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Repetition as Reform: Georges Abi-Saab Cours Général de droit international public

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The *cours général* enjoys a special place within the academic discipline of international law. It is given every year as a three-week series of lectures during the Hague Academy's summer session by an accomplished professor, often the *doyen* of some national community of international lawyers. To be requested to give the general course is a recognition of one's having entered the discipline's hall of fame — as attested to by the photograph of the lecturer printed at the front of the lectures. From the lecturer's perspective, the general course provides a unique opportunity to outline a grand theory or to give a principled statement about international law as a whole, or perhaps to present a summary of one's life's work in the field. During the inter-war era, many of the courses were dedicated to completely theoretical or philosophical topics, such as the 'basis of obligation'¹ or the place of natural law (including 'fundamental rights') in international law.² Many were at least as much works of philosophy or legal or political theory (and some even much more so) than expositions of positive international legal norms.³

After the general turn to pragmatism in the 1950s and 1960s, a change in the style of the general course in the Hague took place. Gone are the speculations about natural law as the 'basis of obligation'. The only theory espoused seems to be the policy-oriented 'theory' of the social conception of law (i.e. realism).⁴ Often theory is reduced into a few generalities in the first pages of the published course which seek a

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¹ Cf., e.g., A. Verdross, 'Le fondement de droit international', 16 *RdC* (1927, I) 251; J. L. Brierty, 'Le fondement du caractère obligatoire du droit international', 23 *RdC* (1928, III) 467; M. Djuvara, 'Le fondement de l'ordre juridique positif en droit international', 64 *RdC* (1938, II) 485.

² Cf. L. Le Fur, 'La théorie du droit naturel depuis le XVIII^e siècle et la doctrine moderne', 18 *RdC* (1927, III) 263; G. Gidel, 'Droits et devoirs des Nations. La théorie classique des droits fondamentaux des Etats', 10 *RdC* (1925, V) 541.

³ See, e.g., the courses by Politis (1925), Kelsen (1926), Verdross (1929), Scelle (1933), Le Fur (1935) and Kaufmann (1935).

⁴ Cf., e.g., the courses by Quadri (1952 and 1964), McDougal (1953), De Visscher (1954), Bishop (1965), Friedmann (1969), Truyol y Serra (1981), Schachter (1982) Virally (1983) and Higgins (1991).

reconciliation between naturalist, sociological and formalist approaches, generalities whose relationship to the rest of the course — the exposition of valid norms — is not always clear. Sometimes the survey of normative substance is preceded by a few general remarks on the character of the international community (with a view to refuting the political realist vision of international relations as an anarchy of sovereignties). To what extent this reflects the anti-theoretical or 'post-theoretical' character of recent academic law in general may be conjectured. What is interesting and, perhaps, disappointing, is that differences in the national or cultural background or political affiliations among the lecturers are barely reflected in the content of the lectures. The world of the general course is a uniformly cosmopolitan world in which historical optimism and the assumption of the ultimate unity and harmony of interests of humankind combine with a critique of sovereignty, a mildly progressive communitarian politics and a commitment to the United Nations as the (however ineffective or rudimentary) focal point of a world law.

But if theory is 'dead', or reduced to a few general statements about international law's historical or sociological context, then it becomes hard to avoid repetition and generalities in a course that is given on an annual basis. Yet repetition and generalities have a role to play in the manner in which the general course acts as a ritual recreation of international law as a coherent whole, separate from politics, diplomacy and the rest of the legal world, initiating successive groups of law students into the historical, sociological and ethical commitments (and language) that sustain the credibility of the careers that may later be offered to them in the field of the public management of international affairs. In a sense, the persistence of a 'general course' — despite all the fashionable *Angst* about specialization, fragmentation and tribalism — remains the most concrete proof of (or is perhaps identical with) the existence of a coherent body of law and practice that still provides that 'view from nowhere' that the rest of modernity lost somewhere during the previous *fin-de-siècle*.

So too Professor Georges Abi-Saab's 1987 general course⁵ — published ten years after the event — is organized according to such an all-encompassing overview. The course starts out with a brief critique of purely formal and purely policy-oriented approaches and chooses a middle-ground in which the law is understood as a relationship between norm and behaviour as mediated by language and the legal system (at 35–43). Then follows a brief discussion of the history of international law, particularly in its relationship to statehood (at 45–104). The course presents the 'system' of international law in terms of its three 'functions' (the legislative, judicial and executive) in the image of the domestic liberal legal system (at 105–318). And a third part looks at the substance of international legal rules, organized under three 'constitutive principles' (sovereign equality, prohibition of the use of force and non-intervention), scattered rules on the coordinative aspects of diplomacy (diplomatic law, succession and responsibility, the law of treaties, *jus in bello*) as well as an emerging 'law of cooperation' especially within the UN (at 319–463).

History, structure (form) and substance (content) — this triptych creates a

⁵ G. Abi-Saab, 'Cours Général de droit international public', 207 RdC (1987).

'complete' image of a working international legal system — even if Abi-Saab is keen to stress that this completeness is not the formal, reductionist completeness of the positivist, created through fixed dichotomies such as law/non-law, binding/non-binding. Although Abi-Saab dismisses the view of international law as a 'primitive system', he nonetheless emphasizes its flexible, complex and sometimes contradictory character (at 203–205). This is in line with a pragmatism that insists on international law's dependence on social facts and sensitivity to political disagreement and whose normative faith is grounded in the assumption that those facts are nevertheless moving towards increasingly intensive and beneficent forms of legal organization. This faith is expressed by invoking Wolfgang Friedmann's well-known dichotomy: an international law of horizontal coexistence is slowly developing into a law of cooperation (at 319–327); history is on the move from state sovereignty to international community. Much of the law in the book coalesces with the law of the United Nations, explicitly discussed as the cornerstone of an emerging international community (at 447–457). This is familiar stuff and although Abi-Saab insists on a distinction between the 'classical' and (his own) 'modern' approach, in fact the alignment of the law with the principles of the UN Charter is the classicism of the past 50 years — a classicism whose political appeal in the 1990s may perhaps no longer be taken for granted.

Abi-Saab's political commitment is to a social-democratic law that is active, regulatory and centralized within the UN. But he stands aloof from Federalism. For joining the voices that today decry the ills of statehood would put him in the odd company of voices — *'comme le reaganisme et le thatcherisme'* — calling for a *'liberalisme sauvage'* and celebrating *'rapports bruts de force'* (at 103). A progressive internationalism can no longer (as it did for most of this century) simply prefer community to statehood. The question now is more complex: whose community to prefer?⁶ A modified and sophisticated reformism — such as Abi-Saab's — is drawn to characterize the law as immersed in a dialectical and unstable relationship between the classical, state-centred system and *'une approche plus collaboratrice'* (at 104) — even if the assumption that horizontality (*justitia correctiva*) will in the end give way to (progressive) values and distributive justice (e.g. at 313–317) remains not far below the surface.

To start with history (instead of, say, theory) as Abi-Saab does, is to affirm that one moves within a 'social conception of law', a conception for which international law is not an abstract morality but 'living law', constantly shaped in and through social experience. *'Ubi societas, ibi jus'*. Abi-Saab observes in order to dispel doubt about whether international law 'really' exists (at 45–46). The test of the truth of statements about the law lies in their correspondence with a reality in constant movement (at 460, 462). All of this is part of the discipline's contemporary mainstream — and all of it invokes a slight unease in a reader with any familiarity with the critiques that have been (quite effectively, and already decades ago) made in social and political theory against behaviouralism and the 'reflexion' metaphor as an apt characterization of the

⁶ On this theme, cf. D. Kennedy, *A New World Order: Yesterday, Today, and Tomorrow* (1994), esp. at 34–47.

relations between law and society. For Abi-Saab, these realist arguments seem necessary, however, in order to create distance from a legal formalism (whose predominant representative is always Prosper Weil with his famous critique of the dilution of normativity) that tries to force the law into a predetermined set of concepts.⁷ His treatment of legal sources, for instance, is written in a chapter on the 'legislative functions' of international law that emphasizes the authoritative role of legal precedent, UN General Assembly resolutions and other kinds of soft law — against (formalist) doctrines that exclude these from the field of normativity. While the classical law of coexistence was largely based on prohibitions and therefore needed to rely on hard rules, the emerging law of cooperation is facilitative and goal-oriented, expressive of community purposes (at 211–213) that may equally well be articulated in informal principles.

But a purely historical or sociological jurisprudence fails to sustain a serious normative faith. And it seems natural to assume that one of the purposes of the general course — consciously or not — is precisely to inculcate such a faith in the listeners. Indeed, Abi-Saab writes about the UN Charter 'as a project of the post-war international community' (at 447) and implicitly calls upon his students to join it. This requires going beyond '*ubi societas, ibi jus*'. After the move that shows that one is not an 'inflexible formalist', another move needs to be made under which history and social facts are vested with a normative direction that the law is understood to reflect. This is how Abi-Saab deals with history. The origins of international law were universal (at 51). The hegemony of European concepts such as statehood and colonialism was the result of a later development (the 'classical law'). But now the emerging law of cooperation will bring a 'qualitative change' (at 93) and re-establish the universality that was temporarily lost. History's progressive spirit reassures of the realism of putting one's faith in international law.

After history, structure. Abi-Saab's systemic outlook implies that statehood is not something pre-existing the law, but constructed by it. The system is prior to its parts: international law is a form of a geographical repartition of competences between states that constantly defines and delimits their statehood (at 73–77). Although it is possible (as a matter of choice) to take the perspective of the part (state) or the system (the law), in fact the latter is the progressive thing to do (as it was for Kelsen and the reconstructive scholarship of the inter-war era) (at 79–80). The appeal for a cooperative international 'community' — of which a UN-supported right to development would form an essential part (at 447–457) — is an uneradicable part of the ethics of the social conception. That Abi-Saab does not lapse into an easy utopianism, however, is checked by his sense of the complexity of things. Formal codification, for instance, is only partly beneficial and has been only partly successful. From a qualitative point of view, resolutions of the UN have more importance: they are the 'new custom', a complex legislative mechanism without formal legislative

⁷ Here as elsewhere, 'formalism' appears as a straw man, a caricature that in fact has no actual representative in the world (apart from, perhaps, Kelsen — but that is already quite another story).

effect but nonetheless authoritative because of their relevance, ascertainable content and democratic legitimacy (at 173).

After a rapid glance at three notions of legal 'system' (those of Kelsen, Santi Romano and H. L. A. Hart), Abi-Saab endorses Hart's descriptive sociology and a legal system built upon the presence of precisely those secondary rules (rules concerning the creation, modification and termination of primary rules) that Hart claims to be absent from the international sphere. Wrong, claims Abi-Saab, such rules do exist in international law, albeit not always in an articulated form (at 122). Abi-Saab's discussion of the legislative function in international law makes forcefully the point about the flexible, spontaneous, contextual nature of law-making. International jurisprudence (especially that of the ICJ) ends in the creation of legal rules just as repeated UN resolutions do, whether or not they are classed under the traditional theory of custom (at 154–177 *et seq.*). The test of the validity of international legal rules lies not in a doctrine of formal sources but is rather a behaviourist one: does a standard affect behaviour (at 180)? Although Abi-Saab does not engage Hart's gunman objection to behaviourism (are the gunman's orders, inasmuch as they affect behaviour, also to be classed as 'law?'), one assumes that he can be unconcerned about the unacceptable consequences of pure behaviourism (the imperialism it implies) by relying on the benign spirit of international history, reflected, perhaps, in the majoritarian *opinio juris* of the UN General Assembly that in the end will distinguish between might and right.

The discussion of peaceful settlement of disputes emphasizes the dynamic rather than formal aspects of the process where the states make claims and counter-claims and proceed from negotiation either to an agreement to disagree or to third party settlement. Somewhat surprisingly, Abi-Saab views the criterion of justiciability to lie in whether the parties to a dispute have chosen to argue their case in terms of legal rules (at 230) — surely, as Lauterpacht, Morgenthau and others have shown, such a purely 'subjective' criterion would enable any state to frustrate legal settlement merely by changing the ground on which it argues.⁸ Abi-Saab discusses the activity of the ICJ by examining the successive 'crises of the Court' in terms of the decline of the optional clause and, in particular, the South West African decision of 1966. The analysis is less normative than delightfully cultural. The Court is pictured as an agent sometimes asserting its independence from and sometimes deferring to states (at 258–274). Described as a political agent, however, the Court is in a dilemma. Anxious to settle disputes on their merits, i.e. by reference to the particular circumstances of the case, the Court avoids determinate statements about general law. The significance of its activity will then shift from such statements to the actual settlements to which it may contribute.

Ce serait la un renversement total de ce qu'on pensait jusqu'ici a ce sujet et une diminution significative du role de la Cour comme la plus haute instance judiciaire dans l'ordre international (at 272).

⁸ H. Lauterpacht, *The Function of Law in the International Community* (1933); H. Morgenthau, *Die internationale Rechtspflege, ihr Wesen und ihre Grenzen* (1929), e.g. at 37–56.

Here, as well as in the discussion of 'sanctions', Abi-Saab stresses the degree to which everything is dependent on unilateral, 'autointerpretative' decisions by states. The dialectic of law and power is constantly present (Abi-Saab even traces the notion of countermeasures to a doctrine within American strategic studies, at 291) — although it is unclear whether the understanding of 'countermeasures' (which Abi-Saab shares with the former ILC rapporteur, Arangio-Ruiz) as interim measures in order to compel the other party to a settlement (instead of a form of satisfaction in its own right) is or should be acceptable. Clearly, the difficulties in interpreting Security Council 'permissions' (collective action or unilateralism in disguise?) and the Council's past selectivity do not call for an understanding of its ripostes as 'sanctions' (at 304–309). But, Abi-Saab consoles his students, international law's effectiveness lies not so much in its provision for collective sanctions *stricto sensu* as in the common values and purposes that it articulates and sometimes, if those values are important enough, enforces through the device of non-recognition (at 311).

Some of the reformist themes that Abi-Saab has chosen to discuss seem oddly outdated. He deals with sovereign equality in terms of the debate over 'permanent sovereignty over natural resources', advocating a 1970s Third World perspective in relation to nationalization of foreign property (at 333–351). The discussion invokes General Assembly resolutions from 1962 and 1974 and the associated notion of a New International Economic Order in a defensive way, without seriously engaging the market-oriented critiques that now dominate the field. Likewise, taking a position in favour of a categorical prohibition of unilateral intervention disturbingly sidesteps the problems of intervention against dictatorial or genocidal regimes, or in situations of civil war, as well as the difficulty of thinking of the Security Council as a reliable agent of international justice — arguably the hard cases of today's UN debate (at 382–389). Some of these problems may ensue from the fact that the course was held as long ago as 1987. The discussion of state succession, for instance, makes no reference to recent developments in Central and Eastern Europe that have in the 1990s put to question the whole normative framework created by the partly abortive 1978 and 1983 Conventions. A somewhat more extensive updating would have been required in order to dispel the slightly anachronistic flavour of some parts of the text and to enhance the critical bite of the author's reformism.

On the other hand, Abi-Saab does make quite an interesting and effective argument in favour of the constantly relevant nature of the right of self-determination in a post-colonial context as a potentiality that may create a legal claim for minorities facing discriminatory policies from the majority population (at 402–406).

The *cours général* given by Abi-Saab is an elegant and sometimes inspired presentation of the cosmopolitan values and doctrines that underlie the 'left faction' of today's international legal mainstream. It relies upon UN law as an expression of a communitarian ethos, expressed particularly in normative UN resolutions such as the 1970 Friendly Relations Declaration and the 1974 Definition of Aggression. The lecture focuses on *jus cogens*, *erga omnes* norms and *actio popularis*, interpreting each as a move away from a purely consensual, sovereignty-based notion of international law and giving effect to communal values that may sometimes be imposed on recalcitrant

states. Even if the normative analysis brings in little that is new and some of the discussion of the substance of the law seems strangely out of step with the more abstract and, perhaps, radical discussion on 'structures', this is still a course in which one hears the distinct voice of a speaker with a message. It is hard to believe, however, that in the face of the various complexities that the course highlights, what would be needed is a further entrenchment of received ideas about a UN-directed international community. And in fact, recurrent pointing at complexity may sometimes seem to be question-begging or a mere stand-in for a deformed concept of law that comes close to the kind of '*justice transactionnelle*' which, as Abi-Saab points out in his discussion of ICJ jurisprudence, fails to meet the postulated goal of a universal legal system.

It seems to me, then, that it is time to let go of the myth of a progressive history that moves from institutional fragmentation to unity. It is time to switch from the critique of formalism to a critique of post-formalism and to show (once again, with our formalist grandfathers) how deformed law equals a system of bureaucratic rule that we have little reason to seek to make universal. However sophisticated legal pragmatism may be in its stress on flexibility and complexity, its institutional implications always seem less appealing than the analysis on which they are based. Here is the difficulty of the *cours général*. It is an appealing and natural forum for the statement of a normative theory, or of a (legal) philosophy, connected to some great unifying wisdom (and this is how it sometimes was delivered during the inter-war period) and then applied to international law. No such great wisdom seems available today. The languages of philosophy or ethics sit uncomfortably in the texts of modern lawyers. In the absence of such overarching normative vision, theory is taken over by a few generalities about legal history or political context while the law disperses into an unending taxonomy of rules and doctrines about rules, principles and policies as well as procedures for weighing them against each other in order to attain pragmatic *ad hoc* resolutions. The Professor's reformism is reduced to being simultaneously narrow, insufficiently argued for, and of doubtful persuasiveness for a career choice by law students hoping to find resonance to their intuitive internationalist sentiments.