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Pragmatism as a Path towards a Discursive and Open Theory of International Law

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Abstract

The theoretical foundations of international law have become ever more dominated by the liberal tradition of thought, the idea of a 'new' ethic of global democracy and human rights. It is nonetheless questionable whether such a pacifist paradigm of international law, with its assumption of consensus as the source and basis of validity of international law, is sufficient to solve present international legal problems. The paper sets out in the first part the idealist tradition of international law, from Kant, through Kelsen, to its reconstitution in the international law doctrine of the Federal Republic of Germany expressed in the textbook Universelles Völkerrecht *by Verdross and Simma. Then, in a second part, the liberal legal paradigm is subject to a critique. Instead of speaking of the transformation of classical international law into a cosmopolitan law of a world civil society, a plea is made for a 'new' pragmatic international law, beyond universality and objectivity. From the perspective of pragmatism, law is seen not as an objective, already given norm, but as a contingent act of creative problem solving. What implications this sort of therapy might have and how international law as discursive law might contribute as a problem-solving discipline, is discussed in the final section, in the context of the Kosovo crisis.*

1 Introduction

Anyone grappling with the theoretical foundations of international law soon arrives at the discovery that they do not exist, or at least have become questionable. The difficulties in dealing with theoretical questions in international law are by no means coincidental. Nor can they be explained purely by the fact that the debate on the theoretical and philosophical problems of international law has for long been

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marginalized.[1] They have instead to do with some fundamental problems of the discipline of international law itself. Like the discipline of international relations, it has no well-established theoretical philosophical foundation able — as Friedrich Kratochwil recently noted — to act as the '*fundamentum inconcussum* for the Cartesian project of science, as well as for the enlightenment hope of practical emancipation'.[2] The attempt to find a foundational norm for the international community of states which would enable us to solve practical problems in world politics with certainty might in fact be hopeless. Foundational myths throw but little light on the real theoretical and political problems, especially in times of ontological ambivalence and rapid international change.[3]

Whatever theoretical position we may be convinced of in detail, we must all the same be prepared to accept that the appropriateness and scope of the prevailing system of international law is being called into question by international change, since it offers no contradiction-free solutions for the practical problems of international law. The dilemmas between positive law and international morality became dramatically apparent in the Kosovo war.[4] For if international conflicts are not simply objectively given, as constructivists argue, and if the international legal problems can no longer be considered from a safe spectator viewpoint, then our situation would seem to be precarious. For that was the very Archimedean point that seemed to guarantee the drawing in principle of a boundary between the subject and object of our general cognition and power of judgment. At any rate the hope of finding a fixed point outside the changing international legal system by taking a rational or generally valid position of justice seems just as problematic as the various attempts to guarantee the positive validity of international legal norms by the objectivity of the will of the state or the hypothetical status of fundamental norms using the perspective of an ideal observer. Now, with the so-called linguistic turn in the modern philosophical debate, these hopes have become more questionable than ever.[5]

International law has taken on the epistemological and methodological conse-

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[1]   Cf. Martti Koskenniemi, *From Apology to Utopia. The Structure of International Legal Argument* (1989) xiii.

[2]   Kratochwil, 'Vergeßt Kant! Reflexionen zur Debatte über Ethik und internationale Politik', in Christine Chwaszcza and Wolfgang Kersting (eds), *Politische Philosophie der internationalen Beziehungen* (1998) 96–148, at 98.

[3]   For basic considerations on this, see James N. Rosenau, *Turbulence in World Politics: A Theory of Change and Continuity* (1990).

[4]   On the mainly philosophical debate on military intervention between moralism and legalism, cf. Bernd Ladwig, 'Militärische Intervention zwischen Moralismus und Legalismus', 48 *Deutsche Zeitschrift für Philosophie* (2000) 133–147; and Harald Wohlrapp, 'Krieg für Menschenrechte?', 48 *Deutsche Zeitschrift für Philosophie* (2000) 107–132. On the legal debate, see the notes in section 4 of the article below.

[5]   The turn to language came when philosophy dropped the theme of experience and declared language to be the sole medium for opening up the objects and phenomena of the world, at the same time enabling it and restricting it. On this, see in particular, in addition to Ludwig Wittgenstein's later work, Richard Rorty, *The Linguistic Turn* (1967); Richard Rorty, *Philosophy and the Mirror of Nature* (1979); Richard Rorty, *Contingency, Irony, and Solidarity* (1989).

quences of the linguistic turn only very selectively.[6] This is not surprising if it is borne in mind that the confession that the link with the modern epistemological debate had been lost evokes certain defensive reactions. The bringers of such 'new' news can be accused of irrationality, and there can be a retreat to the presumably safe ground of scientific cognition and method by stressing the correctness of an objectively valid legal doctrine still more decisively. Some 'debates' can even be won that way. Yet one could hardly contribute to solving problems in the contemporary world, e.g. the nature of the human rights discourse or international humanitarian intervention.

There are still alternatives, however. For instance, we might, once again with Friedrich Kratochwil, set about analysing why we have got into this position. Just as with therapeutic methods, success consists in giving up the search for an all-embracing life plan. It might also suit the case of international ethics and international law were our international legal ideas to become problem-solving once we have finally stopped believing that universal principles, substantive moral notions or purist international law — disciplinary boundaries — might be able to ensure the proper path. The more one accepts this argument the clearer it becomes that this does not mean the end of international law but the real beginning of its true practice, namely by rethinking its own bases, possibilities and opportunities.

In order more strongly to bring out this pragmatist idea by comparison with traditional international legal theory, my argument shall proceed as follows. In section 2 of this article, I shall look more closely into the liberal tradition of political thinking in which the idea of *state consent* as the source and fundamental basis for international law is rooted.[7] The assumption of a liberally inclined consensus of states has led, according to the argument, to a loss of importance by normative scepticism clothed as realism, especially in the second half of the twentieth century, in favour of a liberal conception of international law. At present, 'legal globalism'[8] and the idea of a 'new' ethic of global democracy and human rights seem in particular to be to the fore. In the debate on normative international theory, this is expressed in the rivalry between representatives of cosmopolitanism and of communitarianism.[9] The protagonist of cosmopolitanism is the individual, constituting the anchor for the rights and duties established by the principles of universalistic reason. This viewpoint finds its correspondence in the theory of international law in the transformation of modern

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[6] For an overview, see the following articles: Cass, 'Navigating the Newstream: Recent Critical Scholarship in International Law', 65 *NJIL* (1996) 341–383; Carty, 'Critical International Law: Recent Trends in the Theory of International Law', 2 *EJIL* (1991) 66–96; and Kennedy, 'A New Stream of International Law Scholarship', 7 *Wisconsin International Law Journal* (1988) 1–49.

[7] In the doctrine of international law, there is minimum consensus that 'international law rests on the consent of states and consists of the rules which they agree to apply in their relations with one another'. See the article by Anthony Carty in this issue, at 715.

[8] I have taken this concept from Danilo Zolo's work. Cf. Danilo Zolo, *I signori della pace. Una critica del globalismo giuridico* (1998); Danilo Zolo, *Cosmopolis. Prospects for World Government* (1997).

[9] On the so-called 'communitarian–cosmopolitan divide', see Hoffman, 'Normative International Theory: Approaches and Issues', in A. J. R. Groom and Margot Light (eds), *Contemporary International Relations* (1994) 27–44, at 29.

law into a *law of global citizens*. I shall argue that this sort of liberal, legal, pacifist view of international law existed in the German tradition not just from Kant to Kelsen, but also after 1945. I shall show this in the example of the influential textbook, *Universelles Völkerrecht* (1984 edition) by Alfred Verdross and Bruno Simma.

The emerging paradigm shift in international law is then subjected to further criticism in sections 3 and 4 of this article. I shall argue that the universal morality of respect as a typical product of liberal Western culture on which human rights are based, or by which they are justified, bars us from a worthwhile approach to solving the world's problems that will face us in future. I then go on to advocate a 'new' pragmatism of international law. The 'rehabilitation' of pragmatism for the theory of international law does not of course mean that the old instrumental, realistic view that international law develops no normative effect, and that power politics is everything, is to be sold under a new name. The usual linguistic use of 'pragmatic' leads one completely astray here. Instead, the point is to bring the positive dimension back into the centre of thinking about international law, seeing law not primarily as an objectively given norm, but as a context-related, creative act of problem solving. I shall go on to sketch out, using the example of the Kosovo war, what implications this sort of therapy might have, and how international law as discursive law can be thought of plausibly for the solving of conflict.

2 International Law and Political Philosophy of International Relations Between Scepticism and Idealism

Any hypothesis, including a legal one, which lays claims to objective validity and general application has to defend itself against scepticism. Since not just political philosophy but also international law claim objective knowledge and justificatory foundation in differing ways, there are also different forms of scepticism. It meets the objectivist in the guise of the subjectivist, the universalist as a particularist, and the positivist as an idealist. In the political philosophy of international relations, the sceptic is called a realist.

The realist school long took a highly respected position in political science in the periods of the Cold War and the East–West conflict, with its plea for an ethics-free politics. Standing in the Hobbesian tradition, its starting point at international level is the organizational principle of anarchy. Admittedly the realist is more than Hobbesian, polemicizing against natural law by declaring the world between states to be a norm-free area. While political realists like Reinhold Niebuhr or Hans J. Morgenthau still took a pessimistic world-view of mankind as a starting point, because consistent anthropological optimism blurs the vision to the dangers threatening the international system of states, the structural (neo-)realism of someone like Kenneth Waltz abandons this anthropology.[10] It is no longer the anthropological premises of

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[10]   Cf. Kenneth N. Waltz, *Theory of International Politics* (1979); and for an exhaustive survey, see Stefano Guzzini, *Realism in International Relations and International Political Economy* (1998).

the power struggle and the fight for survival that are the starting point for explaining international politics. The decentralized, anarchical power figure becomes the source of the conduct of states, interested in their own utility. International law merely duplicates this international power structure.

Now the (neo-)realists do not deny that international law exists and that legal norms in international politics exist;[11] to be sure, they reject the prescriptive status of international law by casting doubt on its effectiveness and efficacy.[12] The decentralized essence of international law is the unavoidable outcome of the structure of the anarchical international system of states as by definition decentralized. Where neither a community of interests nor a balance of forces is present, says Morgenthau, the norm-creating and norm-enforcing power of law remains ineffective.[13] Even Oppenheim, one of the leading modern international lawyers of this century, called the balance of powers 'an indispensable precondition for the existence of international law'.[14]

Still, this is only one side of the coin. There is the familiar observation from Hedley Bull that in the modern system of states two other world-views are present alongside realism: a rationalist or internationalist tradition, represented particularly by Grotius (but also by Vattel) and his conception of international politics as 'international society'; and an individual-universalistic tradition based particularly on Kant and his ideal of 'perpetual peace', which is supposed to confer attractiveness on the idea of the cosmopolitan condition.[15] Hobbes, Grotius and Kant do not just embody differing political streams of thought in international politics, but also reflect the 'subfields of international law'.[16]

Below I wish particularly to pursue two arguments: first, that in the present discourse about the philosophy of international relations and international law, cosmopolitan scepticism in the realist tradition has an increasingly difficult time. The notion of an international community is no longer a conceptual chimera but a reality. At the end of this century it is particularly 'legal pacifism' in the tradition of Kant that sets the tone, posing massive problems of justification to the traditional architecture of the ban on force and intervention in international law. Secondly, I shall assert that the tradition of legal pacifist theory of international law that existed in Germany from Kant to Kelsen, was taken up again in part after 1945 and has made an entry into the

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[11] Differing in that respect from the so-called 'international law deniers' in the tradition of John Austin, who completely denied that international law has the property of being a category of law.

[12] Cf. Kratochwil, 'Thrasymmachos Revisited: On the Relevance of Norms and the Study of Law in International Relations', 37 *Journal of International Affairs* (1984) 343–356; see also C. F. Amerasinghe, 'Theory with Practical Effects. Is International Law Neither Fish Nor Fowl?', 37 *Archiv für Völkerrecht* (1999) 1–27, at 15.

[13] Hans J. Morgenthau, *Politics Among Nations* (1960 [1948]).

[14] Lassa Oppenheim, *International Law*, vol. 1 (1912) 193.

[15] Hedley Bull, *The Anarchical Society* (1977) 41.

[16] James C. Hsiung, *Anarchy and Order. The Interplay of Politics and Law in International Relations* (1997) 175. Cf. also Bruno Simma and Andreas L. Paulus, 'The "International Community": Facing the Challenge of Globalization', 9 *EJIL* (1998) 266–277.

doctrine of international law. It was not, however, until the Kosovo War that it was also actually practised by the German Federal Government.

A *Peace Through Law: From Kant to Kelsen*

Legal pacifism and the idea of the cosmopolitan condition go back to the philosophical and theoretical legal thinking of Kant and his essay, 'On Perpetual Peace'.[17] Mediated through the neo-Kantian Marburger school, this line of thought continued in the bold legal construction of Kelsen's Pure Theory of Law, as a school of thought, into our century.[18] The philosophical premise of legal universalism is Kant's idea of the unity of morality and the capacity for language and reason inherent in all humanity. This natural-law and Enlightenment idea was taken up by Kelsen and reformulated in his innovative and radical theses: the unity and objectivity of the legal system, the primacy of international law over domestic law and the need to call the idea of sovereignty the principle barring the road to the maintenance of a stable and universal peace.[19]

In normative respect, Kant's legal pacifism finds its expression in that form of legal system that absorbs the whole of humanity and incorporates every other legal system. Law is to take on the form of a universal legislation, a sort of *lex mundialis erga omnes*, on the basis of a gradual homogenization of political and cultural differences. Here Kant brings a third dimension into legal theory: alongside municipal and inter-national law comes global citizens' law (*Weltbürgerrecht*). While international law, like all law in the state of nature, applies only peremptorily, global citizens' law would definitively end the state of nature. Kant strives for the transition to the cosmopolitan condition, continually using the analogy with that initial emergence from the state of nature that enables a life in legally guaranteed freedom for the citizens of a country through the social constitution of a particular state. Just as the state of nature between individuals relying on themselves was ended, so also is the state of nature between belligerent states transcended. Despite this parallel, Kant very carefully distinguished between a league of nations and a state of peoples (*Völkerstaat*), and from the historical viewpoint it is presumably in favour of Kant's realistic reticence that he rejected the project for a world republic (*Weltrepublik*). A cosmopolitan condition was to be distinguished from the condition of law within the state by the fact that the states would not be subject to a superordinate power but maintain their independence as a federation of free states renouncing war among themselves once and for all. The positive idea of a world republic is replaced by the negative idea of a league warding off war.[20]

Though the contradictory nature of this Kantian construction is obvious and the use of the term 'cosmopolitan law' not infrequently leads to textual interpretation of

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[17]   A new survey can be found in Nicholas G. Onuf, *The Republican Legacy in International Thought* (1998) 5.

[18]   Cf. Zolo, *I signori della pace*, *supra* note 8, at 13.

[19]   Kelsen, *Reine Rechtslehre* (1934); Kelsen, *Peace Through Law* (1973 [1944]).

[20]   For an exhaustive treatment, see Habermas, 'Kants Idee des Ewigen Frieden — aus dem historischen Abstand von 200 Jahren', 28 *Kritische Justiz* (1995) 293–319; see also Otfried Höffe (ed.), *Immanuel Kant: Zum ewigen Frieden* (1995).

Kant's writings, the fruitful innovation of his conversion of the municipal rule of law into a global rule of law nonetheless becomes clear in the term 'rational law' in which he developed this idea. The protagonist of political liberalism and rational law is the universalist nomothete and designer of justice who from an Archimedean point outside society and history designs a universally valid order of human coexistence and formulates irrevocable principles of justice. At the centre stands the autonomous individual, constituting the basic essence for the attribution of rights and duties founded on universalist principles that characterize the normative profile of the cosmopolitan models of order.[21] This is the difference between cosmopolitan law and classical international law that establishes the specific nature of Kant's *jus cosmopoliticum*.

It is undisputed that legal universalism exercised lasting influence on the general discipline of international law in the person of Kelsen.[22] In the context of the Anglo-American debate, the position of thought from Kant to Kelsen is at present very closely linked with the work of the 'Western globalists' (among them Richard Falk, David Held and Daniel Archibugi) and their idea of a 'global constitutionalism'.[23] In Italy Renato Treves and Norberto Bobbio have through their writings in legal philosophy brought about a dissemination of the Kantian and Kelsenian world-view.[24] Cassese even thinks that Kelsen's legal thinking decisively contributed to consolidating the idea of the primacy of international obligations over national values and accordingly to the functionality of the international legal system.[25] Particularly in Germany, important advocates of legal pacifism and neo-Kantian internationalism can be found in circles of political science,[26] philosophy (including Jürgen Habermas and Otfried Hoffe),[27] and also international law.

B *The Idealistic Heritage in International Law in the Federal Republic of Germany:* Universelles Völkerrecht, *by Verdross and Simma*

The pacifist theory of international law as a tradition did not only exist in Germany from Kant to Kelsen, but continued under altered auspices after 1945. Initially,

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[21] Kersting, 'Globale Rechtsordnung oder weltweite Verteilungsgerechtigkeit. Über den systematischen Grundriß einer politischen Philosophie der internationalen Beziehungen', in Volker Gerhardt *et al.*, *Politisches Denken Jahrbuch 1995/96* (1996) 197–246.

[22] Cf. Carty, 'The Continuing Influence of Kelsen and the General Perception of the Discipline of International Law', 9 *EJIL* (1998) 344–354.

[23] For a survey, see Daniel Archibugi *et al.* (eds), *Re-Imagining Political Community* (1998).

[24] Norberto Bobbio, *Diritto e potere. Saggi su Kelsen* (1992); cf. also Danilo Zolo, 'Hans Kelsen: International Peace Through International Law', 8 *EJIL* (1998) 306–324.

[25] Antonio Cassese, *Il diritto internazionale nel mondo contemporaneo* (1984) 29.

[26] See, for instance, Czempiel, 'Kants Theorem. Oder: Warum sind Demokratien (noch immer) nicht friedlich?', 3 *Zeitschrift für Internationale Beziehungen* (1996) 79–101; Klaus Dicke and Klaus-Michael Kodalle (eds), *Republik und Weltbürgerrecht: Kantische Anregungen zur Theorie politischer Ordnung nach dem Ende des Ost-West-Konflikts* (1998).

[27] Cf. Jürgen Habermas, *Faktizität und Geltung. Beiträge zur Diskurstheorie des Rechts und des demokratischen Rechtsstaats* (1992); Habermas, *supra* note 20; Habermas, *Die postnationale Konstellation. Politische Essays* (1998); and Otfried Höffe, *Demokratie im Zeitalter der Globalisierung* (1999).

though, it experienced a sharp counter-blow with the rise of the Nazi dictatorship, and in the academic debate too the liberal idea of world peace through law was marginalized. Concepts like sovereignty and the international legal system were replaced by authoritarian views of international law, going as far as pure National Socialist doctrines would take it. It was only slowly that the link with the idealist tradition was taken up again.

A liberal, universal system of international law is sketched out particularly in the standard textbook, *Universelles Völkerrecht: Theorie und Praxis*, by Alfred Verdross and Bruno Simma.[28] I wish to show on the basis of two arguments that we have here a conception of international law that stands in Kant's idealistic tradition of thought. First, the textbook very clearly pursues a universalist conception of international law. The United Nations is raised into the constitution of the universal community of states. The latter no longer constitute a mere normative idea, but a goal positivized by the states themselves. Secondly, the constitutional principles of the community of states can be interpreted in terms of rational law. The consensus of states is not sufficient to give a foundation for international law. Instead, the position is put forward that the normativity of international law is based on a 'formless' consensus that exists prior to the international organized community of states. The validity of international law is founded not politically, but metaphysically. I should like to explain both arguments in more detail.

One argument concerns the consensus theory that Verdross and Simma pursue in their textbook. The first chapter of Part 2 of the work argues that the constitution of the modern community of states was formed not on a conventional or customary law basis but by way of 'formless consensus' whereby the states mutually recognized each other as subjects of international law of equal right (§ 75).[29] According to this the states subject themselves to particular norms which Verdross and Simma call a constitution of the 'non-organized community of states'. It is the precondition for the further production of the positive international law in force. They contrast normological positivism with a 'structure of original norms' the validity of which is presumed by the states themselves as the basis for the international law they jointly produce. This structure of original norms seems to the authors to be not at all hard to find if it is accepted that positive law cannot lead an isolated existence but is woven together with the other norms of human conduct into an inseparable normative unity.[30] In the background of the positivized community of states, accordingly, there

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[28]   Cf. Alfred Verdross and Bruno Simma, *Universelles Völkerrecht: Theorie und Praxis* (3rd ed., 1984). This is neither a representative discussion of German-language textbooks of international law after 1945 nor an attempt to reconstruct the bandwidth of pacifist theory of international law in Germany (on the latter aspect, cf. Bodendiek, 'Walther Schücking und Hans Wehberg — Pazifistische Völkerrechtslehre in der ersten Hälfte des 20. Jahrhunderts', 74 *Die Friedenswarte* (1999) 79–97). Verdross and Simma's textbook is, however, exemplary, for two reasons: first, like scarcely any other textbook since the 1970s it had the effect of creating a school; secondly, it differs from other standard textbooks, behind which there is, as a rule, a whole set of authors, also by pursuing one clear concept of international law.

[29]   The section numbers relate to the third edition of 1984.

[30]   Cf. Verdross, 'Die systematische Verknüpfung von Recht und Moral', in Ernst Sauer (ed.), *Formen der Rechtsphilosophie* (1959).

have always been non-sanctionable original norms that are the actual guarantee that the positive law will also be observed. For were one to conceive this ethical basis to be absent, then one would also annihilate positive international law.

The natural-law basis of the consensus theory is obvious. Verdross and Simma note that 'no community can exist in which there are not also norms recognized that are valid absolutely, since otherwise the community would fall apart. These norms can accordingly not be derogated from by agreement' (§ 51). The duties in international law are accordingly by no means only of relative quality, i.e. valid only between individual states, but instead the breaking of obligations leads to responsibility *vis-à-vis* the community of states, empowering the latter to take sanctions. There follow certain duties to the community (*erga omnes*) that apply absolutely, and without them as a prerequisite the whole of international law would collapse. Accordingly, 'a minimum of social morality must also [be] a part of international law', since otherwise it would not be able to exist (§ 62).

As other authors have already stressed, the authors come close to Kant's idealistic tradition in their attempts at a foundation for international law.[31] Just as if one were to seek to derive legal rules and norms from objective eternal truths irrevocably established for the world's reason (Kant's *Weltvernunft*), here the essence of international law is made transcendent. The validity of international law is established not politically, but metaphysically. The original structure of norms has an *a priori* nature; it seems to exist not as a mere fact in the legal order, but to stand above the subjects of international law, binding them.

I now come to my second argument. There is a striking universal impulse in the design of an institutionally liberal world system in which the UN is raised to the rank of a written 'constitution' of the international community. Through the recognition of universal international law the states become members of the universal international legal community. The universalist conception of international law goes back to Stoicism and the Christian theory of mankind. It arose from the extension of the Aristotelian natural law theory, previously confined to the *Polis*, which saw the whole of mankind as a unity bound by natural law. It reached its acme in Wolff and his concept of the community of states as *civitas maxima*. By contrast with individualistic concepts that consider particular factual situations, universalist concepts of international law start from the normative idea of the moral unity of humanity as the ethical ought. It is accordingly not surprising if the preamble of the UN Charter, which starts with the words 'we, the peoples of the United Nations', is interpreted in Kant's spirit.

To be sure, this does not mean for Verdross and Simma that these states no longer possess sovereignty directly in international law. To that extent the guarantee of sovereignty in international law and the ban on intervention are in principle maintained, as already formulated by the classical international lawyer Vattel.[32] But

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[31]   Cf., *inter alia*, Carty, *supra* notes 6 and 7.

[32]   Emmerich de Vattel, *The Law of Nations or the Principles of Natural Law. Applied to the Conduct and to the Affairs of Nations and of Sovereigns*, vol. III (1964 [1758]).

the authors of the textbook are far from asserting that the real international world can be depicted in the form of a state model. International law, according to Verdross and Simma, is not exclusively inter-state law, but has developed from a 'law between powers' (*Zwischenmächterecht*) into a highly structured 'law of the international community' (§ 5). Verdross and Simma tie this development to three features.

First, since the UN embraces almost all states and even the few states outside it have recognized its guiding principles, the Charter has moved upward to become the constitution of the universal community of states. It has an 'important impact on the shaping of common values, be it in the General Assembly or in convoking international conferences on a vast array of topics, which bring together non-governmental actors as well as governments'.[33] With the human rights system the UN offers an institutional framework for the Kantian element of the world citizen in the international legal system. This does not of course yet bring the whole arithmetic of the ban on force and intervention shaped round the states into doubt, but what 'the Charter undoubtedly did achieve was the transformation of the concept of the "international community" from an abstract notion to something approaching institutional reality'.[34] It is noteworthy that the authors see the cosmopolitan condition no longer just as a normative idea, but also as 'a goal recognized by the States themselves, to strive after which the members of the UNO, alone and in collaboration with the organization, have solemnly committed themselves' (§ 21). The Kantian goal is accordingly converted by the UN into positive law in force — indeed, the UN enforcement mechanism is even seen as an 'approach to a model of the "World State" [*Weltstaat*]' (§ 41).

Secondly, another aspect owed to an institutionalist liberal perspective is the rapidly growing international law of cooperation, which obliges the states at the bilateral, regional and universal level, in increasingly wider fields and with the decisive involvement of international organizations, to cooperate positively (§ 53). The mere law of so-called coexistence, which was based on stability and the guarantee of peace, no longer exhausts general international law. The need for governmental and social regulation and cooperation is becoming increasingly stronger; the traditional duty to refrain from particular types of intervention within the national sphere of sovereignty seems to be on the wane. Assistance and forms of intervention now exist no longer only on the basis of bilateral agreements but find their justification in an international law in the increasingly cohesive international community (§ 41).

The idealistic liberal tradition seems also to be the basis for the 'moderate or structured monism' pursued in the textbook (§ 73). The municipal legal system is regarded as dependent on the international legal system, yet laws conflicting with the latter may nonetheless be brought to bear against individuals. Although Verdross and Simma are far from assuming a universal legal community among mankind, they nonetheless assume that 'States and the other direct persons in international law are members of a community linked by universal international law, which in turn

[33]   Simma and Paulus, *supra* note 16, at 274.
[34]   *Ibid.*

embraces the whole of humanity' (§ 74). Accordingly, the community of states also requires a constitution linking its members together, even if it regulates not relations among peoples but primarily those among sovereign power groups. The decisive point is that international law, despite the recognition in principle of the constitutional autonomy of states, acts through its obligation to promote human rights in their internal systems too, and aims at shaping them in terms of the rule of law. The closeness to Kant and the thesis of the peacefulness in principle of democracies cannot be overlooked here either.[35]

Despite the affinity noted here with the idealistic tradition of thought in which Verdross and Simma stand, their conception of international law differs from radical interpretations of Kant.[36] Moral human rights policy and missionary interventionism whereby the West's universal values are eagerly carried over the whole planet are foreign to Verdross and Simma. Kant is only one part of the heritage on which their design of international law is built. The view of a multiply structured law of the international community applying positively, in turn based on a non-organized community of states rooted in original norms, points after all to the social and community principle in the tradition of Grotius. 'The uniformity of the idea of law', say Verdross and Simma, 'is not yet enough to establish a universal legal order. This could come about only on the basis of an interweaving of all States, since every legal system has a social basis as its prerequisite' (§ 24).

It remains unclear whether the formation of universal international law is the result of a social basis levelled over the centuries (the heritage of Grotius), or whether the authors do not after all base themselves primarily on rational legal principles applying both universally and without exception (Kant's heritage). Whatever community of heritage we may use to do justice to the intentions of the authors of *Universelles Völkerrecht*, both interpretations nonetheless reflect an optimistic or idealistic vision of international law opposed to realism. It could also be argued that a broad conception of liberal theory in the Kantian tradition also embraces the institutionalist or community-related dimension in the Grotian tradition.[37]

With their universal conception of international law going back to the idealistic tradition, Verdross and Simma differ qualitatively from other traditions of international law.[38] In the Anglo-American area the realist critique of international law has exercised much more lasting influence, right into the most recent past. This may be because realism was for long able in its strict rejection of normative principles to feel

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[35] For a basic treatment here, see Doyle, 'Kant, Liberal Legacies, and Foreign Affairs', 12 *Philosophy and Public Affairs* (1983) 205–235 and 323–353. See also Bruce Russett, *Grasping the Democratic Peace. Principles for a Post Cold War World* (1993).

[36] On this, see in particular Téson, 'The Kantian Theory of International Law', 92 *Columbia Law Review* (1992) 53–102; and Téson, *A Philosophy of International Law. New Perspectives on Law, Culture and Society* (1998).

[37] In international relations theory, institutionalism of claim and scope are in any case not, in the two fundamental paradigms, realism and liberalism, located on one plane; it is seen as more of a theoretical hybrid.

[38] See the paper by Anthony Carty in this issue.

sure of predominant philosophical assent. Just like realism, empiricism and the analytical philosophy of law — even if each in their own way — regarded the enterprise of theoretical justification of generally binding normative principles as having few prospects. Here a scientistic basic agreement was reached that linked realism and empirical positivism with each other.

C On the Path towards a 'New' International Law: From Universal International Law to Cosmopolitan Law?

With the end of the East–West conflict, realism definitively lost its shine and its conviction. Nothing is changed here even by neo-realistic attempts to see international politics as a clash of civilizations.[39] Since the end of the Cold War, 'liberalism [has] experienced a notable revival'.[40] Kant 'has become the pre-eminent practical philosopher of our days'.[41] Nor is this view diminished by the fact that the influence of Kantianism on the formation of the theory of international relations and the approaches and proposed solutions of political discourse must again at present be defended against familiar old Hegelian, neo-Aristotelian hermeneutic competition.[42] On the contrary, the opponents of liberalism operating under the label of communitarianism confirm it. Anyone wanting to combat liberalism, according to Kersting, 'has to deal with the Kantian philosophy, has to attack the icons of universalism itself'.[43] 'Forget Kant!'; this was the terse slogan with which Kratochwil most recently brought the communitarian programme in relation to the debate on ethics and international politics up to scratch.[44]

   Just as liberal theories take up a broad area of the debate in international relations, so too do Kantian themes and arguments determine the current renewal of international legal theory and philosophy.[45] There is broad consensus that the primacy of politics over morality in the tradition of Vattel, and classical international law based on sovereignty and a strict ban on intervention, have served their time.[46] Through President Wilson's initiative and the foundation of the League of Nations, as well as the 1928 Kellogg Pact, and later with the UN Charter, classical international

[39]   As with the spectacular positions in Samuel Huntington, *The Clash of Civilizations and the Remaking of the World Order* (1996).

[40]   Onuf, *supra* note 17, at 2; see also Kegley, 'The Neoliberal Challenge to Realist Theories of World Politics: An Introduction', in Kegley (ed.), *Controversies in International Relations Theory: Realism and the Neoliberal Challenge* (1995).

[41]   Cf. John Rawls, *A Theory of Justice* (1971); Rawls, 'The Law of the Peoples', in Stephen Shute and Susan Hurley (eds), *On Human Rights. The Oxford Amnesty Lectures* (1993) 41–82; Charles R. Beitz, *Political Theory and International Relations* (1979); and Galston, 'Moral Personality and Liberal Theory. John Rawls' "Dewey Lectures"', 10 *Political Theory* (1982) 492–519, at 492.

[42]   Kersting, 'Einleitung: Probleme der politischen Philosophie der internationalen Beziehungen', in Chwaszcza and Kersting, *supra* note 2, 9–69, at 19.

[43]   *Ibid.*

[44]   Kratochwil, *supra* note 2.

[45]   From a philosophical viewpoint, see Rawls, 'The Law of the Peoples', *supra* note 41; Téson, 'The Kantian Theory', *supra* note 36; and as a representative of the international law view: Slaughter, 'International Law in a World of Liberal States', 6 *EJIL* (1995) 503–538.

[46]   Vattel, *supra* note 32.

law was transformed into a modern international law of peace: war was in principle condemned in favour of peace.[47] This position is embodied in the ban in principle on force and aggression as expressed in the UN Charter in Article 2(4). Since, however, even this modern international law has to allow that violent action may occur, corresponding provisions were made in the UN Charter, namely various forms of dispute settlement and collective enforcement measures, and also individual or collective self-defence for a period. The development of the international law of peace did not, however, stop there. Since 1945 the advance of *jus in bello* has further developed, reflected today in the view of many international lawyers in a differentiated 'humanitarian international law'. The community of states has, through the development of *jus cogens* (binding law) and of norms *erga omnes* (law valid for all), 'communitarized to a hitherto unknown degree'[48] interests of human rights protection. Against the background of the Kosovo War, Jürgen Habermas has even spoken imaginatively of a transformation of modern international law into cosmopolitan law.[49]

Are we really on the road to the cosmopolitan law of a society of world citizens? What allows an ethically oriented view of foreign policy to be established in international law? Legal cosmopolitanism is primarily about the strengthening of international organizations, especially the UN as a global collective security system. At the end of the twentieth century the UN is more than ever not just a normative idea but a goal recognized by the states themselves.[50] The universal status ascribed to the UN has confirmed both the internationalization process and the world political agenda: the guaranteeing of world peace, the guarantee of human rights, protecting the environment, questions of international distributive justice etc. All these questions announce a global need for action. And this renders the paradigm of political philosophy prevailing from Plato and Aristotle up to Hobbes and Hegel, namely the individual state, relative.[51] In the era of increasing political internationalization and economic globalization the concept of the guarantee of world

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[47] Classical international law knew not only law 'in war' and 'after war', but also the prior right 'to war', the so-called *jus ad bellum*.

[48] For a survey of the 'hot topic' of humanitarian intervention from an international viewpoint, see Harald Endemann, *Kollektive Zwangsmaßnahmen zur Durchsetzung humanitärer Normen. Ein Beitrag zum Recht der humanitären Intervention* (1997) 293; and von Schorlemer, 'Menschenrechte und "humanitäre Intervention"', 2 *Internationale Politik* (2000) 41–48. More recent observations from a political science viewpoint on the theme of humanitarian intervention are offered by Ernst-Otto Czempiel, *Intervention in den Zeiten der Interdependenz* (Frankfurt, HSFK Report No. 2, 2000) 1–24. From an interdisciplinary viewpoint, cf. the detailed Brock, 'Normative Integration und kollektive Handlungskompetenz auf internationaler Ebene', 6 *Zeitschrift für Internationale Beziehungen* (1999) 323–347.

[49] Habermas, 'Bestialität und Humanität. Ein Krieg an der Grenze zwischen Recht und Moral', *Die Zeit*, 29 April 1999, 1. On this, cf. the reply by Blanke, 'Recht und Moral im Kosovo-Krieg. Eine Auseinandersetzung mit Jürgen Habermas', 32 *Kritische Justiz* (1999) 410–425.

[50] Verdross and Simma, *supra* note 28, at 17. Most recently, see also Cassese, 'Ex Iniura Ius Oritur: Are We Moving Towards International Legitimation of Forcible Humanitarian Countermeasures in the World Community?', 10 *EJIL* (1990) 22–30, at note 4.

[51] For a basic view here, see Höffe, *supra* note 27.

peace based on the Westphalian state model seems to have reached its limits.[52] State sovereignty is no longer, as it still was in Vattel, the guarantor of peace and stability. While the mutual recognition of sovereignty in the historical epoch of Vattel, the classical representative of European international law, represented great progress over the original position,[53] namely the guarantees of an order to keep down religious civil war, this original war-limiting or peace-creating function of international law is today increasingly itself mutating into a threat to world peace and international security.

The 'cosmopolitan turn' was undoubtedly promoted by the break-up of the Soviet Union; it is, however, also and especially an expression of the evolution of the international legal system itself, as evident especially in the tension between international law and human rights. While no global consensus on common value concepts has yet emerged in relation to human rights protection, there is nonetheless a common awareness of anti-values, that genocide, 'ethnic cleansing' and systematic persecution for ethnic, race, religious or other reasons have to be understood as elementary human rights violations and that such action does not constitute a matter falling within the sphere of the *domaine réservé* inaccessible to international law.[54] This awareness of anti-values is reflected in a multiplicity of human rights documents and guarantee procedures binding in international law, starting from the foundation of the UN, through the Convention on the Prevention and Punishment of the Crime of Genocide (1948), up to the two human rights covenants and other international agreements on human rights protection. The clearer the impetus to the differentiated codification of human rights protection becomes and the more *erga omnes* obligations are made operational through the setting up of tribunals, the more the classical principle of national sovereignty becomes relative. Fundamental norms of international law like the ban on use of force (Article 2(4) of the UN Charter) and the ban on intervention (Article 2(7) of the UN Charter) by no means apply unrestrictedly any longer, but instead the growing normative integration of the society of states is leading increasingly to massive tensions between the will to maintain peace and security evident from the Charter on the one hand, and the rising importance of human rights, for the guaranteeing of which the use of force may serve as the *ultima ratio*, on the other. The tension between 'states' rights' and 'human rights' constitutes the core of the intervention question.[55]

It was the UN Security Council itself which, through a broad interpretation of the concept of the threat to peace and in a series of groundbreaking decisions after 1990, relativized the non-intervention principle guaranteed in the Charter by resolving on a number of occasions on appropriate sanctions against severe infringements by

[52] Hobe, 'Die Zukunft des Völkerrechts im Zeitalter der Globalisierung', 37 *Archiv des Völkerrechts* (1999) 253–282.
[53] Thus Reinhart Koselleck, *Kritik und Krise. Eine Studie zur Pathogenese der bürgerlichen Welt* (1992) 32 *et seq.*
[54] Thus, since the legal verdict of 1979 in the *Barcelona Traction Case*, for instance, the view exists that complying with human rights is an obligation *erga omnes*.
[55] Brock, *supra* note 48, at 335.

individual states of the fundamental norms of the community of states, and on the basis of Article 39 of the UN Charter setting a new criterion for multilateral humanitarian interventions.[56] This development found its prolongation in the creation of so-called international ad hoc criminal tribunals for Rwanda and the former Yugoslavia. The International Criminal Court decided on in Rome constitutes for the moment the end point in terms of creating powers of collective action to protect human rights and let the Nüremberg and Tokyo trials appear retrospectively as the start of a transformation of international law.[57]

But it was not just the UN's actions and the setting of the course towards a regular international criminal jurisdiction from which over the years a new development took shape, giving international law the cosmopolitan shift that received an enormous impetus from the war in Kosovo. It appears that a new prevailing canon is crystallizing in international law that no longer counts human rights as matters which by their nature belong to the domestic competence of a state. One may intervene. This is more revolutionary than just a reinterpretation of the relevant Article 2 of the UN Charter: it amounts to a paradigm shift.[58] The unilateral intervention in Kosovo by NATO, circumventing the UN Security Council, may, to be sure, in the short term lead to a reversal for the peace concept of the post-war era, but it will also provide further forward impetus for this paradigm shift. For with it international law is, over the heads of peoples and states, directly addressing single individuals. This means it is developing into a cosmopolitan law.

This development fits the long-term consequences of the second cause. What has often been described in connection with globalization as the political and constitutional disempowerment of the nation state, finds its parallel here.[59] The international community of states is today much more closely integrated and interwoven through a network of cooperation than ever before. The classical picture of international politics as 'state-by-state diplomacy', borne by ad hoc agreements, belongs definitively to the past.[60] International law too cannot escape the globalization process. For if it is true that globalization is softening international sovereignty, then it is not just a shift in the actors' roles and a reallocation of the sources of law that is coming, but traditional international law will be losing its classical subjects.[61] However far in the future the end point of this process may lie, along the line of retreat the international law of foreign policy will in the course of time

[56] Cf. James Mayell, *The New Interventionism 1991–1994. United Nations Experience in Cambodia, Former Yugoslavia and Somalia* (1996); Mario Bettati, *Le Droit d'Ingérence. Mutation de l'Ordre International* (1996); Ferdinando R. Téson, *Humanitarian Intervention: An Inquiry into Law and Morality* (1997).

[57] Cf. e.g. Tomuschat, 'Ein internationaler Strafgerichtshof als Element einer Weltfriedensordnung', 49 *Europa-Archiv* (1994) 61–70.

[58] Zielcke, 'Individuen, hört die Signale', *Süddeutsche Zeitung*, 17–18 April 1999, 17.

[59] A survey of the theme of globalization and the nation state can be found in Ulrich Beck (ed.), *Politik der Globalisierung* (1998).

[60] An exemplary treatment of this is in Gene M. Lyons and Michael Mastanduno (eds), *Beyond Westphalia? State Sovereignty and International Intervention* (1995).

[61] Hobe, *supra* note 52, at 261.

undergo an ethical shift and develop further into the constitution of a future *Weltinnenpolitik.*[62]

For the moment the concepts of *Weltinnenpolitik* or *Weltinnenrecht* may only be a goal.[63] And the fear that intervention may bring self-disempowerment of the UN Charter or even a 'new world order' is slight. Unilateral interventions, i.e. those not mandated by the UN Security Council, are so far the exception. The states continue to be the central shapers and bearers of responsibility in the international legal system, seeking to correct human rights violations under the collective umbrella of the UN system politically, diplomatically and by using the instruments of judicial dispute settlement. It can, however, already be seen that the general legal principles are creating a sort of normative support or normative corrective for an existing or — as in the Kosovo case — absent consensus of states. It is assumed that the legal principle of respect for human dignity, at any rate in the sense of the recognition of an ultimate sphere of privacy, is intrinsic to all legal systems in the world, so that this sort of smallest common denominator can also prove to be a normative answer to the question of the universality of mankind. This also raises the fear that unilateral uses of force may increasingly be justified and utilized to protect alleged common interests of international law.[64]

If, then, the international legal protection of common civilization as an ethically oriented process of change in international law at the end of which stands a world constitution and world criminal code may still be too far a goal, nonetheless concepts like *Weltinnenrecht*, *Weltinnenpolitik* or 'ethical globalization' are metaphors for the 'new' international law that is emerging. For even now one cannot overlook 'a rearrangement of the behaviour of the actors in the international system, with the likely consequences for a new structure of international law'.[65]

> To sum up. The world of the famous 'Lotus principle', according to which States are only bound by their express consent, seems to be gradually giving way to a more communitarian, more highly institutionalized international law, in which States 'channel' the pursuit of most of their individual interest through multilateral institutions... Therefore, we suggest adopting a 'grotian' view, but to mix it, as it were with elements of both 'Vattelianism' and 'Kantianism', and with an increasing pull towards institutionalization.[66]

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[62]   As e.g. Delbrück, 'Wirksames Völkerrecht oder neues "Weltinnenrecht"? Perspektiven der Rechtsentwicklung im sich wandelnden internationalen System', in Dieter Senghaas (ed.), *Frieden machen* (1997) 482–512; Zielcke, *supra* note 58; Brock, *supra* note 48; Habermas, *supra* note 49.

[63]   Siehe Hermann Weber, 'Auf dem Weg zu einem neuen Völkerrecht?', *Neue Zürcher Zeitung*, 7 July 1999, 5; Daniel-Erasmus Khan, 'Der Krieg im Kosovo: Recht oder Gerechtigkeit' (unpublished manuscript, Munich, 1999).

[64]   So, *inter alia*, Lawrence Freedman (ed.), *Military Intervention in Europe Conflicts* (1994); and Czempiel, *supra* note 48.

[65]   Hobe, *supra* note 52, at 261.

[66]   Simma and Paulus, *supra* note 16, at 276f.

3 Beyond Objectivity and Universalism: A Critique of Legal Pacifism from the Viewpoint of Pragmatism[67]

We have so far argued that it is chiefly neo-Kantian themes that determine the renewal of legal thought, and not just overcome the looming security dilemma between sovereign states in international law terms but transcend it in a thoroughly juridified 'post-national' order. Against this development perspective of a 'new' ethics of global democracy and human rights, there are increasingly voices from those who criticize the modernity affirming universalist value orientations of liberalism, its theoretical orientation towards justice and the universal socializing media of the market and law it establishes. In the normative theory debate in international relations, the 'neo-Aristotelization' of practical philosophy by communitarianism under the label of 'social constructivism'[68] is competing with both realism and liberalism. The liberal 'back to Kant' is opposed by the communitarians with a defiant 'forget Kant'.

Equally, in the international legal theory debate the voices of those seeking to overcome the still dominant dual thinking[69] in legal theory, in terms of natural law and legal positivism, are increasing. International lawyers, who take the labels 'critical legal studies' or 'Newstream', question above all the validity of the liberal model of consensus of states as a basis for the validity of modern international law.[70] What is chiefly criticized is the consensus of states as a source of international obligations. On the one hand they point to the internal contradictions of legal dogmatics supported by consensus. These consist in the fact that the principles of sovereign equality of states which at the same time maintain their freedoms, rooted in, say, the UN statutes, are in themselves contradictory. As Kennedy notes, freedom and equality establish the difference between substantive but subjective morality and formal but objective law, and thus the fundamental incoherence of a theory of international law based thereon. Secondly, the traditional view of international law is held to be unable to keep apart its intrinsic categories of 'is' and 'ought', because the empirical is treated as normative and *vice versa*.[71]

The Newstream has undoubtedly contributed to a revival of the theoretical debate in international law by pointing to the sterility of liberal contract thinking in modern international legal science and the contractualist dilemma embodied therein. 'All law

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[67] For the decisive stimulus to (re-)engagement with the philosophy of pragmatism, I thank Gunther Hellmann, who is currently working on a post-doctoral research degree on foreign policy analysis and pragmatism.

[68] For a basic picture, see, *inter alia*, Friedrich V. Kratochwil, *Norms, Rules and Decisions: On the Conditions of Practical and Legal Reasoning in International Relations and Domestic Societies* (1989); Nicholas Onuf, *World of Our Making* (1989); Y. Lapid and F. Kratochwil (eds), *The Return of Culture and Identity in IR Theory* (1996); and Alexander Wendt, *Social Theory of International Politics* (1999).

[69] Cf. Norbert Hoerster (ed.), *Recht und Moral. Texte zur Rechtsphilosophie* (1990).

[70] An excellent survey is to be found in Cass, *supra* note 6; and a summary also in Knut Ipsen, *Völkerrecht* (1999) 12. See also in detail Kratochwil, 'The Limits of Contract', 5 *EJIL* (1994) 465–491.

[71] Cf. Kennedy, 'Theses About International Legal Discourse', 23 *GYIL* (1980) 353–391.

should be based on consent, but that not all law can be traced to consent.'[72] This Newstream perception of the indeterminacy of law, as worked out particularly by Koskenniemi very lucidly in the dichotomy between normativity and concreteness, 'utopianism' and 'apologism', has not left the mainstream of international law untouched. The theory of international law has at any rate taken up many hints from the critical school and from deconstruction and incorporated them into the Mainstream of its arguments.[73] It must nonetheless be doubted whether, in the light of the Newstream, outlines of a convincing new conception of international law can already be discerned.[74] The bulk of the 'critical approaches' have to date been limited to the deconstruction of traditional international law based on the assent of states. But the Newstream has on the whole not managed to bring the reconstructive potential more strongly to bear and offer an independent, and especially an affirmative, 'vision' of international law over and above the positivized international, or global, legal system.[75] This may be connected with the fact that the Newstream authors have not taken the consequences from the internal contradictions of the dogmatics of international law and given up the universality claim of international law principles.

By contrast with the Newstream in international law I shall seek, from the viewpoint of pragmatism and linguistic philosophy, to ask about the contractualistic bases of international law. I shall seek to show that the liberal paradigm of international law is based on particular epistemological, ontological and methodological assumptions that are no longer tenable. They needlessly narrow down the spectrum of possible perceptions of problems and thus hinder an international law approach to solving problems. While the Newstream discourse has contributed to reopening questions that modern international law had closed and locked, the problem with this discourse lies in the fact that it once again overhastily loses the questions by seeking to trace a normative ideal based on an ethics of responsibility.[76] The neo-pragmatist Rorty has, with his method of 'therapeutic redescription' of reality, made a suggestion that avoids such premature conclusions, the approach of which can possibly be utilized to formulate the international law issues too. This sort of proposal need not end up in either anarchy or cynical nihilism. Nor does it mean 'the end of international law'. A redescription of our current international institutions and practices has instead a therapeutic function, namely to show that it is only after saying goodbye to all objective and universal principles that the real debate on the 'real possibilities' of international law can begin.

I shall develop my pragmatic argument against the dominating universal paradigm

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[72]   Carty, 'Book Review: "Liberalism's Dangerous Supplements": Medieval Ghosts of International Law', 13 *Michigan Journal of International Law* (1991) 161, at 161.

[73]   So e.g. Frank Allott, *Eunomia: New Order for a New World* (1990).

[74]   Deborah Cass states on this: 'For example the consequences of alternative strategies of changing international law are never fully explored. . . While concepts such as sovereignty are being denigrated as too incoherent to underpin the legal system, a radically pluralistic politics seems an inauspicious place to find new normative consensus.' Cass, *supra* note 6, at 379.

[75]   Ipsen, *supra* note 70, at 14.

[76]   Thus e.g. Koskenniemi, *supra* note 1, at 488.

of international law in three steps. Since linguistic philosophy and pragmatism play scarcely any part in international legal science, I shall start by sketching out the central features of (neo-)pragmatist thought and action. Secondly, I shall show what consequences pragmatist thought has on the way we understand (international) law quite generally. Finally, the point will be to discuss the particular forms of redescription that international law can really adopt in present conditions, or might possibly adopt. This is discussed specifically against the background of the controversies over the legality of the Kosovo intervention.

A *Pragmatism and Linguistic Philosophy: 'Old' and 'New'*

Pragmatism is an American invention. It is not a homogeneous philosophical tendency, but has a bandwidth ranging from a method for explaining concepts through a theory of action and consensus up to a philosophy of life. What is common to it, however, is the attempt to mediate between theory and practice, between knowledge and interest, something in which it resembles Marxism and existentialism, but in specific reaction to the situation created by modern science.[77] Pragmatism is not a theory in the narrower sense but a maxim for human thought and action.[78]

Pragmatic thinking differs from traditional approaches to thought in many respects.[79] First, pragmatic thinking is 'anti-foundationalist'. It radically questions the heritage of Platonic rationality according to which there exist superhistorically stable *a priori*s. This perception is, however, by no means an expression of relativism; instead, pragmatism suggests we precisely find out how in actuality we raise and establish truth claims. There follows a transition to the thinking of contingency. Secondly, pragmatism criticizes any form of universalization. For instance, where pragmatists consider historical processes of development, like the creation and differentiation of the institutions and law, they do not see at work any necessity unfolding as an inevitable 'necessarism' (Charles S. Peirce). Thirdly, pragmatic thinking and acting is pluralistic, distancing itself from all attempts to abbreviate our forms of knowledge and structures of knowledge into a single methodological ideal. The worth of all knowledge is ultimately to be seen from how it helps us to solve particular problems.

'Beliefs are rules for action', as founding father Peirce summarized the core statement of pragmatism.[80] Everything we do as individuals or groups is guided by particular convictions as to how we can best cope with the problems the world poses and we pose to ourselves, and everything we are convinced of is a consequence of

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[77] On the three ways of mediating between theory and practice, see the landmark work of Karl-Otto Apel (ed.), *Einleitung zu Charles S. Peirce, Schriften II* (1970) 13.

[78] In his essay, 'How to Make Our Ideas Clear', Peirce in 1878 stated his famous rule: 'Consider what effects, which might conceivably have practical bearings, we conceive the object of our conception to have. Then, our conception of these effects is the whole of our conception of the object.' M. H. Fisch *et al.*, *Writings of Charles S. Peirce. A Chronological Edition*, vol. 3 (1982) 257–276, at 266. This essay was originally published in *Popular Science Monthly*, No. 12 (January 1878) 286–302.

[79] I am here following Ludwig Nagl, *Pragmatismus. Eine Einführung* (1998) 8.

[80] Charles S. Peirce, 'The Fixation of Belief', in M. H. Fisch *et al.*, *supra* note 78, at 242–257. This essay was originally published in *Popular Science Monthly*, No. 12 (November 1877) 1–15, and counts among the founding manifestos of pragmatism.

particular prior actions or experiences. We cannot, says Peirce, begin with complete doubt, for alongside the doubt prior convictions are always also present. For Peirce, real doubt exists where it is alive, i.e. where it is felt as unpleasant, causing uneasiness in the sense of dissatisfaction, but never a merely abstract universal doubt in Descartes' sense.[81] 'We generally know when we wish to ask a question and when we wish to pronounce a judgment, for there is a dissimilarity between the sensation of doubting and that of believing.'[82]

Peirce has thereby sketched out the foundations of pragmatist thinking as to the connection between knowledge and reality, later to be built on in detail by other philosophers in the pragmatist tradition of thought.[83] For our purposes three questions in particular are of importance: first, the question of the usefulness of the 'concept of truth'; secondly, the question of the possibility of producing representations of the world; thirdly, the question of general, unconditional duties to the community.

Among the best known theories in pragmatism is the theory of truth. Traditional philosophy and science distinguish knowledge from well-founded opinion, justified conviction. Pragmatists like Peirce, but also Putnam,[84] believe we may certainly retain an absolute meaning of 'true' by equating this with justification in the epistemic ideal case. This epistemization of truth is also followed by such authors as Habermas or Apel, according to whom truth is linked to an ideal speech situation or ideal communicative community, as to which agreement can be reached through argumentation. What is true is that which can be accepted as rational under ideal circumstances. Against this proposal going back to Peirce, however, other pragmatists like Dewey and Rorty, but also Davidson and Wittgenstein, assert that there is only very little to say about 'truth'. Philosophy should confine itself explicitly and deliberately to justification, without an ideal situation.

Under the influence of the late Wittgenstein and of 'ordinary language philosophy', Rorty in particular has forced the view that even when we keep to a reticent use of truth, it is not very helpful to seek to define 'truth'. His strategy is to show how the pragmatic theory of truth fits into a general project concerned to say farewell to the Greek and Kantian dualisms between permanent structure and transitory content, between object and subject, in favour of the distinction between past and future. For the justification and 'truth' of any conviction whatever can be seen in whether it makes a difference in action. Admittedly, Rorty has occasionally let himself be tempted to define truth as an ideal assertion or assertion at the end of a search process; since however he is fond of the role of the ironist and additionally postulates the

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[81]   Peirce, *supra* note 80.

[82]   *Ibid*, at 247.

[83]   I am here following a customary distinction between the 'classical pragmatists' (as well as Peirce, notably William James, John Dewey and Herbert Mead) and the 'neo-pragmatists', among them such philosophers as W. V. Quine, Nelson Goodman, Hilary Putnam, Donald Davidson and Richard Rorty. Cf. Richard Rorty, *Hoffnung statt Erkenntnis. Eine Einführung in die pragmatische Philosophie. IWM-Vorlesung zur modernen Philosophie* (1994) 13.

[84]   Hilary Putnam, *Realism and Reason* (1983).

unavoidable cultural conditionedness of our convictions, he chooses a vocabulary that simply declares 'truth' and 'justification' to be interchangeable.[85]

The search for justification and agreement, instead of the traditional striving for truth, goes closely together with the rejection of the image of a 'mirror of nature' and the possibility of portraying the world. For the modern correspondence theory starts from the position that the relations between our truth claims and the reality of the world are in a relationship of correspondence of representation. This sort of dual subject–object relation is in general diametrically opposed to pragmatism and to epistemological constructivism.[86] Advances in knowledge are expressed in pragmatist thinking not in an improved depiction of objects but in a growth in our capacity to forecast and control.[87] Because everything we say about the world must be expressed in a language, and each language is a specific, and social, phenomenon and not a universal one, and because the relations between language cannot be specified in the relations to validity claims, the need is seen as being to get away from the conviction that 'some vocabularies are better representations of the world than others', and in general 'to drop the idea of languages as representations'.[88]

This conclusion is a turn away from philosophy in the traditional sense and towards the art of poetry which creates a world by creating a language. With this pragmatic turn, proposed by Rorty, he exhausts the conceptual sphere of language-game philosophy opened up by Wittgenstein. Like Peirce, he replaces the binary relation between subject and object by the ternary relation of the symbolic expression that brings a state of affairs into validity for an interpretive community.[89] As long as the description of states of affairs and the conceiving of objects is understood as a binary relation, the linguistic turn leaves the 'mirror of nature' untouched as a metaphor for knowledge of the world. It is only once the criterion for the objectivity of knowledge shifts from private certainty to the public practice of justification, that 'truth' becomes a ternary basic concept.[90]

In the light of such an understanding of the creative possibilities of language, cognition becomes an open, but not arbitrary, process of constructing reality.[91] This means we shall never be able to emerge from language and grasp reality without

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[85] Cf. Richard Rorty, *Objectivity, Relativism, and Truth. Philosophical Papers*, vol. 1 (1991).

[86] Pragmatism can be termed epistemological constructivism since like radical constructivism it represents an instrumentalist, constructivist view of knowledge. Cf. Robert Audi, 'Pragmatism', in *The Cambridge Dictionary of Philosophy* (1998).

[87] Cf. Hans Joas, *Pragmatismus und Gesellschaftstheorie* (1992) 290–308.

[88] Rorty, *Contingency, supra* note 5, at 21.

[89] Peirce describes the sign process (semiotic) as a triadic relation between an object, a sign and an interpreter. The sign representing the object sets an interpreter going, which is in turn a sign to the extent of in turn requiring further interpretation. In the sense of complexity reduction and with the aim of intersubjective exchange, we communicate not about things but about models of meaning. Cf. Nagl, *supra* note 79, at 39–47.

[90] On triangular epistemology, cf. Donald Davidson, *Essays on Action and Events* (1980).

[91] The notion that social reality is linguistically constructed is not specifically pragmatist, but also shared by other currents of thought (*inter alia*, deconstructionism and post-structuralism).

mediation through a linguistic description.[92] This aspect of linguistic philosophical pragmatism is of fundamental importance for the idea of theory formation. 'Since knowledge for constructivists never represents image or the reflection of ontic reality . . . one cannot ever from a constructivist viewpoint call a particular way that can be travelled, a particular solution to a problem or a particular concept of a state of affairs the objectively correct or true one.'[93] There is no neutral deciding criterion for establishing the truth content of theories. Theories are merely tools. They are brought out only when a particular problem is to be solved. There is no criterion for the inadequacy of a theory besides the specification of such problems. One can merely claim to possess a better vocabulary than the existing one, and make the attempt to make this new vocabulary more attractive.[94] The relativity of the epistemological problem of pragmatism is accordingly a qualified one: 'making scientific experience is primarily a theory-loaded problem-solving procedure which may come a cropper on reality.'[95]

If questions of truth and knowledge and the justification of convictions primarily show themselves in terms of viability, what then are the social and political consequences pragmatism draws? A first consequence is that the distinction traditionally drawn between unconditional and categorical duties on the one hand and conditional and hypothetical duties on the other must be dropped. Pragmatists doubt that anything at all non-relational exists. Between morality and reflectiveness, propriety and utility, there is no distinction of kind, since no point can be indicated at which action stops being merely purposive and begins to enjoy authoritative validity. Those who seek to transform this important distinction of degree into a metaphysical distinction of kind, that is, think like Kant that morality proceeds from a specific human faculty called 'reason', are fixated on a centre which alone makes the claim to do justice to the human essence. But the task of pragmatist philosophy is none other than to oppose this, because all metaphysics or philosophy based on a centre is in principle non-humane. Democratic liberalism is defended not by metaphysical overloads, but politically.[96] Nor does one strengthen liberal institutions by employing the traditional vocabulary of the Enlightenment, or talking of universal human rights, of abstract individualism that attaches no political relevance to cultural differences. There is no human dignity that does not also derive from a particular specific dignity of

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[92] Neo-pragmatism does not deny that there is a world independent of the observer, but regards it as out of the question to approach this world using a series of true sentences which are true because they correspond with an independently existing reality. Putnam takes a similar position in noting that 'the elements of what we call language and mind penetrate so deeply into so-called reality that the mere intention to see us as depictors of something independent of language is from the outset condemned to failure.' See also Hilary Putnam, *Realism with a Human Face* (1990) 28.

[93] von Glasersfeld, 'Siegener Gespräche über Radikalen Konstruktivismus', in Siegfried J. Schmidt (ed.), *Der Diskurs des radikalen Konstruktivismus* (1996) 401–440, at 429.

[94] Rorty, *Contingency*, supra note 5, at 8–9.

[95] Merlingen, 'Die Relativität von Wahrheit dargestellt am Beispiel der Entstehungsgeschichte der Wirtschafts- und Währungsunion', 6 *Zeitschrift für Internationale Beziehungen* (1999) 93–128, at 97.

[96] Rorty accordingly also allots democracy primacy over philosophy. Cf. Rorty, 'The Priority of Democracy to Philosophy', in Rorty, *Objectivity*, supra note 85, at 175–196.

a community. Contingency and solidarity are the guiding ideas for creating a democratic, pluralistic community.

Dropping the vocabulary of cosmopolitanism in order to defend the liberal tradition means, though, adopting an ethnocentric, anti-universalist perspective. This might convey the impression that Rorty's position overlaps with that of communitarianism. Despite the reference to the value of community solidarity, Rorty differs from such communitarianist representatives as Alasdair MacIntyre or Michael Sandel. By contrast with these, he does not attribute any such great importance to ethnic groups, for he sees the danger that the individualist metaphysic might be replaced by a metaphysic of shared values. The real advance in Rorty's position seems to me to be that it is unreservedly aware of this danger. This becomes clear particularly in his presentation of the type of the liberal ironist, namely distinguishing public questions from private questions, 'questions about pain from questions about the point of human life, the domain of the liberal from the domain of the ironist'.[97]

The perception of contingency affects all the articles in the creed of the liberal tradition represented by Rorty. According to this, cruelty is the worst thing we can do to other people, in full awareness that there can be no non-circular justification for this conviction. Similarly, the guiding idea of solidarity is nothing but a happy creation of modernity. Pragmatists accordingly retreat from the idea that liberal institutions could be justified and the opponents of liberalism refuted by rational arguments. Since no recourse to an 'essence' or unconditional moral or ethical duties exists, we should drop the idea of such foundations and see the justification of liberal society simply as a matter of historical comparison with other attempts at social organization.[98]

Rorty's contingency theorem applies to questions of community just as to those of self or language. All three contingency conditions are associated with a particular form of necessity. They have not causal but defining effects. They exclude particular possibilities while opening up others. Contingency thinking does not stop even when up against reason as the basis for our moral obligations. To be sure, it was very useful for establishing our modern democratic societies. Today, however, the point is to bid farewell to the conception of reason as a central, universal component of human beings.[99] Today the point is to make the liberal utopia a reality. For this task, however, the traditional Kantian conception of reason proves a hindrance. It is among the ladders we can throw away. It should be replaced by a contingency-related definition of rationality, a mechanization of reason. This has nothing to do with philosophical reductionism, but this mechanization indicates how reason, or rationality, can be understood differently in conditions of contingency: as an intelligent strategy for

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[97] Rorty, *Contingency*, *supra* note 5, at 198.
[98] *Ibid*, at 53.
[99] *Ibid*, at 194.

dealing with contingencies, adjusting them to each other, and in this way arriving at a relatively coherent network.[100]

B *International Law as Relational Law*

If we take Rorty's conclusions that the present condition is marked by a perception of the contingency of language, of community and of the self, then far-reaching consequences result for the way we ought to consider law in general and international law in particular. This can be shown on the basis of many aspects. The form of anti-essentialism critique of the traditional subject–object distinction generalized in pragmatism has a negative and a positive side for (international) legal theory.[101]

The negative side concerns all 'theories' that are caught in the traditional conception of knowledge and belief in the possibility of describing the world. They are faced with a justification problem for what they do. This is a problem that not just natural-law but also positive-law positions have as a burden. Traditional international law can be interpreted as a rationalist approach. Any rationalist system is based on particular assumptions. All the statements of a rationalist theory can be deduced from assumptions, or traced back to basic assumptions. Accordingly, any rationalist system faces the problem of how to justify its basic assumptions. Since, however, the traditional basic assumptions of international law are set exogenously to the system, whether as original norm or hypothetical fundamental norm, they cannot be justified within the system.

This factual position applies to rationalism in general as a method. It refers to thinking, to reason. All theories based exclusively on reason suffer from the fact that reason itself remains unfounded. Autonomous reason seeking to be its own foundation becomes reflexive or self-referential and ends in an irresolvable endless circle.[102] This recognition is relevant for all science seeking to set itself on a rationalist foundation. 'The real antithesis to pragmatism is the kind of rationalism, fairly termed Platonic, that claims to use purely analytical methods to reason to the truth about contested metaphysical and ethical claims. The rational style is common in the law; legal formalism is rationalistic.'[103]

The positive side is a view of something 'new'. If one criticizes something, one cannot do so without taking a standpoint. Here is a difference between pragmatism

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[100] *Ibid.* With the stress on the necessity to weave a net out of the contingencies, Rorty comes close to Vattimo's view that we live 'in a world where … it has become clear that there are no fixed, secure, essential structures, but at bottom only adjustments'. Gianni Vattimo, *Jenseits vom Subjekt* (1986) 34.

[101] On this, see Brian Tamanaha, *Realistic Socio-Legal Theory. Pragmatism and a Social Theory of Law* (1997).

[102] For an exhaustive treatment of this, see Wolfgang Welsch, *Die zeitgenössische Vernunftkritik und das Konzept der transversalen Vernunft* (1995).

[103] Richard A. Posner, *Overcoming Law* (1995) 10.

and deconstruction.[104] While pragmatism seeks through the procedure of redescription to replace knowledge by hope and thereby gives the invention of new possibilities of being human primacy over needs for stability, security and order, deconstructionism is concerned with dissolving texts into an endless game of conceptual oppositions and thereby ultimately taking the ground away from any argument for preferring one idea to another.[105] The contingency thinking of pragmatism by contrast has an open vision of the world built in.

Transferred to the object of law, contingency thinking takes a stance above all against the ontic reality that legal theory too as a general rule starts from. This is nothing new. Ontology counts today for most legal theoreticians as something done away with. Yet ontology is abbreviated into a pure substance ontology. For it is rooted in the supposition supported by experience that what is founded on 'being' is not arbitrarily at our disposal. That this sort of 'indisposable' or 'non-dispositional' thing need not necessarily be something substantive but may also involve structures, relations or correspondences is well known at latest since Peirce's relational logic.[106] The pragmatists, by understanding everything as thoroughly relational, endeavour to remove the opposition between reality and appearance. The traditional question about why things are as they are is replaced by a practical question, namely whether we already have the best possible procedure for bringing things into relation to other things in such a way as better to meet our needs by more appropriately fulfilling them.

Relational thinking is of importance not just for the philosophical debate but also for legal science. For the natural-law-related and normativistic grounds of validity of international law sketched at the outset resemble each other on one point. For both positions the process of development of international law is an un-historical, decontextualized one. Concrete international law, the decision in international law, is derived logically, deductively from the organized community of states, in turn based on higher or supreme norms. The distinction between a position close to natural law and a normative one is then only that in the former the structure of original norms is regarded as given, say in a substantive conception of morality or justice, whereas in the latter the fundamental norm is understood as something positively laid down, as a hypothesis or transcendental condition.

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[104] Neo-pragmatism seeks to take a position that is 'less universalistic and more highly context-oriented than Habermas', but at the same time less coolly ironic than Foucault's, that is, a position that takes human solidarity more into account and is more open to the social-democratic hope'. Richard Rorty, 'Vorwort', in *Solidarität oder Objektivität? Drei philosophische Essays* (1988) 9 (German translation here by Joachim Schulte). On the relationship between deconstruction and pragmatism, cf. Chantal Mouffe (ed.), *Deconstruction and Pragmatism* (1996).

[105] For an introduction to a discussion of the French deconstructionist thinkers and post-structuralism in connection with international law, see Anthony Carty (ed.), *Post-Modern Law: Enlightenment, Revolution and the Death of Man* (1990).

[106] Cf. Kaufmann, 'Die Naturrechtsdiskussion in der Rechts- und Staatsphilosophie der Nachkriegszeit', *Aus Politik und Zeitgeschichte*, B33/91 (1991); for an exhaustive treatment see Joachim Lege, Pragmatismus und Jurisprudenz: Über die Philosophie des Charles Sanders, *Peirce und über das Verhältnis von Logik, Wertung und Kreativität im Recht* (1999).

Whereas in methodological respects it is the primacy of deduction that corresponds with ontological substance thinking, relational ontology appeals to the method of abduction (in the logical sense). There is no need for any closer discussion here to the effect that a purely deductive method of reaching the law has never been practised in reality, since it cannot be practised at all. There is broad consensus on this today. The supreme norms are — though not mere empty formulas — much too poor in content for a concrete legal system and its continued validity to be deducible from them. Empirical aspects always enter in. While as an international lawyer one is as a rule positivist, that is because of sceptical resignation. Legal sociology has attempted to correct the logical weaknesses of legal positivism within the system. But at the end of its efforts to save a 'pure' positivist standpoint as to the law came the sober recognition that legal knowledge is never pure object cognition, that whoever is looking for the law always enters into a process of developing the law. This means, to be sure, that the traditional distinction between object and subject no longer has any validity.[107]

Empirical legal positivism, influential particularly in the English-speaking world, has accordingly attempted a purely inductive logic for finding the law. In the casuistic tradition, its representatives want to arrive at the legal decision on the basis of the case, without calling on the assistance of a norm. But here too the road seemed very soon to lead up a blind alley. For how one can exclusively through induction, i.e. only from the facts of the case, arrive at a decision as to what ought to be remains the secret of those who assert it.

From a pragmatist, relational viewpoint, which seeks specifically to overcome the traditional dualisms, the question of the 'ought' and 'is' does not even arise, because the separation between the concrete norm behaviour of a legal subject on the one hand and a norm structure separated from that, outside human consciousness, on the other does not at all exist. Putting it differently: the case and the norm cannot in their unprocessed form be coordinated with each other, for they are at categorically different levels, those of 'is' and of 'ought'. An allocation is possible only once the norm has been enriched with empirical experience and the case with normativity in such a way that they as it were 'adjust' each other. This idea of correspondence brings out the relational, or discursive, nature of finding the law. The production of facts of the case and legal descriptions in international law has primarily something to do with abduction. The abductive method entered on the heritage of induction by having assigned to it the task of opening up the 'new'. For, according to Peirce, abductive conclusion is the only logical operation that can introduce any new idea at all.[108]

This makes it immediately clear that the relational nature of law refers to a historical process. Law, and accordingly international law, is thought of in pragmatist terms in such a way that for each problem in international law the uninterrupted

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[107] Kaufmann, *supra* note 106, at 11.

[108] The concept of the 'new' used by Peirce evidently corresponds to that of 'emergence', as the following definition of abduction shows: 'By its very definition abduction leads to a hypothesis which is entirely foreign to the data.' For an exhaustive treatment see Helmut Pape (ed.), *Kreativität und Logik: Charles S. Peirce und das philosophische Problem des Neuen* (1994).

context of action must be recreated, and the finding that a case in international law is identical (strictly speaking, only similar) to an already decided one requires such an operation of thought or creativity even if this may not, as with routine cases, enter into awareness. A theory of international law understood in this way is a creative and situational act of creative problem-solving in which norm and international legal case come under the law of contingency. This means that international treaties and agreements must be 'adequate to historicity', i.e. the international legal order must be flexible and open since otherwise it could not be adapted to the conditions of life, which are in the international context after all much more heterogeneous than in the national legal space. A strictly unambiguously conceived international legal system would, because it would be sterile and unliving, be thoroughly unhistorical. Historicity and contingency can exist only in an open court 'system of possibility'. The point is discourse in the open international legal system. International law in the proper sense lies neither in the norm, nor, say, in the case alone, but in their mutual relation. It is not substance, but precisely that quite different thing, namely relation or discourse.[109]

Now projecting pragmatism as presented here onto international law might arouse the impression that a sort of arbitrariness can be seen in the discursive. Claims to truth and correctness are, so the fundamental criticism runs, being inadmissibly mixed with considerations of utility and expedience, and validity claims assertable only discursively are sacrificed to instrumentalist and utilitarianist misunderstandings.[110] It has also been objected that the creative act itself is being declared the highest trading value. A pragmatist legal theory would indeed be too narrowly cast as long as it took as its theme only the production of new solutions to problems and not also the new criteria for evaluating them. Sociologists have reacted to this criticism by tackling particularly the question of the emergence of values and norms against the background of pragmatist thinking.[111] This discourse is also fruitful for our international law approach.

For the justification of norms very generally, for pragmatism there is no higher instance than discourse. From the perspective of an actor developing his actions under contingent conditions, however, it is not justification that is to the fore, but specifying the morally good and just in a situation of action. While we as actors may grant clear primacy to a particular good and just thing, any theory of the good and the just must none the less come under pressure for revision in the light of the consequences of action. Nor does any new specification free us from this; an unambiguous conclusion is not conceivable, since the situations of our legal action are always new, and the search for certainty eternally remains without fulfilment.[112] *In abstracto*, i.e. in discourse separated from a situation of action, there may be certainty that particular

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[109] Kaufmann, *supra* note 106, at 16.
[110] Brunkhorst, 'Eine Moderne ohne Vernunft? Richard Rorty und die falsche Aufhebung der Metaphysik', 16 *Leviathan* (1990) 435–450.
[111] Hans Joas, *Die Entstehung von Werten* (1997).
[112] *Ibid*, at 267–268.

aims of action in international law, such as protecting human rights, ought to enjoy primacy, but by contrast when it comes to the concreteness of the situation of action all we reach intersubjectively is plausibility. From the viewpoint of a theory of 'practical intersubjectivity', we can, to be sure, retrospectively find out more about the *de facto* appropriateness of our legal action, but a definitive, certain judgment does not lie even there, since the future will show further requirements for action and viewpoints that will again endanger our estimates and legal convictions.

The reference to the situation-relatedness of the emergence of norms is not yet an adequate answer to the question of the relationship between the morally good and the just, opening the door and the road to arbitrariness. Even Max Weber in his capacity as ethicist of mentality pointed out that right deeds do not always follow from good will. But the way pragmatists link up the element of creativity and adjustment with that of norm and values does not offer any large room for arbitrariness, but only declares particular revisions and specifications to be acceptable. From the pragmatist conception of action and from the annex of its moral conceptions from the actor's viewpoint, according to Joas, it follows that 'in the situation of action itself the restrictive viewpoint of the just must unavoidably appear, but not otherwise than as one viewpoint alongside the orientations of the good'.[113]

How is this double significance, then, to be understood? On the one hand, the law must appear in this relationship because it represents the anthropologically universal coordination requirements of social action, and this is inevitable given the embeddedness of action in social contexts. For all legal action is unavoidably socially embedded, since even the capacity to act itself is socially constituted. Situational revision thus does not degenerate into arbitrariness, because it has to pass through a potentially universal framework of norms. On the other hand, the just can occur only as one viewpoint among many in the situation of the person acting, because this potentially universal framework of norms would not have anything at all to test if the person acting were not oriented to various conceptions of the good about which he cannot be sure whether they are acceptable from the viewpoint of the just. The point of stressing the creativity of the person acting is just the contingent perception that actions cannot be derived from the universalization viewpoint itself, but all that can be done is test whether a possible action is acceptable and possible from this viewpoint. 'If, then, one starts from a theory of action that roots intentionality just in the situation-related reflexivity of our prereflexive strivings, then it becomes clear that the just can always be only a means of testing.'[114] In other words, in the situation of action there is no primacy of the good over the just or conversely; there is no subordination of superordination, but a relational balance of reflection and discourse.

[113] *Ibid*, at 269.
[114] *Ibid*, at 270.

4 Towards a 'Redescription' of International Law: A Plea for an Emancipatory and Open Philosophy of International Law

From the considerations so far on the relation between pragmatism and law it should have become clear that the polarization between the foundation of international legal norms and institutions from universalist viewpoints on the one hand and the attempt to explain the conditions for the emergence and transmission of common democratic values on the other does not get us any further. Neither in the political philosophy of international relations nor in international law can the point be to set undialectically against the universalism of the liberal tradition a mere particularism, nor against the orientation to morality and justice the appeal to values, culture and community.[115] The communitarian critique of liberalism bites only if it can show that it is the more rational version of universalism, points to a more adequate understanding of the place of justice in action and offers a balanced critique of 'rights talk' and 'value talk'. It is not polarization of viewpoints but their relation and integration that is being asked for here.

What here points to a general, more philosophical, debate also plays an important part for the question of the ground of validity of international law. Like no other topic, the use of military force by the NATO states against the Federal Republic of Yugoslavia to end human rights violations in Kosovo brought the narrow boundary between law and morality before our eyes and opened up a debate on the future of international law. Was the NATO action illegal and thus a blatant breach of the international legal order in force, or was the air attack justified, or indeed excusable? There are no easy answers to the question of how the community of states ought to respond to human rights violations. Both international lawyers and representatives of neighbouring sciences agree on this. Without here raising the claim to portray the evaluations of the NATO actions in international law and politically in their full width, one cannot help but see in the international legal debate on the Kosovo war a polarization between objectively valid law on the one hand and justice and true morality on the other. States' rights and human rights come into conflict with each other, in massive and simply insoluble fashion.[116]

For one group of international lawyers, whom I shall call objective 'legalists', the international legal position in the Kosovo war is clear. The NATO member states' air attacks against Yugoslavia infringe the ban contained in Article 2(4) of the UN Charter against first use of armed force, since there was neither a Security Council mandate for such enforcement measures nor the exercise of a collective right of defence. While it is fully recognized in Security Council practice that the presence of grave human rights violations can meet the requirements to constitute a threat to peace, despite Resolutions 1199 and 1203 there was an absence of the indispensable positive empowerment by the Security Council to the military action. Positive

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[115] A good survey can be found in Rainer Forst, *Kontexte der Gerechtigkeit. Politische Philosophie jenseits von Liberalismus und Kommunitarismus* (1994).

[116] Brock, *supra* note 48.

international law in force knows no right to international humanitarian intervention. It is accordingly in line with 'academic and intellectual honesty' to distinguish clearly between an argument *de lege lata* and one *de lege ferenda*, between reality and wishful thinking, however just. Nor was the Security Council 'blocked', since the veto right is a constituent part of the UN Charter.[117] From the viewpoint of positivism there is after all only the alternative between internationally lawful or internationally unlawful action. Under these circumstances it is hard to avoid the conclusion that NATO infringed the international law ban on force through its operation 'Allied Force'.[118]

Another group of international lawyers, whom I call rational 'moralists', advocate, because of the special marginal situation in which those responsible were acting, an openness of the international regulatory system regarding the use of force. A minimalist and a maximalist position can be distinguished. The moral 'minimalists' argue that in the Kosovo case 'only a thin red line separates NATO's action from international legality'.[119] As regards the infringement of the Charter, there may possibly be only a 'venial sin', which differs from a mortal sin insofar as it can through confession be wiped clean. It would become a mortal sin only if a precedent for the future were to be drawn from it. The teleological interpretation of international law is here supplemented by a 'theological metaphor'.[120] As long as the universal UN system of collective security is not undermined by other 'original sins', the action of the NATO states is excusable, being guided by the maxim: 'all of us leave the path of virtue from time to time.'[121] This 'Lutheran position' is not only right, but the unconditional duty of any Christian and all other people whose action is guided not just by formal legal maxims but, at any rate in *ultima ratio*, also by ethical or moral ones.[122]

The moral 'maximalists' take one further step. They openly criticize the 'Charter-fixated argumentation' of the positivists by pointing out that the ban on force is not the sole content of binding law (*jus cogens*).[123] Current international law knows further binding norms that the subjects of international law may not breach because of the fundamental importance of those norms. These are norms that are of importance for the community of states as a whole. Among such obligations *erga omnes* are *inter alia* the ban on genocide and war crimes against humanity. Large-scale severe human rights violations, while not removing the duty to respect the integrity of states, compel a weighing up of legal interests which in prolongation of the trend of

[117] See Chapter V, Article 27. This aspect is stressed particularly by Wohlrapp, *supra* note 4, at 113.

[118] Zolo, 'Gli strappi della "Global Security"', *L'Unita*, 14 April 1999, 3; and Weber, 'Die NATO-Aktion war unzulässig', *Frankfurter Allgemeine Zeitung*, 9 June 1999, 8. And, for a fundamental treatment, see the arguments in Endemann, *supra* note 48; and Gerhard Zimmer, *Rechtsdurchsetzung zum Schutz humanitärer Gemeinschaftsgüter. Zur Theorie und Praxis der 'Intervention' im zeitgenössischen Völkerrecht* (1998).

[119] Simma, 'NATO, the UN and the Use of Force: Legal Aspects', 10 *EJIL* (1999) 1–22, at 1.

[120] Ipsen, 'Der Kosovo-Einsatz — Illegal? Gerechtfertigt? Entschuldbar?', 74 *Friedenswarte* (1999) 19–23, at 20.

[121] Simma, *supra* note 119, at 22.

[122] Khan, *supra* note 63, at 2.

[123] Dieter Senghaas, 'Der Grenzfall: Weltrechtsordnung vs Rowdiestaaten', 17 *Vierteljahresschrift für Sicherheit und Frieden* (1999) 134–138.

the 1990s tips increasingly in favour of human rights. 'Human rights are increasingly becoming the main concern of the world community as a whole.'[124] The military action in the former Yugoslavia is regarded as legitimate because it has at least anticipated a desirable state of international law.[125]

The linear extension of international law in the direction of global human rights protection is also drawn on for the argument that the Kosovo action can be justified as an emergency measure.[126] Developed municipal legal systems all know the supralegal state of emergency as a ground of justification for a case where a good of the highest value protected by one's own legal system can be protected against infringement or annihilation only by infringing another legal provision. This is accordingly a general principle of law that can be seen as a source of international law within the meaning of Article 38(1) of the Statute of the International Court of Justice and is recognized by all civilized peoples.

What is common to all three positions sketched out here is that in justifying or rejecting the Kosovo operation in international law they are based on a substance-ontological or essentialist type of argumentation. For those who regard the NATO action as inadmissible it is the acceptance of an objective international legal order based on consensus among states that has unconditional application, whereas the others adduce authoritative moral duties ('the argument from emergency') or argue in terms of inalienable human rights in order to legitimate the military intervention in the former Yugoslavia. Each of these positions is one-sided: for they fail to see that law and morality behave towards each other relationally in contingent conditions. The central pragmatist idea regarding a relational concept of law is to claim for (international) law a character that embraces both of the other categories, so that neither law nor morality can be reduced to each other in terms of substance ontology. The definition of international law as a discourse of constant creative problem-solving escapes this constraint. It does not produce a residual category but can specify the framework conditions for the rational application of the other models of law.

From the pragmatic viewpoint, the concept of unconditional moral human rights is neither a better nor a worse slogan than the maxim of 'obedience to God's will'. Both slogans are, if claimed as the 'unmoved movers of large parts of present-day politics',[127] only formulations of the fact that our argumentative reserves of justification are exhausted. It is no help to try to go to the bottom of them, since they are only other ways of saying 'Here I stand, I cannot do otherwise.' They do not denote any grounds for action, but are metaphysical proclamations.

Theoreticians with metaphysical inclinations would of course dismiss such assertions as 'irrationalistic'. What pragmatism is concerned with is practical recommendations that indicate what one should be speaking about; suggestions for

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[124] Cassese, *supra* note 10, at 45.

[125] Cf. Ladwig, *supra* note 4, at 133.

[126] So e.g. Ipsen, *supra* note 120. Cf. also the article by Dicke, 'Zur Situation der VN nach dem Jugoslawien-Einsatz der NATO', in Klaus Dicke and Helmut Hubel (eds), *Die Krise im Kosovo* (1999) 76.

[127] Rorty, *Hoffnung statt Erkenntnis*, *supra* note 83, at 82.

the most adequate concepts with the help of which a discussion of moral questions ought to be carried out. As far as the themes of human rights are concerned, the search for a justification of human rights in human nature or in rationality is seen as leading into error. But this justification is the very basis for those international lawyers who use it to justify engaging in humanitarian intervention.

Starting from this sort of 'ethnocentric' attitude that allows any culture the right to judge rationality questions according to its own viewpoints, this means that we ought to bid farewell to the justifiability of universal human rights. Whether people really possess the rights listed in the Helsinki declaration or embodied in the relevant human rights conventions is accordingly not decisive. And for that reason too action towards a new international law on the basis of human rights protection as an expression of justice does not lead to the goal. For the defenders of the NATO air attacks at bottom accept the infringement of international law in order to guarantee human rights the way they see them. Partly they use the argument of emergency action, partly they openly advocate the infringement of the international legal rule in order to save the most inward purpose of the law, its sense of justice, and partly the global weakening of the system of state sovereignty and the 'birth of a post-national war' (Ulrich Beck) is pointed to in order to push forward ethical globalization. This cosmopolitanism, which expresses an abstract individualism and doubts that political relevance attaches, or ought to attach, to cultural differences, possibly does not solve our real problem. Seeking to defend human rights protection with armed force everywhere in the world where these rights have not yet prevailed would mean declaring the civilizational progress of states in limiting inter-state violence to be invalid and throwing the community of states centuries backwards into the age of permanent civil wars, presenting incompatible conceptions of justice as 'law' again and playing off law against morality.

A pragmatic philosophy of international law is against any doctrine of 'just war', whether in the ethical-moral version of the *justum bellum*[128] or in the guise of humanitarian intervention, or in a narrower, legalistic version in the positivist tradition of Kelsen, who counted war among the specific sanctions of international law. This sort of interpretation is also expressed in, for instance, the argument that the Kosovo conflict was justified at least as a reprisal.[129] Since reprisals must be proportionate by comparison with the breach of international law, it is argued that ethnic cleansing in the form of mass expulsions and killings constitutes a severe violation of rights that at least lets a forbidden armed attack seem at least of the same value. This sort of argument, however, leaves out of account the fact that a modern war, such as took place for instance in the former Yugoslavia with the use of quasi-nuclear means, is incommensurable in ethical and legal respects. For the 'unintended side-effects', those massively lethal 'collateral damages', international

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[128] Michael Walzer, *Just and Unjust Wars* (1992). For a detailed treatment of the moralist justification of the Kosovo war in light of the theory of the just war, see Mayer, 'War der Krieg der NATO gegen Jugoslawien moralisch gerechtfertigt?', 6 *Zeitschrift für Internationale Beziehungen* (1999) 287–321.

[129] Ipsen, *supra* note 120, at 23.

law clings to an archaic legitimatory figure of scholastic thinking, according to which a 'good' action is not delegitimized by the occurrence of 'evil' side-effects as long as the side-effects are not 'intended' but merely put up with, and otherwise not out of proportion to the positive primary purpose. From a pragmatist viewpoint, however, there are no universalizable criteria for this sort of distinction between morally 'good' or 'bad' action. The argument from the just war does not help us any further here, since it creates problems that are as insoluble as they are artificial. Instead, war is outside of any sort of possible normativity.[130] The present situation seems to confirm this view.

For the 'liberal ironist' Rorty, who seeks to distinguish public from private questions, the only way is to help the human rights culture supported by the present international legal system to more self-awareness instead of proving its rationally justified superiority by appealing to cross-cultural facts that are morally of importance.[131] The philosophical theoretical justification is replaced by the liberal utopia, i.e. utopian hopes for convictions as to human progress. Just as scientific process is not based on an increase in rationality but consists in an improvement in justification, so too can progress in international law not be brought about as rational argumentation. The production of binding obligation in international law is instead a question of identifying with norms. And this is a complex process of development and adjustment that makes its way through a multiplicity of practices, discourses and language games. Progress in human rights is accordingly based on the capacity to react increasingly sensitively to suffering. It is this capacity that allows the advantages of a human rights culture and a more global legal system to become a reality.[132] But one does not do justice to this by postulating a sort of ethical statute to which social morals are coming increasingly closer in times of modern progress. For the Kosovo operation has shown that the effectiveness of international legal norms is by no means promoted by arguments from democracy or human rights. This sort of idea presupposes the existence of something non-relational, neither exposed to the vicissitudes of time and history nor affected by changing human interests and needs.

Critics have objected that Rorty's privatization of the truth claim of metaphysics corresponds to the 'Stalinist neutralization of the validity claim of human rights'.[133] This criticism of the politics of neo-pragmatism has, however, failed to see the real point. Rorty's advocacy of less abstract solidarities and reflections and more identification with specific cultural traditions remains tied to Western civilization,

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[130]   On the rejections of the NATO action, see, exhaustively, Reinhard Merkel, 'Das Elend der Beschützten', 32 *Kritische Justiz* (1999) 526–542.

[131]   Cf. Richard Rorty, 'Menschenrechte, Rationalität und Gefühl', in Stephen Shute and Susan Hurley (eds), *Die Idee der Menschenrechte* (1996) 144–182, at 148. The same finding is reached by Zolo, *I signori della pace, supra* note 8, at 143.

[132]   People simply do not believe, as Rorty notes, 'when we are told from a utilitarian side that all pleasure and pain felt by members of our biological species are equally relevant as regards moral considerations, or when we are told from a Kantian side that the capacity to take part in discussing such considerations is adequate for membership of the modern community'. Rorty, *supra* note 131, at 155.

[133] Brunkhorst, *supra* note 110, at 445.

even where he argues that reference to the valuable liberal heritage of the West does not need the blessing of some founded 'grand narrative'; instead 'small narratives' are enough. Rorty insists that political commitment to one's own interests and to those of the groups involved requires no philosophical justification like the appeal to universal human rights, but merely the readiness to discuss them with representatives of competing conceptions and needs in a way defined by persuasiveness and negotiation rather than by force.

Applied to the Kosovo events this means that the NATO states with their 'strategy of subjection' were relying on the false option of a peacemaking policy. A 'negotiated peace' would have been more suited as a method of solving the problem of ending the war by creating peace than the 'imposed peace'.[134] The latter is admittedly associated with assumptions the recognition or creation of which runs diametrically against the prevailing conceptions in the NATO states as to both the Milosevic regime and the Kosovo conflict. A strategy of communication presupposes the willingness to accept the opponent in the conflict as a *bona fide* contracting party and as 'capable of satisfaction'. This policy is made impossible if one sees the normative superiority of particular democratic and international law achievements as an unconditional vanishing point, or if one — as in the case of the Rambouillet Agreement — seeks to replace 'talk' by a *Diktat*.[135] The traps and snares of the Kosovo conflict at any rate show one thing very clearly: as far as moral progress is concerned, we should accordingly not take up Kant's suggestion that morality is based on reason, but instead follow David Hume, who in moral considerations appeals to the role of feelings and sensibility. They guarantee a far better explanation for the allocation of moral quality to our actions, without the need to bring in universal rights or principles.[136]

In the light of an epistemology of pragmatic rationality, however, we ought also to stop seeing the international legal system as an objectively valid order based on contract.[137] We should instead test out new vocabularies and treat the international legal system not as a rational, closed legal system but as an ongoing creative act of problem-solving under historically contingent conditioning factors. At any rate, we ought to drop the hopeless attempt to find legally neutral premises that can be justified by all subjects and from which universally valid obligations in international law can be derived. Instead we should recognize that our liberal and democratic principles only define one language game among others.

Ultimately, accordingly, from the pragmatic viewpoint the question of the ground of validity of international law cannot be answered by the objectification of norms and the idea of universal validity, but international law ought instead to be understood as a whole series of practices aimed at convincing the active subjects of international law

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[134] The distinction between 'imposed peace' and 'negotiated peace' comes from Rittberger, 'Die NATO in den Fallstricken des Kosovo-Konflikts', 74 *Die Friedenswarte* (1999) 24–37.

[135] There has since been increasing agreement that Annex B to the Rambouillet ultimatum, demanding free movement for NATO troops on the whole territory of Yugoslavia, posed a simply unacceptable condition to the Serbs.

[136] Kratochwil, *supra* note 2, at 102.

[137] For basic considerations on this, see Koskenniemi, *supra* note 1.

to extend their obligations to others in such a way as to build up an integrative community. But what is needed for this is not reason or universal conceptions of morality and international justice — ideals of the acme of modernity, which were theoretically perfectionist, morally rigorous and humanly very often unmerciful. As Derrida notes, cosmopolitanism and nationalism have always got on very well, however paradoxical that may seem.[138] Rorty's method of therapeutic redescription can do more to help us.

> The method is to redescribe lots and lots of things in new ways, until you have created a pattern of linguistic behavior which will tempt the rising generation to adopt it, thereby causing them to look for appropriate new forms of nonlinguistic behavior, for example, the adoption of new scientific equipment or new social institutions. This sort of philosophy does not work piece by piece . . . rather, it works holistically and pragmatically. . . It does not pretend to have a better candidate for doing the same old things which we did when we spoke in the old way. Rather, it suggests that we might want to stop doing those things and do something else. But it does not argue for this suggestion on the basis of antecedent criteria common to the old and new language games. For just insofar as the new language really is new, there will be no such criteria.[139]

All this may sound too minimalist to many, just like the exaggeration of the classical liberal idea that the pursuit of one's own interests has its limits in the well-being of others. Looking more closely, however, the pragmatist idea goes deeper. Rorty knows that we share the sensitivity to pain not just with all human beings but also with other living beings. But what links us with all human beings and only with them is the sensitivity to the kind of pain that animals do not share with human beings — humiliation.[140] It is in protection against humiliation that he sees the common basis for all human beings, the ethos for the shaping of public life, the meaning of 'solidarity'. Solidarity, however, is not given through some common goal or common values, but only through the common hope for protection against humiliation. Rorty here wishes to teach us not to seek for commonly binding values, but to let the minimalist ethos of preventing cruelties become practical by our becoming more sensitive to others' conceptions and therefore the dangers of humiliating them.

Most theoreticians of international law in the liberal paradigm, whether in the Kantian or the utilitarian manner, miss the importance of this kind of thinking because they operate with metaphysical concepts that treat the individual as prior to the community and the states as prior to the international system, as bearers of original rights, as utility maximizers or as rational actors. Against the type of liberalism that seeks a universally rational foundation and starts from the position that the international legal order gains in stability when normative criteria are made to override the state monopoly of force that continues to be present in international politics, a pragmatist conception of international law recalls the limits to the claims of

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[138] Derrida himself suggests an interpretation of this principle according to which the European nationalisms, remarkably, justify themselves as cosmopolitan. 'Our Frenchness consists in our having given human rights to the world.' Jacques Derrida, *Das andere Kap. Die vertagte Demokratie* (1992) 38.

[139] Rorty, *Contingency*, *supra* note 5, at 9.

[140] *Ibid*, at 92.

rationalism. By penetratingly reminding us that international law cannot be traced back to a formal or formless basic consensus, because international law is not primarily a system of norms but a creative act under the contingent conditions of language, the community and the self, it compels us to rethink the bases, possibilities and opportunities of international law.

For a relational 'ontology' of international law, the viewpoint of respect and mutual recognition as partners of equal right is of central importance. Increasing sensitivity and growing receptivity to the needs of an ever greater multiplicity of human beings are the most important ethical precepts of the modern world. Since the world is highly complex, only an 'open legal order' can function. In an open system like the international one, the human being must reach out and act without always being able first to be sure on the basis of fixed norms whether an action is right, i.e. he must act creatively and riskily. In just such contexts of action as international relations in which one cannot always know *a priori* what decision is the right one, tolerance and solidarity are needed far more than in closed systems contexts. In them there is no catalogue of natural rights, no unrenounceable moral standards and no unconditional duties, there are only human beings in their multiple referentiality and specific identity.