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On Epistemic Universalism and the Melancholy of International Law

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Abstract

This contribution, first delivered as the keynote address to the 2018 annual conference of the European Society of International Law, aims to explore the effects of the way international legal research is organized on the contents of such research. The paper suggests that international law is no longer about what states do, but has come to be about what international lawyers do, and traces this to two inter-related factors (without any claims of exhaustiveness). First, international legal research has come to be embedded in a highly competitive setting, which affects the topics we examine and the ways in which we do so; it has stimulated, for instance, a strong division between doctrinal scholars, rational scholars, and critical scholars. Second, this competitive setting stimulates a sense of high drama: if we cannot promise a paradigm shift, we will not receive funding or other accolades, yet this way of thinking has little traction in practice or even academically. As a result, international lawyers have become highly fragmented, and the refusal to engage with each other can only be considered as contributing to epistemic injustice – and that is all rather melancholy.

1 On Universalism and Epistemic Universalism

It seems to be the point of this very conference, the 2018 annual meeting of the European Society of International Law, to contest universality narratives. On some level, such an aspiration seems welcome but perhaps overly simple; surely, not all ideas need to be contested because they aim to be universal in scope or reach – not solely for that reason, one would assume. Still, in all of its straightforwardness, it illustrates

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nicely one of the claims I am about to make: the claim that international legal scholarship these days is obsessed with high drama. For surely, this is what the aspiration to contest all universality narratives represents; what it may lack in nuance, it makes up for in tweetability.

Traditionally, when international lawyers discussed the universality of their discipline, what they referred to was whether the rules and principles of international law would be binding on all. The concept of universality referred to the geographical scope of rules and principles, based on the underlying assumption that, ideally, a legal order supposed to govern the international community would also bind all members of that community. This was never a reality, of course, with the International Court of Justice (ICJ) paying homage to the possibility of regional custom and escape from the force of custom through persistent objections, and the late Antonio Cassese conceding in the mid-1980s that the international law he described was an international law operating 'in a divided world'.[1] Yet, the pull of the universal proves strong; we think of the United Nations and other organizations with many member states as 'universal' and dream of *jus cogens* norms and obligations with validity *erga omnes*. And the persistent objector doctrine, it has been suggested, is actually rarely invoked.[2] Still, while this concept of the universal focusing on the geographical scope of rules and principles is considered to be important, it is not generally considered to be particularly interesting.

This is, however, no longer the only concept of universality in circulation. Another way of conceptualizing the universal is the idea that international law might or should cover all possible topics that have an international dimension. This gained some prominence with the adoption of the Rome Statute in 1998, which suggested that with the formal inclusion of international criminal law, the international legal order had become complete.[3] On closer scrutiny, however, this proved misguided; there are important realms of human activity that are the subject of numerous treaties but are not considered to form part of international law. I am not even referring to private international law, although I probably could; instead, what I have in mind are other branches of law. There are, to make a trite point, thousands of taxation conventions in force, yet tax law is rarely considered as international law.[4] Likewise, the International Labour Organization may have sponsored some 200 labour conventions and another 200 or so recommendations, but labour law is rarely considered as international law. The Refugee Convention may be the single most applied convention on earth,[5] but refugee and asylum law are at best budding branches of international law.[6] Nationality law may boast to be among the first topics addressed by the Permanent

1 A. Cassese, *International Law in a Divided World* (1986).

2 Charney, 'The Persistent Objector Rule and the Development of Customary International Law', 62 *British Yearbook of International Law* (1985) 1.

3 Rome Statute of the International Criminal Court 1998, 2187 UNTS 90.

4 But see R. Avi-Yonah, *International Tax as International Law: An Analysis of the International Tax Regime* (2007).

5 C. Dauvergne, *Making People Illegal: What Globalization Means for Migration and Law* (2008).

6 Convention Relating to the Status of Refugees 1951, 189 UNTS 150.

Court of International Justice,[7] but it is still, almost a century later, rarely regarded as international law.[8] Note that what all of these branches have in common is that they address the position of the individual; this is no coincidence, and the claim that the individual is finally a 'subject of international law' strikes, consequently, as rather overblown – much of the law relating to individual well-being is still construed as part of domestic law and, thus, subject to the whims and follies of domestic authorities. Be that as it may, if the geographical scope of international law is seen as important but not interesting, the substantive universality of international law is, by contrast, often considered as interesting but not particularly important.

A third conceptualization concentrates on the inclusiveness of the international legal order. Here, the point is often that international law is a thoroughly exclusive enterprise, implicated in the oppression of women, the global South, the lesbian, gay, bisexual, transgender (LGBT) community, indigenous peoples, the working classes, or all of the above.[9] Hence, important work is done to expose the inherent and structural biases of international law: how it has contributed and still contributes to exploitation, inequality or poverty.[10] It is this concept of the universal that is prominently present in the call attached to this conference, and rightly so, as this concept of the universal is both important and interesting. I will not, however, say much about it.

For there is yet a fourth possible concept of the universal, a concept that may well be termed epistemic universalism. It refers to the idea that there are various different ways of engaging with international law as an academic. Some of us do doctrinal work, and some do it better than others. Some of us work in a critical tradition, and, again, some do it better than others. Some of us are inspired by rationalist theories, and, again, some do it better than others. Some of us concentrate on the history of international law rather than on international law itself, and some engage in interdisciplinary efforts, bringing the insights of other disciplines to bear on international law. It is no exaggeration to claim that in the academy, international law is no longer about what states do but, rather, about what academic international lawyers do. Curiously enough, however, this epistemic universalism is rarely discussed, not even by works aiming to address the practices and belief systems of international lawyers;[11] it seems to be considered neither important nor interesting. So, obviously, I thought it would be a great topic.

7 *Nationality Decrees Issued in Tunis and Morocco (French Zone)*, 1923 PCIJ, Series B, No. 4.

8 A rare exception is the work of Peter Spiro. See, e.g., Spiro, 'A New International Law of Citizenship?', 105 *American Journal of International Law* (*AJIL*) (2011) 694.

9 See, e.g., B.S. Chimni, *International Law and World Order: A Critique of Contemporary Approaches* (2nd edn, 2017).

10 See, e.g., H. Charlesworth and C. Chinkin, *The Boundaries of International Law: A Feminist Analysis* (2000); A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004); A. Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (2014).

11 J. d'Aspremont, *International Law as a Belief System* (2018).

2 On International Law as the Law of States

For much of the 19th and 20th centuries, academic international lawyers had but a single mission; their task was to find out what the law says, and this had to be done because somehow international law was expected to be helpful in getting sovereign states to co-exist. Realist students of international politics may have told us that international law was only epiphenomenal, but, if so, then it was clearly considered the most phenomenal of epiphenomena;[12] even if international law did not seriously constrain anyone who did not want to be constrained, it was nonetheless considered important and instrumental in preventing war and general catastrophe and providing channels and vocabularies for communication between even the fiercest antagonists. The professional ethos for much of the 20th century was geared towards preventing wars from breaking out (unsuccessfully, one may add), from preventing the Cold War from heating up (more or less successfully) and from preventing violence in the decolonization process (partly successful, perhaps). Peace was prioritized over justice, and the notion of peace was a thin one to begin with: the absence of armed conflict rather than what is now sometimes referred to as human security.

If there was a clear idea behind academic international law, which is questionable (after all, international law is not a top-down invention), it was the idea that since international law lacked central institutions, someone had to collect materials, arrange them, systematize them – and who better equipped than the academic international lawyer, with little of the time pressure and little of the partisan bias usually afflicting practitioners and little of the normative concerns usually affecting courts, concerns related to the effective settlement of a dispute or to doing justice in individual cases. Moreover, many of our colleagues in domestic law would habitually be doing much the same: collect materials, arrange or re-arrange them and systematize them. It was in this spirit that, in the USA, the various Harvard draft conventions and restatements were produced; it was in this spirit that the International Law Association and the Institut de Droit International did – and still do – their work, presenting resolutions in which the law on a particular topic is restated; it was in this spirit that the International Law Commission, partly a professorial body, could engage in codification with a little progressive development sprinkled on top and it was in this spirit that individual scholars could write magisterial and lasting treatises. Think only of Arnold McNair's *Law of Treaties*, first published in 1930, then again in 1961, and reissued in the 1990s because, it transpired, the work still spoke to the discipline.[13]

There were, to be sure, some methodological debates, debates on how best to do all this, but these remained embedded within a larger paradigm, so to speak. Georg Schwarzenberger could advocate an inductive method of analysis, thinking his colleagues engaged too much in wishful deduction.[14] Myres MacDougal and his associates

[12] One is reminded of Dutch football commentator Herman Kuiphof's legendary claim (paraphrased here): '*Voetbal is slechts bijzaak, maar het is de belangrijkste bijzaak ter wereld*.' Apologies to those who do not read Dutch; Kuiphof's words lose a lot in translation.

[13] A.D. McNair, *The Law of Treaties* (1961).

[14] G. Schwarzenberger, *A Manual of International Law* (1947).

could advocate a process-oriented way of studying the law,[15] and the likes of Max Huber and Charles de Visscher could endorse a sociological jurisprudence,[16] but, at the end of the day, they all stayed firmly within the same paradigm: that of international law as an academic discipline seeking to describe and understand what the law says and, perhaps, what it should say or possibly one day could say – one would either describe the *lex lata* or *de lege ferenda*. But they would steer clear from trying to understand the effects of the law; even those with a sociological bent would stop short of going there.

Staying within the same paradigm also implied they had an incentive to communicate with each other. MacDougal may have been an outlier within the discipline, but he was nonetheless a member of the US delegation to the Vienna Conference negotiating the law of treaties, and he taught at the Hague Academy of International Law. His associates and students have gone on to sit on multiple investment panels (Michael Reisman), the World Trade Organization's Appellate Body (Florentino Feliciano) and one of them even assumed the presidency of the ICJ (Rosalyn Higgins). Some have also been invited to join the Institut de Droit International, which, like the Hague Academy, serves as a strong indication of acceptance by the profession's mainstream. And few international lawyers have served international tribunals as well as Huber and de Visscher, both former judges at the ICJ or its predecessor, and the former highly influential for at least one groundbreaking arbitral award.[17]

What has changed then is that the methodological debates are no longer confined to one and the same conception of what it is international legal scholars should be doing, and one illustration thereof is the very use of the word 'methodology'. Until the 1980s, the term was used so as to signify how best to find the law; Maarten Bos' 1984 monograph titled *A Methodology of International Law* is precisely that: a guide, directed at practitioners and scholars alike, on how international law can best be identified and how treaties and judgments should be interpreted.[18] And the book could be directed at practitioners and scholars alike because these groups strongly overlapped in terms of personnel as well as in terms of what they were doing; the government lawyer aiming to defend his (usually his) government and the academic writing his (usually his) monograph were engaged in much the same sort of activity.

More recently, this usage started to be displaced by linking methodology to academic research. This is illustrated by a symposium on method organized by Steven Ratner and Anne-Marie Slaughter for the *American Journal of International Law* in the late 1990s; practitioners had by and large been removed from the equation. This now was all about scholarly activity and the best ways of doing academic research into international law: as a neo-positivist (bowing to a long tradition but giving it the prefix 'neo'); as a 'law and economics' scholar; as a feminist or as a critical scholar – although Martti Koskenniemi, the critical scholar, and Hilary Charlesworth, the

[15] See, e.g., M.S. McDougal *et al.*, *Studies in World Public Order* (1982).

[16] M. Huber, *Die soziologischen Grundlagen des Völkerrechts* (1928 [1910]); C. de Visscher, *Theory and Reality in International Law*, translated by P. Corbett (1968).

[17] *Island of Palmas (US v. Netherlands)*, Award, 4 April 1928, reprinted in 2 UNRIAA (1928) 829.

[18] M. Bos, *A Methodology of International Law* (1984).

feminist, both expressed considerable discomfort at the exercise.[19] Likewise, Olivier Corten's *Méthodologie du droit international public*, published a decade ago, is largely geared towards an audience of academic researchers.[20] And when Anne Orford published her insightful article on methodology a few years ago,[21] the process had been completed; international legal method is no longer about possible ways of finding out what the law says but, rather, about possible ways of doing academic research.

International law, in the academy, is no longer about what states do, but has become about what international lawyers do. We have lost touch with legal practice, and the discipline has become transfixed by methodological debates, with each faction occupying its own corner and being reluctant to look outside. And roughly, very roughly, three broad corners can be distinguished. There is the critical corner, the rationalist corner and the doctrinal corner, and there is precious little contact between them. The three have their own canons of thought; their own intellectual leaders and hierarchies; their own publication venues; their own institutions. The discipline has fragmented into different epistemic communities, not only based along traditionally existing lines of nationality, as Anthea Roberts recently suggested,[22] but also deeply divided along methodological lines. Instead of the fragmentation of international law being a concern, we should be worried about the fragmentation of international lawyers. How has this come about? One factor that may play a role is the way our working environment is structured. It will be my contention that our professional ecology[23] has contributed in two rather negative ways to the fragmentation of international lawyers. It has, first, stimulated a sense of competition between scholars – a rat race based on specific ideas as to what makes for interesting and worthwhile scholarship. Second, part of that worthwhile scholarship consists of making grandiose, but often untenable and unreachable, claims and promises; it provokes high drama.

3 On International Law as the Law of International Lawyers

The fragmentation of international lawyers is, in part, a byproduct of the way we go about our business. What we investigate and how we do it is, to a large extent, determined by the profession's ecology, by the way the market for academic research is structured,[24] and it is perhaps surprising that few have looked at this before. After

[19] Slaughter and Ratner (eds), 'Appraising the Methods of International Law: A Prospectus for Readers', 93 *AJIL* (1999) 291.

[20] O. Corten, *Méthodologie du droit international public* (2009). It opens as follows: '*Ce texte est principalement destiné aux chercheurs amenés à étudier et appliquer le droit international*' (at 11).

[21] Orford, 'On International Legal Method', 1 *London Review of International Law* (2013) 166.

[22] A. Roberts, *Is International Law International?* (2017).

[23] I am not sure this is a proper use of the term 'ecology', but I borrow it gratefully from Abbott, Green and Keohane, 'Organizational Ecology and Institutional Change in Global Governance', 70 *International Organization* (2016) 247.

[24] And, lest we forget, there is nothing 'natural' about markets to begin with, neither about markets themselves nor about the topics we think are suitable for being handled by markets. On the former, see E. MacGillivray, *The Invention of Market Freedom* (2011); a classic on the latter is J. Dewey, *The Public and Its Problems* (1954 [1927]).

all, when discussing what states do, or other actors, we are careful to denote external constraints imposed by the settings in which they operate – we are, for example, perfectly willing to accept the idea that a company's actions are in part determined by the structure of the market on which it operates. So perhaps it might be useful to apply the same thought to ourselves, even if doing so seems to acknowledge that we might not be as autonomous and independent as we like to think we are.

International law always was an industry, of course, at least since the professionalization that started in the late 19th century, with law professors, mentors and protégés, publication outlets, conferences and professional associations. But it is fair to say that the industry is changing; that the structure of the market on which the industry operates is changing as well and that this has an impact on what we do and on how we do what we do. Note that this is not a matter of wallowing in nostalgia, yearning for a golden age that has disappeared and may never come back. It would seem obvious that it should by no means be impossible to sketch something that has been, then sketch the thing replacing it, and criticize the replacement without much affinity for what preceded. Simply put, criticizing the new is not endorsing the old; criticizing the new does not imply by definition embracing the old, if only because there might be several alternatives possible, among which 'the old' could represent a poor choice. To put it clearly, the classical international law discussed above was, of course, a closed club, a self-appointed and self-selecting aristocracy, excluding many from participating, and establishing its own particular hierarchies. The newer system that will be discussed below also excludes a lot of people and also sets up strict hierarchies; its veneer is more respectable, in that it presents itself as a meritocracy, but, on closer scrutiny, some merits are considered more meritorious than others, and it is to a large extent more about appearing to be engaged in excellent scholarship than about actually being engaged in excellent scholarship.

At first sight, things have mightily improved; there are many more international events organized, including some specifically aimed at younger scholars. There are many more journals than before, so publishing our work has become easier than ever, and journals are more easily available than before, which greatly facilitates the conduct of literature studies. There is much more money available for traveling in order to take part in conferences, workshops or master classes, and the number of postdoctoral positions has mushroomed over the last decade or so. The invisible college of international lawyers has grown in numbers, and research output has grown dramatically as well.

But there are drawbacks and opportunity costs. Much of the increased spending on research has come from decreased basic funding – it has been taken from the core funding of universities. The wide availability of journals facilitating literature studies entails that much of what is done these days is limited to studies of the literature, including the mapping and charting of debates instead of directly contributing to them, and the ease of publishing entails that some things slip through which, arguably, should not have; the Social Science Research Network (SSRN) is an example of a venue not to be taken seriously yet potentially hugely influential and so are the so-called 'fake journals'. The fashionable idea of open access publishing (more on this

below) is suspect, with editorial boards pushed to accept pieces despite their low quality because, well, someone has already paid for them to be published.[25] And post-doctoral positions have come to replace regular teaching positions, with two nasty side effects. First, the individual researcher has to move from position to position and is lucky to be employed for a few years at a time, may have to move countries and will have problems building up secure pensions and related things, including a family life. Moreover, a large chunk of every post-doctoral project is devoted to looking and applying for the next project. And, second, teaching has become an afterthought, despite all of the lip-service; a succession of post-docs on externally funded projects means that no one is groomed for a teaching position anymore, which can be a problem, especially in a broad and sprawling discipline such as international law – chances are that the brilliant post-doc in a legal history project or the brilliant specialist in marine environmental protection is incapable of teaching basic international law and has problems explaining the distinction between jurisdiction and admissibility.

All of this conspires to create a new international law academic: someone who is highly competitive, who can write sexy applications about sexy topics, knows how to use Instagram and how to generate re-tweets and knows how to bring in a lot of money. The system has moved on to create perverse incentives, for our employers as well as for us. Quality is not snubbed *per se*, but, without quantity, scholars will not get anywhere. Invisible activities such as engaging in peer review are discouraged, precisely because the competitive environment implies that more and more peer review will have to take place, not just for publications but also in the form of tenure review, promotion review or probation review. Real originality or depth is not to be encouraged; too original a mind will not pass the review panels. Publishing should take place in the highest-ranked journals, creating a huge workload in terms of peer review and logistics – and what counts as a high-ranking journal is subject to negotiation and, therewith, manipulation. Interdisciplinarity is a must, but only if the proposal is recognizable to other disciplines, so developing your own method, or developing a truly interdisciplinary project, is out of the question.[26] And if it is correct to assume that the most important breakthroughs and insights owe much to the curiosity and perseverance of individual thinkers, then it is quite a sobering thought that very few of the most influential thinkers of the 20th century would have received external funding in today's climate.

And chances are that this broad competitive climate, replete with strategies and plans and systematic approaches, is no accident. Many universities have started to centralize their administrations, perhaps partly to save money, perhaps partly to enable a greater degree of control over academic staff. My own employer has told me to adopt a unique research identity number identifying me, so as to prevent people from mistaking me for that other scholar named Jan Klabbers, a sociologist (now

[25] 'Hoofdredactie open-accesstijdschrift stapt op na druk uitgever zwakke artikelen te publiceren', available at www.volkskrant.nl/wetenschap/hoofdredactie-open-accesstijdschrift-stapt-op-na-druk-uitgever-zwakke-artikelen-te-publiceren~b18cf4fa/.

[26] M. Lamont, *How Professors Think: Inside the Curious World of Academic Judgment* (2009).

retired) working at the Radboud University of Nijmegen in the Netherlands. Both he and I have been amused by the occasional mix-up, but my university is not so amused because it might mean that my output will come to benefit my namesake's employer. That same university, like many others, has replaced tenure by short-term contracts or contracts of indefinite duration; it is so much easier to steer staff into certain directions that way. Support staff has been ditched and is being replaced by administrators who write strategies and prepare for audits and research assessments, and write press releases about how well the university does in the many different rankings or tell researchers that by tweeting they can accelerate the impact of their work. Our work environment, in other words, is based on cutthroat competition.[27] As the saying goes, 'in politics it's dog-eat-dog; in academia it's the other way around'. This even helps explain the outcries about plagiarism and even self-plagiarism in recent years; these are considered problematic precisely because in a competitive environment, they distort competition between scholars and their employers.

This is even visible in the drive towards open access publishing – on its face, a democratic innovation, a rare spark of public ethos in a setting that is otherwise radically throwing all public ethos overboard. The drive to open access, however, may be barking up the wrong tree. It is doubtful whether it represents much of a public ethos on the part of university management and ministries of education or research. Instead, it seems to be driven largely by two other concerns. First, it is driven in large measure by a desire to fight the power of publishers – in particular, perhaps, Elsevier. Elsevier publishes many of the leading journals in the life and natural sciences. Elsevier also maintains the biggest database for publications (SCOPUS), selecting publications considered important from the not so important ones. It thus plays a double gatekeeping role: it decides what gets published, and it decides what is important and gets further circulated. Some time ago, Elsevier bought SSRN, adding a further gatekeeping function; it now also decides what gets published without being scrutinized. And, at least as importantly, Elsevier produces systems by which universities can follow their staff activities; my own employer uses an Elsevier system through which I am expected to report my publications, my conference presentations, and so on. Wherever universities turn these days, they encounter Elsevier, and, what is more, they are highly dependent on Elsevier, which effectively means that Elsevier gets to dictate what matters in universities, and that is unacceptable.

Second, in a field such as ours, there are few obstacles to the public at large familiarizing itself with our research work. International lawyers are often called upon to explain or comment on current events for television news or in the newspapers, and much the same applies to the humanities and social sciences in general. International lawyers have several blogs available where research results can be published, at least in abbreviated form, by those keen on doing so. Things may be different in the life sciences and physical sciences, however. Here, access to research is far less obvious, and

[27] Insightful is J. Mittelman, *Implausible Dream: The World-Class University and Repurposing Higher Education* (2017).

yet there are far bigger material interests at stake. For companies, it may be interesting to have access to research in engineering, biotechnology or pharmaceuticals; this would possibly lower their own research and development costs. The biggest beneficiary of open access, therefore, is not the public at large but, rather, a specific subsection of it: those who need academic research to further develop their products. And this, in turn, would suggest that the drive towards open access owes much to economic considerations and incentives; it is a response to, and driver of, the idea that universities should somehow be of economic use and no longer be cherished for being concerned with learning or *Bildung*. It is noticeable that in the discussion on open access, no attention is paid to the university's role in creating a civic spirit and fostering democracy[28] – it is almost exclusively conducted in terms of a fair return on the taxpayers' investment, and this alone signifies the primacy of the economic perspective. And it is notable that no one talks about open access to the classroom; surely, teaching is also funded by public money, at least in those universities that are not (yet) fully privatized, so should access to the classroom not be open as well? Instead, universities, even in the Nordic countries, have started to charge tuition fees for those whom it is politically acceptable to charge (that is, students coming from outside the European Union) – so much for public ethos.

4 On Moral Holidays and Muddling Through

The system of incentives that has been put into place over the last couple of decades, with its emphasis on quick fixes, on quantity and on impact, not only stimulates particular ways of doing academic work but also stimulates a particular ethos. That ethos is one of drama – high drama. In order to be successful, grand claims and big promises must be made. A proposal on, say, freedom of assembly cannot just be presented as a proposal on freedom of assembly for its own sake; it has to be framed as part of something larger, more appealing, for instance, in terms of achieving human dignity. Likewise, we cannot just suggest a study on one of the core crimes before the International Criminal Court or the concept of command responsibility, but we must feel the need to capture something bigger, bringing an end to the culture of impunity. Research projects cannot be proposed merely because one is interested in figuring things out; the least that is expected is the promise of a 'paradigm shift'.

Grand claims have always been part of the discipline's vocabulary, but usually tempered by their own makers. Grenville Clark and Louis Sohn promised nothing less than world peace through world law half a century ago, but, on closer scrutiny, they merely confirmed that this meant that there can be 'no peace without law'.[29] Thomas Franck wrote big books on legitimacy and fairness but was always mindful of the idea of international law being a matter of 'muddling through'; he realized he could not

[28] On this, see, e.g., M. Nussbaum, *Not for Profit: Why Democracy Needs the Humanities* (2010); M. Oakeshott, *The Voice of Liberal Learning*, edited by T. Fuller (2001).

[29] G. Clark and L.B. Sohn, *World Peace through World Law* (2nd edn, 1960), at xv.

promise 'justice'.[30] And Nagendra Singh claimed with conviction that international organizations would contribute to the 'salvation of mankind', but it was always clear that the salvation of mankind would be a byproduct, not a goal in its own right.[31]

There are things in life that we cannot achieve intentionally but really only as byproducts. We cannot, for example, decide to become spontaneous or self-confident; we cannot even decide to fall asleep within two minutes. Hence, there is little point in adopting a rule ordering spontaneity, self-confidence or immediate sleep;[32] so too with international law. Human dignity cannot be achieved by fiat. At best, it can be realized as a side product; if we make a point of treating others decently, then human dignity may be guaranteed. The constitutionalization of international law cannot be ordered like a take-away dinner; the culture of impunity will not come to an end by merely creating a court. Yet we need to make such grand claims if we want to be taken seriously by funders and others on whom our competitive positions depend.

The philosopher Avishai Margalit offers an alternative way of approaching things, under the name 'negative politics'. To his mind, what is relevant is not the politics of the grand ideal – this often leads to violence and bloodshed, without any chance of ultimate success – but, rather, the politics of preventing humiliation, the politics of stimulating common decency or civility.[33] The problem with this, however, is that it does not look good in a funding application; reviewers will quickly say it 'lacks ambition'.[34] The minimum requirement these days is the promise of a 'paradigm shift', so well-nigh each and every research proposal promises a paradigm shift; never mind that in the social sciences and humanities, including international law, there are few paradigms to begin with.[35]

What makes matters worse is that we have started to believe in our own grand claims and no longer bother to follow them up. We are happy to proclaim the end of the culture of impunity and then take what William James once called a 'moral holiday'.[36] We proclaim some final goal, propose a treaty or resolution, devote an article or two to it and then sit back and relax; our moral work has been done, now it is up to the politicians and bureaucrats to give effect to our lofty ideals.[37] But that is a luxury we can ill afford. When even the European Court of Human Rights seriously questions whether the Armenian genocide really amounted to genocide, as it did a few years ago,[38] the discipline is in trouble; our big ideals tend to get swallowed whole by the

[30] T. Franck, *The Power of Legitimacy among Nations* (1990); T. Franck, *Fairness in International Law and Institutions* (1995).

[31] N. Singh, *Termination of Membership of International Organisations* (1958), at vii.

[32] For a lucid discussion, see J. Elster, *Sour Grapes: Studies in the Subversion of Rationality* (1983), ch. 2.

[33] A. Margalit, *The Decent Society* (1996); A. Margalit, *The Ethics of Memory* (2002).

[34] It is possibly no coincidence that a recent study on civility seems to be bothered by the limited ambition inherent in the notion. J.A. Hall, *The Importance of Being Civil: The Struggle for Political Decency* (2013).

[35] Kuhn suggested that paradigms were altogether absent in the social sciences. T. Kuhn, *The Structure of Scientific Revolutions* (2nd edn, 1970).

[36] W. James, *Pragmatism* (1981 [1907]), at 36.

[37] See also S. Pihlström, *Taking Evil Seriously* (2014).

[38] See ECtHR, *Perinçek v. Switzerland*, Appl. no. 27510/08, Judgment of 17 December 2013. Decision available at http://hudoc.echr.coe.int/. For critical commentary, see Klabbers, 'Doing Justice? Bureaucracy, the Rule of Law and Virtue Ethics', 6 *Rivista di Filosofia del Diritto* (2017) 27.

very bureaucracies we create to give effect to them, and those bureaucracies can do so because we think our work is done once they are created. But this is a mistake, and the melancholy insight presents itself that heaven will never descend on Earth, and that even when we do good, we cannot rest on our laurels.

5 On Epistemic Injustice and a Little Melancholy

The least visible form of injustice, yet among the more pernicious forms – and probably for that reason – is epistemic injustice. This is the injustice involved in not taking others seriously for reasons unrelated to their performance: because of their sex, their skin colour, their accent, the way they dress, and so on. Usually, this kind of injustice is based on strong prejudice, and because it is so common and difficult to detect, it tends to be perpetuated.[39]

The three main approaches making up the field of academic international law these days (the doctrinal, the critical and the rationalist) have all built their own little fortresses and hardly communicate with each other, and they have been incentivized to do so by the structure of the market on which scholarship needs to operate; the critical scholar, the doctrinal scholar and the rationalist compete for scarce resources, so why on earth would they wish to collaborate, share their insights or even learn from each other? Even worse, a critical proposal with rationalist elements will often be considered 'incoherent' unless it manifests a colonization of one over the other; a doctrinal proposal with a critical element will be considered either 'incoherent' or 'opportunistic', a rationalist proposal with a doctrinal bent will be regarded as 'confused' unless the doctrinal merely serves to support the rationalist (or the other way around). So each broad approach maintains its own little fortress. The Hague Academy of International Law, to give an example, remains a bulwark of the doctrinal; it only rarely invites critical scholars or strongly rationalist scholars. Critical programmes likewise rarely, if ever, invite doctrinal or rational specialists to their events, and rationalist programmes shun critical and doctrinal scholars, by and large. The excuse is usually defensive; young critical scholars, so it is said, or young rationalist scholars need venues where they can publish, or where they can present their work, and where they can be nurtured in a particular tradition, and much the same is said by the doctrinal faction too. And perhaps there is some truth to that, but, if so, then it is a rather melancholy truth.

Here, though, epistemic injustice comes in. Social power operates in epistemic interactions, in the ways we talk (or do not talk) to each other, in the ways we choose to understand each other, and so on; so too in our professional interactions, particularly in the trench warfare between critical, rationalist and doctrinal scholars.[40] Our academic ethos should teach us to listen to others, to listen to their arguments and

[39] Very useful is M. Fricker, *Epistemic Injustice: Power and the Ethics of Knowing* (2007).

[40] If the term trench warfare seems too strong, I am not the first to use this sort of language. See already A. Kronman, *The Lost Lawyer: Failing Ideals of the Legal Profession* (1993), identifying the same fragmentation within US law, speaking of 'contempt' and 'disdain' for doctrinal approaches (at 271) and claiming that doctrinalism and rationalism are 'at war' (at 240).

evidence and to evaluate their arguments. Dismissing a work of scholarship just because it stems from a different tradition means not taking the other person seriously as a scholar, and it is difficult to defend doing this on the basis of their inclinations. We think it is wrong to dismiss a speaker because of her accent, or because her English is not flawless, or because of the clothes she wears or the way her hair is cut – and rightly so. And, yet, we happily dismiss people working in different traditions; we exclude them from our meetings, workshops and journals because they are rationalist, critical or doctrinal. And that strikes me as difficult to reconcile with any fairly basic academic ethos. Obviously, the academic world is not alone in this; think only of the White House circa 2018. But that is no excuse for the academic world.

To conclude, the industry in which we are working has changed dramatically over the last two or three decades. The restructuring of the industry has resulted in greater competition and has resulted in the spread of a different and highly problematic professional academic ethos, eventually creating epistemic injustices without doing much to rectify older epistemic injustices. International law has traditionally excluded the global South, women, minorities and the LGBT movement. It has never been truly universal, not in geographical coverage, not in terms of topics covered, not in terms of representativeness. It has now also lost whatever epistemic universalism it could once boast – and that is a rather melancholy conclusion to draw. Or, rather, and even more melancholic, the epistemic universalism that has come to dominate is that of competition in scholarship, a spirit irreconcilable with any kind of academic ethos. Surely this is indeed one universalist narrative to reject. Importantly, however, the competitive ethos must be rejected not because of its universal ambition but, rather, because its substance is unpalatable.