
'The Divided West': International Lawyers in Europe and America

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Sands, Philippe, *Lawless Worlds: America and the Making and Breaking of Global Rules*. London, New York: Allen Lane, 2005

Slaughter, Anne-Marie *New World Order*. Princeton: Princeton University Press, 2004.

Abstract

It is well known that significant differences exist in international law scholarship between the United States and Europe. Even when they share a positive outlook on the role and future of international law – as Philippe Sands and Anne-Marie Slaughter do – the intellectual approach and analytical style of European and American international lawyers often vary considerably. A complex and fascinating intellectual history lies behind these differences. Its main chapters are the emergence on the two sides of the Atlantic of different assumptions about sovereignty in the modern world; the role of science in legal argument and the relationship between the actual and the normative, areas of thought shaped in the United States by the philosophy of pragmatism which had a marginal influence in Europe; and the deep-seated rule-scepticism that defines much American thinking about the law but is not for the most part a feature of the European approach to the law in general and to international law in particular. Subject to the necessary cautions and disclaimers which must accompany any reflection on general trends in two large and heterogeneous intellectual communities, this analysis seeks to draw attention to these trends as illustrated in the recent work of Sands and Slaughter.

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1 Introduction

In his latest book Jürgen Habermas argues that a deep division has emerged in the West since the terrorist attacks of 11 September 2001: Europe remains committed to the Kantian project for a cosmopolitan order, whereas the United States has disavowed it, preferring either realism, ‘the quasi-ontological primacy of brute power over law’, or hegemonic liberalism, ‘the liberal ethos of a superpower as an alternative to law’.¹

Habermas is writing about government policies, but marked and sometimes striking differences in style, scope and content of argument are also evident in the intellectual approaches to the international order in Europe and in the United States. These differences are often stylized into the complaint of Europeans that American scholarship lacks rigour and that its penchant for interdisciplinary methods has gone too far, to the detriment of proper legal analysis; or into the American perception that European international law scholars are imprisoned in an inveterate and somewhat dull positivism, which causes them to focus on narrow questions and to fail to grasp the complexity of legal phenomena.²

Reading Anne-Marie Slaughter’s *New World Order* and Philippe Sands’s *Lawless World* leaves one with the impression that the intellectual divide in Western international legal scholarship runs deep. Amongst the most prominent international lawyers of their generation, sharing progressive left-of-centre political opinions, Slaughter and Sands have written their latest books for a public broader than the scholarly community, both convinced that something of great significance is happening in the world of international law. Neither is a realist. For Sands rules do matter, but they have been broken. For Slaughter a new world order made of a complex web of transnational networks is emerging; we should embrace it for it is the future of the international law project. Both write in an engaging, direct and often passionate manner.

The differences between Sands and Slaughter are not limited to specific arguments. They concern fundamental assumptions and methodological choices. I will focus on four areas: the relevance of the broader political and intellectual context; the use of scientific or empirical methods in legal argument; the fact-norm distinction; and the approach to the normative. Slaughter assumes, probably correctly, that most of her American readers will be international law sceptics; Sands, in contrast, addresses a public and an intellectual community generally well-disposed towards international law, and open to the possibility of forms of legal and political organization above the nation-state. Slaughter seeks to override preconceptions and reservations about international law with extensive empirical claims; Sands sees it as his mission to explain what the rules are and how they

¹ J. Habermas, *The Divided West* (2006), at 161.

² It is no coincidence that the special issue on method of the *American Journal of International Law* (93 (1999)) considered for the most part approaches developed in the US (New Haven school, international legal process, critical legal studies, law and economics, international law and international relations), with the exception of positivism and feminist jurisprudence (on which the only articles by non-Americans were contributed, by Bruno Simma and Andreas Paulus, and by Hilary Charlesworth).

An illuminating analysis of American thinking about international law is Cot, ‘Tableau de la Pensée Juridique Americaine’, 110 *Revue Générale de Droit International Public* (2006) 537. See also the special issue on French and American Perspectives on International Law of 58 *Maine L Rev* (2006) 282.

have been broken, assuming that his readers will react to such evidence mainly with outrage, even if accompanied by some disenchantment with the international system. Slaughter begins her analysis from the facts rather than the norms, proposing a world order based on the *social fact* of transnational networks; Sands's analysis instead starts from the norms, and looks at facts to assess if the norms are being respected. Underlying Sands's and Slaughter's approaches is, therefore, a different sense of normativity: heightened in the case of Sands, who at times writes as a naturalist more than a positivist; diluted in the case of Slaughter, who is primarily a pragmatist in the American sense.

The analysis that I undertake in this essay – of general trends in intellectual communities as illustrated in the work of two scholars – exposes itself to two parallel risks and calls for a double *caveat*. Firstly, it is not meant to detract from the individuality of the work of Slaughter and Sands, but simply to highlight certain assumptions on which their works rest and which they share with a larger group of scholars, without prejudice to the originality of the specific arguments they develop. Secondly, like any attempt to investigate patterns and trends, it involves some measure of generalization. There are many scholars on both sides of the Atlantic who cannot be subsumed under the mainstream of their intellectual community.³ Moreover, as international law has increasingly taken the centre stage in political and legal debates, the boundaries of these intellectual communities have become more porous than before, a development that hardly anyone would bemoan but that makes it more difficult to pin down mainstream thinking. For this and other reasons, I do not set out to offer a comprehensive picture of contemporary American or European scholarship on international law, but only to flag four areas of divergence before proceeding to consider how the recent works of Slaughter and Sands reflect these differences.

I have chosen to review Sands and Slaughter's books by contextualizing them and discussing their assumptions, mainly because it is an approach that I believe will cast light on their thinking. Another reason is that I found it difficult to review them without some discussion of context and intellectual history because of an unexpected difficulty: the near-incomparability of their works. Yes, *Lawless World* and *New World Order* are contemporaneous works covering the same subject-matter and animated by a similar ambition to look at the essence of the international system. Nevertheless, they are very difficult to compare because the authors understand, describe and characterize the phenomenon of international law in completely different ways. That the works of American and European international lawyers could be so different as to reach or even cross the threshold of comparability is, in itself, a valuable if somewhat unsettling finding, which also confirms that, when it comes to the international system, the divided West goes beyond the world of politics.

2 Assumptions about Sovereignty and the State

A good starting point for this reflection is to note a fundamental difference in attitudes towards the outside world: the ambivalence of the United States, its attempt to shape

³ There is also a preliminary question of membership: '[w]ho qualifies to be a European or an American scholar?'. Like all questions of identity, on an individual basis this question is better left to the persons concerned, but on a general basis it complicates the question of the definition of the two scholarly communities.

it with almost missionary zeal according to American values, on the one hand, and its desire for isolation, on the other; and Europe's imperial vocation, radically transformed by the collapse of empires but certainly not replaced with isolationism.⁴

In many respects it is Europe that has changed dramatically. In a book published in 1959, Federico Chabod wrote that Europe had to refound itself, abandoning its past of imperialism and domination, and looking instead to its fervent critical tradition – from the Scholastics who slated the Spanish government for the conquest and destruction of the New World, to the Enlightenment critics of imperialism, to the anti-fascist intellectuals of the 20th century.⁵ Europe had to reconceive itself based on the ideas of its own fiercest critics. Other European intellectuals, from Thomas Mann to Benedetto Croce, expressed, in effect, similar sentiments.⁶ It would be a simplification to regard post-1945 Europe as a mere anti-hegemonic sequel to centuries of political and economic domination, but that intellectual vision moulded a new consensus on the idea of Europe, and, indirectly, on the role of the nation-state, and on the relationship between European states and the rest of the world. Connected to this intellectual redefinition of the political identity of Europe is the process of European integration, which has reinforced a positive attitude towards the possibility of political and legal organizations above the nation-state, and the wide-ranging constitutional reforms that all major European countries have experienced since the end of World War II.

It is to this consensus that emerged after WWII in Western Europe that one can trace the reasons for the shift in the political centre of gravity of European international lawyers, and more generally of scholars in Europe writing on the international system from a legal, philosophical or political perspective. The reverse of what is for us an assumed fact today – that the 'right-wing' of European intellectual and academic discourse on these issues would be somewhere in the centre, or even in the moderate left, in the United States – would have been true before WWII, when the 'right-wing' of European intellectuals, from Carl Schmitt to Martin Heidegger, was so extreme as to be almost unrepresented in the American academic community.

The first post-war generation of American international lawyers was made, for the most part, of believers in the international system. This is certainly true of Sohn, Henkin, Schachter, and Vagts, although the work of others, McDougal in particular, while still in many respects premised on an internationalist outlook, already evidenced a different intellectual approach to international legal questions. Despite the similarities, however, the broader intellectual context in which American international lawyers worked differed: in the aftermath of WWII American intellectuals had not gone through a profound process of reinvention of the notion of political community;

⁴ See my 'The Sinews of Peace: International Law, Strategy and the Prevention of War', *forthcoming* in 77 *British Year Book of International Law* (2006).

⁵ F. Chabod, *Storia dell'Idea d'Europa* (1959).

⁶ T. Mann, *The War and the Future* (1944); B. Croce, *Considerazione sul Problema Morale del Nostro Tempo* (1945). The notion of the self-constitution of society as the basis for the international legal order is at the heart of Philip Allott's philosophy. See his two main works: *Eunomia* (1990) and *The Health of Nations* (2002).

nor had the United States experienced constitutional change as radical as European countries.⁷ In the absence of such intellectual and constitutional self-redefinition, the internationalism of those lawyers rested on shaky foundations.

Since the 1990s a new generation of American lawyers has challenged the internationalist assumptions and outlook of the previous generation – a development that deepens the divide between Europe and the United States.⁸ Their work is not considered mainstream in American international legal academia; many of them write from the perspective of what is known in the United States as foreign relations law, rather than international law.⁹ But it is fair to say that they have represented the most significant novelty in the intellectual landscape in the United States, and have been at the heart of debates on international law for a decade. Their analyses often rest on a new type of realism, conceiving the outside world not only as dangerous, threatening and corrupt, but also as potentially corrosive of American values. Realist political thinkers of previous generations, like Carr and Morgenthau, had managed to reconcile a liberal view of the domestic political order with scepticism about the liberal international project, maintaining a stark divide between the national and the international planes. That line is being blurred by some of these conservative writers, John Yoo and Robert Bork in particular: they are taking what, in their view, is the inescapable illiberalism of international relations down to the domestic order, arguing for fewer constraints on the executive to enable it to be effective in a world full of dangers which international law and institutions are inherently powerless to avert. Others, however, Goldsmith and Bradley especially, advance objections to the position of international law in the domestic legal system that are primarily grounded in American constitutionalism

⁷ It would not be correct to say that the US experienced no significant constitutional change at all because only six amendments to the Constitution have been passed since 1945, none of which can be described as momentous. As American constitutional scholars like Bruce Ackerman have shown, constitutional change in the US occurs primarily through the courts. The debate on constitutional change there is essentially a debate on constitutional interpretation. Despite this important qualification, it is still true that European countries have experienced more significant constitutional change since 1945, to a large extent dictated by the need to integrate the EU legal order into national constitutions.

⁸ See, e.g., Bork, 'The Limits of "International Law"', 18 *National Interest* (Winter 1989–90) 3; Bradley and Goldsmith, 'The Current Illegitimacy of International Human Rights Litigation', 66 *Fordham L Rev* (1997) 319 and 'Customary International Law as Federal Common Law: A Critique of the Modern Position', 110 *Harvard L Rev* (1997) 815; Bradley, Goldsmith, and Moore, 'Sosa, Customary International Law and the Continuing Relevance of *Erie*', 120 *Harvard L Rev* (2007) 870; J. Goldsmith and E. Posner, *The Limits of International Law* (2005); Guzman, 'A Compliance-Based Theory of International Law', 90 *California L Rev* (2002) 1823; Prakash and Ramsey, 'The Executive Power over Foreign Affairs', 111 *Yale LJ* (2001) 231; Spiro, 'Globalisation and the (Foreign Affairs) Constitution', 63 *Ohio State LJ* (2002) 649; J. Yoo, *The Powers of War and Peace* (2005) and, by the same author, 'Globalism and the Constitution: Treaties, Legislative Power, and the Original Understanding', 99 *Columbia L Rev* (1999) 1955. For a debate on new American scholarship on international law see the symposium, 'The Limits of International Law' in 34 *Georgia J Int'l and Comp L* (2006).

⁹ Vagts has pointed out that the emphasis on foreign relations law is a feature that 'distinguishes American scholarship and teaching on international law', and one that is 'by and large of no interest to foreign scholars and has produced no country to country dialogue': Vagts, 'American International Law: A Sonderweg?', in K. Dicke *et al.*, *Weltinnenrecht: Liber Amicorum Jost Delbrück* (2005), at 841.

and, to an extent, in liberal constitutionalism in general, raising the prospect of a possible tension between the values of internationalism and those of constitutionalism.¹⁰

3 Scientism

Much contemporary American scholarship on international law, regardless of its political orientation, makes extensive use of scientific and empirical methods, a tendency often explained by the influence of international relations on international law scholarship.¹¹ The reasons are, however, more profound. To understand them one has to turn to the impact of the philosophy of pragmatism, or, to use Allott's trenchant description, the 'un-philosophy' of pragmatism.¹²

Pragmatism is an almost uniquely American phenomenon, indeed it is the United States' main contribution to Western philosophy.¹³ In many respects it is a mutation of 19th-century European positivism, the movement of thinkers like Comte who regarded scientific knowledge as the only true knowledge, and the social sciences as analogous to the physical sciences, and who cultivated 'the vision of law's ultimate supersession . . . through the perfection of society, achieved . . . by a science-based manipulation, or by a natural evolutionary process'.¹⁴ Influential though they were, the positivists never dominated the European philosophical scene, which was throughout the 20th century a constellation of different schools without a uniform attitude to science. In the end, the positivist faith in an infallible science was dealt the final blow by the theories of physicists, like Einstein and Heisenberg, and the philosophy of science of Popper.¹⁵ Moreover, the exploitation of science by Nazism and Communism reinforced distrust towards it amongst many liberal political philosophers, Berlin and Hayek in particular.

¹⁰ A similar view is taken by Rubinfeld, 'The Two World Orders', *Wilson Quarterly* (Autumn 2003) 22. Recent decisions of the European Court of First Instance and the English Court of Appeal evince a worrying readiness to put international norms on collective security ahead of domestic ones on human rights (Case T-306/01 *Yusuf and Al Barakat International Foundation v. Council and Commission*, Judgment of 21 Sept. 2005; Case T-315/01 *Kadi v. Council and Commission; R. (Al-Jedda) v. Secretary of State for Defence* [2006] EWCA Civ 327).

¹¹ Slaughter's work is a clear example, as is Goldsmith and Posner's recent book, *supra* note 8. See also: Hathaway, 'Between Power and Principle: An Integrated Theory of International Law', 72 *U Chicago L Rev* (2005) 469, and, by the same author, 'Do Human Rights Treaties Make a Difference?', 112 *Yale LJ* (2002) 1935; Goodman and Jinks, 'How to Influence States: Socialization and International Human Rights Law', 54 *Duke LJ* (2004) 621 and, by the same authors, 'Measuring the Effects of Human Rights Treaties', 14 *EJIL* (2003) 171.

¹² P. Allot, *Towards the International Rule of Law* (2005), at 470, n. 17. See also Dworkin's characterization of pragmatism as 'philosophically a dog's dinner': Dworkin, 'Pragmatism, Right Answers, and True Banality', in M. Brint and W. Weaver (eds.), *Pragmatism in Law and Society* (1991), at 360.

¹³ Habermas is one of the few European thinkers sometimes described as a pragmatist, although his *Divided West*, *supra* note 1, bears little sign of it.

¹⁴ J. M. Kelly, *A Short History of Western Legal Theory* (1992), at 332. There are some important differences between the scientific positivists and the pragmatists that it is not necessary to explore here. Nevertheless, it is correct to say that 'significant features of James's pragmatism and of Royce's idealism were completely consistent with Comtean positivism': G. Harp, *Positivist Republic: Auguste Comte and the Reconstruction of American Liberalism 1865–1920* (1995), at 190.

¹⁵ K. Popper, *The Logic of Scientific Discovery* (1959).

By the time European thought had essentially moved away from scientific positivism, metabolizing its challenge in various ways, the terms of reference of American thought were still those set by a paradigm derivative of it.¹⁶ Pragmatism spread widely and penetrated deeply in the United States, establishing itself with figures like Peirce, William James, Wendell Holmes, and, later, Dewey.¹⁷ Its predilection for science has to be placed in the context of the instrumentalist conception of the truth typical of pragmatism: in the words of James, the truth is 'what works best'.¹⁸ The pragmatists normally abhor systems of thought that seek universal or abstract truths, including those based on strongly normativist assumptions. They see science, with its perceived impartiality and objectivity, as central to the growth of democracy.¹⁹ Pragmatist legal scholarship is, accordingly, 'empirical . . . , *sceptical* about claims that we can have justified confidence in having arrived at the final truth about anything', and relativistic, viewing the scientist 'not as the discoverer of the ultimate truths about the universe . . . but as the exposé of falsehoods, who seeks to narrow the area of human uncertainty by generating falsifiable hypotheses and confronting them with data'.²⁰

Pragmatism offered a fertile ground for another development that distinguishes the United States from Europe: the predominance of behavioural political science. Beginning in the inter-war period with people like Charles Merriam, American political science mounted an attack against political theory, prizing the study of behaviour through 'quantitative or operationalised instruments' with useful policy implications over theory and philosophy.²¹ Political thinkers often at odds with each other like Hannah Arendt, Leo Strauss and Sheldon S. Wolin opposed the behaviouralists.²²

¹⁶ In reality, the epistemology of pragmatism is not merely scientific, leaving room for non-scientific forms of knowledge and attempting to reconcile religious experience with the advances of science, a path explored especially by William James.

¹⁷ Nowadays self-declared pragmatists include conservative scholars like Richard Posner (discussed below) and radical ones like Cornel West (see his *America's Evasion of Philosophy* (1989)).

¹⁸ James, 'Pragmatism', in W. James, *Pragmatism and Other Writings* (ed. G. Gunn, 2000), at 40.

¹⁹ Lane, 'Positivism: Reactions and Developments' in T. Ball and R. Bellamy, *Twentieth-Century Political Thought* (2003), at 340; J. Dewey, *The Public and Its Problems* (1991), at 174, and *Freedom and Culture* (1939), at 142–148. It could be argued that public debates on scientific research, on stem-cells in particular, suggest a less scientific propensity in the US than in Europe. This observation, correct as it is, does not refute what has been said above. To say that American political scientists and legal scholars, including international lawyers, adopt a scientific approach is not to say that the American public at large does the same.

²⁰ Posner, *supra* note 25, at 5–6 (emphasis in original). The falsifiability of social sciences is, however, far from accepted by philosophers of science like Popper.

²¹ Farr, 'The New Science of Politics', in Ball and Bellamy, *supra* note 19, at 443. In addition to the works of Merriam and Lasswell, D. Easton's *The Political System: An Inquiry into the State of Political Science* (1953) became a seminal study in the rise of the new movement.

²² Some of the opponents of behaviouralism disagreed with each other so fiercely that they could not even create a united front against it: Barber, 'The Politics of Political Science: "Value-Free" Theory and the Wolin-Strauss Dust Up of 1963', 100 *Am Political Science Rev* (2006) 539. I do not deal with Strauss in this article because, despite his significance in post-War American political theory, his influence on legal academia can be described at best as marginal (when searching *Harvard Law Review*, the *Yale Law Journal*, the *Stanford Law Review*, and the *University of Chicago Law Review*, only 24 citations of works by Strauss come up, most of them references to *History of Political Philosophy*, which he edited with Joseph Cropsey, or to his writings on curricula in higher education).

Hans Morgenthau was a staunch critic too, and would have most likely been surprised to see himself cited with approval by pragmatist or behaviouralist scholars.²³

Behaviouralism conditioned American thinking about international law through its controlling influence over the study of international relations, an area which, with the exception of the English School and later of constructivism, became a preserve of behaviouralist political science of different denominations. Moreover, one of the central figures in behaviouralist sociology was Harold Lasswell, who, together with McDougal, shaped that exclusively American approach to international law known as the New Haven school, based on ‘purposeful, unremitting efforts to apply the best scientific knowledge to solving the policy problems of all our communities’.²⁴ Behaviouralist political science and economics became the favourite sciences of the pragmatists, and later of the law and economics movement, providing them with that armature of ‘hard fact’ which their theories demanded.

Central features of contemporary American scholarship and teaching about international law can be traced to pragmatism and the scientism it successfully infused, with the aid of behaviouralist political science, into American thought. These include: impatience with definitional questions; the focus on fact, rather than value or abstraction, including the tendency to make moral virtue of reality and power; the lack of interest in large normative projects; an economic reductionism that is, paradoxically given the political leanings of the law and economics school, redolent of Marxist reductionism.²⁵ The pragmatist terms of reference also explain the essentially intra-American nature of many scholarly debates amongst American international lawyers: their protagonists refer predominantly to works by other American scholars and prefer general American law reviews to international law journals.²⁶

The debate on the effectiveness of human rights treaty ratification illustrates these features. It has preoccupied American scholars over the last five years,²⁷ several of them vying to come up with an empirical model, based on quantitative data, that can provide

²³ See, e.g., Goldsmith and Posner, *supra* note 8, at 170. Morgenthau criticized the tendency to resolve complex political problems with a quest for ‘more facts’: H. J. Morgenthau, *Scientific Man vs Power Politics* (1946), at p. vi. He would probably have agreed with Ian Shapiro that the method-driven approach to research leads, paradoxically, to a flight from that reality which it purports to study with ever more refined instruments: I. Shapiro, *The Flight from Reality in the Human Sciences* (2005).

²⁴ McDougal, ‘Law School of the Future: From Legal Realism to Policy Science in the World Community’, 56 *Yale LJ* (1946–47) 1348.

²⁵ See, e.g., R. Posner, *Overcoming Law* (1995), at 4 ff.

²⁶ They prefer general law reviews for another reason: publication in international law journals, including very prestigious ones like the *American Journal of International Law* or the *European Journal* or the *British Year Book*, is not ranked as highly for hiring or tenure purposes as publication in a second-tier general law review – a worrying sign of provincialism which shows little sign of abating.

²⁷ See, e.g., the works of Hathaway, Jinks, and Goodman, cited *supra* note 11, and also Goodman and Jinks, ‘How to Influence States: Socialisation and International Human Rights Law’, 54 *Duke LJ* (2004) 621; Hafner-Burton and Kiyoteru, ‘Human Rights in a Globalising World: The Paradox of Empty Promises’, 110 *Am J Sociology* (2005) 1373; Helfer, ‘Overlegalising Human Rights: International Relations Theory and the Commonwealth Caribbean Backlash against Human Rights Regimes’, 102 *Columbia L Rev* (2002) 1832.

the ultimate explanation of state behaviour.²⁸ The argument that there is a negative correlation between human rights treaty ratification and the human rights record of a country has been met mainly with methodological counter-arguments. European international lawyers – indeed, as far as I am aware, international lawyers outside the United States in general – have not normally engaged with these writings for the simple reason that they do not generally subscribe to the positivist reductivism on which these arguments rest; that they are not, in other words, prepared to be swayed, on such diverse and complex questions as the use of force, human rights law or customary international law,²⁹ by arguments based on quantitative models, cost-benefit analysis or game theory.³⁰ The attempt to reduce complex social and legal phenomena to numbers and equations is regarded – I think it is fair to say – with indifference, or as futile by most European international lawyers who remain sceptical about a methodology that often starts off by assuming what, in reality or in principle, cannot be assumed, limits the analysis to a small number of variables and factors whilst maintaining others constant, paying little, if any, attention to the normative. The irony is that the findings obtained through such a reductionist approach to social explanation are often of little value: they restate the obvious, confirm the well known, or repeat the commonsensical. In the case of the effectiveness of human rights treaties, they confirm that ratification of human rights treaties does not always result in improvements in the human rights situation, that states do not always keep their promises (a fact that strikes some as a 'paradox')³¹ and may choose to become parties simply to increase their legitimacy. The same could be said of constitutional bills of rights. That rules are a necessary condition for liberty, but not sufficient alone, is hardly an earth-shattering discovery.

When Raymond Aron, replying to Oscar Morgenstern, one of the founders of game theory, observed that the non-operational nature of political science, the impossibility of reducing it to formulae, models and equations, was a function of the 'very structure of the object and the activity', rather than of the insufficiency of empirical knowledge, he expressed an objection to these methods that remains, it seems to me, conclusive.³²

4 The Actual and the Normative

Mainstream legal thinking in Europe remains fundamentally faithful to the fact-norm distinction, a statement that would not hold equally true for philosophy of law in Europe since various schools of thought, from natural law to Scandinavian

²⁸ For a review of the main theories, and for one of the latest theories of state behaviour, see Kreps and Arend, 'Why States Follow the Rules: Towards a Positional Theory of Adherence to International Rules', 16 *Duke J Comp and Int'l L* (2006) 31.

²⁹ See, e.g., Yoo, 'Use of Force', 71 *U Chicago L Rev* (2004) 729; Hathaway, 'Do Human Rights Treaties Make a Difference?', *supra* note 11; Goodman and Jinks, 'Measuring the Effects of Human Rights Treaties', *supra* note 11; Goldsmith and Posner, *supra* note 8.

³⁰ The 'old guard' of American international law is similarly sceptical: see, e.g., Vagts, *supra* note 9, at 846.

³¹ Hafner-Burton and Kiyoteru, *supra* note 27.

³² R. Aron, *Peace and War: A Theory of International Relations* (1966), at 768.

realism to German sociological jurisprudence, rejected or qualified this distinction. Confronted with data that show that a particular norm is inefficient or counterproductive, or, even, that it is largely disobeyed, most legal scholars and practitioners in the Old Continent will not deprive it of its normative character, although they may use these empirical observations to argue either for reform of the law, or, should they still view the norm as essentially good, for improving enforcement.³³ Hence, from the fact-norm distinction a number of other key categories of legal argument derive, such as arguments *de lege ferenda* and *de lege lata*.

Typical of much legal thinking in the United States is, instead, the demise, albeit not always expressly stated, of the distinction between the actual and the normative, between the 'is' and the 'ought' – a philosophical postulation that has shaped mainstream scholarship and teaching about the law far more in the United States than in Europe. On it a peculiar structure of legal argument is erected which can be traced back to Oliver Wendell Holmes's article *célèbre* 'The Path of Law',³⁴ and which underlies two different, and in many respects antithetical, contemporary American works on international law, Slaughter's *New World Order* and Goldsmith and Posner's *The Limits of International Law*. The stated premise in these works is that the authors concern themselves with what *really* happens (adjudication in Holmes's case; the fact of transnational networks for Slaughter; the un-normativity of international law as a social fact for Goldsmith and Posner), leaving abstract questions of morality, and even legality, at the door. A purportedly empirical analysis of reality follows: judges do not decide on the basis of syllogistic rationalism for Holmes; transnational networks have begun to create a new world order for Slaughter; international law does not, in actual fact, bind states for Goldsmith and Posner. By the end the authors present readers with an 'ought' conclusion (and sometimes a whole string of wide-ranging ones) – formalism and positivism should be abandoned for Holmes; transnational networks should be embraced for Slaughter; and there is no general obligation to obey international law outside a principle of mere instrumental convenience for Goldsmith and Posner.

Arguments structured in this fashion are marked by a leap from the 'is' to the 'ought'. Even leaving aside (without conceding) the question of the accuracy of the 'is' as represented by these authors, a fundamental problem is that no justification is offered for the transition from the descriptive to the prescriptive – an argumentative process that, as is well-known, Hume castigated.³⁵ Hume's analysis of the 'is-ought' problem has been the object of much attention in legal and moral philosophy, but, whatever position one takes on it, few will disagree with the proposition that the transition from an 'is' to an 'ought' necessitates some principled justification.³⁶ In the writings mentioned above, however, no such principle is articulated, and there seems to

³³ In some circumstances systematic disobedience can however lead to desuetude: Glennon, 'How International Rules Die', 93 *Georgetown LJ* (2005) 939.

³⁴ 10 *Harvard L Rev* (1897) 457.

³⁵ D. Hume, *Treatise of Human Nature* (1739–1740), Bk III, Pt I, Sect I.

³⁶ For the natural lawyer that principle derives from a *reductio* to the state of nature or from other rationalist arguments; for others the passage from an 'is' to an 'ought' is explained as a 'speech act' process: Searle, 'How To Derive an "Ought" from an "Is"', 73 *Philosophical Rev* (1964) 43.

be no more basis for it than an assumption of pragmatic utility or instrumental convenience, the content and implications of which are not explored.³⁷

This shift from empirical to normative statements, as imperceptible in the way it is insinuated as it is momentous in its consequences, is a feature of much debate on law in and outside the classroom in the United States. Purporting to take the normative out of the arguments does not lead to un-normative conclusions, which are self-evidently alien to legal argument, but to either implicit or explicit normative assertions that are reached without ever engaging with the normative.³⁸ In some cases, this assumption means making moral virtue of the particular vision of reality that the authors have been able to establish *with the limited tool* of reductionist empirical inquiry; in others, most notably in critical legal approaches, it leads to a pervasive scepticism about law and normative consequences are left deliberately open.³⁹

As a result of the rejection, implicit or even subconscious, of the is-ought distinction, the pragmatist theorizing about the international law of many American scholars feels alien to most Europeans. Goldsmith and Posner's 'comprehensive theory of international law', Hathaway's 'integrated theory', or Slaughter's 'new world order' are three recent examples of such pragmatist theorizing: sweeping descriptive assertions based on some empirical model, with either uncertain prescriptive implications or express prescriptions which often lack a proper justification. Such theorizing seldom engages with the work of the canonical theorists of international law.⁴⁰ Grotius, Pufendorf, Wolff, Kant, and Hegel theorized in very different ways from these contemporary pragmatist theorists. Their descriptive claims are dismissed or ignored because they are not based on empirical data collected in a manner that the pragmatists would consider scientific; their prescriptive propositions suffer the same fate because of the pragmatists' general lack of interest in the normative. The paucity of canonical references, and the profusion of references to contemporary American scholarship, fuels the European perception that these reflections are part of an inward-looking and largely self-referential debate, a shortcoming for any intellectual debate, certainly more so for one on international law.

³⁷ This is the normative assumption that underlies the law and economics movement, as argued by Owen Fiss in one of the sharpest critical responses to the rule-scepticism and scientism of both law and economics and critical legal studies: Fiss, 'The Death of the Law', 72 *Cornell L Rev* (1986) 5.

³⁸ Goldsmith and Posner purport to make the normative argument that states have no moral obligation to comply with international law, reasoning that since the philosophical disagreements on domestic political obligations show that 'there is little reason to believe that citizens have moral obligations to their governments, there should be no strong expectation that states have obligations to the "international system":' *supra* note 8, at 200. This is not a normative argument; this is a weak argument for not making one.

³⁹ As Owen Fiss has remarked, '[c]ritical studies scholars do not try to transcend the uncertainty – they revel in it': *supra* note 37, at 9. Critical studies in the field of international law are not an exclusively American domain. Leading critical theorists like Antony Carty, Marti Koskenniemi, and Susan Marks are based in Europe.

⁴⁰ Goldsmith and Posner, *supra* note 8, at 3–4; Hathaway, *supra* note 11. This failure to pay regard to theorists that preceded them sometimes produces generalizations that are plainly wrong. Goldsmith and Posner, e.g., argue that international law scholarship rests on the assumption that 'states comply with international law for non-instrumental reasons' (at 14). Such assumption, far from being widespread, would not have been shared in these terms even by Grotius (see, e.g., his Prolegomena in *De Jure Belli ac Pacis* (1625), trans. by R. Tuck for Liberty Fund (2005)).

5 Rule-scepticism

Two distinctive features of American thinking about the law are, as H. L. A. Hart observed, ‘a concentration, almost to the point of obsession, on the judicial process’ and rule-scepticism.⁴¹ That the latter is correlated to the former becomes evident once one realizes that the concentration on the judicial process is not premised on the idea that rules determine judicial outcomes. Quite the contrary. Common to most American approaches to legal scholarship is a rebellion against the conception of law as a system of rules. Judges – American pragmatists and realists have argued for about a century – do not decide on the basis of rules and legal logic, especially when faced with novel and ground-breaking questions. As Oliver Wendell-Holmes famously said, the life of the law is not logic, but experience. And it is to experience, rather than formal legal reasoning, that legal scholars should turn their attention, transforming themselves into economists or statisticians: the future, again according to Holmes, belongs to them, and not to the lawyers.⁴² John Dewey joined in the attack against legal logic.⁴³ And, to come to our field of international law, McDougal wrote that rules often perform a function like ‘that of the squid that confuses its pursuers by squirting blackmail’. Scepticism about rules is common to both the left and the right of American legal scholars – critical legal scholars like Duncan Kennedy, who maintains that all normative concepts contain fundamental contradictions and cannot thus offer any guidance to judges,⁴⁴ and law and economics writers like Richard Posner, who argue that utilitarian principles like wealth maximization can guide courts far better than rules.⁴⁵

Rule-scepticism, which Hart defined as ‘the claim that talk of rules is a myth, cloaking the truth that law consists simply of the decisions of courts and the prediction of them’,⁴⁶ comes in different gradations – from the extreme scepticism of Fred Rodell,

⁴¹ Hart, ‘American Jurisprudence through English Eyes: The Nightmare and the Noble Dream’, 11 *Georgia L Rev* (1977) 969. Rule-scepticism jars, at some level, with the perception of the US as a country where ordinary laws (from tax to road traffic) are often enforced rigorously, and where lawyers wield enormous power and influence. It is true that rule-scepticism has not penetrated the masses and various layers of government; yet it is the preferred intellectual disposition of American legal scholars and of judges, especially those sitting in the highest courts more closely in contact with scholarly debates.

⁴² Holmes, ‘The Path of the Law’, 10 *Harvard L Rev* (1897) 457.

⁴³ Dewey, ‘Logical Method and Law’, 10 *Cornell L Quarterly* (1924) 17.

⁴⁴ Kennedy, ‘The Structure of Blackstone’s Commentary’, 28 *Buffalo L Rev* (1979) 205. Although the critical legal studies movement has offered an important political counterbalance to law and economics and other behavioural approaches to the law, it too has normally been ‘sceptical about or relatively uninterested in any overt engagement with ethical questions’: N. Lacey, *Unspeakable Subjects* (1998), at 224. Lacey rightly distinguishes feminist analysis from critical legal studies, the former still undergirded by a strong normative outlook – an observation that would certainly hold true for the leading feminist analysis of international law: H. Charlesworth and C. Chinkin, *The Boundaries of International Law* (2000). On the normative ethos of American feminist theorists see also S. M. Feldman, *American Legal Thought from Premodernism to Postmodernism* (2000), at 160ff. Lacey has called for a ‘normative reconstruction’ of socio-legal and critical legal studies: *ibid.*, at 223.

⁴⁵ See R. Posner, *Economic Analysis of the Law* (1977), and R. Dworkin’s criticism of this approach in *A Matter of Principle* (1985), at 237–266.

⁴⁶ Hart, *supra* note 41, at 136. More recently, Jean-Pierre Cot has mapped American ideas about the law and examined their impact on international law scholarship (*supra* note 2).

a realist who proposed criminalizing the practice of law and replacing judges with technocrats who would decide on the basis of science,⁴⁷ or that of Jerome Frank, who dismissed the 'belief that there could be legal rules binding on judges and applied by them . . . as an immature form of fetishism or rather fixation calling for psychoanalytic therapy';⁴⁸ to the more moderate scepticism of those who, like Oliver Wendell-Holmes or Richard Posner, would argue that, while in most cases judges simply declare the law based on rules in statutes or precedents, this process is wholly insufficient in difficult cases.⁴⁹ Common to all rule-sceptics is the assumption that the only alternative to their scepticism is a form of rule-absolutism which is often imputed to positivism, but which, however, seems as real as Don Quixote's windmills, for few positivists embrace the notion that deductive reasoning exhausts the sphere of legal argument and decision.

Two different, and to some extent contradictory, reasons are normally offered for rule-scepticism. The first one originates, as we have seen, from empirical observations on the process of judicial decision-making. The second one derives from the association of the formalist application of the law with social and political conservatism.⁵⁰ Clearly, the proposition that rules do not matter cannot be reconciled with the proposition that they are an effective vehicle enabling the forces of conservatism to impose their agenda through the courts on society.

An in-depth analysis of American rule-scepticism would deserve more attention and is beyond the scope of this essay, but a fundamental and worrying difficulty needs to be highlighted because of its relevance to international law: What if the executive imported this intellectual approach, dismissing rules as 'squid ink' and lawyers who call for their respect as 'fetishists'? I do not see what response the rule-sceptic jurist could offer. Nor do I see how an intellectual approach that we would not hesitate to describe as wholly illiberal if espoused by an executive or a judge should be exempt from such an accusation when the proponent is a law professor. As Judge Cot has observed: 'Undermining the very notion of legal norm to the benefit of normative process, the [legal] realists paved the way for the negationism of international law supported by Morgenthau and his school, but also by the disciples of the Bush Administration.'⁵¹

Rule-scepticism is almost entirely alien to the great majority of European international lawyers. Although European legal thought was not immune to it, on the whole mainstream thinking about the law in Europe maintained a positive attitude towards rules, to a large extent because of the centrality of Kelsen and Hart in European jurisprudence in the second part of the 20th century.⁵² Most European international lawyers of the present generation would probably agree with Hart's argument that the

⁴⁷ F. Roddell, *Woe Unto You, Lawyers!* (1939).

⁴⁸ Hart, *supra* note 41, at 974. See J. Frank, *Law and the Modern Mind* (1930).

⁴⁹ Posner, *supra* note 25, at 111f.

⁵⁰ Dewey, *supra* note 43.

⁵¹ Cot, *supra* note 2, at 553–554.

⁵² It is not clear to me why the eminent non-pragmatist legal philosophers that the US had, Ronald Dworkin or John Rawls, e.g., have not been as influential in shaping mainstream argument about the law. I suspect this may have to do with the marginal position that legal philosophy has in the law curriculum in most law schools.

open texture of norms is not a reason for becoming sceptical about them; nor should it lead to normative relativism or even near-relativism, an objection that retains force even after Dworkin's critique.⁵³ Many would also have difficulties with the passage from a purportedly value-free empirical proposition ('Judges don't decide on the basis of rules') to what is in effect a value-laden conclusion ('Judges can never decide on the basis of rules'). In this passage the victim is the *concept* of independent adjudication. If an imperfect reality can so easily replace a concept that includes an aspirational content, the consequence is the loss of the possibility of ever realizing that aspiration. Human fallibility should not become a justification for perpetual failure.

Beyond these jurisprudential apprehensions, rule-scepticism does not resonate for most European international lawyers because they would regard most rules of international law as good – more so today than, say, 40 or 50 years ago on account of the expansion of human rights law, international criminal law, environmental law and so on. I cannot think of any contemporary European international lawyer who would regard rule-scepticism as a necessary jurisprudential basis for the promotion of a progressive international social and political agenda. Nor can I think of many international lawyers in Europe who derive an attitude of rule-scepticism from the *fact* of non-compliance (although attitudes vary amongst international relations scholars).

If one places American international law in its broader intellectual context,⁵⁴ the surprise is not that it has veered towards rule-scepticism in recent years, but that it has taken it so long to do so. For most of the post-war period, American international law escaped rule-scepticism, with the significant exception of the influential New Haven school which, however, was rule- but not value-sceptical.⁵⁵ That American international lawyers did not succumb to rule-scepticism sooner was no easy feat, if one also considers that the field of international law has traditionally come under attack from another group of sceptics, the realist school of international relations which had in the American Hans Morgenthau probably its most sophisticated exponent in the post-war era. The consensus on the Charter system was probably sufficiently solid to resist these attacks for most of the post-war period.

Things are different today. The two prongs of the attack against the international rule of law – the pragmatist rule-sceptics and the IR realists – have come together in the writings of the 'new generation' of conservative international lawyers discussed before. And many of those who, like Anne-Marie Slaughter, would oppose the 'new generation', still

⁵³ H. L. A. Hart, *The Concept of Law* (2nd edn., 1994), at 123ff and 259ff ('Postscript'). Dworkin's famous criticism that Hart neglected the importance of general principles in his theory was not premised on normative relativism: Dworkin, 'Is Law a System of Rules?', in R. Dworkin (ed.), *The Philosophy of Law* (1977), at 38.

⁵⁴ I have attempted to do so in the most succinct form, and invite readers to read Cot's lucid exposition (Cot, *supra* note 2), D. Kennedy and D. Fisher, *Canon of American Legal Thought* (2006), or, for those in search of an intellectual history, N. Duxbury, *Patterns of American Jurisprudence* (1995).

⁵⁵ Some American international lawyers have tried to infuse their process-based approach to international law with the normative. Cot singles out O'Connell and Koh. Glennon is an interesting case: he is frequently associated with radical critiques of specific rules of international law, but, as far as I can see, he never grounds them in a wholesale rejection of the normative (see, e.g., his article on desuetude, *supra* note 33).

choose to do so from a rule-sceptical perspective: they engage them on their descriptive propositions, but shirk a confrontation on normative grounds. I find the realist attack less worrying, because international law has coexisted with this 'existential threat' since its inception. There is no major intellectual breakthrough in realist thinking, as far as I am aware, that fundamentally alters the terms of what is a well-known debate.

The consequences of an attitude of rule-scepticism towards international law are more difficult to predict. In some respects, it is not an exaggeration to say that American legal thought in the 20th century has mounted one of the most sustained intellectual onslaughts on the liberal idea of the rule of law in modern times (its competitor for top place being Marxism), the self-professed liberalism of its proponents distinguishing it from other attacks, for example by Carl Schmitt; but a profession of liberalism is no sure antidote against the development of ideas that can, in the long run, prove destructive of it.⁵⁶ Moreover, rule-scepticism has developed as a way of thinking about the law in the context of a mature domestic legal system that can count on a strong and deeply-entrenched Constitution as a bulwark against the risk that it could become so pervasive and deep-seated as to result in a sort of jurists' hara-kiri, creating a *carte blanche* to be exploited by the executive sooner or later.

Ancient though some of its institutes may be, international law is, on the other hand, still growing and developing as a system, and cannot count on anything similar to American constitutionalism to temper the effects of rule-scepticism. Whether an existing normative order can survive the destructive challenge of pragmatist rule-sceptics and their epigoni remains to be seen, but that no normative order can be built or strengthened on their ideas is so manifest as to be almost obvious: Oliver Wendell-Holmes, Jerome Frank or Richard Posner would have failed where James Madison, Alexander Hamilton and Thomas Jefferson succeeded. In this phase in its history, international law probably still needs a healthy dose of that natural law which the protagonists of the American Revolution so ably championed. That American international law scholars should be no longer able to offer that, and even unwilling, in many prominent cases, to settle for the lesser normativity of positivism, is an unexpected twist in the history of ideas.

6 'New World' Slaughter 'Old World' Sands

The main thesis of Slaughter's *New World Order* is that 'government networks are a key feature of world order in the twenty-first century, but they are underappreciated,

⁵⁶ It would also be necessary to ascertain the precise idea of liberalism behind those professions. As Sheldon Wolin has acutely observed, 'our present age for a variety of reasons lost touch with the original temper and outlook of liberalism and hence is willing to accept at face value the vulgar caricature of liberalism offered by Marxists, romantic conservatives, "realists", and neo-orthodox theologians': S. Wolin, *Politics and Vision* (2004), at 263. Tarello concluded his study of American legal realism noting that the attack on the idea of independent adjudication by American realists was parallel to another attack on that idea, 'by legal theorists in Europe at the service of Fascist dictatorships', adding however that for American realists independent adjudication was synonymous with conservatism, not with the liberal state: *Il Realismo Giuridico Americano* (1962), at 245–246.

undersupported, and underused to address the central problems of global governance'.⁵⁷ A system of world governance based on these networks 'should be particularly attractive to the United States', for it is consistent with the American view that international problems have 'domestic roots'; it is also well-suited to the United States and its regulators, legislators and judges, who possess 'expertise, integrity, competence, creativity, and generosity with time and ideas', and can thus marshal the 'soft power' required to operate through these transnational networks effectively.⁵⁸

Slaughter argues that transnational networks have changed the face of the international system, even modifying one of its foundational ideas – the concept of sovereignty. She invites her readers to:

Stop imagining the international system as a system of states – unitary entities like billiard balls or black boxes – subject to rules created by international institutions that are apart from, 'above' these states. Start thinking about a world of governments, with all the different institutions that perform the basic functions of governments – legislation, adjudication, implementation – interacting both with each other domestically and also with their foreign and supranational counterparts. States still exist in this world; indeed, they are crucial actors. But they are 'disaggregated'. They relate to each other not only through the Foreign Office, but also through regulatory, judicial and legislative channels.⁵⁹

This new world order is not yet born but is already in its late gestation. Slaughter wants us – international lawyers, politicians, public intellectuals – to act as the midwives of the beautiful baby we can already see it will grow to be.

In the first three chapters, Slaughter examines transnational networks of officials belonging to the three branches – regulators, judges and legislators. The executive branch has initiated 'transgovernmentalism', and has probably taken it further than either the legislative or the judicial branch. Networks of regulators already perform three key functions: exchange of information, enforcement and harmonization.⁶⁰ Judicial globalization is a more recent phenomenon, but not less significant; one of its products is the emergence of an 'increasingly global constitutional jurisprudence, in which courts are referring to each other's decisions on issues ranging from free speech to privacy rights to the death penalty'.⁶¹ Citing the work of various scholars of comparative constitutional law, she notes that it is not the American Supreme Court, but the South African Constitutional Court and the Canadian Supreme Court that have been able to exert wide influence over other constitutional courts – a lending capacity that stems, at least in part, from their willingness to borrow from other jurisdictions. Judicial transnationalism is a well-known feature of both human rights law and European law, but it is also a function of the growing opportunities for meetings, conferences and seminars – a new phenomenon which contributes significantly to what she describes as a 'global "community of courts"'.⁶² Of the three branches, the legislature

⁵⁷ *New World Order*, at 1.

⁵⁸ *Ibid.*, at 4–5.

⁵⁹ *Ibid.*, at 5.

⁶⁰ *Ibid.*, at 51–61.

⁶¹ *Ibid.*, at 66.

⁶² *Ibid.*, at 100.

is the one that, according to Slaughter, is still 'lagging behind' in the world of trans-governmentalism, although a number of important networks have been formed both within international organizations and outside.

In making her case, Slaughter relies almost exclusively on the empirical work of international relations scholars and social scientists, neglecting a historical perspective. Most notably, the section entitled 'A New Phenomenon?'⁶³ in the first chapter leaves this central question unanswered. This is, in my view, a significant omission: any claim that something radically new is happening in the world should be accompanied by an historical argument. For my part, I still wonder whether transnational networks are really a new phenomenon: quantitatively perhaps but not as a concept or as a reality. Why should we expect the tenuous ties of bureaucratic affiliation to deliver a 'new order' or even simply order, where other networks (religious orders, professional guilds, associations of merchants, freemasons, not to mention the anthropologically stronger ties of kinship that existed between ruling families in Europe for many centuries) failed in the past. It also seems inaccurate to claim that in this historical phase we are imagining states as 'unitary entities like billiard balls or black boxes' that are subject to 'rules created by international institutions', for most of us, despite the growing importance of international institutions, still consider states as the primary actors in international law-making.

In addition to her reliance on empirical literature, what makes Slaughter representative of contemporary American thinking about international law is her relationship with the normative. A passage in the introduction is worth reproducing in full:

The description and analysis in this chapter are equal parts fact and imagination. I outline what is, in part, and what could be. I also assume, from a normative standpoint, that a world order based on a combination of horizontal and vertical government networks, operating within and alongside future versions of our current international organisations, could be both a feasible and a desirable response to the globalisation paradox.

Such a project may well be laying itself open to charges of hubris, or, at best, foolhardiness. If I attempt it, it is because I believe that politicians and policymakers wrestling daily with problems on a global scale need a structured, enduring theoretical vision toward which to strive, even if never to entirely achieve. As Neil MacCormick writes . . . 'What is possible is not independent of what we believe to be possible.' To achieve a better world order, we must believe that one can exist and be willing to describe it in sufficient detail that it could actually be built.⁶⁴

In accordance with this approach, she builds her analysis of the world order of networks around two headings: what they do and what they could do.⁶⁵ In an argument

⁶³ *Ibid.*, at 41.

⁶⁴ *Ibid.*, at 17–18. The MacCormick quotation is taken from his 'Beyond the Sovereign State', 56 *MLR* (1993) 1. That article, largely devoted to the philosophical implications of the *Factortame* decisions, concluded with a defence of the idea of law as a system of rules, a 'regulative idea' which, according to MacCormick, will be needed even 'beyond the sovereign state' (at 18).

⁶⁵ *New World Order*, at 166–215.

about the law this is unusual: the missing category is of course the ‘ought’. So normative-shy is Slaughter that she prefers to engage in speculative arguments about the possible than in normative ones. To some extent, these ‘could’ arguments conceal normative claims, but the passage from a ‘could’ to an ‘ought’ is quite problematic. An argument about what ‘could be’ is ultimately an argument about human perfectibility, but it is difficult to see how perfectibility can be pursued in the absence of a clear normative framework, whether in the positive sense (what norms are) or in the aspirational sense (what norms should be).⁶⁶

Slaughter’s normative shyness in *New World Order* may seem somewhat out of character since she is the author of various reflections on the liberal theory of international law, to which she does not however refer in this book.⁶⁷ In reality, Slaughter’s thinking has not experienced a normative regression. Her liberal theory was already normative-shy, albeit not normative-free. She described it as a positive theory ‘about how States do behave rather than how they should behave’.⁶⁸ On closer analysis her argument in *New World Order* mirrors the structure of her argument on liberal theory. First, her case is based on a series of descriptive claims. With ‘more facts’, as Morgenthau would have put it, she challenges misunderstandings about the system of international law: that states, regardless of the domestic constitutional structure, will pursue nothing but their self-interest in international relations, and that they are unitary, monolithic entities speaking with one voice on the international plane. Second, her prescriptions are presented as flowing from those facts, not as logical corollaries but as functional necessities. Although the transition from the ‘is’ to the ‘ought’ does not rest exclusively on a principle of utility or convenience, as in other pragmatist writings, it still seems to play an important part.

As the centre of gravity in public argument about international law has shifted towards the right in the United States, towards, as Habermas says, realism and liberal

⁶⁶ A natural lawyer would probably object to a distinction between positive and aspirational normativity.

⁶⁷ Slaughter, ‘International Law in a World of Liberal States’, 6 *EJIL* (1995) 503; ‘Law Among Liberal States: Liberal Internationalism and the Act of State Doctrine’, 92 *Columbia L Rev* (1992) 1907; and ‘Toward an Age of Liberal Nations’, 33 *Harvard J Int’l L* (1992) 393. By liberalism Slaughter means ‘liberal international relations theory: ‘International Law in a World of Liberal States’, at 507, n. 5.

⁶⁸ Slaughter, ‘International Law in a World . . .’, *supra* note 67, at 508. She argues that ‘[n]either law nor politics may be a science, but international relations theorists have a comparative advantage in formulating generalizable hypotheses about State behaviour and in conceptualising the basic architecture of the international system’: *ibid.*, at 504. She also maintains that ‘[t]he positive model cannot itself give rise to normative propositions. Yet to the extent that the positive model gives rise to a different conceptualization of the principal actors engaged in legal relations and the nature of the relations between them, it will define the subjects of new norms and the type of activity such norms are designed to regulate’: *ibid.*, at 515. The space for the normative in her theory is therefore limited to mainly functionalist prescriptions.

Alvarez has criticized both the descriptive and prescriptive components of Slaughter’s liberal theory from what could be described as a Grotian perspective: Alvarez, ‘Do Liberal States Behave Better? A Critique of Slaughter’s Liberal Theory’, 12 *EJIL* (2001) 183. Examples of normative liberal theory of international law, grounded in the older intellectual tradition of liberal political philosophy, are Teson, ‘The Kantian Theory of International Law’, 92 *Columbia L Rev* (1992) 53 and, of course, J. Rawls, *The Law of Peoples* (1999).

hegemony. Slaughter faces an uphill struggle. It may well be that her way of 'selling' prescriptive arguments through an empirical route is effective with an audience inclined to dismiss a purely normative approach, positive or aspirational, to international law. But there is some reason to doubt that the case for international law can really be made successfully without a primary and strong engagement with the normative; without promoting, in particular, the type of paradigm-shift in thinking about the law that will cause Americans to view a rule of international law with a degree of respect if not equal to that which they reserve for the Constitution at least not too far below from it.

One of the most striking differences between public debates in Britain and in the United States on the 2003 Iraq War is that in Britain the argument that the international law on the use of force was violated carried significant weight outside the scholarly community, whereas in the United States that argument carried virtually no weight in the general political debate and did not even muster uniform support in the scholarly community. This observation takes me back to my comment on rule-scepticism: How can the international law project survive such an attitude? Surely the priority must be to instil and nurture a sense of the normative about international law in a firm and direct manner; smuggling it through the backdoor of descriptive claims about 'what happens' and 'what works', or speculative ones about 'what could happen', will leave it vulnerable and frail.

One reason for Slaughter's normative-shyness is her assumptions about state behaviour. It could be said, paraphrasing Hart, that much contemporary American writing and teaching on international law is characterized by a concentration, almost to the point of obsession, on state behaviour – some trying to demonstrate empirically that international law can affect behaviour and that states can be gently socialized into compliance, and others producing more empirical data to show that rules are not a significant variable in determining state behaviour.⁶⁹ Just as the concentration on how courts decide has undermined the concept of how they *should* decide, the concentration on how states behave is eroding the proper sense of how they should behave. It need not be this way: we are perfectly capable, for example, of studying organized crime and find that the criminal law is often ineffective against it without losing our psychological, moral and legal notions about the normative character of criminal law.

⁶⁹ For an illustration of the former see *New World Order*, at 198ff; for the latter position see Goldsmith and Posner, *supra* note 8. A work cited by Slaughter and often referred to in the literature on socialization is Robert Ellickson's *Order Without Law* (1994), a study of customs and practices, often dissonant with the law, followed by a community of cattle-ranchers in Sasha County, California, for settling their disputes. This study purports to show that law matters less than we think. There is something deeply unempirical about seeking to explain reality through such improbable analogies or, to use Shapiro's potent language, 'a flight from reality' rather than a better explanation of it: Shapiro, *supra* note 23. Can we really learn any lesson on the international political order from how cattle-ranchers settle their disputes, or from how corporate governance works (another source of analogical application)? We have always known that *some* types of order can function through social rather than legal norms, but there is no complex socio-political order under which any liberal thinker could wish to live that functions without some legal norms.

But for some reason when it comes to international law, the discrepancy, no doubt strident at times, between norms and reality is often treated in the United States as a form of cognitive dissonance, the solution to which is, for most, the redefinition or the abandonment of the normative.

Slaughter instead wants to persuade us that we should make different and empirically more valid assumptions about the behaviour of liberal states – not only are they better than non-liberal states, they can disaggregate themselves, mutually socialize one another into better behaviour, and usher in a new world order through the peaceful armies of bureaucrats, judges and legislators. Underlying this approach to state behaviour is a preference for the radical tradition of liberalism over the classical one; for the Enlightenment idea of human perfectibility over the pessimism about human nature that has its modern origins in Machiavelli and Hobbes; for – as Slaughter herself puts it using Judith Shklar's elegant terminology – the liberalism of progress over the liberalism of fear.⁷⁰

Those who continue to see liberalism, as Wolin says, as a 'philosophy of sobriety, born in fear, nourished by disenchantment, and prone to believe that the human condition was and was likely to remain one of pain and anxiety',⁷¹ will have some apprehensions about this approach. They may accept that the international behaviour of liberal states is, for the most part, better than that of illiberal ones and that there is something to be gained from establishing transnational networks between them. They will not accept that liberalism has changed the nature of power, and the human nature of those – bureaucrats, judges, legislators – who exert it; it keeps power and human nature at bay through a constant struggle the outcome of which should not be taken for granted. For these 'sober' liberals, beneath the liberal patina of the state and its officials, there will always be power and human nature, unreliable as ever. For them, the feat of liberalism is not that of Hercules killing the Hydra, but that of Ulysses constantly seeking to outsmart the Cyclop: temporary loss of sight is the best one can hope for.

If neither states nor officials can ultimately be trusted, how could the world order rely so heavily on soft law and self-regulation? These misgivings are only accentuated by the ambitious breadth of the concept of world order adopted by Slaughter: 'a system of global governance that institutionalises cooperation and contains conflict sufficiently to allow all nations and their peoples to achieve greater peace, prosperity, stewardship of the earth, and minimum standards of human dignity'.⁷² Networks may be effective at providing regulatory coordination, some standard-setting, even some enforcement, at dealing with what we could call the secondary level of international law, but can they really address primary-level questions like war and peace? Notwithstanding the various examples of important and influential networks, it is difficult to escape the perception that most international issues transcend the reality of these networks that remain, in the broader scheme of things, little more than tangential.

⁷⁰ *New World Order*, at 217.

⁷¹ Wolin, *supra* note 56, at 263.

⁷² *New World Order*, at 166.

Another criticism of networks is worth mentioning. Slaughter refers to an article in which the former United States Ambassador to the United Nations, John Bolton, described enthusiasm for transnational networks as 'corporativist',⁷³ something, he provocatively suggested, that would have made 'Mussolini smile'. Corporativism, one of the central political doctrines of Fascism, promoted the organization of society into 'corporations', each responsible for regulating its area of activity (industry, trade, labour, profession and so on).⁷⁴ Slaughter dismisses Bolton's criticism, but it is difficult not to hear an echo of corporativism in the idea that government networks 'could become self-regulating networks, each with the mission of inducing and compelling its members to behave in accordance with "network norms" that would reflect the highest standards of professional integrity and competence for judges, regulators, legislators, ministers, and heads of state'.⁷⁵

Chapter 6 of *New World Order* deals with other critiques of transgovernmentalism – of which technocracy, lack of accountability and the erosion of domestic political processes seem the most important. In her response to these critiques one finds the most prescriptive part of her analysis. She proposes five norms, or rather general principles, to govern transnational networks: global deliberative equality, legitimate difference, positive comity, checks and balances, and subsidiarity. She writes that these norms should have, like networks, an 'informal character'.⁷⁶ But the main limit of her normative argument is that it only includes *some* secondary norms; missing is a fundamental code of primary norms as well as the equivalent of a 'rule of recognition', a foundational principle that should form the basis and define the scope for legal obligation. I doubt that any credible normative system of international law can be based entirely on secondary rules and be silent on central primary questions like the use of force. But a system that does not offer answers to those primary questions and even fails to address the foundational question of validity – the basis, as Brierly put it, for legal obligation in international law⁷⁷ – cannot provide the 'baseline of acceptable normative behaviour' that she identifies as necessary, and is simply too weak for comfort.⁷⁸

Slaughter also argues that regulators, legislators and judges would have to adopt 'a concept of dual function', to learn that 'their jobs automatically include both domestic and international activity'.⁷⁹ Connected to this concept is her notion of disaggregated

⁷³ *Ibid.*, at 9.

⁷⁴ The first legal articulation of corporativism was the *Carta del Carnaro*, the Constitution adopted by the group of Italian nationalists led by Gabriele D'Annunzio who took over the disputed city of Fiume in 1919 proclaiming the 'Italian Regency of Fiume'. Under Arts. 13 and 14 of the *Carta del Carnaro* all 'productive' citizens were members of 'fully autonomous corporations'.

⁷⁵ *New World Order*, at 213–214.

⁷⁶ *Ibid.*, at 245.

⁷⁷ Brierly, 'The Basis of Obligation in International Law', first delivered at the Hague Academy in 1928 and reprinted in J. L. Brierly, *The Basis of Obligation in International Law and Other Papers* (1977), at 1.

⁷⁸ *New World Order*, at 260. The proposals of the Princeton Project on National Security, which Slaughter co-ordinated with John Ikenberry, suffer from the same shortcomings: J. Ikenberry and A.-M. Slaughter (as Project Directors), *Princeton Project on National Security: Forging a World of Liberty Under Law, U.S. National Security In The 21st Century*, available at www.wvns.princeton.edu/ppns/report.html. For a more detailed discussion of the Princeton Project see my article, *supra* note 4.

⁷⁹ *New World Order*, at 278.

sovereignty that is one of the boldest theoretical arguments in the book. The new idea of sovereignty, she argues, has to reflect the connectedness of the world, rather than crystallize insularity through the notion of a monolithic unitary state. To some extent the difficulty could derive, again, from a confusion between the normative and the factual. Sovereignty is a legal not a factual postulate. It is meant to protect from reality, rather than reflect it: a state remains sovereign, regardless of its political, social and economic power. Legal postulates are not, of course, cast in stone; they can and should be constantly re-examined. But a re-examination of sovereignty has to take into account the intimate connection that exists between this concept and political liberty. One need not go to the Hegelian extreme of requiring a complete symmetry between internal and external sovereignty to see that sovereignty is, to an important extent, the international legal articulation of political liberty, the ‘liberty of the ancients’ in Benjamin Constant’s words that was rediscovered in the 16th century as republican and collective liberty and still constitutes, together with individual liberty, one of the pillars of modern liberalism.

Modern international law has reinvigorated this collective idea of liberty with the principle of self-determination. The real challenge for any critic of sovereignty is to come up with a new articulation of political liberty – philosophically a tremendously arduous feat. Most internationalists refuse to become cosmopolitans precisely because of this problem. The cosmopolitans, for their part, contend that they do articulate an idea of political liberty that transcends the state and is premised, instead, on a universal community. Despite the occasional cosmopolitan tone in her analysis,⁸⁰ Slaughter is generally careful to distance herself from cosmopolitan ideas of world government.⁸¹

Unlike Slaughter, Sands does not seek to offer a comprehensive theory of international law. He has written *Lawless World* for the general educated public ‘to shed some light on international law’,⁸² and to mobilize support for it. He describes *Lawless World* as ‘a practical book based on the personal experiences of a pragmatic Anglo-Saxon who is not seeking to apply Cartesian logic or develop some overarching international legal theory which can explain where we are and where we may be heading’.⁸³ The reference to pragmatism does not indicate a philosophical affinity with American legal pragmatists. In England ‘pragmatic’ does not have that meaning. It often seems to be an epithet of choice (‘the pragmatic Englishman’) that is employed in order to preempt charges of intellectualism or idealism: it is more often connotative of a quality the person does not want to be accused of lacking, rather than, as in ‘pious Aeneas’, one he possesses. In any event, whatever ‘pragmatic’ means in this context, Sands is no pragmatist in a philosophical and legal sense.

Sands’s vision of the international system differs radically from Slaughter’s. For him a world order already exists, but it is under attack. His world order is that established by Churchill and Roosevelt after the end of World War II through their efforts ‘to replace a world of chaos and conflict with a new, rules-based system’⁸⁴ enshrined

⁸⁰ *Ibid.*, at 260.

⁸¹ *Ibid.*, at 270.

⁸² *Lawless World*, at pp. xvii–xviii.

⁸³ *Ibid.*, at p. xviii.

⁸⁴ *Ibid.*, at p. xi.

in the principles of the Atlantic Charter: 'an end to territorial aggrandizement, or territorial changes; respect for self-government; social security; peace and freedom from fear of want; high seas freedoms; and restraints on the use of force'.⁸⁵

The international legal order made significant progress in the 1990s towards the realization of the values of the Atlantic Charter, which, according to Sands, should still underpin it. He gives a vivid account of the Pinochet case in which he was involved as counsel for various human rights intervenors.⁸⁶ The 'Pinochet moment', together with the Rome Statute of the International Criminal Court, signified the culmination of hopes in the 1990s that, with the end of the Cold War, the system of international law had entered a new phase, although, as Sands correctly points out, the tension between this system and the main superpower was already simmering beneath the surface as the United States had begun to 'turn against many of the international rules which lay outside the economic domain, including some which had attracted very broad support'.⁸⁷ With the disavowal of the international system by the United States, partial though it is, there is a risk, according to Sands, that we could end up with an 'international legal order which is essentially limited to the economic side of globalisation'.⁸⁸

The chapter on the Iraq War attracted much media attention in Britain when *Lawless World* came out a few weeks before the 2005 general election. The Iraq War overshadowed most other questions during that campaign, although Prime Minister Tony Blair still succeeded in obtaining a historic third mandate. Sands's book had an impact on the electoral debate that I think is accurate to describe as unprecedented for an international law book. In particular, Sands found himself – or rather put himself – in the eye of the political storm with his legal investigative work on the Attorney-General's 'change of view', in the space of less than two weeks, on the question of the legality of the war. The facts are well known, at least in Britain: in his full advice, which was not publicly available at the time, the Attorney-General gave an analysis of the issue which is now generally regarded as balanced and measured, anything but a 'green light' to regime change; but in an answer to a parliamentary question in the days before the war he presented a more succinct, less nuanced position. These events also raise serious constitutional questions, not least because the full advice was not made available to the members of the cabinet.

In an op-ed published shortly after the 2005 elections,⁸⁹ Sands remained upbeat about international law, a feeling probably encouraged by the reception that his arguments had enjoyed. Indeed, as mentioned earlier, the relevance of international law in recent public debate distinguishes Britain from the United States. Sands did not create the 'international law moment' single-handedly with his book, but he certainly captured it in a country where, in comparison with the United States, it is still quite

⁸⁵ *Ibid.*, at 8–9.

⁸⁶ *Ibid.*, at 23–45.

⁸⁷ *Ibid.*, at 14.

⁸⁸ *Ibid.*, at 21.

⁸⁹ Sands, 'International Law: Alive and Kicking', *The Guardian*, 17 May 2005.

rare for a legal academic to become a public intellectual. But what explains this ‘international law moment’? One reason, the main one in my view, is the deep process of political self-redefinition that has changed for most Europeans, whether of the left or of the right, the idea of the nation-state and the relationship with the rest of the world. Invoking a rule of international law carries, *ipso facto*, some weight in Europe, the normativity of international law being psychologically and politically widely accepted. As early as in 1956, the slogan chosen by protesters against the Suez War revealed the emergence of this collective sense of international normativity: ‘Law not War’ (which, as anti-war slogans go, strikes me as less starry-eyed than the 1960s ‘Make Love not War’ and more constructive than the 2003 ‘Don’t Attack Iraq’).

But there is perhaps also another reason at play, which would temper Sands’s enthusiasm: the process sometimes described as ‘juridification’, the tendency to frame public questions as legal questions identified by Tocqueville as a feature of American democracy but probably typical of many advanced democracies (although it does not manifest itself in the same way). The popularity of international law with public opinion may therefore be the next stage in this process of advancement of a legal style of argument, rather than a success that can be ascribed to the international law project itself. Not that it should matter, it could be objected, except that the international system does need politics. Juridification may be an advancement for the rule of law, but it is the other face, albeit not in a causal sense, of the impoverishment of politics. The 2005 campaign in Britain gave as much evidence of the latter as of the former.

Sands’s assessment of the position of international law in the public domain in the United States is very pessimistic. Until Abu Ghraib, he writes, ‘there was virtually no informed public dissent against the Administration’s efforts to re-write international law into irrelevance’.⁹⁰ In the run-up to the Iraq War, even the *New York Times* refused to publish a letter in which a number of prominent international law academics based in the United States accused the administration of riding ‘roughshod over international law’⁹¹ – a disturbing event which could be commented upon with Tocqueville’s famous observations on the absence of real freedom of expression in the United States despite the First Amendment.⁹²

Sands reserves particular blame for the lawyers in the Bush Administration who provided opinions, some of which have since appeared in the *Torture Papers*.⁹³ ‘The

⁹⁰ *Lawless World*, at 230.

⁹¹ *Ibid.*, at 230 and 308. A similar letter written by British academics was published by *The Guardian* and even gained headlines: ‘War Would be Illegal’, *The Guardian*, 7 Mar. 2003.

⁹² ‘At the present time the most absolute monarchs in Europe cannot prevent certain opinions hostile to their authority from circulating in secret through their dominions and even in their courts. It is not so in America; as long as the majority is still undecided, discussion is carried on; but as soon as its decision is irrevocably pronounced, everyone is silent, and the friends as well as the opponents of the measure unite in assenting to its propriety. . . . I know of no country in which there is so little independence of mind and real freedom of discussion as in America. . . . In America the majority raises formidable barriers around the liberty of opinion; within these barriers an author may write what he pleases, but woe to him if he goes beyond them’: A. de Tocqueville, *Democracy in America* (ed. and trans. H. Reeve, rev. F. Bowen, 1998), at 103–104.

⁹³ K. J. Greenberg and J. L. Dratel (eds.), *The Torture Papers* (2005).

enforcement of international law can turn on the advice of a single lawyer' – he remarks – 'Good faith efforts aside, the principle of individual criminal responsibility bears equally on those whose legal advice allows the state to act.'⁹⁴ Although Sands does not say this, it is not far-fetched to hypothesize a connection between the 'atrocious legal advice'⁹⁵ and the intellectual culture of rule-scepticism which probably shaped the legal education of the lawyers who were giving it.

Sands lays the blame for the breaking of global rules squarely at the door of the Bush Administration and its British allies – an analysis that seems at least incomplete. Whatever their responsibilities, the pangs of the international system also have other causes. Authoritarianism in the Arab world, the emergence in the Middle East of an ideology that is deeply obscurantist and against which local civil society has not yet risen, the almost intractable problem of proliferation of weapons of mass destruction are crucial factors in the development of a crisis, to which the Bush Administration and its allies have given many an inept response but which was not for the most part of their own making.

Sands is particularly critical of Tony Blair. In announcing his resignation in May 2007, the British Prime Minister said that 'Hand on heart, I did what I thought was right'⁹⁶ – a statement that, Sands would probably argue, offers hardly any meaningful mitigation. But there is another argument for mitigation to which historians may be more receptive. Tony Blair was confronted with one of the most difficult foreign policy decisions for any British Prime Minister, because of the special relationship between the United States and Britain. To illustrate the enduring significance of this relationship, it is worth noting that, when Iran took British servicemen hostage earlier this year, the Pentagon approached the British government, within a few days, with various military options.⁹⁷ Taking a decision that could potentially jeopardize such an alliance would be no easy feat for any British Prime Minister. The comparison is often made with Harold Wilson, who is credited with standing up to President Johnson by refusing to drag Britain into Vietnam. But a dramatic British pull-out in March 2003 would have been politically and militarily a different thing. Moreover, Wilson's decision had more to do with his backbenchers rather than his judgment: if he could have had his way, he would have probably sent British troops to Vietnam.⁹⁸

These observations also strengthen Sands's claim that the 'change of opinion' of the Attorney-General, far from a footnote, is a central part of this story: had the cabinet been briefed properly, it could have formed a different opinion. One of the purposes of cabinet government is precisely to avoid reliance in such difficult matters on the fallible judgment of one person. Nevertheless, disentangling Blair's decision from Britain's, and Europe's continuing strategic dependence on the United States will be, for the historians if not for the lawyers, a difficult task. It is a dependence of which we

⁹⁴ *Lawless World*, at 229.

⁹⁵ *Ibid.*

⁹⁶ "'I Did What I Thought Was Right'", *The Guardian*, 11 May 2007.

⁹⁷ 'US Offered Military Action to Free Hostages', *The Guardian*, 7 Apr. 2007.

⁹⁸ J. Colman, A 'Special Relationship'? *Harold Wilson, Lyndon B. Johnson and Anglo-American Relations 'at the Summit', 1964–68* (2004).

have had no cause to be aware for nearly two decades now, although the crises in the Balkans should have acted as reminders. But, with Russia's authoritarian turn and its attempt to bully Estonia, now a Member State of the European Union, Europe's dependence on the United States is becoming once again more difficult to ignore.

The conception of international law that underpins Sands's work could be described as entirely positivist, were it not for the force with which he makes some arguments that a positivist would normally regard as *de lege ferenda*. When he is writing about environmental law or commenting on investment awards on the question of indirect expropriation versus state regulation, he seems to be inspired by a vision of international law closer to a natural lawyer than a positivist, although he does not openly cross that threshold, perhaps out of a fear that a naturalist position could detract from the force of his attacks based on the violation of positive rules. Even when he is a positivist, as he is most of the time, Sands is much more open to soft law, aspirational principles and progressive developments than traditional positivists.⁹⁹ Sands is probably not the only international lawyer in Europe today to combine a strong commitment to the normative in the positive sense with an equally strong commitment to the normative in the aspirational sense, slipping at times into positions that do not distinguish between the two, a hallmark of naturalism. There has not been a significant abjuration of positive law and a return to natural law, but it is fair to say that not a few international lawyers are comfortable in the penumbra between the two.

7 Conclusion

This essay is in some ways a Eurocentric perspective on the divided West, written by a European scholar for a European journal – circumstances which, together with the greater attraction of the unfamiliar over the familiar, can explain why I have concentrated on American scholarship. It is also true, as I have pointed out above, that many American international law scholars are not rule-sceptics, scientists or unable to transcend certain assumptions about sovereignty and the relationship between the domestic community and the rest of the world. The work of José Alvarez, David Caron, Richard Falk or Thomas Franck, to mention only a few, seems to be immune from those trends. Nor are they present in the work of the two leading American legal philosophers of the last 30–40 years, John Rawls and Ronald Dworkin, although I have already noted that their ideas seem to have had far less influence on mainstream thinking about the law in the United States than the ideas of pragmatist thinkers like Richard Posner.

I have also tried to place the works of Slaughter and Sands in a broader intellectual context. But perhaps the most important contextual element is one which is still unfolding, the implications of which are far from clear. For the first time in the history of the West, Europe from the Atlantic to the Baltic, from the North Sea to the Mediterranean – with the exception of a few countries like Belarus and Russia – is overall a more

⁹⁹ See, for example, Weil, 'Towards Relative Normativity in International Law?', 77 *AJIL* (1983) 413.

liberal place than the United States. As such an extraordinary development is taking shape, some in the United States are dismissing Europe as the basket-case of the West, unable to withstand the threat of Islamic extremism and destined to become 'de-Westernized' into Eurabia.¹⁰⁰ The notion that a civilization that survived Attila and Genghis Kahn, Caliphates and Sultanates, as well as home-bred foes like Fascism and Stalinism, should crumble under the pressure of a small minority of terrorist fanatics borders on the hysterical. What should give cause for concern instead, and provides further evidence of the divided West, is the retreat of liberty in the United States; the acquiescence of American courts to the executive now nearly six years since the beginning of the 'War on Terror' (it will soon have lasted longer than World War II); and the inability of intellectuals, despite many determined to do so, to reverse these trends. It is difficult not to see a link between this crisis of liberty and legality in the United States, and the attacks on international law. From this state of affairs Kenneth Roth concludes that, especially when it comes to the promotion of human rights, it is for the EU to 'pick up the slack' and stop punching 'below its weight'.¹⁰¹

In the United States more than in Europe, one also notices a certain dissociation between, on the one hand, the views about international law of a large section of, indeed probably still most, international lawyers *stricto sensu*, and, on the other, those of many scholars and public intellectuals who write about international law; and more generally between the international lawyers, especially those of the older generation, and the political class and the public. One of the reasons for the public success of Sands's book is that in Britain this gap, if it exists, is far narrower.

Slaughter's book is in many respects a rejoinder to the American scholarship that has purported to offer empirical demonstrations of the ineffectiveness and lack of binding force of international law. That scholarship is part of the bigger intellectual trends that I have attempted to describe. The long-term influence of these trends – the power of ideas in other words – should not be underestimated. As Isaiah Berlin often repeated, citing Heinrich Heine, ideas nurtured in the quiet of a professor's study can with time destroy a civilization.

Legal pragmatism is not such an idea, but some of its tenets are certainly capable of inflicting severe damage on a normative system that is still growing and developing. In particular, once the genie of rule-scepticism leaves the bottle, its supporters (legal academics and judges) may be able to control it at first to foster generally progressive goals, but, after it falls in the hands of the executive, there is not much they can do: if the executive adopts the adage 'rules don't matter', a lawyer is simply armless. Utilitarian arguments are bound not to go very far, for any executive is ultimately attracted to no other utility than that of power. Much as those who take this view, like myself, will probably be dismissed as hapless 'positivists', an approach to the law based on a diluted sense of the normative cannot in the long run suit any liberal legal system. Even those who insist that it is right for the American legal system, given its

¹⁰⁰ Podhoretz, 'The Case for Bombing Iran', Commentary, June 2007, available at: www.commentarymagazine.com/cm/main/viewArticle.aip?id=10882&page=all.

¹⁰¹ 'EU Should Fill Leadership Void on Human Rights', available at: <http://hrw.org/englishwr2k7/docs/2007/01/10/global15039.htm>.

Constitution and its history, must concede that it does create an ideal terrain for an executive determined to ignore international rules.

Slaughter is seeking to counter many of these trends, but she does not engage her opponents on the only ground where the argument can be won: the normative. The main challenge for international lawyers in the United States is to infuse their political community and the larger public with a stronger commitment to the international rule of law. It cannot be done with empirical arguments alone and with the obsessive lifting of the normative veil, an approach that ultimately leaves us, as Kelsen said, facing ‘the Gorgon head of power’.¹⁰² Moreover, Slaughter’s new world order, so powerfully and passionately described, ultimately comes down to bureaucrats, judges and legislators talking to each other. A political order needs more than this; it must be built with the cement of principles and ideas, capable of capturing the imagination, of creating loyalty, even of refashioning self-perceptions.

On the other hand, many would question whether Sands’s rule-based system can offer a vision capable of mobilizing more support. On its face, this objection has some force. Yet, if one looks beyond the dryness of the expression ‘rule-based system’, one will find that the rules defended by Sands embody values that are central to human existence – the preservation of peace, liberty, the protection of the environment. They surely have an appeal far greater than processes, methods and networks, whichever the worthy goals to which these may be seen as instrumental.

Sands, surprisingly perhaps, concludes on an optimistic note imbued with that liberalism of progress that also characterizes Slaughter: ‘The rules of international law will turn out to be more robust than the policies of the Bush Administration’. Paraphrasing Michael Corleone in *The Godfather*, he adds: ‘Tough guys are not enough in international relations. In the twenty-first century you need rules, and proper lawyers too.’¹⁰³ It is too soon to tell whether his optimism is misplaced or not, but the ‘sober’ liberals will find it difficult to share.¹⁰⁴ In 1907 one could have made similarly optimistic predictions, based on what rationality and need dictated then. That things turned out so differently in the 20th century, and that the 21st has the potential to be even worse is a reason for trying harder to find new and better ways of outsmarting the tough guys.

¹⁰² Kelsen, cited in C. J. Friedrich, *The Philosophy of Law in Historical Perspective* (1963), at 177.

¹⁰³ *Lawless World*, at 239.

¹⁰⁴ See Wolin, *supra* note 71.