New International Law: Silence, Defence or Deliverance?

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I. Introduction and Article Outline

The meaning of international law is conveyed in the act of interpretation. The meaning consists of both the semantic content and the significance of the applied norms in an actual situation. This is because international law is not a physical fact, not a thing, but a human phenomenon. Even sceptics have to yield to some sort of understanding of meaning if they try to articulate their scepticism. In human phenomena the two – the meaning-content and the meaning as significance – have to be considered together. Every legal claim in the international environment has a significance and a semantic meaning which depend on each other. Both are present in the making and in the perception of a claim. They are the two sides of the same coin.[1] The semantic meaning and the significance of international law become known only through an act of interpretation. This is the actuality character of international law. Norms complete with meaning and significance do not exist *a priori* as independent objects which could be picked up by whomever, whenever. They come into existence in a network of actual factors. The practitioner of international law knows this from experience. There is no book or store where he could find universally applicable norms and put them to use as they are. That is why he has to keep on struggling with those hard cases, no matter how many of them he already has on the record. Time after time he has to choose and compromise anew, taking into account the circumstances, possible consequences of his interpretation and semantic possibilities. In fitting together norms and particular circumstances, the practitioner cannot separate the meaning-content and the significance. The significance is reflected in the search for the right meaning-content.[2] The mind

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1 On the inseparable character of the semantic meaning and the significance in interpretation generally, see H.G. Gadamer, *Wahrheit und Methode* (1965).

2 The words 'meaning-content' and 'right meaning-content' are used here without a reference to a specific school of thought. They should be read without prejudice to any meaning-formation for they refer only to the generally understood linguistic meaning.

cannot search for a meaning without considering what it really means, i.e. what the significance is. They are inseparable, regardless of how hypothetical one is trying to be.[3] Through interpreting international law in actual situations the practitioner creates the meaning-content of individual norms in real-life situations. The circumstances attach a significance to any particular meaning-content *ad hoc*. The amount of 'creativity'[4] involved in the act of interpretation has been widely and critically discussed. Its limitation has been attempted by means of rules of interpretation, standards of rationality, requirements of consensus etc.[5] Creativity has been curbed by a variety of boundaries from the outside. Nevertheless, however reduced it has been made to seem, creativity has remained a subjective (inner) capacity of the individual (mind) interpreting in a unique situation. Thus, its core remains beyond the reach of any pre-set standards.

In recent international law scholarship new approaches have emerged. The point of departure has been the inner contradiction of international law, illustrated above as the dilemma of interpretation. The new approaches have uncovered the dilemma of objectivity and subjectivity of international law – in other words, the dilemma of idealism and relativism. Are there determinate objective ideals, objectively knowable behaviour, objective facts, objective truth? Or are law, norms and legal decisions just as relative and indeterminate as their subjectively interpreted meanings? This dilemma is present in the theory, doctrine and practice of international law. Both objectivism and subjectivism seem persuasive. In fact, both are needed.[6] However, hardly anyone would answer this first set of questions absolutely in the affirmative. Naive objectivism has been buried in the course of the century. Despite its extinction, modified legal objectivism[7] flourishes, for the relativist argumentation seems to deprive law of its legality and its legitimation force *vis-à-vis* apologist subjective politics. The proponents of modified objective legality, or the mainstreamers, try to retain the normativity of law by invoking generality, rationality, consensuality, behavioural coherence or any such positive standards. All of these definitions can be contested because their application requires subjective assessment, and hence, is relative. However, a naive subjective relativist is as hard to find as an archetypical objectivist. Some of the arguments of the relativist view have been developed by the critical new stream of international

3 The mind is not made of isolated compartments, and even if it were and a hypothetical meaning could be known without considerations of its significance, it could never be applied without those considerations entering into play. Thus, the separation of meaning and significance is useless and illusory.

4 It should be obvious that the concept of creation is not used in a divine sense, i.e. to indicate that a meaning is created out of nothing. Here, 'creativity' refers to an ability to recognize certain qualities (e.g. semantic 'content') detectable in the interpretative relationship with the interpreted object (e.g. a legal norm), and to organize them with other influencing factors (the significance) into a conceivable meaning. In other words, there is more 'gathering' than creation involved.

5 See, e.g., A. Aarnio, *Laintulkinnan teoria* (1988).

6 See M. Koskenniemi, *From Apology to Utopia* (1989).

7 By modified legal objectivism I mean an underlying conviction of the mainstream of international law scholarship. This may seem a rather overstated argument, for it includes also those who systematically deny objectivism but implicitly subscribe to it by trying to set outside standards to subjective and relativist features of international law – though generally admitting their presence.

law scholarship.[8] Critics within this 'new stream' criticize the reversibility of the mainstream argumentation doctrine which circulates between naive objectivism and subjectivism. They emphasize the *ad hoc* character, the dynamism, and the equity considerations in upholding normativity in practice. In other words, an opposition evolves between the definitionists in the mainstream and the indeterminationists in the new stream. The first, introducing ever-better methods and definitions, are accused of rigidity, reduction and either alienation from, or total surrender to, practical interests. The latter, deconstructing conceptions and avoiding definitions, are criticized of laxity, nihilism and the politicalization of practice.

The critical approaches to international law have laid bare the problems caused by the ideological underpinnings of legalism; the underlying liberalism, the dichotomy of sovereignty and community-based goals, the reversibility of legal argument, the evasion of substantial questions by the judiciary. The mainstream approaches seem to be unable to give up these foundations and structures regardless of the controversies they involve. In its turn, the mainstream accuses the new stream of eliminating international law. If this accusation were true, the new stream would be in a process of abolishing the meaning and significance of international law. It would be contesting the actual interpretative situation from which this article proceeds. Thus, it would be abolishing itself, because the necessities of the interpretative situation is exactly from where the new critique springs. It is true that, for instance, the deconstructive approach manages to disintegrate the groundwork of international law scholarship to such an extent that to certain observers the result seems to be nihilism.[9]

The motivation for this article is the question arising from the gloomy picture presented: How is one to study or practice international law if the uncovering of foundational controversies is paving the way to utter nihilism? What kind of a justifiable position is there for study and practice of normative international law? In other words, this inquiry focuses on the professional ethics of international legal work.

Approaching the question philosophically, I disagree that there should be a necessary binary choice between objectivism and nihilism. A way to know and practice international law which does not amount to an objective epistemology is possible. The exclusion of objective epistemology does not mean anarchy. An approach to international law which is supportable in terms of epistemology, ethics

8 The concept of new stream is used here to refer to the recent trends in international law scholarship, motivated, for instance, by the Critical Legal Studies movement and developments in other fields of science. For introductions, see A. Carty, 'Introduction', *Post-modern Law* (1990); Kennedy, 'Theses about International Law Discourse', 23 *GYIL* (1980) 353; Purvis, 'Critical Legal Studies', 32 *Harv. Int'l L.J.* (1991).

9 See e.g., Purvis who doubts the ability of critical knowledge to 'sustain itself as an epistemology', thus, leaving 'a stark choice between objectivism and nihilism'. Purvis, *supra* note 8, at 121 (footnote). This is the conclusion and the focus of opposition by many mainstreamers as well.

and ontology exists.[10] It will be discussed in the second section of the present article. It is not a simple formula. Therefore, some clarifications are needed first. A new way of thinking beyond the objectivism/relativism divide cannot be grasped without understanding the origins of a discipline.

To begin with, it is important to understand the concept of situationality. It is here reflected in the international legal context. It sheds light on the interrelationship of a human person and the world, the unity of theory and practice, the illusionary character of objectivity, the pitfalls of relativity and the necessity of contextual limits and their openings. Second, following the fall of objectivity and neutrality ideals, the correctness of the realist challenge and its heirs is reconsidered. The identity of international law is considered in relation to international politics. Next, after having presented as very challenging the realist argument, a division between tekhne and phronesis – dimensions of international legal skill – is considered. In the second section of the article, there follows a deliberation of the new international legal approaches. A division or a spiral move between three different orientations is suggested. The aim is to show their characteristics in a way that enables the reader to see the underlying world-view and the conception of meaning concerning legal activity. Only then may it be decided whether these approaches are convincing, justified or simply add to the scepticism about international law.

A. Situationality – Limits and Potentials

All the talk about the controversial character and elimination of international law increases the level of uncertainty that the practitioner faces. Regardless of the insecurity of the groundwork, the international lawyer and scholar are supposed to come up with convincing interpretative arguments from day to day. Subjectivism would have it that their interpretations are always relative. Objectivism maintains that outside standards enable them to find incontestable interpretations. Both views are inconclusive. The practitioner has rules to follow. However strict they are, he always operates with a margin of appreciation whereby he is free to make subjective evaluations. A balance between subjective evaluation and objective standards has not been struck. Interpretation and skillful international legal management live and prosper on this constant need for rebalancing. The former functioning on the inside, the latter on the outside create circularity. The produced argumentation sweeps back and forth. Practice reflects this circularity, as does the scholarly narrative. Indeterminacy results. But an international legal circumstance never occurs in a void. The practitioner is no solipsistic monad. Both are situated in a more or less determinate tradition and in historical continuity. These determined factors anchor the practitioner in reality. Still, his argumentation remains undetermined. In order not to let the indeterminate and determinate influences confuse his thinking, the

10 On its philosophical prerequisites, see O. Korhonen, *Kansainvälisoikeudellinen tulkinta ja dialogisuus* (Philosophical Inquiries at the University of Tampere) (1995).

international law practitioner should become conscious of them. They constitute both the potentialities and the limitations of his situation.

The concepts of situationality and situation are invading the theory of international law. These concepts, more frequently used by philosophers, developed by hermeneuticists and phenomenologists, refer to a certain feature in human existence. Situationality is an ontological concept. It is a manifestation of one of the three ontological elements which constitute human existence: The mind, the body and the situation.[11] The situation breaks the duality of mind and body and connects these to each other. It also connects the human person to his or her surroundings. In short, a person's situation is his or her location in the spatio-temporal continuity of the world. It can be described as personal roots which keep growing with the person. Through the situational element the individual is connected to dynamic interaction with other phenomena. Situationality is the opposite of solipsism and monad-like existence. The situation encompasses concrete matters such as sex, race, genes, physical environment, home, work, other persons; but also abstractions such as culture, tradition, upbringing, education, profession, economic and social conditions some of which we can choose and some not. These components form the situational conditions of a human person that limit and shape human life. The situational limits are often referred to as the *Vorverständnis*. The concept encompasses the idea that the limits are there before (*Vor*) anything can be understood (*verstanden*) by the mind. The mind cannot overstep these limits. But it is also not wise to forget potentialities that situationality offers, and succumb to sceptical relativism.

Understanding the concept of situationality is of crucial importance in international law. It is the ultimate denial of solipsism, it enables interpersonal and social communication, through it the individual influences other persons and phenomena and is influenced by them, it connects the lawyer to normative tradition. Giving the ability to encounter others, situation delivers the basis of ethics, knowledge, responsibility – and law. Due to the interconnection between the mind and the situation, the thinking and theorizing of a person influences reality. If a person's views change, his location changes; he becomes otherwise situated than before. This shift influences all the matters that he is in anyway related to, i.e. all the components of his situation. It is important to note that if one relation changes, the whole changes and all the other relations with it. Thus, for instance, in international legal practice the borders between political, personal, legal, moral and other influences become nebulous. The individual situation adds to the concept of responsibility both in magnitude and in variety. On the one hand, the international legal theorist or practitioner is responsible for all those he is related to through his situation, not just the 'legal audience'. On the other, the ability to claim only scientific (as opposed to practical) responsibility vanishes. One is always both theoretically and practically responsible. It should be clear that if an international legal scholar either confines himself to making hypotheses and models or declines to

11 'Situation' is the core concept, 'situationality' its manifestation.

answer pragmatic questions, he still cannot escape influencing reality. Even 'no comment' is a comment. In addition, the dynamism of situationality includes the fact that the influences run in both directions. If the scholar's findings are continuously irrelevant and insignificant for his life-world, he becomes alienated. The practitioner faces the same condition. In interpretative action, the practitioner is striving for meaning and significance. If he – for one reason or another – tries to evade this, it affects his situation as a whole; the world starts to evade him. The meaning of worldly phenomena escapes him. His attempts to form a coherent world-view to ground adequate interpretations will be useless. For an international lawyer this would mean an inability to find meaningful solutions to real-life problems. It would mean surrendering to being simply an instrument of the vast international 'technology' of law. This results in indifferent management, in other words, totalizing the other. It frustrates the sense of meaning of one's international law work.

A concept close to situationality is that of socialization. Situation comprises the limits and potentials of the human condition, socialization those of the social condition. For example, in becoming an international lawyer one becomes socialized to this particular social role. The principal socializing factor is language with its traditionally developed meanings and meaning-structures. In situationality the determinant is language in general, in socialization a specific jargon, e.g. the language of the international legal tradition. In order to be able to make a meaningful argument in international law one has to adapt to the meaning-structures, the already-defined problematic, and the direction of epistemic interest that together amount to the world-view of the discipline.[12] These also constitute the 'technology' of international law referred to above. This example can be extended to any discipline and to life in general. However, the more one tries to ascertain the meanings and confine oneself to the given problematic, the more one becomes determined by the particular world-view. The world-view begins to seem first incontestable, then self-evident, finally natural until not even perceived any more. This results in rhetoric filled with reified concepts[13] which fails to offer alternative solutions for practice. The controversies of the world-view are automatically controversies of the practice which is based on it. It is preposterous to think that one could somehow escape the problems by locking them up in a separate compartment of one's consciousness. There is neither a compartment nor a way to lock anything away from the interconnectedness of situationality. Socialization and situationality bring contextual elements, from the tradition one is part of to the world-view propagated, to every action the individual agent performs, be it judicial or otherwise. Therefore, an organized conception of the situational limitations is indispensable for the international lawyer. It helps him to understand the conditional character of his

12 See Koskenniemi, *From Apology to Utopia, supra* note 6, at 23.

13 On the reification problem, see Boyle, 'Ideals and Things', 26 *Harv. Int'l L.J.* (1985) 327: International legal writings filled with reified concepts seem to present a 'fateful and absurd contrast between the infinite quality of human aspiration and the unrelenting indifference of the world' reminiscent of the French chosists' world-view.

engagement without becoming a relativist for whom the discipline of international law is just another random name for the universal project of power struggle or philanthropic management. Neither the cynical power orientation nor the charity approach present any alternatives to the circularity and frustration experienced in the discipline today.

B. Situationality and Interpretation

Situationality locates an individual in time and space, history, tradition and physical reality. However, this description does not exhaust the matter. It would be a terrible mistake to take situationality to be an entirely determining quality. In fact, situation forms an indeterminate momentum in a human being – the potential to open encounter between the individual and the world.[14] Situation sets limits and opens possibilities. In the context of interpretation it means both frames and openings. Situational interpretation is open and closed at the same time. It is closed by the *Vorverständnis*, the necessities of socialization and situation. But it is not alienated from other phenomena by objective boundaries. The situational frames are moulded in a dynamic exchange.

Normative interpretation must be situational. More accurately, all human action is already situational because human existence is. However, international legal interpretation does not reveal its situationality easily. That is because the constitution of meaning has been covered by international legal structures. These structures seem to uncover the meaning in a process which totally determines the encounter of the interpreter and interpreted. Principles are used in these argumentation structures. As regards international legal interpretation there are textual, teleological, systemic, intertemporal, dynamic, effectiveness and equity principles. Their simultaneous application creates a truly multifaceted, but still utterly closed approach. International legal interpretation doctrine usually starts from the textual method. The Vienna Convention on the Law of the Treaties (1969) is claimed to be an affirmation of the ascendancy of the textuality approach – an objective, closed method. The number of ratifications and accessions to the Vienna Convention is among the highest for any international treaty. Thus it is a good starting point when searching for a consensual standard of interpretation. The relevant Articles 31 (and 32) mention the ordinary meaning, the context, the object and purpose and good faith as the rule. Together these principles amount to systemic objectivism including the idea of a determinable intention of the parties.

It is evident that the Vienna rule is inconsistent with the situationality conception which denies the possibility of detached, objective knowledge. The fact remains that meaning is a product of interpretative activity by an individual mind working within

14 This description runs along the lines of existential analysis or existential phenomenology. See generally, L. Rauhala, *Eksistentiaalinen fenomenologia hermeneuttisen tieteenfilosofian menetelmänä* (1993).

the frames of a situation. The situational approach seems ever more persuasive when one takes a closer look at the inner contradictions of the sophisticated formulation. The objectivism of the Vienna rule is undermined by its own inherent subjectivism and relativism. The meaning of the concept *ordinary meaning* requires just as much interpretation as any 'other meaning'. The *context* requires determining, limiting and deciding on what should be included or excluded. Similarly, *object and purpose*, intention and *good faith* have to be subjectively interpreted in order to be understood as meaning something. In brief, in the place of objectivism one detects relativism and subjectivism; where universality and neutrality is claimed, a particular, eclectic perspective is found. Or, and this is the most problematic feature, *vice versa*.

Because the methods of international legal interpretation fail to have access to a desired objective meaning, they can only produce arguments about meaning which are just as vulnerable to criticism as the original contrasting opinions from which they started. This is why a 'healthy' recourse to equitable principles and relativistic notions has become a common phenomenon.[15] It effects the giving up of the pretence of an ability for objective and neutral decision-making. It also means an urgent search for a new basis for judicial integrity and identity, resulting usually in the revival of the old role of the balancer or arbitrator. One very important healthy feature of the equity principle is the openness of its definition. Another is the clear recognition of subjective evaluation in the process of interpretation. However, these features are severely criticized for their subjectivism, relativism and apologism. One continually comes across the contrasting of *the* equitable solution with *an* equitable solution, the former being objectively determinable, the latter falling outside international law.[16]

International legal interpretation doctrine is in flux. The practitioner faces the dilemma of objectivism and subjectivism again and again in the ever multiplying forms of relativistic technocracy. He does not know whether his project should be based on the 'is' or the 'ought', description or prescription, Society or Law.[17] In interpretation, he applies a wide variety of methodological tools. He might use arguments of effectiveness, *effet utile*, *Vertrauensschutz*, implied powers, dynamism, peremptory character, *bona fide*, tacit consent or equity and if one argument does not succeed he can shift to the next. The practice seems both open and closed. It seems indeterminate in its procedural results and determined by the

15 The description 'healthy' is used by Koskenniemi, 'The Politics of International Law', *EJIL* (1990) 31: He says that the 'turn to equity ... is ... a healthy admission of something that is anyway there', i.e. contextual influences and, in particular, political choice.

16 Since Kant we have known that the world is not represented in our consciousness *an sich*. There is scarcely a scientist who would deny this epistemic fact. Nevertheless, in some inexplicable way, the law has always been believed to be an exception thence constituting the unique worldly phenomenon of which objective knowledge is not only possible but in relation to which the search for objective knowledge is the only acceptable demeanour. This illusion is currently being transposed to equity. On an objective view of equity see, e.g., K. Ipsen, *Völkerrecht* (1990) 218-20. Also, as to the approach of the International Court, Thirlway, 'The Law and Procedure (Part 5)', LXIV *BYbIL* (1993) 46-54.

17 For a discussion on this 'naturalistic' fallacy in international law, see Koskenniemi, *From Apology to Utopia*, *supra* note 6, at 262 and *id.*, *Theory* (1991); Purvis, *supra* note 8, at 100, 114. Also, Carty, *Post-modern Law*, *supra* note 8, at 10.

foundational dilemma. It is free and limited. But this is not situational openness and closure. It is rather sceptical relativism and technocratic management. The doctrine does not recognize situational limitations. If it did, it would not vainly try to curb interpretation involving 'extra-legal' standards.

Situational frames limit interpretation in the only necessary and the only possible way. However, doctrine fails to recognize the potentials of situationality. If it did, it would not have to worry about the 'objective meaning' of equity or effectiveness or dynamism. They can be understood only from the perspective of the individual situation, taking account of their respective significance in the particular case. To attach them to a structure, e.g. determined international law, is superfluous. It increases complexity without securing universality. It alienates them from the reality which constituted them and where they should be reconstituted time and time again. Thus, to briefly conclude, rather than adding imaginary limits and freedoms, interpreters should become conscious of those they already have at the base of their own self-understanding. The piling up of contradictory principles obscures the clarity of situational interpretation. The mind becomes disoriented and the situation alienated. An alienated situation where controversies reign is no basis for organizing reality for other people, i.e. making normative solutions and managing world affairs. Only a reflected understanding of one's situation is a fruitful basis for finding solutions – meaningful interpretations – in normative practice. Situational interpretation thus escapes the dilemma of balancing between objectivism and subjectivism, between outside and inside. Situation is neither 'in', 'out' nor 'in-between' because it is the tie of the individual to the world.

C. The Realist Challenge

Situational interconnectedness blurs the borderlines between different disciplines. The practitioner of international law does not work in an isolated legal realm. He works in a realm where all situational influences interweave: legal, political, personal. The practitioner of international law faces a variety of influential factors. They emerge into interpretation through the significance element. A specific legal significance is a fiction, a hypothesis non-existent in practice. This has been widely recognized in the international law of the nineties. Emphasis has been put on the relativist nature of international legal activity. In the relativist view, most frequently, politics is singled out among the situational influences. The argumentation of legal advisers as well as judges is seen relative to political realities. The separation of legal and political tasks is considered more a matter of perspective than of material difference. In the mainstream, this relativization is often perceived as a threat to the existence of international law. It is viewed as an attempt to reduce law to politics.

As such it is fiercely opposed. Regrettably, the opposition is often too strong, denying incontestable facts and confusing positions.[18]

The new stream is not to be understood too simply as a single novel realist school. Even though many strands have their roots in realist pragmatism, the new stream has multiple dimensions.[19] However, the critique of political bias of the doctrinal assumptions is often seen as social criticism pointing to a realist program. But to confine it merely to realism would be a drastic reduction of what is actually said. In the focus of new-stream critique is the actual incidence of international law: that is the interpretative argumentation. In the view of some of the most poignant new-stream scholars, argumentation keeps ending up in incompatible positions that can be equally well justified by the constitutive assumptions of the system. The international legal structure forces practitioners into untenable positions where they cannot reach each other. The result is an unending interchange of argumentation strategies which offers no escape to the parties from their respective contentions. This pattern has been described by Martti Koskenniemi as the oscillation between apology and utopia.[20] The new-stream critique seems to leave the international law practitioner with an exasperating choice between utopian legalism, political apology or an embarrassing self-contradiction in trying to balance the two. Since utopia is *u-topos*, eternally absent, there is really no choice here at all. Apology and self-contradiction undermine the esteem both of the lawyer and the discipline. That is why the discoveries of the new stream are often perceived as propounding novel realism or even 'anything goes'-relativism.

The new stream recognizes political realities and the influence of power-structures. The oscillation pattern presented above brings to mind the game-theoretical analysis in international relations studies: the zero-sum-game or, more particularly, the so-called 'tit-for-tat'.[21] In tit-for-tat the counter-acting individuals are seen more or less as quasi-mechanical units. When the one goes 'tit', the other goes 'tat' and so on infinitely. The decisions the players make always seem the only possible choices for them. The game is so structured that the choice is either to counter-strike or to lose. It positively excludes any cooperation. This model has been used to explain the coming into being of the balance of terror between the superpowers during the cold war. The gist of the analogy is to show that structures may have more power over individuals than they realize, with frustrating consequences: if 'tit' and 'tat' present two extreme choices their balance is at most a dissatisfactory compromise. In the oscillation pattern of international legal argument individuals are similarly forced by the structure. Unable to break out of the game they are caught in alienation, irrelevance or frustration. The political aspect of these

18 I am not saying that the realist challenge is overestimated in certain traditions of the mainstream. On the contrary. However, it cannot be defeated once and for all relying on a superior or anterior authority. It has to be encountered in every case anew. It is a matter of constant reappreciation.

19 The new stream does not emphasize only the political influences in international normative practice. The influences of language, morals, personal life etc. are also quite clearly indicated.

20 Koskenniemi, *From Apology to Utopia, supra* note 6.

21 See, e.g., K. Holsti, *International Politics* (1983). For a general introduction, see E. Rasmusen, *Games and Information* (1989) 123-29.

problems is again the most frequently mentioned one. The pattern results in alienation from political reality, and irrelevance when faced with major political interests. At this point, the archetypical objectivist interposes to say that international law is equally as relevant as international politics. The relativist says that the relevance depends on the perspective. The first can be criticized for idealism, the second for subjectivism. In each case, whether law and politics are considered equal or intertwined, the speakers fail to show why both are needed and why they coincide every now and then. Therefore, in recent international legal thinking the considerations of the realist challenge have been developed further.

Regarding the role of law in international society, it is important to remember that legal activity is no *Herrschafts- sondern eine Dienstform*.[22] This seems to support the relativist compromise as a solution. An example of this line of thinking can be construed from the new United Nations Convention on the Law of the Sea (1982).[23] Some of its features can be seen as emphasizing the prevalent character of politics over law.[24] Though the Convention is primarily a legal instrument, some features can be seen as 'giving in' to politics. First, the use of the package-deal method fuelled political bargaining. It also made the treaty very vulnerable to changes in national political climates as was demonstrated by complete turns of direction during the negotiations and deferrals of ratification afterwards. Second, the dispute settlement procedures refer substantial questions to be settled outside any definitive legal framework, between the parties concerned. The equitable principles to be used will be determined by the negotiating diplomats who are not necessarily familiar with legal standards of equity. Instead of legally equitable results, coercive political deals may emerge. If agreement is reached, it is only *a* solution, very probably not *the* one and only equitable solution.

This sort of dispute settlement can also be seen as a removal of most significant matters from the legal sphere. It leaves international law the marginal task of deciding on the bureaucratic details of political negotiations. Thus, the new Law of the Sea Convention can easily be seen as a desperate effort to enhance Law's relevance through the alliance with politics – if not outright submission to it. For many of the more traditionalist mainstreamers this scenario gives a reason to go to the barricades. They do not intend to be servants in the house of the masterful power-politics (the *Herrschaftsform*). Consequently there are attempts to make equity a strong objective legal concept so that it could not be overtaken by politicians *ad hoc*. There is also the avoidance of discussing politics in legal contexts. The legal field is protected by an intrigue of silence. The new stream on the other hand takes the *Dienst* more light-heartedly. They do not set out to fight

22 See Gadamer on judicial interpretation. In his view, it provides an example for all interpretation in this respect. Gadamer *supra* note 1, at 293-5.

23 On discussion of this treaty see, for instance, P. Allott, *Eunomia* (1990) xiii, 356-64. Koskenniemi, *From Apology to Utopia*, *supra* note 6, at 439-43; *id.*, 'The Politics of International Law', *supra* note 15, at 28; *id.*, *Theory* , *supra* note 17, at 32.

24 Here should be added '... and *vice versa*'. The features mentioned can also be seen as strengthening the relevance of law in political matters. Here, however, I only discuss the realist challenge and the risk of reduction of international law to politics.

with politics about their respective relevance. They discuss politics and let it try to master the power-struggle. They know that international law may serve a master, but that the master is not power or international politics. They either respect the diplomatic effort of a compromise or, more ambitiously, aim at the demolition of the oscillation between apology and utopia. Though admitting the significance of politics, they search for other ways to avoid alienation and ground the relevance of normative practice. They admit the realistic limits, but go further to look for the openings in the situationality of the particular case or task.

D. Tekhne and Phronesis in the International Legal Situation

The realist challenge questions the relevance of international legal activity. It cannot be answered by referring back to the origins or the goals of international law. The former are not known, the latter are always relative. That is why international lawyers concentrate on the practice. Inquiry into theoretical foundations is often avoided. When it is performed, theory is but a continuation of practice. In the advanced strands of the new stream the starting point is often the actual incidence of international law: the argumentation. The mainstream, for its part, takes over the task of teaching the international normative dogma to be used, i.e. the pragmatics. Thus, both are practical approaches.

Tekhne means human knowledge of a certain skill. Tekhne is a generalization acquired through empirical inquiry. Its possession means to know how to achieve a goal. Tekhne is learned. Knowledge of international norms and their application is a tekhne. Tekhne does not concern the origins or the significance of international law. If one has only a tekhne, one has a means to an end, but no knowledge of the meaning or the contextual significance of the deeds involved. If international legal practice is based on a mere tekhne, the relevance of international law is singularly particular. This seems to be the way of practice. The relevance of international law is decided in individual cases. The lawyer acts as an efficient technician fighting off situational influences as best he can. He acts as a balancer, a neutralizer and a manager. But he does not succeed in exorcizing situational controversies because his work is interpretative. Stabilization is never absolute. He uses appreciation. Of course, the tekhne provides for appreciative skills, too. But the appreciation of an international lawyer is not the same as that of a technician. There are similarities. For instance, the automobile-technician uses appreciation if a desired part is not available; the lawyer to fill gaps of law, the *lacunae praeter legem*. Nevertheless, the lawyer's task is sometimes more demanding. He uses appreciation to capture a new meaning beyond *intra* or *praeter legem* – sometimes to find the most equitable solution, the one corresponding with the object and purpose, the one reflecting the spirit of law, the just one, the one producing the real *effet utile*. There are no such concerns in the pure technical task of car repair. The crucial difference is that the lawyer is concerned with living reality and the technician with spare parts. The approach to human reality cannot be reduced to the method used with things. As

well as being unethical, it is inadequate. It misses the complexity of the target. Thus, the lawyer needs to overstep tekhne.[25] He has to concern himself with the wider meaning-context and look beyond the dogma of tekhne, even principles of discretion.

Phronesis is also knowledge of a skill. In contrast to tekhne, it is not learned but intuitive. Phronesis takes into account the entirety of the situation whereas tekhne confines itself to a part. Phronesis is holistic, tekhne particular. Tekhne can erode to irrelevancy, if its constituting assumptions become inadequate, or swell to totalization if it forces a balance upon conflicts non-resolvable on its grounding assumptions. Phronesis is not constituted on assumptions. Its sole ground is in the momentary incidence of the worldly phenomena and their relations. Both tekhne and phronesis spring from practical experience. But tekhne is frozen to a dogma and phronesis not. Tekhne has a pragmatic goal, phronesis does not. Tekhne is closed, phronesis open knowledge. Tekhne is relative to the practice from which it is derived. At the same time, it makes everything relative within its confines. Phronesis exists only in practice and is not relativizing. Phronesis shows the significance of phenomena, and its own value depends on that function in each case. Phronesis is an ability to be in dialogue with phenomena, but not to control them. Phronesis is dialogic as opposed to dogmatic knowledge. It is knowing of oneself and of the other simultaneously. There is no clear distinction between the subject and object, between the knowing and the known in phronesis.

In international law both tekhne and phronesis are needed. Tekhne comprises the learning of the discipline. Phronesis provides a way out of the dilemma of objectivism and subjectivism. In practice the use of intuition is frequent, though not always recognized. Using a metaphor, tekhne is like the skeleton and phronesis the flesh of the organism of international law. International law theory also has its tekhne and its potential phronesis. Tekhne deals with how to research, phronesis with how to research in a relevant manner. There might be a set of rules for the former purpose, but none for the latter, at least in the traditional sense. The recent thinking in international law scholarship has produced quite remarkable pieces of work. Some traces of phronesis can be detected. There is an attempt to break out of the artificial balancing structure, encounter the world, bear the responsibility and account for the consequences of one's theorizing. The realist challenge is met, outside influences welcomed, questions not suppressed. However, in the eyes of some of the mainstreamers the newstreamers are trashing the system. The meeting of the realist challenge is seen as reduction to politics, the application of philosophical methods – such as deconstruction – as nihilistic, the questioning of foundations as radical scepticism concerning the whole of international law. The mainstream – both traditional and the liberal – would satisfy itself with an international law tekhne. Unfortunately, a closed system never quite functions adequately in situational interconnectedness. This is the realisation motivating the

25 On the need to overstep tekhne in the function of a judge, see Gadamer *supra* note 1, at 301.

new stream inquiries into alternative approaches. Their various features can be assessed in this light.

II. New International Legal Thinking

Theoretical and practical interpretation are basically identical tasks.[26] Both search for meaning and significance. In international law the theoretical and practical tasks derive their interest from the *Dienst* itself – the 'serving' function, in other words, the application. This is not to be confused with pragmatism. For *Dienst* here refers to the philosophical qualities of the discipline, not just crude utilitarianism. Through situationality the consequences of application expand over the boundary of mere legal and mere disciplinary interest. The responsibility expands accordingly, regardless of whether one is a theorist or a practitioner. Ultimately, an international lawyer is faced with the entire situational interconnectedness – both in terms of other disciplines of scholarship and in terms of his own personal being.

The international legal tradition provides the practitioner with a tekhne to learn. However, in hard cases the tekhne does not supply the answers. There may be the need to use intuition, creativity, appreciation of equity and justice. Of course, there are many ways to react to the challenge of hard cases and their requirements. First, one can forbid the use of intuition, creativity or anything of the sort. It follows then that one has to retreat from deciding hard cases, which are usually the most important ones. Hence, the retreat is made at the cost of the relevance of international law. Second, one can demand that only the tools provided by the tekhne of the discipline be used. The result is similar to before; one fails to produce anything which was not already known. Instead of solving the problem, one is caught in the oscillation pattern with interim results and shaky compromises at best. Third, one can use intuition, equity and creativity, taking into account political considerations. The result is realism – acquiescence to power. Fourth, one can use intuition and creativity without really knowing it. The results are arbitrary and criticized by colleagues. Or fifth, one can take into account the necessities of situationality, the limits and potentials. One can take seriously the possibility of a phronesis, a dialogue with the world. In fact, the last is the most viable alternative in a discipline such as international law. The problems, but also the persons engaged in international legal work, demand it. Many of the people studying in the field are enthusiasts, if not idealists, with a genuine interest in finding answers to even the most difficult questions concerning international life. They reflect on their responsibilities and professional identities on a grand scale. They try to look for meaningful and relevant solutions in all cases. They do not want to force compromises or dominate parties representing the other, outside the confines of the presuppositions of the discipline. But very often their attempts are frustrated. The

26 This view is supported by existentialists, e.g., Gadamer, *supra* note 1, but contested by many, see for instance Aarnio, *supra* note 5.

status of international law regresses. It is useful to remember, as Socrates said, that the greatest responsibility of a person is the care for his own soul. It is the greatest because it is the first. In order to develop a viable approach to international law one has to start with developing a meaningful life of one's own, become conscious of limits and clarify possibilities. How and with which results this is happening in recent international legal thinking is the next question.

The next three sections speak of three different themes. The first is the tragic theme, the most general characterization among the three. Evidently, many very different approaches can be included in it. The second is a fortress-defending theme which adds an imminent care for practice and a moral of optimism to the tragedy. The third theme provides the clearest recognition of phronesis. Starting from tragedy, evolving to practical optimism, the lawyer then faces the care of his own soul as a prerequisite to the encounter with other(matter)s. He considers the question of the meaning of his own being in connection with the meaning of international law. These three descriptions form a spiral from the *tragedy* to the *cave* without excluding one another, allowing for complete turns. In the course of the development, the sense of phronesis changes from vague to accurate, weak to strong.

A. The Tragedy: Silent and Elegant Death

The necessity of tragic silence seems a wide-spread notion. It is detectable in modernist and post-modernist, foundationalist and anti-foundationalist, determinationist and indeterminationist schools of international legal thought. Apparently, these labels have at least as many differences as they have things in common. However, the trace of phronesis in these approaches is similar – the necessity of silence. The tragedy results from a submission to structure, although its manifestations differ radically. Even the indeterminationists and the anti-foundationalists have not been able to overcome the structural necessities. A curse of immanence, of not being able to transcend the limits of the world-view, haunts them equally.

The first strand of tragedy is the simplest form of the tit-for-tat-thinking. The international lawyer accepts a binary structure of the system. He thinks that the only possible choice is between objectivism and nihilism, or between realism and nihilism; being determined or not being at all. The argumentation concentrates on beating the opponent. No truce, no reaching out to the adversary, no authentic cooperation is considered a viable alternative. Objectivists that are not naive in the sense that they would expect objective knowledge to be possible have this sort of tragic approach. They know that they are caught in circularity. They may recognize the oscillation pattern of their argumentation. But they think that without the claim of objective neutrality their identity would fade away with their integrity. They keep quiet about the controversial premises of their discipline and try to hush up others,

too. They confine themselves almost entirely to tekhne. However, in allowing for equity they have opened a door for phronesis. Their phronesis emerges from the attempt to protect their own identity in connection with the integrity of international law. Unfortunately, they have developed problematic technical solutions. Two examples, the tragic strategy of evasion[27] and the relativist balancing effort discussed above. The Vienna rule on interpretation was a good example of the former; doctrine is filled with sophisticated controversies allowing escape from one to the other. The International Court of Justice has also used the method of fitting together contrasting approaches to be able to build a solid case resting on the strategy of evasion.[28] The tragedy of relativism lies in its degeneration to either scepticism or frustrating bureaucratic management of recurring instabilities of the international world.

Realism is tragic in a similar sense. Politics is considered a matter of power, and law its servant. In recognizing political realities the international lawyer tries to influence power through yielding to it and working inside it. He sees the human person primarily as a *homo politicus*. It is a tragic reduction. Many treaties, such as the new United Nations Convention on the Law of the Sea and maybe most importantly the Final Act of the Conference on Security and Cooperation in Europe, can be taken to enforce the realist conception of the relationship between international law and politics. The realist approach is closed, as it is determined by the realities of politico-economical factors. But having a sort of phronesis, it is also open; it is looking for ways to influence power and fulfil legal responsibility beyond legal tekhne – inside politics. Though tragic in theme, it combines rather more phronesis with its tekhne than the tragically paralysed traditional approaches.

The second strand common to all tragic phronesis is the silence. It is perhaps best manifested in those post-modern approaches that are most keenly devoted to deconstruction. The traditional modernists have to keep silent because discussion of the controversial foundations would undermine the *Grundnorms*; the post-modernists because everything is vulnerable to deconstruction. The post-modern critique results in the Death of Man just as the modern Enlightenment critique resulted in the Death of God for the occidental tradition.[29] The crucial difference is that the Death of Man, unlike the Death of God, has to be a suicide. Otherwise, the killer, with his situational foundation, would still be left alive. In the post-modern conception of law, there is no foundation. The argumentative oppositions continue to deconstruct the foundations of one another infinitely. The theoretical discourse reflects the unending oppositions of anti-rational practice, but in the most elegant ways.[30] The deconstructed modern subject is a self-reflective subjectivity which

27 'Strategy of evasion' applies to both material questions in practical cases and methodological and theoretical problems. The term is used by Koskenniemi. See, e.g., 'The Hobbesian Structure', *Hobbes* (1989) 175.

28 See Koskenniemi, *From Apology to Utopia, supra* note 6, at 236.

29 See Carty, *Post-modern Law, supra* note 8.

30 See Koskenniemi, 'Oikeuspositivismin kuoleutuminen', *Oikeus, demokratia, informaatio* (1993) 30-2. Or Carty, 'Critical International Law', *EJIL* (1991) 67, 82: suggesting 'a mature anarchy'.

keeps on criticizing its opponent, but also its own critique and the critique of the critique. The tragedy of the post-modern and anti-foundational approaches is that they cling to the critical method as though it was the ultimate universally valid method. Even if their quest started with phronesis, an intuition that something beyond objectivist illusion and relativist scepsis could be found, they became so fascinated with the deconstructive method that they retained only its tekhne. This is also one form of submission to structure. The deconstructive method becomes the structuring determinant.

Even though this approach leads to a vision of the indeterminacy of international law, it is only relative indeterminacy. As a negation of modern determinacy, it is relative to it. It cannot escape the immanence to modern premises because a tekhne cannot transcend itself, the already known. This is why it provides the tools for its own deconstruction *ad infinitum*. The denial of foundation is a similar matter. For in order to be able to deny a foundation, there has to be a conception of a foundation and also of the denying subject. Anti-foundationalism is always relative to those two at least. The tragic conclusion is that silence is the only way to really be rid of the foundations, objectivism, relativism and the entire burden of the tradition. It follows that after post-modern comes post-post-modern and post-post-post, critique of critique, until the dead elegantly still in the void closing in around them. For, in discourse, relativism and dualism always prevail. In complete silence their expulsion from the mind may be momentarily achieved. But at that point, the necessity of post-modern silence negates the meaning of any sort of international legal engagement with others.[31]

The critical strands of new-stream international law scholarship can be read to include both realist and post-modern tragedy. Martti Koskenniemi's formidable regressive analysis, or deconstruction, in *From Apology to Utopia* provides an example. If his deconstructive analysis is read as mere social criticism, his references to political realities may be taken as a buttress to a new realism. He can be read as presenting a tragic choice between objectivism and realism. Koskenniemi's criticism of the idealistic nature of objective normativity and the implications of the realist tradition in his work are then seen as tearing towards apology. Even though Koskenniemi is equally critical of apologetic argumentation, many critical readers, assuming that the choice must be binary, have read him as favouring this in his conclusion: either one or the other must be preferred.[32] Rather more than in Koskenniemi's approach itself, in this case, the tragedy lies in the reading. On the other hand, taken more philosophically, Koskenniemi's

31 The negation of meaning follows from the post-modern necessity of silence, because otherwise even post-modern writing seems to seek an understanding of a public, as Frankenberg puts it '(e)ven the free play of ... rhetorical levels ... (doesn't) get anywhere without meaning, or foundation in language or writing'. He suggests that it would appear that '(t)he author would prefer to keep silent ... so as not to appear modern'. However, even silence would not rescue the meaning of post-modern thinking because '(t)hen the reader must engage her theoretical imagination and deconstruct even this silence. Ironically, of course'. Frankenberg, 'Down by Law', *Critical Legal Thought* (1989) 329, 352.

32 See, e.g., in Scobbie, 'Towards the Elimination of International Law', LXI *BYbIL* (1990) 345.

deconstruction can be seen as resulting in anti-foundational perspectivism[33] and an unending play of argumentative oppositions. As such, it may be read as post-modern criticism of objectivism which results in the denial of any systems or constructions. The classification of equity as a principle of non-principle, the propounding of a theory of non-theory, of particularity, indeterminacy and unlimited openness point to this conclusion. However, the concluding chapter of *From Apology to Utopia* can only be seen as an awkward rhetorical lapse in this reading. At best, it could be viewed as an epitaph for the late modern subject. Yet some of its propositions seem to be in flagrant contradiction with the bulk of the book. If read as tragic post-modernism, Koskenniemi's inquiry does not escape the immanence of modern structure. The enquiry remains bound to the structure through negation, through not having kept complete silence.[34] Deconstruction invites further deconstruction and auto-critique which might be foreseen as resulting in the eventual elimination of international law.[35] This can be seen as the ultimate triumph of extreme 'anything goes'-relativism. All becomes a question of pragmatic management of individual interests both of the 'clients' and of one's own. Certainly, in post-modern anti-foundationalism, there is no place for reconstructing a new system. In this reading, the elegant seven chapters of Koskenniemi's book seem to represent at best nihilism.[36] The eighth is dismissed as a lapse. If Koskenniemi is not to fall prey to his own criticism, he has to keep on deconstructing every tekhne.

To conclude with the tragic approaches, it must be said that they do not offer a meaning for the practitioner's engagement. That is exactly the tragic characteristic. The incapacity to provide for concerted methods, principles and guidelines is recognized together with the pressing practical responsibility. The mainstream offers equity *intra* and *praeter legem*, the realists advocate working within politics, the relativists champion pragmatic management, the post-modernists provide criticism, perspectivism or plain nihilism. All of them offer the practitioner a tekhne, if anything. The structure does not seem to give any choice. Tragic but true, none of them really trust their own advice. They constantly observe the practice slipping from the tekhne. But on the other side, as the only alternative, they see the silence. Their phronesis is the tragic acceptance of the necessity of silence, if the tekhne of management and determination are ever superseded.

B. The Fortress: Noble Fight for Lost Cause

Moving inwards in the spiral, the tragic theme persists, but the silence breaks. In 'the fortress' deconstruction is first accepted but later halted. Disciplinary efforts arise anew. The choice is not seen as binary any more. An absolute openness is not

33 Carty, 'Critical International Law', *supra* note 30, 81.
34 See Kennedy's review. Kennedy, 'From Apology to Utopia', 31 *Harv. Int'l L.J.* (1990) 386.
35 See Scobbie, *supra* note 32.
36 His perhaps most frequently quoted phrase is that international law is 'singularly useless'. On detailed information about Koskenniemi's position regarding this statement, see Wrange, 'Från domstolsession till jamsession', 64 *Retfaerd* (1994) 10 (footnote).

demanded. Consequently, the above presented ultra-modern/realist/relativist/ post-modern views are softened. The need to break the silence and take sides in practice arises from situational responsibility. Ethics take over from elegance. The *Dienst* function, in multiple forms comes to the fore. Though no incontrovertible grounds for an international law discipline are in sight, anti-foundationalism fades. There seems to be at least the moral ground of practical responsibility to fortify international law; to engage in it, not to pass away with it. The responsibility is based on the recognition of situation. The Death of Man is not considered inevitable. In fact, just as the Death of God proved to be a mere substitution, in the course of time, the Suicide of Man seems to be a similar case. At most, a substitution of Man by Mind is attempted. Tragics may believe in its success, but the fortress-defenders try to delay. Intuitively they recognize the connection of mind, body and outer world in situationality; this, in other words, is the proof of being alive.

Typical of the fortress is the bringing to an end of deconstructivity and the sceptical 'anything goes' – attitude. In the fortress, accomplishments are no longer made through an intellectually refined, tragic silence. A second way of reading Martti Koskenniemi provides another good example. After accomplishing a regressive analysis, in his later work, he lets the elegance fall, defends the State sovereignty *Grundnorm* against any supposed communal values and speaks for equity and concretivism which he himself has proven defective. This return certainly amounts to a taking of responsibility for the practical consequences of one's theorizing. Silence and suicide are no answers. Koskenniemi emphasizes the open characteristics of the equity principle in order to offer a *relatively* satisfactory legal tool for international lawyers. Nothing better is at hand. The difference to tragic objectivism is that here the equity is not confined to *intra legem*. It is more open to the whole situation. In this way Koskenniemi can be read as a sophisticated new pragmatist who does not deny the relevance of theoretical analysis, even when it produces confusing results.

The fortress approach settles for *relatively* satisfactory answers, implicitly accepting the hopelessness of anything more than that. However, the fortress is not a naive attempt to return to Eden, to a state of innocence before deconstruction. Deconstruction and its revelations are kept in mind. Still, it is a sort of building up against deconstruction, 'anything goes'-scepticism and their annihilating power. After acquainting himself with the enemy, the scholar returns to fortify international law. He participates in building up some technical elements against other elements in order to provide the drifting practitioners with a firm foothold in conflict-filled reality. It is a taking of sides for the lack of which David Kennedy once criticized Koskenniemi.[37]

The fortress describes how, after deconstruction, one dutifully returns to the fortifications of the old order and works to strengthen the most solid parts of what remains. These are the morals of *John Angel* as can be read in Mika Waltari's

37 Kennedy's review, *supra* note 34, at 387.

magnificent novel of the same name. The contribution of John Angel to the wretched defence of fifteenth-century Constantinople against the vastly superior power of the Turks and their weaponry is a practical ethical choice of a cynical but duty-conscious person. Whatever nobility John's conduct has, it is also very self-destructive and requires a firm, underlying belief in the unavoidability of human regression. Thus, tragedy continues. Even John Angel himself could never forget what his philosophical deconstructive mind had revealed. He could not overlook the fact that the old routine prospered only on dissimulation and could never last. The apocalypse loomed in the background, though there were also some successes for the old order. Even at such times, John was haunted by his own disbelief and scepticism. In addition, whatever he tried to suggest in order to save the old system was mistrusted and suspected by those who had never questioned the foundations of the fortress and knew that John had. But, as the John Angel metaphor elaborately demonstrates, distinguishing fortress from plain tragedy, there existed the belief in the moral necessity of an optimistic defence. It is no teleological optimism about reaching a goal, but optimism regarding engagement, the possibility to work for international law.

Recent international legal discourse provides many examples of the fortress. There are several theoretical as well as doctrinal developments aimed in this direction. Take, for example, a couple of doctrinal issues. The prohibition of aggression is considered a candidate for a peremptory norm, yet its violation has been witnessed without condemnation innumerable times. In the already mentioned State sovereignty *Grundnorm* the idea of States as entities has proven more than dubious, without a clear capacity to entail any subjectivity, yet, the *Grundnorm* is quite meaningfully discussed and even defended. More particularly in the theoretical sphere, take the turn-around of Martti Koskenniemi as regards the social concept of law; first he devotes considerable efforts to uncovering the problems caused by the liberal social theory underlying the controversies of international law, later he reaches the conclusion that this very same social concept is no obstacle for the relevance of international law.[38] In all of these examples contradictions are quite intentional. Somehow, they even manage to make sense. Reality seems contradictory. Why not proceed accordingly? Why not balance and manage the instability? This, of course, is an endless task, but if one escapes the spellbinding cynicism one may well have the energy for it.

The contradictory nature of the fortress-defender results from the fact that he escapes the tragedy, but then returns. Koskenniemi's work demonstrates this well. The regressive analysis in the *From Apology to Utopia* discloses a controversial relation between the particular and the general, the individual and the universal, as a condition of the current international legal theory and practice. After the disclosure, the author argues for some sort of transformation, a reconstruction, which eventually collapses under the weight of the same critique which undermined the old system.

38 See, Koskenniemi, *From Apology to Utopia, supra* note 6, at 52-5; *id., Theory, supra* note 17, at 43-4.

This proves the post-modern point, the inevitability of the eternal tragic game. However, Koskenniemi does not seem to be inclined to this game. He neither continues to deconstruct, nor falls silent. A complete turn becomes necessary.

Koskenniemi abandons the camp of the dead post-modern souls and their doomsday deconstruction machines to go back to the fortress of international law discipline, to defend it with fellow international lawyers many of whom still believe in the indestructible fortifications of their traditions. This return has no grounds or reasons other than a moral one – a certain nobility. Hence, it is both unfounded (epistemologically) and founded (ethically). The defending of concretivism and State sovereignty cannot be based on the disintegrated foundation after the unveiling of the void in deconstruction. That is exactly why the fortress-defender is ever more eager to pile up haystacks to protect his fortifications; he knows they will fall. The fortress-stream can be seen as an attempt to answer affirmatively the question rising from the flooding tragedy: Is it possible to break the necessity of silence without having to return to it later? The fortress is defended solely with John Angel morals, which Kennedy urged Koskenniemi to take up in saying that his doctrinal agnosticism makes him liable to accusations of insincerity and uselessness.[39]

However, the return to fight for the fortress is just as tragic as the tragedy itself. Nevertheless, in qualitative terms the fortress marks a clear turn by adding moral optimism, concreteness and a certain earnestness to the tragic conclusions. The tragedy is a sort of a game played either by the scornful post-moderns, sceptical relativists or the pessimistic realists conceiving the human being as in 'tit-for-tat' or as an object for forced management. The defending of the fortress is a miserable fight too, but the interaction with others is earnestly appreciated, as in John Angel sanctified.[40] In tragedy, the human interaction is an eternal discursive pinball at best, whereas in the hopelessness of the fortress-defending, there is no sense of futility whatever. The fortress has no solid ground for hope. In the mind of the defender the question prevails: if not by objective authority, how does international law produce legitimation? As long as he sees no answer, his fortress has no foundations and remains in constant danger of collapse.

It is obvious that the legitimation question cannot be answered inside the fortress where tragic immanence abides. The fortress-defenders break the silence because they want to fight for the practical relevance or the pragmatic interests they deem best. However, the turn-around leaves the fortress-defenders with many problems. Deconstruction bombards the fortifications with problems of alienation, meaninglessness, the impossibility of any method, the dichotomy of subjectivism and objectivism, the inability to deal with totalitarianism, the indeterminacy, the controversiality and irrationality reflected in the defended tekhne. It can be concluded that returning to the fortress is an ethical choice, it is a taking of

39 Kennedy, *supra* note 34.

40 The adjectives used here to describe the quality of the orientations are carefully chosen and mean more to someone familiar with the philosophical terminology of recent discussion. But they can be understood by an open-minded reader, regardless of prior special knowledge.

responsibility. Deconstruction is stopped, return is made. That is the point of phronesis. The taking of responsibility continues inside the fortress. Once there, it mainly fortifies a part of the tekhne. The phronesis of the fortress is twofold: the breaking away from deconstruction or scepsis and accepting the situational reality of practical life. But as long as the fortress is defended mostly by means of tekhne, instability increases. The more phronesis inside the fortress, the clearer the answer to the question 'why international law?'.[41]

C. The Cave: Dragging and Crawling in Darkness

In the cave approach the duality breaks. Phronesis comes together with tekhne. It does not any more eliminate or silence the tekhne, or even draw it in the opposite direction, as it did in the previous instances. The theory and practice are brought together, the aspiration of the lawyer for a meaningful life is brought together with the search for the meaning of international law, one is brought together with the other. The dilemma of objectivism and subjectivism is superseded. The power of determination ceases. The need for managing differences from an upper-level hierarchical position vanishes. When subjectivism and objectivism disappear, the subject and object of international legal discipline become inseparable. The interpretative quest focuses on their unity in the actual encounter. Such is the actuality of international law. Regrettably, tragedy does not end. Despite the deliverance from the fundamental controversies, the cave is no paradise.

First, this approach is very difficult to realize because it has to be incessantly reaccomplished. Evidently, it cannot be built into a predetermined system. Second, it is not easily made into a science. The cave approach to international legal issues is not easily generalized, discussed or even described. This is because language is such a determining factor. Drawing a cave experience into a pattern, a structure or a generalization deprives it of its meaning. Third, because of these difficulties one easily overemphasizes the tekhne and thus retreats to the former two approaches. In the new stream of international law where the cave approach may be detected, the use of metaphors is commonplace. When a change in the way of thinking is required, metaphors are necessary. Only with their help can one surpass the old way of thinking which language otherwise carries over. A change of thinking cannot be rationally argued for with the concepts of the old system, or it would not be new. Without exact definition metaphors try to cause the reader to grasp the new meaning through his own efforts without lead or prescription by any authority.

The concept of 'cave' used here comes from a metaphor, too. Plato's cave metaphor elaborates vividly upon the limits and possibilities of the human condition. It also demonstrates what one can say about an open, dialogic way of knowledge, a

41 The post-modern ontological challenge can be stated with a hint of a moral theme as 'Why anything at all?' It would be the tragic question, whereas the question of fortress asks, as above, 'Why international law?' On the post-modern question, see Carty, *supra* note 8, at 9.

phronesis. It describes the problems involved. Without making any conclusions, it helps the reader to realize and learn something, leaving it entirely to him. Nothing is ready. The structure is not that of a usual scientific argument. The phronesis comes forward in the actuality of reading – in the combining of the reader's contribution to that of the writer and story.

In short, Plato's cave metaphor in the seventh book of *The Republic* can be presented as follows:[42]

> In a dim cave there are prisoners chained to face the back wall on which shadows appear. The light comes from a fire behind. The chains are so tight that the prisoners do not even see themselves but as shadows on the common wall. They discuss, profess and give merit to each other on the account of the knowledge based on the reality of the reflections on the wall. It is their immanent reality. If a prisoner is liberated and made to look at the fire behind, two things happen: he looses sight of his own shadow and he is blinded by the brightness. He most certainly wants to return to the shadows and the community created by watching them. The other prisoners feel threatened by his freedom, suspect him and want to slay him. If, however, the freed prisoner is dragged towards the mouth of the cave and he has time to adjust to himself (as other than a reflection) and to the sunlight, he will crawl and stagger the last distance on his own efforts. Eventually, he will be able to look at the sun and he realises how all seeing is a phenomenon of light.

Deconstruction as uncovering, not just social criticism, might lead to the breaking of the chains, as in the cave metaphor. Then again, it might not, if it were used nihilistically only to play a tragic strain on the prisoners' conditions. In the best case, it is not the scholar bent on uncovery who breaks the chain; it is the method that does this for him.

In a discipline of knowledge, the breaking of the chain is the breaking of the determination. The result is not very reassuring, though: What the prisoner considered as reality disappears, his conception of himself becomes annihilated, as in the Death of Man, he loses the community with others, he is blinded, does not see the alternatives and everything he does produces a counter-effect in the reality of his fellow prisoners. It leads to what was discussed in the tragedy of international law. Using Koskenniemi's *From Apology to Utopia* as an example, one sees how everything happens in a concrete case: first, the reality of the discipline becomes relative, concepts contradictory, then fellow-scholars judge the propositions in light of their technical descriptive and prescriptive value in the shadow-world. Any proposition perceived as a shadow-construction is deconstructable. One had better return to the chains. As shown above, the way back led to the fortress approach. But now, the spiral spins on. The cave is about how to escape silence-doomed tragedy without returning to the ill-founded fortress.

If not slain by the other prisoners as in *The Republic*, the freed prisoner may be tossed past the blinding light of the fire. Still, it will be difficult to see. One is far

42 My reading of Plato is based on the lectures by Juha Varto in 1990, at that time Acting Assistant Professor in Philosophy, University of Tampere. The materials *Myytti ja metodi* were published in the Series of the Department of Philosophy in 1992.

away from the mouth of the cave. The cave is dark. The inside and outside of the cave are thought to be separated, because the path in between is not observable. First, one must remember that there is no method other than being dragged, followed by crawling on one's own. It means, for instance, that all deconstruction and reconstruction must be left to the tragic prisoners, the shadow-observers. Second, relativism, as a belief that everything one sees is related to something already known, and that meaningful new balances can be struck, has to be left to the fortress-defenders. One must understand that looking for things that one immediately recognizes as answers is excluded because the things to look for are no more in any relation to what one already knows. Thus, the third requirement is radical openness.

To stay with the example of Martti Koskenniemi's work, it can also be read as going further than the fortress, at least in the *From Apology to Utopia*. Namely, in the controversial, widely criticized concluding Chapter Eight the author presents a description of a new open practice beyond strictly defined principles, methods and theories; that is, as its title states, *beyond objectivism*. Its aim is to restore the meaning and relevance of international law by theorizing a new positive identity for the international lawyer. First, Koskenniemi's deconstruction demonstrates the deeply contradictory nature of liberal social theory. Simultaneously, deconstruction proves the subjectivist and objectivist argumentation structures of international law to be incoherent and inadequate. In order to save the discipline from total nihilism Koskenniemi proposes the adoption of a personal perspective. From this perspective the international lawyer or scholar could observe or act without having to insist on any other foundation. At the heart of perspectivism[43] is thus the human person. The perspectivism includes a shift from legal technique to normative practice and from interpretation to imagination. The gist of Koskenniemi's deconstruction was the controversial nature of international law based on the legal subjectivity of States. Therefore, Koskenniemi's new proposal stresses the role of the individual in the constitution of international law at the expense of the role of State subjects. Critics have pointed out the risk that through the introduction of a reconstructed subject the whole subjectivism versus objectivism dichotomy is instigated all over again. Another criticism is that it does not escape the problems of relativist pragmatism, which oppresses the other and puts the world in the position of something needing effective management.

Perspectivism is an uneasy answer. It can be deconstructed, as was taken for granted in the previous two approaches. As in the cave metaphor, the discussion of the freed prisoner seems inconceivable, obsolete or at least contradictory to those in chains, as they relate it to what they know, to their immanent reality. The spiral keeps on turning further. The contradictions surface in the use of words and language in general, which of course carry with them tradition, its conventions and meanings. Also methods carry in them the situational determinants from the time

43 Carty, 'Critical International Law', *supra* note 30.

they were first established – deconstruction being no exception. Therefore, Koskenniemi's *From Apology to Utopia*, both deconstruction and perspectivism, has been criticized for contingency and modernistic premises. Koskenniemi is seen to contradict himself by first denying the possibility of a pragmatic rational consensus and then returning to it in his perspectivism. The critics simply will not accept that first using deconstruction, one could later abandon it. In their view, Koskenniemi cannot escape objectivism, system-building and technocratic tendencies through denying them. Their reading grabs Koskenniemi's proposal by its concepts and drags it back to the conventional framework which it originally denounced.

In this way the tragic theme continues to echo in the cave. Perceptive critics have shown how Koskenniemi's new normative practice and imaginative interpretation can be put through the very same deconstructivist machine that he himself so elaborately operates to disintegrate the old normativism. The shadow of modernity is seen conditioning Koskenniemi's effort to go beyond. The choice is dual between silence or critique, death or moral defence of the shadow-world. But the critics have not asked themselves if it is really likely that Koskenniemi forgot, in Chapter Eight, what he had said earlier in the book. In this following third reading, it is proposed that they might also ask themselves, if it is not more convincing to think that in fact he tried to point to something else beyond the tragedy, beyond the fortress.

If Koskenniemi is read as giving an example of the cave approach, the position of the critics makes sense, though it is far from justifiable. The breaking of chains, turning-around, and the whole painful deliverance necessitates all of what has been described above. However, the continuing on the trail towards the mouth of the cave further necessitates the giving up of the already-known methods and principles, even relativism and pragmatic balancing. Their reintroduction cannot be accepted. Deconstruction reveals the fire which produces the shadows in the cave. Looking at it too long, does not reveal anything more; *au contraire*. Regarding the above example, in abandoning deconstruction, perspectivism denies its universal applicability and looks away from it. The deconstructive method can be used in dealing with the old, but in the sphere of the new its application literally blinds the eyes. The right of the new to its newness has to be respected. Though the language belongs to tradition, on the cave trail one focuses on something else beyond it by using the old concepts in a new way. The automatic reduction to the old meaning-structures is a deliberate deprivation of substance which is, in other words, false interpretation by a master-mind. That is the metaphorical slaying. It is totalitarian thinking. Admittedly, allowing the dynamic use of the old language is anything but easy.

Important in avoiding the return to silence and to the fortress, is the attempt to restore the meaning of the practical work of an international lawyer. This was already discussed in connection with the fortress approach. Here, the meaning and significance of practical engagement is differentiated from mere pragmatic efficiency, i.e. the balancing of the interests of oneself and others. The previous example shows Koskenniemi's commitment to accept the responsibility of the

practical influence of his work. In the fortress, the issue was to give firm, though temporary, foothold for the practitioner. In the cave, there is only dragging and staggering on rocks and through swamps: no comforts of the middle-ground.

In the perspectivism of the final chapter of *From Apology to Utopia*, there are traces of the cave. The most important is the realization of oneself resulting from concrete encounter with the world. It is the realization that something not relative exists – even if as a reflection it was very relative and could be relatively managed. In Plato's cave the unchaining alone was of no use. Only the recognition of what one is, other than a shadow on the common wall, and the crawling that follows such recognition takes one to the light. In the conclusions of *From Apology to Utopia* Koskenniemi speaks of the concrete, experienced meaning of life of a being. One may well wonder, if this is mere rhetoric, or the requiem as suggested above. If one, however, becomes convinced that it is not, it seems to point to a cave approach. It finds ground for the meaning of international law in the potential inherent in the human being. This being (not dead) means the breaking of the chains of determination and deliverance from endless tragic return to silence or defence. If there is no recognition of one's own being, one has no means by which to eventually stagger out of the cave. The coming out is possible only for one prisoner at a time, not for a whole society. But first the individual must be dragged close enough to the light. For the dragging, another or others are needed. This means that a person can come closer to finding a trail (*Spur*) only through experiences with other human beings, through encounters. In international law this means practical experience and dialogue with others. The word 'dragging' signifies the painful and shocking character of the most revealing encounters, crises, if you will.[44] The path of encounters that clears a person's knowledge can be described by means of the dialogic principle.

The dialogue, contrary to the totality which knowledge forms in the minds of the cave-prisoners, is dynamic, constantly changing, volatile. Dialogism is the opposite of dogmatism. It is a game, *ein Spiel*, but not a tragic or scornful play or a tit-for-tat-mechanism. It is *ein Spiel mit heiligem Ernst*.[45] Most importantly, it is the constant acting in concrete reality with others, but without relativist managerial ambitions. It necessitates no fighting for lost causes nor silence on foundational questions. In dialogue, one is prepared to act and make concrete decisions on concrete questions, but at the same time one is ready to be dragged forth. Tekhne has only instrumental value in the cave. Its use is confined to technical matters. The phronesis of the cave lies in continuing forward, abandoning projects and pushing the limits of the discipline in concrete encounters – theoretical and practical.

44 As an example of encounter, see Kennedy, 'Spring Break', 63 *Texas Law Review* (1985) 1377.
45 Gadamer *supra* note 1, at 97, 100.

III. Conclusions

The importance of the relationship of theory and practice has been stressed in numerous ways. Each affects the other and therefore holds a certain potential. In interpretation, theory and practice meet. At the same time, the coming together of human agents occurs. Recent international legal thinking has produced sinister pictures of these occasions, at least if one considers the treatment of otherness. On a more practical level, argumentation sweeps back and forth without a meeting of minds. The methods given do not convince, a gap forms between theory and practice, scepsis rises, nihilism wins ground, law breaks to norm-fragments, conflicts become exclusive matters for power, indeterminacy increases towards the verge of chaotic anti-rationality all at the same time. The international law practitioner is caught in a prison-house of principles, language, structures or any other such frustratingly deterministic limits. It is important to remember, however, that one's mind is the worst prison-house there is. Fortunately, the human person is more than the mind. In actual encounters with the world's phenomena the situational limits can be pushed.

New thinking is emerging in international law. The tone of such thinking has seemed somewhat tragic, but not as nihilistic as has been suggested. The positive aspects have been motivated by practical realizations. The requirement of practical relevance, the realist challenge, the situational interconnectedness, the personal engagement have made it possible to understand how and why international legal activity finds a meaning. The 'how' and 'why' are clearest in the cave approach. It is not very much concerned with the change in tekhne. Instead, it is provoking a sense of phronesis. The difficulty of making a science out of something which cannot be determined is overcome. It requires dialogism in the sense described in the third section of this article. Metaphorical presentation and qualitative research invade the field. The quest is concentrated on actual phenomena, argumentation and interpretation; personal perspective is openly stated; methods are recreated for each case anew; reification is avoided; *Vorverständnis* is taken into account; the relationship to other phenomena is reconsidered; the self is reflected in connection with the progress of the study; neutrality is substituted with engagement; dialogue is prompted. This approach is a leaving of personal tracks for others to perceive and cross. Generalization, determination and management leading to alienation and totality-forming are rejected.

The three new themes presented above were each based on a certain way to encounter phenomena, a conception of world and the scholar's situation in it. In the tragic orientation, the scholar's phronesis is critique and critique of critique ending in silence. In the fortress orientation, it consists in noble fighting for small things though surrendering in big. In the cave orientation, it is inner and outer dialogue, aiming to recognize radically new paths of thinking, although this means constant shattering of one's totality, recurrent crises of mind. The cave orientation went beyond the others, still somehow including them in its motivation. The tragedy was

in the gravest danger of falling from dynamic thinking to fixed thought because it had the strongest determinants. The fortress needed strong defences because of its internal hopelessness and vulnerability. The cave approach was weak because it remains open. The cave orientation is a matter of conviction: whether the human person becomes convinced of his potential ability to transcend or whether he just keeps on wondering why anything at all.

Though there can never be a universally coherent system of international law, that is a coherent tekhne, there can still be a source of legitimation: the phronesis of the practitioners and scholars. For the time being, the current of the new stream which recognizes a phronesis of international law is only just emerging. For the moment, there is thinking, but there will be doing; for between tragedy, fortress and dark cave, who would not opt for a possibility of deliverance?