomes the universal problem of the law on intervention and its materialisation in the Kosovo case. All other starting points and routes of legal reasoning are bound to be perceived as ‘ideological’, or ‘political’, but not ‘legal’ arguments. In sum, legal reasoning in periods of change loosens the criteria for both substance and form, only if these arguments are recognisable within the normative problem-solving imagination of the discipline.

the Prison House of Language’, 26 *Harvard International Law Journal*, (1985) 327.

⁴⁹⁰ After the collapse of the Soviet Union and the Eastern Bloc, the approaches informed by Soviet legal theory of international law have also lost their currency in the discipline.

⁴⁹¹ For an overview of liberal and civic republican traditions, see D. Held, *Models of Democracy* (2nd ed. 1996), at 33-116; P. Petit, *Republicanism: A Theory of Freedom and Government* (1997).

5. CONCLUSION

This thesis aimed to explore the terms and conditions of change within the boundaries of the discipline of international law by studying the law on intervention, a body of international law that is regarded by many as undergoing change. The presupposition throughout this study has been that doctrinal and technical arguments in periods of transition about change in a particular rule of international law are not ends in themselves. They are instead by-products of a disciplinary internalisation of what is perceived as the parameters of change among the community of international lawyers at a given time on a given legal subject. In this examination, by using the law on intervention as a case study, I have aimed to map the ways in which contemporary international lawyers negotiate change. In the following I shall attempt an overview of conclusions that can be drawn from the preceding discussions.

What I have sought to achieve in this study has been to argue that change in international law does not occur through the formalist abyss of technical discussion in the aftermath of an unprecedented phenomenon. There are no formal rules that can definitely establish how international law changes, notwithstanding the fact that formalism is an important aspect of formulating change. Instead, there are disciplinary mechanisms which internalise the world outside of international law and try to make sense of it in its own disciplinary terms. The internalisation process is arguing about the law in practice and at the same time theorising about it. It actively involves both the theoretician and the practitioner of international law. In this respect, 'change' in a particular law

occurs by negotiating the boundaries of international law on a given issue by the community of international lawyers who identify themselves as creators of legal knowledge and/or users of it. Change does not occur simply by claiming to observe what states do, even if this is a strong strategy of argumentation for or against change.

My analysis of change in international law has taken place at three levels as discussed in Part I and Part II (Chapter 3 and Chapter 4). At the first level, in Part I, I have argued that the theories about *law* in general informs the most fundamental conceptions of change held by international lawyers. At the second level, in Chapter 3, I have put forward that competing problem-solving theories of a particular international issue guide international lawyers about how to find laws, how to qualify facts and how to locate these two within a coherent historical narrative. In so doing, problem-solving theories utilise the conceptions of change that best support their account. At a third level, in Chapter 4, I have demonstrated that international legal arguments on concrete issues, or ‘real’ events emerge from the complex interaction of competing problem-solving accounts.

When change is conceptualised along these lines, change is neither a factual nor a natural phenomenon. *International law is being changed by our categories and definitions about what constitutes law and international phenomena.* International law –in order to stay as a discipline in its own right– always does differentiate itself from other disciplines. It, however, includes qualities of its political, moral, legal and historical environment by a translation of these qualities into international law. In this respect, studying how a particular international law changes gives us strong clues about the dominant

representations of law, history, morality and politics in the international arena at a given time. The most dominant legal, political or moral positions of our contemporary time find their reflections more easily and swiftly in international legal theory. Marginal, peripheral or particular positions, on the other hand, are more likely to be ignored or not qualified as problems immediately in need of deliberation.

In Part I of the thesis, I first problematised the concept of change in international law. As discussed, traditional spaces available for the study of the concept of change have taken this concept for granted. Change has been generally understood as entering into (international) law from an outside terrain. Instead, I have suggested that regardless of the representations of change as an external phenomenon entering into law, change, in effect, occurs at the heart of the discipline. The condition of metamorphosis refers to the collective effort, including both the theoreticians and practitioners of international law, to put an end to the rival accounts of change and reach a relative point of stability and closure of law centred around a dominant interpretation of what the valid law is. In this respect, the naturalist, positivist, realist or indeterminist concepts of change in legal theory are subordinate to a larger formal framework. They can be understood as tools used by international lawyers to advance their advocated position about legal change. Therefore, the concept of change that has been advanced in this thesis has been non-essentialist: I have not aimed to judge legal theories in terms of their closeness to a *true* account of change. What I have argued, instead, is that if one is advocating a legal position, it is necessary to have a legal discourse with absolute, essential reference points. Understanding

the concept of change in (international) law *per se*, on the contrary, requires looking behind and beyond the plethora of these essentialist projects.

The formal framework of change presented in this thesis has not been purely apolitical and descriptive.⁴⁹² In essence, the main philosophical question is whether it is at all possible to talk about any change in an apolitical and descriptive fashion. As has been discussed in Part II, talking about change in international law does lead to a breakaway from traditional ways of understanding law, but understanding law is always located in particular philosophical, political, and moral worldviews. What we have in international law (or any law for that matter) is not an objective universality, but a particular universality that is broadly accepted as the working theory of international law. Legal knowledge produced in the most powerful states has proved to be more dominant in international legal culture. It may furthermore be asserted that the discipline of international law is a discipline that may only be located in the worldview of the dominant legal and international cultures and clashes in between them. This point has reoccurred both in Part I and in Part II.

In Part I, I have discussed the conceptions of change in (international) law by exposing their links to the epistemological breaks in western philosophy. For many international lawyers, who increasingly specialise in sub-fields of international law, philosophy is not a direct source of knowledge. Nevertheless, I have argued that the way in which change is understood in international law reproduces the philosophical turns in western thought. In other words, philosophical worldviews are built into international law and materialise as conflicting positions formulated within the international legal lexicon. Widely

accepted positions repeatedly occur and are regarded as the valid understanding of law so long as they are not credibly challenged. Natural, positivist, realist and indeterminist conceptions of change all exist and may effectively be advanced by international lawyers in contemporary international legal argument within the context of concrete issues. Positivism, naturalism and realism are more likely to be internalised by the international law practitioners who are committed to projects of change and resistance, while indeterminism, as yet, only provides a tool for reflection on the underlying structures, and practices of international law. As is discussed in Chapter 3, natural, positivist and realist conceptions of change have surfaced in the arguments of international lawyers in explaining change in the law of intervention, while the indeterminist insights were largely ignored.

One grand conception of change after another does not lead to the total destruction of its predecessors. What in effect happens is that they become argumentative tools for the international lawyer who aims to provide a persuasive account in identifying the valid law. Judges, scholars or practitioners do not essentially differ in how they use the different conceptions of change. What matters, however, is the authoritative or diminishing value that is attached to how the conceptions of change are utilised by these actors.

Given the available problem-solving frameworks before the international lawyer on a particular issue, it is possible to foresee the potential solutions that may be pronounced by a court on any question of change. A juridical *dictum* often freezes the tensions that are inherent in the theoretical, doctrinal and technical positions before the international lawyers. The concept of change that

⁴⁹² Politics in this sense is the process of allocation of things of value.

is put forward in this thesis enables an in depth understanding of the conditions under which such a *dictum* may be reached.

In Part II, I aimed to locate the law on intervention between rival contemporary theories that all take their cue from some form of modern liberal thought. In Part II, the traditional positivist account of the law on intervention has emerged as the dominant account the authority of which has been challenged. All the rival contemporary problem-solving theories have been outcomes of an elaboration of the contemporary political, moral and historical atmosphere from a diversity of western liberal perspectives, which the theoreticians have presented as appropriate for reflection in ‘positive’ international law. In this respect, we are not faced with a ‘fundamental’ change in the law of intervention –if it were fundamental we should not be able to explain it-, but with a ‘disciplined’ change, however fundamental it may seem. This, as I have sought to explore, with the case study of the law on intervention, is a complicated process in which the disciplinary concepts of change discussed in Part I are also effectively instrumentalised in the course of arguments.

Another point that has emerged from this study is that an international legal question that is brought forward under the condition of metamorphosis is not an open-ended question. There are not an unlimited number of answers with regards to how the change on a particular law can be addressed. In this respect, the discipline functions as offering both potential and limits to the substantive and procedural determinations of change. By the time the question of change starts to occupy the agenda of the international law community, there also emerge candidates for the content and direction of possible change.

It has also emerged from this study that the pull of stability is one of the most important characteristics of the international legal discipline. International law cannot be constantly unstable. The logic and purpose of international law is to provide a man-made reference point of stability between many clashing views of politics and moralities. The consensus on normative stability resists international practices up until the point when international lawyers regard these practices as incommensurable with the existing consensus of what the law is. International law enters into a period of metamorphosis when the amount of worldviews informing laws multiply in number. The potential for change comes with loosening the closure of the discipline on a given question of law: in our case the 'black box' conception of the state. The limitations, however, are also embedded in the 'rush to closure'. The identification of gross human rights violations as a rationale for intervention can also function as a 'new black box'. Criticising the traditional account, which understands the state as a given fact, simply may end up offering a *new* given fact tailored around the category of the individual. Therefore, while offering an absolute break from the *old*, the *new* may only become a reaffirmation of the system one wishes to escape. In other words, there is no guarantee at a *theoretical level* that instead of claiming to act in the name of the state, if we start to act in the name of the individual that there will be more peace and security.

Both Part I and Part II showed that the claim to objective knowledge of international law, both at the level of seemingly abstract concepts and at the level of particular laws, is only the tip of the iceberg of international legal analysis. The knowledge that is acquired in international law does not have an onto-legal basis of objectivity, but it nevertheless enjoys the support of the members of the

discipline of international law. Part I and Part II have shown that knowledge ‘travels’ into international law from a diverse variety of locations (and also vice versa). General disciplines such as moral philosophies, political theories, and natural sciences as well as more specific articulations of knowledge such as ‘neo-Kantianism’, or ‘international relations liberalism’ all make their way into international law. However, the crucial question is what kinds of particular knowledge are endorsed and internalised by the majority as legally relevant in understanding, teaching and interpreting international law.

There is an increase in the travel of knowledge into international law when, in a Kuhnian sense, a tacit consensus emerges about the need to rethink and question what we think we already know, when ‘facts’ do not fit comfortably with the ‘laws’. The condition of metamorphosis usually precedes unforeseen events, which do not sit easily, or fit the existing and stable mode of problem-solving. The continuity of the production of international legal knowledge is disturbed with these events. However, rethinking, re-evaluating, reconceptualising, re-interpreting, modifying international law is not an open-ended project. That is, the disciplining effect functions as rejecting the relevancy of some worldviews and favouring some approaches over the others. The centres of disciplinary power are the centres for production of the most authoritative knowledge. For the contemporary setting of international law, the western concepts of law, ethics, humanity, politics and the immediate concerns produced from this body of knowledge ought to be the focus of attention to study the changes in international law.

The authoritative understandings of the discipline give a professional identity to the international lawyer, but at the same time limit her ‘freedom of

thought' within the discipline. Abandoning the disciplinary lexicon, arguing a position which is not argued by anyone else, threatens the credibility of the international lawyer. The international lawyer always has to argue a median 'rational' position the parameters of which are defined by the problem-solving theories of the field. The discipline, in this respect, also creates the identity of the international lawyer. In periods of metamorphosis, in the same way that problem-solving theories multiply in a given area of law, diverse professional identities also emerge. In the law of intervention, the problem-solving theories present the divergences of the choices so starkly that the international lawyer is left to make a professional choice between denouncing the immediate killing and suffering of the innocent at the expense of protecting the autonomy of the state. While the traditional positivist account strives to keep the 'suffering of the individual' in a sphere not *directly* creating consequences for legal reasoning, the challenging accounts bring this dimension into the public, disciplinary sphere by attaching an international legal significance to the individual. Who we are as international lawyers and what kinds of international aspirations we ought to further are simultaneously negotiated in periods of transition.

Right from the outset, this thesis has refrained from anticipating what is happening, will/should happen to the law on intervention. The central research question has been how the concept of change can be understood in international law by using the law on intervention as a case study. The intervention debate, here, was selected precisely for its popularity, for both old and young generations of international lawyers and scholars who are expected to have an opinion (legal and otherwise) about this issue. It is a *locus* where the questions of change in contemporary time are strongly felt. In such a setting, the insistence on not

answering the big question can be disturbing. The question of intervention is waiting for its *persuasive* answers carefully crafted in the international legal language of the sources of international law. The ‘Kosovo question’ needs to be answered and put aside so that we can move to the next questions.⁴⁹³

For this study, however, the ‘big question’ has laid some place else. It has been about exploring the conditions under which any definitive judgement on change and intervention are reached on theoretical, doctrinal and factual dimensions in contemporary international law. In this respect, this thesis has aimed to capture the moment of decision when an international lawyer is about to make choices about how to see the world as an international lawyer and how to deliver a concrete judgement on a particular case. To decide on the change of the law of intervention is not only about what the law tells us to do. It is also about how we identify ourselves professionally as members of the international legal discipline in the 21st century. It is only by reflecting on the conditions under which changes are explained in international law that we can start to understand the nature of our solutions as well as questions. This study has endeavoured to contribute to reflect on our theoretical vistas by turning the mirror to the contemporary face of ever-changing international law.

⁴⁹³ At present, the military operation conducted in Afghanistan in the aftermath of the attacks on the World Trade Centre and Pentagon has initiated yet another condition of metamorphosis, creating its own questions and answers for normative problem-solvers. See generally, T. M. Franck, ‘The Use of Force against Terrorism in International Law’, 95 *American Journal of International Law* (2002) 839; D. V. Vagts, ‘Hegemonic International Law’ 95 *American Journal of International Law* (2002) 843.

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