

THE UNIVERSITY OF HULL

**A Legal Realist Critique of the  
New International Law Regime Relating to the  
Treatment of Minority Communities  
in Eastern and Central Europe  
(a Dialectical Theoretical Inquiry)**

*being a Thesis submitted for the Degree of Ph.D. (Law)*

*in the University of Hull*

*by*

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*I dedicate this work to my mother, Gulchekhra Rasulova, and my grandparents, Kharram Sharipova and Aziz Rasulov, without whose care, support, and encouragement none of this would ever happen.*

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Admittedly, Debray does not go very far, but by simply reminding people of certain obvious facts in the face of the powerful, prevailing ideology, he performs what Foucault was fond of calling, a 'cleansing operation'. ... It is, I concede, a simple and limited operation, but a truly materialist one.

LOUIS ALTHUSSER, *THE FUTURE LASTS A LONG TIME* 223-4  
(transl. by Richard Veasey; 1994)

We have too little theory in the law rather than too much, especially in this ... branch of study.

Oliver Wendell Holmes, Jr., *The Path of the Law*,  
110 Harv. L. Rev. 991, 1007 (1997)

The remoter and more general aspects of the law are those which give it universal interest. It is through them that you not only become a great master in your calling, but connect your subject with the universe and catch an echo of the infinite, a glimpse of its unfathomable process, a hint of the universal law.

Id. , 1009

The shortest way is always mined.

Anon.

## Introductory Note

This thesis is a work written in the genre of the legal realist critique. Its main topic is the development of the new international legal regime relating to the treatment of minority communities in Eastern and Central Europe (ECE) following the end of the Cold War.<sup>1</sup> The general methodological approach on the basis of which it was produced derives primarily from the traditions of American legal realism and the first-wave critical legal studies (CLS).<sup>2</sup> On a more fundamental level, the philosophical sensibility underlying this thesis's inquiry can be described as a combination of a non-Hegelian dialectical theory and historical materialism.

### *What is this thesis about?*

The basic analytical project pursued in this thesis consists of two general investigative tasks each of which constitutes its own separate problematic.<sup>3</sup> The first investigative task relates directly to the development of the new international law relating to the treatment of minority communities (ILTMC). Its main line of inquiry focuses primarily on that complex socio-historical transformation which has occurred in the ECE region in the last seventeen years and which has been marked on the plane of international law by the rapid emergence of the new ILTMC project.<sup>4</sup>

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<sup>1</sup> In accordance with the established convention, I treat the end of the Cold War as a rather short-lived historical process that began sometime in the mid-1980s and culminated by the end of 1989, with the fall of the Berlin Wall customarily representing the main symbolic point of reference.

<sup>2</sup> See further Chapter I, Section 3, below.

<sup>3</sup> I use the term "*problematic*" in this thesis in the same sense in which it was used by James Kavanagh in James H. Kavanagh, *Marxism's Althusser: Toward a Politics of Literary Theory*, 12 *Diacritics* 25, 26 (1982): "the matrix of theoretical pre-suppositions that *cohere* a given field of thought, determining the visibility, or *invisibility*, of objects within the field – the '*forms in which all problems must be posed*,' and, therefore, the possible solutions that can be generated. A word or concept cannot exist outside of a problematic, which sets or 'articulates' its significance in a systemic relation of differences with other words and concepts; a problematic provides 'a definite theoretical structure' for a discourse, its 'absolute and definite conditions of possibility.'" NB: here and elsewhere, unless specified otherwise, all italics are copied from the original.

<sup>4</sup> In this thesis I use the term "*the new ILTMC project*" to describe that totality of mutually coordinated discursive activities which over the course of the last seventeen years have produced the *new ILTMC regime*



The second investigative task addressed in these pages relates to a somewhat more abstract subject matter. Its main line of inquiry can be preliminarily summarized in the form of the following question: “How should the general problematic of the new ILTMC project be investigated from the point of view of international law?”

*What is the general relationship between legal realism, historical materialism, and the structural-conjunctural method?*

The theory of historical materialism practised in this thesis derives essentially from the works of the French Marxist philosopher Louis Althusser. Despite the terminological parallels, it differs quite considerably from the similarly-named theories practised by the orthodox Marxist schools from the Second International onwards. In particular, it rejects in every form and guise all versions of Hegelian teleologism, which it considers to be a variation of ontological idealism, and adopts a position of extreme suspicion with regard to vulgar economism.<sup>5</sup>

In that context, for the purposes of the present thesis, the term “structural conjuncturalism” should be generally understood as the short name given to the basic analytical method developed in the framework of the historical materialist theory for the purposes of social sciences.<sup>6</sup> Legal realism, in its turn, should be generally understood as the “local” variation of that method adapted for the specific purposes of juridical scholarship.<sup>7</sup>

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and established a corresponding system of the *new ILTMC discourse*. See further Chapter I below. In chronological terms, the beginning of the new ILTMC project coincides with the end of the Cold War. Cf. *supra* n.1.

<sup>5</sup> See further Chapter II below.

<sup>6</sup> *Id.*

<sup>7</sup> See further Chapter I, Section 3, Chapter II, Section 2, and Chapter III, Section 1, below.

**I**

**Context**

## Section One

### The New Conventional Wisdom

Much has been written in recent years about the international law relating to the treatment of minority communities.<sup>1</sup> A topic considered effectively dead less than a generation ago and “nearly obsolete” for the greater part of the preceding half a century,<sup>2</sup> the “minorities question” has once again become one of the hottest items in the contemporary international law debate. No sooner had the dust settled on the ruins of the Berlin Wall and the last Soviet soldier crossed the Friendship Bridge across the river Amu than virtually everyone from the UN experts<sup>3</sup> to political theorists,<sup>4</sup> international civil servants<sup>5</sup> to NGO consultants<sup>6</sup> discovered they had something urgent to say about politics, international law,

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<sup>1</sup> For traditional book-length introductions to the subject, see, e.g., PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* (Oxford: Oxford University Press, 1991); CATHERINE BRÖLMANN ET AL (EDS.), *PEOPLES AND MINORITIES IN INTERNATIONAL LAW* (Dordrecht: Martinus Nijhoff Publishers, 1993); THOMAS D. MUSGRAVE, *SELF-DETERMINATION AND NATIONAL MINORITIES* (Oxford: Oxford University Press, 1997); ATHANASIA SPILIOPOULOU ÅKERMARK, *JUSTIFICATIONS OF MINORITY PROTECTION IN INTERNATIONAL LAW* (London: Kluwer Law International, 1999); KRISTINE HENRARD, *DEVISING AN ADEQUATE SYSTEM OF MINORITY PROTECTION: INDIVIDUAL HUMAN RIGHTS, MINORITY RIGHTS, AND THE RIGHT TO SELF-DETERMINATION* (The Hague: Martinus Nijhoff, 2000); GAETANO PENTASSUGLIA, *MINORITIES IN INTERNATIONAL LAW* (Strasbourg: Council of Europe Publications, 2002).

<sup>2</sup> See Josef L. Kunz, *The Present Status of the International Law for the Protection of Minorities*, 48 *AJIL* 282, 282 (1954); THORNBERRY, *supra* n.1, 5; PENTASSUGLIA, *supra* n.1, 26-27.

<sup>3</sup> See, e.g., Asbjørn Eide and Erika-Irene Daes, “Prevention of Discrimination against and the Protection of Minorities: Working Paper on the Relationship and Distinction between the Rights of Persons Belonging to Minorities and Those of Indigenous Peoples,” UN Doc. E/CN.4/Sub.2/2000/10; Fernand de Varennes, “Minority Rights and the Prevention of Ethnic Conflicts,” UN Doc. E/CN.4/Sub.2/AC.5/2000/CRP.3.

<sup>4</sup> See, e.g., WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* (Oxford: Oxford University Press, 1995); JENNIFER JACKSON PREECE, *NATIONAL MINORITIES AND THE EUROPEAN NATION-STATES SYSTEM* (Oxford: Oxford University Press, 1998).

<sup>5</sup> See, e.g., WALTER A. KEMP (ED.), *QUIET DIPLOMACY IN ACTION: THE OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES* (The Hague: Kluwer Law International, 1998).

<sup>6</sup> See, e.g., Kinga Gál, “Bilateral Agreements in Central and Eastern Europe: a New Inter-State Framework for Minority Protection?”, *ECMI Working Paper No. 4.*, May 1999 (available from [http://www.ecmi.de/download/working\\_paper\\_4.pdf](http://www.ecmi.de/download/working_paper_4.pdf)). [NB: all weblinks valid as of 30 September 2006]

ethnic conflict, and minorities.<sup>7</sup> A whole new discourse seems to have emerged almost overnight, springing to life like Minerva out of Jove's head. Manifold as its faces have since become, numerous as its surfaces have since grown a single general structure can still be discerned behind its façade, a robust autochthonous principle,<sup>8</sup> an organizing logic that penetrates all its countless manifestations, bringing together its various strands into a single Frankensteinian whole.

Whatever context we approach them in, declares<sup>9</sup> this logic, whichever way we look at them, whatever aspiration we entertain in their regard, the general problematics of minorities protection, ethnic conflict, and nationalism in international law must always be considered together and can never be resolved separately from one another.<sup>10</sup> It is only by taking on all of them at the same time, as a single package, that the international community can hope to address any one of them satisfactorily, realizing the ideals of justice and good governance and averting the horrors of ethnic war and genocide while preserving the existing institutional structure of the international political order.<sup>11</sup>

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<sup>7</sup> In line with the established convention, I use the term “minorities” here to describe exclusively those communities that have been traditionally known as “national, ethnic, religious, and linguistic minorities.” Cf. Asbjørn Eide, “Commentary to the Declaration on the Rights of Persons Belonging to National or Ethnic, Religious, and Linguistic Minorities”, UN Doc. E/CN.4/Sub.2/AC.5/2000/WP.1.

<sup>8</sup> Cf. MICHEL FOUCAULT, *THE ARCHAEOLOGY OF KNOWLEDGE & THE DISCOURSE ON LANGUAGE* 15 *et seq.* (transl. by A. M. Sheridan Smith; New York: Pantheon Books, 1972).

<sup>9</sup> I am perfectly aware of the dangers of personifying inanimate objects and abstract phenomena and crediting them with qualities and actions that can only be properly attributed to human beings. I have tried to resist that tendency as far as possible, but sometimes the sentences that came out as a result would look far too awkward to be accepted as reasonable. Choosing effectiveness over rigour, I have decided, consequently, to stick on this point with the traditional practice adopted in mainstream scholarship. On legal scholars' propensity to personify abstract phenomena and the dangers involved in this, see further PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 86-9 (Durham, NC: Duke University Press, 1998); James Boyle, *Ideals and Things: International Legal Scholarship and the Prison-house of Language*, 26 *Harv. Int'l L. J.* 327 (1985). See also more generally Georg Lukács, “Reification and the Consciousness of the Proletariat,” in GEORG LUKÁCS, *HISTORY AND CLASS CONSCIOUSNESS* 83 (transl. by Rodney Livingstone; London: Merlin Press, 1971).

<sup>10</sup> For exemplary illustrations, see, e.g., Stephen J. Roth, *The CSCE and the New Increase of National Ethnic and Racial Tensions*, 4 *Helsinki Monitor* 5 (1993); THORNBERRY, *supra* n.1, 1-5; Rein Mullerson, *Minorities in Eastern Europe and the Former USSR: Problems, Tendencies and Protection*, 56 *MLR* 793 (1993).

<sup>11</sup> “Although ... ethnic relationships ... often have a centuries old history, such conflicts very often have more immediate political causes. ... Preventing conflict requires that the net be thrown widely to include the political order, or disorder as the case may be, economic factors, and often highly political issues such as the

From the perspective of the classical social theory, the ideological implications of such a peculiar commitment to methodological holism, of course, should not be that difficult to identify.

On the most fundamental level, there exist three basic approaches to the question of peace and order in contemporary social theory. The first approach, derived from the theoretical tradition most commonly associated with the works of Adam Smith, tends to emphasize the spontaneous ability of the unrestrained international intercourse to produce stable and lasting equilibria.<sup>12</sup> To secure the achievement of international peace and order, on this view of things, what the international community basically needs to do is deregulate every area of the international political process. Once every field of international relations is released from the shackles of the artificial institutional constraints, the spontaneous dynamics of the unrestrained intercourse created by its participants will begin to construct a stable and effective balance. Over a sufficiently long period of time, this will bring about the most secure and steady kind of international order possible.

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territorial integrity of states and the inviolability of borders. ... The prevention of conflict in Europe in the long run requires building a viable democracy and its institutions, creating confidence between the government and the population, structuring the protection of human rights, the elimination of all forms of gender or racial discrimination and respect for minorities. It also requires the peaceful transition from a rigid state-commanded economic order to a flexible market-oriented system which increases prosperity while paying due regard to social justice. ... [C]onflict prevention requires a comprehensive approach which combines the various tension-generating factors in an overall strategy. ... While one should obviously not lose sight of immediate threats to peace and stability, it should also be understood that quick fixes cannot be real solutions.” (Max van der Stoep, “Political Order, Human Rights, and Development”, in WOLFGANG ZELLNER AND FALK LANGE (EDS.), *PEACE AND STABILITY THROUGH HUMAN AND MINORITY RIGHTS: SPEECHES BY THE OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES* 71, 71-6 (Baden-Baden: Nomos Verlagsgesellschaft, 1999). Cf. Thomas W. Simon, *Minorities in International Law*, 10 *Can. J. L. & Jur.* 507, 507 (1997): “The ideology of ethno-nationalism creates a new world disorder. States and international organizations must find a way to deal with group conflicts to prevent ethno-nationalism from transmogrifying into ethnic cleansing and genocide. Minorities need protection against harm. The problem of minorities dominates many political conflicts.”

<sup>12</sup> For illustrative examples, see PAUL A. SAMUELSON, *ECONOMICS* (10<sup>th</sup> edn.; New York: Macmillan, 1976); Robert C. Ellickson, *Of Coase and Cattle: Dispute Resolution Among Neighbors in Shasta County*, 38 *Stan. L. Rev.* 623 (1986); Jack L. Goldsmith and Eric A. Posner, *A Theory of Customary International Law*, 66 *U. Chi. L. Rev.* 1113 (1999).

The second classical approach, derived from the traditions of Niccolo Machiavelli and Thomas Hobbes, in contrast, tends to emphasize the idea that every increase in the freedom of social intercourse tends to pave the way to the eruption of war, turmoil, and chaos. The more deregulated the social and economic processes of a given body politic become, the closer it moves to the original “state of nature” in which everyone acts as an enemy of everyone else, “continual fear and the danger of violent death” reign over every aspect of social life, “and the life of man [is] solitary, poore, nasty, brutish, and short.”<sup>13</sup> If there can be found any hope to overcome this grim tendency, declares the second school of social theory, it is solely through the creation of a centralized Leviathan, a powerful despotic institution which through the sheer supremacy of its force and power can impose its iron will on the rest of the society so as to compel everyone by the simple “terror thereof” into general obedience and order.<sup>14</sup>

The newly established conventional wisdom of the new ILTMC discourse emphatically rejects both of these approaches. Its starting premise explicitly accepts that the international community must never leave the questions of ethnic governance, minority-majority relations, and nationalism to the free winds of fate. Clearly, asserts the new ILTMC dogma, there can be no such thing as a spontaneously emerging peace in international affairs. One would have to be completely deluded to believe in the existence of a Smithian invisible hand that could bring a stable and long-lasting equilibrium into every area of social life. If left unattended, most ethnic tensions tend to escalate into open conflicts. Violence, chaos, and mayhem will ensue if the international community does not take continuous, systematic, and purposeful regulatory interventions. That said, it does not necessarily follow from this that the best way to accomplish that task would be to create some kind of an international Leviathan.

It is not the philosophy of Hobbes and Machiavelli whose ideological spectre haunts the common narrative of the new ILTMC discourse most consistently. The background sensibility on which the new ILTMC dogma is based derives, rather, from a

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<sup>13</sup> For illustrative examples, see HANS MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (2<sup>nd</sup> edn., New York: Alfred Knopf, 1954); ARNOLD WOLFERS, *DISCORD AND COLLABORATION: ESSAYS ON INTERNATIONAL POLITICS* (Baltimore: The Johns Hopkins University Press, 1962).

<sup>14</sup> THOMAS HOBBS, *LEVIATHAN* 227 (London: Penguin, 1985).

completely different ideological origin. In the modern juridical environment it is most commonly known under the rubric of the Montesquieuvian “rule of law.” In historical terms, however, its genealogy goes back significantly further than this. It is essentially the ontological theory of the Platonic-Judeo-Christian Logocentric tradition of the Word-become-God that underlies the doxic structures of the new ILTMC discourse and serves as the ideological bedrock of the new ILTMC project.<sup>15</sup>

Follow the paths drawn by international law, observe the precepts of multiculturalism, resist the ideas of unrestrained nationalism, and peace and justice will be yours, declares the new ILTMC dogma.<sup>16</sup> Navigate through the turbulent seas of ethnic politics under the guidance of the international standards, and you will reap the fruits of stability and freedom.<sup>17</sup> Certainly, the challenges of nationalism are tremendous and formidable, but, rest assured, imparts the new conventional wisdom of the ILTMC discourse, a body of special expertise has already been produced, a toolbox of standards,

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<sup>15</sup> Pierre Schlag explores this idea from a slightly different angle in Pierre Schlag, *Law as the Continuation of God by Other Means*, 85 Cal. L. Rev. 427 (1997). Further on the practical logic of the “rule of law” tradition, see also PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 7-18, 36-90 (Chicago: The University of Chicago Press, 1999).

<sup>16</sup> “[B]ecause many peoples do not live in a clearly delimited geographical area, it is simply impossible to redraw the borders of our continent in such a way that state borders and ethnic borders would coincide. Inevitably, many states would continue to have national minorities living on their territories. Against this background it becomes even more important to oppose strongly any form of nationalism that does not respect the rights of minorities ... The only way to reduce tensions and to avoid conflicts concerning national minorities is to make them realize that they are free to develop fully their identity and that, even if they give up trying to create their own state, ways are open for them to fulfil many of their aspirations. No stable European order is possible without solving the problems of minorities and excessive nationalism.” (Max van der Stoep, “We Only Fully Realize the Full Significance of Human Rights When We Have Lost Them”, in ZELLNER AND LANGE, *supra* n.11, 35, 37.)

<sup>17</sup> “[O]nly the recognition of the rights of persons belonging to a national minority within a state, and the international protection of those rights, are capable of putting a lasting end to ethnic confrontations, and thus of helping to guarantee justice, democracy, stability and peace.” (Preamble of the Proposal for an Additional Protocol to the Convention for the Protection of Human Rights and Fundamental Freedoms, Concerning Persons Belonging to National Minorities, as appended to Recommendation 1201 (1993), Parliamentary Assembly of the Council of Europe; available from THE COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY DOCUMENTS, at <http://assembly.coe.int/Documents/AdoptedText/ta93/erec1201.htm>.)

solutions, policies, and formulas,<sup>18</sup> that can help you to tackle every single one of them. Seize it, accept it, believe it, invest all your trust in its wisdom, and you will find the path to the land of peace, order, justice, and prosperity, for the ultimate knowledge which this canon of standards imparts is not just some ordinary compendium of speculative theories, but the magic know-how of freedom, equity, and optimal governance.

No feature characterizes the surface philosophy of the new ILTMC discourse more exhaustively than its unwavering belief in the mysterious capacity of a body of abstract standards to provide a fully adequate response to the most complex political challenges confronted by the modern society without any resort to the hegemonic violence of a Leviathan. No feature reveals the latent ideological momentum of the ILTMC project more tellingly than its continuous insistence on representing the newly established ILTMC canon of standards not as an artificial construct created in the course of an intense political struggle, but as a politically neutral embodiment of the objective truth of good governance.

One of the main functions of all conventional wisdoms has always been to obfuscate the actual reality of the underlying social processes. What kind of social processes have been obfuscated by the conventional wisdom of the new ILTMC discourse? What kind of mystificatory role has it played in the development of the new ILTMC project? What sort of unpleasant political facts has it helped to conceal and what categories of political actors would normally find these facts so deeply unpleasant as to require them to be concealed in this way? To catch an initial glimpse into these and other related questions, let us turn now briefly to the history of one international organization's efforts undertaken on this front following the end of the Cold War.

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<sup>18</sup> "I tend to favour a pragmatic approach ... and then to opt for formulas which would provide the best chance of relative stability." (Wolfgang Zellner and Max van der Stoep, "Interview with the OSCE High Commissioner on National Minorities," in ZELLNER AND LANGE, *supra* n.11, 13, 26.)



## Section Two

### What Lies Beneath: the Conference on Security and Co-operation in Europe (CSCE) and the Rise of the New ILTMC Project

#### *a. The History of the CSCE Evolution and the Great Transformation of the Post-Cold War Europe*

The first comprehensive statement of the CSCE policy on the subject of the treatment of minority communities came less than a year after the unification of the two German republics.<sup>19</sup> Adopted in the summer of 1990, the Copenhagen Document of the Second CSCE Conference on the Human Dimension dedicated a whole section to outlining the new pan-European consensus relating to the decision of the minorities question.<sup>20</sup> Less than a half year later it was followed by the Charter of Paris for a New Europe,<sup>21</sup> and in another half a year, by the Geneva Report of the CSCE Meeting of Experts on National Minorities.<sup>22</sup> Between them, these three documents can be considered today to have codified all the main aspects of the CSCE's substantive stance on the matter of minorities treatment during this initial post-Cold War stage, the Copenhagen Document still being widely regarded as the most comprehensive authoritative statement on the subject in the modern era,<sup>23</sup> even if from the ideological perspective it is probably the Geneva Report that deserves significantly more attention, since it turned out to be the first international

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<sup>19</sup> On the negotiating history of the CSCE ILTMC-related documents, see further Alexis Heraclides, *The CSCE and Minorities: the Negotiations behind the Commitments*, 3 Helsinki Monitor 5 (1992).

<sup>20</sup> *Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE*, Second Conference on the Human Dimension of the CSCE, 29 July 1990. All cited CSCE and OSCE documents are available from THE OSCE DOCUMENTS LIBRARY, at <http://www.osce.org/documents/>.

<sup>21</sup> *Charter of Paris for a New Europe*, 2<sup>nd</sup> CSCE Summit of Heads of States or Government, 21 November 1990; *supra* n.20.

<sup>22</sup> *Report of the CSCE Meeting of Experts on National Minorities*, 19 July 1991, *id.*

<sup>23</sup> Cf. Zellner and van der Stoep, *supra* n.18, 14; JACKSON PREECE, *supra* n.4, 48-9, 136; PATRICK THORNBERRY AND MARÍA AMOR MARTÍN ESTÉBANEZ, *MINORITY RIGHTS IN EUROPE* 17 (Strasbourg: Council of Europe Publishing, 2004).

document whose title unequivocally confirmed not only the possibility but also the existence of such a phenomenon as an international expertise in the question relating to the treatment of minority communities.<sup>24</sup>

Be that as it may, in the end, however, it turned out to be neither the Copenhagen nor the Geneva meetings that produced the most important landmarks in the development of the CSCE/OSCE approach to the international problematic of minorities treatment. Indeed, the first most noteworthy achievement on this front did not actually take place until a full year after the Geneva meeting, when in the second decision of the 1992 Helsinki Summit of the Heads of State or Government, the CSCE participating states agreed to establish the first full-time European institution to deal with the question of minority protection on the international level, the CSCE High Commissioner on National Minorities (HCNM).<sup>25</sup> The second most important event followed two years later. In December 1994, at the 4<sup>th</sup> CSCE Summit in Budapest, the participating states resolved to transform the increasingly proceduralized *Conference* on Security and Co-operation in Europe into a permanently institutionalized *Organization*. The CSCE gave way to the OSCE.<sup>26</sup>

What were the main socio-theoretical trends that lay behind these events? To get a general sense of the political dynamics characteristic of this phase of the CSCE/OSCE response to the problematic of minority protection, let us consider briefly the main document adopted at the Budapest Summit.

Like all other CSCE/OSCE documents of that rank, the Budapest Declaration opens with a customary adulation of the 1975 Helsinki Final Act.<sup>27</sup> The students of the institutional theory will, of course, immediately recognize the basic logic behind this ritual. Every adulatory invocation of the institution's founding documents tends to cultivate a general sense of ideological continuity between the newly proposed policy measures and

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<sup>24</sup> Following the Geneva meeting, the importance of the ILTMC project to the CSCE process increased so rapidly that already by 1994 commentators began to observe that "minority ... issues belong to the core of the CSCE activities." See, e.g., Arie Bloed, *The CSCE and the Minority Issue*, 5 Helsinki Monitor 82 (1994). Cf. Heraclides, supra n.19, 5: "It is generally acknowledged that the CSCE has been at the forefront among intergovernmental forums in developing the rights of minorities." On the highly politicized atmosphere that dominated over the Geneva meeting's negotiations, see also id., 13-5.

<sup>25</sup> Decision II, *The Document of the Helsinki Summit of the CSCE*, Helsinki, 10 July 1992, supra n.20.

<sup>26</sup> *Budapest Summit Declaration*, 4<sup>th</sup> CSCE Summit of the Heads of States or Government, 1994, supra n.20.

<sup>27</sup> *Final Act of the Conference on Security and Co-operation in Europe*, Helsinki, 1 August 1975, supra n.20.

the organization's constitutional moment. The immediate practical effect of such an achievement normally is to lend the former an additional degree of historical and institutional legitimacy while reinforcing the latter's general authority as an ever-timely source of guidance and order. By downplaying the radicality of the introduced reforms in such a manner, the ritual of adulatory invocation also tends to induce a greater degree of consent on the part of the various power elites whose anxiety about the redistribution of power and welfare within the institutional structure in question could otherwise block or hinder the swift passage of the reform.

To understand the full character of the Budapest Declaration, consequently, one needs to begin by bracketing out all customary references to the Helsinki Final Act and grasping the Declaration as a political event located within its own immediate context. That context, for the current purposes, can be said to consist essentially of a dynamic dialectical interplay involving two general processes: the disintegration of the former socialist bloc and the accompanying domestic regimes, a process started sometime in the late 1980s and effectively completed with the disintegration of the Yugoslav federations in 1990-1993, and the institutional transformation of the old CSCE structure into the new OSCE one. By virtue of the former, the power elites of the CSCE's former western bloc acquired an historic opportunity to renegotiate the original power balance underlying the Helsinki process. By virtue of the latter, they also acquired a unique chance to entrench the new power balance in a long-lasting institutional structure.

Needless to say, however, one of the first steps that had to be taken to open the way for these transformations was to construct a new institutional philosophy. In order to receive a new political direction, the Helsinki process first had to receive a new ideological content. The solution found to that challenge by the Declaration's authors came to be most succinctly restated in paragraphs 4 and 5 of the Declaration:

4. ... Since we last met, there have been further encouraging developments. Most vestiges of the Cold War have disappeared. Free elections have been held and the roots of democracy have spread and struck deeper. Yet the path to stable democracy, efficient market economy and social justice is a hard one.

5. The spread of freedoms has been accompanied by new conflicts and the revival of old ones. ... The plagues of aggressive nationalism, racism, chauvinism, xenophobia, anti-semitism and ethnic tension are still widespread. Along with social and economic instability, they are among the main sources of crisis, loss of life and human misery.

Three themes immediately spring to attention in the quoted passage. The first one is the theme of the liberal-democratic quest. The newly established OSCE community, suggest the authors of the Budapest Declaration, is essentially a community brought together by the tenets of liberal democracy. Every participant of the Helsinki process is portrayed to be committed without any reservations to the “spread of freedoms,” the creation of an “efficient market economy,” and the cultivation of “the roots of democracy.” It is in the pursuit of these and only these goals and values, arrives the logical implication, that the *raison d’être* of the whole CSCE enterprise has to be sought.<sup>28</sup>

That said, immediately add the authors of the Declaration, the journey to the liberal-democratic stability, of course, has not been an easy one to make. Grave challenges have faced the CSCE travellers on that road. New threats and perils, some unexpected, others misunderstood, have emerged since the fall of the Berlin Wall – the second theme of the Budapest Declaration – that now promise to undo every encouraging development achieved by the CSCE community. To deal with these threats in the most efficient way, the old CSCE structures can no longer be considered adequate. A new environment calls for a new set of institutional solutions.<sup>29</sup> Enter the concept of the OSCE and the underlying theory of *institutionalizing* the regional transition towards liberal democracy.

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<sup>28</sup> By comparison, as the repeated references to “lasting peace,” *détente*, and “overcoming distrust” make clear, the enterprise originally envisaged by the Helsinki Final Act era was inspired mainly by the considerations of *realpolitik* and military security. Whatever attention was paid to the protection of human rights at the time was mostly limited to the questions related to the freedom of religion and freedom of emigration, both items being developed by the Western bloc as an arm-twister against the socialist countries. See Roth, *supra* n.10, 5. For further reflection on the evolution of the original CSCE agenda, see Wilhelm Höynck, *The Role of the CSCE in the New European Security Environment*, 5 Helsinki Monitor 16, 17-8 (1994) (emphasizing the arms control dimension).

<sup>29</sup> Consider the message suggested by the language the CSCE Secretary General, Wilhelm Höynck, used in his October 1993 address to the Netherlands Society for International Affairs (*id.*): “the gap between vision and reality is growing,” “serious doubts as to the effectiveness of [existing] political solutions in coping with our

Against the background of the traditionally decentralized pattern of the international political process, the ideological imports of this centripetal turn seem to be rather difficult to overlook. First, unlike the traditional structures of multilateral diplomacy, international organizations tend to create a consistently unisonic pattern of decision-making. Before the Budapest Summit, there had been only one democracy-promoting international organization in the region, the Council of Europe. Now, with the advent of the OSCE, there were two. The pan-European liberal-democratic reform received a very considerable boost with the Budapest Declaration. Second, unlike the Council of Europe, the newly-created OSCE was a structure conceived under the rubric of an international security mandate. Security mandates, as a rule, tend to provide executive powers of a far more considerable and flexible scope than the non-security ones. If the idea of centralizing the liberal-democratic reform project by institutionalizing it then essentially meant that no member state of the CSCE community would have the chance to stray too far from the common path; the idea of doing so within the framework of a security organization effectively meant there would be provided a far more efficient executive structure for overseeing that than before.

But what exactly were the new threats and perils that endangered the liberal-democratic reforms in Europe following the end of the Cold War? The first among the threats listed in the Budapest Declaration, and by implication, therefore, also probably the most dangerous one, is the “plague of aggressive nationalism.” A main source of “crisis, loss of life and human misery,” the European nationalism of the Budapest Summit era seems to be a very far cry from the vital dynamic force its Versailles-era predecessor had been. The portrayal of nationalism in decidedly negative tones<sup>30</sup> and its subsumption in the

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new problems,” “the spread of instabilities,” “now we have to provide for another quantum leap in cooperation,” “structural change is underway,” “making a meaningful contribution to new stability,” etc.

<sup>30</sup> Cf. Max van der Stoep, “The Role and Importance of Integrating Diversity”, in ZELLNER AND LANGE, supra n.11, 151, 159: “Above all, we must realize that the forces of extreme nationalism constitute the greatest enemy of a peaceful Europe. ... [T]hey are directly responsible for the bloody conflicts which have erupted in the last ten years. ... We have seen how fast the ethnic card, once played, can create an atmosphere of suspicion, hatred and fear. .. Extreme nationalism profits from the division of societies through the demonisation of ‘the other’ and it attributes guilt by association such that even the most innocent are forced to withdraw to the security of their purported ‘nation’ notwithstanding the absence of strong ties. ... We must treat the threat as extremely serious and we must not tolerate its manifestations.” Cf. Mullerson,

same item series as racism, xenophobia, and anti-Semitism forms the third main theme against whose background the Budapest era of the OSCE minorities discourse has to be approached.

The institutionalization of the liberal-democratic quest in response to the ever-growing threats and perils of nationalism, racism, and ethnic tension – this is the gist of the Budapest Summit’s surface political philosophy. But what could have made these threats and perils so important and so dangerous?

The authors of the Declaration appear to have no doubts about what must be the right answer to that question.

The emergence of the new pan-European crises and threats, announces the Budapest Declaration, reflects first of all the failure to apply the established CSCE principles and commitments.<sup>31</sup> Had the latter been implemented correctly and faithfully by all CSCE members, follows the logical implication, none of the current woes besetting the CSCE community would have materialized. Put differently, the established normative code which exists within the framework of the CSCE process at the moment of the Budapest Summit, and which includes, of course, the minorities regimes established by the Copenhagen Document, the Charter of Paris, and the Report of the Geneva Meeting, can still be understood to comprise a fully adequate set of policy responses to the minorities question within the CSCE area. However, as the string of various events that have taken place since the adoption of that code clearly indicates, in a sufficiently high number of cases the institutional mechanism through which this code has been implemented has proven itself to be grossly inadequate. As a response to this failure, the first practical measure that has to be taken by the CSCE community has to be to replace that mechanism with a new one, which in the present context effectively means substituting the old CSCE structure with the new OSCE one.

Certainly, given the bloody record of the Yugoslav wars of secession, it would be perhaps completely unwarranted today to suggest that the inclusion of “aggressive nationalism” as the first item in the list of the new threats confronting the project of European stability in the post-Cold War era by the authors of the Budapest Declaration

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supra n.10, 803: “the role of nationalist ideology and nationalist movements is becoming ever more destructive and negative.”

<sup>31</sup> *Budapest Summit Declaration*, supra n.26, §5.

had been an entirely gratuitous move. The scale of the human and political catastrophe that accompanied that pronouncement, it seems, was far too considerable to justify such a conclusion. Nevertheless, it would probably be equally, if not even more, unwarranted to suppose as a result that in the circumstances in which it was made that move was not also intended to carry some other, more immediately strategic significance. Indeed, it is only when we begin to consider the immediate ideological implications it has had on the development of the basic argument alongside which it had been made, the argument by which the necessity of replacing the old CSCE structure with the new OSCE one was established, that the full practical functionality of the “aggressive nationalism” peg starts to reveal itself. Consider briefly the following observation.

The territorial mandate of the new OSCE organization created by the Budapest Summit, from the formal point of view, remains exactly the same as that of the CSCE process before it. No new territories were added to the new institutional structure in Budapest, and no old territories were excluded from it. However, as the common knowledge of the time indicates, the geography of the nationalist conflicts in the CSCE area in the early 1990s was primarily confined to the territories covered by the countries of the former socialist bloc. Nowhere else within the CSCE area had any kind of nationalist conflicts been registered or detected. Placing these two facts side by side with one another and against the background of the newly declared theory that the post-Cold War conflicts in the CSCE area had been essentially caused by the respective CSCE members’ failure to implement the existing CSCE standards, what is going to be the most immediate conclusion inviting itself to be made?

The underlying logic of the new theory inaugurated by the Budapest Declaration suggests, first of all, that there must exist some sort of direct correlation between the degree of the incidence of violent conflicts in the CSCE area and the failure of the old uninstitutionalized CSCE process to ensure an adequate observance of the existing CSCE standards. Extending this premise logically, it follows that wherever one finds a situation where there had been no open violent conflicts in the CSCE area in the years following the end of the Cold War, the old CSCE process can be presumed to have performed its task well and, by presumption, to still remain adequate for its mission. If a new OSCE structure has to be created, consequently, it has to be created *essentially* as a response to the failures of the political dynamics occurring in those states where the violent conflicts did take place.

According to the conventional wisdom of the CSCE process, none of the states constituting the old Western bloc had witnessed the spread of aggressive nationalism in the years following the fall of the Berlin Wall.<sup>32</sup> Northern Ireland and Turkish Kurdistan were both afflicted by terrorism, not national liberation movements. So were also Corsica and the Basque country. None of the “old Western” states, consequently followed the implicit message, had a real, objective, and urgent necessity to have the old CSCE process replaced with a new OSCE structure. For them, the status quo existing on the eve of the Budapest Summit had worked fine. The countries of the former socialist bloc, in contrast, seemed to have all fallen prey to the worst forms of the nationalist virus as soon as the Moscow-backed regimes started to wane. Kosovo, Karabakh, Transdnistria, Bosnia, Cluj – it was the objective political needs of the former East that had created the greatest demand for the new institutional structure. It was for them – which is effectively to say, as a response to their failures – consequently, that the new OSCE was being created.

In the final analysis, the use of the “aggressive nationalism” peg by the authors of the Budapest Declaration in conjunction with the institutional reform proposal was not perhaps completely gratuitous and without substance. But the way in which the objectivity of nationalism was diagnosed in practice – no aggressive nationalism found in Belfast or Barcelona, but a lot of it in Belgrade and Bucharest – and the way in which it was merged in one fell swoop with racism, xenophobia, and anti-Semitism (as opposed to, say, economic instability or massive unemployment) certainly did leave a very particular imprint on the logic of the new OSCE process. As a result of that conjunction, the implicit understanding that became inscribed into the background of the Budapest Declaration was that it had been essentially for the countries of the former socialist bloc, and, consequently, primarily in order to work *on* them, that the new OSCE structure had to be created. A close analysis of the actual record of the OSCE practice in the last twelve years proves this conclusion beyond any doubt. In the time passed since the days of the Budapest Summit the OSCE organs have virtually never turned their attention or taken any kind of intrusive action into the domestic affairs of any one of the OSCE’s North Atlantic members. On paper, all CSCE member states may have been equal in that process of the massive

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<sup>32</sup> Cf. Mullerson, *supra* n.10, 800: “Nationalism is, of course, a phenomenon which one can find in most countries where different ethnicities live together, but in former communist countries, which practically all are multi-ethnic states, nationalism has a particularly fertile soil.”



redistribution of sovereign powers which was effected by the Budapest Declaration. In practice, however, it was mostly the effective sovereignty of the former socialist bloc that was taken away to nourish the functionality of the new OSCE structure.

But on its surface, of course, the Declaration did not betray any signs of such bias. The new OSCE was unveiled as a structure designed to address the problems facing all its member states as a whole, the chief declared purpose of the Budapest reform being to “further enhance the CSCE’s role as an instrument for the integration of [all its member] States in resolving security problems.”<sup>33</sup>

What was the logic by which that goal was proposed to be achieved? The new OSCE structure, explained the authors of the Budapest Declaration, was intended to become “a primary instrument for early warning, conflict prevention and crisis management” in the region.<sup>34</sup> Obviously, that was not a completely new ground for the CSCE to explore: over the course of the preceding several years it “has [already] created [several] new tools to deal with new challenges,” including the Office for Democratic Institutions and Human Rights (ODIHR) and the CSCE HCNM.<sup>35</sup> But it certainly represented a considerable advancement on everything that had come before.

Still, to resolve to create a permanent institutional structure to serve as a practical instrument for conflict prevention and crisis management, however timely it might sound, was one thing, and to unveil a concrete plan for the achievement of those goals was a completely different thing. What exactly did the Declaration’s authors have in mind when they spoke of all those conflicts, crises, and challenges that confronted the new OSCE community? What kind of programmatic vision did they imagine would have to guide the newly-created organization in its fight against the threats of aggressive nationalism, racism, and xenophobia? What exactly was it supposed to do to help its member states to advance ever further down “the path to stable democracy, efficient market economy and social justice”? Once more, a very peculiar, even if not entirely unwarranted, theory seems to have inspired the Declaration’s authors.

To build “a secure and stable [O]SCE community, whole and free,” explained the second operative paragraph of the Declaration, the answer, yet again, had to be sought in

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<sup>33</sup> *Budapest Summit Declaration*, supra n.26, §7.

<sup>34</sup> *Id.*, §8.

<sup>35</sup> *Id.*, §9.

“the principles of the Helsinki Final Act and subsequent CSCE documents” reflecting those very “values which will guide our policies, individually and collectively.”<sup>36</sup> In the unlikely case anyone would suddenly start to wonder just what exactly that formula might have actually meant, an explanation was immediately offered: “[t]he protection of human rights, including the rights of persons belonging to national minorities, is an essential foundation of democratic civil society.”<sup>37</sup> How could one know what rights those rights in fact included? The answer, once more, could hardly be any clearer: the rights in question were the same rights that had been first inaugurated in the Helsinki Final Act and that were later reaffirmed and elaborated in “all other CSCE documents relating to the protection of the rights of persons belonging to national minorities,” which, of course, included the various “tools” produced by the OSCE HCNM – “[t]he participating States ... commend the work of the HCNM in this field”<sup>38</sup> – as well as the Council of Europe – “[t]he participating States ... take note of the adoption, within the Council of Europe, of a Framework Convention on [sic] the Protection of National Minorities, which builds upon CSCE standards in this context.”<sup>39</sup>

Fast-forward nine years. It is December 2003 now, and the OSCE starts to unveil its new strategy vision for the twenty-first century. Four years have passed since the end of the NATO campaign in Kosovo, two years since the Albanian uprising in Macedonia. Less than a year remains before the European Union is set to acquire a common land border with Russia. The ambitious political vision conceived a decade earlier at the Budapest Summit has gradually matured into a fully-fledged political dogma. Where a decade earlier one could only find the contours of a grand but vague aspiration, one sees now a fully crystallized, sophisticated ideological regime.

The gravest “[t]hreats to security and stability in the OSCE region,” announces the new OSCE Strategy Document, “are today more likely to arise as negative, destabilizing

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<sup>36</sup> Id., §2.

<sup>37</sup> Id., *Budapest Summit Decisions*, “VIII: The Human Dimension,” §2.

<sup>38</sup> Id., 21. Cf. Para 3. of *Statement 1 of the Ministerial Council of the OSCE*, OSCE’s 10<sup>th</sup> Meeting of the Ministerial Council, 7 December 2002, MC DOC/1/02: “We encourage concerned countries in the region to adopt and implement legislation on national minorities consistent with their international commitments and with the recommendations of the OSCE High Commissioner on National Minorities.”

<sup>39</sup> *Budapest Summit Decisions*, “VIII: The Human Dimension,” §§ 22, 25.

consequences of developments that cut across the politico-military, economic and environmental and human dimensions, than from any major armed conflict.”<sup>40</sup>

Weak governance, and a failure by States to secure adequate and functioning democratic institutions that can promote stability, may in themselves constitute a breeding ground for a range of threats. Equally, systematic violations of human rights and fundamental freedoms, including the rights of persons belonging to national minorities, can give rise to a wide range of potential threats<sup>41</sup>

as can also “environmental degradation,”<sup>42</sup> “demographic factors and widespread degradation of health,”<sup>43</sup> and “the actions of terrorists and other criminal groups”<sup>44</sup> among others.

How should these multifarious threats be best addressed in the complex context of the post-Kosovo world? The answer, as ever, is clear and unambiguous: exclusively through collective international action.

“No single State ... can, on its own, meet the challenges” engendered by the new security environment.<sup>45</sup> The first thing to do for all OSCE member states, consequently, concludes the Strategy Document, is to accept as unquestionable the proposition that any programmatic response to such challenges, if it is to be successful, has to be produced exclusively on the international level.<sup>46</sup> Whoever may be inclined to resent the implications of this theory is then immediately reminded of the incontrovertible fact that in the end it is always the “[n]on-compliance with international law and with OSCE norms and principles [that] lie[s] behind the immediate causes of violent conflict.”<sup>47</sup> To address the challenges raised by the new security environment, consequently, the first practical measure that the

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<sup>40</sup> §3, *OSCE Strategy to Address Threats to Security and Stability in the Twenty-First Century*, OSCE 11<sup>th</sup> Ministerial Meeting, 2 December 2003, MC DOC/1/03.

<sup>41</sup> *Id.*, §4.

<sup>42</sup> *Id.*, §5.

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*, §7.

<sup>45</sup> *Id.*, §52.

<sup>46</sup> *Id.*, §2.

<sup>47</sup> *Id.*, §9.

Organization's members have to take is to reaffirm their "respect for ... international law"<sup>48</sup> and to help the OSCE "build on [its] unique strengths and expertise."<sup>49</sup>

But what exactly do these "unique strengths and expertise" consist of?

First of all, explains the Strategy Document in its opening operative paragraph, the source of the OSCE's unique institutional strength derives from its unique membership circle. The breadth of its territorial ambit allows the OSCE to include within its sphere of action not only the whole of the European continent, but also North America, Russia, and even "parts of Asia."<sup>50</sup> No other regional organization can boast of the same achievement. Never mind, of course, the fact that the greater tends to the scope of any mandate the less efficient tends to become its performance, or the fact that virtually all OSCE activities have so far been limited to the countries of the former social bloc: the greater the scope of the OSCE's territorial reach, imply the authors of the Strategy Document, the greater is the OSCE community's potential to meet the challenges of the new security environment.

The second most important source of the OSCE's institutional strength is identified in the same passage. Quite unsurprisingly, it turns out to be the OSCE's "multidimensional concept of ... comprehensive ... and indivisible security."<sup>51</sup> Certainly, every alert political commentator after Carl Schmitt may recall at this point that the fuzzier the notion of the security threats tends to become, the more difficult it will be to challenge any intrusive action taken by the security-managing structures under the banner of security-enhancing measures, the more problematic, by implication, will become any attempt to establish a system of effective accountability for those undertaking such measures. But in the present case, of course, none of these considerations appear to be of any consequence. In the context of the OSCE practice, suggest the authors of the Strategy Document, the more adaptable the concept of the security threat becomes, the better it is for the OSCE community, the more prepared the Organization becomes for the various challenges posed to its members' well-being by the new security environment.

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<sup>48</sup> Id., §2.

<sup>49</sup> Id., §17.

<sup>50</sup> Id., §1.

<sup>51</sup> Id.

The vacuity of such reasoning patterns hardly requires any further discussion.<sup>52</sup> Everything else aside, neither its territorial mandate, nor its theory of security can supply an international organization with the required amount of political capital if it purports to act on the same scale as the OSCE. Every reasonable observer will be able to recognize that, and the Strategy Document's authors must have surely understood this. How is it then that they must have expected to justify their proposal to recognize the OSCE as the most capable international actor in the newly emerging security environment?

To grasp the logic structuring their stance on this question, let us turn to paragraphs 16-27 of the Strategy Document.

During the three decades of its existence, explain the authors of the Strategy Document, the CSCE/OSCE group has developed an unparalleled range of "special mechanisms for early warning and peaceful settlement of conflicts."<sup>53</sup> No other international institutional structure of comparable magnitude can boast the same wealth of practical experience, tools, capacity-building techniques, and security-enhancing know-how. Its network of early warning and crisis managements institutions together with its matchless system of "tools of rapid expert assistance and co-operation teams"<sup>54</sup> have put the OSCE over the last few years in a position where it can not only assist its members in the implementation of all their international commitments, but also do so in ways no other international organization can replicate, which should allow it to enter the new political era with a sense of poise and self-confidence.<sup>55</sup>

Of course, admit the authors of the Strategy Document, "[i]n a changing security environment, threats [will always be] evolving, and not all threats [are, therefore,]

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<sup>52</sup> It is nevertheless rather widespread. See, e.g., Hans van Mierlo, *The Significance of the OSCE in the European Security Structure*, 6 Helsinki Monitor 6 (1995).

<sup>53</sup> *OSCE Strategy to Address Threats to Security and Stability in the Twenty-First Century*, supra n.40, §22.

<sup>54</sup> *Id.*

<sup>55</sup> Cf. Höynck, supra n.28, 19-21 (listing the [O]SCE procedures and its "high human dimensions standards" and "the newly acquired capability for concrete action" among the chief qualities enabling the Organization to perform its challenging tasks); Van Mierlo, supra n.52, 8-9 (observing that "although other organizations are active in the field of preventive diplomacy, the OSCE is unique because of its specialization" which consists, essentially, of the most comprehensive deployment of "non-military measures" for the purposes of early warning and early action, and which makes "the OSCE ... the most appropriate organization for conflict prevention and crisis management in the region").

foreseeable.”<sup>56</sup> And “the prime responsibility for providing security for their citizens,” of course, always “lies with the participating States” themselves, which thus always remain “accountable to their citizens and responsible to each other for implementation of their OSCE commitments.”<sup>57</sup> But

[a]s a regional arrangement [created] under Chapter VIII of the United Nations Charter [and] a key instrument for early warning, conflict prevention, crisis management and post-conflict rehabilitation in its region,<sup>58</sup>

the OSCE has proven beyond any doubt its ability to respond promptly to every emerging threat in the most efficient manner.<sup>59</sup> An “extensive set of instruments” acquired by the Organization in the process, “rang[ing] from all forms of political consultations to special representatives, experts and fact-finding missions,”<sup>60</sup> has enabled it not only to respond successfully to every immediate challenge to international peace and security in the region, but also to “promote and assist in building [stable and secure] democratic institutions and the rule of law”<sup>61</sup> across the OSCE area, thus addressing the main long-term causes and processes behind the new security threats.

Of course, proceeds the background message, both the breadth of its territorial mandate and the multidimensionality of its theory of security have been very important in ensuring the OSCE’s continuous success. However, in the end, it has been exactly this unprecedented wealth of political know-how – the know-how of preventive diplomacy which allows “conflict prevention and crisis management by non-military measures” through “activities that occur either before the outbreak or escalation of violence or after the acts of violence have run their course”<sup>62</sup> – and nothing else that has to be credited with the main achievements of the Organization.

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<sup>56</sup> *OSCE Strategy to Address Threats to Security and Stability in the Twenty-First Century*, supra n.40, §16.

<sup>57</sup> *Id.*, §18.

<sup>58</sup> *Id.*, §24.

<sup>59</sup> *Id.*, §25.

<sup>60</sup> *Id.*

<sup>61</sup> *Id.*, §27.

<sup>62</sup> Van Mierlo, supra n.52, 8.

But what exactly does this know-how consist of? Like the Budapest Declaration a decade earlier, on its surface the new OSCE Strategy Document continues to emphasize the same concepts of the rule of law, human rights, fundamental freedoms, democracy, and due process.<sup>63</sup> Like a decade earlier, the background theory underlying the OSCE's institutional philosophy continues to identify the principles of liberal democracy as the main component of the security-enhancement recipe. Like a decade earlier, the Organization's main selling pitch continues to revolve around the basic thesis that democracy, liberalism, and social stability always walk hand in hand, the implied message behind it being that because the OSCE has always had a special interest in all three of these questions, it has now a great deal more valuable advice to offer to its members.

But consider now for a moment a statement produced exactly a year after the new Security Document by one of the OSCE's former chairmen.

Speaking at the OSCE's 12<sup>th</sup> Ministerial Council in December 2004, the Portuguese Foreign Minister, Antonio Monteiro, explained that one of the main reasons why the OSCE had become such "an exceptional tool for dealing with [the] new and complex security environment" of the post-Cold War era was not that it simply provided a qualitatively new forum for the creation of a permanent political dialogue in the region. The OSCE's most important achievement and strength, rather, derived from its unprecedented wealth of experience and its unparalleled capacity to assist those "States [which] suffer from a lack of democratic tradition and [whose] national institutions still seem to be distant from the democratic aspirations of their own people ... to further strengthen and implement a set of common [European] principles and values based on democracy, the rule of law, and the respect for human rights," including those that "ensure that the rich cultural, religious and ethnic diversity of this vast area becomes a source of strength, not of strife."<sup>64</sup>

What is the significance of these brief passing remarks? Certainly, at the first sight there seem to be no real major differences between Monteiro's statement and the new Strategy Document. Both documents seem to focus on the same key concepts and emphasize the same basic themes: democracy, the rule of law, ethnic diversity, and the

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<sup>63</sup> *OSCE Strategy to Address Threats to Security and Stability in the Twenty-First Century*, supra n.40, §§ 4, 36.

<sup>64</sup> *Speech of the Portuguese Minister for Foreign Affairs, Ambassador Antonio Monteiro*, OSCE 12<sup>th</sup> Ministerial Council, 6 December 2004, MC DEL/27/04.

protection of human rights as the core common values of the OSCE community. But notice the two short references in the quoted passage about the construction of cultural diversity and the satisfaction of the democratic aspirations. Placing these comments side by side with our earlier observations about the implicit logic underwriting the institutional transformation of the old CSCE into the new OSCE, what kind of a background message can be read beneath the immediate surface of Monteiro's statement?

Clearly, what Monteiro's language seeks to import in the quoted passage is not just some abstract belief that peace, freedom, and democracy in Europe are somehow inseparable from one another. What emanates from his words, rather, is a much stronger conviction, a conviction which, when vocalized in its fullest form, seems to suggest that for the first time in the post-World War II era an international organization has emerged which in its own self-understanding not only sees itself *able* to restructure its members' domestic political regimes but also understands itself to be in a significantly *better* position to do that than the members themselves, a conviction one of the major sources of which derives from the fact of this organization's accumulated body of expertise in the area of ethnic governance.<sup>65</sup>

A mere fourteen years separate Monteiro's statement from the Charter of Paris. A mere fourteen years that also mark the completion of an enormous transformation in the development of the modern European political sensibility.

In the same place where at the end of 1990 one would still find nothing more than just a high degree of enthusiasm for a new form of multilateral diplomacy – “a periodic platform for dialogue between East and West,” in the words of one a Dutch Foreign Minister<sup>66</sup> – a decade and a half later one already discovers a fully-fledged regime of self-assured regional paternalism. From an innocently looking structure of general political dialogue ostensibly set out as nothing more than a good-faith attempt to ameliorate the pan-European security environment threatened by the rise of aggressive nationalism and

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<sup>65</sup> Cf. Max van der Stoep, “In the OSCE Area there Can Be no Zones of Lesser Humanity”, in ZELLNER AND LANGE, *supra* n.11, 107, 108: “the OSCE has to assume as its responsibility the burden of supporting individual participating States which cannot by themselves solve the problems which are confronting them. This effort of co-operative implementation is not only a political duty of OSCE States but also a moral one.” Cf. text accompanying *infra* n.89.

<sup>66</sup> Van Mierlo, *supra* n.52, 6.



ethnic tensions in the former socialist bloc in fewer than twenty years the CSCE process has grown into nothing less than a fully functional model of a pan-European imperialism, accompanied, as all imperialist models tend to be, by an unceasing rhetoric of peace, freedom, civilization, and progress.<sup>67</sup>

How has this new Great Transformation of our age happened? What has enabled its passing to occur so swiftly and successfully? What kind of political mythology has been concocted to cover up its ongoing actuality? How did it work? What role has international law played in this process? None of these questions would normally invite themselves to an easy, linear resolution. None, correspondingly, have yet been explored with any degree of systematicity in the contemporary international law scholarship. Yet few events in the post-Cold War history have had such far-reaching implications for the constitution of the global political order or symbolized as vividly the end of the traditional nation-state politics in modern-day Europe as those which have accompanied that Great Transformation. So, how should this discrepancy be best rectified now?

How should those momentous changes which have taken place between the Charter of Paris and the statement of Ambassador Monteiro be given their full due in the contemporary international legal theory? How ought those tremendous gaps which they have left in the discipline's intellectual order to be finally completed now? What kind of challenges does their analytical capture pose to the post-Cold War international legal discourse and how should international law scholars go about recognizing and addressing this problematic?

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<sup>67</sup> See EDWARD W. SAID, *CULTURE AND IMPERIALISM* 8 (London: Vintage, 1994): "As I shall be using the term, 'imperialism' means the practice, the theory, and the attitudes of a dominating metropolitan centre ruling a distant territory; 'colonialism', which is almost always a consequence of imperialism, is the implanting of settlements on distant territory. As Michael Doyle puts it: 'Empire is a relationship, formal or informal, in which one state controls the effective political sovereignty of another political society. It can be achieved by force, by political collaboration, by economic, social, or cultural dependence. Imperialism is simply the process or policy of establishing or maintaining an empire.' In our time, direct colonialism has largely ended; imperialism, as we shall see, lingers where it has always been, in a kind of general cultural sphere as well as in specific political, ideological, economic, and social practices." Further on the basic features of imperialism, see also DAVID HARVEY, *THE NEW IMPERIALISM* (Oxford: Oxford University Press, 2005); MICHAEL HARDT AND ANTONIO NEGRI, *EMPIRE* (Cambridge, Mass: Harvard University Press, 2000).

No single set of international reforms that have accompanied the ideological journey from the Charter of Paris to the statement of Ambassador Monteiro, it seems, can provide a better insight into these questions than that which has taken place under the rubric of the new ILTMC project. In no other field of international lawmaking has such a high concentration of ideological resources taken place as here. In no other dimension of the international political process can such a comprehensive illustration of the new governance techniques developed by the architects of the post-Cold War order be found as in the area of the new ILTMC. To see how and why that is so, let us turn now briefly to the telltale mythology created by the OSCE HCNM in his practice in the last thirteen years and the basic story it suggests about the continuous rise of the new ILTMC project.

*b. From Necessity to Sufficiency: the Rise and Rise of the New ILTMC Project*

It would be impossible to pinpoint the exact moment when the paradigmatic shift from the political sensibility of the Paris Charter to that of the statement of Ambassador Monteiro had actually taken place. Indeed, in all probability, such a moment never in fact happened in the conventional meaning of the term. The two sensibilities most likely had co-existed side by side for quite some time before one started to outweigh the other.

Nevertheless, what can be asserted with a more or less substantial degree of certainty is that even in the context of the brief span of the post-Cold War history the firm conviction underlying the statement of Ambassador Monteiro comprises a relatively recent phenomenon.

Certainly, already in 1991, the Geneva Meeting Report had found it possible to conclude that peace, justice, stability and democracy in the European region were effectively unachievable if the ethnic, cultural, linguistic and religious identity of Europe's national minorities was not protected,<sup>68</sup> and that to ensure the latter, all present and future work undertaken within the OSCE area would have to be based not on the member states' individual domestic strategies but solely on those "commitments [that were] contained in

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<sup>68</sup> Supra n.22, Part I.

the relevant adopted CSCE Documents, in particular those in the Charter of Paris for a New Europe and the Document of the Copenhagen Meeting of the Conference on the Human Dimension of the CSCE,”<sup>69</sup> since “[i]ssues concerning national minorities ... are matters of legitimate international concern and consequently do not constitute exclusively an internal affair of the respective State.”<sup>70</sup> By logical implication, this effectively suggested that, as far as the newly emerging global political consensus was concerned, only a policy programme based on the internationally-endorsed theory of governance could in fact guarantee a successful resolution of the minorities question, and that, consequently, no CSCE member had either the right or, indeed, the *competence* to experiment with the minorities question on its own outside the ambit of the common programme.

Nevertheless, as late as October 1995, the first occupier of the OSCE HCNM post, the Dutch diplomat Max van der Stoel, at an official OSCE meeting in Warsaw, still saw it appropriate to recognize that while “[l]asting piece and stability on this continent are possible only if the Copenhagen Document, the UN Declaration on the Rights of Persons belonging to National Minorities and the Framework Convention of the Council of Europe are fully implemented,” a mere compliance with these international norms and standards “is by no means a panacea”: although their full implementation “is essential for the protection of the identity of minorities,” it “will often not be sufficient to ensure an adequate solution to ... specific problems.”<sup>71</sup>

A little more than a year and a half later, the situation had undergone a radical change.

Speaking at the Michael Akehurst memorial lecture at the University of Keele, in the summer of 1997, the HCNM suddenly appeared to suggest that observing the internationally supplied code of minority standards no longer had to be seen as only a *necessary* factor when it came to building piece, order, justice, and democracy in the OSCE area, but also, increasingly, a relatively *sufficient* one.

What might have enabled such a dramatic ground shift? Shortly before the Warsaw report, the HCNM, according to his own admission, had decided to request the newly established non-governmental organization called the Foundation on Inter-Ethnic

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<sup>69</sup> Id.

<sup>70</sup> Id., Part II.

<sup>71</sup> Van der Stoel, *supra* n.65, 108-9.

Relations “to convene a conference with some outstanding experts to study [the] problems [related to the newly emerging minorities question].”<sup>72</sup> The basic idea behind the request, at the first sight, seemed quite unremarkable. If the existing international standards were so basic that they could only provide a starting framework for the development of a comprehensive minorities policy but not a sufficient basis for efficiently addressing the full spectrum of the minorities problematic, then maybe “it would be useful to invite some internationally recognized experts to make recommendations on an appropriate and coherent application” of these standards,<sup>73</sup> on the premise that, perhaps, in one way or another, this might lead to a more adequate development of the ILTMC canon.

What came out eventually as the result of that initiative was a rather remarkable document entitled the Hague Recommendations Regarding the Education Rights of National Minorities. What made it so remarkable and what immediately distinguished it from all other previous statements on the subject was not so much its content as its general tenor: for the first time since the creation of the new OSCE structure, a new ILTMC document was issued and it came out not in the shape of *political* statement but as a statement of objective *expertise*.

Certainly, the official position on the matter, according to the document itself, continued to remain that “[t]he Hague Recommendations are not intended to be comprehensive. They are meant to serve as a general framework which can assist States in the process of minority education policy development.”<sup>74</sup> Yet, as his later pronouncements on the question have unequivocally confirmed, in the eyes of the HCNM himself the document has certainly come to represent something far bigger than just a “general framework” designed to serve as a merely helpful implement existing for the convenience of the OSCE member states:

I [am] pleased to find the Hague Recommendations so well received by relevant parties as a *practical and balanced guide* for resolution of many *specific* issues.

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<sup>72</sup> Id., 111.

<sup>73</sup> Max van der Stoep, “The Hague Recommendations Regarding the Education Rights of National Minorities”, id., 141, 142.

<sup>74</sup> *Explanatory Note to the Hague Recommendations*, available from <http://www.osce.org/item/2931.html>.

To the extent that the Recommendations may usefully guide governments in elaborating more appropriate and acceptable laws and policies with regard to minority education, they *will* serve to resolve or at least diminish an important source of inter-ethnic tension. I am, therefore, pleased to see several states already having referred to the Hague Recommendations in the context of current national discussions. For example, in early April [of 1997] the [Latvian] Minister of Education states that the Hague Recommendations would form the basis for Latvian law and policy in this field. This was well received by representatives of national minorities and, *if realized, will remove* a major source of tension between the majority population and national minorities ... The Hague Recommendations have now been translated into several languages. Through this kind of modest initiative, I believe much can be done to respond to the root causes of inter-ethnic tensions.<sup>75</sup>

A professional diplomat, van der Stoel is, of course, skilled in the art of vague statements like no one else, but the bottom-line message in the quoted passage is still rather self-evident.

Certainly, begins the HCNM, the formal appearance of the Hague Recommendations is nothing more than what its title implies: a potentially helpful set of general suggestions. But a formal appearance is always only that and nothing else. It is not the real indication of the document's substantive essence. Indeed, the only correct way to approach the Hague Recommendations, implies the Commissioner, is to view them not as a framework of helpful suggestions, but as the expertly identified quintessence of a *practicably assured strategy* for the mitigation of *numerous* types of inter-ethnic tensions, an objectively developed strategy which the governments of all OSCE member states experiencing problems with the handling of the minorities question should bear in mind as something that not only would be appropriate and advisable to incorporate domestically but which also, if adopted, would be essentially sufficient to provide the foundation for the development of *all* domestic minority education regimes. The logical implication deriving from such a suggestion is hard to miss: whatever may have come before the Hague Recommendations had only been a set of politically determined guidelines designed to

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<sup>75</sup> Van der Stoel, *supra* n.73, 142-3 (italics added).

indicate which steps may be *necessary* to take in order to reach the condition of good governance; what is coming now is a fully functional expert know-how of what steps are positively *sufficient* to accomplish this task. The Rubicon has been crossed. Where previously one had found only a spirit of pledges and advice, one now begins to detect a spirit of directives and instructions.<sup>76</sup>

Two years later, and whatever ambiguities may have marred the language of Keele are now decisively erased. In a formal interview conducted a mere few weeks after the NATO campaign in Kosovo, the HCNM declared:

Working on minority issues, I could of course not follow my own subjective views on specific issues in the educational or the linguistic fields. I had to base myself on international standards. The 1990 OSCE Copenhagen Document on the human dimension and the Framework Convention of the Council of Europe are especially important in this respect. But these documents do not provide specific recipes for each problem one encounters; often they indicate more the direction for finding solutions. Reflecting on this, my staff and I felt that it ought to be possible to elaborate these standards a bit further. We asked a group of outstanding educational and linguistic experts to perform this task.<sup>77</sup>

The two documents that came out as the result of that request, the already mentioned 1996 Hague Recommendations and their twin 1998 Oslo Recommendations Regarding the Linguistic Rights of National Minorities, did not, of course, have any legally binding force.<sup>78</sup>

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<sup>76</sup> Van der Stoel, of course, is not the only person to have aired this sentiment. Although he is certainly one of its most visible exponents, he is definitely not alone today in professing the view that over the course of the last decade the new ILTMC project, not least thanks to the work of the Foundation on Inter-Ethnic Relations, has developed a veritable know-how of good governance in the area of ethnic governance. For the expression of a similar attitude, see, among others, John Packer and Guillaume Siemienski, *The Language of Equity: the Origin and Development of the Oslo Recommendations Regarding the Linguistic Rights of National Minorities*, 6 Int'l J. Min. & Group Rts. 329, 349-50 (1999); Sally Holt and John Packer, *OSCE Development and Linguistic Minorities*, 3. Int. J. Multicult. Soc. 99 (2001); YEORGIOS I. DIACOFOTAKIS, EXPANDING CONCEPTUAL BOUNDARIES: THE HIGH COMMISSIONER ON NATIONAL MINORITIES AND THE PROTECTION OF MINORITY RIGHTS IN THE OSCE 124-6 (Athens: Ant. N. Sakkoulas Publishers, 2002).

<sup>77</sup> Zellner and van der Stoel, *supra* n.18, 23.

<sup>78</sup> *Id.*

Nevertheless, they did still have a very “considerable value.” What was its source? “First of all,” explained van der Stoel, “they help in determining the line I have to take in specific situations.”<sup>79</sup> Secondly,

It is especially the fact that we have succeeded in having a group of people work on this who are well-known throughout Europe for their outstanding competence in these fields that has given the recommendations their weight.<sup>80</sup>

In a similar vein, speaking several years later at the Hague Academy of International Law, van der Stoel observed:

[the previous standards existing in this field] might not always provide the High Commissioner a sufficiently clear directive on what position he has to choose when a Government and a minority have a quarrel about educational rights. In order to escape this dilemma, I decided in 1996 to invite a group of eminent international experts on education to further elaborate the concept of educational rights of minorities. They formulated the Hague recommendations regarding the educational rights of national minorities. They have not been formally adopted by States participating in the OSCE, but the high reputation of the authors give them considerable weight.

In 1998 a similar study was undertaken by a group of experts on linguistic rights, resulting in the Oslo recommendations regarding the linguistic rights of national minorities. They also play a big role in the international discussion on the subject, and, like the Hague recommendations, were of great help to me in my work.<sup>81</sup>

Put differently, the two sets of recommendations are not just a restatement of the various international normative obligations incumbent on the OSCE member states by virtue of their membership in that organization, but, rather, a combination of, on the one hand, an

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<sup>79</sup> Id., 23-4.

<sup>80</sup> Id., 24.

<sup>81</sup> Max van der Stoel, *The Role of the OSCE High Commissioner on National Minorities in the Field of Conflict Prevention*, 296 Recueil des Cours 9, 21 (2002).

objective expert opinion delivered by an outstanding cohort of internationally recognized specialists, and, on the other hand, a practical statement of the HCNM's own institutional-professional know-how.

Once more, the bottom-line message seems quite difficult to miss. The two documents in question, explains the HCNM in effect, are not just a product of a subjective attempt to rationalize some ambitious political project. They are, rather, a formal embodiment of the objective experience of an expert institution constituted as an independent and impartial instrument of conflict prevention<sup>82</sup> backed up by the best insights of the foremost international authorities on the subject. Both by their form and by their content, the Hague and the Oslo Recommendations are thus intended not just as a helpful summary of the existing ILTMC regime, but as a fully operationalizable set of instructions that have to be applied in practice not only by the HCNM himself, but by the governments of the participating states too: “[the Recommendations] help [me] in determining the line I have to take. But also a government can find inspiration in these documents. And that is not just hope.”<sup>83</sup> Put differently, should a participating government decide to accomplish the same goals for the securement of which the HCNM has been constituted, the basic expectation incumbent on it within the OSCE structure will be that it would do so by turning *directly to these documents and nowhere else*.

Surely, though, when the Commissioner suggests that the participating governments should only seek inspiration in the Expert Recommendations, while admitting that the Recommendations have not been formally adopted by the OSCE member states, this can only mean that the latter are completely free to take advantage of the experts' wisdom if they so wish but are not in fact in any way compelled to do so if they do not? Alas, the situation, it seems, is not nearly as simple as it may at first appear.

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<sup>82</sup> For the formal statement of the HCNM mandate, see *supra* n.25.

<sup>83</sup> Zellner and van der Stoep, *supra* n.18, 24. Cf. Packer and Siemienski, *supra* n.76, 349-50: “When considering the Oslo Recommendations ... it should be kept in mind that they ... should be viewed as an attempt to provide further specificity with regard to the application of existing international standards. ... The ultimate objective was to render useful guidance for domestic authorities [not] the final word on the topic of the linguistic rights of national minorities. [However,] the experts who elaborated The Oslo Recommendations felt that if the recommendations would be implemented in their present form, the OSCE region would be both more stable and secure and the probability of inter-ethnic conflict would decline significantly.”



Consider, for a start, the following three facts about the HCNM's general role in the context of the OSCE political process.

1. As the Budapest Declaration and the 2003 OSCE strategy document make clear, when it comes to pursuing the goals of "peace, justice, stability and democracy," every OSCE member state is obliged to observe, passionately, wholeheartedly, and relentlessly, every single standard laid down in the Organization's documents. Unless the OSCE itself decides otherwise, every commitment postulated within its framework is quite literally intended to be "irreversible."<sup>84</sup>

2. By the terms of the established structure, the HCNM is empowered to exercise the OSCE's full competence in the area of the ILTMC policy.<sup>85</sup> Everything the HCNM pronounces on the subject matter of minority treatment is by default considered a pronouncement of the whole of the OSCE itself. As van der Stoel himself put it, everyone involved "realize[s] that the views expressed in the recommendations are not exclusively those of the Commissioner, but also reflect the views of a considerable number of states."<sup>86</sup>

3. Even the briefest survey of the OSCE practice suffices to confirm that every formal recommendation the HCNM has issued on the subject of minority governance in the past thirteen years has been automatically and virtually without reservations endorsed by the Organization's governing bodies.<sup>87</sup> The record of the numerous acts of international pressure mobilized by the HCNM against the recalcitrant states<sup>88</sup> quite unequivocally suggests that whenever the HCNM decides to get involved in a particular minorities situation, the option of disagreeing with his considered opinion effectively disappears.<sup>89</sup>

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<sup>84</sup> See *supra* n.21.

<sup>85</sup> See *supra* n.25.

<sup>86</sup> Van der Stoel, *supra* n.81, 17.

<sup>87</sup> See KEMP, *supra* n.5, 72-4, 88-9, 92; Zellner and van der Stoel, *supra* n.18, 17-9. Cf. Max van der Stoel, "National Minority Issues in the OSCE Area," in ZELLNER AND LANGE, *supra* n.11, 161, 163.

<sup>88</sup> See KEMP, *supra* n.5, 73, 99.

<sup>89</sup> *Id.*, 73: "As the protection of persons belonging to national minorities is a consideration for EU accession, the High Commissioner was able to use his links with the European Commission and EU Presidency to great effect. This leverage was crucial in affecting changes in Slovakia (particularly in regard to the law on minority languages), and in Latvia and Estonia (regarding language laws) in 1999. Indeed, Van der Stoel's criticisms of the Mečiar Government's treatment of minorities played a role in keeping Slovakia out of the first group of accession countries in 1997." See also *id.*, 96-100 (describing the HCNM's capacity to influence the policy

Anyone who tries to challenge that is doomed to fail before even getting a chance to make her case.<sup>90</sup>

To be sure, the instructions which the Expert Recommendations provide to their addressees most of the time remain quite general from the point of view of their immediate substance. At least in that sense, the documents in question, one could say, could be described more as a set of guidelines than an actual ILTMC code. In the final analysis, however, this does not in any way alter the essential character and ideological import of the Recommendations. To paraphrase Terry Eagleton, just because a geography teacher does not tell her class the exact height of Mount Everest down to the last millimetre does not in itself make her statement that it is the highest mountain in the world look meaningless.<sup>91</sup> One does not need to detail every leaf, or even every branch, of a tree to confirm that what one has drawn is a cedar and not a bear oak.

Still, even if there had been any room for doubt after Oslo, the matter was quite conclusively put to rest with the arrival of the 1999 Lund Recommendations on the Effective Participation of National Minorities in Public Life:

The twenty eminent persons that drafted the Lund recommendations tried to produce what could be called a 'toolbox' of instruments which could be used to give the national minorities the confidence that their interests will be given the necessary attention, but in a way which will respect the territorial integrity of the state. In this way a balance of interests can be achieved. The majority can feel assured that the multi-ethnic state in which they form the largest group is not going to dissolve, and the minority or the minorities are provided with what they

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positions of the European Commission, the Council of Europe, the United Nations Development Programme, and the World Bank).

<sup>90</sup> There are a number of different tactics the HCNM uses to marginalize those who disagree with his opinions. See, e.g. Max van der Stoep, "In Trying to Perform My Tasks, I Am Making Enemies," in ZELLNER AND LANGE, *supra* n.11, 123, 123: "it is my duty to be an instrument of conflict prevention ... and to promote ethnic harmony. I am not going to hide from you that, in trying to perform these tasks, I am making enemies. But I also have to add that these enemies are almost invariably extreme nationalists. I think this is inevitable. I would even feel that I would not perform my task properly if they would not object to my activities and views. These nationalists are not interested in promoting inter-ethnic harmony – they prefer to stir up inter-ethnic hatred."

<sup>91</sup> See TERRY EAGLETON, *AFTER THEORY* 204 (London: Penguin, 2004).

need most: special provisions which will ensure that their interests will not be neglected.<sup>92</sup>

The new ILTMC canon is not *just* a statement of the policy-measures *necessary* to avoid the outbreaks of genocides and violent inter-ethnic conflicts. It does not *just* tell you what exactly you must do to ensure an *optimal* development of the educational and linguistic dimensions of ethnic governance in the post-Cold War era. It knows what *exactly* is needed to build a stable inter-ethnically balanced social regime in *every area* of public life in *every* European state.<sup>93</sup> It knows what exactly an ideal multicultural society looks like and what having a *good government* is. And it also knows what each member of every polity has to do in order to ensure that.

“The official vision of political life at the uppermost level” in the European Communities, wrote Noel Malcolm shortly after the Treaty of Maastricht laid down the foundations of the newly established European Union, “is essentially that of ... a technocrat’s ideal, a world in which large-scale solutions are devised to large-scale problems by far-sighted expert administrators.”<sup>94</sup> The official vision that has come to underlie the new ILTMC project since the second half of the 1990s seems hardly different.

### *c. The Ideological Character of the New ILTMC Project*

The paradigm of the social order and the assumptions underlying it inscribed into the surface of the new ILTMC discourse may certainly look quite eccentric – how much of an overstatement would it be to conclude that the passage quoted on the previous page does not effectively imply the existence of a *formula of social happiness?* – but the longer one contemplates the background model on which it relies, the more familiar its general thrust seems to appear.

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<sup>92</sup> Zellner and van der Stoel, *supra* n.18, 25.

<sup>93</sup> Cf. *Introduction to the Lund Recommendations* (*infra* n.124): “The standards have been interpreted specifically to ensure the coherence of their application.”

<sup>94</sup> Noel Malcolm, *The Case against ‘Europe’*, 74/2 *Foreign Affairs* 52, 64 (1995).

The belief in the political power of an intangible order of interconnected maxims accompanied by a principled investment of trust in the general capacity of a transcendent system of norms and standards to supply a sufficient solution to the problems of social intercourse has a very long pedigree in the modern political discourse. In ideational terms, it harks back to the days of the Rousseauvian theory of the social contract and that classical liberal sensibility so exhaustively captured by John Adams's yearning for a "government of laws, not men." It is the same sensibility that has inspired the Lockean philosophy of constitutionalism and gave coherence to the Westphalian school in international legal thought. Derived from the Judeo-Christian tradition of Logocentrism mediated through the prism of Platonic idealism and the Cartesian philosophy of reason-worship,<sup>95</sup> the basic logic on which that belief is based has found perhaps its most consistent formulation in the works of the 18<sup>th</sup>-century German philosopher, Immanuel Kant.

For Kant, one of the central goals of human existence was to develop the condition of personal autonomy.<sup>96</sup> Analysing Kant's own views and the subsequent moral-philosophical tradition derived from him, it appears that, in the Kantian understanding, personal autonomy meant first and foremost "a combination of freedom and responsibility [.] a submission to laws which one has made for oneself."<sup>97</sup> Put differently, in the Kantian tradition, the rational agent, whose chief defining feature, according to Kant, is a perennial aspiration for autonomy, is believed to achieve self-realization only at that point when she

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<sup>95</sup> For various discussions of the defining role of reason-worship in the age of Enlightenment, see generally, ROY PORTER, *FLESH IN THE AGE OF REASON: HOW THE ENLIGHTENMENT TRANSFORMED THE WAY WE SEE OUR BODIES AND SOULS* (London: Penguin, 2004); MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977* (Brighton: The Harvester Press, 1980); MAX HORKHEIMER, *CRITICAL THEORY: SELECTED ESSAYS* (transl. by Matthew J. O'Connell and others; New York: Herder and Herder, 1972). For a dose of healthy skepticism in conceptualizing the state of reason-worship today, see also Umberto Eco, "On the Crisis of the Crisis of Reason", UMBERTO ECO, *FAITH IN FAKES: TRAVELS IN HYPERREALITY* 125 (transl. by William Weaver, London: Vintage, 1998).

<sup>96</sup> Further on Kant's theory of autonomy, see IMMANUEL KANT, *GROUNDWORK OF THE METAPHYSICS OF MORALS* (trans. H. J. Paton; New York: Harper and Row, 1964). The notion of autonomy in Kant's works is quite different from the more traditional notion derived from the historical practice of Greek city-states. Further on the Kantian reappropriation of the Greek concept, see Andrews Reath, "Autonomy, Ethical", in EDWARD CRAIG (ED.), *ROUTLEDGE ENCYCLOPEDIA OF PHILOSOPHY*, v.1 586 (London and New York: Routledge, 1998).

<sup>97</sup> ROBERT PAUL WOLFF, *IN DEFENSE OF ANARCHISM* 14 (New York: Harper and Row, 1970).

comes to abide exclusively by those commands alone which originate in her reason. The crucial factor that distinguishes Kantians at this point from the later anarchist tradition (which, in fact, shares far more in common with Adam Smith than most of its adherents would find comfortable to admit) is the subsequent assertion that, to the extent to which they are actually made in the exercise of “free will” and are thus cleansed of all unreasonable contaminations, these commands, even though they are in fact self-derived, will also be an accurate reflection of the Categorical Imperative, a “universal law of nature” comprising a set of objective, categorical moral principles. Based on a logic lifted directly from Aquinas<sup>98</sup> and to that extent essentially incomprehensible in the modern secular environment,<sup>99</sup> Kant’s argument, thus, effectively runs more or less along the following lines: (i) when a subject comes to be autonomous, she starts to produce her own commands; (ii) the commands produced through an autonomous exercise of will are necessarily in consonance with the Categorical Imperative; (iii) thus even though the subject acts in a self-guided fashion, her actions are in fact reflective of the universal Reason;<sup>100</sup> (iv) the shortest route to social order, then, is to spread personal autonomy as much as possible: once you achieve that, there will be no need for anything as brutal and crude as the Hobbesean Leviathan to keep the society in check, the universal Reason will

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<sup>98</sup> For a brief overview of the relevant theses in Aquinas’ thought and their ideological contextualization, see ERICH FROMM, *THE FEAR OF FREEDOM* 59-63 (London: Routledge, 2001); Umberto Eco, “In Praise of St. Thomas”, in ECO, *supra* n.95, 257. My understanding of Aquinas’s thought is formed by my reading of Averroës. See also, consequently, ALFRED L. IVRY (ED.), *AVERROËS: MIDDLE COMMENTARY ON ARISTOTLE’S DE ANIMA* (transl. by Alfred L. Ivry; Provo, UT: Brigham Young University Press, 2002).

<sup>99</sup> Its opaqueness is the first thing modern commentators observe about Kant’s conception of personal autonomy. See, e.g., Thomas E. Hill, “The Kantian Conception of Autonomy”, in JOHN CHRISTMAN (ED.), *THE INNER CITADEL: ESSAYS ON INDIVIDUAL AUTONOMY* 91 (New York: Oxford University Press, 1989); ROBERT PAUL WOLFF, *THE AUTONOMY OF REASON: A COMMENTARY ON KANT’S GROUNDWORK OF THE METAPHYSICS OF MORALS* 178 (Gloucester, MA: Peter Smith, 1986).

<sup>100</sup> This may seem somewhat contradictory, and, indeed, some modern commentators have made exactly that point. See, e.g., FROMM, *supra* n.98, 60 (talking of Aquinas): “To bridge the contrast between the doctrine of freedom and that of predestination, he is obliged to use the most complicated constructions; but, although these constructions do not seem to solve the contradictions satisfactorily, he does not retreat from the doctrine of freedom of the will and of human effort, as being of avail for man’s salvation, even though the will itself may need the support of God’s grace.”

bring us to of peace, stability, and prosperity, taking care of everything else, and whoever doubts that Reason must necessarily be so benevolent is probably slightly dim.<sup>101</sup>

The resemblances between the Kantian Logocentric theory of governance through reason and the Westphalian theory of international relations are truly striking. Consider, for a start, the classic passage from the *Lotus* case:

This way of stating the question is also dictated by the very nature and existing conditions of international law. International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.<sup>102</sup>

The secret of preserving peace and stability in the international arena, says the Court, is captured in the fundamental principle that the organization of international relations ought to be ensured solely through the autonomous choices made by independent states. In other words, there is no need to establish a centralized institution to ensure the orderliness of international relations; the system of abstract rules devised by the community of independent states through the exercise of their individual sovereignties can provide for every regulatory need. Moreover, so long as the independence of each state remains as full as possible, there is also no need to institute any other system of rules in the international arena. To ensure their peaceful co-existence and fruitful cooperation, it is enough that the states are bound only by those rules which emanate from their own free choices. No

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<sup>101</sup> “Kantian autonomy... requires acknowledging the principles not only as ‘self-imposed’, ...but also as unconditional requirements of *reason*” (Hill, *supra* n.99, 93). “[E]very minimally rational agent, in [autonomous] deliberating and acting, is actually committed to [the Categorical Imperative], as an overriding rational constraint.” (Ibid., 99).

<sup>102</sup> *S.S. Lotus case (France v. Turkey)*, PCIJ, Series A, No. 9, 1927, 18.

additional or higher law is needed. The positive legal order, as long as it is created in accordance with this procedure, will be fully sufficient.<sup>103</sup>

The parallels between the *Lotus* dictum and the Kantian theory are quite striking. In both cases, the stability of the social order is expected to be secured not by some centralized hegemonic regime, but by a disembodied set of self-devised norms created by a community of actors whose main characteristic, essentially, is that they aspire to be mutually autonomous in the sense that they try not to be subjected to each other's personal wills. To the extent to which each of them manages to remain autonomous in this sense, the rules they end up positing through the accumulation of their free choices in both cases are imagined to develop into nothing less than a direct reflection of some transcendent universal wisdom under whose guidance every conceivable problem of social ordering, can be addressed and resolved, which is the main reason, ultimately, why there is no need for them to institute any kind of centralized government structure. If it works through rules, why involve institutions?

Certainly, a sensibility of that kind must have made a lot of sense in the Logocentric world of Kant and Aquinas. No matter what happened to the commonwealth of the righteous, whatever nasty impasse it had entered, whatever calamity it had faced, in the religious mind of a Christian logocentrist, it could always rely on the certainty of "God's endless grace." Men should trust their free will, ran the basic argument, and not worry about exercising it, because, at the end of the day, God is not just almighty but also kind. His kindness and generosity ensure that the acts of the righteous will never stray too far from the path of wisdom. This makes certain that a righteously exercised free will shall always lead to the sight of Peace and Justice. Because that is how God's grace works, and that is what Man's bargain with God is ultimately all about: peace and justice through the observance of divine wisdom.

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<sup>103</sup> Despite numerous calls for reform (see, e.g., Individual Opinion of Judge Alvarez, *The Corfu Channel Case (Albania v. United Kingdom) (Merits)*, ICJ Reports 1949, 4, 39), this pattern of thought remains the dominant international law dogma to the present day. See, generally, ANTONIO CASSESE, *INTERNATIONAL LAW* 3-21 (2<sup>nd</sup> edn.; Oxford: Oxford University Press, 2005). See also ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* (Cambridge: Cambridge University Press, 2005); PIERRE-MARIE DUPUY, *DROIT INTERNATIONAL PUBLIC* (7<sup>e</sup> edn.; Paris: Dalloz, 2004); IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* (5<sup>th</sup> edn.; Oxford: Oxford University Press, 1998); *RESTATEMENT (THIRD) OF FOREIGN RELATIONS LAW OF THE UNITED STATES* (St. Paul, Minn.: American Law Institute, 1987).

Alas, most of us no longer live in that kind of world.<sup>104</sup> For better or for worse, international lawyers cannot proceed anymore on the implicit assumption that no matter how bad things may turn, God's grace can always be expected to fly in at the last moment to save the children of Adam from an imminent disaster. In an age in which all politics has become an exclusively this-worldly affair, there can be no place left for a divine guarantee. A question then immediately arises at this point: taking all this into account, how reasonable can it be for the students of the international legal process to continue to discuss their subject from the perspective of Kantian Logocentrism? How reasonable can it be for anyone attempting to accomplish a political task of the same scale and magnitude as that attempted by the new ILTMC project to insist that this can be done on the basis of what in effect is an ontological theory of medieval Christianity?

Assuming for a moment that the architects of the new ILTMC project could not possibly be less intelligent than an average undergraduate student, how can one explain the fact that they seem to have done everything within their power to propagate the belief that one of the central tasks confronting the international community after the end of the Cold War has been to intervene in the ordering of ethnic governance and that the best way to accomplish that was not by creating a global ethnogovernance authority, akin to, say, the International Football Board or the International Labour Organization, but by constructing an abstract normative canon for the regulation of the questions relating to the treatment of minority communities? That the complex ideological regime eventually created under that rubric fully fit that description, did not exceed its terms, and did not, therefore, involve anything more than the creation of a disembodied set of abstract norms – certainly nothing in the way of a robust institutional structure acting as a *de facto* Leviathan? That because that structure was not created, it has not been necessary to examine it on the subject of its decision-making procedures, the adequacy of its success record, democratic legitimacy, and so on? That the terms of the general discourse this belief promoted made it increasingly difficult to discuss the *executive* aspect of the new ILTMC regime thus leaving the general public effectively unprepared to track and monitor the evolution of the ILTMC project?

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<sup>104</sup> “But our days pass, and still we do not know you fully. Why then do you remain silent? Speak, God.” (ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* 295 (New York: The Free Press, 1984).)



Having removed God from the picture, how can anyone who continues to act as if a body of abstract rules could actually exist which, having been produced solely through the exercise of free will by this-worldly authorities, could, nevertheless, contain some secret magic formula for the building of peace, order, and optimal governance, be considered to act in good faith?

Knowing that international lawmakers do not tend to be generally unintelligent, what kind of explanation can be offered for the fact that the official dogma of the new ILTMC project proceeds on the presumption that a body of objective expert knowledge can be obtained which should be able to relieve the national governments from ever having to count on the luck, intuition, political acumen, negotiating skills, and bargaining talents of their domestic elites when dealing with the challenges of ethnic governance? That a science of ethnic regulation can crystallize that will carry in its folds the mighty power of the transcendent reason? That the ordering of domestic ethnoscaapes can be turned into the mechanistic application of a general algorithm? That the recipe for peace, justice, and order can be fully packed into a set of normative standards?

*d. The Challenge of Explaining the Emergence of the New ILTMC Project*

Commenting on the ideological predilections of the mid-19<sup>th</sup> century political philosophers, Karl Marx famously observed that almost all of their reform programmes essentially derived from the popular assumption that:

[h]itherto men have constantly made up for themselves false conceptions about themselves, about what they are and what they ought to be. They have arranged their relationships according to their ideas of God, of normal man, etc. The phantoms of their brains have got out of their hands. They, the creators, have bowed down before their creations. Let us [, therefore,] liberate them from the chimeras, the ideas, dogmas, imaginary beings under the yoke of which they are pining away. ... Let us teach men ... to exchange these imaginations for thoughts

which correspond to the [real truth] and [the] existing [regimes of injustice] will collapse.<sup>105</sup>

The problem with that view, observed Marx, was that, unfortunately, it was quite fundamentally misguided. Giving the general public the “right ideas” is not normally enough to resolve the problem of social oppression. Stating the “truth” will not, as a rule, suffice to set anyone free. How and why is that so? Marx answers with a metaphor:

Once upon a time a valiant fellow had the idea that men were drowned in water only because they were possessed with the *idea of gravity*. If they were to knock this notion out of their heads, say by stating it to be a superstition, a religious concept, they would be sublimely proof against any danger from water. His whole life long he fought against the illusion of gravity, of whose harmful results all statistic brought him new and manifold evidence.<sup>106</sup>

What is the main message Marx tries to convey in this passage? The answer to this question, I think, is this: the effectiveness of the ideological process by which the dominant regime sustains itself cannot be annulled by simply debunking the regime’s official dogma. It is not just because everyone has been convinced that the new ILTMC discourse tells the truth about the way the social reality works that the ILTMC project has managed to come as far as it has. The viability of hegemonic regimes is not exclusively determined by the practical believability of their dogmas. The march of an ideological project cannot be halted by the simple raising-of-consciousness act because the hidden logic of the ideological process cannot be reduced to the linear schematism of truth, lies, and setting the record straight. Certainly, an ideological regime can always be *weakened* by an act of demystification, but demystification alone will not normally be enough to bring an ideological project down, since, to put it briefly, the life of an ideology is not led only in the domain of lies, deception, and false consciousness. And what this means for the present context, consequently, is this: the practical functionality of the new ILTMC project will not,

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<sup>105</sup> KARL MARX AND FREDERICK ENGELS, *THE GERMAN IDEOLOGY (PART ONE)* 37 (ed. by C. J. Arthur, London: Lawrence & Wishart, 1999).

<sup>106</sup> Id.

in all likelihood, be fully comprehended if we construct our inquiry solely in terms of lies, misapprehensions, and conspiracy theories.

Or, in other words, it will not make sense to try to answer any of the questions asked in the concluding paragraphs of the previous subsection by operating only with the theories of deception, ignorance, and misrepresentation. A far more complex frame of reference will need to be constructed to describe the productive logic of the new ILTMC project. A far more nuanced paradigm and theory of socio-historical causality will have to be put in place to illuminate the conditions enabling the emergence of the new ILTMC regime. To prepare the stage for that, however, let us first take the stock of our emerging problematic once again.

*e. Summarizing the Problematic*

How can the ideals of ethnic self-determination be reconciled with the practical exigencies of multicultural politics? Should national minorities be granted the right to political autonomy? What is the optimal level of ethnicization for democratic politics? When is the duty of protection and care every state owes to its citizens satisfied in the case of minority-language education? How much affirmative action must the state afford to its minority communities? All of these questions, the new ILTMC discourse suggests, it can now provide a fully sufficient answer for; all of them it can now supply with an objective expert opinion, elaborating, explaining, and clarifying every single major aspect of it; all of them, that is, but one: where exactly has that expertise come from?

Clearly, the knowledge of what constitutes “good governance” can never arise by itself, spontaneously, like the Einsteinian Big Bang, without any preceding material cause. Policies and normative standards inscribed into the legal discourse do not emerge like the Leibnizian sufficient reason of their own accord. Kant was probably not a very good lawyer, or at least a very impractical one, if he failed to acknowledge that. Whoever has transplanted his philosophy into the domain of the practical legal process, however, deserves to have their intentions cast under an even deeper form of suspicion.

Few facts could be more self-evident today, more than two centuries after the first seeds of Enlightenment broke through the crust of medieval dogma, than that all social phenomena, including moral and political norms, are entirely *human* creations. Global

benchmarks and standards do not crystallize out of some transcendent universal Ether. They are always produced by concretely positioned historical agents pursuing concretely determined, historically formulated political goals. The Categorical Imperative has as much to do with the content of international law as the level of precipitations on the Easter Island in the second week of February.

Admittedly, no single discipline is inherently superior to any other, but if there is anything the last two centuries of sociological thought from Durkheim to Leslie Sklair may have taught international law, it is certainly that there is no such *place* as a “heaven of legal concepts”<sup>107</sup> in which the transcendent universal Reason resides and the boundaries between legitimate and illegitimate violence, permissible and impermissible affirmative action, democratic and undemocratic governance, collective and individual legal interests, or equitable and inequitable distribution of social welfare are justified and established. All facts of socio-theoretical knowledge are *categorically* historically contingent. If only because of that, they are also always completely and inescapably *political*. There does not, consequently, exist a single chance out of a million of ever explaining the emergence of any particular body of social norms, institutions, or processes without examining first the immediate socio-historical context in which it has been produced and the political stakes involved in its structuration, which these norms, institutions, and processes affect and distribute. No normative canon promoted under any banner, be it the “law of nations” or the “world-best practices,” can be ever comprehended in its full practical existence without first being rigorously investigated on the subject of what Foucault used to call its “hazardous career.”<sup>108</sup>

As we have seen in the previous pages, the rise of the new ILTMC project has become possible not least thanks to the rise of the global cult of international expertise. Its main ideological tenet essentially comes down to the theory “that the general public is best left ignorant, and the most crucial policy questions affecting human existence are best left to ‘experts,’ specialists who talk about their specialty only, and ... ‘insiders,’ people (usually

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<sup>107</sup> See Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Col. L. Rev. 809 (1935).

<sup>108</sup> FOUCAULT, *supra* n.95, 67.

men) who are endowed with the special privilege of knowing how things really work and, more important, of being close to power.”<sup>109</sup>

What is the politics of the global cult of international expertise? What kind of a global society does it create? What kind of a power elite does it authorize and enthrone? When the general public conviction becomes that the project of “building democracy” must be a field of objective expertise in which only those who are in the know should be allowed to make choices, what kind of a meaning does this inscribe in the concept of democracy? What kind of a hegemonic logic is created the moment the general social consensus starts to regard as uncontroversial the view that there should exist a group of people who would know best not only about what must be the most optimal relationship between the executive and the judiciary branches but also about how a working class Serb living in Macedonia should *feel* and *express* his Serbness in public? And what kind of a society do we create by convincing ourselves that the people who admit they have that kind of knowledge – most of them white, male, university-educated, and unable to put together a single sentence in Serbo-Croat – are indeed “experts in that kind of things”?

Seven of the nine “experts” who have drafted the Hague Recommendations were university academics. Four of them were lawyers, three were linguists. Of the remaining two, one was a Dutch government official, the other was a senior curriculum adviser for the Dutch National Institute for Curriculum Development.

Six of the eleven “experts” who drafted the Oslo Recommendations were lawyers, five of them were in full-time academic employment. Only two on the remaining list of five were professional linguists (one employed by a university, another by a government body). One participant represented the European Board of Lesser Used Languages; one worked as an adviser to the Norwegian Forum for the Freedom of Expression; one was a researcher for the Latvian Centre for Human Rights and Ethnic Studies.

Two thirds of the eighteen-strong body of “experts” by whose authority the Lund Recommendations established their legitimacy were lawyers, of them ten were primarily employed as academics teaching various aspects of public international law. What kind of a collective expertise can a group in which more than half of the participants earn their living

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<sup>109</sup> EDWARD W. SAID, REFLECTIONS ON EXILE AND OTHER ESSAYS 119 (Cambridge: Harvard University Press, 2002).

by lecturing about jurisprudence possess? In what field or area? Linguistic policy and religious affairs? Genocide prevention and ethnic conflict management? The practicalities of establishing national-territorial autonomies?

### **Section Three**

#### **Synopsis: the Main Argument and the Basic Terms of Inquiry**

##### *a. The Main Argument*

The basic objective of this work is fairly straightforward. The main substantive thesis I try to defend in these pages is that the general character of the legal-normative processes hidden behind the complex discursive façade erected by the new ILTMC project is in fact far darker and more ambivalent than what is commonly revealed about it by the official ILTMC discourse. To put it somewhat more schematically, the new ILTMC regime established after the end of the Cold War neither does and can do nor is and can be what the established conventional wisdom about it claims on its behalf.

The new ILTMC regime holds itself out as the end product of a long drawn-out expertise-driven project whose central objective from the very beginning has been to develop a system of politically neutral, pragmatic responses to the newly emerging challenges of racism, xenophobia, and aggressive nationalism. The longer one looks at it, however, the clearer it becomes that however generously one interprets the facts this image has to be completely false.

The discourses of the ILTMC community operate on the presumption that the normative regime which they discuss is fully consistent with the ideals of social justice and liberal democracy. In reality, however, the objective predispositions created by this regime have established a political dynamics whose practical impact could never be considered compatible with these ideals in their usual understanding, even if we accept the view that the new ILTMC regime was intended not as a sub-species but as a substantive amendment to the classical liberal theory.

One of the main starting points of the new ILTMC discourse, according to its own admission, was the understanding that in practice every modern society tends to break into

a series of different cultural communities; that some of these communities tend to view themselves as entitled to some form of political autonomy; that not all such self-awarded entitlements can be consistently honoured in practice; that despite this fact, every human individual still has the right to a free and effective expression of her cultural identity as well as the right to live in a state of basic equality with all other such individuals and to contribute to the governance of that sovereign polity in which she lives with more or less the same degree of effectiveness as all other members of that polity. The new ILTMC regime is claimed to rest on this understanding, but the objective dynamics created by it stands so far from what one would normally expect a dynamics inspired by such knowledge to look like that only the most extravagant assessment of it would ever fail to conclude that the image the new ILTMC discourse projects about it is not deeply problematic and that a very significant proportion of claims around which it is organized are not fundamentally untrue.

In a way, one could say, the main substantive argument I try to make in these pages mirrors the scaled-down version of the general law-is-politics claim first made by American legal realists and the first-generation CLS.<sup>110</sup> The original version of that argument<sup>111</sup>—which was made, it must be recalled, in a context in which most of the mainstream legal scholarship refused to accept the idea that the juridical practice is ineradicably ideological — asserted in effect that what is commonly known in modern liberal societies as the legal discourse is essentially indistinguishable from what is commonly known as “pure politics,” meaning that adjudication, for example, was, by default, a completely political process since the argument structure of judicial reasoning was to all intents and purposes the same as that “used in ‘ordinary’ political discussions.”<sup>112</sup>

Formulated in such terms, the claim, rather predictably, attracted quite a lot of fire from the mainstream circles. A stream of angry refutations followed, purporting to prove that not all judges experienced their professional practice the way the legal realists and the CLS crowd described it and that many statistical surveys, in fact, “demonstrated some

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<sup>110</sup> See in particular DUNCAN KENNEDY, *A CRITIQUE OF ADJUDICATION* (Cambridge, MA: Harvard University Press, 1997).

<sup>111</sup> See, e.g., James Boyle, *The Politics of Reason: Critical Legal Theory and Local Social Thought*, 133 U. Pa. L. Rev. 685, 710-3 (1985); UNGER, *supra* n.104, 83-100; Duncan Kennedy, *Legal Formality*, 2 J. Leg. Stud. 351 (1973).

<sup>112</sup> Mark. V. Tushnet, *Critical Legal Theory (without Modifiers) in the United States*, 13 J. Pol. Phil. 99, 107 (2005).

degree of purely legalist, non-political influence on case outcomes.”<sup>113</sup> The irony of these refutations, however well-intentioned some of them may have been, of course, was that in the end they only proved that the law-is-politics claim had been formulated relatively imprecisely, not that it was completely wrong.

As Mark Tushnet put it years later:

Not every [judicial] decision had to be motivated by politics in the usual sense for the “law is politics” claim [for that claim] to be interesting, and strongly critical. It would be enough that *some* decisions were so motivated, and that the ideology of legalism required that *none* were (or at least required that there be a careful account of why the occasional meanly political decision did not undermine the ideology of legalism).<sup>114</sup>

The parallel between the last statement and the main substantive argument of this thesis is rather direct. The basic ideological foundation on which the new ILTMC project rests – that grand conventional wisdom by the means of which it has secured that enormous amount of legitimacy capital which it needs to stay afloat – is essentially the same as the basic ideological foundation of the liberal theory of adjudication. It derives ultimately from the same type of socio-theoretical claim, namely that the complex normative canon created and promoted under the rubric of the ILTMC over the course of the last seventeen years *is not in fact a product of some open-ended subjective political speculations*, but that it actually represents *a politically neutral body of expertise*, established and justified by the fact of its *ascent from a set of technocratic practices based on rigorous empirical studies and objectively different from politics*.

Consider once again the basic language patterns used by the new ILTMC ideologues, starting once more with the HCNM:

In my work as High Commissioner on National Minorities, I have often observed constantly recurring issues regarding the specific needs and desires of particular

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<sup>113</sup> Id., 106.

<sup>114</sup> Id.



minorities in various situations. There is a great variety of such situations, and no two are exactly alike. Nonetheless, they display some essential similarities.<sup>115</sup>

They could almost be characterized as constant aspects of the relationship between minorities and the states they live in. Let me indicate them by three words: communication, participation and integration. First, communication. ... In many cases an effective solution might be the establishment of a minorities' council or roundtable through which the authorities and representatives of the minorities can engage in a structural dialogue. ... Sometimes what is needed is an independent state body to which persons belonging to minorities can turn when they feel that the authorities are not paying due attention to their problems and concerns. The figure of an ombudsman comes to mind, an independent personality who can take up cases and make the authorities pay attention to the and to the concerns expressed. ... Second, participation. ... Of immediate relevance in this respect is the right of persons belonging to national minorities to effective participation in public affairs. That includes participation in the affairs relating to the protection and promotion of the identity of such minorities, in the first place in parliament and government. ... Third, ... the issue of integration ... Questions concerning language laws, citizenship requirements et cetera all have to do with this issue.<sup>116</sup>

Ethnic minorities consider especially linguistic and educational rights as essential for maintaining their identity. They are usually not satisfied with the teaching of their language as a subject in their schools, they want separate minority language schools. Moreover, large minorities often insist on the setting up of separate minority State universities. For majorities, the main concern is to ensure the loyalty of the minority toward the State they are living in.<sup>117</sup>

In general terms, one may consider nationalism to be a principal cause of national minority problems. ... People's reactions are usually based on perceptions,

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<sup>115</sup> Van der Stoel, *supra* n.30, 154.

<sup>116</sup> Max van der Stoel, "Human Dimension Commitments Are Matters of Direct and Legitimate Concern to All Participating States," in ZELLNER AND LANGE, *supra* n.11, 49, 53-4.

<sup>117</sup> Van der Stoel, *supra* n.81, 18.

particularly in relation to things which are dear to them. These can be manipulated by xenophobic and chauvinistic slogans. ... To confront the root causes of excessive nationalism, one has to break down “nationalist” issues to their core elements. More often than not, these concern political participation, education, language, culture, or resource allocation.<sup>118</sup>

Relatively minor problems can, if not tackled, develop into major sources of tension. That is why I have decided to become increasingly involved in the development of contacts and concrete projects to look into and possibly tackle the root cases of ethnic tension. The first example I would like to mention lies within the field of education. It is clear that education is an extremely important element for the preservation and the deepening of the identity of persons belonging to national minorities.<sup>119</sup>

An unmistakable message emerges from these passages: (1) however different they may seem at first, all questions of ethnic governance in the last instance derive from the same, invariable problematic which, if we look at it sufficiently closely, will reveal itself to be essentially technical in nature; (2) setting about the subject of ethnic governance in the spirit of objective analysis, it follows, therefore, that all questions related to the problematic of minority-majority relations can be ultimately resolved on the basis of an objective, empirically oriented, technical approach. Extending this thesis by logical implication suggests, consequently, that: (i) all immediately observable ethnic problems are expressions and manifestations of the same single hidden cause (root-case); (ii) addressing the actual logic of that hidden cause provides an opportunity both to obtain a truly effective answer to every apparent question and to avoid having to re-invent the wheel every time there is a need to travel, so to speak; (iii) following this principle also leads to a radical minimization of all decision-making costs and allows to avoid having to engage in any kind of politics. Furthermore, since politics is that which always floats on the surface and the real causes of ethnic tensions lie at a far deeper, sub-surface level, it also follows that the best way to resolve every ethnic governance problem is by sidestepping all its immediate political

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<sup>118</sup> Max van der Stoel, “Early Warning and Early Action: Preventing Inter-Ethnic Conflict,” in ZELLNER AND LANGE, *supra* n.11, 165, 168

<sup>119</sup> Van der Stoel, *supra* n.73, 142.

aspects and concentrating instead on the underlying root causes, so as not to get distracted by the surface ripples and not to miss the sight of the underwater reefs. How does one know what the underlying root causes are, however? Why, that is precisely what the experts are for.

Minorities do not want to have their kids wear their ethnic dress, teaches the new ILTMC expertise; they only want to “maintain their identity.” Majorities do not want to prevent minorities from setting up their investment funds; they only want to “ensure their loyalty towards the State they are living in.” Education is not a major ideological state apparatus whose regulation affects the construction of the body politic and, possibly, determines its very survival as a sovereign entity;<sup>120</sup> it is only an area in which majorities and minorities have identity concerns. The problem of the inter-ethnic equality and effective participation revolves around consultative bodies and the right to use one’s mother tongue in dealings with the public authorities, not around differentiated taxation. Whoever misses these crucial points is set to commit a colossal mistake by overlooking the shape of the real root causes behind the rise of aggressive nationalism. Only a specially trained mind, however, can avoid this and deal with the underlying problematic adequately.

Put differently, what the HCNM basically says here quite closely follows the traditional pattern of the classical dialectical (in the Hegelian sense) argument. It starts from the intuitive premise that every question of ethnic governance is not in fact what it seems on its face, but that it actually reflects some kind of hidden root-cause logic. From there, it moves to the preliminary conclusion that every question of ethnic governance *can be* therefore resolved not by addressing its immediate political problematic, but by focusing on its ultimate root-cause subject-matter, and then in a classical Hegelian move of negation supersedes that with another conclusion according to which every question of ethnic governance not only *can* but *must* be resolved through its root-cause problematic.

What is the general meaning of this narrative sequence?

*Every minorities question can be resolved by addressing the root-cause problematic.* Considering the broader context, this means essentially that in the HCNM’s opinion there ought to be enough room in the ILTMC project for the evolution of an essentially administrative

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<sup>120</sup> See further ERNEST GELLNER, *NATIONS AND NATIONALISM* (Oxford: Blackwell, 1983).

sensibility of ILTMC decision-making alongside the traditional sensibility of politics and diplomacy.

*Every minorities question must be resolved by addressing the root-cause problematic.* The meaning of this statement, obviously, is markedly different. Unlike the previous statement, this one tries to suggest that the administrative sensibility not only can but also should replace the political sensibility, i.e. that there has to be as little politics and as much expertise in the ILTMC field as possible.

Square this last idea now with the two commonplace beliefs – both clearly endorsed by the HCNM, as his comments about “communication” and “participation” show – that the concept of politics essentially represents a negotiation of conflicting interests and that the dispensation of expertise requires a retention of impartiality, and the immediate upshot of the whole argument sequence becomes that, despite all his formal statements to the contrary, the HCNM’s basic proposal is essentially that, *as much as possible, the questions of ethnic governance should be resolved not by the national governments of the participating states* – a government, being an interested party, clearly cannot be expected to be impartial and thus to keep consistently on the administrative/expertise path – *but by the representatives of the international community, who, having no apparent immediate interest in the resolution of any minority-majority question in one way or another,<sup>121</sup> can be generally trusted to act objectively and in the spirit of impartial expertise.* The former can certainly be delegated some residual powers of interstitial improvisation here and there. But their main function remains essentially executive against the monolith of the “international legislature.” That is, their basic job is not to experiment and ad-lib on their own, but to accept the general policy packages supplied by the international community, adopt them into their domestic political orders, and faithfully implement (and finance) all their substantive requirements.

At every point and in every passage, the language of the HCNM’s discourse consistently betrays the symptomatic of a self-worshipping technocracy. Conflicts are not discussed in terms of avoidance. They are a set of phenomena that should be prevented (like some kind of an epidemic). Crises are not described in terms of negotiations. They are

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<sup>121</sup> This is clearly an illusion. As the history of modern international involvement in minority-majority conflicts from Kurdistan to Transylvania shows, most of the time the representatives of the international community tend to have a clear interest in the retention of the existing status quo, which, as one can guess, normally tends to favour the dominant majorities over the non-dominant minorities.

a set of problems that should be managed (like a bank account). Ethnic governance regimes are not depicted as exceptional political constructs each of which is unique and has to be constructed according to its own singular circumstances. All ethnic groups in the world pursue the same basic goals (even if they do not know this themselves). All that requires to be done, therefore, to construct a functional ethnic governance regime in every case is to work out which goals these are and to apply the relevant set of formulas.

Is there a tension in the area of “communication”? No problem! As soon as we have that diagnosis, the HCNM algorithm says: “Must set up an inter-ethnic roundtable or appoint an ombudsman.” The answer is there, all that needs to be done now is to implement it.

Certainly, some dilettantes may observe at this point that to create a new government institution is probably the epitome of what most people would normally consider an act of *politics*, but that is certainly a completely wrong observation. Politics is something that, by definition, always involves bargaining, negotiations, and the conflict of wills. In the implementation of international standards, however, *there can be no bargaining or negotiations*. International standards are binding on every agent subjected to them, period. That is what makes them standards and not mere comity. If a standard says: “do X and then Y,” it means “do that and nothing else”; it certainly does not mean “let’s talk about it, maybe you’d like to do X or Y or both?”

Of course, as every international law student would normally insist, because international standards are ultimately created by the states, it is the states that must have the right of final decision whenever it comes to deciding what the given international standard in question means (which implies that, after all, there is in fact some room for bargaining and negotiation in this). But that is, naturally, what makes them students and not specialists, because specialists know that those theories are essentially nothing but a myth. Even if such an era did exist when it was the independent states that created international standards, it is long over now. The content of international standards today is decided by experts.<sup>122</sup> That is what makes them so reliable, authoritative, and effective. And, naturally, whoever disagrees with what the experts have to say on a given point, considering how impartial and objective the experts, by definition, are, must clearly be a rogue, insolently

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<sup>122</sup> See the text accompanying *supra* nn. 77, 81.

bent on flaunting the international community and threatening the tasks of fruitful international cooperation. At which point, it may perhaps be appropriate to recall that

[i]f there is simply no willingness to respect the international standards, ... then it becomes of course very difficult to speak about co-operative solutions. In such a case other methods of a more coercive nature may have to be used. Serbia is an example that comes to mind in this respect.<sup>123</sup>

Sure enough, if we decide to look a little more closely at what the experts actually have to say, it may often turn out that the content of their advice tends in fact to be quite bland, not to say completely inane.<sup>124</sup> But that, of course, is fundamentally beside the point: *it is the*

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<sup>123</sup> Zellner and van der Stoel, *supra* n.18, 21.

<sup>124</sup> Ideally, the purpose of every norm-articulation is to distinguish between two or more alternative courses of actions, so as to affect the preference patterns of the norm's addressees by persuading them to choose a particular course of action which they otherwise would not necessarily do. Against this background, consider now, for example, §11 of *The Oslo Recommendations Regarding the Linguistic Rights of National Minorities* (available from [http://www.osce.org/documents/hcnm/1998/02/2699\\_en.pdf](http://www.osce.org/documents/hcnm/1998/02/2699_en.pdf)): "Access to media originating from abroad shall not be unduly restricted." Consider also §5 of *The Lund Recommendations on Effective Participation of National Minorities in Public Life* (available from [http://www.osce.org/documents/hcnm/1999/09/2698\\_en.pdf](http://www.osce.org/documents/hcnm/1999/09/2698_en.pdf)): "When creating institutions and procedures in accordance with these Recommendations, both substance and process are important. Governmental authorities and minorities should pursue an inclusive, transparent, and accountable process of consultation in order to maintain a climate of confidence. The State should encourage the public media to foster intercultural understanding and address the concerns of minorities."

An old rule of interpretation suggests that the best way to test the insipidity of every discursive statement is to substitute it with its mirror-opposite. The more oxymoronic the new statement looks, the more insipid the original statement must be. Applying that rule to our two examples, what we seem to get is: (i) "Access to media originating from abroad shall be unduly restricted" and (ii) "When creating institutions and procedures in accordance with these Recommendations, only process, but not substance, will be important. Governmental authorities and minorities should never pursue an inclusive, transparent, and accountable process of consultation. They should not seek to maintain a climate of confidence. The State should discourage the public media from fostering intercultural understanding and addressing the concerns of minorities," or in other words two statements which no reasonable democratic lawmaker could ever regard as promising norm-making material, no reasonable politician could ever adopt as a potential public policy heading, and no speech-writer could ever entertain as good campaign slogans. Considering all this, a question slowly starts to arise: just how meaningful was the norm-articulation executed by the authors of the Oslo and Lund recommendations when they came up with the two original statements cited above?

*general idea that counts, not its immediate content.* And the general idea is always revealed not by the swarm of disparate bits that float on the surface, but by the background narrative structure that stands behind the discourse. The background narrative structure that stands behind the several passages quoted above, as every student of modern narratology would be able to recognize, is the narrative of the heroic quest.

The narrative of the heroic quest is not, in fact, a simple narrative pattern. From the point of view of modern narratology, it is what is known generally as a *masterplot*. By this term, the modern narratologists normally describe those formulaic “stories that we tell over and over in myriad forms and that connect vitally with our deepest values, wishes, and fears.”<sup>125</sup> To give a few examples, one of the most popular masterplots in the contemporary Western culture is the Cinderella masterplot: a poor, hard-working, decent girl earns the affection of a rich and handsome prince through an equal opportunities programme operated by a kind fairy. Another all-time Western favourite is the Icarus/mad-genius masterplot: in a feat of phenomenal inspiration a daring inventor rises far above anything any human before him had achieved; for a short time, this brings him to the top of the world and makes him equal with gods; in the end, however, it proves the cause of his downfall, misery, and destruction. Every cultural formation abounds with basic formulaic stories like these. Some of them tend to be more universal, others more local. The masterplot of the heroic quest is, arguably, one of the most universal masterplots of all times. It appears to be common to all known cultural traditions, from the ancient Sumerian to the modern Hollywoodian.<sup>126</sup> The general structure of the heroic quest narratives, as identified by the French-Lithuanian semiotician Algirdas Greimas<sup>127</sup> on the basis of the

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<sup>125</sup> H. PORTER ABBOTT, *THE CAMBRIDGE INTRODUCTION TO NARRATIVE* 42 (Cambridge: Cambridge University Press, 2002).

<sup>126</sup> See further CHRISTOPHER BOOKER, *THE SEVEN BASIC PLOTS: WHY WE TELL STORIES* (London: Continuum Publishers, 2005).

<sup>127</sup> See further A. J. GREIMAS, *SEMANTIQUE STRUCTURALE* 180 *et seq.* (Paris: Larousse, 1966). For further introduction to the Greimasian semiotics, see also ALGIRDAS JULIEN GREIMAS, *ON MEANING: SELECTED WRITINGS IN SEMIOTIC THEORY* (transl. by Paul J. Perron and Frank H. Collins; London: Pinter, 1987); RONALD SCHLEIFER, A. J. GREIMAS AND THE NATURE OF MEANING: LINGUISTICS, SEMIOTICS AND DISCOURSE THEORY 33-5 (London: Croom Helm, 1987); FREDRIC JAMESON, *THE PRISON-HOUSE OF LANGUAGE: A CRITICAL ACCOUNT OF STRUCTURALISM AND RUSSIAN FORMALISM* 124-5 (Princeton: Princeton University Press, 1972); TERENCE HAWKES, *STRUCTURALISM & SEMIOTICS* 91-3 (London: Methuen, 1977).

path breaking studies of the Russian philologist Vladimir Propp,<sup>128</sup> is essentially comprised by the interplay of six functional entities:<sup>129</sup> the Sender, the Subject (Hero), the Object, the Receiver, the Helper, and the Villain.<sup>130</sup> The formulaic sequence of the interplay always boils down to the same arrangement: the Hero struggles to deliver the Object sent by the Sender to the Receiver for the enjoyment and benefit of the latter, drawing in the process support and assistance from the Helper and finding resistance and opposition from the Villain.

A classic example of the heroic quest narrative is the medieval epic cycle of the Holy Grail legends. The noble Knights of the Round Table set out to uncover the Holy Grail sent by God for the glory and profit of the humankind. In the process of accomplishing that goal they are obstructed by various wicked characters (*Fata Morgana*) and the temptations of sin and helped by the Christian virtues and various friends (*Merlin*). Another classic illustration can be found in the vulgar Marxist folklore, in which the march of History is equated with the act of the Sender, communism plays the role of the coveted Object, humanity as a whole the fulfills the function of the Receiver, with the proletariat, the communist party, and the forces of global capitalism acting as the Hero, the Helper, and the Villain respectively.

Now, if we look at it from this perspective, the same basic pattern starts to reveal itself behind the surface ripples of the HCNM's discourse. The six functional entities are identified with History, International Community/International Experts, Good Governance/Multiculturalism, New Europe/OSCE Participating Polities, the New ILTMC Regime, and Domestic Political Elites/the Forces of Aggressive Nationalism: history sent the OSCE member states the gift of good governance; international experts employed in

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<sup>128</sup> VLADIMIR PROPP, *THE MORPHOLOGY OF THE FOLK TALE* (2<sup>nd</sup> edn.; transl. by Lawrence Scott; Austin: University of Texas Press, 1968).

<sup>129</sup> Greimas calls them *actants*. The morphology of the actantial plane does not always correspond to the morphology of constructed on the surface of the narrative. Depending on the circumstances, each actant may be represented in the body of the actual story by one character or several characters at once. In some cases, moreover, observes Greimas, an actant may have no immediate character representation but be actively implied by the rest of the story. In other cases, several actants may "share" the same character space (i.e. one and the same character may perform simultaneously several narrative functions).

<sup>130</sup> In Greimas's own formulation, the latter two were called "l'adjuvant" and "l'opposant" respectively. For the purposes of greater clarity, I preferred to retain Propp's terminology.



the service of the international community with the help of the new ILTMC regime seek to bring that gift to its recipient; the forces of aggressive nationalism and excessively independent domestic elites thwart and obstruct every one of their attempts.

The most important feature of all masterplots from the perspective of ideology studies is that they command an enormous amount of emotional capital.<sup>131</sup> They make new factual environments look familiar, lower the costs of information processing, and turn every encounter with an unknown phenomenon into a generally controllable affair. In the words of Frank Kermode, a masterplot is the foundation of “the mythological structure of a society from which we derive comfort, and which it may be uncomfortable to dispute.”<sup>132</sup> Every time we run into a masterplot-based discourse, we lower the level of our critical guard. The more the given set of narrative to which we are exposed turns out to follow the established masterplot sequence, the more we tend to accept the facts relayed in it as true and uncontroversial. It can be truly amazing sometimes how far a skillful deployment of an appropriate masterplot can induce the target audience to lose its critical faculties and suspend its sense of disbelief, but it is a fact long observed and explored by modern sociology and literary theory.<sup>133</sup>

What is the ideological upshot of the HCNM’s deployment of the heroic quest masterplot in his discourse? The same as with every other heroic quest narrative employed in such circumstances: to convince the target audience that the Hero needs more help to ensure the delivery of the Object and to defeat the Villains. Or, in other words, the implementers of the new ILTMC regime must have bigger teeth, longer sticks, and more public support to assist in the establishment of good governance throughout the OSCE area.

The same narrative pattern which stands behind the several passages quoted from the HCNM a few pages ago can also be detected in many other places throughout the new ILTMC discourse. Consider, for instance, the opening pages from Will Kymlicka’s hugely influential *Multicultural Citizenship*:

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<sup>131</sup> ABBOTT, *supra* n.125, 42.

<sup>132</sup> FRANK KERMODE, *THE GENESIS OF SECRECY: ON THE INTERPRETATION OF NARRATIVE* 113 (Cambridge: Cambridge University Press, 1979).

<sup>133</sup> See, e.g., ROLAND BARTHES, *MYTHOLOGIES* (transl. by Annette Lavers; London: Vintage Books, 2000); PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* (transl. by Richard Nice; Cambridge: Polity Press, 1990).

Most countries today are culturally diverse. ... This diversity gives rise to a series of important and potentially divisive questions. Minorities and majorities increasingly clash over such issues as language rights, regional autonomy, political representation, education curriculum, land claims, immigration and naturalization policy, even national symbols, such as the choice of national anthem or public holiday. Finding morally defensible and politically viable answers to these issues is the greatest challenge facing democracies today. ... Since the end of the Cold War, ethnocultural conflicts have become the most common source of political violence in the world, and they show no sign of abating. ... There are no simple answers or magic formulas to resolve all these questions. [E]very dispute has its own unique history and circumstances that need to be taken into account in devising a fair and workable solution. My aim is to step back and present a more general view of the landscape – to identify some key concepts and principles that need to be taken into account, and so clarify the basic building blocks for a liberal approach to minority rights.<sup>134</sup>

Thus, on the one hand, it may certainly seem as if “there are no simple answers and magic formulas” and “every dispute has its own unique history and circumstances,” but on the other hand, it is absolutely clear *what exactly underlies* all ethnocultural conflicts (language rights, political representation, education curriculum, etc.) and on what particular terms “fair and workable solutions” have to be *devised*, i.e. not begotten in the hearths of a strenuous political debate inspired by violence, luck, opportunism, intuition, and pure chance, but mechanically constructed in a cool state of mind, assembled in the same way in which a competent builder assembles a dog-house or a garden wall from “the basic building blocks.”

Not all ILTMC ideologues, of course, agree with Kymlicka on what exactly the terms of the “fair and workable solution” must be, but virtually everyone agrees that it is possible to identify them. Thus, for Thomas Simon, for instance, the main factor that has to be taken into account in devising the new ILTMC policy is the concept of the group harm. Writing about the theoretical difficulties involved in the conceptualization of the notion of the minority community, Simon observes that even though

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<sup>134</sup> KYMLICKA, *supra* n.4, 1-2.

[p]olitically, it should not surprise us that the concept of minorities has become a problem[, since] States have a stake in keeping the issue muddied[,] intellectually, we should express dismay at how the political has duped our intellectual ability to see the contours of minority groups, which become evident once we look at history.<sup>135</sup>

In fact, however, the task of

defining minorities poses no real problem. The historical record of oppression unleashed by dominant groups locates minorities. ... Group harm has stark manifestations. ... Internecine disputes erupt over who represents the Romani people, and the United Nations struggles to determine the positive identifying traits of the Romani. In the meantime, the harms, past and present inflicted upon the Romani stand out for all to see. [J]urists using a group harm analysis do not need to fear what statisticians call false positives and false negatives.<sup>136</sup>

How exactly a jurist using the group harm principle may avoid these two inescapable scourges of social theory, Simon, unfortunately, forgets to explain. But, of course, that only confirms that the ILTMC is essentially a subject matter for an expert to work on, not an average enthusiast.

Other ILTMC ideologues approach the matter essentially from the same philosophical position. Take, for instance, Fernand de Varennes. In a working paper prepared for the 4<sup>th</sup> session of the UN Working Group on Minorities, he explains, in a tone reminiscent of the adepts of exact sciences, that

[t]he first and perhaps most basic way to provide more effective participation and representation of persons belonging to minorities in public life is to ensure that certain fundamental human rights are respected: [the rights] affecting the citizenship of individuals, ... non-discrimination ..., the prohibition of statelessness ... or of the right to vote and to be elected. [A]ny first step in terms

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<sup>135</sup> Simon, *supra* n.11, 511.

<sup>136</sup> *Id.*, 511-2.

of effective minority participation must be based on a state's scrupulous respect for these international standards. ... Additionally, a truly effective presence and role for persons belonging to minorities may require some other mechanism in order to compensate for the "democratic deficit" ... There are in fact a vast array of mechanisms in many countries which have been shown to be appropriate and well adapted practices to widely different situations. These can include among others mechanisms such as federalism or some form of territorial autonomy, proportional electoral systems, special veto powers, guaranteed minority seats or advisory boards.<sup>137</sup>

Notice the absence of any traces of awareness that the question of effective participation is essentially a deeply political question that does not, in general, admit of any technical solutions because like all other political questions it is ultimately all about substance (a participatory regime becomes effective only thanks to its outcomes, not because of the shape of its architectural forms).

Notice also that, as far as expert advices go, a statement like that could hardly qualify as particularly useful in any area in which the notion of professional expertise enjoys any kind of currency. "A vast array of measures that may or may not require to be supplemented by other measures" is hardly the kind of answer one would normally find satisfactory from one's dentist, ophthalmologist, or anyone else claiming to have a unique, professional understanding derived from an uncommonly profound immersion in the nature of the studied problem. Still, the expert sensibility continues to persist and proliferate from year to year throughout the whole ILTMC realm and the ideological impact it produces continues to intensify.

Consider, for instance, a paper on autonomy regimes by Professor Tim Pottier, produced in the same context three years later. Discussing the logic of creating minority self-governance regimes, in a tone more befitting a concluding report of some pharmaceutical study than a policy-proposing document, Pottier explains:

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<sup>137</sup> Fernand de Varennes, *Towards Effective Political Participation and Representation of Minorities*, Documents of the 4<sup>th</sup> Session of the UN Working Group on the Rights of Minorities, 29 May 1998, E/CN.4/Sub.2/AC.5/1998/WP.4.

Man is not naturally loyal – he is a creature of advantage and betrayal. ... When he feels he is being over-ruled, history has demonstrated his very power to overthrow that for which he has lost all respect and the strength of that tide has proved decisive even over the most resolute of regimes. ...

Autonomy is surely not a preferred model. These half-state entities would not arise were it not for the failure of nation states to satisfy, consequently provoking a desire for (if only some of) its peoples to start again. ... In this post-[Berlin]Wall world, a decade on from the collapse of the Soviet bloc and its salt-water satellites, what will this new century ... prefer? ...

While, without question, circumstances will arise where, practically, some form of territorial autonomy should be the preferred outcome, even, on occasions, where there has been no background to it; equally, 'elsewhere', the wider needs of all groups in the state (minority and majority), as well as the interest of the given region will, frequently, be better served by the creation of [cultural and functional autonomies].

[As] the Estonian Law on Cultural Autonomy [shows, the content of cultural autonomy is] not only uncontroversial, but simple in form. ... The main aim ... of cultural autonomy is to preserve [minority] groups from deliberate or tacit assimilation. ...

What separates functional from cultural autonomy? Actually, not very much; indeed, one could address existing cultural forms of autonomy with very functional language. The history of functional autonomy is drawn very much from the Islamic, but also, 'equally', Christian-populated lands of the Near East[, in [particular,] the *millet* system of the Ottoman Empire.<sup>138</sup>

Could any reasonable observer with a general level of critical ability ever come to believe that a political system established at the end of the Middle Ages on the basis of the *sharia* theory of *dhimmah* protection might actually share so many intrinsic features in common with a normative regime established in a post-Cold War Baltic state in order to score some additional points with the liberal crusaders of the New-Europe project that the two phenomena not only do not have to be categorically distinguished from one another on

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<sup>138</sup> Tim Pottier, *Autonomy in the 21<sup>st</sup> Century: Through Theoretical Binoculars*, Documents of the 7<sup>th</sup> Session of the UN Working Group on the Rights of Minorities, 18 May 2001, E/CN.4/Sub.2/AC.5/2001/CRP.1.

account of their radical political, economic, and ideological incommensurability, but actually deserve to be subsumed under the same analytical category without any further discussion? Yet this is exactly what the quoted passage – and dozens like it – seeks to propose.

What kind of a mass-scale reification and industrial-level enchantment backed up by a systematic suspension of reason and intellectual myopia are required to allow this kind of a discourse to be produced so casually?<sup>139</sup> – one might begin to ask. Or, maybe: just how many people *do* actually take the new ILTMC discourse seriously? Or: do not all the parties involved in this business in fact agree, at least implicitly, that the objective problematic of ethnic governance cannot be actually reduced to technocratic expertise? Or: but what would happen if the new ILTMC's grand fiction about expertise and technocratic regulation had somehow completely dissolved or had never been formed in the first place? However one goes about these questions, in the end, the basic fact seems to remain that:

- (i) both the theory and practice of the new ILTMC project are based on the fiction of its political neutrality;
- (ii) as it stands, this fiction has been formulated in such terms that make it ideologically unaffordable to continue carrying out the new ILTMC project while openly admitting that the ILTMC regime may have an in-built structural bias that serves any other cause than those endorsed by the theory of liberal multiculturalism;
- (iii) a close examination of the objective reality of the new ILTMC's social functionality clearly and unequivocally confirms the existence of exactly that kind of bias in the normative structures of the new ILTMC regime;
- (iv) a bias of that kind does not have to be complete and overwhelming, or a proven product of a bloodcurdling conspiracy, to justify the conclusion that the

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<sup>139</sup> To understand how truly enormous the scale of the ideological mystification underlying the new ILTMC project has become, one only needs to recall now that this discourse was produced more than a whole century *after* Einstein, Husserl, Darwin, Lobachevsky, and Dewey, each in their own way, have taught the scientific and the philosophical communities that, as William of Ockham had long declared, universal absolutes, such as “stoneness,” “woodenness,” or the “essence of the idea of functional autonomy,” do not exist.

new ILTMC project is not what it actually says it is and that it promotes an essentially spurious image of itself.

It is to the exploration of this fact, consequently, that the present thesis is dedicated.

*b. In Defence of Legal Realism*

The gist of this thesis's main argument is encapsulated in claim (iii) detailed above. In a way, one could say, that claim constitutes the main ideological link connecting this thesis to the broader tradition of the legal realist scholarship.<sup>140</sup> As every student of modern jurisprudence would be able to recognize, however, the general socio-theoretical assumptions underlying the legal realist theory are not entirely free of controversy. It would not be completely uncommon in some juristic circles to consider the basic logic of the legal realist discourse somewhat scandalous. The main purpose of this short sub-section, consequently, can be formulated as an attempt to propose a general answer to the typical challenges posed to the legal realist project.

*The Postmodern Challenge.* From the perspective of the modern-day postmodern tradition,<sup>141</sup> every general claim presented in the language of legal realism will usually appear essentially misguided, unfounded, and extremely conceited. How could anyone claim to know what the objective reality of the international legal process actually is, if, as Derrida explained, "there is nothing outside the text,"<sup>142</sup> that is, everything we think we know is ultimately only a product of a language game, and if all language-games which aim to construct a meta-narrative are completely and irredeemably corrupt?<sup>143</sup>

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<sup>140</sup> For the working definition of legal realism, see the "Introductory Note" section of the present thesis, at p. 2. Otherwise, see Karl Llewellyn, *Some Realism about Realism – Responding to Dean Pound*, 44 Harv. L. Rev. 1222, 1233-55 (1931) (in particular consider n.35 on p. 1234).

<sup>141</sup> Like every other philosophical tradition, postmodernism has gone through several stages of ideological development. The stage at which it finds itself today is characterized by the ideological domination of the so-called "French high theory," otherwise known as (French) poststructuralism.

<sup>142</sup> See JACQUES DERRIDA, *OF GRAMMATOLOGY* 158 (transl. by Gayatri Chakravorti Spivak; Baltimore, MD: The Johns Hopkins University Press, 1997).

<sup>143</sup> See JEAN-FRANÇOIS LYOTARD, *THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE* (transl. by Geoff Bennington and Brian Massumi; Manchester: Manchester University Press, 1984).

On the level of the abstract ontological theory, an argument constructed on such terms, as a rule, will come across as essentially irrefutable. It seems difficult to imagine how one could manage not to arrive at the same normative conclusions, if one accepted as given the same starting premises. That said, it should not, for all that, be particularly difficult to work out the general model of a tactical response one could produce to defend the legal realist tradition against such kind of criticism.

Every postmodernist claim derived from the Derridean-Lyotardian tradition can be essentially attacked on at least two different levels. To put it rather schematically, it seems that every time a legal realist project attracts the ire of the postmodern tradition, it will be possible for the legal realist camp to respond to the criticism along more or less the following lines.

Step One: there can be no common discursive ground between the legal realist camp and the postmodern camp on the level of the rational scholarly discourse because, as far as the former is concerned, from the logical point of view, the Lyotardian argument about meta-narratives is either completely meaningless in the same way in which Zeno's paradox about the tortoise and Achilles<sup>144</sup> is meaningless, or it is completely self-defeating, in the general logical sense that if all meta-narratives are false, then, insofar as Lyotard's claim about meta-narratives is also a kind of a meta-narrative, that argument is false too.

Step Two: the ideological significance of the Lyotardian argument, quite obviously, tends to lean in favour of supporting the currently existing hegemonic order, since the only outcome which this argument guarantees to achieve in practice is the legitimization of the ideology of political quietism and the dampening of the spirit of critical resistance. Insofar as the legal realist project, by its very definition, is a project of critical resistance organized in the desire to depose the existing ideological dogma, it follows that the legal realist camp can never be expected under any circumstances to share the same political sensibility as the postmodern camp, which means that there can be no common discursive ground between the two camps even on the non-rational level.

Step Three: because there can be no common discursive ground between the two camps on either level, the two traditions cannot be expected to connect in any kind of common discursive exchange. There can be, consequently, no real reason for either of

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<sup>144</sup> For further elaboration, see Lewis Carroll, *What the Tortoise Said to Achilles*, 104 *Mind* 416 (1995).



them to have to present any sort of reasoned response to what the other may consider a valid statement of its critique. The postmoderns may say all they want about legal realism (and vice versa). Their arguments simply will not have any theoretical significance in a legal realist universe.

By and large, however, it is not usually the postmodern camp that subjects the legal realist project to the most gruelling and severe type of criticism. The most consistent assault on legal realism comes normally from a completely different end of the disciplinary ideological spectrum: the so-called “mainstream,”<sup>145</sup> or, which is essentially the same thing, the followers of the “good traditions” of the international law profession. It is mainly against them, then, that the legal realist project requires an apologia.

*The Mainstream Challenge.* Judging by the patterns of the recent practice, the general sequence of the verbal attacks mounted against legal realism by the defenders of the good traditions most commonly boils down to: (i) a basic epistemological challenge (“what makes you think you got the reality all figured out?”), followed by (ii) a combination of various ideological accusations involving charges of ignorance, sabotage, ill-will, and impudence (“just who do you think you are to criticize all the good men of tradition who have come before you and to obstruct them in their noble business?”). Presuming a state of goodwill on the part of its authors, it seems the legal realist camp could easily counter such criticism by pointing out (as Lon Fuller suggested one should<sup>146</sup> in such situations) that *one does not actually need to know the exact shape of the international legal reality to be able to recognize that this or that account of it is so manifestly false or biased that this fact deserves to be brought to the attention of the general public immediately*, or, to go back once more to Eagleton’s example,<sup>147</sup> one does not need to know just how tall the Mount Everest is to be able to know that whoever claims it to be lower than Ben Nevis must certainly be wrong, so much so that even if we cannot say at once by exactly how many metres Mount Everest is taller than Ben Nevis, there is still more than enough merit in saying that they are wrong. For, surely, is it not that every act that diminishes the volume of falsehood must have enough merit in itself even

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<sup>145</sup> For a general theorization of this concept in modern international law, see further David Kennedy, *When Renewal Repeats Itself: Thinking against the Box*, 32 N.Y.U.J. Int’l L. & Pol. 335, 373-97 (2000).

<sup>146</sup> See further LON L. FULLER, *THE MORALITY OF LAW* 5-15 (New Haven: Yale University Press, 1963) (discussing the difference between the morality of aspiration and the morality of duty).

<sup>147</sup> Cf. *supra* n.91.

when it does not bring us the truth whole and pure? This rule of scholarly discourse appears to be so uncontroversial, it seems, every sensible scholar acting in good faith can be expected to accept it without any commotion or hassle ... But the mainstream challenge of the legal realist project, alas, is not at all about good faith dialogues. The more one studies the patterns of its recent practice,<sup>148</sup> the clearer it seems to become that in the eyes of the “good men of tradition” being a legal realist in international law today is not just a sign of an intellectual indiscretion: it is an ideological offence.

Certainly, most reasonable people would usually find it quite unproblematic to accept that even though the “possibility of a trouble is not [yet] a prediction of a trouble,” one “would [still] do well to keep an alarm signal flying.”<sup>149</sup> By the same token, most modern social theorists would normally find it unproblematic to recognize that because “[t]he given reality has its own logic and its own truth” within whose terms it always looks irreproachable, “the effort to comprehend them *as such* and to transcend them [by definition] presupposes [the need for] a different logic, a contradicting truth”; that in order to be constituted, this logic would require a rigorous investigation of the *overall* momentum inscribed in the current historical conjuncture, basing on the principle of the non-identity of essence and appearance; that, because it challenges the truth of the established appearances, this logic would not qualify as “scientific” within the established dogma’s circle of criteria, since the latter, in order to retain its fiction based on the appearances it

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<sup>148</sup> Mainstream international law scholars tend to get very angry very quickly whenever they come across a legal realist discourse. It is not uncommon for them to slip immediately into a sharp accusatory tone, charging legal realists with unprofessionalism, opportunism, lack of intelligence, short-sightedness, weak-mindedness, egotism, sabotage, intellectual plagiarism, and, as the last straw in the draw, nihilism and *ressentiment*. For various recent illustrations, see, among others, Oliver Gerstenberg, *What International Law Should (Not) Become: A Comment on Koskenniemi*, 16 EJIL 125 (2005); Pierre-Marie Dupuy, *Some Reflections on Contemporary International Law and the Appeal to Universal Values: A Response to Martti Koskenniemi*, 16 EJIL 131 (2005); Jason A. Beckett, *Behind Relative Normativity: Rules and Process as Prerequisites of Law*, 12 EJIL 643 (2001); Andreas Paulus, *International Law after Postmodernism: Towards Renewal or Decline of International Law?*, 14 *Lei. J. Int’l L.* 727 (2001); Christian Tomuschat, “International Law: Ensuring the Survival of Mankind on the Eve of a New Century,” 281 *Recueil des Cours* 9, 25-9 (1999); Ian Brownlie, “International Law at the Fiftieth Anniversary of the United Nations,” 255 *Recueil des Cours* 9, 27-9 (1995); ROSALYN HIGGINS, *PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 9-10 (Oxford: Clarendon Press, 1995); Iain Scobbie, *Towards the Elimination of International Law: Some Radical Scepticism about Sceptical Radicalism*, 61 *B.Y.I.L.* 339 (1990).

<sup>149</sup> JOHN KENNETH GALBRAITH, *THE AFFLUENT SOCIETY* 151 (rev. edn.; London: Penguin, 1999).

endorses, would always have already taken care to delegitimize as un-rigorous all those reasoning patterns which can lead to a contrary opinion; that this logic, nevertheless, would not for all that be any more disconnected from the reality of the existing historical conjuncture, if only because “it understands the world as a *historical* universe, in which the established facts are the work of the historical practice of man” and “[t]he ontological tension between essence and appearance [is always a] historical tension,” and historical tensions can always be identified conclusively and sufficiently reliably but only if one studies the structural terms of the present historical conjuncture as a whole.<sup>150</sup>

Yet, just because one would normally expect something like that in the context of a general socio-theoretical discussion,<sup>151</sup> it does not yet necessarily follow that one ought to expect the same when facing the militant defenders of the “good men of tradition.” And it is not that they tend somehow to be less intelligent or have a weaker understanding of social theory than the rest of the social science community – quite on the contrary, in fact, some of them tend to be astonishingly well-versed in such matters – it is more rather that by the very fact of having entered the enterprise of defending the project of the “good traditions” against the background just outlined, the “militant defenders” in effect always-already end up having automatically refused to play the game of critique-counter-critique on the basis of those rules which characterise the practice of the usual socio-theoretical debate. The stakes of the game for them, the logic of their investment in the discourse, in other words, acquire a markedly different character.

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<sup>150</sup> See HERBERT MARCUSE, *ONE-DIMENSIONAL MAN* 144-6 (London: Routledge, 2002). See also *id.*, xli-xlii and 225-6. Cf. LUKÁCS, *supra* n.9, 52.

<sup>151</sup> What is normal is not universal. Social science empiricists are likely to be more sceptical of this proposition – which, in effect, reflects nothing more than a simple dialectical thesis that the social reality is not what it appears to be at the first sight and that it is possible, nevertheless, to know the “true reality” of the social reality – than those with a more philosophical understanding of social theory. For a general criticism of the empiricist tradition in social sciences (and its various disciplinary cousins) as an ontologically misconceived enterprise, see further MARCUSE, *supra* n.150, 127-203. More generally, see also PHILIP ALLOTT, *THE HEALTH OF NATIONS* (Cambridge: Cambridge University Press, 2002); ERIC HOBBSBAWM, *ON HISTORY* (London: Abacus, 1997); BOURDIEU, *supra* n.133; ROBERTO MANGABEIRA UNGER, *SOCIAL THEORY: ITS SITUATION AND ITS TASK* (Cambridge: Polity Press, 1987); HORKHEIMER, *supra* n.95; LOUIS ALTHUSSER AND ÉTIENNE BALIBAR, *READING CAPITAL* (transl. by Ben Brewster, London: New Left Books, 1970); ARNOLD J. TOYNBEE, *A STUDY OF HISTORY*, v. XII (Oxford: Oxford University Press, 1961).

But if saying what one really thinks about the question of legal realism should indeed be so pointless in this case, how should then the legal realist camp begin to respond to the typical criticisms made of it by the “good men of tradition”? What ought I begin to say if someone decided to attack this Ph.D. thesis by criticizing its jurisprudential tenor and lambasting its main arguments on the same grounds which are traditionally cited by the “militant defenders” and their sympathizers? To understand the basic factors conditioning the response line which I propose to adopt in these pages, let us turn first to the general structure of the ideological challenge traditionally laid by the “militant defenders” against the legal realist discourse.

The classical line of attack mounted by the militant defenders of the “good men of tradition” against legal realism (or for that matter any project of legal critique derived from the socio-legal tradition) consists, generally, of three basic themes. Each theme ultimately boils down to one single, but very powerful, narrative sequence which, when it is articulated in the right tone of voice, tends to create a completely “objective” impression in the minds of the unprepared audience that even though the legal realists may have something sensible on their side (which is not, of course, at all a foregone conclusion), it is definitely those who oppose them who have the moral high ground.

The basic argument that establishes the first theme runs more or less along these lines: what the realists are saying certainly looks meaningful but only to the extent to which we are ready to ignore the fact that they are subjecting the targeted rules or regimes of law to an absolutely paranoid test of reason. Nobody in their right mind would take the idea that international law should be internally coherent, democratic, flexible, representative of the Other’s viewpoint, formally realizable, egalitarian, predictable, equitable, self-consistent, or effective *that* seriously. The realist critique works, in other words, only because it constantly overshoots and its advocates pretend not to be aware of this. The legal realists, it follows, therefore, are not really proper scholars, but just a group of saboteurs permanently lodged in the deepest reaches of “bad faith,” since they obviously know that the rigours of the testing drive they are proposing for the vehicle in question far exceed the levels of pressure it has been designed to survive (and yet they are still going ahead with it!).<sup>152</sup> For

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<sup>152</sup> The only other alternative is that they are not really that bright since they constantly fail to realize how inappropriate their expectations of international law are.

brevity purposes, we can call this theme the “(you’re not a) Jehovah” theme, since it essentially takes off on the same note as the famous “if thou, Jehovah, shouldest mark iniquities, O Lord, who could stand?”<sup>153</sup>

The second theme around which the criticism of legal realism is usually organized seems to be slightly different. The basic argument at its core consists of three separate but analytically inter-linked parts: (i) nobody said international law is (already) perfect; (ii) but we are getting there – it just takes time; and, anyway, (iii) the realist critics are clearly exaggerating the extent of international law’s imperfections, since, as it stands, international law actually works quite satisfactorily most of the time. Since this argument is a composite one, quite predictably, it does not always get articulated in its entirety. Sometimes sub-arguments (ii) or (iii) (or both) are left under-formulated (or are dropped completely). At other times they are run autonomously, in seeming independence from sub-argument (i). Variations of that kind, however, should not be allowed to prevent us from seeing the big picture. Relying either on sub-argument (ii) or sub-argument (iii) *by necessity* entails accepting sub-argument (i) as a given. Even if it is not articulated, therefore, it is always present in this line of thought. For this reason, we can call the second theme of the anti-realist attack the “it is okay (for international law) to be imperfect” theme.

The third theme rehearsed by the “militant defenders” is probably the most familiar one. It seems, at any rate, to feature more frequently than the other two themes in the modern-day mainstream writing. The basic argument at the centre of this line of discourse normally takes one of the following two forms. In its milder version, the argument runs somewhere along the lines of “talking negative does not really help, what we need is people acting constructive,” the underlying theory being that to support critical scholarship is essentially an evil act because critique is always counterproductive. The harder version of the argument has a considerably different tone. The basic refrain here is “we heard your point, now what is your solution?,” the underlying suggestion being “if you are not going yourself to solve the problem you have just identified, you had better to keep quiet.” Borrowing from Pierre Schlag we may call the third theme of countercritique the

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<sup>153</sup> THE BOOK OF PSALMS, Book V, Psalm CXXX (“Hope in the Lord’s Forgiving Love”); available from <http://www.bartleby.com/44/3/130.html>.

“Thumper school of jurisprudence,”<sup>154</sup> since its main premise seems to be the theory that “if you can’t say anything nice, don’t say anything at all.”<sup>155</sup>

The Thumper school of jurisprudence, like virtually all other jurisprudential schools, has taken a rather decisive instrumentalist turn lately. Accordingly, in the legal academy, Thumper’s transcendental value in niceness has been transformed into the more instrumentalist value in being “constructive.” Thus, it is widely held among legal thinkers that one should not merely criticize or destroy, but try to be constructive as well.<sup>156</sup>

The problems with the “Thumper school of jurisprudence,” of course, are many. The first of them, perhaps, is its unbridled enthusiasm for replacements:

Consider a graphic example: If you take someone’s neurosis away, are you being *destructive* (of that person’s way of doing things) or are you being constructive (of a new organically healthy person)? If you were being destructive when you took away the person’s neurosis, are you then obliged to do something more afterwards – something constructive? What would this additional constructive moment look like, and how would it help? Indeed, how often does a “cured” patient terminate therapy with the statement, “Yes, I understand I’m fine now. There’s just one more question, doctor: What should I do?”<sup>157</sup>

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<sup>154</sup> Pierre Schlag, *Normative and Nowhere to Go*, 43 Stan. L. Rev. 167, 175 (1990).

<sup>155</sup> “Thumper” was the name of the little hare from Walt Disney’s animated film *BAMBI* (Walt Disney Studios, 1942). The scene to which Schlag seems to refer is this:

*Thumper*. He doesn’t walk very good, does he?

*Mrs. Rabbit*. Thumper!

*Thumper*. Yes, mama?

*Mrs. Rabbit*. What did your father tell you this morning?

*Thumper*. [*clears throat*] If you can’t say something nice ... don’t say nothing at all.”

See THE INTERNET MOVIE DATABASE, entry “Title: *Bambi* (1942),” section “memorable quotes”; available at <http://www.imdb.com/title/tt0034492/quotes>).

<sup>156</sup> Schlag, *supra* n. 154, 175-6 n.23.

<sup>157</sup> *Id.*, 176.

To any outside observer this suggestion alone should normally be enough to discredit the whole Thumperist discourse in international law. But not, of course, to those who practice it.

So, going back to the three classical themes of the anti-realist attack, the first two of them seem to be generally not that difficult to counter. To the “it is okay (for international law) to be imperfect” argument, legal realism, depending on the circumstances, can always say either (i) no, it is not okay – the terms of the implicit social contract concluded between the legal profession and the rest of the society do not stipulate that the former can get away with submitting such an under-par product as is being presented on their behalf by the ILTMC drafters; call the consumer protection line, we have a faulty product here, or let’s start a product liability proceedings; or (ii) yes, but not *that* imperfect – the new ILTMC regime does not work satisfactorily; it does not pass any of the established tests of legal technique; if we believe that its drafters are really trying to improve it (which is not, in fact, a foregone conclusion), it is still taking them an excessively long time to sort it out, which is not okay, etc.

Once either of these statements is pronounced, the encounter is likely to enter into an argument pattern that, sooner or later, is going to relocate the focus of the discussion to the question of facts, where the “good men of tradition” will usually either argue the “(you’re not a) Jehovah” theme – and thus suggest that the realists are applying an impermissibly harsh set of criteria to judge international law’s imperfection – or construct a combination of the “(you’re not a) Jehovah” argument and a Thumperist argument, by suggesting that not only are the realists being excessively stringent but that they should also keep generally quiet since they have no immediate solution on hand for the problem they describe. In the former case, the legal realist answer will be quite simple: (i) yes, we are not a Jehovah, but one does not need to be a Jehovah to be able to mark the iniquities; and (ii) there is nothing excessively stringent in the tests we have used to evaluate the performance of the ILTMC regime – the same tests have been used in the domestic constitutional law of most established democracies as well as in the modern international human rights law and so on. In the latter case, what needs to be added is a statement to the effect that one, of course, does not need to know what the perfect solution would be to be able to say what a

blatantly dysfunctional solution is. A variation of that statement was famously formulated by Fuller in *The Morality of Law*.<sup>158</sup>

The task of finding [the right moral balance to guide our ethical action] has been needlessly complicated by a confusion of thought that runs back at least as far as Plato. I have in mind an argument along these lines: In order to judge what is bad in human conduct, we must know what is perfectly good. [This argument is wrong.] [T]he assumption that we cannot know the bad without knowing the perfectly good ... is contradicted by the most elementary human experience. The moral injunction “thou shalt not kill” implies no picture of the perfect life. It rests on the prosaic truth that if men kill one another off no conceivable morality of aspiration can be realized. In no field of human endeavor is it true that our judgments as to what is undesirable must be secretly directed by some half-perceived utopia. In the field of linguistics, for example, none of us pretends to know what a perfect language would be like. This does not prevent us from struggling against certain corruptions of usage which plainly tend to destroy useful distinctions.

In the whole field of human purpose – including not only human actions but artefacts of every kind – we find a pervasive refutation for the notion that we cannot know what is unsuited to an end without knowing what is perfectly suited to achieve it. ... If a working companion asks me for a hammer, or the nearest thing to it available to me, I know at once, without knowing precisely what operation he is undertaking, that many tools will be useless to him. I do not pass him a screwdriver or a length of rope. I can, in short, know the bad on the basis of very imperfect notions of what would be good to perfection. So I believe it is with social rules and institutions. We can, for example, know what is plainly unjust without committing ourselves to declare with finality what perfect justice would be like.<sup>159</sup>

The new ILTMC regime, then, one could say, is like a screwdriver that holds itself out, with the help of its accompanying discourses, as a hammer; the “good men of tradition” and

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<sup>158</sup> Whatever else he might have been, no one today would describe Lon Fuller as a bad lawyer, a weak theorist, or an intellectual radical.

<sup>159</sup> FULLER, *supra* n.146, 10-2.



their defenders are, in fact if not in name, the cynical continuators of the post-Platonic confusion that mixes the prosaic dynamics of everyday life with the ideal aspirations of perfect existence; and the legal realist critique of the new ILTMC dogma is like a projection of the Fullerian reminder into the domain of the ILTMC scholarship. One could say all that, but it would still not be enough to repel the anti-realist assault.

But what should legal realists do if their opponents do not resort to the first two arguments but jump instead straight to the Thumper school of jurisprudence? The Fullerian move, of course, would still remain fully applicable. However, a crucial difference would need to be introduced and borne in mind at all times: compared to the other two themes, the “Thumper school” theme tends to be far more aggressive in its anti-realist enterprise. Its logical endpoint is not simply to suggest that the realist critics (or any of their sympathizers) may be slightly deluded, unhealthily pedantic, or permanently lodged in the deepest reaches of bad faith, but that, if they do not at once cease causing trouble, they should be publicly denounced as a clique of aspiring Herostratuses<sup>160</sup> and despicable nihilists. Without addressing this latent suggestion, consequently, one cannot really counter the Thumperist assault in an effective way. And for that, one must, therefore, move beyond Fuller.

This, however, should not, in the end, be that much of a challenge. The nihilist move, after all, is a very telling sign. A tactic honed to perfection by political theorists and law professors ever since the Catholic Church lost its historical monopoly on excommunication and hunting the morally suspicious characters became a deregulated industry in Europe, the accusation of nihilism constitutes at once the most sublime and the most desperate move in every modern argument about ethics. Whoever gets to throw the nihilist card on the table essentially gets to pre-empt their opponent’s arguments – and thus avoid having to engage with them (which may say something about not having anything to respond with) – by branding them as the material embodiment of decadence, totalitarianism, perverse voluntarism, and moral corruption, the utterly despicable traits with which, as everyone knows, the “men of good will” may never argue but which they

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<sup>160</sup> ENCYCLOPEDIA BRITANNICA ® describes Herostratus as the disgraceful “madman” who burned the Temple of Artemis at Ephesus, one of the seven wonders of the ancient world, in pursuit of vainglory and historic fame. See BRITANNICA ONLINE, <http://www.britannica.com/eb/article-9009680?query=Herostratus&ct=>.

to fight, relentlessly, bluntly, ardently, without any trace of compassion or forgiveness.<sup>161</sup> The threat of the use of force, of course, is often as effective as the use of force itself. The nihilists do not always have to throw the nihilist accusation on the table. Hence the common tendency for the active employment of metonymies<sup>162</sup> and half-tones<sup>163</sup> whose formal mildness only emphasizes the fervour of the passion concealed by the thin veneer of gentlemanly conduct.

Against this background, how should the legal realist camp proceed to defend itself? Mainly, it seems by combining and switching between the following five arguments:

(i) the “stepping stone” argument. The basic narrative sequence here runs along the following lines: “You say ‘trashing does not help and you need to be constructive.’ We say – no, you are wrong. Of course, trashing helps! It convinces everyone to reopen the debate and to start searching for the new solutions. Without this, there would be no progress of

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<sup>161</sup> On the rhetorical patterns of the nihilist accusation, see further Pierre Schlag, *Normativity and the Politics of Form*, 139 U. Pa. L. Rev. 801, 828-831 (1991). See also *Symposium: “Of Law and the River”, and of Nihilism and Academic Freedom*, 35 J. Leg. Educ. 1 (1985). Cf. Paul D. Carrington, *Of Law and the River*, 34 J. Leg. Educ. 222 (1984); John Singer, *The Player and the Cards: Nihilism and Legal Theory*, 94 Yale L. J. 1, 47-56 (1984).

<sup>162</sup> A popular metonymy for the nihilist accusation is the use of the name of Carl Schmitt: “We should not, therefore, be afraid of demanding the promotion of universal values that have already been integrated into the norms of positive law. They are not (or not only) part of our European heritage, but the common heritage of mankind, and automatic suspicion of such norms on principle should be left to those ... nostalgic for Carl Schmitt.” (Dupuy, *supra* n.147, 135.) “What remains a puzzle for me, personally, is why Schmitt continues to exert such an attraction to ‘critical’ legal scholars.” (Gerstenberg, *supra* n.147, 130.)

<sup>163</sup> Consider, for instance, the undercurrents animating this passage: “There is a certain inward-looking tendency in both Martti Koskenniemi’s and Hilary Charlesworth’s contributions to this symposium. Whereas the former does not even try to give an ‘operational’ answer to the problem of how to deal with the perpetrators of human rights violations, the latter seems to dispense with neutrality and objectivity for the sake of a highly subjective analysis. We doubt, however, that such analysis will be helpful in the dialogue with decision makers because it does not appear compatible with the setting of general standards for human behavior – norms urgently needed to hold the perpetrators of crimes against women accountable under the rule of law. ... Of course, the time when the claim of positive science to objective knowledge remained largely unchallenged is over, and there is no way back to yesterday’s certainties behind the insights of critical theory, be it late- or postmodern. If we take the critique of positivism as a call for self-consciousness of one’s own political, economic, religious, ethical, male or other bias, we do not object. But what we do reject is the step from criticism of positivism to arbitrariness or postmodern relativism.” (Bruno Simma and Andreas Paulus, *The Responsibility of Individuals for Human Rights Abuses in Internal Conflicts: a Positivist View*, 93 AJIL 302, 306-7 (1999).)

policy analysis. *So what* that we do not propose any extensive solutions ourselves? We do not *need* to do that in order for trashing to become a useful act. It is enough that we do something to help awaken other people's attention and thus enable those who *can* work out the new solutions (but who are not yet aware that these solutions are needed) to do that when the time comes. Trashing is constructive. Its contribution to the progress of the policy dialogue is not negligible. Criticisms clear the undergrowth. Without them, those who can build new solutions will not be able to begin. Cleansing the house of reason from the miasma of superstition is no mean feat."

(ii) the "flat denial" argument. The basic narrative here is: "You say we are not contributing any constructive proposals. You are wrong in the most ordinary sense of the word. We *are* contributing a lot of constructive proposals. You just do *not* see them (or, what is far more likely, do not want to admit it). The answers you claim we are not giving are all there, in black and white, just look in Section X. Or turn to page Y, for instance. Here, we give a very concrete set of proposals about what needs to be done to improve the situation. None of these proposals lie out of the bounds of what is realistic and cost-efficient. So, in what way is that not a constructive contribution?"

(iii) the "who told you it's our job?" argument. The narrative sequence here would normally look like this: "The people you are defending have bungled everything up (even though they were constantly warned about that by those around them), so why is it that you are saying now that we are not allowed to criticize them unless we have cleaned up after them first? What kind of *perverse* logic is that? If your pig-headed neighbour tinkers with the communal drain pipe and breaks it, are you going to say you have to sit tight and keep quiet about it unless you can and are willing to repair it? Let's all be clear about this: it was not *us*, it was the people you are defending here who got us into that dark, miserable situation in which we find ourselves today. It is *their* responsibility, not ours, to get us out of here. And, yes, it would still be absolutely *fair* for us to continue to ostracize them even if we knew they could not 'make things whole again.' If someone in the street knocked out three of your front teeth, would you think it is fair to let him off the hook just because neither he nor you can put those teeth back in your jaw now? The damage is done, and we are here to speak about it. What kind of skeletons in your closet do *you* have to suggest there is anything wrong with that?"

(iv) the “institutional competence” argument. The basic sequence here is somewhat similar to the previous one but it has several distinguishing features: “First of all, it seems you really got us confused with someone else. We are the *watchdogs* who look out on behalf of ourselves and the general public, we are *not* the lawmakers who get paid – and presumably also trained – to run the world in the interests of the common good and to come up with elaborate constructive solutions to every sophisticated problem facing the international order and who for these ends have millions of taxpayers’ money at their disposal, including the funds for hiring hundreds of Ivy League-trained policy analysts and multilingual research associates and dozens of Swiss-based think-tanks to do long-term specialist studies. In fact, it is rather *disingenuous* of you to demand that we do these people’s job, when we all know that we have none of their resources at our disposal and that they, despite having all of them, still have managed not to perform their job properly. It is even more disingenuous when you make our submission to that demand a condition for our exercise of the right to speak. It is *totally scandalous*, finally, that in doing so you also call *us* ‘arrogant,’ when it is, in fact, *they* who had been *so conceited* in the first place that they willingly assumed – nobody forced them, remember – the mantle of the world lawmakers and then held themselves out as if they actually *knew* how the world should be governed, how oppression could be ended, and how social justice could be achieved. They established themselves as people who worked for the common good and they got invested for that with all the responsibility (as well as the accompanying privileges, perks, and kudos) that comes with that kind of job. It totally escapes us now why we should just let it go. They have kept charging the world more and more each year for the grace of their wisdom, and in the end they still have not succeeded. Now, what exactly would be wrong with us telling this fact to those who have been paying their bills all these years literally and figuratively?”

(v) the democracy argument. The basic idea here is this: “By telling us to stay quiet unless we know how to resolve the problems the people you are defending have got us into, you destroy all those democratic values that make constructive dialogues (which you so passionately appear to advocate) a virtue in the first place. Not only do you seek to deny us – completely unjustifiably – our right to free speech, but you also seek to destroy in the process the very culture of democratic accountability that you claim to be protecting. We do not claim any fancy ethical positions for ourselves. All we are saying is that people *deserve* to know what is happening around them, at their expense, and in their name, and that

those who inflict untold sufferings on multitudes of innocent people deserve to be held responsible for their deeds. What *we* do – even if you think it is nothing but trashing – serves all of these ends excellently. What *you* do stifles the democratic process and promotes obscurantism.”

The response matrix comprised by these five arguments is not, of course, perfect. Some arguments do not seem to combine so well with one another (argument two, for example, appears to be quite difficult to reconcile with argument three). Taken in its pure form, each of the five arguments, moreover, may appear to be somewhat extremist. Perhaps, metonymies and halftones should once again be preferred over direct statements. Or, perhaps, one should at long last dare to become firm and upfront and not allow the rituals of form to defuse the impact of substance. After all, how often have the Thumperist militiamen treated the legal realist scholarship with the courtesy of the “true gentlemen”? Perhaps the established dogma of the new ILTMC project has survived for so long not because its ideologues have kept everyone in the dark about its real dysfunctionality but because it has never been attacked with sufficient intensity.

At any rate, the general message sent out by the legal realist camp, it seems, ought to proceed somewhere along these lines:

“1. As far as its professional and disciplinary ethics is concerned, the legal realist camp has *nothing* to have to be ashamed of and *nothing* to have to justify. The accusations thrown at the legal realist scholarship by the militant defenders of the established dogma are all essentially spurious. The realist critics are not a ‘combination of worthless wreckers and hopelessly vague visionaries.’<sup>164</sup> Far more often than not, it is not they but those who pour vile and scorn on them who churn out the most unrealistic utopias and harmful delusions and confuse their audiences’ thought-processes.

2. To the extent to which some of the legal realist scholars do end up sometimes sounding a little highfalutin, the real reason behind that is not that they are just ‘too full of themselves,’ but rather that the techniques of oppression and mystification developed by the ‘good men of tradition’ have become now so complex and sophisticated that they can no longer be resisted on the level of the traditional conceptual apparatus.<sup>165</sup> The more

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<sup>164</sup> Mark G. Kelman, *Trashing*, 36 *Stan. L. Rev.* 293, 297 (1984).

<sup>165</sup> *Id.*, 326.

sophisticated the hegemonic practices are, the more sophisticated the mechanisms of the counter-hegemonic project must become. The legal realist scholarship is not pretentious. It just does not share the idiotic belief that David must come to every battle wielding nothing but a sling.

3. Moreover, what the legal realist scholarship does is not only completely legitimate in professional-ethical terms; it is also completely necessary and indispensable on the level of the general ideological practice *provided* we do indeed intend to protect and promote all those democratic values which the ‘good men of tradition’ claim to be so fervently committed to on the surface of their discourse. For, clearly, it is not the realist critics, but the ‘good men of tradition’ themselves who constitute the most serious threat to the protection of the democratic culture in international law. It is they who insist, in deed if not in name, on retaining a complete *carte blanche* for everything the dominant elites try to do, denying everyone the right to criticize them by advocating the view that one must never be able to disparage the good men of practice unless they can readily better them at their own job (which, considering the extent of the resource monopolization/deficit problem outlined above, is, obviously, completely unlikely to happen), and escaping every form of professional responsibility, while still trying to keep all the perks that come with the job.<sup>166</sup> Without a strong tradition of a legal realist critique, the international law project driven by the interests of such self-declared ideological elites will certainly and irreversibly evolve into a complacency-inducing instrument employed in the service of the established hegemonic

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<sup>166</sup> Mark Kelman captures the logic of the situation quite laconically: “While the greatest desire of the producers of ‘good rhetoric’ may be that people think their rhetoric good so that such producers can stay atop some pyramid, producers of apology also have a reasonably, perhaps unusually, strong belief that *general* status differentials are justified at a general level[,] that the legal system is well-grounded, that the particular legally-based disabilities and privileges they dimly perceive to frame one’s social position are distributed according to an orderly scheme.” (Id., 323.)

In a passage immediately after that, Kelman goes on further to outline the possible class dimension of the critique-counter-critique conflict: “[R]elatively well-off citizens generally are more prone to be self-righteous and immune from crises of conscience because they sense that people are generally treated fairly – that, for both better or worse, people ... get what they deserve. To a discernible degree, the idea that legal rules of the most general form are defensible and are being defended (somewhere) by experts bolsters this belief.” Any critique of the established legal order, consequently, tends to upset them profoundly, making them feel uncomfortable with themselves and motivating them, as a result, to join the “good men of tradition” against the “worthless wreckers” speaking the voice of critique.

order. Every time the legal realist tradition comes under attack, consequently, it must be an immediate duty of all those who believe in the general ideals of the modern international law project to come swiftly to its defence.”

*c. The Main Argument Continued*

But there is, of course, something else here too, something more than just an internecine academic battle waged around the endless chain of glaring inaccuracies in the new ILTMC’s “official autobiography.” For the new ILTMC discourse is not, at the end of the day, *just* an academic discourse. It is also an ideological order whose internal dynamics decides and dispenses with a great number of *tremendous political stakes*. What kind of stakes these are and how big they tend to be can probably be best gleaned from another one of Ambassador van der Stoel’s recent suggestions, viz., the suggestion that the patterns of compliance with the new ILTMC regime have now become a key component of the postmodern standard of civilization.<sup>167</sup>

One does not need, of course, to have an especially profound knowledge of international law’s history to be able to recall what particular ideological role the concept of the standard of civilization has traditionally played in international affairs. As Antony Anghie has so convincingly demonstrated in his numerous writings produced over the course of the last decade, once it had become possible in international law to draw a categorical distinction between the civilized and the uncivilized polities *as a matter of legal theory*, it became only a matter of time before the “international community” arrived at the “completely logical” proposition that not only was it entirely acceptable to deny the uncivilized polities the right to any kind of political independence on the international arena, but that it was also utterly legitimate for the governments of the civilized polities to disagree with the uncivilized natives’ opinions about the contents of their best political, economic, social, and cultural interests.<sup>168</sup>

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<sup>167</sup> See Max van der Stoel, “Integrating Diversity in a Multiethnic Region: Promoting Peace and Security in South-Eastern Europe” (as quoted in DIACOFOTAKIS, *supra* n.76, 139): “An important lesson of the 20<sup>th</sup> century is that the way we treat minorities is ... a measure of the overall civility of our societies.”

<sup>168</sup> For the development of this argument, see further Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 Harv. Int’l L. J. 1, 25-30 (1999). See more generally also

As I will show in the following pages, the new ILTMC project does not just propagate an essentially erroneous understanding of nationalism, ethnic politics, and minority communities. The political potentiality which its development has served in the context of the post-Cold War international relations, in one way or another, appears to have led to what, in the final analysis, appears to be nothing less than a new regime of pan-European imperialism.

Undoubtedly, the emergence of the new ILTMC regime has brought a great deal of positive developments to the post-Cold War European politics. It has certainly decreased the level of transaction costs for the regional decision-makers at a time when the prohibitive impact of such costs may have been truly enormous. Very probably, it has also generated a certain endowment effect<sup>169</sup> dynamics by occupying the field of political imagination with its structures, values, and standards, as a result of which the extreme right elements in some European countries probably did not gain as much political capital as they otherwise could. In any event, at the very least, it has also provided a common frame of reference for the representatives of different ethnic communities, in whose absence the tone of conflict and tension across the region would have very probably been considerably more electric.

No responsible student of the subject could plausibly deny or downplay any of these facts. But neither ought one to ignore the darker sides of the phenomena which they tend to conceal.

History does not allow itself to be acted out twice. It is impossible to say with any degree of certainty how exactly the events in the ECE region would have turned out in the last seventeen years had the new ILTMC project not taken place. Would there have been more ethnic conflicts? Would those that did take place have been more violent? Would the region's transition to democracy have been slower? The assessment of the next most probable scenarios is always a speculative act, not an exact science.

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ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (Cambridge: Cambridge University Press, 2004).

<sup>169</sup> The endowment effect arises when the owner's willingness to retain a particular good exceeds her willingness to have it replaced by an equivalent sum of money. The practical impact of the endowment effect tends to chill the exchange activities and reinforce the established status quo. For further discussion, see Christopher Curran, "The Endowment Effect", BOUDEWIJN BOUCKAERT AND GERRIT DE GEEST (EDS.), *ENCYCLOPEDIA OF LAW AND ECONOMICS*, v. 1 819 (Cheltenham: Edward Elgar, 2000).



What has been more politically considerable: the positive or the negative impact of the new ILTMC project on the events in the ECE area? Recognizing the complex historical role it has played in the post-Cold War development of the ECE politics, should we decry the emergence of the new ILTMC project as a blameworthy enterprise of ideological subjugation or a laudable undertaking that ultimately served benevolent and prudent ends? Questions like these, in the final analysis, can only admit of a purely abstract answer, and even that, in all probability, is likely to be nothing more than a thinly veiled version of a general moral prejudice. “Colonialism is wrong, period.” “But the brutes will run themselves into death if left to their own devices.” “No one has the right to deny another people the right to live its own life according to its own rules.” “But a humanitarian imperialism is better than genocide.” “Imperialism can never be humanitarian. Whoever says humanity cheats. A slave well-fed is a slave still.” “But it is the mark of the mature mind that it wants a cause preserved humbly rather than destroyed brilliantly.” And so one and so forth.

The complexity of the problem we are dealing with here is probably best revealed at the point where we remember that a great deal of the new ILTMC’s self-justifying rhetoric derives not only from its claims about peace and stability – if that had been the ILTMC’s only base of self-validation, its ideology probably would not have been able to make its vision of good governance look as convincing as they eventually made it look – but also from the notion that the regime in question can actually strengthen and enhance the experience of *freedom* for those under its rule. It is best revealed at this point, I think, because it is exactly here that Herbert Marcuse’s observations about the nature of unfreedom immediately spring to mind, and few modern writers, one would have to admit, have explored that subject so insightfully as Marcuse.

Of course, one says from the Marcusean positions, there must be something unseemly about the fact that the ECE polities have not been allowed to resolve their ethnic governance problems (or even decide if what they had on that front should have counted as problems) on their own, and that the promise of freedom for these polities in this matter has been extended to them from somewhere else: that imaginary space-process whose ideologues identify it by the name “international community”, a half-mystified deity serviced by the solemn priesthood of self-proclaimed “international experts.” A political regime created by such a dubious system of social relations cannot but be essentially rotten.

What underlies it is a firm conviction that “we” have the access to the privileged truth which “they” do not. What kind of a privileged truth can there be when it comes to living one’s life in *freedom*?

And yet, one notices immediately, however easy it may be to condemn that kind of discourse, it is still impossible

to refute [it] because [at least] it has the merit to acknowledge, without much hypocrisy, the conditions (material and intellectual) which serve to prevent genuine and intelligent self-determination.

[It shows that the] society must first create the material prerequisites of freedom for all its members before it can be a free society; ... it must first enable its slaves to learn and see and think before they know what is going on and what they themselves can do to change it. And, to the degree to which the slaves have been preconditioned to exist as slaves and be content in that role, their liberation necessarily appears to come from without and from above. They must be “forced to be free,” to “see the objects as they are, and sometimes as they ought to appear,” they must be shown the “good road” they are in search of.

But with all its truth, the argument [still] cannot answer the time-honored question: who educates the educators, and where is the proof that they are in possession of “the good”?<sup>170</sup>

So where does this all bring us then? I think it brings us to a point where we must make a fundamental choice, a choice the implications of which for the rest of this inquiry will be truly enormous but which itself cannot be guaranteed in the end by any traditional means: a foolproof test of objective science, a divine revelation, or a reference to an infallible authority. And the choice that I decided to make here, the wager of this work, if you will, is that, however significant the positive impact of the new ILTMC project on the development of the ECE politics may have been over the course of the last seventeen years, it was still not enough to justify refraining from criticizing it.

“[W]hen men of all social disciplines and all political faiths seek the comfortable and the accepted; when a man of controversy is looked upon as a disturbing influence;

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<sup>170</sup> MARCUSE, *supra* n.150, 43-4.

when ... the bland lead the bland,”<sup>171</sup> those are the days when the greatest achievements of freedom come into the service of its greatest enemies.

It is a usual thing in some circles to purposely equate critical deconstruction with arrogance and nihilism. “If you *really* care about law, why don’t you go and do something *with* it?” is a common reaction one usually gets even when one steers clear of the rampant Thumperists. Most of the time such comments, of course, are quite beside the point. If you look at them from the point of view of formal logic, they are often, in fact, self-contradictory. They proceed from the twin premises that, to put it simply (i) doing international lawyer makes ample moral sense because, essentially, law being an instrument of governance, one can turn people’s lives for the better by working from within international law; and (ii) doing international law scholarship makes ample moral sense too, because international law scholars teach and train the rest of the international law cadre and (at least to some extent) impart to them their professional values. But they do not then remain consistent enough in their reasoning to recognize that to offer a critical reconsideration of the existing legal arrangements with a view to restoring to light the historical alternatives which their political establishment had thwarted or suppressed, so as to broaden the arsenal of concepts and doctrines available for present or future policy employment, *cannot but be* one of the most direct and valuable *constructive* contributions an international law scholar can make to the formation of the international law profession.

The politics of the countercritical attacks, of course, tends to become even more problematic when they are executed by other international law scholars. When legal scholars start to reprimand other legal scholars for not playing along with the ideological elites’ favourite story of the day, what does this tell us about the values of legal scholarship and legal academia in general? If international law scholars refrain from submitting the ideological mystifications created by the global establishment to relentless critique, who will be there to pick up the baton? How well will they be able to carry it? And what will the academics do themselves then?

Certainly, the message of every critical text can often be disheartening. Things that had seemed morally progressive and deserving of an ethical investment may lose a lot of their shine and appeal because of a critical intervention. And obviously even having one’s

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<sup>171</sup> GALBRAITH, *supra* n.149, 4.

profession's public record subjected to any kind of ostracism can rarely be an enjoyable experience. But then, perhaps, not all records deserve to be concealed and not all enjoyments are, probably, worth preserving.

When all is said and done, whichever choice one makes in the confrontation between legal realism and the mainstream international law scholarship, it seems that in the end it would be completely unacceptable for international lawyers to resist any kind of public criticism of their work. For not only is it always and completely true, for international law as much as for every other field of ideological production, that every act of critique "by itself exercises an effect – one which appears to me to be liberating – every time the mechanisms whose laws of operation it establishes owe part of their effectiveness to miscognition,"<sup>172</sup> but if Robert Cover had been at all, even partially, right, and the practices of law do indeed, at least sometimes, take place in a field of pain and death,<sup>173</sup> then it must also be true that, international law being the law of the all-humanity,<sup>174</sup> the international legal practice must be a field of *global* pain and *global* death. With scales and stakes of that kind, who can demand that the voice of an alternative truth be silenced in the name of unity?

#### *d. The Context*

This thesis, then, is a work produced in the genre of legal critique. Its analytical tenor derives essentially from the intellectual traditions of American legal realism and the first-wave CLS.<sup>175</sup> The *substantive* part of its argument sequence, as already indicated, begins with the declaration that the usual "stories" which the newly established ILTMC project tells of itself and its place in the wider social context have all been severely "edited" and that the

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<sup>172</sup> Pierre Bourdieu, "A Lecture on the Lecture," in PIERRE BOURDIEU, *IN OTHER WORDS: ESSAYS TOWARDS A REFLEXIVE SOCIOLOGY* 177, 178 (transl. by Matthew Adamson; Cambridge: Polity Press, 1990).

<sup>173</sup> See Robert M. Cover, *Violence and the Word*, 95 *Yale L. J.* 1601 (1986).

<sup>174</sup> Philip Allott, *The Concept of International Law*, 10 *EJIL* 31 (1999).

<sup>175</sup> My understanding of these two jurisprudential traditions has been shaped primarily by KENNEDY, *supra* n.82, 73-96 and MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 169-212 (New York: Oxford University Press, 1992). To a lesser extent, it has also been influenced by Llewellyn, *supra* n.140, SCHLAG, *supra* n.9, Tushnet, *supra* n.112, as well as Andrew Altman, *Legal Realism, Critical Legal Studies, and Dworkin*, 15 *Phil. & Pub. Aff.* 205 (1986).

programmatic conclusions which these stories “arrive” at, moreover, look convincing and supportable only because of that. Whether deliberately or not, the ideological elites behind the new ILTMC project have constantly and unfailingly “omitted” all those aspects of the international political reality which do not fit the general picture they are trying to present and have then carefully papered over this fact. The resulting product became a series of fundamentally unrealistic and essentially self-supporting myths, which the general public – and this includes to a considerable extent the “invisible college of international lawyers”<sup>176</sup> – has accepted without any serious testing or questioning, partly because they did not seem to deviate from any of the conventional wisdoms of the post-Cold War European discourse, the order of the *doxic* knowledge which Fredric Jameson would usually call the “political unconscious”<sup>177</sup> and Thurman Arnold would have perhaps described as the modern-day folklore of the new Europe.<sup>178</sup> Their acceptance, however, does not make any of these myths any more truthful. Each of them, in the end, is an elaborate fabrication.

The reverse side of this argument is the classical critical contention of the kind traditionally practised by every ideology critique project. It starts with the proposition that if we manage to bring all the “omitted bits” back into the full picture, the official stories of the new ILTMC project will start to fall apart. Their accounts of their surrounding context will begin to reveal themselves as essentially spurious and the conclusions they try to impart on that basis will then no longer look as convincing or supportable as they do now. A completely new set of stories about the new ILTMC enterprise will then emerge, far darker and more troublesome than its ideologues today would find it acceptable to allow. What had previously seemed like a fairly unproblematic and generally progressive phenomenon will now come out as a profoundly questionable enterprise. The political dynamics of the new ILTMC project will start to reveal its ugly sides and their list in the end will prove quite substantial: thousands of innocents will be shown to have been forced to suffer; oppression will be shown to have spread and proliferated; the imperialist project will be revealed to have been advanced and reinforced, injustices to have gone unmentioned and

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<sup>176</sup> I borrowed this term from Oscar Schachter, *The Invisible College of International Lawyers*, 72 *Nw. U. L. Rev.* 217 (1977).

<sup>177</sup> FREDRIC JAMESON, *THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT* (London: Routledge, 2002).

<sup>178</sup> THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* (New Haven: Yale University Press, 1937).

unacknowledged, freedom to have turned into servitude, tensions intensified, the reputation of international law as a discipline tarnished, and the professional ethics of the “invisible college” given a rather sinister tinge.

This thesis, then, is essentially a thesis about international law’s ideological role. Before and above that, however, it is also a thesis about legal discourse, legal thought, and legal scholarship, which is to say, in essence, it is not just a longer version of the basic argument sequence reviewed in the two previous paragraphs. Before it starts to explore the substantive dimensions whose general outlines I have just sketched, it will try to uncover the *doxic* structure of its own productive context. A very considerable part of this thesis’s argument space-process, in other words, has been dedicated to the examination of the underlying systems of knowledge habits, thought mechanisms, and ideological assumptions that make up its cognitive environment.

Admittedly, doing something like that is not a particularly widespread practice in contemporary ILTMC scholarship. But there are more than one good reason for changing that. Few ideas in history have been so widely shared across the spectrum of social and political theory as the basic belief that in one way or another there *must* exist a relationship of direct dependence between the general assumptions adopted in the common theory of knowledge and the specific visions of governance, order, and institutional principles adopted in the everyday practice of politics.<sup>179</sup> Without addressing the former, any attempt to examine the latter will always risk falling over into a bottomless pit of unsolvable riddles, a mirror-hall of empty phantoms in which the weary thought endlessly chases the play of its own shadows constantly confusing it with the signs of the real world outside itself. The starting step of every rigorous inquiry must always be to reconstruct the hidden structure of its *own* general epistemic condition, to understand the in-built logic of its analytical reflexes and learn the limits of what its executors can hope to uncover within its studied object. Unless and until it does that, it shall always “misunderstand [its] own ideas by failing to apprehend their [enabling] premises and implications.”<sup>180</sup> The temple of reason in which it will work will always turn into “a prison-house of paradox whose rooms [do] not connect and whose passageways le[a]d nowhere.”<sup>181</sup> The flight of its knowledge will remain

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<sup>179</sup> UNGER, *supra* n.104, 3.

<sup>180</sup> *Id.*, 6.

<sup>181</sup> *Id.*, 3.

condemned to the tunnel of incessantly proliferating superstitions and self-indulgent incoherences of whose superstitious and incoherent nature it will remain constantly unaware, destined to acquiesce in a chain of insoluble paradoxes it will find both irresolvable and inescapable, while, in reality, they would only be the instant consequences of the invisible postulates it does not need to accept. Regarding “as disparate principles what are in fact different aspects of a single doctrine,” it will “be deluded into imagining it possible to dispose of one without rejecting all the others, or to accept one without conforming to the rest.”<sup>182</sup> What will emerge at the end of that journey will only be describable by one word: *myth*.

None of the phenomena which form the ultimate object of this thesis’s substantive inquiry – “minority community,” “imperialism,” “reality of the legal process” – reflect a plain, straightforward set of social facts. Nor do, of course, the concepts of “international law,” “legal regulation,” or “the wider social context.” Too often the students of the modern international legal order pretend not to be aware of the enormous complexity of the epistemological challenges incident to its study. Too often the temptation to seek short and simple answers that fit with a pre-established wisdom wins over the duty to present a rigorous methodical analysis.

True, in a way, one could say, this thesis turns rather heavy on what some may call “abstract theory.” It spends a lot of time on such matters which many other ILTMC scholars normally skip over or do away with in only a few paragraphs. But what is the real merit of trying to treat as simple that which in reality is complex and convoluted?

It is never possible simply to oppose “concrete facts” to a conceptual order. To criticize one set of concepts, we need to draw on another set that has to be meticulously constructed by the use of a complex rival analytical framework. Otherwise, the broader ideological form underlying the target phenomena we seek to challenge will escape our critical reach. Moreover, through our implicit acceptance of its underlying terms, it will become even more strengthened in its grip over our imagination-space. Without taking the targeted domain in its full ideological totality, thus, we have no chance to win an ideological encounter.<sup>183</sup>

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<sup>182</sup> Id., 6.

<sup>183</sup> For further development of this thought, see, e.g., ERNESTO LACLAU, *POLITICS AND IDEOLOGY IN MARXIST THEORY* 53 (London: NLB, 1977).

The only real advantage of glossing over the tremendous intricacy of the general problematic raised by the new ILTMC project, including in area of methodological significance, other than that, of course, it greatly eases the reception of the resulting discourses in certain scholarly circles, is that it helps to *divert* the both the scholarly and the general public's *attention* from the enormous leeway enjoyed by its enforcers and the colossal ruses created by its ideologues and *sustain the popular belief* in the possibility of a self-executing universal technology of good governance and an objective, context-independent know-how of social justice building. Beyond this, the oversimplification of the subject-matter in question achieves nothing that could be remotely praiseworthy. Believing that every complicated problem can be effectively reduced to a series of simple, easy-to-understand questions each of which correlates with a simple, easy-to-understand objective answer, and that the search for these answers is exactly what the international institutions and those pretending to act on behalf of the international legal order today are engaged in, is, beyond doubt, a serious delusion. Complex problems do not admit of simple solutions. Social ordering is inconceivable without making contentious policy choices. Pretending this fact away has always been a favourite technique of those trying to use such policy choices to promote power changes they know otherwise would be considered unacceptable. What kind of unacceptabilities can the people behind the new ILTMC project be interested in covering up?

The language which international lawyers normally use when they talk of international law's practical functionality, minority rights, legal regimes, politics, ethnic conflict, and good governance practices tends to create an impression of an order of facts and phenomena that is transparent, stable, and easily cognizable. That impression is profoundly wrong. The moment we step outside the idealist, formalist solipsistic world of conventional wisdom and push to its logical conclusion the central injunction of the liberal Enlightenment project – the injunction to seek consistently secular, *this-worldly* explanations for every social phenomenon we encounter, without turning away from the fulminating temporality of social existence or trying to find refuge in the false comfort of religious mystificatory tropes – this soothing mirage of serene simplicity will dissolve immediately and without a trace. The international legal order *is* a tremendously complex phenomenon. No social process in the global arena today could probably be as unstable, multilayered, convoluted, internally fragmented, and multivectoral as the process of the international



legal regulation. And that is not just some unfortunate accident or a side-effect of some random twist of fate. In the age of an ever-intensifying transgovernmentalization of governance, globalization, and polymorphic juridification, there is hardly any other way for the international legal order to be or to be constituted.<sup>184</sup> The students of international law will do their object of study no little disservice if they persist in pretending away this fact.<sup>185</sup>

I mentioned earlier that there is a certain affinity between the investigative project of this thesis and the scholarly traditions of American legal realism and the first-wave CLS. I should make it clear now: this is not exactly a work written in the field of either of these traditions or any of their historical manifestations in the contemporary international law discipline. However displeasing or pretentious this may sound, the discipline of international law has not yet developed an adequate theoretical apparatus that could effectively meet the epistemological requirements of this inquiry. The reason for this, of course, is not that difficult to point out.

Most of the ILTMC-related scholarship in the last twenty years has been decidedly formalist and doctrinalist (in its practice, even if not self-designation). No serious lawyer, of course, would ever deny that formalism and doctrinalism can have a considerable heuristic potential under certain conditions. But a formalist paradigm cannot explain the practical effects of the international legal order in its wider social context and doctrinalism cannot decode the ideological functionality of its accompanying discourses. To tackle that kind of a challenge, one needs to turn away from the rules-oriented approach to the methodology of the socio-legal studies. And that is exactly what the new ILTMC scholarship has by and large failed to do.

The degree of progress which the ILTMC project has witnessed in the last twenty years has been barely short of breathtaking. From a short list of bland recommendations which made up its core in the early 1980s – Article 27 of the International Covenant on

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<sup>184</sup> See further on this *International Symposium on the International Legal Order*, 16 *Lei. J. Int'l L.* 839 (2003); Philippe Sands, *Turtles and Torturers: the Transformation of International Law*, 33 *N.Y.U. J. Int'l L. & Pol.* 527 (2001); Anne-Marie Slaughter, *The Real New World Order*, 76/5 *For. Aff.* 183 (1997); David M. Trubek et al., *Global Restructuring and the Law: Studies of the Internationalization of Legal Fields and the Creation of Transnational Arenas*, 44 *Case W. Res. L. Rev.* 407 (1994).

<sup>185</sup> Cf. Philip Alston, *Myopia of the Handmaidens: International Lawyers and Globalization*, 8 *EJIL* 435 (1997).

Civil and Political Rights (ICCPR)<sup>186</sup> is a typical illustration – it has moved in less than a decade to a full-blown, hierarchically organized normative code of elaborate structure spread through a series of ostensibly soft-law instruments adopted initially under the aegis of the CSCE and then the Council of Europe.<sup>187</sup> By the middle of the next decade, having discovered in the process a completely new field of application and *raison d'être* for itself, it further witnessed the arrival of a whole separate UN Declaration,<sup>188</sup> two legally binding treaties, one global,<sup>189</sup> one regional,<sup>190</sup> a full-time institutionalized mechanism (the OSCE HCNM), followed in the next several years by half a dozen sets of “expert recommendations” and solemn statements about nationalism, ethnic conflict, and multiculturalism that were mentioned earlier.

None of these developments at the end of the day, however, has received any kind of sustained socio-legal engagement from the new ILTMC scholarship. Most of the scholarly work dedicated to the ILTMC project in the last two decades has been limited to surface descriptions, token historicizations, doctrinal apologetics, and low-intensity ideological rationalization. Even those few non-formalist studies that have been produced on the topic by the non-mainstream scholars have by and large failed to address the essential socio-legal problematic of the new ILTMC order.<sup>191</sup> Partly this happened because there were just too few of them; partly because often they did not even try that.<sup>192</sup>

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<sup>186</sup> Article 27, *International Covenant on Civil and Political Rights*, 1966, 999 UNTS 171:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practise their own religion, or to use their own language.”

<sup>187</sup> The primary points of reference are the *Copenhagen Document*, supra n.20; and the *Geneva Report*, supra n.22.

<sup>188</sup> *Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities*, UNGA Resolution 47/135, 18 December 1992, UN Doc. A/47/49.

<sup>189</sup> *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, 1989, 72 ILO Off. Bull. 59.

<sup>190</sup> *Framework Convention for the Protection of National Minorities*, CETS No. 157, 1995; reprinted in 34 ILM 351.

<sup>191</sup> The list is short, even if the entries are brilliant: Nathaniel Berman, “The International Law of Nationalism: Group Identity and Legal History”, in ROBERT J. BECK & THOMAS AMBROSIO (EDS.), *INTERNATIONAL LAW AND THE RISE OF NATIONS* (London: Chatham House, 2002); ZELIM SKURBATY, *AS IF PEOPLES MATTERED ...: A CRITICAL REAPPRAISAL OF ‘PEOPLES’ AND ‘MINORITIES’ FROM THE INTERNATIONAL HUMAN RIGHTS PERSPECTIVE AND BEYOND* (The Hague: Kluwer, 2000); Bill Bowring, “Multicultural Citizenship: a More Viable Framework for Minority Rights?”, in DEIRDRE FOTTRELL AND BILL BOWRING (EDS.), *MINORITY AND GROUP RIGHTS IN THE NEW MILLENNIUM 1* (The Hague: Kluwer, 1999); Eric Heinze, “The Construction and Contingency of the Minority Concept”, id., 25; Nathaniel

To say that the social practicality of the new ILTMC project has remained therefore fundamentally underexplored in the contemporary international law scholarship would be, thus, a rather serious understatement. There have been no critical-deconstructive analyses of the new ILTMC project's internal logic, its impact on the evolution of the practical understanding of the international legal order in the ECE region, or its influence on the transformation of the international legal process. There have been no socio-legal inquiries seeking to elucidate the real effective structure of the new ILTMC regime and its place in the regulation of the political economy of the post-Cold War European societies, the ideological function of its discursive patterns, or its relationship with the broader processes of globalization, juridification, and transgovernmentalism. Aside from the brilliant (but ultimately confused) attempt by Skurbaty,<sup>193</sup> there have been no real scholarly efforts to penetrate the shiny façade of the official dogma proliferated by the ideological elites at the helm of the new ILTMC project and to explore the murky reality behind it. At the end of the day, the “invisible college” of the international law scholarship seems to have by and large completely ignored the social factuality of the new ILTMC project.

Moving to the broader field of the general critical discourse, the story hardly seems to improve. While numerous studies have been produced in recent years that have successfully addressed from the perspective of the traditional critical theory the

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Berman, *“But the Alternative is Despair”*: *European Nationalism and the Modernist Renewal of International Law*, 106 Harv. L. Rev. 1792 (1993); Nathaniel Berman, *Nationalism Legal and Linguistic: the Teachings of European Jurisprudence*, 24 N.Y.U. J. Int'l L. & Pol. 1515 (1992); Nathaniel Berman, *A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of the Interwar Framework*, 33 Harv. Int'l L. J. 353 (1992); Nathaniel Berman, *Modernism, Nationalism, and the Rhetoric of Reconstruction*, 4 Yale J. L. & Hum. 351 (1992).

<sup>192</sup> None of Berman's works target the new ILTMC project. The object of his usual attention, rather, is the history of what he calls the “international law of nationalism” in the interwar period.

<sup>193</sup> *Supra* n.191. Another potential exception could be the scholarship produced by the modern feminist international law scholars. Most of their ILTMC-related insights, however, have come by as a side-effect of their investigations of other international legal regimes, in particular the regimes of international human rights protection. There have been no feminist studies focused immediately on the ILTMC itself. For the two most directly relevant examples of the feminist international law scholarship, see KAREN KNOP, *DIVERSITY AND SELF-DETERMINATION IN INTERNATIONAL LAW* (Cambridge: Cambridge University Press, 2002) and Karen Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 Mich. J. Int'l L. 517 (1992).

problematics of the international human rights project,<sup>194</sup> globalization,<sup>195</sup> imperialism,<sup>196</sup> European integration,<sup>197</sup> and the transformation of the capitalist mode of production,<sup>198</sup> there has been no comparable degree of interest in the problematic of the new ILTMC project. The subject of the new “minorities question” ideology, its legal realization, and its historical significance in the context of the post-Cold War international political development has by and large remained outside the field of attention of the general critical discourse.

But no one today writes in a true theoretical solitude,<sup>199</sup> not even an international legal realist.

Dialectical theory, legal realism, critical deconstruction, and historical materialism may not be, certainly, the most fashionable trends among the modern ILTMC scholars, but the analytical project pursued in these pages is not for all that a *solitary* and *lonely* project. Granted, no single work so far has shared the exact methodological premises of this inquiry. But a number of them have resonated with it rather strongly. Of these, a particular mention has to be made of David Kennedy’s *The Dark Sides of Virtue*,<sup>200</sup> China Miéville’s *Between Equal Rights*,<sup>201</sup> B. S. Chimni’s *Global State in the Making*,<sup>202</sup> Kerry Rittich’s

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<sup>194</sup> See, e.g., DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* (Princeton: Princeton University Press, 2004).

<sup>195</sup> See, e.g., AMY CHUA, *WORLD ON FIRE* (London: William Heinemann, 2003); William I. Robinson, *Globalization: Nine Theses on Our Epoch*, 38:2 *Race and Class* 13 (1996).

<sup>196</sup> See, e.g., HARVEY, *supra* n. 67; Pierre Bourdieu and Loïc Wacquant, *On the Cunning of Imperialist Reason*, 16 *Theory, Cult. & Soc.* 41 (1999).

<sup>197</sup> See, e.g., Susan Watkins, *Continental Tremors*, 33 *NLR* 5 (2005).

<sup>198</sup> See, e.g., LESLIE SKLAIR, *THE TRANSNATIONAL CAPITALIST CLASS* (Oxford: Blackwell, 2001); HARTD AND NEGRI, *supra* n.67.

<sup>199</sup> On the notion of theoretical solitude, see further LOUIS ALTHUSSER, *MACHIAVELLI AND US* 117-30 (transl. by Gregory Elliot and Ben Brewster; London: Verso, 1999).

<sup>200</sup> *Supra* n.194. See also David Kennedy, *The International Human Rights Movement: Part of the Problem?*, 15 *Harv. Hum. Rts. J.* 101 (2002).

<sup>201</sup> CHINA MIÉVILLE, *BETWEEN EQUAL RIGHTS: A MARXIST THEORY OF INTERNATIONAL LAW* (Leiden: Brill, 2004). See also China Miéville, *The Commodity-Form Theory of International Law: an Introduction*, 17 *Lei. J. Int'l L.* 271 (2004).

<sup>202</sup> B. S. Chimni, *International Institutions Today: an Imperial Global State in the Making*, 15 *EJIL* 1 (2004). See also B. S. Chimni, “Cooption and Resistance: Two Faces of Global Administrative Law”, *IILJ Working Paper*

*Recharacterizing Restructuring*,<sup>203</sup> and James Gathii's *Good Governance as a Counter Insurgency Agenda*.<sup>204</sup> On the level of the epistemological tactics important parallels can also be found in Peter Fitzpatrick and Patricia Tuitt's *Critical Beings*,<sup>205</sup> Nathaniel Berman's *Modernism and the Rhetoric of Reconstruction*,<sup>206</sup> and David Kennedy's *International Legal Structures*.<sup>207</sup>

Like every other product of the literary process,<sup>208</sup> this thesis is ultimately a work that has developed its theory as it went about performing its practice. The theory in which this inquiry has found its organization, in other words, was not a master blueprint executed by a mechanical process. It did not grow out from some pre-existing insight like a plant from a seed sown in a patch of fertile soil. On the contrary, it was the product of a drawn-out laborious practice, constituted painstakingly, step by step.

“A literary work,” wrote Pierre Macherey once, “is never entirely premeditated; or rather, it is, but at several levels at once without deriving monolithically from a unique and simple conception.”<sup>209</sup> It is “the product of a certain labour,” an overdetermined work of an artisan, “not of a conjurer or a showman.” To grasp the general essence of the literary process, we must recognize two things. First, “method” and “theory” are not just some free-floating phenomena but the essential materials of the scholarly work. Second, “[t]he writer, as the producer of a text, does not manufacture the materials with which he works. Neither does he stumble across them as spontaneously available wandering fragments,

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2005/16 (*Global Administrative Law Series*), Institute for International Law and Justice, New York University Law School, 2005.

<sup>203</sup> KERRY RITTICH, *RECHARACTERIZING RESTRUCTURING: LAW, DISTRIBUTION AND GENDER IN MARKET REFORM* (The Hague: Kluwer, 2002). See also Kerry Rittich, *Transformed Pursuits: the Quest for Equality in Globalized Markets*, 13 Harv. Hum. Rts. J. 231 (2000).

<sup>204</sup> James Thuo Gathii, *Good Governance as a Counter Insurgency Agenda to Oppositional and Transformative Social Projects in International Law*, 5 Buff. Hum. Rts. L. Rev. 107 (1999). See also James Thuo Gathii, *Neoliberalism, Colonialism and International Governance: Decentering the International Law of Governmental Legitimacy*, 98 Mich. L. Rev. 1996 (2000).

<sup>205</sup> PETER FITZPATRICK AND PATRICIA TUITT (EDS.), *CRITICAL BEINGS: LAW, NATION AND THE GLOBAL SUBJECT* (Aldershot: Ashgate, 2004).

<sup>206</sup> *Supra* n.191.

<sup>207</sup> DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (Baden-Baden: Nomos Verlagsgesellschaft, 1987).

<sup>208</sup> I borrow the idea of the literary production from PIERRE MACHEREY, *A THEORY OF LITERARY PRODUCTION* (transl. by Geoffrey Wall; London: Routledge, 2006).

<sup>209</sup> *Id.*, 46.

useful in the building of any sort of edifice.”<sup>210</sup> Rather, he constructs them, gradually, painstakingly, while also coming inevitably to be constructed (in his text-producing role) “back.”

The methodological component that in the conventional imagery cements every thesis and gives it its specific sense of internal composure is not, in fact, a starting element of the inquiry, but a thoroughly overdetermined effect of its practice. Its construction is not deprived of its own logic, but that logic is too complex to be reduced to an abstract formulation. To see it in its full complexity, to comprehend the manner in which its constituent tensions are turned into that ad-hoc balance which in the end finds its embodiment in the final product, one must restore the awareness of its individual history, its past, its trajectory, the long and winding path the course of its development took on its way to where it is now.

However, the conventions of the established practice dictate that as far as possible one should always refrain from attempting anything along those lines. The sequence of the written narrative, according to the established expectations, must be decoupled from that of the thought in which it was produced. What in reality, thus, can only become clear after the work is finished – and even then only with the benefit of several journeys up and down the same path – in written practice is usually articulated at the beginning of the work. With this as my basic disclaimer, let me turn now to my next chapter, the chapter on the question of method. Retracing the steps that have taken me through this field, let me show now how exactly – by what logic and on what terms – this thesis has arrived at that model of the legal realist critique which it adopted and what exactly it understands by the idea of “legal realism.”

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<sup>210</sup> Id., 47.

## **II**

### **Method**

“The most valuable insights are the last to be discovered;  
but the most valuable insights are *methods*.”

Friedrich Nietzsche, *The Anti-Christ*, §13

My objective in this chapter is twofold. First, I am going to explain the basic methodological challenges facing this thesis. Then I am going to describe the general epistemological framework from within which I have written it.

For a number of reasons, which I discuss in the opening section, I have decided to steer clear of the traditional epistemological framework characteristic of most modern-day international law scholarship. Drawing on the work of the French Marxist philosopher Louis Althusser and his students Pierre Macherey and Nicos Poulantzas, I offer instead to consider the problematic of the ILTMC from the perspective of an alternative epistemological framework, one constructed on the basis of a dialectical understanding of the historically constituted socio-political conjuncture (historical materialism). Seen against this background, the first main question addressed in this chapter can be essentially summarized in the following terms:

The first problem, which materialism always re-establishes in its priority, is the problem of the objectivity of the reflection. It poses the question: ‘Is there an existent material reality reflected in the mind which determines thought?’ ... The second problem, which can only be posed correctly on the basis of the first, concerns the ... knowledge of the exactitude of the reflection. It poses the question, ‘If thought reflects an existent reality how accurate is its reflection?’ or better, ‘Under what conditions (i.e. historical conditions whereby the dialectic between ‘absolute truth’ and ‘relative truth’ intervenes) can it provide an accurate reflection?’ ... In the context, it is clear that this second problem poses the question, ‘What form does the reflection take?’ But it only has a materialist implication once the first question has been posed and the objectivity of the reflection affirmed.<sup>1</sup>

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<sup>1</sup> Etienne Balibar and Pierre Macherey, “On Literature as an Ideological Form,” in TERRY EAGLETON AND DREW MILNE (EDS.), *MARXIST LITERARY THEORY: A READER* 275, 278-9 (Oxford: Blackwell, 1996) (transl. by I. McLeod et al.).



Every method constructs its own object. In the end, though, the authority of every method always derives from the nature of its object.<sup>2</sup> From this basic interdependency derives the general law of all discursive production, a social practice whose basic concept is

constituted by a structure which combines (*Verbindung*) the type of object (raw material) on which it labours, the theoretical means of production (its theory, its method and its technique, experimental or otherwise) and the historical relations (both theoretical, ideological and social) in which it produces.<sup>3</sup>

The epistemological mechanism of the historico-materialist method having been constructed, I will turn then to the production of this thesis's object of discourse, explaining in the process the basic difference between a genuinely historico-materialist study of the new ILTMC's problematic and the study undertaken in these pages.

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<sup>2</sup> See PIERRE MACHEREY, *A THEORY OF LITERARY PRODUCTION* 9 (transl. by Geoffrey Wall; London: Routledge, 2006).

<sup>3</sup> LOUIS ALTHUSSER AND ÉTIENNE BALIBAR, *READING CAPITAL* 41 (transl. by Ben Brewster, London: New Left Books, 1970) [hereafter *READING CAPITAL*]. For a similar understanding but formulated in different terms, see J. M. Balkin, *Interdisciplinarity as Colonization*, 53 *Wash. & Lee L. Rev.* 949, 955-7 (1996) (outlining a vision of a discursive process occurring under the rubric of "discipline" and its relationship with thought, reason, and reasoning).

## Section One

### The Discursive Conventions of International Law Scholarship

#### *a. The Ethical Dynamics of the Traditional Scholarship*

Whatever one may think of them otherwise, most Ph.D. theses are written to be read. The starting question of every such undertaking, consequently, must be: “Who is the target audience of this work?”

It is not very common among modern international lawyers<sup>4</sup> to spend much time thinking about the target audiences of their discourses. Naturally, virtually all international lawyers will be quick to recognize (or at least declare they do) the basic difference between an article written for an international law yearbook and a dissenting opinion rendered in the context of an international adjudication. That, however, is usually nothing but an appearance.

In practice, most international lawyers hardly exhibit any real awareness of the basic differences between the readers of yearbook articles and the readers of international judgments. A good portion of the modern-day “invisible college” seem<sup>5</sup> to live under the impression – even though most of them would probably deny this with great vehemence if

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<sup>4</sup> It is possible that this statement can be seen as an excessive generalization. As Austin Sarat has repeatedly argued (see, e.g., *The Profession versus the Public Interest: Reflections on Two Reifications*, 54 *Stan. L. Rev.* 1491 (2002)), the legal profession is not nearly as unitary and internally coherent as most sociological discussions of it tend to suggest. That said, it still remains true that, however we go about it, unless we are ready to give up on everything but the most vulgar forms of phenomenologism, generalizations will remain an inevitable feature of every theoretical inquiry we undertake and every scholarly text we write.

True, one can always assert at this point that few actual international lawyers consciously subscribe to the views I discuss here. As I understand it, this argument completely misses the point. What I offer here is a general impression of the scholarly genre as a whole, not a statistics sheet for every individual scholar’s life project. Some symptoms plaguing our collective practices cannot be adequately explained unless we are prepared to engage in large-scale generalizations. The current case, I believe, is one of those cases.

<sup>5</sup> David Kennedy has written at length about this. So has Paul Kahn. See, further, David Kennedy, *Theses about International Law Discourse*, 23 *GYIL* 353 (1980); PAUL W. KAHN, *THE CULTURAL STUDY OF LAW: RECONSTRUCTING LEGAL SCHOLARSHIP* 109 *et seq.* (Chicago: The University of Chicago Press, 1999). More generally, see also David Kennedy, *The Disciplines of International Law and Policy*, 12 *Lei. J. Int’l L.* 9 (1999).

anyone decided to state it openly – that they secretly sit on the International Court of Justice or, better still, that it is once again 1648 or 1945 and they have just been asked to fill in for the whole San Francisco conference or whoever it was who thought up the Treaties of Munster and Osnabruck.<sup>6</sup> Reading on a regular basis Article 38(1)(d) of the ICJ Statute<sup>7</sup> and Ronald Dworkin,<sup>8</sup> obviously, does not help.

Regardless of how far one can legitimately go in categorizing such attitudes as a mild form of daydreaming, it seems that a fairly good case can be made today for the proposition that historically the most respectable genres of scholarly writing in international law seem to have been those that have denied every notion that the scholarly endeavour might have any value in its own right, constantly reducing it to the pallid role of the shy dishwasher who simply cannot believe her fantastic luck in having stumbled upon these glamorous demigods of “legal practice” whom she can now humbly serve. The basic idea behind the ideal model of the scholarly practice in international law, in other words, is that

scholars [are supposed to] suggest ways to modify current practice, proposing that what worked in one area be tried in another, or generalize from past successes and failures in order that they might be repeated or avoided.

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<sup>6</sup> For a comprehensive overview of these two treaties, more commonly known under a single heading as “The Peace of Westphalia,” and a good illustration of the established dogma about their ideological contribution to the development of modern international law, see further Leo Gross, *The Peace of Westphalia*, 42 AJIL 20 (1948).

<sup>7</sup> See Article 38, *Statute of the International Court of Justice*, 1945, 59 Stat. 1031:

“1. The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:

- a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
- b. international custom, as evidence of a general practice accepted as law;
- c. the general principles of law recognized by civilized nations;
- d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.”

For a summary of the traditional understanding of Article 38(1)(d), see further IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 4, 24-5 (5<sup>th</sup> edn.; Oxford: Oxford University Press, 1998) (the works of international law scholars are a material source of international law, not a formal source).

<sup>8</sup> See, e.g., RONALD DWORKIN, *LAW'S EMPIRE* (Cambridge, MA: Harvard University Press, 1986).

Scholarship of this type aims to persuade the reader that there exists a better mousetrap, and most scholarly work in the international law field presents itself in this way. ... The key here is that there is another group of people, called “practitioners,” for whom scholars are doing this work and who will judge its persuasiveness and ultimate value. However argumentative and critical this work may be, it will ultimately be judged not by other scholars on the basis of its arguments, but by practitioners on the basis of its usefulness. ... If an idea is not taken up and repeated by practitioner-beings, it must not be useful.<sup>9</sup>

On closer inspection, the reality behind the appearances, as usual, turns out to be quite different. The image of the Dworkinean Hercules, as Pierre Schlag has correctly observed,<sup>10</sup> at the end of the day, is not, in fact, an idealized image of a judge – just as the Fullerian Rex<sup>11</sup> is not, in fact, an idealized image of a legislator – but rather that of a middle-aged, middle-class, First-World legal academic with an overly ambitious ego. The constant self-effacement practiced by the practice-oriented international law scholarly discourse is in reality, thus, nothing but an inverted form of self-aggrandizement. Scholars write for judges<sup>12</sup> not because they hope that the judges will take the time to listen to their helpful advice, but because they *expect* the judges to heed and venerate their wisdom.

Certainly, not *all* international law scholars usually write in this vein. The argument here, however, is not about that. When I talk about the discursive conventions of international law scholarship I do not have in mind some universal invariants or a brooding omnipresence in the sky of which the invisible college of international law scholarship is a mere plaything. I do not pretend – nor am I interested – to know what holds true for all international law scholars under all conditions all of the time. My interest is only limited to their conventional wisdom, i.e. what the invisible college of international law scholars has historically identified as the privileged forms of its practice and how these forms of practice

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<sup>9</sup> David Kennedy, *When Renewal Repeats Itself: Thinking against the Box*, 32 NYU J Int'l L. & Pol. 335, 398-9 (2000) [hereafter Da. Kennedy, *Thinking against the Box*].

<sup>10</sup> Pierre Schlag, “*Le Hors de Texte, C'est Moi*”: *The Politics of Form and the Domestication of Deconstruction*, 11 Cardozo L Rev. 1631, 1662-6 (1990). See also Pierre Schlag, *Normativity and the Politics of Form*, 139 U. Pa. L Rev. 801, 845 (1991).

<sup>11</sup> See LON L. FULLER, *THE MORALITY OF LAW* 33 *et seq.* (New Haven: Yale University Press, 1963).

<sup>12</sup> See Pierre Schlag, *Writing for Judges*, 63 U. Colo. L Rev. 419 (1992).

construct their target audiences. In this connection, I find it is rather uncontroversial to observe that at the very least: (i) most international law scholarship today is essentially normative;<sup>13</sup> (ii) the hallmark of normative legal scholarship is that it proceeds on the assumption that social institutions, such as, for instance, treaty regimes, can and ought to be subjected to some sort of moral (in the broader sense of the word) evaluations; (iii) for such evaluations to be possible, at least three conditions have to be assumed: (a) that a set of principles external to the institutions in question exists and can be employed in the role of a yardstick against which the institutions can be measured, (b) that people can be reasoned to on the basis of these principles, and (c) that people have enough free will to be able to accept or to refuse to accept these principles; (iv) the abstract person who agrees with all the above and, in particular, satisfies condition (c) is the ideal “Thinking Man” to whom all this scholarly discourse is addressed.<sup>14</sup>

It does not take a particularly strenuous effort to figure out how problematic this attitude can become. To start with, the “Thinking Man” simply does not exist; chances are, moreover, it never did.<sup>15</sup> Even if this were not the case, it would still be true that whoever comes close to fitting the “Thinking Man”’s ideal profile is not, probably, the kind of person the modern international law discourse – or, at any rate, the ILTMC discourse – should pride itself on picking as its main interlocutor or target audience. Judging by the general traits expected of him, the “Thinking Man” is clearly a well-educated, upper-middle class person who resides in the First World, belongs to the global cultural-economic elite, and is sufficiently politically empowered to interest himself with the moral improvement of the global political institutions.

Put differently, the ideal target audience of the traditional international law scholarship does not consist of the global underclass, the economically marginalized, the ethnically cleansed, the uneducated, the low-paid, or the IDPs. The moral vantage point from which the majority of the “invisible college” writes its normative evaluations of those

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<sup>13</sup> Further on the concept of normative scholarship, see Pierre Schlag, *Normative and Nowhere to Go*, 43 *Stan. L. Rev.* 167 (1990).

<sup>14</sup> For further analysis of the narratological institution of the “Thinking Man,” see THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* 5-7 (New Haven: Yale University Press, 1937).

<sup>15</sup> “Fact-minded persons who do not believe in the ‘thinking man’ and who do not expect to gain political objectives by making rational appeals to him are not considered respectable. They are called ‘politicians’ and not ‘political scientists.’” (Id., 60.)

social institutions which it picks for consideration is *not* that of the dispossessed, the excluded, and the browbeaten. The sociology of the traditional international law scholarly discourse does not extend beyond the maddeningly narrow – especially when considered in the global context – circle within which the mythology of liberal politics can resonate freely with the practical experiences of its interlocutors undrowned by the grim realities of annual epidemics, civil strife, ethnic cleansing, functional illiteracy, urban poverty, permanent economic crisis, gender violence, systemic discrimination, and exclusion.

Approaching it against this background, consequently, here is the first methodological challenge confronting us in these pages: how can this Ph.D. thesis begin to comment on the established normative regimes constituting the body of the modern international law relating to the treatment of minority communities if the discursive conventions adopted in the traditional international law scholarship make it structurally incapable of *engaging with* the practical experiences of some of the worst afflicted among these minority communities? Is it not the case that every discourse that addresses itself only to the ideologically dominant groups but has as its immediate object of reference the general situation and the terms of life of the politically disempowered communities, is, in fact, an instrument of hegemonic dominance, by means of which the former manage and administer the lives of the latter, or, to put it slightly less elegantly, keep the excluded where they are? Accepting the prevailing consensus that, whatever else it may be, a minority community is first and foremost politically non-dominant, how, against this background, can we start producing an international law scholarship *for* and *in favour of* – and not just *about* or *on behalf of* – such communities? Is this something that is practically achievable? Or does this task belong in the realm of the effectively impossible? How can we produce an international law scholarship that will empathize with the minorities' practical experience and still not veer away from the established professional conventions so far as to alienate the rest of the "scholarly guild" and sink, against their rejection, like a stone in a quiet pond?

It is not, of course, a pure contingency that the scholarly discourse of international law has developed such a strong tilt in favour of the powerful and the dominant. But is there any way one could try to change this? Put differently, is international law scholarship *by its very nature* the wrong forum for doing something other than entertaining the fantasy of

the Dworkinean Hercules and talking to the “Thinking Man” or can we write an international law scholarship that from the perspective of the oppressed minorities?

The further one delves into these questions, the more unlikely it seems one is going to find a quick resolution to any of them. Part of the reason for that, undoubtedly, lies in the essential complexity of the ethical impulse for empathization.

The basic logic of the modern aspiration for empathy, as Keith Jenkins has recently pointed out, derives ultimately from the classical liberal tradition in its Millian formulation,<sup>16</sup> at the centre of which, famously, stood

the notion that the individual could do what he/she desired so long as the exercise of that desire did not curtail the liberty of others. To calculate if this would occur as a consequence of any action, the person (agent) had to imagine what these consequences would be; to put him/herself into other people’s positions; to see their point of view. In doing so this calculation would have to be both rational and universalisable, capable of rational reciprocation for all involved. For if the person(s) affected were ever in a position to do the same thing back to the agent then mutual harm could occur. ... This approach – being rational, seeing other people’s views and balancing the options and thus the possibly hurtful consequences of extreme actions (extremism) – is thus what lies behind all those requests to put oneself into another person’s position ...; to try to see things from their perspective.<sup>17</sup>

What Jenkins seems to be saying here, in other words, is this: the *practical* logic of empathization in its classical liberal format essentially requires that, in order to be able to empathize, we need *both* to de-contextualize the phenomenon of experience *and* to assume the existence of something in the register of a universal experiential grammar, that is, a transcendental systematic grid in reference to which different agents can synchronize their appreciations of different experiences. For an intellectual project like this to become possible, however, at least three ontological conditions appear to be necessary.

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<sup>16</sup> See JOHN STUART MILL, *ON LIBERTY AND OTHER ESSAYS* (Oxford: Oxford University Press, 1991).

<sup>17</sup> See KEITH JENKINS, *RE-THINKING HISTORY* 54 (London: Routledge, 2003).

Firstly, it must be assumed that all experiences are essentially intelligible. In other words, we must accept as basically self-evident the view that every experience is organized around a certain internal logic by grasping which one can make enough sense of it to understand its practical significance. Secondly, it must be assumed that every experience is susceptible to cognition not only through immediate practice but also through analytical exertion so long as by that exertion we grasp the essence of its internal logic. In other words, one must believe that in order to understand what it is like to be a lower middle class Tatar woman living in Kyiv one does not necessarily have to fill her proverbial shoes: so long as one frames the terms of one's analysis correctly, one can understand everything one needs to understand. Thirdly – and most importantly – it must be also assumed that all experiences have a common, context-independent foundation. In other words, we must take it for granted that all experiences consist of the same constituent blocks and follow the same set of developmental regularities by understanding which the non-experiencing subjects can work out the basic essence of every experience without having to enter them on the receiving end.

A different way of putting this is to say that the practical logic of empathy is essentially the logic of rationalist hegemony. To figure out, how a particular action would be perceived from other people's vantage point, we project ourselves into the functional subject positions occupied by them by first singling out the intelligible essence of the targeted experiences and then analytically readapting the corresponding context to our subject capacities through the transposition of the relevant blocks of our personalities into the relevant parts of the given experiences' logical grids. When we engage in empathetic practices, in other words, what we really do is not gauge what other people's experiences are but only *imagine* what *our* experiences in their situation could become, which is effectively the same thing as to say that the methodology of empathy is based on a combination of reduction, universalization, and the self-aggrandizement of reason. Since it is only the *functionality* of another person's experience, i.e. the experience's objective relationship with the rest of its context, that can be cognized without having to live through that experience itself, it follows that to be able to empathize we must always inevitably *reduce* the lived experiences of other people to their functional role in that remainder of their context which is susceptible to analytical reconstruction. At the same time, since there is no such thing as a presuppositionless thought, when we empathize we



always inevitably end up *universalizing* our own values by substituting an abstract golem constructed through *our* exercise of *reason* for the multidimensional singularity of the living experiencer's figure within its lived practice. The usual name reserved to such operations in modern political theory is "hegemony."<sup>18</sup>

But if empathy is essentially (only) a species of hegemony, where does this fact leave us with regard to our initial apprehension about the methodology of the traditional international law scholarship?

One way of responding to this dilemma, of course, would be to reject this apprehension and to re-legitimize the traditional conventions of the scholarly practice: hegemonism is inevitable; it happens in all discursive contexts, between all cultures, and in all inter-personal encounters. Foucault said as much.<sup>19</sup> So also did Edward Said.<sup>20</sup> International law scholars cannot be expected to achieve what is ontologically unachievable. The only thing each of them can then be asked to do is to admit that: "[l]ike other theorists, I have no wish to write in a way that is falsely universalizing, exclusionary, arrogant, and domineering. Yet the fact remains that it is impossible to write theory without generalizing and universalizing."<sup>21</sup> For "the very moment of speaking (or writing) is [in itself always] a moment of *arrogation*," and to that "there is no alternative."<sup>22</sup>

However logical (and practically convenient) it may seem at first, this argument, I think, is ultimately flawed. Simply because hegemonism is ontologically inevitable – and the discourse of the international law scholarship cannot, for that reason, ever escape being

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<sup>18</sup> ERNESTO LACLAU AND CHANTAL MOUFFE, *HEGEMONY AND SOCIALIST STRATEGY* xiii (2<sup>nd</sup> edn.; London: Verso, 2001): "This relation, by which a certain particularity assumes the representation of a universality entirely incommensurable with it, is what we call a *hegemonic relation*."

<sup>19</sup> Although Foucault did not explicitly use the term "hegemony" in the sense described above, a common idea that goes through all his works is the idea that every discursive enterprise is ultimately an enterprise of ruling and domination. See further MICHEL FOUCAULT, *MADNESS AND CIVILIZATION: A HISTORY OF INSANITY IN THE AGE OF REASON* (transl. by Richard Howard; London: Routledge, 2001); MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (transl. by Alan Sheridan; New York: Vintage Books, 1995); MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 92-102 (transl. by Robert Hurley; New York: Vintage Books, 1990); MICHEL FOUCAULT, *POWER/KNOWLEDGE: SELECTED INTERVIEWS AND OTHER WRITINGS 1972-1977* (Brighton: The Harvester Press, 1980).

<sup>20</sup> See in particular EDWARD W. SAID, *ORIENTALISM* 50-72 (London: Penguin, 2003).

<sup>21</sup> TORIL MOI, *WHAT IS A WOMAN?* 123 (Oxford: Oxford University Press, 1999).

<sup>22</sup> *Id.*, 249-50.

hegemonic, however hard it tries – it does not yet necessarily follow that the particular hegemonic system maintained by the discursive conventions of the traditional international law scholarship is in fact legitimate. Hegemonies, like realisms, after all, come in different stripes and colours.<sup>23</sup> To be able to figure out which are “better” than others, we need first to understand what it is about hegemonism that makes it so immediately objectionable to our eyes as international lawyers.

A significant part of the moral case justifying the impulsive aversion to the practice of hegemonism commonly perpetuated in the modern cultural environment, it seems, ultimately derives from the classical liberal assumption that, in its essence, hegemony represents an unrestrained projection of subjective political will, and will, being a basic emanation of desire, is always, by its character, arbitrary and irrational. Desires, declares the liberal metaphysics, are by their very nature always irrational.<sup>24</sup> Their contents can never be defended by any exertion of Reason, nor can they be brought onto any kind of logical basis. Desires can only be described and classified, but never fully comprehended or controlled. However one goes about them, in the liberal worldview, desires are an unwaveringly suspicious bunch of characters that should never be given a free hand in anything.

Given that all people are born equal, continues the classical liberal argument, no one person’s desires can be recognized as inherently superior to anyone else’s. Any attempt to impose one’s desires on others, consequently, is not only utterly indefensible on the ground that it cannot be sanctioned by Reason, but also on the ground that it runs absolutely contrary to the principle that all people are essentially equal. Only if a positively created political consensus concluded by people in the exercise of their mutual equalities – the Rousseauvian social contract – establishes some form of an inter-personal hierarchy, it seems, can this position ever be changed. In the self-imagery of the modern international law project no such consensus, however, has ever been concluded, not at least in the context of the inter-cultural encounters between minority and majority communities. If we are to remain worthy of the ethical ambitions our professional sensibility has inculcated in

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<sup>23</sup> Anne-Marie Slaughter, *International Law and International Relations*, 285 Recueil des Cours 9, 30 (2000).

<sup>24</sup> My understanding of the metaphysics of liberalism is borrowed from ROBERTO MANGABEIRA UNGER, *KNOWLEDGE AND POLITICS* (New York: The Free Press, 1984) and Duncan Kennedy, *Legal Formality*, 2 J Leg. Stud. 351 (1973).

us,<sup>25</sup> consequently, it follows, we must on every possible occasion oppose every manifestation of inter-cultural hegemony. But let us take another step forward and ask: to what extent is this duty practically performable?

The logic of the liberal ideology, as Unger and others before him pointed out, is essentially a logic of vicious circles and irresolvable contradictions.<sup>26</sup> The reason for this, as Nietzsche explains, derives from a rather peculiar ideological anachronism: having dethroned the medieval metaphysical system of Religion grounded in the concept of God, liberalism decided to retain the two basic prizes – knowledge and comfort – which Religion had traditionally promised to its disciples. The problem with that retention, however, was that it created a set of fundamentally unfulfillable expectations, for once God had been removed from the picture, the two basic questions on which Religion offered to its disciples the possibility of a *comfortable knowledge* – “why does anything exist at all, rather than nothing?,” and, “why do people have to die?” – became effectively unanswerable. Instead of interrogating the driving momentum of the productive impulses which pushed it towards these questions, liberalism chose to press on stubbornly in its quest to answer them, thus preparing its own self-arrestment.

Suppose that everything man ‘knows’ does not satisfy his desires but instead contradicts them and arouses horror, what a divine excuse it is to be permitted to lay the guilt for this at the door of ‘knowing’ rather than ‘wishing’? ... ‘There is no knowing; *consequently* – there is a God’.<sup>27</sup>

The problem, says Nietzsche, is that once the liberal project of Reason begins to realize its inability to resolve the two questions it had inherited from Religion, it ultimately has no way to stop itself from self-destruction.<sup>28</sup> Not knowing how to restore its internal composure, liberalism throws itself back to the same point from which it had tried to

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<sup>25</sup> I borrow this phrase from Pierre Bourdieu. See PIERRE BOURDIEU, *HOMO ACADEMICUS* xxv (transl. by Peter Colier; Cambridge: Polity Press, 1988).

<sup>26</sup> See UNGER, *supra* n.24, 6-7.

<sup>27</sup> FRIEDRICH NIETZSCHE, *ON THE GENEALOGY OF MORALITY* 123 (transl. by Carol Diethe; Cambridge: Cambridge University Press, 1994).

<sup>28</sup> Terry Eagleton discusses the same problematic from a slightly different perspective in TERRY EAGLETON, *AFTER THEORY* 194-8 (London: Penguin, 2004).

depart in the first place when it set out to eradicate “Religion.” Arrested by the radical incommensurability between its aspirations and its capacities, the liberal project of Reason pushes itself into an endless sequence of irresolvable contradictions. Brought to its logical limits, it leads itself into a situation in which the only way for it to overcome its paralyzing antinomies is to bring back the same metaphysical sensibility which it had originally set out to fight on the grounds that it was essentially a mystification, a sensibility which it now purifies and reinforces, making it “more elusive, more spiritual, more insidious” by “constantly and unsparingly detach[ing] and br[eaking] off a wall or outwork that attached itself to it and *coarsened* its appearance.”<sup>29</sup>

Nietzsche’s diagnosis of the basic predicament of the liberal project of Reason was issued more than a century ago. Yet it could hardly be any more relevant today. One only has to think of Heidegger with his *Dasein*,<sup>30</sup> Camus with his deification of “the absurd,”<sup>31</sup> or Unger, with his nervous “Speak, God,”<sup>32</sup> to see how prescient Nietzsche’s observations have turned out to be.

Whatever guise it takes, the liberal project of Reason always runs out of steam at one point or another. When this happens, the ethical logic (i.e. the logic that teaches us what we must do) generated on its basis immediately grinds to an abrupt halt.<sup>33</sup> The void that becomes exposed after this can then either be acknowledged in an open return to

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<sup>29</sup> NIETZSCHE, *supra* n.27, 122.

<sup>30</sup> See MARTIN HEIDEGGER, *BEING AND TIME* (transl. by John Macquarrie and Edward Robinson; Routledge, 2002).

<sup>31</sup> See ALBERT CAMUS, *THE MYTH OF SISYPHUS* (transl. by Justin O’Brien; London: Penguin, 2000).

<sup>32</sup> See UNGER, *supra* n.24, 295.

<sup>33</sup> Camus captures the mood quite forcefully: “all the knowledge on earth will give me nothing to assure me that this world is mine. You describe it to me and you teach me to classify it. You enumerate its laws and in my thirst for knowledge I admit that they are true. You take apart its mechanism and my hope increases. At the final stage you teach me that this wondrous and multi-coloured universe can be reduced to the atom and that the atom itself can be reduced to the electron. All this is good and I want for you to continue. But you tell me of an invisible planetary system in which electrons gravitate around a nucleus. You explain this world to me with an image. I realize then that you have been reduced to poetry: I shall never know. . . . What need had I of so many efforts? The soft lines of these hills and the hand of evening on this troubled heart teach me much more. . . . A stranger to myself and to the world, armed solely with a thought that negates itself as soon as it asserts, what is this condition in which I can have peace only by refusing to know and to live, in which the appetite for conquest bumps into walls that defy its assaults?” (CAMUS, *supra* n.31, 25.)

some pre-Enlightenment sensibility or be shamefacedly covered up by the various ersatzes of the postmodern God and the corresponding tropes.<sup>34</sup>

Faced with the “unnameable” “monstrosity” “proclaiming itself ... under the species of the non-species,”<sup>35</sup> Jacques Derrida had discovered, beneath the maze of all signs and structures, the traces of an “arche-writing” and a “*différance*.”<sup>36</sup> Ludwig Wittgenstein, bending his seasoned spade, uncovered instead the “language games” and the “forms of life.”<sup>37</sup> Jacques Lacan invented “the Real.”<sup>38</sup> Gilles Deleuze made out the contours of the “pure immanence.”<sup>39</sup> Antonio Negri thought up “*kairos*” and “the multitude.”<sup>40</sup> Jürgen Habermas conjured “discourse ethics” and “ideal speech situations.”<sup>41</sup> Toril Moi invested her faith in the good intentions of speech and the “non-defiant silence” of “restful self-respect.”<sup>42</sup> Each of them might as well have joined John Lennon and simply called it “God.”<sup>43</sup> Little would have changed in terms of the additional insight.

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<sup>34</sup> For an illuminating overview of how this is achieved, for example, in modern American jurisprudence, see further PIERRE SCHLAG, *THE ENCHANTMENT OF REASON* 92-125 (Durham, NC: The Duke University Press, 1998).

<sup>35</sup> See Jacques Derrida, “Structure, Sign and Play in the Discourse of the Human Sciences,” in JACQUES DERRIDA, *WRITING AND DIFFERENCE* 278, 293 (transl. by Alan Bass; Chicago: The University of Chicago Press, 1978).

<sup>36</sup> On arche-writing, see JACQUES DERRIDA, *OF GRAMMATOLOGY* (transl. by Gayatri Chakravorty Spivak; Baltimore, MD: The Johns Hopkins University Press, 1997). On *différance*, see JACQUES DERRIDA, *MARGINS OF PHILOSOPHY* 1-28 (transl. by Alan Bass; Brighton: Harvester Press, 1982).

<sup>37</sup> See further LUDWIG WITTGENSTEIN, *ON CERTAINTY* (transl. by Denis Paul and G. E. M. Anscombe; Oxford: Basil Blackwell, 1979).

<sup>38</sup> For a general introduction to Lacan’s theory, see JACQUES LACAN, *ÉCRITS* (transl. by Alan Sheridan; London: Routledge, 2001); MALCOLM BOWIE, *LACAN* (London: Fontana Press, 1991); SLAVOJ ŽIŽEK, *THE SUBLIME OBJECT OF IDEOLOGY* (London: Verso, 1989).

<sup>39</sup> See further GILLES DELEUZE, *PURE IMMANENCE: ESSAYS ON A LIFE* (transl. by Anne Boyman; New York: Zone Books, 2001).

<sup>40</sup> See further ANTONIO NEGRI, *TIME FOR REVOLUTION* (transl. by Matteo Mandarini; London: Continuum Publishers, 2003).

<sup>41</sup> See further JÜRGEN HABERMAS, *JUSTIFICATION AND APPLICATION: REMARKS ON DISCOURSE ETHICS* (transl. by Ciaran P. Cronin; Cambridge: Polity Press, 1993).

<sup>42</sup> See MOI, *supra* n.21, 230-50.

<sup>43</sup> Cf. John Lennon, “God”, in JOHN LENNON/PLASTIC ONO BAND 10 (Parlophone Audio CD; 2000): “God is a concept by which we measure our pain.”

The relevance of all these observations for the present purposes should be quite self-evident. So long as in our discursive practices we continue to retain both the liberal promise of a non-religious metaphysics and the religious promise of reaching an *existential comfort* amidst the practical activity of *knowledge*, the question of hegemony is going to remain ontologically irresolvable. Another way of putting this is to say that the ethical question of discursive hegemony in international law scholarship is effectively only a proxy for the ontological question of God in the liberal project of non-religious metaphysics. Some of the best minds of the 20<sup>th</sup> century have tried to resolve this problem. All of them have failed without exception. Even the illustrious leaders of the “new approaches to international law” movement,<sup>44</sup> all their unquestionable brilliance notwithstanding, have not been able to escape this fate.<sup>45</sup> Faced with the fundamental irresolvability of the Reason-induced conflict between the ethics of empathy and the ethics of anti-hegemonic resistance, every discursive resolution they produced over the last twenty years has, in one way or another, has arrived on the back of an essentially religious trope.

Thus, for Nathaniel Berman in 1999 it was the trope of expiatory self-flagellation that provided a convincing illusion of a way out from the impasse into which the stalemate of international law’s universal present and its Eurocentric imperialist past had evolved.<sup>46</sup> Meanwhile, for Martti Koskenniemi a decade earlier it was the Hegelian update of Spinozist pantheism that created the confidence that there might be a viable path beyond the Scylla and Charibdes of apology and utopia.<sup>47</sup> For David Kennedy two years before that the

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<sup>44</sup> Further on the history of the “new approaches to international law” movement, see Da. Kennedy, *Thinking against the Box*, 457-500; Martti Koskenniemi, *Letter to the Editors of the Symposium*, 93 AJIL 351 (1999); Thomas Skouteris, *Fin de NAIL: New Approaches to International Law and Its Impact on Contemporary International Legal Scholarship*, 10 *Lei. J Int’l L.* 415 (1997). For the external perspectives on the movement, see also Deborah Z. Cass, *Navigating the Newstream: Recent Critical Scholarship in International Law*, 65 *Nord. J Int’l L.* 341 (1996); Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2 *EJIL* 66 (1991); Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 *Harv. Int’l L J* 81 (1991).

<sup>45</sup> Which they themselves would probably not contest. See Da. Kennedy, *Thinking against the Box*, 499-500; Koskenniemi, *supra* n.44, 359-61.

<sup>46</sup> See Nathaniel Berman, *In the Wake of Empire*, 14 *Am. U. Int’l L Rev.* 1521, 1552-4 (1999) (propagating the acceptance of international law’s “fundamental irredeemability” and ending with an appeal for “international law [to] muster the courage to look frankly, painfully, at the horrors of its own past”).

<sup>47</sup> See MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 491-8 (Helsinki: Lakimiesliiton Kustannus, 1989) (arguing that “it is necessary to outline for the

promise of international law's disciplinary liberation from the chain of deadlocks between theory and practice had come from essentially the same logic as that which lies at the heart of the literal Kabbalah.<sup>48</sup> A decade and a half later, in 2004, it became the turn of the Calvinist tropes of unceasing effort<sup>49</sup> (Koskenniemi)<sup>50</sup> and grace (Kennedy)<sup>51</sup> to do the job of the *deus ex machina* by carrying the burden of transcending the irresolvable opposition between "law-humanitarianism-community" and "politics-governance-oppression."

Where does all this leave us in the end? What does the record of these failures tell us about the nature of the ethical challenge facing us on the methodological front? There are, it seems, at least two general lessons that we can draw from our discussion so far:

1. *Pursuing a scholarly commitment in international law requires a basic tolerance for contradiction and the unachievability of emotional tranquility.* The job of the international law

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lawyer an existence in routine which constantly aims at transforming the contexts which shape it and an intellectual directedness towards context-transformation without losing touch of its embeddedness in routine," the proposed solution being the ethics of "contextual equity" defined as the "commitment to reaching the most just solution in the particular disputes he is faced with" and the "routine which allows the lawyer to escape from the limitation of the role and help to create a better society while enabling him to live a conscious and meaningful life as a lawyer in the midst of the actuality of social and political conflict"). Cf. Martti Koskenniemi, *The Politics of International Law*, 1 EJIL 4, 31 (1990).

<sup>48</sup> See David Kennedy, *A New Stream of International Law Scholarship*, 7 Wisc. Int'l L. J. 1, 6-12 (1988) (expressing the hope that by "reimagining the field" in terms of rhetorical patterns, treating "theory" and "history" as the continuation of "doctrine," and approaching "doctrine" as a set of textual practices, one can "dislodge the discipline of international law from its stagnation in post-war realism" and "releas[e it] from a constellation of [illusory] images"). See also more generally KENNEDY, *infra* n. 83.

<sup>49</sup> For further discussion of this trope, see ERICH FROMM, *THE FEAR OF FREEDOM* 78-80 (London: Routledge, 2002).

<sup>50</sup> See Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 EJIL 113, 118-123 (2005) (arguing that "the choice is not between law and politics, but between one politics of law and another" and that through hard effort and good-faith reliance on our everyday practical wisdom – "the real difficulty lies in being able to make that distinction – and I can invoke nothing better than the personal histories of all of us to make the point that we constantly *do* make that distinction" – backed up by art and religion we can somehow make that choice in a meaningful fashion).

<sup>51</sup> See DAVID KENNEDY, *THE DARK SIDES OF VIRTUE: REASSESSING INTERNATIONAL HUMANITARIANISM* xxv-xxvi (Princeton: Princeton University Press, 2004) (announcing "the hope that well-meaning people, people who hope to make the world a more human and just place," will be able "to embrace the human side of humanitarian practice, including its dark sides, uncertainties, and ambivalences," finding, in other words, what "[p]erhaps the word *grace*" encapsulates best: "I propose we rethink our humanitarian traditions as the search for grace in governance.")

scholarship is not to deify some dubious ersatz of a transcendental godhead. Whatever institutional legitimacy the modern scholarly enterprise may have, it has it, at least in part, because of its commitment to the liberal project of Reason and demystification. Whether one likes it or not, however, one cannot simply remain faithful to this commitment without at the same time accepting the ontological unachievability of existential comfort in one's professional practice, i.e. without treating as inevitable the absence of any metaphysical guarantees for one's project of knowledge. If we should resist the re-mystification of our discourses, to be able to go on with our investigations, we must learn to accept that none of them are ultimately guaranteed and that each of them can disintegrate at every moment.

2. *The barriers raised by the question of hegemony cannot be surpassed by reformulating the methodological problematic.* The question of hegemony cannot be resolved without resolving at the same time the basic predicament of the liberal project of Reason. Without giving up on the liberal promise of a non-religious metaphysics, however, the latter task remains effectively impossible. One can gloss over the problem and conceal the void, but never get over it.

With this as our starting platform, we can move now to the more technical part of our inquiry, the question of the epistemological mechanism. The main query that will concern us at this stage of our inquiry is essentially twofold: (i) what are the main epistemic limitations facing the project of juridical scholarship?; (ii) what are the conditions under which international law scholarship can provide its object of knowledge with an objective grounding without resorting to any of mystificatory tropes?

*b. The Practice of Interpretation and the Epistemological Challenge of Intertextuality*

To understand the basic problematic of juridical knowledge in the context of modern-day international legal studies, it is instructive to begin by considering the general challenge presented to the traditional international law scholarship by the rise of the doctrine of intertextuality.



The concept of intertextuality, according to the traditional view,<sup>52</sup> was first introduced in the modern literary discourse some forty years ago by the French-Bulgarian psychoanalyst and literary theorist Julia Kristeva.<sup>53</sup> In its narrower sense, the concept of “intertextuality” is generally understood to stand for the simple proposition that no piece of writing can be ever isolated from the rest of the semiotic domain.<sup>54</sup> Each text carries in itself the traces of some other texts and the various extra-textual discursive events against whose background it is located.<sup>55</sup> Seen from this perspective, for example, it follows that one cannot really approach Francesco Capotorti’s definition of minorityhood<sup>56</sup> without also

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<sup>52</sup> See, however, GRAHAM ALLEN, *INTERTEXTUALITY* 8-30 (London: Routledge, 2000) (tracing the theory of intertextuality back to the Swiss linguist Ferdinand de Saussure and the Russian literary theorist Mikhail Bakhtine).

<sup>53</sup> See JULIA KRISTEVA, *DESIRE IN LANGUAGE: A SEMIOTIC APPROACH TO LITERATURE AND ART* (transl. by Thomas Gora et al.; New York: Columbia University Press, 1980).

<sup>54</sup> The classical definition of “semiotics” (or “semiology” – in the last half a century the two terms have become virtually interchangeable), given by Saussure, reads: “It is... possible to conceive of a science which studies the role of signs as part of social life. It would form part of social psychology, and hence of general psychology. We shall call it *semiology* (from the Greek *semeion*, ‘sign’). It would investigate the nature of signs and the laws governing them.” FERDINAND DE SAUSSURE, *COURSE IN GENERAL LINGUISTICS* 15 (transl. by Roy Harris; London: Duckworth, 1983). A modern introductory text on the subject describes semiotics as a study of “signs not in isolation but as part of semiotic ‘sign systems’ (such as a medium or genre)[, i.e. a] study [of] how *meanings* are made: as such, being concerned not only with communication but also with the construction and maintenance of reality.” DANIEL CHANDLER, *SEMIOTICS FOR BEGINNERS* (1994), available at <<http://www.aber.ac.uk/media/Documents/S4B/semiotic.html>>.

<sup>55</sup> Here is how Jonathan Culler defines intertextuality: “Recent theorists have argued that works [of literature] are made out of other works: made possible by prior works which they take up, repeat, challenge, transform. This notion sometimes goes by the fancy name of ‘intertextuality’. A work exists between and among other texts, through its relations to them.” JONATHAN CULLER, *LITERARY THEORY: A VERY SHORT INTRODUCTION* 33 (Oxford: Oxford University Press, 1997).

<sup>56</sup> Famously, there is no official definition of what counts as “a minority” in contemporary international law. Ever since the new ILTMC discourse began to emerge in the late 1980s, international lawmakers have consistently avoided producing a coherent definition of minorityhood. (See, however, *CEI Instrument for the Protection of Minority Rights*, 1994; available from [http://www.ceinet-download.org/download/minority\\_rights.pdf](http://www.ceinet-download.org/download/minority_rights.pdf); Recommendation 1201 (1993), Parliamentary Assembly of the Council of Europe; available from THE COUNCIL OF EUROPE PARLIAMENTARY ASSEMBLY DOCUMENTS, at <http://assembly.coe.int/Documents/AdoptedText/ta93/erec1201.htm>). In the absence of a universally adopted formal definition, the most authoritative statement on the question is commonly considered to be that given in 1977 by the Special Rapporteur of the United Nations Sub-Commission on Prevention of

invoking the League of Nations Minorities Treaties<sup>57</sup> or the PCIJ dicta on the same subject.<sup>58</sup> In its broader sense, the concept of “intertextuality” is understood to reflect a more general epistemological theory whose central tenet involves the rejection of every notion of disciplinary or epistemic closure.<sup>59</sup> The project of knowledge cannot be subjected to any internal-structural limitations. Kant was wrong. The number of valid forms in which cognition can proceed is infinite.<sup>60</sup>

Conceived against this background, the basic stance of the international law profession regarding the question of intertextuality can be generally summarized as follows:

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Discrimination and Protection of Minorities, Francesco Capotorti, according to which the term “minority” refers to “a group numerically inferior to the rest of the population of a State, in a non-dominant position, whose members – being nationals of the State – possess ethnic, religious or linguistic characteristics differing from those of the rest of the population and show, if only implicitly, a sense of solidarity, directed towards preserving their culture, traditions, religion or language.” See Francesco Capotorti, *Study on the Rights of Persons Belonging to Ethnic, Religious and Linguistic Minorities*, 1977, UN Doc. E/CN.4/Sub.2/384/Rev.1, para. 568.

<sup>57</sup> On the League of Nations Minorities Treaties system, see further Geoff Gilbert, *Religio-nationalist Minorities and the Development of Minority Rights Law*, 25 Rev. Int'l Stud 389, 402-6 (1999); JENNIFER JACKSON PREECE, NATIONAL MINORITIES AND THE EUROPEAN NATION-STATES SYSTEM 67-94 (Oxford: Clarendon Press, 1998); PATRICK THORNBERRY, INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES 38-54 (Oxford: Clarendon Press, 1991); Julius Stone, *Procedure under the Minorities Treaties*, 26 AJIL 502 (1932). For a contemporary view of the Minorities Treaties system, see also Helmer Rosting, *Protection of Minorities by the League of Nations*, 17 AJIL 641 (1923); Ifor L. Evans, *The Protection of Minorities*, 4 BYIL 95 (1923-4); Joseph S. Roucek, *Procedure in Minorities Complaints*, 23 AJIL 538 (1929).

<sup>58</sup> Prior to Capotorti's report (supra n.56), the passage that was commonly treated as the most conclusive pronouncement on the nature of minority communities was this one: “the ‘community’ is a group of persons living in a given country or locality, having a race, religion, language and traditions of their own and united by this identity of race, religion, language and traditions in a sentiment of solidarity, with a view to preserving their traditions, maintaining their form of worship, ensuring the instruction and upbringing of their children in accordance with the spirit and traditions of their race and rendering mutual assistance to each other.” (*Greco-Bulgarian “Communities”*, 1930, PCIJ, Series B, No. 17, 21). See also *Rights of Minorities in Upper Silesia (Minority Schools)*, 1928, PCIJ, Series A, No. 15, 32-3.

<sup>59</sup> The idea of the epistemic closure refers to the general theory that “we [can] know [everything] that follows from what we [already] know.” Cf. Steven Luper, “The Epistemic Closure Principle”, in EDWARD N. ZALTA (ED.), *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (spring 2002 edn.); available from <http://plato.stanford.edu/archives/spr2002/entries/closure-epistemic/>.

<sup>60</sup> For a classical expression of this view, see further ROLAND BARTHES, *IMAGE MUSIC TEXT* 142-8, 155-64 (transl. by Stephen Heath; London: Fontana Press, 1977).

(1) *International law practice*. While “in private” most international law practitioners seem to feel generally ambivalent about intertextuality,<sup>61</sup> “in public” they usually either pretend it out of existence completely, preferring the far more comfortable notion of the “legal context,”<sup>62</sup> or approach it with a sense of profound suspicion. The unique case of Martti Koskenniemi is all the more revealing because almost everyone knows it to be unique.<sup>63</sup> The common view held by the college of the international law practice, in other words, is far more orthodox than what would be usually advocated under the rubric of the intertextuality theory. Whenever an international law practitioner encounters a piece of written text, the usual epistemological assumption seems to be that she can easily uncover the meaning of the studied text by extracting it directly from the body of the text itself, throwing, perhaps, an occasional glance at the *travaux préparatoires* or the “teachings of the most highly qualified publicists”, but without really having to consult the broader political, historical, and cultural contexts of its production. Part of what makes it possible for her to pull off that trick on a regular basis is the “incontrovertible fact” that meanings exist independently of interpretations and that – as a result – every international law text always possesses an objective, intelligible essence eminently amenable to analytical capture. The skills that enable international lawyers to perform that capture are what ultimately constitutes the essence of international law’s disciplinary canon, i.e. that epistemological method whose mastery sets the international law profession apart from everyone else.<sup>64</sup>

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<sup>61</sup> For a telling illustration, see, e.g., R. Y. Jennings, “Closing Address”, in CATHERINE BRÖLMANN ET AL. (EDS.), *PEOPLES AND MINORITIES IN INTERNATIONAL LAW* 341 (Dordrecht: Nijhoff, 1993).

<sup>62</sup> For a definition of “legal context,” see, e.g., the dissenting opinion of Judges Basdevant, Winiarski, McNair, and Read in *Conditions of Admission of a State to Membership in the United Nations*, Advisory Opinion, ICJ Reports 1948, 57, 84: “it is a rule of interpretation which was well recognized and constantly applied by the Permanent Court of International Justice that a treaty provision should be read in its entirety[i.e.] it must be placed in its legal context as supplied by the other provisions of the [treaty in question] and the principles of international law.”

<sup>63</sup> Koskenniemi published the first edition of *From Apology to Utopia*, an intertextualist manifesto *par excellence*, while he was still a practicing international lawyer with the Finnish ministry of foreign affairs. See KOSKENNIEMI, *supra* n.47.

<sup>64</sup> “To determine the meaning of a treaty provision – to determine, as in this case, the character (exhaustive or otherwise) of the conditions for admission stated therein – is a problem of interpretation and consequently a legal question.” (*Conditions of Admission*, *supra* n.62, 61.) Cf. *Free Zones of Upper Savoy*, 1932, PCIJ, Series A/B, No. 148, 138 (“... the Court whose function it is to declare the law...”).

Of course, goes on the conventional wisdom, some international legal texts can be sometimes confusing. Normally this tends to happen because their drafters use imprecise language or choose inconsistent formulations. Take, for instance, the classical texts on the right to self-determination. Does the penultimate paragraph of the section on “The principle of equal rights and self-determination of peoples” of the 1970 Declaration on the Principles of International Law<sup>65</sup> endorse a limited right of secession in apartheid-style circumstances<sup>66</sup> or does it not? If it does, what kind of procedure does it require to be followed? The same as in Resolution 1541?<sup>67</sup> Also, how does the subject identified in the paragraph just before that as “the people” differ from the subject identified in Article 1 of the ICCPR as “a people”?<sup>68</sup> Sometimes, the confusion can also result from the multiplicity of the text’s authoritative versions. A treaty drafted in two languages can say different things in different versions. That both of them can qualify as “authentic” obviously does not help.

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<sup>65</sup> “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed, or colour.” (*Declaration on Principles of International Law Concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the United Nations*, UN GA Resolution 2625 (XXV), 24 October 1970, UN Doc. A/RES/2625 (XXV); as reprinted in 65 AJIL 243, 249 (1971).)

<sup>66</sup> For a discussion of this possibility, see further ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* 108-124 (Cambridge: Cambridge University Press, 1995); THORNBERRY, *supra* n.57, 19-20.

<sup>67</sup> *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter*, UN GA Resolution 1541 (XV), 15 December 1960, UN Doc. A/4651.

<sup>68</sup> See Article 1, ICCPR:

- “1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.
2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.
3. The States Parties to the present Covenant, including those having responsibility for the administration of Non-Self-Governing and Trust Territories, shall promote the realization of the right of self-determination, and shall respect that right, in conformity with the provisions of the Charter of the United Nations.”

None of these problems, however, are endemic. All of them are, rather, the products of rare accidental glitches, virtually all of which are easily rectifiable. Thus, when the problem of the conflicting authentic texts came up before the European Court of Human Rights in the *Belgian Linguistics Case*, the immediate solution worked out by the court turned out to be as effective as it was simple: whenever two authentic meanings clash, the narrower meaning should be selected over the more general one.<sup>69</sup>

However daunting the interpretative obstacle may be, declares the conventional wisdom of the traditional international law practice, there is nothing, in theory, that the international law practitioner should not be able to deal with without leaving her disciplinary home turf. True, sometimes the literal meaning of a provision may be somewhat deficient or lacking, but, ultimately, that does not really matter that much. If the literal meaning does not work, it can always be discarded:

In every legal system, whether common law or civil law, where the meaning of the words in a statute is clearly defined, the obligation of the judge is to give the words their clearly defined meaning and apply them strictly. This is the literal rule of interpretation. ... Where the use of a word or expression leads to absurdity or repugnance, both common law and civil law courts will disregard the literal or grammatical meaning.<sup>70</sup>

In one way or another, every interpreted object, according to the conventional wisdom of the international law practice, is seen to possess a singular, correct, natural meaning.<sup>71</sup> Every such meaning, moreover, is imagined to be completely objective and to reside

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<sup>69</sup> *Case relating to Certain Aspects of the Laws on the Use of Languages in Education in Belgium*, 23 July 1968, Series A, No. 6; 1 EHRR 252. It bears mentioning, however, that what was ultimately involved in that case was a fairly minor terminological problem involving two rather closely related European languages. It is difficult to imagine the same principle would apply with the same ease if one dealt, say, with a terminological ambiguity in Chapter VII of the United Nations Charter, which, apparently, has six authentic versions written in six different languages representing three different language families.

<sup>70</sup> *Prosecutor v. Delalic et al.*, ICTY, Case No. IT-96-21, Trial Chamber, Judgment, 16 November 1998, 63, §§ 161-2.

<sup>71</sup> The “natural” meaning is sometimes also called “ordinary.” See, e.g., *Polish Postal Service in Danzig*, 1925, PCIJ, Series B, No. 11, 37.

(almost always) inside the immediate body of the text.<sup>72</sup> As a result, it follows, there is no need for the college of the international law practice to spend any time on intertextuality, since there is really not that much use for it in its work.

(2) *International la scholarship*. By contrast with their practicing colleagues, a fairly significant proportion of international law scholars over the course of the last few decades have chosen to take a considerably more sympathetic view of the theory of intertextuality. Proceeding under the rubric of interdisciplinary studies, the intertextualist tradition in international law scholarship seems to have not only taken a rather firm professional rooting, but also gone through at least two different stages (generations), with the second stage following on the heels of, but not replacing, the first one.

Generally speaking, for the international law intertextualists of the first stage accepting the theory of intertextuality has essentially meant supporting one or another form of discursive interdisciplinarity.<sup>73</sup> Anne-Marie Slaughter's appeal for the linkage of international law and the international relations theory conveys the sentiment perfectly:

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<sup>72</sup> "It is appropriate to recall the rule of interpretation stated by this Court in its Advisory Opinion of 3 March 1950 on the subject of the Competence of the General Assembly for the Admission of a State to the United Nations, to the effect that the text should be recognized as authoritative, unless its terms are ambiguous or lead to an unreasonable result." (Separate opinion of Judge Ammoun, *North Sea Continental Shelf Cases (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, ICJ Reports 1969, 3, 102.)

Cf.: "Having been asked to determine the character, exhaustive or otherwise, of the conditions stated in Article 4, the Court must in the first place consider the text of that Article. The English and French texts of paragraph 1 of Article 4 have the same meaning, and it is impossible to find any conflict between them. The text of this paragraph, by the enumeration which it contains and the choice of its terms, clearly demonstrates the intention of its authors ..." (*Conditions of Admission*, supra n.62, 62.) Compare J. L. BRIERLY, *THE LAW OF NATIONS* 238 (4<sup>th</sup> edn.; Oxford: Clarendon Press, 1949): "law often does not hesitate to attribute an intention to parties who have never thought of the situation with which in the even the law has to deal.") For a succinct summary of the general epistemological code adopted in the traditional international law practice, see also more generally Article 33(3), *Vienna Convention on the Law of Treaties*, 1969, 1155 UNTS 331. For a traditional doctrinal understanding of that code, ANTONIO CASSESE, *INTERNATIONAL LAW* 134 (Oxford: Oxford University Press, 2000).

<sup>73</sup> For a representative sample of first-stage intertextualist works in international law, see further Kenneth W. Abbott, *International Relations Theory, International Law, and the Regime Governing Atrocities in Internal Conflicts*, 93 *AJIL* 361 (1999); ABRAM CHAYES AND ANTONIA HANDLER CHAYES, *THE NEW SOVEREIGNTY: COMPLIANCE WITH INTERNATIONAL REGULATORY AGREEMENTS* (Cambridge, MA.: Harvard University Press, 1995); Michael Byers, *Custom, Power, and the Power of Rules: Customary International Law from an Interdisciplinary Perspective*, 17 *Mich. J Int'l L.* 109, 128-9 (1995).

Institutionalists and international lawyers subscribe to a common ontology of the international system: the actors, the structure within which those actors act, and the process of their interaction. Both groups, separately and together, are describing a common agenda focused on the study of improved institutional design for maximally effective international organizations, compliance with international obligations, and international ethics. Although a broad avenue with many promising vistas, the Institutionalist road to interdisciplinary collaboration is only one possible route, with an inevitably limited set of destinations. [This article] proposes another path, equally promising, but considerably more challenging. This new interdisciplinary bridge involves the application of “Liberal” international relations theory to law within and among nations. ... The Liberal agenda will require international lawyers to revise their most fundamental conceptions of the international system. The rewards are worth it, however; this approach permits the construction of a comprehensive legal framework that links factors and trends of interest to the widest possible spectrum of international lawyers, from traditional specialists on questions such as national self-determination, to human rights activists, environmental lawyers, trade experts and international litigators and deal makers. Moreover, the Liberal agenda *complements* the Institutionalist agenda as the study primarily of law among liberal states. Many of the world’s most pressing problems are left to the Institutionalist. In sum, the dual agenda is a unified agenda, offering powerful tools and a cornucopia of research opportunities for all students of international law and politics.<sup>74</sup>

[I]nternational lawyers can ill afford to ignore the growing wealth of political science data on the world they seek to regulate. The measurements may be imprecise, the theories crude, but the whole offers at least the hope of a positive science of world affairs. ... In the end, law informed by politics is the best guarantee of politics informed by law.<sup>75</sup>

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<sup>74</sup> Anne-Marie Slaughter, *International Law and International Relations Theory: a Dual Agenda*, 87 AJIL 205, 206-7 (1993).

<sup>75</sup> *Id.*, 239.

As Jack Balkin probably would have pointed out,<sup>76</sup> the central element here, of course, is not so much the author's heartfelt conviction that the epistemological techniques of the traditional international law scholarship have somehow become profoundly inadequate – after all, this kind of conviction has characterized *every* generation of ambitious international law scholars, from Grotius to Alvarez to Lauterpacht<sup>77</sup> – but rather the immediate form which it takes. As in most other fields of legal studies, the main characteristic feature of international law's first-generation intertextualism seems to be the fact that it has come to recognize itself as such. What motivates it and gives it a distinct sense of identity, thus, is not just a desire for a disciplinary renewal, but the conviction that there exists a concrete epistemological technique called “interdisciplinarity” and that its practical elaboration requires, in effect, a union of two traditions (one of which is called “law”) and not just, say, a progressive development of the traditional legal technique.

As one can imagine, the professional-ideological implications of such a posture, all its technical aspects aside, are not particularly inconsequential. On the one hand, running away from the suffocating formalism of the traditional legal scholarship, every group of the first-generation interdisciplinarians has ended up, in one way or another, creating a formalist technique of their own, equipped with a full set of non-rebuttable axioms, untestable preconceptions, and self-fertilizing deductive chains. On the other hand, because they have made such a special point emphasising the fact of their transcendence of the narrow confines of the traditional legal technique, none of them, in the end, could really recognize that if the web of the self-fertilizing dogma is the ultimate prison-house of reason, then the only thing which the first-generation intertextualism has really managed to achieve was exchange one prison-cell for another, slightly bigger, more spacious, perhaps, and more colourful, but a prison-cell none the less. In that sense, one could say, the ultimate apogee of international law's first-generation intertextualism came in the second half of the 1990s, with the development of the so-called “international law and economics” movement,<sup>78</sup> whose unfailing insistence on the immediate “analogy between the market of

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<sup>76</sup> See Balkin, *supra* n.3, 950.

<sup>77</sup> Cf. David Kennedy, *A New World Order: Yesterday, Today, and Tomorrow*, 4 *Trans'n'l L & Contemp. Probs* 329, 357-61 (1994).

<sup>78</sup> For a representative sample of “international law and economics” works, see Eyal Benvenisti, *The US and the Use of Force: Double-Edged Hegemony and the Management of Global Emergencies*, 15 *EJIL* 677 (2004); Eric A.



international relations and the traditional markets for goods”<sup>79</sup> appears to be the most logical conclusion of the trend set in motion two generations earlier by the New Haven scholars.<sup>80</sup>

The methodological allegiances of the second generation of international law intertextualists were markedly different. Far less respectful of the sacred cows of their predecessors than the first generation, the second generation of international law intertextualists took as their starting point the traditional poststructuralist<sup>81</sup> injunction to resist every form of disciplinary hypostatization, including those that merged two or more disciplines together.<sup>82</sup> In their understanding, the main implication of accepting the theory of intertextuality was not that the scholarly community had to throw the weight of its authority on the side of a modest interdisciplinary linkage (and, consequently, a new, even if misnamed, formalism), but that it had to force a decisive reopening of every

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Posner, *A Theory of the Laws of War*, 70 U. Chi. L Rev. 297, 300 (2003); Alexander Thompson, *Applying Rational Choice Theory to International Law: the Promise and Pitfalls*, 31 J Legal Stud. S285 (2002); James D. Morrow, *The Laws of War, Common Conjectures, and Legal Systems in International Politics*, 31 J Leg. Stud. S41, S45 (2002); Jack L. Goldsmith and Eric A. Posner, *A Theory of Customary International Law*, 66 U. Chi. L Rev. 1113 (1999); William J. Aceves, *The Economic Analysis of International Law: Transaction Cost Economics and the Concept of States Practice*, 17 U. Pa. J Int'l Econ. L. 227 (1996); Richard Morrison, *Efficient Breach of International Agreements*, 23 Denv. J. Int'l L & Pol'y 183 (1994).

<sup>79</sup> Jeffrey L. Dunoff and Joel P. Trachtman, *Economic Analysis of International Law*, 24 Yale J Int'l L 1, 4 (1999).

<sup>80</sup> It is difficult to think of the New Haven school's "policy-oriented approach," with its Porphyrian tree of self-hypostatized functions, tasks, values, and analysis phases, as anything other than a formalist dogma in denial. For a representative sample of the New Haven school scholarship, see Harold D. Lasswell and Myres S. McDougal, *Jurisprudence in Policy-Oriented Perspective*, 19 U. Fla. L Rev. 486, 501-13 (1966-67); Myres S. McDougal, Harold D. Lasswell, and W. Michael Reisman, *Theories about International Law: Prologue to a Configurative Jurisprudence*, 8 Va. J Int'l L 188 (1968); Myres S. McDougal, *Human Rights and World Public Order: Principles of Content and Procedure for Clarifying General Community Policies*, 14 Va. J Int'l L 387, 394-405 (1974); LUNG-CHU CHEN, *AN INTRODUCTION TO CONTEMPORARY INTERNATIONAL LAW* (2<sup>nd</sup> edn.; New Haven: Yale University Press, 2000).

<sup>81</sup> On poststructuralism, see generally CATHERINE BELSEY, *POSTSTRUCTURALISM: A VERY SHORT INTRODUCTION* (Oxford: Oxford University Press, 2002); PETER BARRY, *BEGINNING THEORY: AN INTRODUCTION TO LITERARY AND CULTURAL THEORY* 61-79 (2<sup>nd</sup> edn.; Manchester: Manchester University Press, 2002); COLIN DAVIS, *AFTER POSTSTRUCTURALISM: READING, STORIES AND THEORY* (London: Routledge, 2004).

<sup>82</sup> See on this further FREDRIC JAMESON, *THE PRISON-HOUSE OF LANGUAGE: A CRITICAL ACCOUNT OF STRUCTURALISM AND RUSSIAN FORMALISM* 182 (Princeton: Princeton University Press, 1972).

methodological consensus forged by the previous generations. The basic objective of the second generation intertextualism, on this view of things, was not to popularize the practice of occasional foraying into the neighbouring fields in search of loose methodological chattel but to bring about a complete eradication of every discursive boundary between international law and other disciplines.<sup>83</sup> The final goal was not to remove the centre of international law's discursive gravity to some adjacent field, but to put an end to the idea of having such a centre in the first place. The task, put differently, was not to learn to think *outside* the box, but rather *against* it.<sup>84</sup>

Now, to understand the general significance of the intertextualist tradition in the context of the modern-day international law scholarship and to grasp its immediate implications for the present project, it seems two basic facts need to be borne in mind. First, the general epistemological stance adopted in this thesis leans far closer to that of the second-generation intertextualism than to that of the traditional international law practice. Second, to endorse the basic premises of the intertextualist method does not necessarily mean to accept the view that "a text can mean anything you want it to mean." In that sense, one could say, the basic problem of the intertextualist project, once it is brought to its logical conclusion, is effectively the same as the basic problem of the Nietzschean ethics.

The traditional logic of the international law practice, let us recall, is essentially a quasi-religious logic: the metaphysical foundations on which the international rule of law

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<sup>83</sup> The prime examples here are Da. Kennedy, *Thinking against the Box* and KOSKENNIEMI, *supra* n.47. For a representative sample of second-generation intertextualist works in international law, see also more generally Nathaniel Berman, "The Appeals of the Orient: Colonized Desire and the War of the Rif," in KAREN KNOP (ED.), *GENDER AND HUMAN RIGHTS* 195 (Oxford: Oxford University Press, 2004); Makau Mutua, *Savages, Victims, and Saviors: the Metaphor of Human Rights*, 42 *Harv. Int'l L J* 201 (2001); Antony Anghie, *Finding the Peripheries: Sovereignty and Colonialism in Nineteenth-Century International Law*, 40 *Harv. Int'l L J* 1 (1999); Anne Orford, *Embodying Internationalism: the Making of International Lawyers*, 19 *Aust. Yb. Int'l L* 1 (1998); Karen Knop, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 *Transn'l L. & Contemp. Probs.* 293 (1993); Karen Engle, *International Human Rights and Feminism: When Discourses Meet*, 13 *Mich. J Int'l L* 517 (1992); DAVID KENNEDY, *INTERNATIONAL LEGAL STRUCTURES* (Baden-Baden: Nomos Verlagsgesellschaft, 1987).

<sup>84</sup> Needless to say, many literary theorists would have viewed this attempt with utter scepticism. See, e.g., STANLEY FISH, *THERE'S NO SUCH THING AS FREE SPEECH (AND IT'S A GOOD THING TOO)* 231 (Oxford: Oxford University Press, 1994); JAMESON, *supra* n.82, 182-6. For further discussion, see Balkin, *supra* n.3, 958-9.

project is premised, as we observed earlier, have been borrowed directly from the Judeo-Christian tradition of Logocentrism.<sup>85</sup> By contrast, the productive impulse of intertextualism, as Roland Barthes once pointed out, derives from the ethics of a relentless secularism: “by refusing to assign ... an ultimate meaning ... to the text, [we engage in] what may be called an anti-theological activity, ... since to refuse to fix meanings is, in the end, to refuse God.”<sup>86</sup> Seen from this perspective, the second-generation intertextualist project in international law scholarship can be effectively understood as a direct continuation of the Nietzschean project of “attack on all values”: what Nietzsche had argued about morals in general, the second-generation intertextualists argue about epistemology and disciplinary conventions.

To understand the logic of the second-generation intertextualist project, consequently, it is instructive to consider the basic pattern of Nietzsche’s reception in the modern discourse. Moral norms, declared Nietzsche originally, never come “from the beyond”; they are all, rather, products of the *human* history; as a result, the only ethically responsible stance that can be taken on this front is that all our virtues must become our inventions.<sup>87</sup> Now, for a number of various reasons, against this background, it has become a rather common position among Nietzsche’s commentators to declare that, because he denied the existence of a transcendently valid system of morals, Nietzsche was effectively an ethical nihilist – or, to be more precise, a libertine – who preached that people could do everything they pleased, including destroying each other’s property and killing children. From a “purely” philosophical perspective, of course, all such readings are completely spurious. As Albert Camus has repeatedly pointed out, the only direct *logical* conclusion that can be validly deduced from Nietzsche’s pronouncement that self-evident moral norms do not exist is that, in the end, no ethical conduct is in itself either categorically prohibited or categorically authorized. To have no eternal truths on which one can rely for moral guidance does not automatically translate into “people may do whatever they want.”

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<sup>85</sup> See Chapter I of this thesis. Cf. ANTHONY CARTY, *THE DECAY OF INTERNATIONAL LAW?* (Manchester: Manchester University Press, 1986) (tracing the metaphysical origins of the modern international law project).

<sup>86</sup> BARTHES, *supra* n.60, 147.

<sup>87</sup> See FRIEDRICH NIETZSCHE, *TWILIGHT OF THE IDOLS AND THE ANTI-CHRIST* 133 (transl. by R. J. Hollingdale; London: Penguin, 2003). See also more generally NIETZSCHE, *supra* n.27.

Authorization, like prohibition, requires a pre-existing system of values.<sup>88</sup> The destruction of property and the killing of children are not legitimated in Nietzsche's philosophy. Rather, the responsibility for their permission – if and when it is given – is placed squarely at the door of that society in which these acts take place: our virtues, according to Nietzsche, are in the end our inventions.

The analogy with the intertextualist tradition at this point becomes quite obvious. Even if we accept the most radical version of the intertextualist creed – the thesis that there does not exist any privileged epistemological method – it still does not follow that international law texts can be interpreted to have whichever meanings we like. The number of valid interpretative moves, although potentially large, is not infinite. A statement like “persons belonging to national minorities have the right to maintain and develop their culture in all its aspects” may be one of the most indeterminate statements in the modern international law discourse (what are the precise limits of “culture”? what exactly is understood by “all aspects”? does the right to develop one's culture entail a right to receive financial support from the state?), but it cannot be interpreted to mean just *anything*. It cannot be interpreted to mean, for example, that persons belonging to national minorities must be assimilated into the majority culture or that national minorities have the right to external self-determination – unless, of course, we have agreed in advance that it should mean that, in which case, however, we would have precisely that which Camus had mentioned: a case of a pre-established authorization.

Reflecting on his literary experiences, Umberto Eco once wrote:

[s]ome contemporary theories of interpretation [suggest] that ... a text is nothing more than a picnic where the author brings the words and the readers the sense. Even if that were true, the words brought by the author are [still] a rather embarrassing bunch of material evidence that the reader cannot pass over in silence.<sup>89</sup>

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<sup>88</sup> See ALBERT CAMUS, *THE REBEL* 62 (transl. by Anthony Bower; London: Penguin, 2000). See also CAMUS, *supra* n.31, 65.

<sup>89</sup> Umberto Eco, *Reading My Readers*, 107 *MLN* 819, 821 (1992).

The intertextualist injunction to seek meaning beyond the immediate boundaries of the given text does not necessarily mean that “the text is there, do with it what you will”: “the notion of unlimited semiosis does not lead to the conclusion that there are no criteria for interpretation.”<sup>90</sup>

The practice of the international legal interpretation may not be as linear as the conventional wisdom of the practitioner college suggests – there is certainly far more inexactitude and ambivalence in it than is acknowledged in the Vienna Convention on the Law of Treaties – but that does not mean that it is, therefore, a completely open and unstructured affair. International law, after all, is an applied discipline. It operates, to recall the famous metaphor from Robert Cover, “in the field of pain and death.”<sup>91</sup> If only because of that, it seems, the practice of interpretation adopted in international law scholarship must be inevitably a practice with concrete foundations, *not* a field of merry chaos.

But what must be those foundations? If the discourse of international law scholarship must have a set of objective criteria that determine the limits of what can be considered a valid act of scholarly interpretation, how are these criteria provided? What do they consist of? Put differently, how should we proceed with the epistemological aspect of this inquiry once we step outside the narrow box of traditional scholarship?

The most effective way to start answering all these questions – a way, the outlines of which I have already sketched in the previous chapter – I believe lies in the work of the French Marxist philosopher Louis Althusser and his students, Pierre Macherey and Nicos Poulantzas. It is to that now, that this chapter will turn.

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<sup>90</sup> Id.

<sup>91</sup> See Robert M. Cover, *Violence and the Word*, 95 Yale L J 1601 (1986).

## Section Two

### The Epistemological Mechanism of Historical Materialism

#### *a. Dispensing with Hegel: Materialism Is Not Monism*

To understand the epistemological relevance of the Althusserian tradition for the purposes of the present thesis's inquiry, it is necessary to begin by briefly recounting the basics of the Althusserian theory of ontology and its peculiar variation of historical materialism. In order to perform that task most efficiently, however, it seems we must first take stock of the immediate historico-intellectual context in which the works of Althusser and his followers first emerged in the post-World War II France.

Whatever else his other influences and inspirations may have been, as a philosopher Althusser was always first and foremost a Marxist. Marxism was his intellectual base camp, his political home, and the basic horizon of all his thought and practical engagement. Althusser's first major publications started to appear in wide circulation in the first half of the 1960s. What had become the orthodox philosophical position in Western Marxism at that time was essentially a crude combination of two closely inter-related monist sensibilities:<sup>92</sup> Hegelian teleologism and vulgar economism. According to the former, the course of all historical development was imagined to unfold in accordance with some ambitious transcendental plan established and guaranteed for implementation outside the historical plane and allegedly described in *The Communist Manifesto*. The language of the "inexorable march of events" and the "inevitable triumph of socialism" were the usual symptoms of that approach.<sup>93</sup> According to the latter, the logic of all social intercourse was understood to be defined by a unidirectional relationship between the so-called base (*Basis*) constituted by the totality of economic relations, i.e. relations effectuated in the context of the productive process, and the so-called superstructure (*Überbau*), i.e. all other "cultural"

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<sup>92</sup> Cf. LOUIS ALTHUSSER, *ESSAYS IN SELF-CRITICISM* 186 (transl. by Graham Lock; London: New Left Books, 1976) [hereafter *ESSAYS IN SELF-CRITICISM*].

<sup>93</sup> Further on the Hegelian teleologism, see LOUIS ALTHUSSER, *THE HUMANIST CONTROVERSY AND OTHER WRITINGS* 188-9 (transl. by G. M. Goshgarian; London: Verso, 2003) [hereafter *HUMANIST CONTROVERSY*].

forms of social life, including law, ideology, and politics. The language of the economic determinism (“the base defines the superstructure”) was the usual symptom of this sensibility.<sup>94</sup>

However effective they might have been as ideological teachings a generation or two earlier, following the end of World War II, neither teleologism nor economism seemed to be sufficiently well-suited to meet the exigencies of the current political environment. Lest the Marxist practice was to be allowed to bury itself in a political impasse,<sup>95</sup> it was felt that the Marxist theory had to be “restored” to its pristine integrity.<sup>96</sup> For Sartre, Camus, and Garaudy this, consequently, meant attempting to give Marxism “a humanist face.” For Althusser, by contrast, it meant cleansing it of all Hegelian traces.

The basic problem with the Hegelianized Marxism, declared Althusser, was essentially twofold. On the one hand, the Hegelianization of the Marxist theory of history, with its tropes of the “inexorable march of events” and “historical inevitability,” cultivated a sense of false security among the Marxist corps. If the “bankruptcy of the Second International” was anything to go by, this was, certainly, not something to be taken lightly.<sup>97</sup> On the other hand, the Hegelianization of the Marxist frame of reference dangerously distorted the Marxist theory of historical materialism,<sup>98</sup> without which, as Lenin pointed out, and Althusser reminded his audiences, Marxists could never hope to develop a viable political strategy.<sup>99</sup> A Marxist trained to think of history in terms of a pre-established script in which both the port of departure and the port of arrival are known before one even embarks on the journey, would, thus, not only tend to underestimate the importance of the ideological and political struggles, but would also misrecognize the

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<sup>94</sup> Further on economism, see LOUIS ALTHUSSER, *FOR MARX* 213 (transl. by Ben Brewster, London: Verso, 2005) [hereafter *FOR MARX*]. For an illuminating example of economism, see, e.g., JOHN MCMURTY, *THE STRUCTURE OF MARX'S WORLD-VIEW* 157 *et seq.* (Princeton: Princeton University Press, 1978).

<sup>95</sup> The stakes of the dilemma facing the Western Marxism at the end of the Stalinist era and Althusser's intervention in that context are discussed in admirable detail in G. M. Goshgarian's *Introduction*, in *HUMANIST CONTROVERSY*, xi-lxii.

<sup>96</sup> *FOR MARX*, 30.

<sup>97</sup> *HUMANIST CONTROVERSY*, 188-9.

<sup>98</sup> *FOR MARX*, 103-4, 202-6.

<sup>99</sup> LOUIS ALTHUSSER, *LENIN AND PHILOSOPHY AND OTHER ESSAYS* 31 (transl. by Ben Brewster, New York: Monthly Review Press, 2001) [hereafter *LENIN AND PHILOSOPHY*].

irreducible multidimensionality of social contradictions and thus get completely disoriented in her assessment of the current situation. The longer the Western Marxism remained enthralled by Hegel, followed the conclusion, the more toothless its political practices would become. A Hegelianized understanding of the social reality, pointed out Althusser, could never provide a practicable basis for devising a political strategy: there has never been and cannot be “a Hegelian politics.”<sup>100</sup>

Furthermore, the only *logical* condition, explained Althusser, under which a linear vision of history uninterrupted by any breaks, fissures, or discontinuities could become imaginatively possible would be when our discourse, in one way or another, accepted, on the level of its ontological assumptions, that behind the façade of all disparate events that we perceive in our day-to-day existence there lies a single fundamental act, a hidden super-Event, of which everything else is only an elaborate appearance, a shadow, a pure phenomenon. By its very structure, the making of such an assumption, however, would also require us to make a second assumption. To be able to imagine history as a single fundamental act, one has to imagine first some kind of a supreme Subject, through whose grace and will that fundamental act is sustained and held together. In short, one has to assume the existence of God (*Logos*).<sup>101</sup>

It is true, concedes Althusser, that at the root of Hegel’s doctrine lies an open denial of “every thesis of Origin, Transcendence or an Unknowable World”: “[t]he first words of [Chapter 1 of Hegel’s *Great Logic*] tell us: Being is Nothingness. The posited beginning is negated: there is no beginning, therefore no origin.”<sup>102</sup> But that is only the first appearance. Despite making such a promising start, in its essence, the Hegelian theory is

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<sup>100</sup> FOR MARX, 204.

<sup>101</sup> For further exploration of that idea, see the work of Jacques Derrida (*supra* nn. 35, 36). Derrida was one of Althusser’s students, although not a Marxist (see *infra* n.177).

<sup>102</sup> ESSAYS IN SELF-CRITICISM, 135. The particular passage to which Althusser refers at this point reads in full as follows (see G. W. F. HEGEL, *SCIENCE OF LOGIC* (transl. by A. V. Miller, London: Allen & Unwin, 1969): “§132. *Being, pure being*, without any further determination. In its indeterminate immediacy it is equal only to itself. It is also not unequal relatively to an other; it has no diversity within itself nor any with a reference outwards. It would not be held fast in its purity if it contained any determination or content which could be distinguished in it or by which it could be distinguished from an other. It is pure indeterminateness and emptiness. There *is nothing* to be intuited in it, if one can speak here of intuiting; or, it is only this pure intuiting itself. Just as little is anything to be thought in it, or it is equally only this empty thinking. Being, the indeterminate immediate, is in fact *nothing*, and neither more nor less than *nothing*.”



thoroughly Logocentric. The only two factors that separate the more traditional Judeo-Christian Logocentrism from that of Hegel are (i) the ontologization of *Logos*: in Hegel, the transcendental domain of the supreme Subject is placed not outside the lived plane of human history (heaven) but within it; and (ii) its narratological manifestation: in Hegel, the Subject is constructed not in the form of a sovereign Origin but in the form of the ultimate End (*Telos*):

Hegel, who criticized all theses of subjectivity, nevertheless found a place for the Subject, not only in the form of the “becoming-Subject of Substance”<sup>103</sup> ..., but in the *interiority* of the *Telos*<sup>104</sup>..., which by virtue of the negation of the negation, realizes the designs and destiny of [*Logos*].<sup>105</sup>

The most fundamental trope of Hegel’s philosophy – the very trope that allows the Hegelianized Marxists to present history as a process governed by a pre-established finality – is, thus, a profoundly religious trope. At its core rests the concept of a supernatural godlike entity which by its majestic will and action organizes the field of history into a single line and guarantees its arrival at a determinate, immutable destination. (It is not for nothing, observed Althusser, that Hegel described humanity as a product of the self-alienation of some supernatural *Weltgeist* (world spirit).) Marxism, being a thoroughly materialist teaching, should have no time for any form of religious idealism. If the Marxist

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<sup>103</sup> This is, of course, a direct reference to Spinoza. In Spinoza’s pantheistic philosophy, the totality of all material existence was conceptualized as a single Substance inhabited by God. In Althusser’s understanding, Hegel began by accepting Spinoza’s starting point but then departed from it by discarding the Spinozist theory of the ontological consubstantiality of God and matter and positing instead the theory of the matter as the product of God’s self-alienation, thus replacing the pantheist paradigm with the Logocentric trope of the inner kernel of existence.

<sup>104</sup> Here is how Althusser explains this point in a later essay: “[even though] the Hegelian dialectic rejects every Origin, which is what is said at the beginning of the *Logic*, where Being is immediately identified with Nothingness, it [still] projects this into the End of a *Telos* which in return creates, within its own process, its own Origin and its own Subject. There is no assignable Origin in Hegel, but that is because the whole process, which is fulfilled in the final totality, is indefinitely in all the moments which anticipate its end, its own Origin.” *ESSAYS IN SELF-CRITICISM*, 180-1.

<sup>105</sup> *Id.*, 136.

theory is to be preserved and developed in its pristine integrity, concluded Althusser, all Hegelian traces have to be expunged.

What this meant in practical terms was, first of all, a round repudiation, on the theoretico-philosophical level, of the whole legacy of the Second International.<sup>106</sup> The theorists of the Second International (Karl Kautsky, Georgy Plekhanov, etc.) with their mechanistic understanding of the supersession of the modes of production and blind faith in the inevitability of socialism were for Althusser as pitiable and deplorable as George Eliot had been a century before that for Nietzsche.<sup>107</sup> Having never found enough courage to openly acknowledge their faith in the *Weltgeist*, they were still unscrupulous enough to retain most of its ontological tropes. Everything they wrote by way of social theory was to be resolutely discarded, announced Althusser. Plekhanov's ideological contribution to the popularization of Marxism might have been tremendous and without parallel, but in philosophical terms his theories were lame and hopelessly flawed.<sup>108</sup>

Had Althusser stopped his reform project at this point, none of his contemporaries would have probably regarded him half the rebel they eventually did. Everyone who pretended to be anyone in the post-World War II Marxism, it seems, would think it a kind of a rite of passage to try to pour a bucket of scorn on the clumsy dogmas of the Second International.<sup>109</sup> For a 1960s French Marxist, there was nothing radical in denouncing Kautsky or criticizing Plekhanov. What *was* radical was criticizing Marx himself.

Having set out on his anti-Hegelian mission, it was only a matter of time before Althusser had come to the inevitable conclusion that if the mission were to be completed successfully, he could not afford to stop at the vulgarisms of the Second International. The ultimate target had to be Marx himself, for even he, in his 1844 *Manuscripts*, with their incessant references to the man's species-being and the irrational faith in the pre-determined nature of history, had been contaminated by the Hegelian virus. If the Marxist

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<sup>106</sup> For further discussion of the common paradigm shared by the theorists of the Second International, see, e.g., LACLAU AND MOUFFE, *supra* n.18, 14-48.

<sup>107</sup> See NIETZSCHE, *supra* n.87, 80: "G. Eliot. – They have got rid of the Christian God, and now feel obliged to cling all the more firmly to Christian morality."

<sup>108</sup> For Althusser's diagnosis of Plekhanov's materialist monism as a variation of Hegelianism, see FOR MARX, 202, n. 42; HUMANIST CONTROVERSY, 188.

<sup>109</sup> In this, of course, they had quite an impressive tradition to follow. See, e.g., V. I. LENIN, THE STATE AND REVOLUTION 97-113 (Moscow: Progress Publishers, 1977).

theory were to deliver on its materialist promises, concluded Althusser, all of Marx's early writings showing the traces of Hegelian teleologism had to be discarded, however mildly. Only his later writings – starting more or less with the first volume of *The Capital* – could be retained as part of the canon.<sup>110</sup> For that to be done, however, Marxists had to agree to pay a truly heavy price: for better or for worse, in his later works Marx said virtually nothing about philosophy or general social theory.<sup>111</sup> If the anti-Hegelian mission was to be completed, concluded Althusser, it was left to those who took it upon themselves to initiate it, to “reconstruct” the true materialist apparatus of the Marxist philosophy, a task he duly set out to perform beginning with his seminal *For Marx*<sup>112</sup> and *Reading Capital*.<sup>113</sup>

*b. Materialism as a Theory of the Complex Whole*

The general solution Althusser offered to rescue Marxist materialism from the encroachments of the Hegelianized mysticism involved two basic steps. First, he proposed to eradicate all traces of ontological monism by insisting on the immediate irreducibility of every component of the social architecture. Second, to explain the logic of the socio-historical causality in a non-Logocentric way, he proposed to “bring back” the Spinozist concepts of the immanent cause and aleatory materialism.

To this day the most famous element in Althusser's proposed re-reading of Marx remains, probably, his fundamental reconstruction of the concept of superstructure. Unlike in the orthodox Marxism of the Stalinist era, in the Althusserian understanding the phenomenon of the superstructure was no longer presented as a mere phenomenon of the base, i.e. a passive screen on which the economic instance projected its sovereign determinations. Instead, it was reconceptualized as an essentially autonomous ontological entity, an instance in its own right, irreducible in its existence to anything other than itself. Moreover, picking up on an idea outlined earlier by Gramsci, Althusser also declared at this

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<sup>110</sup> Althusser made the case for this decision in virtually all his writings published in the mid-1960s. See, e.g., FOR MARX, 49-86, 153-8; HUMANIST CONTROVERSY, 231-270.

<sup>111</sup> Engels hardly fared any better. See FOR MARX, 117-28.

<sup>112</sup> Cf. id., 30-1: “The end of dogmatism puts us face to face with this reality: that Marxist philosophy, founded by Marx in the very act of founding his theory of history, has still largely to be constituted, since, as Lenin said, only the corner-stones have been laid down.” See also KELLÉ, *infra* n.120, 20-1.

<sup>113</sup> READING CAPITAL, 30-2, 74-8.

point that, even though there may, in the end, be only one economic “base,” there is, in fact, not one, but many different superstructures. Each of them is an instance in its own right. Each enjoys a degree of relative autonomy from the rest of the social space, including the base itself. Each also exerts a certain degree of constitutive influence (feedback effect) on its “neighbours.”

The ontological consequences of accepting this thesis, predictably, were barely short of revolutionary.<sup>114</sup> In lieu of the monist mantra of the reigning orthodoxy, Althusser basically proposed a theory in which

the ‘secondary’ contradictions [produced within the playing fields of various superstructures] are not the pure phenomena of the ‘principal’ contradiction [taking place at the level of the economic relations], ... so much so that the principal contradiction might practically exist *without* the secondary contradictions, or without some of them, or might exist *before* or *after* them. On the contrary, ... the secondary contradictions are essential even to the existence of the principal contradiction, ... they really constitute its condition of existence, just as the principal contradiction constitutes their condition of existence.<sup>115</sup>

In other words, put together, argued Althusser, the totality of the mutually conditioning relatively autonomous superstructural instances and the economic base comprise a single “complex whole,” or, as he also called it, the existing “structure in dominance.” Each instance influences every other within the limits established by the complex whole and is in return influenced back, again, within the limits established by the complex whole.<sup>116</sup> As a

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<sup>114</sup> And the frenzied character of the reaction it elicited (and still does) from the more traditional Marxist circles confirms just as much. See, among others, FRANCIS WHEEN, *MARX’S DAS KAPITAL: A BIOGRAPHY* 108-10 (London: Atlantic Books, 2006); ALEX CALLINICOS, *IS THERE A FUTURE FOR MARXISM?* 53-80 (London: Macmillan, 1982); E. P. THOMPSON, *THE POVERTY OF THEORY AND OTHER ESSAYS* 1-210 (London: Merlin, 1978); André Glucksmann, *A Ventriloquist Structuralism*, 72 *NLR* 68 (1972); Leszek Kolakowski, *Althusser’s Marx*, 8 *Socialist Register* 111 (1971).

<sup>115</sup> *FOR MARX*, 205.

<sup>116</sup> Cf. ERNESTO LACLAU, *NEW REFLECTIONS ON THE REVOLUTION OF OUR TIME* 24 (London: Verso, 1990): “What we find, then, is not an interaction or determination between fully constituted areas of the social, but a field of relational semi-identities in which ‘political’, ‘economic’ and ‘ideological’ elements will enter into unstable relations of imbrication without ever managing to constitute themselves as [completely]

result, the effective web of the determinative impulses circulating within the relational matrix comprised by such numberless interdependencies cannot but give rise to such a tremendously complicated logic of overlaps, clashes, and condensations that none of the traditional concepts used in the general theory of causation could be considered adequate to convey its essential character. A new descriptive formula had to be found, concluded Althusser. In the end, it was the Freudian “overdetermination” that provided the right metaphor.<sup>117</sup>

The main thesis at the core of the Althusserian theory of structural overdetermination is as simple as it is ingenious. The logic of the socio-historical causality, begins the argument, is in principle neither univocal (as economism and other monistic theories would have it), nor, strictly speaking, “equivocal” (as voluntarism and other “pure contingency” theories would have it).<sup>118</sup> Rather, it is *determinedly polyvocal*, i.e. it is comprised of several, mutually irreducible lines of causal impulses whose common aggregate determines the actual dynamics of socio-historical causation. Which particular shape that aggregate will take at any particular moment is always decided by the shape of the existing structure in dominance, i.e. that specific combination of social instances and their mutually

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separate objects. ... This does not mean, of course, that an area of the social cannot become autonomous and establish, to a greater or lesser degree, a separate identity. But this separation and autonomization, like everything else, has specific conditions of existence which establish their limits at the same time.”

<sup>117</sup> FOR MARX, 206-9. The concept of overdetermination is closely linked to the concept of non-linear dynamics as developed, for instance, in fractal geometry and modern chaos (complexity) theory. Further on the complexity theory, see, e.g., M. MITCHELL WALDROP, COMPLEXITY: THE EMERGING SCIENCES AT THE EDGE OF ORDER AND CHAOS (London: Penguin, 1992). Cf. Mark J. Roe, *Chaos and Evolution in Law and Economics*, 109 Harv. L Rev. 641, 642 (1996).

<sup>118</sup> Id., 209. Many of Althusser’s critics have failed to appreciate Althusser’s insistence on the second part of this thesis. See, e.g., Ireland, *infra* n.120, 125 (concluding that in Althusser’s theory the course of historical development is a “hopelessly arbitrary and contingent affair”). It was Balibar, I think, who captured most succinctly (see Etienne Balibar, “The Infinite Contradiction”, in JACQUES LEZRA (ED.), DEPOSITIONS: ALTHUSSER, BALIBAR, MACHEREY AND THE LABOR OF READING 142, 162 (New Haven: Yale University Press, 1996)) what Ireland and others like him have missed in Althusser: “One cannot propose that history is causally overdetermined without positing that there are truth effects in history. All materialism ... is incompatible with any relativism. It does not, though, seek the antithesis of relativism in some eternal truth or in what is no more than a lay version of such a truth, a law of evolution, i.e., some guarantee or *a priori* that anticipates a consensus. ... That history is not the process of effectuation of truth [as the Hegelian tradition holds] does not mean that it is the process of its constant destitution.” See also Lewis, *infra* n.128, § 36.

constitutive interconnections which obtains at the present moment. Depending on the development of the structure, it may turn out that at one given point, the centre of causal gravity may lie in one particular social instance (e.g. the order of law); at another point, it may lie in another instance (e.g. culture); at a third point, in a third, and so forth. The only thing that is guaranteed to remain the same at all times is the complex character of the causal mechanism. Its immediate outlook, however, is subject to constant change.

What is the logic that determines the course of that change? Is the evolution of the complex whole an essentially random process or does it follow some particular determinate pattern? How is the exact character of causal dynamics decided under the theory of structural overdetermination? The answer proposed by the Althusserian school to these questions became with time as (in)famous as its theory of the relative autonomy of the superstructures.

The make-up of the existing structure in dominance, declared Althusser, drawing on an oft-celebrated passage in Engels's 22 September 1890 letter to Joseph Bloch,<sup>119</sup> is essentially decided by the developments occurring in the field of economic production. Put differently, if the essential dynamics of the socio-historical causality at every given moment of time is determined by the current logic of structural overdetermination, the terms of the latter themselves are always determined by the current state of the relations of production. Thus, although the economy never decides the course of the socio-historical development directly, it still defines it "in the last instance":<sup>120</sup>

in order to conceive [the notion of the structure in dominance] it is necessary to refer to the principle of the determination 'in the last instance' of the non-economic [instances] by the economic [instance, for] only this 'determination in

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<sup>119</sup> See FOR MARX, 112. The relevant part of the passage is also reprinted in EAGLETON AND MILNE, *supra* n.1, 39.

<sup>120</sup> Many orthodox Marxists took this point as a betrayal of Marx. See *supra* n.114. For some of the more recent examples, see also ELLEN MEIKSINS WOOD, *DEMOCRACY AGAINST CAPITALISM: RENEWING HISTORICAL MATERIALISM* 7-8 (Cambridge: Cambridge University Press, 1995); Paddy Ireland, *History, Critical Legal Studies and the Mysterious Disappearance of Capitalism*, 65 MLR 120, 124-5 (2002). Compare, however, V. ZH. KELLÉ (ED.), *PRINTSIP ISTORIZMA V POZNANII SOTSIAL'NYH YAVLENIY* 8, 79-80 (Moscow: Nauka, 1972); JAMESON, *infra* n.179, 30.

the last instance' makes it possible to escape the arbitrary relativism of observable displacements by giving these displacements the necessity of a function.<sup>121</sup>

Thus, although *as such* the logic of socio-historical causality "cannot be reduced to the primacy of a centre"<sup>122</sup> because each of the superstructural instances carries "an existence largely specific and autonomous,"<sup>123</sup> in the end, it is still

the economy [that] is [ultimately] determinant in that it determines which of the instances of the social structure occupies the determinant place.<sup>124</sup>

Or, as Poulantzas put it several years later:

the fact that the structure of the whole is determined in the last instance by the economic [domain] does not mean that the economic [domain] always holds the *dominant role* in the structure. The unity constituted by the structure in dominance implies that every mode of production has a dominant level or instance; but the economic [instance] is in fact determinant only in so far as it attributes the dominant role to one instance or another, in so far as it regulates the shift of dominance which results from the decentration of instances.<sup>125</sup>

By supplementing the theory of structural overdetermination with the thesis of the determination in the last instance, the Althusserian tradition offered historical materialism a fine middle road between the vulgar economism of the orthodox Marxist dogma and the radical voluntarism of the liberal humanist tradition. Insisting that the structural dynamics of the complex whole was ultimately grounded in the character of the dominant mode of production, it established a critical distance between itself and that kaleidoscopic motley of theories that unites today the Anglo-Saxon discipline of "cultural studies" with the various

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<sup>121</sup> READING CAPITAL, 99.

<sup>122</sup> Id., 98.

<sup>123</sup> FOR MARX, 113.

<sup>124</sup> READING CAPITAL, 224 (Balibar).

<sup>125</sup> NICOS POULANTZAS, POLITICAL POWER AND SOCIAL CLASSES 14-5 (transl. by Timothy O'Hagan and David McLellan; London: NLB and Sheed Ward, 1973).

postmodern traditions in their common diminution of the value of the political economic inquiry.<sup>126</sup> At the same time, by highlighting the fact that the logic of the economic determination bore only a *last-instantial* character, it also distanced itself from all other theretofore known materialist traditions.

*c. Summarizing the Althusserian Theory of Social Ontology*

The architecture of the social space, according to the Althusserian tradition, consists of a complex combination of semi-autonomous, mutually irreducible domains or instances. No instance within this combination enjoys the privileged position of the “central-subject instance,” i.e. the foundation category – the latent supreme Subject – of which all other instances are only a phenomenal expression.<sup>127</sup> The relationship that unites the totality of social instances into one structured whole, however, is not a relationship of analogical correlation in which different instances connect with one another through a series of homological parallels. Nor is it a relationship of a pre-established exteriority in which the various interacting instances relate to one another as objects constituted outside the context of their interaction. Rather, the place and the immediate character of each particular instance at every given moment in time are defined by the structure of the general complex of mutually constitutive interactions linking it with other instances, that complex itself being, in the last instance, a function of the existing relations of production.<sup>128</sup>

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<sup>126</sup> Slavoj Žižek, *The Parallax View*, 25 NLR 121, 128 (2004).

<sup>127</sup> POULANTZAS, *supra* n.125, 14.

<sup>128</sup> In their seminal work on hegemony, Ernesto Laclau and Chantal Mouffe have attempted to appropriate Althusser’s theory of overdetermination while excluding every trace of the determination in the last instance thesis. Their basic argument seems to be that while the former is certainly sound, the latter is not and, indeed, the two are logically incompatible. See LACLAU AND MOUFFE, *supra* n.18, 97-105. As William Lewis has shown, however, that contention is clearly wrong. See further William S. Lewis, “The Under-theorization of Overdetermination in *Hegemony and Socialist Strategy*”, *Borderlands E-journal*, Vol. 4, No. 2, 2005; text available from [http://www.borderlandsejournal.adelaide.edu.au/vol4no2\\_2005/lewis\\_overdetermination.htm](http://www.borderlandsejournal.adelaide.edu.au/vol4no2_2005/lewis_overdetermination.htm).



*d. The Role of Law*

Against the background of the general social theory outlined in the previous sub-section, what role does the Althusserian tradition ascribe to the juridical instance? What structural function does it imagine Law as a field of social activity to perform in the context of the complex whole? To answer this question in line with the onto-theoretical principles established earlier, let us begin by examining the basic dynamics of the *last-instantial* conditioning created by the currently dominant logic of economic relations. According to the general Marxist view, that logic today is commonly understood to be a species of the Capitalist Mode of Production (CMP).<sup>129</sup>

The central characteristic feature of the CMP, in the common Marxist understanding, resides in the fact that “[c]apitalism is the *only* mode of production in which the *maximization* of surplus-creation is rewarded *per se*. In every historical system, there has been *some* production for *use*, and *some* production for *exchange*, but only in capitalism are all producers rewarded primarily in terms of the exchange value they produce and penalized to the extent they neglect it.”<sup>130</sup> As every student of Pashukanis will be able to recall, the two crucial components that enable the functioning of every exchange-dominated economic system are an increased standardization of the exchange transactions and the corresponding sophistication of the accompanying politico-legal superstructures.<sup>131</sup> Without a highly sophisticated system of politico-legal support mechanisms, it is impossible to sustain a progressive development of the economic domain geared simultaneously towards the maximization of surplus-creation and the sustenance of an elaborate web of

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<sup>129</sup> See, e.g., ELLEN MEISKINS WOOD, *THE ORIGIN OF CAPITALISM: THE LONGER VIEW* (London: Verso, 2002); Robert Went, *Globalization: towards a Transnational State? A Skeptical Note*, 64 *Sci. & Soc’y* 484 (2001); Ronald Dore, *Will Global Capitalism be Anglo-Saxon Capitalism?*, 6 *NLR* 101 (2000); William I. Robinson and Jerry Harris, *Towards a Global Ruling Class? Globalization and the Transnational Capitalist Class*, 64 *Sci. & Soc’y* 11 (2000); Sebastian Budgen, *A New ‘Spirit of Capitalism’*, 1 *NLR* 149 (2000); GIOVANNI ARRIGHI AND BEVERLY J. SILVER, *CHAOS AND GOVERNANCE IN THE MODERN WORLD SYSTEM* (Minneapolis: The University of Minnesota Press, 1999); Jason W. Moore, *Capitalism over the Longue Duree*, 23 *Crit. Soc.* 103 (1997). See also sources cited in *supra* n.120.

<sup>130</sup> ETIENNE BALIBAR AND IMMANUEL WALLERSTEIN, *RACE, NATION, CLASS: AMBIGUOUS IDENTITIES* 117 (London: Verso, 1991).

<sup>131</sup> E. B. PASHUKANIS, *SELECTED WRITINGS ON MARXISM AND LAW* 77-100 (ed. by Piers Beime and Robert Sharlet; transl. by Peter B. Maggs; London: Academic Press, 1980).

standardized exchange transactions. The more elaborate becomes the structure of social exchange, the more intense becomes the necessity for the guardianship of its regime, the more elaborate become the politico-legal regimes propping it up.

Starting from these premises, the Althusserian tradition has proceeded to conclude that on the most fundamental level the *last-instantial* dynamics of every CMP-dominated social formation is determined by the combination of the following three factors.

First, under the CMP, the economic and the political instances are constituted in a relationship of very considerable mutual autonomy. Naturally, this does not mean that under other modes of production the economic and the political instances are *not* mutually autonomous, only that under the CMP their reciprocal autonomy is far more extensive than it was before.<sup>132</sup>

Second, even though the economic domain under the CMP continues to retain the dominant role in the context of the overall structure, its dependence on the political order increases tremendously. More than ever before, a “pure” economic relationship under capitalism becomes unimaginable without an accompanying political framework. The “lonely hour of the last instance” is less likely to strike under the CMP than under any previous mode of production.<sup>133</sup> All economic processes in CMP-dominated social formations are, thus, utterly dependent on the support of the accompanying political order. “To be sure, the relations of production still play the dominant role [but] the relations of production are [always-]already relations of struggle and power,” and the relations of power can only be carried out through the institutional structure of the political order.<sup>134</sup>

Third, partly because of this increased dependence on the political order, partly because of its general systemic impetus that constantly pushes it to search for an ever-greater productive efficiency, the last-instantial dynamics produced by the CMP-dominated economic instances constantly induces the structural evolution of the accompanying political order in the direction of an ever-increasing sophistication. What emerges as a result then is a political field comprised not of one but of many different political

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<sup>132</sup> POULANTZAS, *supra* n.125, 29.

<sup>133</sup> FOR MARX, 113.

<sup>134</sup> See NICOS POULANTZAS, *STATE, POWER, SOCIALISM* 44-5 (transl. by Patrick Camiller; London: Verso, 2000).

apparatuses, each conditioned, adjusted, and optimized for the performance of a particular set of specialized functions but essentially ineffective for the performance of others.

Where all other previous modes of production have thus tended to rely on a generally straightforward and unsophisticated regime of political ordering, the CMP, under the pressure of its internal logic, has a tendency to produce a whole multitude of supporting political mechanisms. On a long enough time scale, under the influence of the logic of cost-minimization, this inevitably leads to the propensity to substitute every overtly repressive political mechanism with a less noticeably repressive alternative, the underlying presumption being that in the long run it will always be more cost-efficient to convince the economic subjects to comply voluntarily than to force them into compliance by explicitly violent means.<sup>135</sup>

What this means for the structural-institutional dynamics of the capitalist society is that the more developed the CMP relations become in the given social unit, the more conclusively the corresponding order of political mechanism tends to divide into two formally disparate categories:<sup>136</sup> (i) the mechanisms that operate *mainly* through the imposition of overt repression, i.e. the Repressive State Apparatus (RSA), “that is to say the State apparatus in the classical Marxist sense of the term (government, army, police, tribunals and administration”;<sup>137</sup> and (ii) the mechanisms that operate *mainly* through inducing consent, i.e. the Ideological State Apparatuses (ISAs), that is, those social institutions whose main function consists of elaborating, inculcating, and reproducing the various competing ideologies sustained through corresponding material practices, and whose ultimate aim is to forge a particular set of “lived relations” “which orients the subject to its practical tasks in society.”<sup>138</sup> The RSA provides the basic backbone of the political order; the ISAs ensure its effective functioning at the lowest possible cost.

Crucially, it must be observed at this point that the term “State” in that context is used *in a very different sense* from that in which it is normally used in the mainstream

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<sup>135</sup> See TERRY EAGLETON, *IDEOLOGY: AN INTRODUCTION* 113-6 (London: Verso, 1991).

<sup>136</sup> LENIN AND PHILOSOPHY, 94-7. According to the Althusserian tradition, with the exception of Gramsci, Marxist theorists had never explicitly theorized this split, even though “in their political practice, [they] treated the State as a more complex reality than [what they formulated] in the ‘Marxist theory of the State’.” See *id.*, 95. See also Poulantzas, *infra* n.141, 80; POULANTZAS, *supra* n.134, 28.

<sup>137</sup> Nicos Poulantzas, *The Problem of the Capitalist State*, 58 *NLR* 67, 77 (1969). Cf. LENIN, *supra* n.109, 9-18.

<sup>138</sup> EAGLETON, *supra* n.135, 22.

international law discourse. For the Marxist tradition, the idea of the “State” does not normally refer to Westphalian-style territorial-political entities organized under efficient governments capable of participating in international relations on behalf of those territories’ inhabitants,<sup>139</sup> but, rather, to that “*instance that maintains the cohesion of a social formation and which reproduces the conditions of production of [the given] social system.*”<sup>140</sup>

In other words, the term “State” in the Althusserian discourse is used to convey the idea not of some concrete institutional entity, but of *the general organizational principle* by which the political process of the given social formation is produced and held together.<sup>141</sup> To the extent to which the modern international arena can then be said to comprise a coherent social formation, it follows that the domain of the international political process can also be said to be endowed with a discrete “State” system of its own. Needless to say, the State in question does not have to take any particular institutional shape: it can be organized in the form a global hegemon, a bloc of mutually balanced powers, a web of supranational organizations, or indeed none of the aforementioned. As recent Marxist scholarship shows, these are certainly not the only possible senses in which international law can speak today of the “global State.”<sup>142</sup>

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<sup>139</sup> See Article 1 of the *Convention on the Rights and Duties of States*, 1933, 165 L.N.T.S. 19: “The State as a person of international law should possess the following qualification: (a) a permanent population; (b) a defined territory (c) government; and (d) capacity to enter into relations with other states.”

<sup>140</sup> Poulantzas, *supra* n.137, 77 (italics added).

<sup>141</sup> POULANTZAS, *supra* n.125, 44. Cf. Nicos Poulantzas, *The Capitalist State: a Reply to Miliband and Laclau*, 95 NLR 63, 74 (1976): “the State should be seen (as should capital, according to Marx) as a relation, or more precisely as the condensate of a relation of power between struggling classes. In this way we escape the false dilemma entailed by the present discussion on the State, between the State comprehended as a Thing/instrument and the State comprehended as a Subject. As a Thing: this refers to the instrumentalist conception of the State, as a passive tool in the hands of a class or fraction, in which case the State is seen as having no autonomy whatever. As Subject: the autonomy of the State, conceived here in terms of its specific power, ends up by being considered as absolute, by being reduced to its ‘own will’, in the form of the rationalizing instance of civil society (cf. Keynes), and is incarnated in the power of the group that concretely represents this rationality/power (bureaucracy, elites).”

<sup>142</sup> Consider, for instance, B. S. Chimni, *International Institutions Today: An Imperial Global State in the Making*, 15 EJIL 1, 5-6 (2004): “The thesis that a nascent global state has emerged ... does not imply ... the replacement at a structural level of the sovereign state system, but rather its transformation in a manner that facilitates the construction of a global state.”

The relevance of all these observations for the purposes of the present argument should be self-evident.

If the international arena can be said to possess its own State – in the sense of the “organizational principle of the social formation” – then it follows that it can also be said to possess its own RSA and its own ISAs.<sup>143</sup> Any analysis, from the Althusserian perspective, of the broader systemic context in which the new ILTMC phenomenon appears to have emerged, consequently, has to be conducted against the background of the questions: what role does the new ILTMC play in the context of the global political apparatus? How do other elements of the “global State” relate to it? Is the new ILTMC part of the global RSA or the global ISAs?

And that is where the argument starts becoming slightly complicated.

First of all, according to the Althusserian understanding of the CMP, the juridical instance in a CMP-dominated social formation falls neither entirely within the RSA nor entirely within the ISA domains.<sup>144</sup> Rather, it belongs simultaneously in both fields. That is, it is *both* an institutional modality by which the State constructs the ontological field of the social formation by inscribing it over the “practical terrain ... of [monopolized] violence” *and* a discursive form that serves to “organiz[e] the consent of the dominated [groups]” to facilitate the governance process. In the former capacity, the juridical instance “organizes the conditions for physical repression” by “establish[ing] an initial field of injunctions, prohibitions and censorship” as well as prescriptions, commands, and authorizations enabling “private” repression. In the latter capacity, it “gives expression to the imaginary ruling-class representation of social reality and power” by, on the one hand, “obscur[ing] the [true] politico-economic realities ... by means of a peculiar mechanism of concealment-inversion” and, on the other hand, by presenting the members of the social unit with an ideological grid “which assigns [them] the place they must occupy [in] the politico-social system.”<sup>145</sup>

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<sup>143</sup> From now on the term “state” (with a small “s”) will be used in the sense of supra n.138, and the term “State” (with a capital “S”) will be used in the sense defined by Poulantzas in supra n.140.

<sup>144</sup> LENIN AND PHILOSOPHY, 96-7.

<sup>145</sup> See POULANTZAS, supra n.134, 77-83. Cf. PASHUKANIS, supra n.131, 54-62, 96-8.

In the context of the everyday practice, each of the two functions of the juridical instance appears to be as important as the other. However, in the final analysis, it is always the RSA-component that plays a more important role, for

[p]hysical violence and consent do not exist side by side ..., related in such a way that more consent corresponds to less violence. Violence-terror always occupies a determining place – and not merely because it remains in reserve, coming into the open only in critical situations. *State-monopolized physical violence permanently underlies the techniques of power and mechanisms of consent: it is inscribed in the web of disciplinary and ideological devices; and even when not directly exercised, it shapes the materiality of the social body upon which domination is brought to bear.*<sup>146</sup>

Obviously, the central and the essential meaning of “repression” is the organized exercise of violence “in the most material sense of the term: *violence to the body.*”<sup>147</sup> Even when it is not explicitly concretized in the daily exercise of power, violence is still constantly present in the background of every power relation.<sup>148</sup> It determines every act of the State in the same way in which the pursuit of surplus determines every act of the capitalist enterprise. It is the gist of its enabling principle.

In common understanding the practice of repression is usually associated with physical constraint, assault, and mutilation. The actual truth, of course, is significantly more complicated. An overwhelming majority of repressive practices are constituted by acts that tend to fall considerably short of open physical coercion. A critical glance at the everyday manifestations of State power activities in CMP-dominated formations indicates that far more often than not repression is actually exercised not through armed constraint but

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<sup>146</sup> POULANTZAS, *supra* n.134, 81 (italics in the original). Cf. Poulantzas, *supra* n.137, 77-8: “The condition of possibility of the existence and functioning of [the ISAs] is the State repressive apparatus itself. If it is true that their role is principally ideological and that the State repressive apparatus does not in general intervene *directly* in their functioning, it remains no less true that this repressive apparatus is always present behind them, that it defends them and sanctions them, and finally, that their action is *determined* by the action of the State repressive apparatus itself.”

<sup>147</sup> *Id.*, 29.

<sup>148</sup> *Id.*, 80-2.

through regimentation, normalization, and other forms of order.<sup>149</sup> Or, in other words, the logic of repression under the CMP is not synonymous with “the purely negative logic of rejection, obstruction, compulsory silence, and the ban on public demonstration”: “*repression is never identical with pure negativity.*”<sup>150</sup>

More than a conglomeration of prohibitions and censorship, law has since Greek and Roman times also issued positive injunctions: it does not just forbid or leave be [-] it lays down things to be done, dictates positive obligations, and prescribes certain forms of discourse that may be addressed to the existing power. Law does not merely impose silence or allow people to speak, it often *compels* them to speak [in a particular way. L]aw organizes the repressive field not only as a repression of acts forbidden by law, but also as a repression of a failure to do what the law prescribes.<sup>151</sup>

The more law acts in the latter capacity, the more it acquires the quality of the *normalizing order*, i.e. the order that trains its subjects *to be in a particular way* by making them commit certain types of positive acts on a regular basis, the more it reveals its society-constitutive potential.<sup>152</sup>

*e. From Ontology to Epistemology: the Idea of the Conjunction and the Parallax Theory*

The epistemological mechanism of historical materialism is predicated directly on its ontological theory. The most important feature of the historical materialist ontology, meanwhile, is its relentless insistence on ontological immanentism and situationality.

Compare this now with the epistemological dynamics of Hegelianism. It is possible to understand the whole mystificatory nature of Hegel’s philosophy, observes Althusser, without ever examining any of his allusions to the transcendent finality of history. All that needs to be done is we should inspect the way in which Hegel treats concrete social

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<sup>149</sup> Id., 29.

<sup>150</sup> Id., 82 (italics in the original).

<sup>151</sup> Id., 82-3.

<sup>152</sup> It in this sense that the idea of law as the self-constitution of the social unit must be understood. Compare Philip Allott, *The Concept of International Law*, 10 EJIL 31 (1999).

phenomena in his discourse. Wherever you look in Hegel, writes Althusser, “the concrete of a political situation” is always regarded “as [only] ‘the contingency’ in which ‘necessity is realized’.”<sup>153</sup> The whole multitude of elements comprising the richness of the social space is treated as nothing but a collection of random instrumentalities, a transparent vessel graced by the presence of the transcendent *Logos*.

By contrast, in the works of the Marxist tradition, all socio-political phenomena are always studied exclusively in the context of their given immediacy and from the point of view of their observer. Marxism, being a thoroughly materialist teaching, has no place in its ontology for any transcendental fictions. For materialism, there exists nothing beyond the limits of the material given – no God, no *Weltgeist*, no supreme *Telos* – consequently, it does not make sense to study anything in terms of such entities *or* from their alleged point of view. All Marxist knowledge projects are, thus, entirely concretized and situationalized.

Does that mean, however, that the epistemological mechanism of the Marxist tradition must necessarily be empiricist in character? Not at all, exclaims Althusser. Empiricism may have been the earliest historical form of the materialist epistemology, but it is certainly not the limit of its practical horizon. The empiricist knowledge project is pervaded with the sensibility of the “myth of the inner presence.”<sup>154</sup> Since the days of Aristotle, all variations of empiricism<sup>155</sup> have been fundamentally essentialist in their outlook, that is, they assumed, in one way or another, the existence within each studied phenomenon of a hidden invariable essence – the kernel of gold within the dross of earth – making the cognitive retrieval of that essence the ultimate target of their epistemic aspirations.<sup>156</sup> From the materialist point of view, this makes empiricism analytically indistinguishable from the Hegelian version of transcendentalism and thus effectively a species of Logocentrism and a variation of religious idealism. A truly materialist epistemology must, therefore, at all times seek to escape the plane of the empiricist reason

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<sup>153</sup> FOR MARX, 178.

<sup>154</sup> For a further development of this thesis, see MICHEL FOUCAULT, THE ORDER OF THINGS 238-70 (transl. unknown; London: Routledge, 2005).

<sup>155</sup> The sense in which Althusser uses the term “empiricism” does not allow him to agree with Hume and Deleuze’s self-designations as empiricists. Then again, most people would probably agree with Althusser on this point. For Deleuze’s peculiar understanding of empiricism, see John Rajchman, “Introduction”, in DELEUZE, *supra* n.39, 7-20.

<sup>156</sup> See READING CAPITAL, 35-40.



(which is not to say it must steer clear of all empirical investigations; as Althusser shows quite convincingly, there is a world of difference between empirical and empiricist studies). Without slipping into the mystificatory scepticism of Camus or Ockham,<sup>157</sup> it must seek and find a robust nominalist attitude that would allow it to engage with the material physical and social reality not simply with a view to producing more – and more accurate – knowledge but with a view to enabling it to sponsor effective practical action. What does this mean in practical terms for the materialist approach? To answer this question, Althusser turns to Lenin.

As Althusser explains it, when Lenin set out to write his famous commentaries about the vicissitudes of the Russian revolution and global imperialism in 1917, he had not actually tried to address the question of *imperialism as such*. Rather, what he tried to do was comprehend the historically existing imperialist phenomena in their immediate current context, i.e. “the concrete of the Russian situation, of the Russian conjuncture [of 1917].”<sup>158</sup> Lenin’s overarching concern, in other words, was not to grasp the abstract essence of the imperialist institution as it might exist in the heaven of socio-political concepts,<sup>159</sup> but to comprehend the imperialist dynamics “in the modality of a *current existence*: in a concrete present.”<sup>160</sup>

At no point in his writings from this period, continues Althusser, did Lenin’s thought betray any signs of an idealist sensibility. At no point did it try to pursue a pointless goal and understand the invariant traits of the imperialist idea. Lenin’s sole target of investigation was the immediate given conjuncture and its material features. Did that require him to turn empiricist? Not in the least.

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<sup>157</sup> Further on Ockham’s philosophy, see Paul Vincent Spade, “William of Ockham”, in EDWARD N. ZALTA (ED.), *THE STANFORD ENCYCLOPEDIA OF PHILOSOPHY* (fall 2002 edn.), available from <http://plato.stanford.edu/archives/fall2002/entries/ockham/>.

<sup>158</sup> FOR MARX, 178.

<sup>159</sup> Cf. Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 Col. L. Rev. 809, 809 (1935): “Some fifty years ago a great German jurist had a curious dream. He dreamed that he died and was taken to a special heaven reserved for the theoreticians of the law. In this heaven one met, face to face, the many concepts of jurisprudence in their absolute purity, freed from all entangling alliances with human life. Here were the disembodied spirits of good faith and bad faith, property, possession, *laches*, and rights *in rem*.”

<sup>160</sup> FOR MARX, 178.

What is clear from Lenin's commentaries about the Russian revolution and global imperialism from 1917, observes Althusser, is that in working out his theoretical understanding of these phenomena Lenin did not at any stage reduce his analytical methodology to the one-dimensional poverty of vulgar empiricism. His accounts of imperialism and revolution suggest a penetrating understanding of the *deep logic* of the surrounding historical conjuncture, a theoretical insight that would remain simply unachievable from the immediate surface of the empiricist inquiry. What was it, however, that enabled Lenin to perform this feat? Mainly and in the first place, says Althusser, his attention to the logic of social production and his implicit understanding of the irreducible complexity of the social whole. By isolating different logics of the social process from one another, Lenin was able to identify the taxonomy and the configurations of the existing social instances. With that as his theoretical arsenal, he was then able to "analyse[] what constitutes the characteristics of [the currently existing] structure: the essential articulations, the interconnexions, the strategic nodes ...; the disposition and relations typical of the [given] contradictions."<sup>161</sup>

The lessons which the Althusserian school went on to draw from these observations turned out, in the end, to be as simple as they were fundamental. First, repeating after Marx,<sup>162</sup> it declared that the structure of the complex whole should never be studied formally and *in abstracto*, but only through its immediate manifestation in the concrete "living" conjuncture. Second, where Marx stopped at the point of a simple announcement, it went further to articulate the ontological meaning – the philosophical premises – behind that injunction: the structure of the complex whole must be studied through its manifestation in the current conjuncture not because this way we can obtain more practically relevant knowledge, but because the structure simply does not exist in any other form.

The structure is not an essence [located] outside the [field of the social] phenomena which comes and alters their aspect, forms and relations and which is

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<sup>161</sup> Id.

<sup>162</sup> See his "Theses on Feuerbach" and "Introduction to a Critique of Political Economy," in KARL MARX AND FREDERICK ENGELS, *THE GERMAN IDEOLOGY (PART ONE)* 121-51 (ed. by C. J. Arthur, London: Lawrence & Wishart, 1999).

effective on them as an absent cause, absent because it is outside them. The absence of the cause in the structure's 'metonymic causality' on its effects is not the fault of the exteriority of the structure with respect to the [social] phenomena; on the contrary, it is the very form of the interiority of the structure, as a structure, in its effects. This implies therefore that the effects are not outside the structure, are not a pre-existing object, element of space in which the structure arrives to imprint its mark: on the contrary, it implies that the structure is immanent in its effects, ... that the whole existence of the structure consists of its effects, in short, that the structure, which is merely a specific combination of its peculiar elements, is nothing outside its effects.<sup>163</sup>

The social reality constituted in the course of historical development comprises the only plane of existence for the social structure. If by "historical conjuncture" we understand the social reality as it is located within the course of its historical development, then it is exactly that which, according to Althusser, circumscribes the full ontological horizon of the structure in dominance. To resort to the organicist metaphor, the historical conjuncture is the living body of the structure, its "real, concrete, current" field.<sup>164</sup> Outside it, there can be no structure, just like outside the living organism, there can be no life (Althusser's debt<sup>165</sup> to Spinoza<sup>166</sup> becomes most obvious here); without it, there can be no idea of structuration. The field of the historical conjuncture is identical with the space of the complex whole, or, to put it in a slightly different way, the structure of the social plane manifests itself exclusively within its present givenness since it is that which embodies it. There is no other

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<sup>163</sup> READING CAPITAL, 188-9.

<sup>164</sup> FOR MARX, 207.

<sup>165</sup> See ESSAYS IN SELF-CRITICISM, 126-41.

<sup>166</sup> My understanding of Spinoza is essentially based on E. V. ILYENKOV, DIALECTICAL LOGIC: ESSAYS ON ITS HISTORY AND THEORY (transl. H. Campbell Creighton; Moscow: Progress Publishers, 1977). On the Spinozist legacy in modern Marxism, see also WARREN MONTAG, BODY, MASSES, POWER: SPINOZA AND HIS CONTEMPORARIES (London: Verso, 1999); ETIENNE BALIBAR, SPINOZA AND POLITICS (transl. by Peter Snowdon; London: Verso, 1998); WARREN MONTAG AND TED STOLZE (EDS.), THE NEW SPINOZA (Minneapolis: The University of Minnesota Press; 1997); ANTONIO NEGRI, THE SAVAGE ANOMALY: THE POWER OF SPINOZA'S METAPHYSICS AND POLITICS (transl. by Michael Hardt; Minneapolis: The University of Minnesota Press, 1991).

form or space in which the locus of the structure in dominance can be inserted or grasped. To think otherwise is to fall back into the pits of religious idealism.<sup>167</sup>

Even when the appearance of the present conjuncture suggests the presence of a structural gap, continues Althusser, even when, that is, this or that particular social instance appears to be completely inconsequential in the determination of the current socio-historical momentum, as was, for example, the case in October 1917, when the course of the Russian revolution seemed to have been determined *entirely* through the developments in the field of political actions (the Bolshevik coup, the storm of the Winter Palace) and the developments in the field of culture, for example, did not even seem to register, that gap is still a direct sign of the structure as a whole, an unambiguous symptom of its current shape.

No silence is ever completely silent; every lacuna always says something about the content of the field around it. It was the logic of the structural overdetermination accumulated within the historical conjuncture of October 1917 that produced such an exceptional condensation of all determinative processes in the political instance that the developments occurring in other planes were so confidently overridden as to suggest they were effectively negligible in historico-causational terms.

The invisible is the indispensable factor whose function is to highlight and complement the visible. A gap in its practical imprint is not a sign of the current structure's internal incompleteness; on the contrary, it is a direct indication of what exactly its internal completeness at the given moment looks like. When the constituted conjuncture appears to lack "activity" in a particular region of the complex whole, this is nothing but a symptom of the present form the structure of the complex whole has taken.

An essential component of the historico-materialist epistemological theory, consequently, consists of the symptomaticist know-how, i.e. the know-how which enables reliable symptomatic interpretations of the social material supplied by the historical conjuncture. As Althusser saw it, it is precisely that know-how which Lenin practiced on the political reality of 1917<sup>168</sup> and Marx on the classical political economy half a century earlier.<sup>169</sup> The "only" thing that was left for Althusser himself to do was, consequently, to

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<sup>167</sup> Cf. KELLÉ, *supra* n.120, 164 (from the materialist point of view, structuralist analysis makes sense only as part of a historically grounded investigation).

<sup>168</sup> FOR MARX, 175-80.

<sup>169</sup> READING CAPITAL, 18-28.

formulate that know-how in explicit terms in order to enable a functional historico-materialist methodology<sup>170</sup> and to point out on this basis *the inherent limits of every materialist knowledge project*.

Althusser's first conclusion in this context was quite simple: if the space of the embodied structure is a field permeated with *both* what from within that field appear as visibilities *and* what appear as invisibilities, and the latter are as much a symptom of the structure's historical development as the former, then it obviously follows, considering that every discourse is itself a structured field (because it is a field of production), that no discourse can provide a complete vision of its own structure (and consequently of the full complex whole), since every discourse will always contain at least some lacunae (regions of invisibilities) within its field which it will not be able to visualize, but which would nevertheless be constitutive of its structure. Even Marx's own symptomatic reading (*lecture symptomale*) of classical economics had to be subjected to a further symptomatic reading by Althusser to reveal its full structure.<sup>171</sup>

The second conclusion flowed out directly from the first: from the epistemological point of view, the theory of the social reality as a structured complex whole designates nothing other than that the social space-process contains all its structural conditions within its surface, including its lacunae and condensations,<sup>172</sup> which is to say that (i) in social sciences, all valid analytical vantage points are immanent to the object of study; and (ii) there is no single vantage point from which we can cover the "whole field."

And that is where we come to the theory of the parallax view.

The gist of the parallax theory, according to the Slovenian philosopher Slavoj Žižek, can be best understood in the following context. Take an irresolvable binary opposition, strip it to its basic ontological terms, work out the contradictory logic connecting these two terms until you finally hit the dead mass of the Wittgensteinian bedrock, and what will come out in the end is the realization that "it is not that one [term of the opposition] is the 'truth' of the other," or that the truth somehow hides on some higher ontological level, above that immediate plain on which the opposition takes place: "the truth is rather the very shift of perspective between [the two elements of the

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<sup>170</sup> Id., 13-69. See also MACHEREY, *supra* n.2, 172-4.

<sup>171</sup> Colin Davis explores the implications of this thesis in DAVIS, *supra* n.81, 111-2.

<sup>172</sup> FOR MARX, 209.

opposition].”<sup>173</sup> Consider now that in the Althusserian theory, given the principle of overdetermination, the dialectical process always involves more than just two opposites. Adjust the parallax theory to that condition and what you get in the end is the basic outline of the Althusserian theory of interpretation, i.e. the epistemological mechanism of the structural-conjunctural analysis.

To understand the factuality of any given social phenomenon in accordance with structural-conjunctural theory, it must always be studied from several different angles at once. Put differently, it is absolutely futile to try to understand a social event from one perspective only, say, only in terms of its cause (i.e. by imagining it as an effect of something that needs to be comprehended) or only in terms of its effect (i.e. by imagining the event as a cause of something that needs to be comprehended). The cause cannot provide the sole valid criterion by which one can judge the effect (*contra* liberal humanism), just like the effect cannot provide the sole valid criterion by which one can judge the cause (*contra* Hegel). The reason why that is so derives ultimately from the general ontological character of the social reality: the social instances are not related to one another according to the logic of transitive causality. The effects, as Spinoza would say, in this context, are only a mode of the existence of the causes.<sup>174</sup> The only theoretical dimension in which a given social phenomenon can be adequately comprehended, consequently, is that in which the *concrete* relationship of the mutual support and mutual entailment which links it with its causes *and* its effects can become apparent. Practically speaking, in the final analysis, this basically means that every studied phenomenon has to be approached exclusively within that particular historical conjuncture in which it is constituted, each element of it being understood at once as its potential symptomatic and constitutive factor.<sup>175</sup> To the extent to which this requires us to approach the studied question from several different perspectives at once, each of which remains at all times epistemically irreducible to any of the others, it follows inevitably that, with each perspective giving rise to a separate act of discursive production and each **object of discourse** being ontologically distinct from the **real object**

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<sup>173</sup> SLAVOJ ŽIŽEK, *IRAQ: THE BORROWED KETTLE* 6 (London: Verso, 2005).

<sup>174</sup> See *supra* n.103. Cf. also *ESSAYS IN SELF-CRITICISM*, 140-1; ILYENKOV, *supra* n.166.

<sup>175</sup> Cf. James H. Kavanagh and Thomas E. Lewis, *Interview with Etienne Balibar and Pierre Macherey*, 12 *Diacritics* 46, 49 (1982).

cognized through that discourse,<sup>176</sup> a concrete **knowledge of the studied object** produced in accordance with the parallax theory will in effect be a **composite product** constructed through the combination of the disparate discursive objects produced in accordance with each interpretative perspective adopted in the inquiry, a product that, like the structure in dominance itself, will lead a *systemic* existence, being manifested in no particular single point of space but rather in the many mutually autonomous instances of which it consists and which it organizes.

Another way of conveying the same idea is to say that in order to be understood “in a materialist way,” every interpreted object must be taken in its immediate givenness contextualized by its surrounding conjuncture and approached as a singular, complexly overdetermined *effect* produced through its continuous encounters with its dialectical opposites.<sup>177</sup> Through each of these encounters another side of it will be glimpsed, a full

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<sup>176</sup> Cf. READING CAPITAL, 43: “Knowledge working on its ‘object’, then, does not work on the *real* object [existing in the real world outside the cognizing subject’s consciousness] but on the peculiar raw material, which constitutes, in the strict sense of the term, its ‘object’ (of knowledge), and which, even in the most rudimentary forms of knowledge, is distinct from the *real object*. For that raw material is ever-already ... a *raw material*, i.e., matter already elaborated and transformed.” A few pages later, Althusser goes on to explain that “the problem of the relation between these two objects (the object of knowledge and the real object) [is] a relation which constitutes the very existence of *knowledge*” (id., 52). That problem, it seems, is the very question to which the parallax theory aims to give an answer. Cf. text accompanying supra n.1.

<sup>177</sup> Cf. Warren Montag, *Materiality, Singularity, Subject: Response to Callari, Smith, Hardt, and Parker*, 17 *Rethinking Marxism* 185, 189 (2005): “We can understand this on the basis of Spinoza’s theory of singularities. Works are always themselves conjunctions of disparate elements that combine in such a way as to produce an effect (*Ethics* II, definition 7) – in this case, the effect of meaning, the effect of being read. As they persist in time, they encounter other singularities and may enter into new conjunctions (and thus become parts of new singularities) to produce new effects, new meanings, new readings.” A similar ontological theory has been advocated under the rubric of *différance* by Jacques Derrida (see supra n.36), a concise summary of which for the purposes of the contemporary international law theory can be found in Sarah Kyambi, “National Identity and Refugee Law”, in PETER FITZPATRICK AND PATRICIA TUITT (EDS.), *CRITICAL BEINGS: LAW, NATION AND THE GLOBAL SUBJECT* 19, 22-4 (Aldershot: Ashgate, 2004). Cf. also PIERRE MACHEREY, *IN A MATERIALIST WAY* (transl. by Ted Stolze; London: Verso, 1998). Notice, however, that Derrida does not share Althusser’s understanding according to which the main problem which the materialist epistemology must resolve is the problem of the relationship between the object of knowledge and the real object (cf. Balibar and Macherey, supra n.1; supra n.170). For Derrida, the cognition of the real object will always remain impossible/deferred (see supra n.36).

understanding being available only through a constant reconstruction exercise bringing all these side images into a single complex whole.

Or as another Marxist philosopher once put it:

Precisely because reality is a structured, evolving, and self-forming whole, the cognition of a fact or of a set of facts is the cognition of their place in the totality of this reality. In distinction from the summative-systematic cognition of rationalism and empiricism which starts from secure premises and proceeds systematically to array additional facts, dialectical thinking assumes that human cognition proceeds in a spiral movement in which *any* beginning is abstract and relative. If reality is a dialectical, structured whole, then concrete cognition of reality does not amount to systematically arraying facts with facts and findings with findings; rather, it is a process of *concretization* which proceeds from the whole to its parts and from the parts to the whole, from phenomena to the essence and from the essence to phenomena, from totality to contradictions and from contradictions to totality. It arrives at concreteness precisely in this spiral process of totalization in which all concepts move *with respect to one another*, and mutually illuminate one another. [S]uch cognition is not a summative systematisation of concepts erected upon an immutable basis, constructed once and for all, but is rather a spiral process of interpenetration and mutual illumination of concepts, a process of dialectical ... totalization that transcends ... one-sidedness and isolation [and asserts] that the parts not only internally interact and interconnect both among themselves and with the whole, but also that the whole cannot be petrified in an abstraction superior to the facts, because precisely in the interaction of its parts does the whole *form* itself as a whole.<sup>178</sup>

*f. The Epistemological Mechanism of Historical Materialism*

And thus at last we come to the main question of this chapter: in the light of the outlined theory, which particular interpretative techniques (in the sense of angles or levels of inquiry) suggest themselves for adoption into the epistemological mechanism of the

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<sup>178</sup> KAREL KOSÍK, *DIALECTICS OF THE CONCRETE: A STUDY ON PROBLEMS OF MAN AND WORLD* 23 (Dordrecht: D. Reidel Publishing Company, 1976).



present thesis? To answer this question, let us first briefly recap the four main lessons we have learned so far from Althusser:

(1) The social reality exists in the form of a complex structured whole. Its constituent parts are mutually autonomous and are not reducible to anything other than themselves. Each social instance has its own internal dynamics.

(2) Every social instance influences every other social instance. Put together, the web of combined influences gives rise to a complex system of overdetermined causation. The exact character of every given overdetermination is determined, in the last instance, by the realities obtaining in the domain of the relations of production. That said, this domain itself is also subject to the constitutive influences emanating from other domains, not least the domain of law.

(3) The social structure that constitutes the complex whole exists only in the form of that immediate historical conjuncture whose social “material” it organizes. The architectural make-up of the historical conjuncture consists both of internally visible and internally invisible elements. Within the context of the structured whole, the latter carry an enormous symptomatic significance. The ability to diagnose that constitutes the foundation of every materialist epistemology. Symptomatic reading can be practised both at the level of the historical conjuncture as a whole and within every individual regional structure (internal structure of the particular social instance).

(4) No single interpretative technique can yield a full knowledge of the interpreted object. A true historico-materialist knowledge can only be developed on the basis of the parallax methodology, the main thesis at the heart of which states that an accurate understanding of every particular object can only be achieved through a constant shift of perspectives conditioned by the overdetermined logic of the current historical conjuncture. Every interpretative method is apt to produce its own object of discourse.

Proceeding against this background now, it seems we can draw the following general conclusions for the construction of this thesis’s epistemological mechanism:

(i) Combining the thesis of the relative autonomy of social instances with the theory of the structural causality, the parallax theory, and the thesis of the determination in the last instance suggests that, from the perspective of historical materialism, every interpreted social phenomenon has to be studied *both* in terms of its own internal dynamics

and the “regional history” of that social instance within whose field it takes place *and* in terms of the broader social context formed by the surrounding historical conjuncture.

(ii) In the case of a jurisprudential inquiry, taking into account the dual functionality of the juridical instance as a constituent element of both the repressive-political and the ideological-political orders, this consideration effectively translates into the methodological injunction to adopt an essentially tri-partite investigative approach, the three corresponding stages of inquiry being: (a) the study of the given legal regime as an integral part of the order of the RSA; (b) the study of the accompanying body of legal discourse as an integral part of the order of the ISAs; and (c) the study of the underlying social project – the enterprise that brings together the legal regime with its accompanying discourse – as an ideologematic component of the broader historical conjuncture.

(iii) Even in the context of this complex approach, it must still be acknowledged that however much we approximate the goal of cognizing it, the given legal regime and its accompanying discourses can never be grasped exhaustively in all their plenitude. The basic reason for this ultimately has less to do with the practical limitations of our investigatory resources (although that, too, obviously, plays an important part) than with the epistemological inexhaustibility of the material phenomena comprising the studied object. On the one hand, every real object acquires its identity only in the course of its concrete dialogical interaction with other objects. To the extent, consequently, to which our “political unconscious”<sup>179</sup> (*doxa*) also constitutes one of these objects, it inevitably follows that, being the participating co-constituents of these dialogues, we can never in fact remove ourselves to an effective external point (the view from nowhere) from which we could perceive the dialogical field in its entirety, since that would require us to “undo” our status as cognizing agents.<sup>180</sup> At the same time, considering that every object represents in the end an overdetermined effect of its continuous encounters with its dialectical opposites, it also follows that the process of knowledge production concerning any given phenomenon can never be terminated: whatever meaning we produce of the analyzed object, it can always be

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<sup>179</sup> See FREDRIC JAMESON, *THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT* (London: Routledge, 2002).

<sup>180</sup> Nietzsche formulated this idea far more succinctly (even if also more ambiguously): an exhaustive judgment is impossible because everyone of us always remains a party to that dispute over which we are supposed to pronounce a judgment. See NIETZSCHE, *supra* n.87, 40.

supplemented by still another meaning produced in line with the on-going development of the historical conjuncture and thus *ad infinitum*.

*g. The Epistemological Mechanism of This Thesis*

Earlier I have said that this thesis is essentially a work written in the genre of legal realism. So far in this chapter I have spoken at length about historical materialism, structural conjunctural theory, dialectical knowledge, parallax theory, and what not. But I have not spoken about legal realism. As far as I could, I have tried to explain the objective advantages of historical materialism as a general ontological-theoretical instrument and the epistemological inevitability of arriving at the structural conjuncturalist position once one adopts the historico-materialist approach in the domain of social sciences. But I have not discussed what exactly this means for legal scholarship and if the application of structural conjuncturalism is what one should ultimately understand by legal realism.

So, to start with the last question first, the brief answer is: yes. Legal realism is the “local” variation of structural conjuncturalism adapted to the needs of juridical scholarship. It is a sub-species of historical materialism, and, within the context of this thesis at least, this is the only correct way to understand this term.

When I say, consequently, that this thesis is a work written in the genre of legal realism, what I ultimately mean by that is that it is the end product of a particular type of a historico-materialist investigation of a particular type of socio-historical problematic, in this case the rise and development in the post-Cold War era of the new ILTMC project. I do *not* mean to say it is the final product of a *complete* historico-materialist investigation of that problematic. To accomplish that kind of investigation in the case of the new ILTMC project, one would have to write a work several times longer than this one.

Were I to undertake a work of that scale, I would probably have to make now a general declaration explaining that even though there may exist only *one object of knowledge* behind its inquiry, there would have to be constructed at least *three different objects of discourse*, each a product of its own analytical perspective. The first of these three perspectives, as explained in the previous sub-section, would focus its exploratory attention on the factuality of the *effectively existing legal regime* produced and sustained by the new ILTMC project. The second perspective would focus on the factuality of the *discursive space-process*

accompanying that regime and its relationship with the general order of the global ISAs. The third perspective, in contrast, would turn to the *general ideologematic function performed by the new ILTMC project* in the context of the corresponding historical conjuncture as a whole.

Needless to say, I have not produced that kind of work in these pages. My ambition in this thesis is not nearly as big as that. Pursuing all these three lines of inquiry within the space of one investigative project would have required a truly gargantuan effort, an expenditure I decided to leave for the time being for some other occasion.

Just how enormous the analytical task facing the author of such kind of a work would be, one can glean, for example, from considering the fact that in order only to begin to uncover the third topic, one would need to go through hundreds if not thousands of disparate pieces of evidence drawn from dozens of different fields and sources.

As we saw earlier, the basic concern of every ideologematic inquiry is not to identify the immediate causal contribution made by any particular social project to any particular event, but to elucidate the general function the corresponding ideological form underlying that project played in the context of the broader socio-political process.<sup>181</sup> The reason for such a peculiar choice of focus, as Fredric Jameson pointed out, is that the analysis of the background ideological form, unlike the study of the immediate social projects which it produces and sustains, can ultimately provide us with an insight into the objective dialectical condition of the currently existing structure in dominance (complex whole).<sup>182</sup> Or, in other words, by approaching the given social project as a *parole*-like manifestation of an underlying *langue*-like structure we can develop an understanding of the actual character of the current historical conjuncture *as a whole*, and not just some separate aspect of it.

To accomplish that task, however, one must always place the studied suprstructural domain in the context of its interaction with all other such domains existing within the current conjuncture, or, in other words, one must insert the given ideological form against the background of all those economic, repressive-political, and discursive practices and their dialectical interconnections which accompany its historical existence in time. In the case of the new ILTMC project, that would mean, *inter alia*, contextualising the

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<sup>181</sup> Cf. JAMESON, *supra* n.179, 73, 103-4.

<sup>182</sup> *Id.*, 47, 103-4.

development of the new ILTMC regime and its accompanying discursive space-process against the background of:

- the rapid spread of the CMP across the surface of the globe in the wake of the disintegration of the Soviet bloc;
- the rise of the pan-European organizations and their associate and subordinate institutional structures and the corresponding projects of pan-Europeanisation, manifested not least in the development of the theory of a “common *acquis*”;
- the reinvigoration after the end of the Cold War of the United Nations process, the branching out of the UN human rights architecture and the corresponding political projects, including the creation of the post of the UN High Commissioner on Human Rights and the corresponding human-rightsization, in the second half of the 1990s, of all aspects of the UN activity;
- the growth in size and the increasing sophistication of the Bretton-Woods architecture and the expansion of its programs into the former Soviet bloc;
- the politico-institutional reinvention of the NATO and the patterns of its enforcement operations in the ECE region, not least its “policing campaigns” in the Balkans, its elaboration of the Partnership for Peace scheme, and its punitive actions against Yugoslavia in 1999;
- the continuous expansion of the European Union from the 1980s EEC into a post-Amsterdam fortress Europe without any parallel institutionalization of the all-Union structures other than in the area of monetary control;<sup>183</sup>
- the rise in prominence and prestige of the international law profession (including its scholarly constituent) accompanied by the intensification of the alliance struck under the rubric of “transition studies” between “legal expertise” and “progressive international policy-making”;<sup>184</sup>
- the rearrangement of the international security practice on the basis of the OSCE-defined “comprehensive security” theory;

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<sup>183</sup> See on this further, PERRY ANDERSON AND PETER GOWAN (EDS.), *THE QUESTION OF EUROPE* (London: 1997).

<sup>184</sup> See on this further, David Kennedy, *The Politics of the Invisible College: International Governance and the Politics of Expertise*, 2001 EHLRR 463; David Kennedy, *Contestation of the Outcomes and Procedures of the Existing Legal Regime*, 16 *Lei J Int'l L.* 915 (2003).

- the decoupling of the formal-political and the effective-economic dimensions of the national sovereignty processes and the migration of the locus of economic decision-making into the politically unaccountable, under-institutionalized transnational domain;<sup>185</sup>
- the popularization and rise in prominence of the practices of allegedly neutral judgments passed on the lower-tier polities by regional and global powers through the instrumentality of corruption studies, security analysis briefs, and human rights and development reports;
- the rapid institutionalization of the practice of international expert missions and its break-neck expansion into areas as diverse and complex as banking, public health, and secondary education reform;
- the rapid expansion and the stupefying rise in prominence of the watchdog component of the transnational civil society architecture generously financed (and often staffed) by the citizens of regional and global powers and the increase in attention attributed by these powers and the international public organizations to its judgments about governments and societies lacking any history of indigenous liberal capitalism;<sup>186</sup>
- the gradual but decisive displacement on the level of the legal form, in the writings of legal scholars and international institutional discourse alike, of all communitarian self-determination tropes in favour of the individualist human rights vocabulary;
- the historical transformation of the modern warfare patterns away from the large-scale conventional war in the direction of low-intensity guerrilla conflicts<sup>187</sup> accompanied by the intensification of the technological progress in the area of telecommunications enabling the introduction of same-minute reporting practices by international news agencies, not least those relying on electronic media;

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<sup>185</sup> See on this further, e.g., Stanley Hoffmann, *Clash of Globalizations*, 81/4 *Foreign Affairs* 104, 108-111 (2002).

<sup>186</sup> See on this further, e.g., Chimni, *supra* n.142, 11-2.

<sup>187</sup> See on this further, e.g., MARTIN VAN CREVELD, *THE TRANSFORMATION OF WAR* (New York: The Free Press, 1991).

- the rise in popularity of various aspects of international studies in Western universities and the corresponding increase in demand for beginner- and intermediate-level literature;
- the general retreat of organized religion and the disintegration of the communitarian value system in the North-Atlantic societies over the course of the last several decades, followed by a rapid spread of the active consumerist culture and the “end of ideology” discourse;
- the universal defeat of every significant outlet of the traditional Left project in the North Atlantic societies, from Western Marxism to the first-wave feminism, and the drift of the traditionally centre-left parties to traditionally right and centre-right agendas, represented not least by the rise of the New Labour in Britain and the Clintonian triangulation of the Democratic Party in the United States;
- the rapid spread of the neoliberal dogma across the former Soviet bloc in the early 1990s aided by the large-scale social demoralization following the collapse of the established political regimes;
- the progressive separation of the effective ideological order of lived practices inhabited by the working masses from the formally articulated official ideological orders propagated by the governing elites, with the former’s tendency to oppose the pro-multiculturalist, pro-individualist, and anti-nationalist doctrines of the latter in favour of the passive-aggressive practices of particularist communitarianism, culturalism, and racism;<sup>188</sup>

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<sup>188</sup> Cf. BALIBAR AND WALLERSTEIN, *supra* n.130, 230: “[It is] useful to distinguish the perspectives of the small group of ‘cadres’ and the vast majority of the population. I do not think they relate in the same ways to the ideological constructs of their system. [U]niversalism is a belief-system primarily intended to reinforce the ties of the cadres to the [capitalist] system. This is not simply a question of technical efficacy. It is also a way to limit the effects of the very racism and sexism the cadres find so useful to the system, since sexism and racism, if carried too far, are potentially dangerous to the system. ... To be sure, there always exist other cadres, the second team as it were, who are ready to challenge those in power in the name of diverse particularisms. But, in general, universalism as an ideology serves the long-term interests of the cadres better than its inverse. I do not argue that the attitudes of the various working strata are simply the obverse of those of the cadres. But they do seem to tend in the opposite direction. By assuming a particularist stance – whether of class, of nation or of race – the working strata are expressing an instinct of self-protection against the ravages of a universalism that must be hypocritical within a system founded both on the permanence of

- the swift replacement on the level of popular and scholarly discourse in the West of the class-centred problematic with the problematic of multiculturalism and the corresponding failure to register the overwhelmingly imbalanced class dimension of the “weakening” of state sovereignty in the European region in the 1990s.<sup>189</sup>

The list of the relative factors that would have to be taken into consideration in an ideologemetic inquiry can be extended still longer. But the basic message it conveys is sufficiently clear already. The scale of the analytical challenges presented by the requirements of the ideologemetic inquiry is truly and genuinely daunting. To complete an inquiry of such a large magnitude, one would have to spend hundreds and hundreds of research weeks, covering the span of a dozen neighbouring disciplines and recruiting far greater intellectual and investigative resources than are currently at the disposal of this thesis’s author. And all that only in order to complete the ideologemetic strand of the analysis. There would still be left the other two fronts.

To elucidate the internal logic of the discursive space-process surrounding the new ILTMC legal regime, one would have to conduct a close, painstaking analysis not only of the general ideational substance grafted on its conceptual scaffolding, but also of the regular form patterns of the corresponding discursive constructs. In other words, one would have not only to uncover the ideological significance of the various rhetorical resolutions the new ILTMC discourse offers to the philosophical conflicts between, for instance, the individual rights theories and the collective rights theories, but also to identify

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inequality and on the process of material and social polarization. ... It is perhaps only because ordinary people have less room for manoeuvre that they remain more loyal to the others in their group, but the fact remains that this is the case. That is, the nation, the race and even the class serve as refuges for the oppressed in this capitalist world-economy which explains why they remain such popular ideas.”

<sup>189</sup> As Susan Watkins argues, it would be rather short-sighted to assume that the intensification of the European economic integration in the last fifteen years has sounded the death knell for the institute of the national economic sovereignty in Europe. National economic sovereignty has not died with Maastricht. It underwent a fundamental structural transformation. With the overall responsibility for ensuring the macroeconomic stability still resting in the hands of the national governments and most of the historically established mechanisms for cyclical and other macroeconomic adjustments blocked, what the European economic integration has effectively meant from the class-centred perspective, explains Watkins, is that the only effective instrument of controlling the macroeconomic processes, such as inflation and the balance of payments, left at the disposal of the national governments was “wring[ing] concessions from labour.” See further Susan Watkins, *Continental Tremors*, 33 NLR 5, 13 (2005).



and critically deconstruct the typical masterplots on the basis of which it assembles its narratives.

Moreover, since the ideological functioning of the legal discourse can never be practically isolated from the ideological effects of the broader belief-system underlying the general structure of the political *Überbau*, the completion of this stage of inquiry would also have to take in at some stage what Thurman Arnold described once as “the more general superstitions concerning the function of government.”<sup>190</sup> A casual empirical survey of the general discursive space-process produced in the internationally-minded Western circles throughout the 1990s<sup>191</sup> tends to suggest that the starting list of such superstitions in the case of the new ILTMC project would at the very least include:<sup>192</sup>

- the belief that while the Western nationalism of the 19<sup>th</sup> century was a liberating and enriching phenomenon, the post-Cold War nationalism of the ECE region is a regressive, exclusivist, destructive, blood-thirsty, and totalitarian force;<sup>193</sup>

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<sup>190</sup> ARNOLD, *supra* n.14, 60-1.

<sup>191</sup> For the symptomatic traces of these beliefs in the scholarly discourse, see, among others, LARRY DIAMOND AND MARC F. PLATTNER (EDS.), *DEMOCRACY AFTER COMMUNISM* (Baltimore: The Johns Hopkins University Press, 2002); Gyula Csurgai, “Geopolitical Aspects of the Minority Question in Central and South Eastern Europe,” in KINGA GÁL (ED.), *MINORITY GOVERNANCE IN EUROPE* 55 (Budapest: Open Society Institute, 2002); Will Kymlicka, *Nation-building and Minority Rights: Comparing West and East*, 26 *J. Ethn. & Migr. Stud.* 183 (2000); FRITZ PLASSER AND ANDREAS PRIBERSKY (EDS.), *POLITICAL CULTURE IN EAST CENTRAL EUROPE* (Aldershot: Avebury, 1996); Andras Sajó, *Protecting Nation States and National Minorities: a Modest Case for Nationalism in Eastern Europe*, 1993 *U. Chi. L. Sch. Roundtable* 53. For the traces of the same belief-system in the “official discourse,” see, e.g., *President George Bush’s Address to the NATO Summit in Istanbul, Turkey*, reprinted in *The Guardian*, 30 June 2004; *Statement on South-Eastern Europe as a Region of Co-operation*, OSCE, 11<sup>th</sup> Ministerial Meeting, 2 December 2003; *ENLARGEMENT OF THE EUROPEAN UNION: AN HISTORIC OPPORTUNITY* (Brussels: European Communities, 2003). See also the various speeches and interviews with the OSCE HCNM cited in Chapter I above.

<sup>192</sup> For further discussion of the general folkloric belief-system underlying the new ILTMC project, see, among others, Slavoj Žižek, *‘You May!’*, *London Review of Books*, 18 March 1999; Serge Schmemmann, *What’s Wrong with This Picture of Nationalism?*, *New York Times*, 21 February 1999; ATILLA ÁGH, *THE POLITICS OF CENTRAL EUROPE* 7-21, 202-25 (London: Sage, 1998); Cristina Posa, *Engineering Hatred: the Roots of Contemporary Serbian Nationalism*, 11 *Balkanistica* 69 (1998); Sabrina Petra Ramet, *War in the Balkans*, 71/4 *Foreign Affairs* 79, 80-2 (1991-1992).

<sup>193</sup> Cf., e.g., Robin Cook, *Bosnia: What Labour Would Do*, *The Guardian*, 10 December 1994: “All these measures, though, will be meaningful only if the West’s democratic, secular states grasp the destructive character of the fundamentalist nationalism now wrecking post-communist countries. Nationalism can be a

- the belief that the post-Cold War ECE nationalism is not a new historical development but actually a continuation of a very old political trend that had long been suppressed by communism, but that has now been reawakened;<sup>194</sup>
- the belief that at the deepest bottom of her heart no reasonable person should ever trust the native political elites of the ECE states, since most of their unconscious reflexes are ultimately ruinous for the freedom, justice, stability, and prosperity of their societies, and the reason for this is that some of these elites are not yet fully competent when it comes to such matters, while others are either essentially indifferent or, worse still, outright opposed to the values of freedom and democracy;
- the belief that the main problem with the ECE polities following the end of the Cold War is not that their economic decision-making power has been taken away from them by the West, but that their native political elites, unlike their North-Atlantic counterparts, do not have any real understanding of the nature of democracy and that most of them, moreover, are generally predisposed to succumb to the lure of aggressive nationalism, corruption, and xenophobia,<sup>195</sup>

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liberating and enriching force, but in the ex-communist world it has supplied an exclusivist identity which strengthens itself through violence. Western nationalism of the 19<sup>th</sup> century aimed to build a common loyalty to the state that conveyed a mutual territory, and therefore offered similar democratic rights of citizenship to multiple ethnic groups. The nationalism now feeding the conflicts of eastern Europe is based not on territory, but on ethnic identity, and is trying to build a polity based on ethnic, not state, citizenship.”

<sup>194</sup> Cf., e.g., Vernon Bogdanor, *Exorcising the Ghosts of 1914*, *The Independent*, 1 August 1994: “Many people have spoken of the changes in [the ECE region] since 1989 as having created a new political order. It would be more accurate to view what has happened as the restoration of an old order, which the peacemakers at the end of the First World War tried to create to fill the vacuum left by the decay of empire.” Cf. also Peter Jenkins, *Nationalism Deserves a Better Name*, *The Independent*, 14 July 1991 (observing that “[w]ith the communist yoke lifted ... it is fashionable to dwell upon the unresolved and long-suppressed nationality questions of [the ECE region] in the expectation of history repeating itself [as] the collapse of the Soviet empire in Eastern Europe has enabled the resumption of some ancient quarrels”).

<sup>195</sup> Cf., e.g., John Edwin Mroz, *Russia and Eastern Europe: Will the West Let Them Fail?*, 72/1 *Foreign Affairs* 44, 52 (1992). Cf. also *Racism: a Legacy of Fascist Rule* (editorial), *The Independent*, 10 January 1993: “[W]ithin the European Community at least, no sizeable political party (Jean-Marie Le Pen’s National Front apart) preaches crude nationalism or racism. The reasons are clear. National governments [in Western Europe] have voluntarily pooled a good deal of their sovereignty and intertwined their economic destinies. Non-member

since (i) unlike in the North-Atlantic region, there has always been a lot of inter-ethnic hostility in the ECE region, and the ECE peoples have always been unhealthily obsessed with their past and can never get over their historic grievances; (ii) the tensions of communist totalitarianism not only generally weakened the socio-political immune systems of the ECE polities, but also cultivated tremendous distrust and hatred between different ethnic and religious groups; and (iii) having been ruled by Moscow for several decades, the ECE political elites lack the necessary capacity for ideological self-sufficiency of the kind acquired by the West Europeans through the creation of the European Union;<sup>196</sup>

- the belief that the Balkans *are* indeed the powder-keg of Europe and that world wars have a habit of starting in Sarajevo;
- the belief that it is not only a prudent measure but also an honourable duty for the “West”<sup>197</sup> to extend its helping hand to the ECE polities and to share its

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Scandinavians have strong democratic institutions. There is no such tradition in Eastern Europe and the Balkans.”

<sup>196</sup> Cf. Bogdanor, *supra* n.194.

<sup>197</sup> Cf., e.g., Polly Toynbee, *Left behind and Left Seething as a New Way Struggles to Be Born*, *The Guardian*, 12 April 1999. See also Andrew Marshall, *Clinton Offers Vision of Wider Europe*, *The Guardian*, 10 January 1994: “Western Europe should open up to eastern Europe and Russia, Bill Clinton said yesterday, warning of the threat of ultra-nationalism if integration failed: ‘We must not let the Iron Curtain be replaced with a veil of indifference.’ ... The President underlined that the most important challenge facing Europe was in the east. The region faced a ‘race between rejuvenation and despair’. The West must offer assistance, trade, military co-operation, support for democracy and a place at the table. He wanted ‘to help lead the movement to that integration, and to assure you that America will be a strong partner in it.’ But this support for Moscow’s efforts was matched by a warning that reformers had enemies. ‘Pitted against them are the grim pretenders to tyranny’s dark throne, the militant nationalists and demagogues who fan suspicions that are ancient, and parade the pain of renewal in order to obscure the promise of reform.’ [H]e said the West’s stance would help decide whether Russians ‘elect leaders who incline back towards authoritarianism and empire.’” Cf. Lord Cobbold, *Maastricht*, *The Times*, 6 June 1992: “The stability and success of the European Community, albeit under the umbrella of NATO, has been the inspiration for Europe’s eastern population in its struggle against the economic and intellectual poverty of communism. As the people of Eastern Europe and of the Russian empire rediscover their identity and their independence, the free peoples of the European Community must not allow themselves to slip back into the catastrophic patterns of nationalism. The beacon of co-operation that has shone into the totalitarian darkness must not now be dimmed.”

values and wisdom with them in order to save them from the perils of aggressive nationalism, corruption, and xenophobia, since (i) unfortunately, the Eastern Europeans themselves are too inexperienced yet to know how to avoid all these dangers on their own (so much so that, if left to their own devices, most of them probably would immediately slip up and allow some populist demagogue to cloud their minds, taking them off the road leading to freedom, justice, and prosperity in an opportunistic pursuit of some short-term goals);<sup>198</sup> and (ii) what is really at stake in guiding the ideological transition in the ECE today is nothing less than the future of freedom/human dignity/the Western civilization itself.<sup>199</sup>

In short, the task of producing a *complete* historico-materialist account of the new ILTMC project would require the completion of an investigative study on such an enormous investigative scale that, it would seem, even in the most optimistic and confident assessment the present thesis cannot be expected to provide anything more than a general opportunity to sketch out its basic contours.

All of which is basically to say that instead of trying to accomplish the unaccomplishable, having outlined the structural terms of its general epistemic condition, this work from here onwards is going to restrict its investigative focus to the exploration of only one of the three indicated objects of discourse: the effectively existing legal regime created by the new ILTMC project through its repressive-political functionality.<sup>200</sup> The two

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<sup>198</sup> Cf., e.g., Mroz, *supra* n.195.

<sup>199</sup> Cf., e.g., Vaclav Havel, *A Call for Sacrifice: the Co-Responsibility of the West*, 73/2 Foreign Affairs 2 (1994).

<sup>200</sup> The sense in which the term “regime” is used in this context is not the same in which it has been used in some international relations works in recent years. There, the concept of “regime” normally corresponds to a complex social phenomenon which includes in itself not only a particular set of rules, principles, and standards, but also institutions, procedures, values, informal conventions, and programs. By contrast, in this work the term “regime” is used exclusively to describe the factuality of the ILTMC on the plane of the juridical instance. For a similar usage of the term “regime,” see Byers, *supra* n.73, 128-9. See also Anne-Marie Slaughter, *The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations*, 4 *Transnat'l L & Contemp. Probs.* 377, 385-8 (1994). For a representative sample of regime theory works, see further ARILD UNDERDAL AND ORAN R. YOUNG (EDS.), *REGIME CONSEQUENCES: METHODOLOGICAL CHALLENGES AND RESEARCH STRATEGIES* (Dordrecht: Kluwer, 2004); ROBERT O. KEOHANE (ED.), *POWER AND GOVERNANCE IN A PARTIALLY GLOBALIZED WORLD* (London: Routledge, 2002); ANDREAS HASENCLEVER ET AL. (EDS.), *THEORIES OF INTERNATIONAL REGIMES* (Cambridge: Cambridge University

central concerns of the last, third, chapter of this thesis, consequently, will be, firstly, to reconstruct the exact shape and content of the new ILTMC regime, and, secondly, to determine to what extent and in which way the effectively existing ILTMC regime may differ from its ideological self-image and what kind of consequences this may have for the sustainability of the latter.

With this as our background, let us close now this section and move back to the plane of the new ILTMC and its legal realist critique.

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Press, 1997); Marc A. Levy et al., *The Study of International Regimes*, 1 *Eur. J. Int'l Rel.* 267 (1995); Jack Donnelly, *International Human Rights: a Regime Analysis*, 40 *Int'l Org.* 599 (1986); STEPHEN D. KRASNER (ED.), *INTERNATIONAL REGIMES* (Ithaca, NY: Cornell University Press, 1983).

# III

## Critique

“Men think in terms of models.... When we verify a model by testing how far it does or does not correspond to the phenomena, this is, of course, not an end in itself but only a means to an end. Our ulterior purpose is not to learn whether the model is or is not valid; it is to get new insight into the structure and nature of Reality by applying a model that is valid and is therefore an effective tool.”

Arnold Toynbee, *A Study of History*, Vol. XII

As explained in the last sub-section of the previous chapter, the main analytical objective of this chapter is basically twofold. The first main task pursued in these pages will be to identify and describe the full content of the effectively existing legal regime created by the new ILTMC project. Once this stage of the investigation is successfully completed, the next general task will be to identify and evaluate the social distributive impact of that legal regime and to compare the obtained findings with the “official story” produced by the new ILTMC project.

Despite all its unquestionable advances on the front of social theory, historical materialism has not yet worked out a coherent practicable approach for evaluating the contents of effectively existing international legal regimes. A number of important advances have been made in this direction, to be sure. As things stand, however, none of them have yet been developed into a comprehensive workable theory. The main challenge confronting the opening sections of this chapter, consequently, will be to try to rectify this crucial shortcoming.

Predictably, the pursuit of this goal will bring us once more to the subject of juristic epistemology. Continuing the general line started in the previous two chapters, I will complete my investigation of the question of method by working out an *immediately applicable* analytical model that can enable the production of truly *objective* understanding of international legal phenomena. In the process of doing so, I will return to the question of

the traditional epistemic conventions adopted in the mainstream international law scholarship and the basic reasons for steering clear of them.

To a certain extent, the logic underlying the analytical model I propose here may suggest that I believe it necessary to rethink the theory of the formal sources of international law. That is not so. From the point of view of the RSA-functionalist tradition elaborated in the course of this chapter, the question of the theory of sources is ultimately completely irrelevant. This is not to say, naturally, that the historico-materialist tradition does not *ever* care about the rules of recognition adopted in the international legal order; only that in the context of its jurisprudential theory this topic is not in fact substantively important.<sup>1</sup>

Several assumptions will have to be made in order to enable an effective execution of this stage of our inquiry. First, because our main aim here is to understand the structure of *objective* incentives created by the new ILTMC regime through its RSA functionality, I propose to simplify our model understanding of the basic dynamics of social agency. What this means in practical terms is this. To be able to understand the objective limits of social possibility, I will suspend for the duration of this stage of our investigation all awareness of the full range of subjective diversity and the complexity of individual and collective psychology patterns. Every subject category studied in these pages will be constructed on the basis of an archetypal model. In other words, instead of, for instance, investigating how the new ILTMC regime affects the reality of social possibilities for *every* single minority community and *every* state in the ECE region, I will only investigate the patterns of the new ILTMC's distributive impact on the social possibilities of an archetypal minority community and an archetypal state.

Immediately, a question starts to arise: against the background of everything that was said in the previous chapter, would this not be a completely absurd action? Have I not just spent more than a dozen pages berating Hegel and preaching the virtues of cognitive

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<sup>1</sup> Cf. OSCAR SCHACHTER, *INTERNATIONAL LAW IN THEORY AND PRACTICE* 35 (Dordrecht: Martinus Nijhoff, 1991) (explaining that ever since international law became multilateral and left the narrow confines of bipartite treaties, the international law discipline has been haunted by the constant need of creating a mechanism for the conclusive determination of its current status and pointing out that the most common solution found to this problem has been to formulate a "doctrine of sources" laying down "the verifiable conditions for ascertaining and validating legal prescriptions").



concretism, insisting on the need to recognize the ontological irreducibility of the studied phenomena? Is archetypization not a species of abstraction and does not the idea of abstraction fly in the face of everything that structural conjuncturalism is all about?

The brief answer to the last sentence is: yes and no. All archetypes, of course, are a species of analytical abstractions. However, as Kellé quite correctly pointed out, just because the requirements of the historico-materialist method constantly postulate the need to reject all forms of abstract schematism, it does not necessarily follow that a historical materialist inquiry must reject the use of all kinds of abstractions.<sup>2</sup> As Jameson observes, as long as one remains continually aware of their basic limitations, it would be highly counterproductive to insist that a social analyst should discard the instruments of the non-dialectical thought (such as, for instance, syllogistic logic) simply because they are non-dialectical.<sup>3</sup>

What are the limits of the admissible use of abstractions in structural conjuncturalism then? To understand the basic conditions for answering this problem, let us first clarify the content of the corresponding concepts. Writes Ilyenkov:

The terms 'the abstract' and 'the concrete' are employed both in everyday speech and in the special literature rather ambiguously. Thus, one hears of 'concrete facts' and 'concrete music', of 'abstract thinking' and 'abstract painting', of 'concrete truth' and 'abstract labour'. This usage is in each case apparently justified by the existence of shades of meanings in these words, and it would be ridiculously pedantic to demand a complete unification of the usage [in all types of discourse. However,] the categories of the abstract and the concrete [do] have quite a definite meaning in dialectical logic, which is intrinsically linked with the dialectico-materialist conception of the truth, the relation of thought to reality, the mode of theoretical reproduction of reality in thinking, and so on. As long as we deal with categories of dialectics connected with words, rather than with words themselves, any licence, lack of clarity or instability in their definition (let alone incorrectness) will necessarily lead to a distorted conception of the essence of the matter. For this reason it is necessary to free the categories of the abstract and the

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<sup>2</sup> V. ZH. KELLÉ (ED.), *PRINTSIP ISTORIZMA V POZNANII SOTSIAL'NYH YAVLENIY* 8 (Moscow: Nauka, 1972).

<sup>3</sup> See FREDRIC JAMESON, *THE POLITICAL UNCONSCIOUS: NARRATIVE AS A SOCIALLY SYMBOLIC ACT* 10, 32, 34, 41 (London: Routledge, 2002).

concrete from the connotations that have been associated with them throughout centuries in many works by tradition, from force of habit or simply because of an error, which has often interfered with correct interpretation of the propositions of dialectical logic.<sup>4</sup>

The starting premise of all non-Hegelian understanding of the relationship between the abstract and the concrete derives from the recognition that

knowledge reflecting an individual fact, though it may be a frequently recurring one, but failing to grasp its internal structure and internally necessary links with other such facts, is extremely abstract knowledge even if it is direct and sensually perceived.<sup>5</sup>

The concept of concreteness, warns Ilyenkov, should not be confused with the concept of the concrete example: “[g]raphic examples illustrating a meagre abstraction can only camouflage its abstractness, creating merely an appearance or illusion of concrete consideration.”<sup>6</sup> A properly dialectical understanding of the concept of concreteness (and therefore of the limits of permissibility in the use of abstractions) is determined by a different set of factors.

The basic idea of abstraction

means considering a quite particular recurring fact with respect to its own immanent content, it means considering it ‘in itself’, as the familiar phrase has it, ignoring everything that this fact owes to the entire totality of the external influences of the broader spectre of reality in which it exists. That is the path Marx follows in *Capital* in studying the phenomena of simple commodity exchange. He obtains the real objective characteristics of value ‘abstractly

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<sup>4</sup> See Chapter 1, “The Conception of the Abstract and the Concrete in Dialectics and in Formal Logic”, in EVALD ILYENKOV, *THE DIALECTICS OF THE ABSTRACT AND THE CONCRETE IN MARX’S CAPITAL* (transl. by Sergei Kuzyakov; Moscow: Progress Publishers, 1982); available from <http://www.marxists.org/archive/ilyenkov/works/abstract/abstra1.htm>.

<sup>5</sup> Id., Chapter 2, “The Abstract as an Expression of the Concrete”, available at <http://www.marxists.org/archive/ilyenkov/works/abstract/abstra2.htm>.

<sup>6</sup> Id.

considered, that is, apart from circumstances not immediately flowing from the laws of the simple circulation of commodities.<sup>7</sup>

All abstractions, in other words, involve a certain measure of decontextualization. Not all decontextualizations, however, points out Ilyenkov, are equally legitimate.

The point is ... that the very right to consider the given particular phenomenon *abstractly* presupposes comprehending its specific role and place in the whole, within the universal interconnection, within an ensemble of mutually conditioning particular phenomena. ... The fact that commodity is considered abstractly, independently from all other phenomena of capitalist production, expresses logically (theoretically) its concrete historically unique form of dependence on the system of production as a whole. The point is that the commodity-form of connection proves to be the universal, elementary form of interconnections between men only within the developed system of capitalist production and in no other system of production relations. ... Had any system of social production relations other than the capitalist one ... been theoretically studied as the subject-matter, nothing would have been more erroneous in Marxian logic, than to consider the commodity form abstractly, as it is considered in the economic theory of capitalism. [So, w]hile the theoretician has not merely a right but even an obligation to consider the commodity form in abstraction within the capitalist system, he has no logical right to consider just as abstractly any other form of economic connection in the same capitalist organism, e.g., profit or rent.<sup>8</sup>

All of which leads to the conclusion that

the right to abstract consideration of a phenomenon is determined by the concrete role of this phenomenon in the whole under study, in a concrete system of interacting phenomena. If the starting point of the development of a theory is taken correctly, its abstract consideration happens *to coincide directly* with a concrete consideration of the system as a whole.<sup>9</sup>

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<sup>7</sup> Id.

<sup>8</sup> Id.

<sup>9</sup> Id.

The starting point of the theoretical project undertaken in this chapter is to ascertain the structure of objective incentives created by the new ILTMC regime. Within the concrete system of interacting phenomena presupposed as that regime's grounding context, the phenomena of minority communities, majority communities, and the state play the role of the structural nodal points in reference to which all other phenomena covered by that regime's discourse are conceptualized. Furthermore, within its own terms of reference, the ILTMC legal regime is designed to provide a social structure of general application covering all existing examples of specified subject categories. Considering these two facts, it seems to make perfect practical sense for the purposes of this thesis to construct the subject categories corresponding to these phenomena in the form of archetypal models.

The construction of social models, however, cannot be an act of "exact science." How well a given archetypal model fulfils its heuristic functions in a given setting will to a large extent depend on how logical (objectively supportable) the model-production criteria used for its construction look against the background of the internal condition of its original context. A close analysis of the internal condition of the new ILTMC project suggests the appropriateness of the following three criteria:

(i) every archetypal subject (minority community, majority community, state, etc.) has to be constructed on the basis of both the new ILTMC's conceptualization of it and the general understanding of such subjects' objective traits at the current conjuncture obtained on the basis of the structural-conjunctural analysis;

(ii) because we are interested in understanding the web of *objective* incentives created in the repressive-political order, all considerations of the ideological order created by the new ILTMC project will be suspended; as a result, in our discussion of the archetypal subjects we will not entertain the possibilities of their developing a state of false consciousness, misrecognition, self-denial, mass delusion, etc.; all subjects considered at this stage of our inquiry will be assumed to act, react, and choose as if they were completely unconstrained by such factors;

(iii) to maximize the analytical penetration of the topic, all subjects will be also assumed to be boundedly rational; in other words they will be assumed to possess (a) an ability to recognize the different costs and benefits associated with different courses of actions; (b) an inclination to maximize benefits and minimize costs; and (c) an inclination

to preference deliberation and consistency over impulsive and random action.<sup>10</sup> The ultimate function of this assumption is to help us to flesh out the *static* component of the strategic field created by the RSA aspect of the new ILTMC regime. It is not to produce a formula of the *dynamic* action occurring within that field.<sup>11</sup> In other words, as institutional economists would normally say, the main objective we will try to achieve this way will be to obtain “a theory of advantage rather than a theory of behavior,”<sup>12</sup> i.e. we will seek to understand the shape of “opportunity sets” created for the interacting parties, not the pattern of how these sets are actually used.<sup>13</sup>

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<sup>10</sup> Cf. RICHARD A. POSNER, *FRONTIERS OF LEGAL THEORY* 252 (Cambridge, MA: Harvard University Press, 2001) (defining rationality as “choosing the best available means to the chooser’s ends”). See also Thomas S. Ulen, “Rational Choice Theory in Law and Economics”, in BOUDEWIJN BOUCKAERT AND GERRIT DE GEEST (EDS.), *ENCYCLOPEDIA OF LAW AND ECONOMICS*, v. 1 790, 791-2 (Cheltenham: Edward Elgar, 2000). Cf. also Heico Kerkmeester, “Methodology: General”, *id.*, 383, 384-5.

<sup>11</sup> This point is very important. It separates the knowledge project of this chapter from the Chicago-school style law and economics project. Further on the limitations of the rational actor paradigm, see Mark Kelman, *Law and Behavioral Science: Conceptual Overviews*, 97 *Nw. U. L. Rev.* 1347 (2003); Lee Ross and Donna Shestowsky, *Contemporary Psychology’s Challenges to Legal Theory and Practice*, 97 *Nw. U. L. Rev.* 1081 (2003); John F. Tomer, *Economic Man vs. Heterodox Men: the Concepts of Human Nature in Schools of Economic Thought*, 30 *J. of Soc.-Econ.* 281 (2001); Christine Jolls et al., *A Behavioral Approach to Law and Economics*, 50 *Stan. L. Rev.* 1471 (1998); Cass R. Sunstein, *Behavioral Analysis of Law*, 64 *U. Chi. L. Rev.* 1175 (1997); Mark G. Kelman, *Misunderstanding Social Life: a Critique of the Core Premises of “Law and Economics”*, 33 *J. Leg. Educ.* 274 (1983). Cf. Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 *Maryland L. Rev.* 563, 631-2 (1982). Cf. POSNER, *supra* n.10, 256-64.

<sup>12</sup> See, e.g., A. ALLAN SCHMID, *PROPERTY, POWER, AND PUBLIC CHOICE* (2<sup>nd</sup> edn.; New York: Praeger, 1987).

<sup>13</sup> As Ross and Shestowsky point out, “[a]n important truism of social psychology is that people respond not to some objective reality but to their own subjective interpretations or definitions of that reality. [V]ariability and unpredictability in such subjective construals can give rise to variability and unpredictability in behavior.” (See *supra* n.11, 1088.) It is not the objective of this thesis to predict through a combination of mathematical models what particular response the new ILTMC regime will engender in every particular minority community in the ECE region.

## Section One

### Understanding Law as an Element of the Repressive Political Order

#### *a. The Question of Names and the Basics of the Functionalist Approach*

A series of preliminary questions must be addressed before we proceed anywhere further. The first of them is: what is the relationship between “ILTMC” and the more traditionally used category “the international law of minority rights”?<sup>14</sup> Are these just two different terms that refer to the same object? Is it the same single phenomenon we have in mind when we use these two labels? The answer, of course, is: no; and there are at least two good reasons for it.

First, there is nothing flagrantly unintelligible with the term “the international law of minority rights.” It is a sufficiently accurate designation of a body of law that exists in large part in the space of the international political process and is certainly concerned with the question of minority rights. The name, by and large, seems to justify itself and, practically speaking, makes perfect sense from the point of view of jurisprudential semantics. It is, furthermore, a sufficiently well-established usage in the modern international law discourse. Practitioners seem to like it. So do scholars and the representatives of the civil society. Amending it simply for the sake of the amendment would, thus, only lead to unnecessary confusion, which is not the intention of this thesis.

More importantly, the legal regime identified here as the ILTMC is *not*, in fact, identical with the legal regime commonly designated as “the international law of minority rights.” Although the latter can be said to form a significant part of the former, on the conceptual level, the two entities are not the same. There are parts of the ILTMC regime which are not constituted by the international norms concerning the protection of minority rights. Similarly, there are parts of the international law of minority rights which have very little to do with the ILTMC. One of the best ways to understand how and in what sense

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<sup>14</sup> Cf., e.g., PATRICK THORNBERRY, *INTERNATIONAL LAW AND THE RIGHTS OF MINORITIES* (Oxford: Clarendon Press, 1991).

this is so is to recall the analytical distinction<sup>15</sup> between “minorities as positive associations” (in Sartrean *minorities-for-themselves*) and “minorities as negative associations” (in Sartrean *minorities-in-themselves*), or, to use a slightly more accurate description, “minorities seeking to retain and promote their communal identity” and “minorities formed as an object-effect of other communities’ inter-ethnic practices.” The immediate shape of the boundary line between the two categories as social factualities, of course, is a completely separate matter, but the basic idea behind the theory seems to make a lot of sense when one analyzes the patterns of the international legal response to the minorities question. For instance, it seems it was clearly the former – minorities as positive associations – whose interests the League Minorities System was designed to protect in the interwar period, while today it is mostly the latter that Nigel Rodley, for instance, has in mind when arguing that all the usual concerns included under the heading of minority rights can in fact be easily addressed by the existing body of general human rights law, such as, for instance, that contained in the ICCPR, without actually having to invent a separate category of minority rights.<sup>16</sup> Most of the modern scholarship addressing the topic of the international legal regulation of the minorities question tends to ignore this distinction. The practical organization of the international regulatory project, however, suggests it should not. To put it slightly schematically, a minority collective that has come into existence only because its members have been constantly discriminated against by the rest of the society certainly may over some unspecified period of time develop some kind of form of residual group solidarity, but that feeling of solidarity will be highly unlikely to develop into any kind of “aggressive nationalism,” so it is very probably not those kinds of minority groups which the pan-European lawmakers had in mind throughout the 1990s when expressing their horror and dismay at the spread of postmodern tribalism, the rise of ethnic conflict, and the threats posed by disloyal minorities to the stability of the existing states.

A minority formed solely as an object-effect of the discriminatory practices of the majority is highly unlikely ever to develop into a *community* in the normal sense of the word,

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<sup>15</sup> John Packer makes a lot of this distinction in “On the Definition of Minorities,” in JOHN PACKER AND KRISTIAN MYNTTI (EDS.), *THE PROTECTION OF ETHNIC AND LINGUISTIC MINORITIES IN EUROPE* 23 (Turku: Abo Akademi University, 1993).

<sup>16</sup> See further Nigel S. Rodley, *Conceptual Problems in the Protection of Minorities: International Legal Developments*, 17 HRQ 48 (1995).

i.e. in the sense adopted, for instance, in the *Greco-Bulgarian "Communities"* case<sup>17</sup> (and duplicated later by Capotorti<sup>18</sup> and numerous others<sup>19</sup>), *viz.*: a group of people possessing a common set of cultural traits and intent on retaining and developing them where possible.<sup>20</sup> If nothing else, that consideration alone should be enough to distinguish the ILTMC from the rest of the international-law-relating-to-the-regulation-of-the-minorities-question field.

The immediate object of the ILTMC's attention, as the name suggests, must be the question of the treatment of *minority communities as communities*. As every international lawyer knows, however, in the eyes of the existing international legal system minority communities are not currently recognized as legal subjects,<sup>21</sup> i.e. as entities capable of possessing and enjoying legal rights and exercising legal duties in their own name.<sup>22</sup> A great deal of international legal regulation of their status, consequently, has to take place through juridical schemes not immediately manifested in constructs commonly known as "minority rights." The substantive scope of the ILTMC as a body of law, therefore, in many respects has to go beyond the substantive scope of the international law of minority rights.

If that is the case, however, if, in other words, the ILTMC is not the same thing as the international law of minority rights, then a question must inevitably arise: what is it then? Better still, how do we know, how can we be certain that *it is*, i.e. it exists as a body of law, to start with?

Obviously, the phrase "international law relating to the treatment of minority communities" is not a common usage in the modern international law discourse. It is not

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<sup>17</sup> See Chapter II, Section 1, p.115, n.58, above.

<sup>18</sup> *Id.*, p.114, n.56.

<sup>19</sup> Including the OSCE HCNM. See, e.g., Max van der Stoep, "Considerable Sacrifices Are Inevitable in Order to Avoid New Disasters in Europe", in WOLFGANG ZELLNER AND FALK LANGE (EDS.), *PEACE AND STABILITY THROUGH HUMAN AND MINORITY RIGHTS: SPEECHES BY THE OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES 77* (Baden-Baden: Nomos Verlagsgesellschaft, 1999).

<sup>20</sup> Rodley was certainly right insofar as criticizing the Capotortian line of reasoning. Capotorti's decision to subsume all minority issues covered by Article 27 of the ICCPR under the umbrella of the *Greco-Bulgarian "Communities"* doctrine is profoundly flawed.

<sup>21</sup> See further IAN BROWNIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 61-7 (6<sup>th</sup> edn.; Oxford: Oxford University Press, 2003); PETER MALANCZUK (ED.), *AKEHURST'S MODERN INTRODUCTION TO INTERNATIONAL LAW* 105-7(7<sup>th</sup> edn.; London: Routledge, 1997).

<sup>22</sup> GEORG SCHWARZENBERGER, *A MANUAL OF INTERNATIONAL LAW* 42 (6<sup>th</sup> edn.; London: Professional Books Ltd., 1976).



used as a chapter heading in any of the existing international law textbooks (unlike, for instance, “international law of air space” or “international environmental law”).<sup>23</sup> There are no international organizations or tribunals named after it (unlike, for instance, “international labour law”<sup>24</sup> or “international law of the sea”).<sup>25</sup> Universities and law schools do not offer advanced degrees in the ILTMC (unlike, for instance, “international law of human rights” or “international law and development”).<sup>26</sup> How can we know then that the object described in these pages actually exists? Moreover, how can we claim that the “invisible college” of the international law scholarship is aware of its existence and that there is, in fact, such a thing as the ILTMC scholarship if no one writes books and articles using the words “international law relating to the treatment of minority communities” (or its synonyms) in the title?

Clearly, as the short survey of the established usage above shows, to be able to declare the existence of a legal regime entitled the “international law relating to the treatment of minority communities,” one needs to resort to some other criterion than a routine reference to the established discursive conventions. Two questions arise in that regard immediately. First, what should that criterion be? Second, is it legitimate to impute to a given discursive community the knowledge of a particular concept and, consequently, the theoretical practice of the corresponding knowledge project, when its positive discursive conventions do not seem to include that concept in their outwardly observable conceptual framework?

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<sup>23</sup> See, e.g., MALANCZUK, *supra* n.21, 198-201, 241-53; ANTHONY AUST, *HANDBOOK OF INTERNATIONAL LAW* 327-53 (Cambridge: Cambridge University Press, 2005).

<sup>24</sup> For a brief synopsis of the mandate and history of the International Labour Organization, see further “About the ILO”, available from <http://www.ilo.org/public/english/about/index.htm>.

<sup>25</sup> For a brief synopsis of the mandate and history of the International Maritime Organization and the International Tribunal for the Law of the Sea, see further “Introduction to the IMO” and “General Information – Overview: International Tribunal for the Law of the Sea,” available respectively from <http://www.imo.org/home.asp> and [http://www.itlos.org/start2\\_en.html](http://www.itlos.org/start2_en.html).

<sup>26</sup> See, for example, the list of LL.M. specialist degrees offered at the University of Nottingham, available from [http://www.nottingham.ac.uk/law/courses/pg\\_courses\\_introduction.php](http://www.nottingham.ac.uk/law/courses/pg_courses_introduction.php). Cf. the list of LL.M. specializations offered at the New York University School of Law, available from <http://www.nyulawglobal.org/graduateadmissions/masteroflaws/index.htm>. Cf. also the list of specialized LL.M. degrees offered at the UCL Faculty of Laws, available from [http://www.ucl.ac.uk/laws/prospective/graduate/index.shtml?llm\\_specdegree](http://www.ucl.ac.uk/laws/prospective/graduate/index.shtml?llm_specdegree).

To start with the second question first, the brief answer is yes. The longer answer is: yes, because, firstly, although a lot of the modern-day international law discourse on the minorities question is couched in terms of “minority rights,” a lot of it is also couched in terms of “minority protection,” and what “minority protection” in that context really means, of course, is not “just” the protection of persons of minority origin, but more like “the regulation of the inter-communal relations between minorities and majorities,” since if we look at the actual contents of the corresponding regimes, such as, for instance, that reflected in the Lund Recommendations, it will be clear that a lot of existing international norms purport to address questions that cannot in the normal understanding of the term be legitimately qualified as “only” protection<sup>27</sup> (unless one takes such a sophistic approach to interpretation that virtually anything can be read into “protection,” including ethnic cleansing and apartheid). From the semantic point of view, therefore, calling the corresponding body of law “the international law relating to the treatment of minority communities” seems to make far more sense.

Secondly, accepting the premise that the ILTMC does in fact exist also seems to make a lot of sense from the point of view of inductive reasoning. Postulating the existence of an ILTMC as an entity ontologically separate from the international law of minority rights helps to explain many phenomena that otherwise would remain inexplicable, such as, for instance, why so many scholars writings about international law and the minorities question so often end up turning to the problematics of nationalism and group interests even when the immediate raw material to which their knowledge process is applied is entitled “the rights of *persons* belonging to ethnic, religious, and linguistic minorities”; or why whenever in the last twenty years the pan-European bodies purported to discuss the questions of the legal regulation of minority protection, they almost always in the same breath also spoke about nationalism, irredentism, and ethnic conflict, phenomena that normally tend to happen at the level of communities and inter-communal affairs and not at the level of disparate individuals; or why it is that the COE convention on the minorities question and the various HCNM recommendations on the different aspects of multiculturalist governance are entitled the Framework Convention for the Protection of

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<sup>27</sup> See, for instance, §§14-18 of the *Lund Recommendations*.

*National Minorities* and the Hague, Oslo, and Lund Recommendations on the Rights and Participation of *National Minorities* and not “persons belonging to national minorities.”<sup>28</sup>

Going back to the first question now, the answer in this case seems to be a lot simpler. As far as this inquiry is concerned, it was probably first formulated and elaborated in the late 19<sup>th</sup> century, in the writings of one of the most prominent American jurists, Justice Oliver Wendell Holmes, Jr.<sup>29</sup> The immediate passage I have in mind comes in what certainly must be his most celebrated piece of scholarly writing, *The Path of the Law*. It begins with the simple observation that:

in societies like ours the command of the public force is intrusted [sic] to the judges in certain cases, and the whole power of the state will be put forth, if necessary, to carry out their judgments and decrees. People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves, and hence it becomes a business to find out when this danger is to be feared.<sup>30</sup>

From these premises, Holmes goes on to conclude that if one really

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<sup>28</sup> A diehard empiricist may reject this argument because it is an *ex hypothesi* argument. The implication here – the background assumption on which that rejection is based – is that *ex hypothesi* reasoning is somehow analytically inferior and that good arguments cannot be built this way. Needless to say, this assumption is fundamentally wrong. Certainly, a lot of bad ideas and ideological rubbish have started out as bold hypotheses – the Fukuyamian end of history thesis is a good example – but so have also a lot of good ideas and genuine examples of the theoretical progress. From Newton’s discovery of gravity to Plank’s discovery of the quantum, from the Mendeleev periodic table to the Kondratiev long waves, the greatest advances in modern thought have started their life as just guesses. The functioning of every knowledge process turns on the creation of hypotheses. The ultimate criterion by which every hypothesis must be judged is whether or not it helps make more sense of the empirically observed reality than its rivals. The hypothesis offered about the existence of the ILTMC certainly meets that criterion.

<sup>29</sup> Further on O. W. Holmes, Jr., and his contribution to jurisprudence, see MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1870-1960: THE CRISIS OF LEGAL ORTHODOXY* 109-42 (New York: Oxford University Press, 1992). See also Neil Duxbury, *The Reinvention of American Legal Realism*, 12 *Leg. Stud.* 137, 161-4 (1992); Neil Duxbury, *The Birth of Legal Realism and the Myth of Justice Holmes*, 20 *Anglo-Am. L. Rev.* 81 (1991); G. Edward White, *The Rise and Fall of Justice Holmes*, 39 *U. Chi. L. Rev.* 51 (1971).

<sup>30</sup> Oliver Wendell Holmes, *The Path of the Law*, 110 *Harv. L. Rev.* 991, 991 (1997).

want[s] to know the law and nothing else, [one] must look at it as a bad man, who cares only for the material consequences which such knowledge enables him to predict, not as a good one, who finds his reasons for conduct, whether inside the law or outside of it, in the vaguer sanctions of conscience.<sup>31</sup>

But what does it *actually* mean, he asks then, to adopt the bad-man perspective in terms of one's jurisprudential outlook?

Mainly, and in the first place, [the bad man is interested to know] that if he does certain things he will be subjected to disagreeable consequences by way of imprisonment or compulsory payment of money. ... It does not matter [to him], so far as the given consequence ... is concerned, whether the act to which it is attached is described in terms of praise or in terms of blame, or whether the law purports to prohibit it or to allow it.<sup>32</sup>

In other words, what Holmes is saying here is this: to understand the law from the perspective of the bad man, i.e. to *know the law as it actually is*, to see the *real shape and content* of the given legal regime, we must analyze it from the point of view of its addressees by asking the question: what disagreeable material consequences are the judges likely to visit on the given category of subjects under a particular scenario? The underlying assumptions informing Holmes's vision, as we can see, are thus completely and thoroughly *functionalist*<sup>33</sup> as well as *situationalist*.<sup>34</sup> If you want to know the law, Holmes is basically saying, you have to study its practical workings in a particular given situation: law is what the law does.<sup>35</sup>

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<sup>31</sup> Id., 993.

<sup>32</sup> Id., 994.

<sup>33</sup> The Holmesian concept of functionalism used in this chapter must not be confused with that constructed in Hans Morgenthau, *Positivism, Functionalism, and International Law*, 34 AJIL 260 (1940).

<sup>34</sup> Further on the use of situationalism in international law, see generally OUTI KORHONEN, *INTERNATIONAL LAW SITUATED* (The Hague: Kluwer Law International, 2000).

<sup>35</sup> Cf. Sheldon M. Novick, "Introduction to the Dover Edition", in OLIVER WENDELL HOLMES, JR., *THE COMMON LAW* iii, xvii-xviii (New York: Dover, 1991): "[What was Oliver Wendell Holmes'] truly original insight? All throughout the 19<sup>th</sup> century [law writers, including Holmes [himself] up through the very year of his Lowell lectures [1880], had tried and failed to make sense out of the multitudinous rules of conduct that courts seemed to recognize and enforce. A landowner had a duty [of care] to guests, but not to trespassers;

And what the law does, according to Holmes, is not just bring together an abstract set of morals but determine the application of social repression.

The law, for Holmes, is not essentially a lofty complex of ethical ideas but an elaborate practical system through the instrumentality of which the social body in question administers different kinds of compulsion on its members.<sup>36</sup> Structurally speaking, the legal system, in Holmes's theory, thus, consists of three basic elements: (i) a particular set of *apparatuses*,<sup>37</sup> which are authorized to apply (ii) a particular type of *compulsion*<sup>38</sup> under (iii) a particular set of abstractly formulated<sup>39</sup> *circumstances*. The knowledge-in-advance of these circumstances, in Holmes's understanding, is what ultimately constitutes the central task of every jurisprudential inquiry.

The relevance of this insight for the purposes of the present inquiry is genuinely invaluable. Firstly, it gives us the basic notion of the ILTMC. Taken in the context of its practical social functionality, *the ILTMC represents the general object-effect of that body of coercive practices by international apparatuses which a minority community, if it were in the position of a Holmesian bad man, would want to know about.*

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railroad companies had complex duties toward their passengers and the owners of their freight, still others to pedestrians crossing their tracks. Holmes had labored unsuccessfully, like his predecessors, to make sense of this tangled mass of duties and correlative rights. In 1880, however, he seemed to have suddenly seen a new organizing principle. The question in every case, Holmes realized, was whether liability would be imposed. His great stroke was to examine not the rules themselves, but the circumstances under which a breach of the rule would be punished. By looking at the circumstances in which liability was imposed, and ignoring rationalizations about duty and rules of conduct, Holmes for the first time was able to make general statements about law and its relation to society.”

<sup>36</sup> One can see at this point the immediate parallel between the Holmesian and the Althusserian traditions. For both, the most important thing about the law's identity is its socially repressive function. For Althusser, the law is essentially the primary organizer of the repressive field operated by the dominating class. For Holmes, the law is the main institution through which the body politic administers whatever compulsion it deems necessary on its members.

<sup>37</sup> As we can see from the quoted excerpts, for Holmes these are effectively limited to judges and courts. This feature, however, is not really central to the functionalist theory. As every international lawyer knows, it is not necessary to have a compulsory adjudicatory structure in order to have a functional system of law.

<sup>38</sup> In the examples Holmes gives in *The Path of the Law*, the taxonomy of applicable compulsion is limited to physical (imprisonment) and pecuniary (fine) compulsion. Once again, one can see how that feature is not, in fact, essential for the validity of the functionalist theory.

<sup>39</sup> Because, as the first quoted excerpt indicates, they are sufficiently knowable in advance to justify the emergence of a whole category of consultant businessmen.

Secondly, despite all its unquestionable advances on the front of general jurisprudence, the Althusserian social theory has never developed a workable, hands-on mechanism for investigating the internal structure of the juridical instance in its repressive-political quality. Holmes's path-breaking studies of the functional dimension of the legal order comprise, in this regard, an unparalleled practical advance.

This said, none of Holmes's own observations are in themselves quite sufficient to set up the full problematic of the ILTMC's status as an element of the repressive-political order. Although he had outlined in great detail the general terms on which the functionalist inquiry must be conducted – the bad man looks out for the disagreeable material consequences and does not really care about their formal designation in the legal discourse – Holmes gave no immediate guidance as to where exactly such consequences should be expected to come from (*topoi*) or how one can reliably complete a map of such consequences in a decentralized legal order bereft of a compulsory judiciary organ.<sup>40</sup> To complete the missing links of the analytical chain, we must, therefore, turn now from Holmes's own works to those of his students and followers, the scholars who picked up the functionalist theory where he left it and who brought it to that point where it can be easily connected to our inquiry. The particular scholar I propose to concentrate our attention on here is the American legal realist from Columbia University, Robert Lee Hale.<sup>41</sup>

*b. The Logic of the Functionalist Approach: Coercion, Law, and the RSA*

According to Hale, the general function of every legal order regardless of its immediate historical context essentially boils down to deciding the distribution of power and welfare across the given body politic. The general structure of all social interactions, in Hale's

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<sup>40</sup> For a commentary on Holmes's own understanding of how the material circumstances triggering the application of compulsion can be known, see further Hessel E. Yntema, *Mr. Justice Holmes' View of Legal Science*, 40 *Yale L. J.* 696, 700-1 (1931).

<sup>41</sup> Further on Hale and his contribution to jurisprudence, see Warren Samuels, *The Economy as a System of Power and Its Legal Bases: the Legal Economics of Robert Lee Hale*, 27 *U. Mi. L. Rev.* 261 (1973); Neil Duxbury, *Robert Hale and the Economy of Legal Force*, 53 *MLR* 421 (1990); Duncan Kennedy, "The Stakes of Law, or Hale and Foucault!", in *DUNCAN KENNEDY, SEXY DRESSING ETC.* 83-111 (Cambridge, MA: Harvard University Press, 1993).

understanding, consists of what he calls the “bargaining situation.” The constitutive terms of every bargaining situation are co-determined by a variety of institutional patterns, including moral conventions and ideological values, and are also affected by different types of historical givens (path dependence) and the facts of nature (e.g. climate and geography). But it is the legal regime – in the Halian sense of it – that ultimately decides its structure.

What normally takes place in the context of every bargaining situation, according to Hale, is basically this: (1) every bargaining situation is essentially like a game<sup>42</sup> – it has its constitutive rules, its internal dynamics, and its set of preferable skills; (2) depending on the objective predispositions created by the confluence of the background institutional patterns and the historical and natural givens, every game attracts a particular variety of collective and individual players; (3) every player enters the game in pursuit of his own particular goal and preferences; all players, however, seek, in the end, partly for its own sake, partly to enable the pursuit of other goals, to maximize their relative shares of power and welfare available for distribution within the context of the given bargaining situation; (4) no player is usually strong enough to secure all of his needs by himself; cooperation and negotiation with others are, thus, an inevitable condition of every game; (5) as a result, every social interaction at one point or another tends to resolve itself into an act of bargaining, in which the participants apply various forms of pressure (sticks) and supply various types of encouragement (carrots) to one another in order to achieve their respective ends; (6) the available stocks of power and welfare, however, remain at all times limited; every social interaction can be, consequently, modelled in terms of its internal potential for conflictuality, i.e. dynamics, conditions, and forms of conflict inscribed within it.<sup>43</sup>

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<sup>42</sup> Cf. ERIC BERNE, *GAMES PEOPLE PLAY: THE PSYCHOLOGY OF HUMAN RELATIONSHIPS* 49-50 (New York: Grove Press, 1964): “The use of the word ‘game’ should not be misleading. ... The possible seriousness of games and play, and the possibly serious results, are well known to anthropologists. ... The grimmest of all, of course, is ‘War.’”

<sup>43</sup> This is very Hobbesian. See further THOMAS HOBBS, *LEVIATHAN* (London: Penguin, 1985). The vulgar understanding of Hobbes misreads his thesis about *bellum omnium contra omnes* as suggesting that in the state of nature men are embroiled in an unbridled violent conflict. As Foucault has shown, however, a much more accurate reading of that thesis would be that: (i) the state of universal war does not belong only to the state of nature but in fact continues throughout all stages of social existence: “beneath [all] peace, order, wealth, and authority, [a] primitive and permanent war” rages unendingly and even “peace itself is [nothing but] a coded war”; and (ii) the universal war does not in fact involve open unbridled violence but is always sublimated: considering its structural condition (everyone against everyone), the society will never be sufficiently

This latter thesis constitutes the central theme of all Hale's theoretical writing. Every social context, according to Hale, is saturated with relations of force and coercion. Even the most innocent at the first sight social situations are, in reality, constituted by a complex system of *various types* of coercion. Take, for instance, a contract for the purchase of goods.<sup>44</sup> Such transactions, observes Hale, are generally believed to be voluntary for the simple reason that the parties who enter them appear to do so as of their own volition. That belief is wrong. As every student of duress knows, just because people agree to enter into a transaction, it does not necessarily follow that their actions had not been forced.<sup>45</sup>

Consider the practical implications of human socialization. No member of the human society can satisfy all his vital needs by himself. People need food, shelter, education, physical protection, family support, socializing, etc. Nobody can supply all this for himself. Every individual, consequently, is at least somehow dependent on the rest of the society for the satisfaction of his living requirements, which is to say every individual must engage in at least some kinds of bargainings to obtain the goods required to satisfy his vital needs. Because everyone is dependent at least at some point on somebody else, it follows, concludes Hale, that everyone at least at some point can be *coerced* into agreeing to some course of action he would not under ideal circumstances find acceptable. Even the richest capitalists and landowners are not invulnerable to coercion. Each of them is susceptible to changing his course of action at least insofar as his relationships with the labour force and other capitalists and landowners are concerned.<sup>46</sup>

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incentivized to allow the universal war to erupt in the open – “[t]here are no battles in Hobbes’s primitive war, there is no blood and there are no corpses. There are presentations, manifestations, signs, emphatic expressions, wiles, and deceitful expressions; there are traps, intentions disguised as their opposite, and worries disguised as certainties [–] a sort of unending diplomacy.” MICHEL FOUCAULT, *SOCIETY MUST BE DEFENDED* 46-7, 51, 92 (transl. by David Macey; New York: Picador, 2003).

<sup>44</sup> See further Robert L. Hale, *Bargaining, Duress, and Economic Liberty*, 43 Col. L. Rev. 603 (1943).

Hale's theory of coercion finds many parallels in Foucault's capillary theory of power, as summarized in, e.g., MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION* 92-102 (transl. by Robert Hurley, 1990). For further comparison of Hale and Foucault's theories, see generally Kennedy, *supra* n. 41.

<sup>45</sup> See further Robert L. Hale, *Force and the State: a Comparison of "Political" and "Economic" Compulsion*, 35 Col. L. Rev. 149, 150 (1935).

<sup>46</sup> As Duncan Kennedy points out, it is here that Hale's radical difference from the vulgar economist Marxists starts to come out in full. See Kennedy, *supra* n.41, 85.



The old axiom of the conflict theory teaches: a conflict prevented is a conflict won.<sup>47</sup> Hale's re-reading of it emphasizes: a conflict prevented is a conflict *still*.

Even if no workers at the given factory actually join the industry-wide strike in order to force their employers into paying them a higher wage, it still does not follow that there has been no coercion in their relationship with the employers. The workers and the employers, being experienced bargainers, are always aware that if the workers decide so, a strike can take place more or less at any time. The industrial process will be halted, the factory's output targets will not be met, the owners will lose profits. Whatever they do, the owners will sustain at least some damage to their economic interests. The threat of the strike, thus, is quite tangible and constantly hangs over *every* worker-employer relationship. Because the employers know that the workers can strike and because they know that the workers also know it, the employers, being *en masse* a rational group of agents, would normally seek to pre-empt the actualization of that threat by increasing the workers' wages *in advance*. If this occurs, the unilateral character and the advance timing of that decision at the first appearance may suggest it was a voluntary act. But that would be a completely incorrect interpretation, explains Hale. The outwardly *expression* of the employers' act should not at any point distract our attention from the simple fact that had the threat of the strike not hung over their heads at all times, the employers would have never raised the workers' wages beyond the bare minimum required to sustain an adequate reproduction of the labour force which would, almost certainly, not be the kind of money that the workers would find sufficient to forego their right to strike.<sup>48</sup> To the extent to which the amount of the wages the workers are paid is conditioned by the employers' desire to avoid the strike, it follows that it is a direct product of a coerced relationship.

Moving to the larger scale, Hale observes, the same pattern can also be discovered in every other social context:

The owner of a shoe factory is in no danger of going ill-shod – he may wear his own shoes. But he cannot live on shoes alone. Like everyone else, he must buy food or starve. Even the producer and owner of food must as a rule buy other forms of food than those in which he has specialized. Any person, in order to

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<sup>47</sup> SUN-TZU, *THE ART OF WAR* 14, 132-3 (ed. and transl. by John Minford; New York: Penguin, 2003).

<sup>48</sup> Robert L. Hale, *Coercion and Distribution in a Supposedly Non-Coercive State*, 38 *Pol. Sci. Q.* 470, 474 (1923).

live, must induce some of the owners of things which he needs, to permit him to use them. The owner has no legal obligation to grant the permission. But if offered enough money he will probably do so; for he, too, must obtain the permission of other owners to make use of their goods, and for this purpose he too needs money – more than he has at the outset. He needs it more than he needs his surplus of shoes.<sup>49</sup>

Most people, rich as well as poor, would die of want were it not for the fact that many owners of the necessities of life can be induced to relinquish their constitutional rights to withhold them, and many workers to relinquish their constitutional rights to remain idle. They relinquish these rights in order to obtain money, without which they cannot induce *other* owners of goods to permit their use.<sup>50</sup>

But what is it exactly that makes the rich owner of a shoe factory coerced in his relationship with a local grocer? Surely, it is not the amount of physical force the latter can summon in his defence were the shoe factory owner's minions to raid his shop. No, the answer, says Hale, must be sought in the construction of the repressive-political order:

The owner of the shoes or the food or any other product can insist on other people keeping their hands off his products. Should he so insist, the government will back him up with force. The owner of the money can likewise insist on other people keeping their hands off his money, and the government will likewise back him up with force. By threatening to maintain the legal barrier against the use of his shoes, their owner may be able to obtain a certain amount of money as the price of not carrying out his threat. And by threatening to maintain the legal barrier against the use of his money, the purchaser may be able to obtain a certain amount of shoes as the price of not withholding the money. A bargain is finally struck, each party consenting to its terms in order to aver the consequences with which the other threatens him.<sup>51</sup>

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<sup>49</sup> Hale, *supra* n.44, 604.

<sup>50</sup> Robert L. Hale, *Our Equivocal Constitutional Guaranties*, 39 Col. L. Rev. 563, 576 (1939)

<sup>51</sup> Hale, *supra* n.44, 604.

The conditions of social compulsion are thus determined not so much by the relative physical strengths of the bargaining parties, but by their ability to mobilize the repressive state apparatus in protection of their interests. What prevents the shoe factory owner from sending his servants to rob the local grocer, in other words, is not the latter's ability to resist robbery but the knowledge that if he actually tried to do that, there would be a very high likelihood – measured by the terms of the grocer's protective entitlements under the government-endorsed legal order – that the government would interfere on the side of the grocer. No shoe factory owner is normally powerful enough to afford a fight with a modern state apparatus. Consequently, even the richest private consumers are going to accept the grocer's price demands and comply with his compulsion to offer him money in return for his commodities so that he does not mobilize the force of the RSA and direct it against them.

Naturally, the extent of the grocer's power will be always limited, not least by the availability of other grocers (the more grocery shops there are in the vicinity, the less power each grocer has in his dealings with his clients) and the scarcity of the commodities he controls and how essential they are (one can compel a higher price when one sells medicine or bread than when one sells chewing gum). Still, when all is said and done, it is the grocer's position under the structural order enforced by the RSA and not something else that defines the fundamental terms of his power. Whether or not the given grocer will have many local rivals whose competitive pressure will compel him to lower his prices is going to be determined in the last analysis not by some fortuitous event but by how many grocery shops the government allows in the given vicinity (licensing), how well the police protects the grocery shops in that region, how much grocery owners are taxed, what kind of economic subsidies they receive, and so on. The ability of the grocer to control a scarce product is likewise going to be ultimately determined by the position taken on the issue by the government and enforced in practice through the RSA. If the government caps the prices or refuses to grant the grocer a monopoly over a particular commodity his capacity to compel his clients to accept a particular exchange rate will diminish.

The bottom line, argues Hale, is simple: coercion is ubiquitous and in the final analysis coercion can always be traced to the government's use of the RSA. Even "the systems advocated by the professed upholders of *laissez-faire* are in reality permeated with

coercive restrictions of individual freedom.” “Some sort of coercive restriction of individuals ... is absolutely unavoidable.”<sup>52</sup>

What role in this context can then be ascribed to the phenomenon of the legal order? Having carried to its logical conclusion the Holmesian observations about the bad man’s basic concerns, Hale produced two crucial insights about the social functionality of the legal order.

The first was a direct continuation of Holmes’s own remarks. How the legal discourse describes a particular juridical phenomenon does not in fact give us any conclusive guidance about its real nature. A phenomenon can be portrayed by the lawmakers in perfectly neutral terms, but its social function for a given subject can be deeply negative. For the person “on the receiving end of it,” it does not matter if the act by which he is deprived of the possibility to fulfil his vital needs is formally depicted in terms of blame or in terms of praise. If it hurts, it hurts. That is what *matters*. And that is, consequently, what we should focus on in our study of the law: the susceptibility of different subjects to harm and coercion under different juridical scenarios.

The second insight pushed the envelope significantly further: the degree of a given subject’s susceptibility to harm and coercion is not determined by the scope of those acts which are formally designated as “violence” and “duress,” but by the actual extent of circumstances in which his partners in those transactions through which he obtains the goods he requires to satisfy his needs (food, education, entertainment, etc.) can withhold these goods from him under the aegis of the RSA. Or, in other words, the law is different things to different people. Depending on the kind of bargaining situation we engage in, the shape and content of the legal regime to which we are subject are likely not to be the same for us as for our neighbours.

The basic logic by which Hale arrived at these conclusions can be glimpsed from the following series of passages:

When the government ... threatens to [execute or imprison someone] unless he conforms to some prescribed course of conduct, it is exerting compulsion to make him obey. ... While his obedience may be voluntary in case he has no

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<sup>52</sup> Hale, *supra* n.48, 470.

desire to deviate from the prescribed course of conduct, the requirement that he conform is itself compulsory.<sup>53</sup>

Prescription and proscription, of course, are the most obvious manifestations of the government's coercive practices. But they are certainly not the most widespread or the most typical ones. Take, for instance, the case of civil liability in private contractual transactions. Here the government's coercive presence is certainly not as patent as in the former case, but it is still quite substantial and important. If one of the parties to a contract refuses to honour its obligations to the other party, the latter under the government-supported law of contracts can enforce it to change its mind or to pay damages. To the extent to which it is the possibility of this "disagreeable consequence which tends to make the contractor do as he said he would," it follows that all contractual transactions are thoroughly permeated with coercive relationships. The character of the coercion-exercise in this case, however, is markedly different:

To the extent that anyone performs simply to avoid being sued, to that extent [he is] compel[led]. Yet apart from the exceptional cases where "punitive damages" are added to compensatory, no one is [really] compelled to refrain who is willing to pay for the losses. Subject to some qualifications, the compensatory damages are measured by the amount of loss caused to the plaintiff ... This serves ... to deter those defendants to whom liability for damages is more disagreeable than respecting [the plaintiff's interests], but not other defendants.<sup>54</sup>

As soon as we accept the idea that the intensity of coercion does not have to be uniform for all coerced, the traditional liberal theory of coercion-exercise immediately invites a radical rethinking. Consider again Holmes's comment that the bad man's concern always lies with the disagreeable material consequences. What determines the coerciveness of a particular regime of civil liability for the Holmesean bad man is exclusively the amount of damages he would have to pay in the event of non-compliance. If he can afford to pay the established sum easily, then, from the functionalist point of view, he is not sufficiently

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<sup>53</sup> Hale, *supra* n. 45, 149-50.

<sup>54</sup> *Id.*, 161-2.

compelled to honour his contractual obligations to his counterpart. If he cannot afford, then he is. Remove now the external shell of that transaction and focus on its internal logic: the dynamics of the social relationship that determines the prospects of the bad man's compliance with his contractual obligations, if we think of it in structural terms, is effectively established by the interplay of the following four elements: (i) a *legally* established (ii) *sum* whose (iii) size *induces* the potential transgressor (iv) *to adopt or to refrain* from a particular course of action. Keeping this in mind, let us examine now other transactional patterns involving the transfer of material wealth. The first thing that is likely to attract our attention here is that the exact same structure is also present in the case of taxation:

[when] a tax [is imposed] on a course of conduct[, although t]his does not render the conduct illegal [-] one who persists in it and pays the tax is doing nothing legally wrong [-] the freedom to engage in the conduct taxed ... is quite as effectively subjected to a compulsory restraint as if it were ... sanctioned by a fine or a liability to pay damages.<sup>55</sup>

Moreover, if we go back to our original example with the private contract between the bad man and his counterpart, we can observe that the same type of coercive structure can also be detected on another level of the contractual transaction, not the one that is linked to the enforcement of the civil liability in the event of the violation, but the one which concerns the possibility of entering the transaction in the first place:

When people desist from conduct in order to avoid payment of a tax on it, they desist under compulsion; so do they also when the payment which the law requires is called a "price." If a government water monopoly exacts a certain price per gallon, not only are the payments which it receives compulsory (sanctioned by the penalty of doing without water), but some people are compelled to refrain from consuming all the water they would like, under penalty of paying the price. The same thing is true if the payments which the law requires to be paid for a service are made not to the government itself but to a private company or

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<sup>55</sup> Id., 163-4.

individual[, for] desistance is no less compulsory when motivated by a desire to avoid a price imposed by private groups.<sup>56</sup>

In the end, of course, every instance of such kind of compulsion is grounded not in any kind of special force wielded by these private groups, but in the government's promise to come to their help, i.e. in their capacity to mobilize the RSA. As our earlier example with the shoe-factory owner and the grocer showed, the buyers, thus, refrain from seizing the product they cannot pay for not because it is the sellers themselves who can threaten to use force and violence against them (although that too can happen by way of self-defence), but because if they do so, the sellers are going to be in the position to mobilize the police, the judiciary, the sheriffs, and so on:

[t]he owner of property has [the] power to continue to subject [every non-owner] to the duty to abstain from its use, or to release him from that duty. ... If the use of the property is something vital to the other person's livelihood, he has only a choice "between the rock and the whirlpool." [But if he] should attempt to use the property without complying with the conditions, the owner may ... call on the judicial machinery to impose ... sanctions.<sup>57</sup>

If the non-owner does not comply with the judicial sanctions, the owner will then be able to call the police who will apply violent force to end the trespass. In the end, thus, there is nothing mysteriously special about the source of "privately" ordered coercion. Like government-directed compulsions, it is ultimately rooted in the repressive order practices operated through the RSA. In one case, the use of the RSA is more immediate. In another

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<sup>56</sup> Id., 168. This is a very important point. In modern Western jurisprudence, Hale was the first legal theorist to place such a consistent emphasis on the fact that legitimately exercised coercion is not solely the province of the public authorities. An immediate consequence of that insight, of course, was the categorical undermining of the public/private distinction (see HORWITZ, *supra* n.29, 196-7, 208; Duxbury, *supra* n.41, 434).

<sup>57</sup> Hale, *supra* n. 45, 174-5.

case, the chain that links the two ends is more extended. On both occasions, though, the person “on the receiving end of it” experiences the same kind of subjection.<sup>58</sup>

That said, there still remain some very important differences in the operation of the two scenarios and it would not be amiss to emphasize this fact as forcefully as possible. In the case of the public compulsion scenario the locus of the decision-making rests exclusively with the public authorities. It is the government that essentially decides when, to what extent, and on what basis the RSA dynamics is going to be mobilized. In the case of the private compulsion, on the other hand, before and above the government involvement one constantly finds an instance of the private choice: for the coercive dynamics of the RSA to become mobilized in support of a breached contract, for example, the aggrieved party must, as a rule, agree to bring the suit against the violator. Without it, there will be no actual coercion.

Naturally, at the end of the day, without the underlying possibility of the RSA mobilization this private option becomes effectively meaningless: in the absence of an RSA-involvement, there can be no compulsion in the Hlean understanding of the term. Furthermore, like every other category of private choice, the choice to bring or not to bring a civil suit, when all is said and done, will always ultimately reveal itself as a product of an essentially coerced decision. Put differently, from the point of view of formal logic, every private compulsion scenario, after some unspecified number of syllogistic removes, always returns to the same single premise: the original practice of the publicly controlled RSA.

But in the realist universe, of course, the life of the law is never governed by logic alone. From the socio-theoretical point of view the number of the effective removes standing between the immediacy of the given transaction and the reality of the RSA-provided coercion is not in any sense unimportant. The more mediated the practical application of the RSA becomes in the given instance by the structure of the intervening private options, the more the historico-causal dynamics of that transaction becomes overdetermined by the logic of private decision-making, the more the “mixed government” logic starts to replace the “public government” logic in the given area of social relations,

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<sup>58</sup> For the development of the same argument, see also THURMAN W. ARNOLD, *THE FOLKLORE OF CAPITALISM* 263-331 (New Haven: Yale University Press, 1937).



the more decentralized, as a result, turns the corresponding plane of political practices, the more democratic, by implication, becomes the corresponding political regime.

The importance of this last insight for the purposes of the present inquiry can hardly be overstated. Consider rerunning the argument sequence in the *opposite* direction but precede it first with the commonplace observation so frequently made in the mainstream scholarship that the foundational framework of the modern international society is, in essence, a variation of direct democracy.<sup>59</sup> What will come out as a result is essentially the following two-pronged thesis: (1) the international political order may be decentralized but that does not mean there is no such thing as a global RSA; (2) indeed, the fact that there is no centralized mechanism for the dispensation of violence in the international arena can easily be an indication that the “public government” logic of international political ordering has been *replaced* in favour of the “private government” logic, nothing more.

Needless to say, if this thesis should prove correct, then at the very least it will establish the legitimacy of: (i) suspending the traditional paradigm of the mainstream international law scholarship inasmuch as it has failed to recognize the existence of the global RSA and the organized character of the exercise of the repressive-political practices in the international arena; and (ii) transposing the functionalist approach into the context of the international legal studies, despite the fact that in its original Holmesian definition – “the prediction of the incidence of the public force through the instrumentality of the courts”<sup>60</sup> – functionalism seemed to require the existence of an elaborate system of compulsory adjudication to be practically operable.

A detailed examination of the foundational documents of the international political order and the corresponding field of state practice later, and all our expectations are fully confirmed. There *does* exist a fully functional Repressive State Apparatus<sup>61</sup> in the international arena. The use of international violence is not prohibited in the modern international order. Resort to coercion is neither unheard of, nor, generally, considered

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<sup>59</sup> For a typical statement of the thesis, see, e.g., Louis Henkin, “International Law: Politics, Values and Functions,” 216 *Recueil des Cours* 9 (1989-IV).

<sup>60</sup> Holmes, *supra* n.30, 991.

<sup>61</sup> The word “state,” once again, is used here in the Althusserian sense.

illegitimate in the modern international political process.<sup>62</sup> The very state of the existing law on countermeasures,<sup>63</sup> and its corollary in the law on the use of force, the law of self-defence,<sup>64</sup> is a clear proof of that. The same goes for the law of sanctions<sup>65</sup> and international humanitarian law.<sup>66</sup> The habitual liveliness of the various policy and scholarly discourses on these topics over the last several decades unmistakably suggests that a great deal of international law's practical attention is dedicated not to *prohibiting* coercion but to channelling and regulating its use.

The institutional manifestation of the global RSA, as evidenced, for example, by the conceptual framework underlying the existing law on countermeasures, is practically consubstantial with the existing totality of sovereign states. This means that the field of the repressive-political practices in the international arena is essentially organized on the basis

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<sup>62</sup> For the classical study of the international regulation of the use of coercion in international affairs, see MYRES S. MCDUGAL AND FLORENTINO P. FELICIANO, *LAW AND MINIMUM WORLD PUBLIC ORDER: THE LEGAL REGULATION OF INTERNATIONAL COERCION* (New Haven: Yale University Press, 1961).

<sup>63</sup> For an overview of the law on countermeasures, see N. D. White and A. Abbas, "Countermeasures and Sanctions", in MALCOLM EVANS (ED.), *INTERNATIONAL LAW 505* (Oxford: Oxford University Press, 2003). For further overview of the law of state responsibility, see James Crawford and Simon Olleson, "The Nature and Forms of International Responsibility", *id.*, 445; Linos-Alexander Sicilianos, *The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility*, 13 *EJIL* 1127 (2002); Iain Scobbie, *The Invocation of Responsibility for the Breach of 'Obligations under Peremptory Norms of General International Law'*, 13 *EJIL* 1201 (2002). See also JAMES CRAWFORD (ED.), *THE INTERNATIONAL LAW COMMISSION'S ARTICLES ON STATE RESPONSIBILITY: INTRODUCTION, TEXT, AND COMMENTARIES* (Cambridge: Cambridge University Press, 2002).

<sup>64</sup> For an overview of the law on the use of force in self-defence, see THOMAS M. FRANCK, *RECOURSE TO FORCE 45-133* (Cambridge: Cambridge University Press, 2002); YORAM DINSTEIN, *WAR, AGGRESSION AND SELF-DEFENCE 159-244* (3<sup>rd</sup> edn.; Cambridge: Cambridge University Press, 2001). See also Christine Gray, "The Use of Force and the International Legal Order", in EVANS, *supra* n.63, 589, 599-605; Michael Bothe, *Terrorism and the Legality of Pre-emptive Force*, 14 *EJIL* 227 (2003); Bruno Simma, *NATO, the UN and the Use of Force: Legal Aspects*, 10 *EJIL* 1 (1999).

<sup>65</sup> For an overview of the law of sanctions, see Matthew Craven, *Humanitarianism and the Quest for Smarter Sanctions*, 13 *EJIL* 43 (2002); Mary Ellen O'Connell, *Debating the Law of Sanctions*, 13 *EJIL* 63 (2002). See also White and Abbas, *supra* n.63.

<sup>66</sup> For an overview of international humanitarian law, see YORAM DINSTEIN, *THE CONDUCT OF HOSTILITIES UNDER THE LAW OF INTERNATIONAL ARMED CONFLICT* (Cambridge: Cambridge University Press, 2004); Christopher Greenwood, "The Law of War (International Humanitarian Law)", in EVANS, *supra* n.63, 789.

of the “private government” logic.<sup>67</sup> That said, there do exist several prominent exceptions, each of which on closer consideration seems to bring the general rule into further relief. First, a casual scrutiny of the existing international arena points out a number of exceptional institutional arrangements, the two most symptomatic of which at the present moment being the UN Security Council and the International Criminal Court. The effective monopoly of the former over the pro-active use of armed force in international affairs<sup>68</sup> and the potential capacity of the latter for the *proprio motu* enforcement of certain international crimes in circumvention of the statal apparatus<sup>69</sup> can be effectively considered as rudiments of the public government” logic in these areas of international relations. Second, a close examination of the practical patterns of the recent use of force in the international arena suggests that the locus of the main default instrumentality for the enforcement of international law in recent years has shifted from individual states to the so-called “coalitions of the willing” (or, to be more precise, coalitions of the concerned and the capable), apparently spontaneous groupings of states organized by the common pursuit of a particular coercive project, often exclusively on an ad-hoc basis, whose functional patterns of activity closely resemble those of a self-appointed people’s militia.<sup>70</sup>

*c. Law and the Construction of the Coercive Order: from Hale (back) to Hohfeld (and back again)*

One of the first questions about coercion that arises from the point of view of political theory is: what should be done about it? In the Hlean understanding of the question, the answer seems to be fairly straightforward.

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<sup>67</sup> Once again one can detect a clear echo between the Hlean tradition and Kelsen. For Kelsen, the main means of enforcement in international law was self-help.

<sup>68</sup> For further discussion, see Gray, *supra* n.64, 606-10; DINSTEIN, *supra* n.64, 253-82; DAN SAROOSHI, *THE UNITED NATIONS AND THE DEVELOPMENT OF COLLECTIVE SECURITY: THE DELEGATION BY THE UN SECURITY COUNCIL OF ITS CHAPTER VII POWERS* (Oxford: Clarendon Press, 1999).

<sup>69</sup> For further discussion, see Antonio Cassese, “International Criminal Law”, in EVANS, *supra* n.63, 721, 730-3; Monroe Leigh, *The United States and the Statute of Rome*, 95 AJIL 124 (2001). Generally on the enforcement structure of international criminal law and the ICC’s role in it, see also William W. Burke-White, *A Community of Courts: towards a System of International Criminal Law Enforcement*, 24 Mich. J. Int’l L. 1 (2002); Daryl Mundis, *New Mechanisms for the Enforcement of International Humanitarian Law*, 95 AJIL 934 (2001).

<sup>70</sup> The same pattern holds true in most other areas of international law, from the enforcement of the existing rules on the making of reservations to multilateral treaties to the regulation of international trade.

First of all, not all forms and instances of coercion occurring in the modern society are equally destructive or equally “painful.” If the access to the good in question is not part of a person’s vital needs, the power of the public authorities or his private counterparts to withhold that good from him does not put him under any kind of genuine duress. Nor do those prices, fines, and penalties imposed on his activities which he can afford to pay.<sup>71</sup> Secondly, because it is an inevitable side-effect of large-scale socialization, it follows that, even if we decided that all forms of coercion were inherently repugnant, it would still be impossible to root all of them out, since, ultimately, “some sort of coercive restriction is absolutely unavoidable.”<sup>72</sup> As a result, Hale concludes, since it cannot outlaw all possible forms of social coercion, every body politic must, in one way or another, legitimize *some* of them. The basic means by which that legitimization is done is what, consequently, has to be understood as the Holmesian institution of law.

Approached from this perspective, it follows that in a Halian understanding the idea of law essentially represents that region of the social space-process (or, to use the Althusserian vocabulary, the order of the State) within which the given body politic identifies and articulates those forms of practical coercion which it understands to be legitimate distinguishing them from those which it does not. Those forms of coercion that are identified as legitimate, consequently, become invested with the *mana* of the social approval (including the permission to use the violent potential of the corresponding RSA).

Given such a direct link between law and coercion, it furthermore follows, concluded Hale, that because coercion is ubiquitous, in the grand scheme of things the field of law must be ontologically coextensive with the field of the social space-process as a whole. Or in other words, there can be no such thing as a gap in the effectively existing juridical order: because everyone can be coerced in one way or another and every form of coercion has to be either legitimized or delegitimized by the body politic in question, it follows that the juridical instance in fact, even if not in name, reaches everywhere where

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<sup>71</sup> See Hale, *supra* n.48, 492: “the rich man will always be in a position to satisfy his wants more completely than the poor man.” Cf. Hale, *supra* n.50, 586-9.

<sup>72</sup> Hale, *supra* n.48, 470.

there exists any form of social intercourse. There is, to put it differently, no possibility of a social life outside the cover of the law.<sup>73</sup>

A very similar insight several years earlier had been developed by another early 20<sup>th</sup> century American jurist, a Yale law professor, Wesley Newcomb Hohfeld. Indeed, some scholars have recently suggested that Hale's jurisprudential theory may have been directly inspired by Hohfeld.<sup>74</sup> Although it is not a view commonly shared by all Hale's commentators, on its merits it seems very compelling. Hale's understanding of the completeness of the legal order, in any event, appears to be very similar to Hohfeld's.<sup>75</sup>

In the eyes of most legal scholars today, Hohfeld's contribution to the development of the modern legal thought is primarily limited to his work on the theory of rights and the two semiotic squares consisting of jural correlatives and jural opposites.<sup>76</sup> In fact, of course,

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<sup>73</sup> Because of its focus on the bargaining background, this argument about the completeness of the legal order is slightly different from the more traditional (from the perspective of the international law discipline) Kelsenian argument. According to Kelsen, what makes the (international) legal order complete is the idealist (liberal) presumption that whenever the law remains silent, the legal subjects are free to act as they please. See HANS KELSEN, *GENERAL THEORY OF NORMS* 131-2, 326, 366 (transl. by Michael Hartney; Oxford: Clarendon Press, 1991). For a further reflection on the logic of the Kelsenian argument, see MARTTI KOSKENNIEMI, *FROM APOLOGY TO UTOPIA: THE STRUCTURE OF INTERNATIONAL LEGAL ARGUMENT* 45 *et seq.* (rev. edn.; Cambridge: Cambridge University Press, 2006). That said, there is a lot in common between the Halian understanding of the legal order and Kelsen's. Kelsen too has emphasized the coercive dimension of the legal order's factuality. Unlike Hale, however, he was a deductivist (in the sense of the Vienna circle-style logical positivism) and spent what from the legal realist point of view was an inordinate amount of time and effort on elucidating the difference between "is" and "ought," "law" and "morality," etc. For the realist position on that question, see Felix Cohen, *Transcendental Nonsense and the Functional Approach*, 35 *Col. L. Rev.* 809 (1935).

<sup>74</sup> Kennedy, *supra* n.41, 91, n. 8.

<sup>75</sup> See Wesley Newcomb Hohfeld, *Some Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 23 *Yale L. J.* 16 (1913); Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 *Yale L. J.* 710 (1917). Both articles were later included in WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS AS APPLIED IN JUDICIAL REASONING* (ed. by Walter Wheeler Cook; New Haven: Yale University Press, 1919).

<sup>76</sup> It must be noticed that the two semiotic squares (see below) by which Hohfeld's theory of the eight fundamental legal conceptions is often presented nowadays were not a form proposed by Hohfeld himself. They were constructed later.

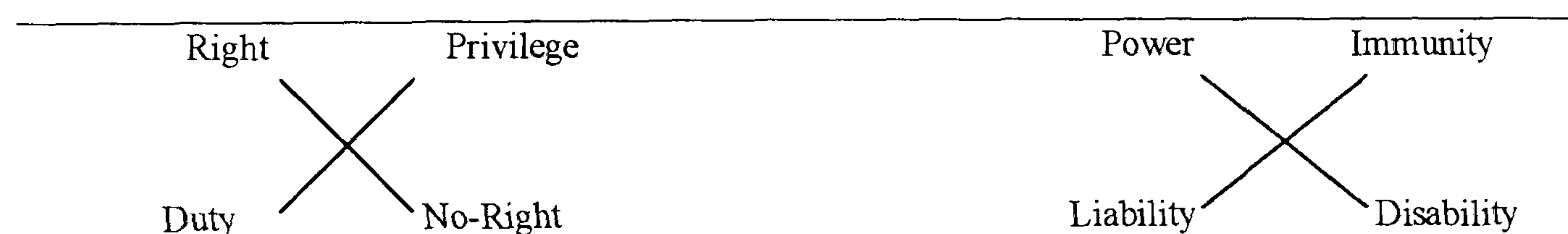
his legacy was far richer than that.<sup>77</sup> That part of it which interests us here is his reflection on what in the modern terminology could be described as regulatory dynamics of legal lacunae. Hohfeld's basic position on this question, in fact, was very positivist. In an interesting twist of events, this allowed Hale's understanding of the legal order several decades later to come very close – at least in this instance – to that of Hans Kelsen.

Hohfeld's basic proposition on the matter was astonishingly simple. Even when the existing legal order says nothing about a particular social transaction, proposed Hohfeld, it still remains the case that the transaction in question is in fact governed by the body of law in question in the sense that the law, in effect, allows all the involved parties to pursue their respective interests against one another in the given context freely, while at the same time directing the rest of the body politic to accept as legitimate every possible outcome produced as a result of their such interaction and, depending on the exact terms of the law's silence, to renounce as illegitimate any attempt to restrain the parties' freedom.<sup>78</sup>

It is striking to think now how simple (and even austere) Hohfeld's reasoning was. Yet, at the time those theories were first announced, none of them probably looked as commonplace as they do today. Indeed, even today many jurists would probably fail to recognize the full scope of their epistemological implication.

As a modern-day commentator put it, one of the main reasons why people tend to ignore the regulative power of lacunae

is that we don't think of ground rules of permission as ground rules at all, by contrast with ground rules of prohibition. This is Wesley Hohfeld's insight: the legal order permits as well as prohibits, in the simple-minded sense that it *could* prohibit, but judges and legislators reject demands from those injured that the injurers be restrained. ...



<sup>77</sup> See further, e.g., J. M. Balkin, *The Hohfeldian Approach to Law and Semiotics*, 44 U. Miami L. Rev. 1119 (1990).

<sup>78</sup> The immediate source of that observation can be found in HOHFELD, *supra* n.75, 46-8, in particular, in footnote 59. For a different illustration, see also Wesley N. Hohfeld, *The Need of Remedial Legislation in the California Law of Trusts and Perpetuities*, 1 Cal. L. Rev. 305, 314 (1912-13).

The invisibility of legal ground rules comes from the fact that when lawmakers do nothing, they appear to have nothing to do with the outcome. But when one thing that many other forms of injury are prohibited, it becomes clear that inaction is a policy and that the law is responsible for the outcome, at least in the abstract sense that the law “could have made it otherwise.”<sup>79</sup>

Against this background, Hohfeld’s basic insight reappropriated by Hale for the purposes of his theory was that

[w]ithin this category of legal permissions, perhaps the most invisible is the decision not to impose a duty to act on a person who is capable of preventing another’s loss or injury or misfortune. ... It is clear that lawmakers *could* require almost anything. When they require nothing, it looks as though the law is uninvolved in the situation, though the legal decision not to impose a duty is in another sense the cause of the outcome when one person is allowed to ignore another’s plight.<sup>80</sup>

The gist of Hale’s jurisprudential contribution, thus, can be effectively described as a felicitous merging of, on the one hand, the basic Hohfeldian observation that the space of the legal order must be ontologically co-extensive with the rest of the social space with, on the other hand, the classical Holmesian thesis that the essence of the legal process ultimately lies in the direction of the socially approved, RSA-supported compulsion.

*d. Bringing Functionalism and Structural-Conjunctural Analysis Together*

All bargaining situations, explains Hale, involve the production of social balances (equilibria). The term “balance” in this context, of course, should not be understood to suggest the condition of perfect social harmony; rather, any empirically realized pattern of power and welfare distribution, by the very fact of its realization, constitutes a “balance” (if it had not done that, it would not have been realized). Not all balances, obviously, are

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<sup>79</sup> Kennedy, *supra* n.41, 90-1.

<sup>80</sup> *Id.*, 91.

equally appealing to all people; nor, of course, are all balances equally stable and sustainable – some power arrangements tend to last for decades (think, for instance, of the Cold War), others only for days (the so-called “Missile Crisis” was also a balance of power) – but neither the former nor the latter criterion can detract anything from their “balanceness.” A balance is what a balance does. And what balances do is embody historico-ontologically possible correlations of social positions and interests, or, to translate back into the Althusserian vocabulary, the structure of the complex whole. *Law from the perspective of each social balance, then, is effectively that – and only that – part of the social structure in which the terms of the RSA’s knowable-in-advance involvement in the given social balance are determined.*

Some knowledge about that involvement – and thus an understanding of the functional contours of one’s bargaining position – as Hale pointed out, can be derived quite immediately. All one needs to do is analyze the existing structure of legal injunctions, i.e. the regime of outright legal requirements and prohibitions. That knowledge, however, in itself will always be incomplete. To obtain a genuinely complete understanding of the contours of one’s regime of compulsion, we must remember that bargaining positions can also be affected by the proportionate responsibility regimes (damages payment schemes) as well as licensing, taxation, procedural requirements, the legally recognized rights of others, and so on; and that all these factors will always have only a relative weight, dependent on our ability to pay the requisite price.

In other words, insofar as the functional understanding of the Holmesian bad man is concerned, the actual shape and content of the legal order can never be fully comprehended *in abstracto*. Every knowledge of the legal regime has to be contextualized in order to be complete, and what contextualization means here is that every person’s subjectedness to the legal order can be understood only in reference to the currently existing structure of the socially approved RSA-supported constraints imposed on his immediate bargaining position. Given the transactional character of every bargaining context, such constraints, once again, include not only the actual limitations imposed by the society (through the instrumentality of the state) on the person’s ability to inflict different kinds of compulsion on others but also the various socially supported permissions given to these others to inflict their compulsions on that person.

The parallels between the Halian and the Althusserian traditions are quite immediate. Both traditions:



(1) accept that the essence of every legal subject's social position is best understood by focusing on the relations of coercion imposed on him by the socially approved order;

(2) are characterized by their general acceptance of the determination in the last instance thesis: for Althusser, it is the development of the relations of production which determines the index of structural causality; for Hale, what makes the role of law in the modern society so considerable is the fact that the modern society lives under the reign of the principle of the inevitability of social co-operation;

(3) insist on the causal importance of the legal order with regard to the rest of the social space, while at the same time recognizing the fact that the shape and the contents of that order are ultimately determined by the course of the broader social development. In Althusser's works, these ideas take the shape of the doctrines of the relative autonomy of the superstructure(s) and structural overdetermination. In Hale, the two corresponding points are the doctrine of law as the determiner of the limits of socially permissible coercion and the economist's understanding that the ultimate impact of every legal sanction is determined by the sanctioned individual's relative paying power;

(4) rely on an ontologically expanded conception of the State (and correspondingly government): for Althusser, the factuality of the State is co-substantial with the organizing power logic that holds the given social formation together and the scope of State apparatuses is not exhausted by those formally controlled by "public authorities"; for Hale, the State is that organizational entity that gets implicated in the distribution of all power and welfare stakes in the society even those that, on the surface of it, are distributed through voluntary "private" transactions and in which coercion is exercised by "private" parties;

(5) maintain the necessity of a relentlessly situational investigation of the studied object: for Althusser, every object exists only within the immediate conjuncture framed by its interaction with other objects; for Hale, the content of the legal order can only be understood with reference to concrete bargaining situations involving mutually dependent participants;

(6) stress the inescapably contextual nature of meaning: for Althusser, the only appropriate mode of interpretation is that which recognizes the validity of the parallax theory; for Hale, one can never know the contours of one's bargaining position without also understanding, in the context of the given transaction, the contours of the bargaining

positions of one's counterparts and – the path dependence argument – one's general wealth, for the law does not deter those who are willing to pay its penalties;

(7) issue more or less the same set of methodological injunctions for jurisprudential inquiries: the epistemological mechanism produced by the Halian combination of the Hohfeldian insight into the normative character of law's lacunae and the Holmesian injunction to study law in terms of its effects mirrors directly the Althusserian mechanism of symptomatic reading.

*e. Extending the Functionalist Analysis into International Law: the Challenge of Political Realism and the Effectivity of the Legal Regimes in the Context of the International Political Process*

It is a rather common practice in modern international studies, especially among those commentators who in one way or another associate themselves with the tradition of "political realism," to routinely downplay the role of legal regimes in the determination of the bargaining outcomes.<sup>81</sup> Stripped of all its verbal niceties, the typical argument advanced by "political realism" essentially boils down to the suggestion that the legal profession has grossly overestimated the importance of legal rules in the constitution of the social process. What *really* determines the outcome of every social interaction, according to this argument, is a set of factors that ultimately have nothing to do with either the legal rule or the legal process. The factors that are usually identified in this context include: the bargaining skills of the involved parties; the scarcity of the various goods and benefits they control which are needed by others and which may not be obtainable elsewhere; the degree of their domination over the respective markets or sets of opportunities; the structure of the benefit-producing chains of each of the parties and the nature of interference each of them

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<sup>81</sup> In the context of international law, see famously HANS MORGENTHAU, *POLITICS AMONG NATIONS: THE STRUGGLE FOR POWER AND PEACE* (2<sup>nd</sup> edn., New York: Alfred Knopf, 1954); GEORGE F. KENNAN, *AMERICAN DIPLOMACY 1900-1950* (Chicago: The University of Chicago Press, 1951). See also Jack L. Goldsmith and Eric A. Posner, *A Theory of Customary International Law*, 66 U. Chi. L. Rev. 1113 (1999); Eric A. Posner, *A Theory of the Laws of War*, 70 U. Chi. L. Rev. 297 (2003). For the classical pattern of response by mainstream international law scholarship, see Myres S. McDougal, *Law and Power*, 46 A.J.I.L. 102 (1952); Ian Brownlie, *The Reality and Efficacy of International Law*, 52 B.Y.I.L. 1 (1981).

can effect in these chains; the depth of their bargaining resources; the breadth of their ally circles, and so on.<sup>82</sup>

A question arises at this stage: where does the Hlean tradition stand with regard to this argument? Does it refute it or does it recognize its validity? As Duncan Kennedy has pointed out, by and large, the Hlean tradition is inclined to agree with most of the contentions advanced by the “political realists.” It does not, for example, challenge their suggestion “that all these factors are profoundly important.” On the contrary, it wholeheartedly accepts it and can even be said to turn it into its starting point.<sup>83</sup> What it does *not* accept, however, is the background assumption on the basis of which that statement is usually formulated in the “political realist” discourse, the assumption which holds that all or any of the abovementioned factors can be imagined to possess a constant “inherent” value independent of the shape and content of the legal regime.

From the Hlean perspective, the basic point which the “political realists” seem to miss “is that each [of the listed factors] has significance in practice only within the framework of legal rules, and the rules affect each factor’s ‘value’ to the parties.”<sup>84</sup> There simply are *no* inherent “values” for any type of political resource.<sup>85</sup> No “price” is natural outside the context of the supply-demand relationship. No supply-demand relationship is possible without a background structure of property rules outlining the conditions under which the owners of the various resources can be assured of retaining their resources if their selling price is not met by the buyers.<sup>86</sup>

If Ruritania is prohibited by international law from using a particular type of weapons in its war with Arcadia, the size of its ammunition stocks for these weapons is largely irrelevant. If the Security Council can order an enforcement action against Arcadia for failing to abide with its resolutions, the depth of its political alliance resources outside the list of the Permanent Five does not matter, or at least does not matter as much as it would have, had Article 42 not given the Security Council such far-reaching powers. If the

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<sup>82</sup> Kennedy, *supra* n. 41, 87-8.

<sup>83</sup> *Id.*, 88.

<sup>84</sup> *Id.*

<sup>85</sup> This is a typical institutional economics argument (and it bears mentioning Hale was an institutional economist; see Duxbury, *supra* n.41, 429-30).

<sup>86</sup> See further Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 Maryland L. Rev. 563, 578 (1982).

Arcadian nation is not recognized as “a people” under international law, it is essentially beside the point how favourably the CNN discusses the Arcadian self-determination cause. If a particular canal is declared an international canal, it does not really matter how completely the Freedomian Navy controls its entry points, other states’ ships will still be able to pass through it freely.

What is the common conclusion that suggests itself through all these examples? Law is not the only factor that determines the outcome of the bargaining process; however, it is far more important than the “political realist” tradition acknowledges it to be. It affects the availability and “weight” of all other factors whose totality determines the development of the social situation and structures the terms of their relative functionality vis-à-vis one another. It provides a basic frame of reference within which the social space is constituted and defines the dynamics of the bargaining process occurring on its basis. It determines the general conditions under which different components of the bargaining power can be utilized and sets the boundaries within which the bargaining conduct can be performed. It supplies that foundational starting point from which the bargaining process starts and without which the bargaining positions could never be calculated.

A question arises at this stage: how exactly does law do all this? In what particular way does it make its contribution to the constitution of the social process?

#### *f. Mapping the RSA Factuality of Legal Regimes*

According to the Hlean tradition, there are two basic ways in which the legal order affects the dynamics of the bargaining process.<sup>87</sup> In the first instance, the legal order determines the structure of strategic alternatives available to the involved parties. What the law does at this level, in other words, is basically (i) outline the range of the general scenarios available to each participant if they decide to withdraw from a particular bargaining situation; and (ii) determine the degree of each scenario’s desirability. A classical example to illustrate the point would be the famous Resolution 1541 of the UN General Assembly.<sup>88</sup>

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<sup>87</sup> See Kennedy, *supra* n.41, 87.

<sup>88</sup> *Principles which should guide Members in determining whether or not an obligation exists to transmit the information called for under Article 73e of the Charter*, U.N. G.A. Resolution 1541 (XV), 15 December 1960, U.N. Doc. A/4651.

Every member of the United Nations entrusted under Chapter XI of the Charter with the administration of a non-self-governing territory is obligated under Article 73e of the Charter to transmit to the UN, at a regular interval, a set of prescribed data concerning the development of the respective territory, in order to enable the Organization to keep track of the territory's "evolution and progress towards a 'full measure of self-government'." The basic function of Resolution 1541 against this background is to set out in an orderly fashion a list of basic conditions under which that obligation ceases. According to Principle VI of the Resolution, there are in general three such conditions: (i) the emergence of the territory in question "as a sovereign independent State"; (ii) the "free association" of the territory in question with another "independent State"; and (iii) the "integration" of the territory in question into another "independent State."

Seen from the functional perspective, what Resolution 1541 thus does is, essentially, delimit the range of strategic alternatives awarded by international law to the non-self-governing polities finding themselves on the verge of reaching formal independence. Depending on their citizens' wishes, by the end of the Article 73e reporting period, such polities are allowed to enter into any one of the three designated political trajectories. Whatever choice they may make between the three, the final decision would be considered completely legitimate by the international community (subject to the observance of the respective procedure). Moreover, in case any third party would decide to interfere with the exercise of that decision, the polity in question would be allowed to use whatever self-help would be proportionate to repel such interferences and, at least in theory, would be in the position to attract the support of the international community's RSA. Outside the list of these three alternatives, however, there is nothing a non-self-governing polity can legitimately expect from international law.

How desirable each of the available alternatives may be vis-à-vis the other two is, of course, a question that can never be answered *in abstracto*. In every case there would have to be "organized" a careful balancing exercise, the relevant factors at play being, among others, the geopolitical potential of the polity in question, its capacity for a self-sustaining economic development, its historical ties with other polities, as well as its interest in obtaining a certain position within the international community. The latter, in its turn, would be further conditioned, among other things, by other rules and institutions of international law, including not least Article 1(2) of the International Covenant on Civil and

Political Rights<sup>89</sup> that provides an equal degree of protection to all polities that qualify as “peoples” and Article 2 of the Charter that provides a far greater degree of protection against external interference to a polity formally organized as an independent state than to a polity formally incorporated into another polity’s state.<sup>90</sup>

The second way in which the legal order affects the dynamics of the bargaining process is by regulating the terms of the bargaining conduct permissible under each of the strategic alternatives, i.e. by structuring each of the available model scenarios from within. At this level, the basic function of the law, according to Hale, is to determine what particular types of coercion can be used by the bargaining participants against one another.

If the first instance at which the legal order got implicated in the course of the social process thus came at the level of the delimitation of strategic alternatives, the second instance comes at the level of defining the range of permissible tools, techniques, and

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<sup>89</sup> Article 1(2), *International Covenant on Civil and Political Rights*, 1966, 999 U.N.T.S 171:

“2. All peoples may, for their own ends, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence.”

<sup>90</sup> Article 2, *Charter of the United Nations*, 1945, 59 Stat. 1031:

“The Organization and its Members, in pursuit of the Purposes stated in Article 1, shall act in accordance with the following Principles.

1. The Organization is based on the principle of the sovereign equality of all its Members.
2. All Members, in order to ensure to all of them the rights and benefits resulting from membership, shall fulfill in good faith the obligations assumed by them in accordance with the present Charter.
3. All Members shall settle their international disputes by peaceful means in such a manner that international peace and security, and justice, are not endangered.
4. All Members shall refrain in their international relations from the threat or use of force against the territorial integrity or political independence of any state, or in any other manner inconsistent with the Purposes of the United Nations.
5. All Members shall give the United Nations every assistance in any action it takes in accordance with the present Charter, and shall refrain from giving assistance to any state against which the United Nations is taking preventive or enforcement action.
6. The Organization shall ensure that states which are not Members of the United Nations act in accordance with these Principles so far as may be necessary for the maintenance of international peace and security.
7. Nothing contained in the present Charter shall authorize the United Nations to intervene in matters which are essentially within the domestic jurisdiction of any state or shall require the Members to submit such matters to settlement under the present Charter, but this principle shall not prejudice the application of enforcement measures under Chapter VII.”

tactics of coercion prescribed for each particular bargaining situation. Some tactics can be regulated explicitly in the form of express permissions and prohibitions. Many, however, can also be regulated indirectly, through an accretion of background norms, including those that take the shape of lacunae. The most reliable way to track the dynamics of law's structuration of the social process on this level, consequently, would be by applying the Hohfeldian theory of fundamental jural relations, keeping a particular emphasis on Hohfeld's remarks about the essential differences between rights and privileges<sup>91</sup> and Holmes's remarks about the complex relationship between rights and remedies.<sup>92</sup>

Thankfully, the basic rules on the latter front turned out to be quite simple. If the cumulative effect of the legal order's implication in a particular bargaining situation leaves a given party in the position where it can advance its subjective interests over those of its counterparts, the party in question can be said to have a legal entitlement. Different legal entitlements are marked in the legal order with different degrees of hierarchical precedence. An interest protected by a "fundamental right" always trumps that protected by a lower-level right, and so forth. Every legal entitlement, thus, is effectively a sign – a coded message, if you will – that informs the participants in the bargaining process to what extent the body politic in question considers the corresponding interest worthy of protection and to what extent, consequently, it is ready to throw its weight (RSA) behind its holder when his pursuit of it clashes with the pursuit by his counterparts of their interests.

In addition to the hierarchical status, entitlements can also be distinguished according to their functional forms. Essentially, all legal entitlements can be said to come in two different forms: <sup>93</sup> rights (rights-claims) and privileges (liberties).<sup>94</sup> Rights give their

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<sup>91</sup> See HOHFELD, *supra* n.75, 36-50.

<sup>92</sup> See Holmes, *supra* n.30, 993-4. See also Karl Llewellyn, *Some Realism about Realism – Responding to Dean Pound*, 44 Harv. L. Rev. 1222, 1244 (1931).

<sup>93</sup> Although Hohfeld proposed eight fundamental legal conceptions, I agree with the suggestion that the second semiotic square – power, immunity, liability, disability – is analytically superfluous. See on this further ANDREW HALPIN, *RIGHTS AND LAW: ANALYSIS AND THEORY 27 et seq.* (Oxford: Hart Publishing, 1997).

<sup>94</sup> "It is ... clear ... that ... a privilege or liberty ... might very conceivably exist without any peculiar concomitant rights against 'third parties' as regards certain kinds of interference. Whether there should be such concomitant rights (or claims) is ultimately a question of justice and policy, and it should be considered, as such, on its merits. ... It would therefore be a *non sequitur* to conclude from the mere existence of such liberties that 'third parties' are under a *duty* not to interfere, etc." HOHFELD, *supra* n.75, 43.

holders a greater degree of protection than privileges. A *right* can be said to exist whenever the legal order in question burdens the given subject's counterpart in the corresponding bargaining situation with an actual duty to satisfy the subject's demand. A *privilege* is said to exist whenever the legal order burdens the counterpart only with an obligation not to prevent the subject's exercise of her entitlement through the instrumentality of the legal system and not to "complain" whenever her intervention with the subject's exercise of her entitlement is successfully thwarted by the latter's actions. Another way of putting it is to say basically that a privilege exists whenever there are present simultaneously an absence of a duty on the part of the holder to refrain from pursuing the corresponding interest and an absence of a right on the part of the holder's counterpart to prevent her from such pursuit.<sup>95</sup> A right accompanied by a centrally provided remedy, furthermore, provides a greater degree of protection to its holder than a right accompanied by the permission to resort to self-help (countermeasures) in case of a violation. (Indeed, for practical purposes, the latter is often indistinguishable from a privilege.) The absence of recognition as either a right-holder or a privilege-holder before the eyes of the legal order, finally, signifies the lowest level of protection available within the legal domain, as it is effectively tantamount to a total exposure to one's counterparts' discretion (all damage sustained in such situations will come under the heading of *damnia absque injuria*).

Continuing furthermore with the question of the legal technique, there seem to be, as already indicated, at least two different modalities of affecting the course of a bargaining conduct through the instrumentality of the legal rules. Firstly, the rules in question can address the terms of the bargaining behaviour directly. A good example here would be Article 12 of the UN Charter,<sup>96</sup> which effectively states that the General Assembly has a

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<sup>95</sup> Another way to understand the basic difference between rights and privileges is to analyze the dynamics by which a *damnum* (practical infliction of harm) translates into *injuria* (legally prohibited damage). In a relationship governed by the entitlement of privilege, a *damnum* inflicted by the privilege-holder on his counterparts will never lead to the recognition of an *injuria*. In a relationship governed by the entitlement of right, a *damnum* inflicted on the right-holder will always give rise to an *injuria*.

<sup>96</sup> Article 12, *Charter of the United Nations*.

"1. While the Security Council is exercising in respect of any dispute or situation the functions assigned to it in the present Charter, the General Assembly shall not make any recommendation with regard to that dispute or situation unless the Security Council so requests.



legal privilege to issue its recommendations with regard to any international dispute or situation within the ambit of the Charter so long as the Security Council does not deal with it at the moment. When the Security Council seizes a dispute or a situation, the General Assembly may begin to address it only after the Council expressly requests it to do so. To ensure that the General Assembly remains abreast of which disputes and situations the Security Council is dealing with at the moment the Secretary-General is obliged to inform the General Assembly about all such matters, with the consent of the Security Council.

The second way in which legal rules can become implicated in the outcome of the bargaining process is slightly less direct. As we saw earlier, very often the law tends to affect the distribution of the bargaining power between the involved parties by addressing various background factors involved in the constructability of their bargaining positions. Consider, for instance, Principle III of the Final Act of the CSCE Helsinki Summit.<sup>97</sup>

The participating States regard as inviolable all one another's frontiers as well as frontiers of all States in Europe and therefore they will refrain now and in the future from assaulting these frontiers.

Accordingly they will also refrain from any demand for, or acts of, seizure and usurpation of part or all of the territory of any participating State.<sup>98</sup>

What we have here, in effect, is a legitimization of a particular status quo (map of Europe as of 1 August 1975) accompanied by a simultaneous delegitimization of a particular scenario of its change (change effected through the use of force). Considering the historical context in which the Final Act was produced, the distributive dynamic created by this twin regulation can be consequently diagnosed more or less as follows:

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2. The Secretary-General, with the consent of the Security Council, shall notify the General Assembly at each session of any matters relative to the maintenance of international peace and security which are being dealt with by the Security Council and shall similarly notify the General Assembly, or the Members of the United Nations if the General Assembly is not in session, immediately the Security Council ceases to deal with such matters.”

<sup>97</sup> On the legal character of the OSCE documents, see Section Two below.

<sup>98</sup> *The Final Act of the Conference on Security and Co-operation in Europe, Declaration on Principles Guiding Relations between Participating States*, 1<sup>st</sup> CSCE Summit of Heads of State or Government, Helsinki, 1 August 1975; available from [http://www.osce.org/documents/html/pdftohtml/4044\\_en.pdf.html](http://www.osce.org/documents/html/pdftohtml/4044_en.pdf.html).

(i) in the context of those polities that struggle for secession from the occupying powers which had incorporated them into their domestic sovereign space, the most immediate impact of Principle III is to decrease the bargaining power of the former and increase the bargaining power of the latter by depriving the secessionist movements of any access to external military help – examples: the Baltic Republics, Western Ukraine, and the Soviet Union;

(ii) in the context of those historical polities that are currently divided into two or more different states which seek to be reunified, the most immediate impact of Principle III is to increase the relative strength of those domestic elements within these polities that seek a peaceful reunification of the respective states over those elements that seek an essentially military resolution of the problem – examples: the FRG and the GDR, Romania and Moldavia, Albania and Kosovo;

(iii) in the context of those polities that act as the leaders of the opposing global camps, the most immediate impact of Principle III is to free up a certain part of their political resources on a number of fronts (including protection of the post-World War II zones of influence) and to increase the relative bargaining power of those domestic elements within them that are inclined to preference peaceful conduct of foreign policy over belligerent – examples: the Soviet Union and the United States.

The analysis can be continued further. The basic regularity that is emerging, however, is going to remain the same: (i) depending on the particular arrangement of the background historical factors, a facially neutral normative regime can produce a substantively disparate political-distributive effect, empowering some actors more than others, by creating an intricate web of legal entitlements and burdens; (ii) a legal rule that does not even appear to recognize the existence of a particular category of subjects can end up affecting their most immediate interests in a very fundamental way.

With this as our working knowledge, then, let us turn now to the next stage of this inquiry.

## Section Two

### Finding the Shape of the New ILTMC Regime

#### *a. Previous Attempts to Map the ILTMC Regime: Achievements, Shortcomings, and the Ghost of Legal Formalism*

The main methodological injunction of the Hlean tradition, as we saw in the previous section, is to “discover law” by looking out for the coercive limitations it produces and to do so from the situational perspective of those subjects that are immediately affected by it. Transposing this idea into the context of the present inquiry, it appears that if we want to understand the exact shape and content of the new ILTMC regime as a body of law, and if we want to do this in a way that would allow us to empathize with the practical experiences of the minority communities it addresses, we must first of all start taking stock of all those international legal rules which in the course of their normal application have the capacity<sup>99</sup> to affect the bargaining positions of the minority communities. By putting these rules together into a single, although not necessarily uncontradictory, whole, we can then start to flesh out the actual body of the new ILTMC regime that currently remains submerged under a plethora of ideological appearances and verbal façades.

Before proceeding anywhere further with this, however, it behoves us to consider briefly the pattern of some previous attempts to tackle the same challenge. How have other new ILTMC studies approached this question? What were their main achievements? What were their shortcomings? How did they construct their investigative paradigms? What prevented them from realizing its analytical potential? The first thing that needs to be noticed in this regard is that, for better or worse, on the most fundamental level, the methodological formula outlined in the previous paragraph is not, in fact, all that novel in contemporary international law scholarship. Although he never identified it explicitly, Patrick Thornberry seems to have followed more or less the same methodological principle

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<sup>99</sup> The frequency of the capacity’s realization does not matter. See further Kennedy, *supra* n.41, 107: “It is clear that background rules *may* be important even if *never* invoked[;] the mere frequency of invocation doesn’t mean much.”

in his seminal *International Law and the Rights of Minorities*.<sup>100</sup> So apparently did Nathan Lerner in his *Group Rights and Discrimination in International Law*.<sup>101</sup> So, indeed, had several years before them, in a generally comparable context, Paul Sieghart with his *International Law of Human Rights*.<sup>102</sup> The latter, seeking to identify the boundaries of the then still mostly latent international human rights code, for instance, admitted that the logic which had guided him in his exercise had not been to follow the nominal designations adopted in the then international law discourse, but to look out instead for whatever rules of international law actually had the capacity to affect the bargaining positions of individuals in their dealings with their governments:

What all these treaties have in common, and what makes the legal code which they collectively constitute unprecedented in international law, is that ... they define and create specific rights for the individuals over whom ... States are able to exercise power, but who are not themselves parties to those instruments.<sup>103</sup>

Where this brought Sieghart in the end, we all know: a brilliant account of the field that included in its scope of vision not only the self-evident International Bill of Human Rights and its regional equivalents but also the far less noticeable at the first sight Convention on Consent to Marriage, Minimum Age for Marriage and Registration of Marriages,<sup>104</sup> the ILO Convention concerning Employment Policy,<sup>105</sup> and the Convention on the International Right of Correction.<sup>106</sup>

The methodological approach advocated in Lerner's study followed the same basic lines. The starting objective of the enterprise was to identify the shape of a currently submerged body of international law, the law relating to the protection of racial, ethnic, religious, linguistic, and cultural groups. The analytical procedure proposed to that effect

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<sup>100</sup> *Supra* n. 1.

<sup>101</sup> NATHAN LERNER, *GROUP RIGHTS AND DISCRIMINATION IN INTERNATIONAL LAW* (Dordrecht: Nijhoff, 1991).

<sup>102</sup> PAUL SIEGHART, *THE INTERNATIONAL LAW OF HUMAN RIGHTS* (Oxford: Clarendon Press, 1983).

<sup>103</sup> *Id.*, 16.

<sup>104</sup> *Id.*, 205.

<sup>105</sup> *Id.*, 217.

<sup>106</sup> *Id.*, 337.

was to distil those international rules which concerned or could in one way or another affect the positions of these groups in the context of national and world politics and to put them into a single code.<sup>107</sup> Armed with this understanding, Lerner managed in the end not only to identify a list of the relevant material sources, which included, among others, the Convention on the Prevention and Punishment of the Crime of Genocide, Convention on the Elimination of All Forms of Racial Discrimination, Convention on the Suppression and Punishment of the Crime of Apartheid, the 1989 ILO Convention concerning Indigenous and Tribal Populations or Peoples, the Helsinki Final Act of the CSCE, and the 1990 CSCE Copenhagen Document,<sup>108</sup> but also in fact draw a tentative catalogue of group rights recognized under international law.<sup>109</sup>

Similarly, for Thornberry, the main objective of the exercise was formulated as the search for a “synchronic picture of international law related to minorities”<sup>110</sup> or, more straightforwardly, a “picture of what international law offers to minorities.”<sup>111</sup>

Starting with a brief investigation of various previous attempts on that front, Thornberry conveyed the gist of his methodology by implicitly equating the past ILTMC regimes with “protective treaties concluded for the benefit of specific groups,” “the treaty [being] the paradigmatic instrument recognizing the right of minorities to fair treatment.”<sup>112</sup> Transposing the analytical procedure constructed on that basis into the present context and recognizing that “[f]ormally speaking, minorities as such as holders of rights and duties are almost ignored in international law,”<sup>113</sup> he then concluded that, firstly, the legal reality of minority protection in international law in “the greater part ... is given over to individual rights,” and that, secondly, as a result of that, the international legal regime of minority protection had to be conceptualized in “substantive and indirect, not formal and direct” terms.<sup>114</sup> Proceeding against this background, Thornberry went on to construct a vision of a legal regime which in substantive terms consisted of the right to existence, the right to

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<sup>107</sup> See LERNER, *supra* n.101, 23-4.

<sup>108</sup> *Id.*, 17-9.

<sup>109</sup> *Id.*, 34-6.

<sup>110</sup> See *supra* n. 1, 6.

<sup>111</sup> *Id.*, 396.

<sup>112</sup> *Id.*, 25.

<sup>113</sup> *Id.*, 394.

<sup>114</sup> *Id.*, 396.

identity, the right not to be discriminated against, and the rights of indigenous peoples – “[t]he rights [that] provide at least the minimum forms of protection” to members of minority communities<sup>115</sup> – and which included the Convention on genocide, various provisions on non-discrimination from the general and regional human rights law, Articles 1 and 27 of the ICCPR, the Convention on racial discrimination, the UNESCO convention against discrimination in education, some ICJ caselaw, the 1957 ILO convention on the protection of indigenous peoples, as well as the Helsinki Final Act.

It is difficult to overestimate the practical importance of these works for the development of the ILTMC studies. At the time when so few other international lawyers sought to engage with the question of the international law’s response to the treatment of minority communities with the same degree of attention, the intellectual intensity of these studies not only helped to revive a theoretical interest in a topic otherwise forsaken but also sponsored an enormous amount of critical self-reflection in the ILTMC practice, inspiring as a result a whole series of genuinely insightful investigations and scholarly studies. As every path-breaking work, however, each of them turned out, in the end, to be as much an integral part of the old approach from which they tried to break free as it was a part of the new approach which their scholarly practices tried to beget.

The first step can never effect a complete rupture. Caught up in the same orthodox dogma which they struggled to terminate, both Thornberry and Lerner ended up eventually succumbing to its stultifying embrace. Yet even that setback has carried in itself a valuable lesson for the next wave of the ILTMC scholars, a lesson, alas, that none of them in the end seems to have heeded with enough attention.<sup>116</sup>

Put simply, the most fundamental shortcoming of Thornberry and Lerner’s epistemological approach, – despite their energetic profession of allegiance to the logic of interdisciplinarity – lay in its unreflective residual loyalty to the *formalist* jurisprudential tradition.<sup>117</sup> Still dominant over much of mainstream international law scholarship, that

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<sup>115</sup> Id., 392.

<sup>116</sup> There may be several partial exceptions, however. Consider, for instance, Geoff Gilbert’s attempt to reconstruct an aspect of the ILTMC regime in Geoff Gilbert, *Autonomy and Minority Groups: a Right in International Law?*, 35 Cornell Int’l L. J. 307 (2002) (moving significantly beyond the traditional scope of formal sources of international law).

<sup>117</sup> See also SIEGHART, *supra* n. 102, 39.

tradition basically holds that the practical limits of the international legal order are ultimately determined by the scope of *forms* inscribed in the “original” list of sources given in Article 38(1) of the ICJ Statute.<sup>118</sup> Historically, the most articulate formulation of that tradition in international law came in the works of Hans Kelsen and the scholarly projects derived from the intellectual legacy of German logical positivism. In ideational terms, however, the apogee, of the tradition as it is seen now, has come not so much with Kelsen, as with Sir Gerald Fitzmaurice. The particular occasion in point was Fitzmaurice’s famous 1956 article on the foundations of international law’s authority published in *Modern Law Review*.<sup>119</sup> Fitzmaurice’s main thesis there – the same thesis, incidentally, that later provided the ideological foundation for the notorious but highly symptomatic *South West Africa Cases (Second Phase)* judgment<sup>120</sup> – was essentially this: what makes a particular norm part of the “legal order” is not the effects it produces in the social fabric at the point of its application but only the fact of its origination in the foundational decision about what should count in practice as the recognized sources of Justice.<sup>121</sup> Whatever can be proved through a chain of syllogistic arguments to have the same basic *form* as one of the ideal items on the “original” list of sources through which the foundational decision established Justice could be achieved in practice, counts as law; whatever cannot be proved, does not.<sup>122</sup>

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<sup>118</sup> Statute of the International Court of Justice, 1945, 59 Stat. 1031. For further sources, see n.7 in Chapter II above.

<sup>119</sup> See G. G. Fitzmaurice, *The Foundations of the Authority of International Law and the Problem of Enforcement*, 19 M.L.R. 1 (1956).

<sup>120</sup> *South West Africa Cases (Second Phase) (Ethiopia v. South Africa; Liberia v. South Africa)*, I.C.J. Reports 1966, 6.

<sup>121</sup> For Kelsen’s view on this question, see further Hans Kelsen, *On the Basic Norm*, 47 Cal. L. Rev. 107 (1959). See also Kelsen, *supra* n.73, 252-65. What sets Kelsen apart from Fitzmaurice is his principled insistence that in order to be valid, a legal norm must also be effective, i.e. it must be observed in practice (see *id.*, 138-41). Beyond the special case of customary international law, Fitzmaurice roundly rejects that suggestion (see *supra* n.119, 2). Most mainstream international lawyers today, it seems safe to guess, would join Fitzmaurice over Kelsen. For further elaboration of Kelsen’s logical positivism and his theory of the basic norm as the normative expression of the foundational decision about what should count as law in practice, see also HANS KELSEN, *PURE THEORY OF LAW* 31, 198-201 (transl. by Max Knight; Berkeley and Los Angeles: University of California Press, 1978). For Kelsen’s qualms about the relationship between “law” and “justice,” see Hans Kelsen, *The Pure Theory of Law and Analytical Jurisprudence*, 55 Harv. L. Rev. 44, 44-9 (1941).

<sup>122</sup> This logic underwrites the liberal theory of legal formality. See, further, Duncan Kennedy, *Legal Formality*, 2 J. Leg. Stud. 351 (1973).

In the Hlean tradition, of course, the factuality of the legal regimes can never be understood in such terms. For the functionalist approach, the frame of reference for understanding the factuality of international law cannot ever be set in terms of the logical comparisons of forms and deductive elaborations of a decisionistically established “original” list. **It is the social approval of the application of coercion that provides the general background against which the contours of the legal order should be made out.**<sup>123</sup> **Whatever process determines which of the various constraints effectively imposed on the different freedoms of the participants of the international political process to act as they please are legitimate *is* the international legal process. Whatever code brings together all the legitimate constraints permitted in the international arena *is* the code of the international legal order. The cognition of every international legal regime, on this view of things, must thus always start with the identification of the *effective* dynamics by which coercion is legitimized in the international arena. Anything else would be a return to the practises of “transcendental nonsense.”**<sup>124</sup>

That said, a principled rejection of legal formalism seem to form a very important part of what characterizes most of the mainstream ILTMC scholarship today in its own eyes. It appears to be a rather common feature among the mainstream ILTMC writers to pride oneself on one’s ability to transcend the narrow-minded habits of the formalist mindset and pay attention to those international norms that would not usually pass the muster of an Article 38 test.<sup>125</sup> In reality, however, most of these self-allegations appear to

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<sup>123</sup> In contemporary international law scholarship this view is often associated with the New Haven school approach. (The immediate point of reference at hand is usually Myres S. McDougal, *The Hydrogen Bomb Tests and the International Law of the Sea*, 49 A.J.I.L. 353, 354 (1955).) In fact, however, as we have seen earlier, it is a profoundly Hlean thesis. That international lawyers should constantly overlook this fact is ultimately understandable. Unlike McDougal, Hale never wrote anything about international law, and, in a way, the New Haven tradition was a direct offshoot of legal realism. (As far as offshoots go, however, it was certainly a rather crooked one. No loyal student of Cohen, Frank, or Hale would ever come up with a “policy science” or the kind of Porphyrian tree of hypostatized phases, ossified functions, and mysteriously self-justifying values that McDougal and Lasswell developed in the fifties and sixties.)

<sup>124</sup> See Cohen, *supra* n.73.

<sup>125</sup> For a highly symptomatic example, see, e.g., PATRICK THORNBERRY AND MARÍA AMOR MARTÍN ESTÉBANEZ, *MINORITY RIGHTS IN EUROPE* 18 (Strasbourg: Council of Europe Publishing, 2004): “a great deal can be achieved in minority protection through methods other than the ‘hard law’ approach.” See also



be at best naïve and at worst misguided: as things stand, there have been as yet no real functionalist accounts of the established ILTMC problematic. The methodological sensibility traditionally understood in mainstream ILTMC scholarship as a species of legal realism comes, in fact, nowhere near that, and, ultimately, one should hardly be surprised by that. Hanean sensibility has never gained much popularity among modern international lawyers. Partly, of course, this can be explained perhaps by the lingering dominance of the formalist sensibility. To a significant extent, however, this may also be due to international lawyers' traditional failure to engage with the theoretical legacy of the socio-legal studies as well as the rather peculiar political situation of the international law discipline.<sup>126</sup>

Nevertheless, in recent years there have been a number of important advances on this front that deserve a few comments.

*b. The Question of "Soft Law"*

Initially, it seems, it was mostly those international relations scholars who were associated with the regimes theory approach who first started to drift towards a general equivalent of the Hanean/functionalist paradigm. Where they had led, others soon followed. The easiest way to track the intellectual achievements of the regimes theory scholarship, it seems, is by considering its approach to the question of the so-called "soft law."

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GAETANO PENTASSUGLIA, *MINORITIES IN INTERNATIONAL LAW* 199-208 (Strasbourg: Council of Europe Publications, 2002).

<sup>126</sup> While the invisible college has never had any significant material or organizational power base to lean on politically – there is no international law bar, no global ministry of international justice, no global system of international judiciary – it has always had to defend its political projects against relentless assaults from every possible corner and direction. From Austinian positivists to Morgenthavian "political realists," the Bible-belt conservatives to the Third World anti-imperialists, the First-World feminists to "*il popolo di Seattle*" – every theoretical school and ideological movement with any kind of universalistic pretensions in the last hundred years has taken its opportunity to revile the international legal order and to scorn its disciples at some point or another. The common pretext on almost every occasion has been the invisible college's failure to get realistic about the certainties of international life. With a past record like that, how surprising is it really that an overwhelming majority of the invisible college have not yet found the idea of legal realism particularly appealing?

Whichever perspective one looks at it from, the concept of “soft law” is certainly a rather paradoxical one.<sup>127</sup> At its core seems to lie the idea of “international prescriptions that are deemed to lack requisite characteristics of international normativity, but which, notwithstanding this fact, are capable of producing certain legal effects.”<sup>128</sup> A typical example of a soft law regime – and one that concerns the object of this inquiry directly – on this reading of the term would be the 1975 Helsinki Final Act. The accepted view in the mainstream scholarship today is that, despite the fact that it is drafted in a language very similar to that of contemporary international treaties, the Helsinki Final Act does not in fact constitute a regular international law treaty in the sense in which that term is used in the 1969 Law of Treaties Convention, and that the obligations entrenched in it are not, therefore, legally binding on its participants.<sup>129</sup>

The general theory on which this argument is based tends to place the primary emphasis on the concluding paragraph of the Helsinki Final Act which explicitly states that the Act’s signatories do not in fact intend to register it with the UN Secretariat under Article 102 of the UN Charter.<sup>130</sup> Taking into account the fact that all treaties concluded by the UN members are normally expected to be registered under Article 102, it is commonly argued that if the signatories of the Act decided to include such a statement in its text, then it must be because they certainly intended not to create any formal legal obligations.<sup>131</sup>

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<sup>127</sup> Pierre-Marie Dupuy, *Soft Law and the International Law of the Environment*, 12 Mich. J. Int’l L. 420, 420 (1991).

<sup>128</sup> Gunther Handl, *Remarks*, 82 A.S.I.L. Proc. 371, 371 (1988). A parallel theory holds that “softness” is, in fact, an attribute of the norm’s content, i.e. that the concept “softness” is effectively synonymous with the concept of “formal realizability.” (Dupuy entertains this view at some length in *supra* n.127, 429-31.) That theory has been generally rejected in recent years, probably because there are not that many mainstream international lawyers today who would want to see some of the most fundamental components of the modern-day international *corpus juris* relegated into the category of soft law. On formal realizability, see further Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 Harv. L. Rev. 1685, 1687-8 (1976).

<sup>129</sup> Jane Wright, *The OSCE and the Protection of Minority Rights*, 18 HRQ 191, 192-3 (1996).

<sup>130</sup> *Final Act of the Conference on Security and Co-Operation in Europe*, 1 August 1975, Helsinki:

“The Government of the Republic of Finland is requested to transmit to the Secretary- General of the United Nations the text of this Final Act, which is not eligible for registration under Article 102 of the Charter of the United Nations, with a view to its circulation to all the members of the Organization as an official document of the United Nations.”

<sup>131</sup> Wright, *supra* n. 129, 193.

That said, the argument usually continues, no one should, nevertheless, doubt that the Act and the documents adopted in its wake were in fact intended to produce a series of internationally binding commitments:

[as] Van Dijk correctly states: “A commitment does not have to be legally binding in order to have binding force; the distinction between legal and non-legal binding force resides in the legal consequences attached to the binding force,” not in the binding force as such.<sup>132</sup>

Now, from the perspective of the regimes theory approach, drawing this kind of distinctions would normally appear a rather suspicious analytical operation.

What use can it be, practically speaking, to insist on calling one set of obligations “soft law” and another set of obligations “hard law,” if: (i) the procedures for compliance in both cases are normally very similar, or at any rate a sufficient number of “hard law” regimes are accompanied by a compliance procedure far less robust and rule-driven than a considerable number of “soft law” regimes, and the members of the international community seem to be perfectly comfortable with that;<sup>133</sup> (ii) the logic of norm-making in both cases is almost completely the same;<sup>134</sup> (iii) the patterns of enforcement and voluntary observance do not at all coincide with the analytical division between the hard-law and the

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<sup>132</sup> Id., 193 (quoting Arie Bloed).

<sup>133</sup> Alberto Székely, *A Commentary on the Softening of International Environmental Law*, 91 A.S.I.L. Proc. 234 (1997). Cf. Bruno Simma, *Remarks*, 82 A.S.I.L. Proc. 377, 379 (1988).

<sup>134</sup> FRIEDRICH KRATOCHWIL, *RULES, NORMS, AND DECISIONS 200-3* (Cambridge: University Press, 1989). It is generally believed that the formal procedure for soft-lawmaking is different from that for hard-lawmaking, but then again this statement looks far more certain when entertained as an item of faith than an empirically falsifiable contention. Especially after the *Nicaragua* decision (ICJ Reports 1986, 14), a lot of customary lawmaking, particularly in the area of the international human rights law, has become difficult to distinguish from the “classical” soft-lawmaking processes. See further on this Dupuy, *supra* n.127, 432-3. See also more generally Anthea Elizabeth Roberts, *Traditional and Modern Approaches to Customary International Law: a Reconciliation*, 95 A.J.I.L. 757 (2001); Bruno Simma and Philip Alston, *The Sources of Human Rights Law: Custom, Jus Cogens, and General Principles*, 12 Aust. Yb. Int'l L. 82 (1988-89); Frederick L. Kirgis, Jr., *Custom on a Sliding Scale*, 81 A.J.I.L. 146 (1987); Robert Y. Jennings, “Identification of International Law”, in BIN CHENG (ED.), *INTERNATIONAL LAW: TEACHING AND PRACTICE 3* (London: Stevens & Sons, 1982).

soft-law instruments;<sup>135</sup> (iv) the degree of concreteness of a normative provision does not necessarily increase as one moves from the soft-law end of the spectrum to the hard-law end;<sup>136</sup> and (v) “[a]fter all, the most severe psychological pressures ... in the international arena [tend to] result from unilateral but vague policy commitments which need not necessarily qualify as either a moral imperative or a direct legal obligation”<sup>137</sup>

Against an empirical background so unambiguous and clear, how reasonable can it be to insist on retaining the concept of soft law as an analytical heuristic? What purpose does it serve from the point of view of practical knowledge when it comes to explaining the logic of the international political process?

Over time, most of the empirical criticisms made by the regimes theorists were gradually received into the mainstream international law scholarship. On the one hand, it was acknowledged, soft law instruments “in many cases concretize[] abstract notions embodied in hard-law provisions[,] especially in a field like international human rights where the use of soft law for defining the precise content of hard law is more the rule than the exception.”<sup>138</sup> On the other hand, it was recognized that “if one looks to the reality of what states actually are doing, ... when they are concluding a soft law instrument[, they] in many ways behave precisely as though they were concluding a treaty.”<sup>139</sup> Despite many parallels between them, however, the pattern of the soft-law debate in the mainstream international law discourse did not, ultimately, proceed along the same lines as it did in the regimes theory scholarship. All the empirical recognitions notwithstanding, the basic question of the practical value of the analytical category of “soft law” was never explicitly raised by the mainstream international law scholarship.<sup>140</sup>

Consider, for example, the highly symptomatic treatment of the subject by Professor Gunther Handl. From the regimes theory point of view, the starting observations all seem quite familiar:

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<sup>135</sup> KRATOCHWIL, *supra* n. 134, 206; Martha Finnemore, *Are Legal Norms Distinctive?*, 32 N.Y.U. J. Int'l L. & Pol. 699, 703 (2000).

<sup>136</sup> Székely, *supra* n. 133, 234-41.

<sup>137</sup> KRATOCHWIL, *supra* n. 134, 206.

<sup>138</sup> Simma, *supra* n. 133, 380.

<sup>139</sup> Christine Chinkin, *Remarks*, 82 A.S.I.L. Proc. 389, 389 (1988).

<sup>140</sup> Compare ROSALYN HIGGINS, *PROBLEMS & PROCESS: INTERNATIONAL LAW AND HOW WE USE IT* 10 (Oxford: Clarendon Press, 1995).

We are all, of course, familiar with examples of formal international law such as treaties, whose ineffectiveness relegates them to the ranks of nonlegal norms, or, if you will, soft norms, notwithstanding their formal status. And vice versa, there is an abundance of, formally speaking, nonnormative documents such as resolutions and declarations of international organizations or conferences, which have proved to be highly effective internationally and must be deemed part and parcel of the international normative order. The frequency with which this discrepancy between formal status and legal significance is being encountered is decidedly on the rise.<sup>141</sup>

But where does Handl's argument go after this? Faced with the realization of the practical dysfunctionality of the established heuristic, Handl correctly concludes that

[t]he fundamental question here is [nothing less than] whether we, as international lawyers, approach this possibly bewildering normative scene with appropriate tools, with an adequate theory about law; whether we understand the [new] nature of international law as a process of communications, and whether we are able to distinguish between signals indicating international normativity and those that do not.<sup>142</sup>

So far, so good. The logic of the argument up to this point seems to be generally sound and quite unfaultable. But only so far.

At the next stage of his reasoning, having just about admitted that the theoretical machinery constructed around the conceptual opposition between "hard law" and "soft law" is completely ineffective for the task of explaining and describing the reality of the international political process, Handl suddenly performs a logical somersault, turning the argument on its head and concluding that the main challenge confronting the international law scholar at this point – instead of discarding completely the morally bankrupt frame of

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<sup>141</sup> Handl, *supra* n.128, 372.

<sup>142</sup> *Id.*

reference – is simply to study the factuality of the soft-law phenomena ever more attentively.<sup>143</sup>

One is reminded at this point of the medieval scholastic theologians who, reportedly,<sup>144</sup> would have endless heated debates about how many individual angels could normally fit on the top of a needle. Some thought the number was very high; others believed it was higher. To every suggestion that the analytical framework of their debate might actually be totally incommensurate with what could be practically verified, both parties normally responded with an invitation to try and improve the framework, which most of the time simply meant making the terms of argument even more complex. Nobody seemed to be willing to acknowledge that the most reasonable thing to do was to abandon the starting framework altogether. At any rate, nobody went on record admitting as much.

Now, the reason why I decided to mention this is that medieval scholastic theology, of course, provides a typical illustration of all that is wrong with *discursive formalism*. The defining feature of every species of discursive formalism, as Fitzmaurice's example shows, is the unshakeable belief in the existence of a basic set of foundational axioms from which all necessary knowledge can be directly and logically deduced. (Euclidean geometry and Wittgenstein's *Tractatus* are two classical illustrations of discursive formalist systems.) The basic criterion of truth in all formalist discourses, thus, is ultimately derived from the investigation of logical compatibility: a tested statement is supposed to be valid whenever it fits, on the ground of formal logic, with the accepted set of foundational axioms. If it can be shown to link up to the foundational axioms through a chain of formal-logical deductions, then the idea behind it must be truthful; if not, then it is false. Any arguments derived *ex practica* are simply dismissed as theoretically irrelevant. The foundational axioms are understood to embody all the truth about the studied object that can ever be obtained, which basically means there is no need ever to go back to the messy world of practice: if there can be no valid truth beyond what is already contained in the starting axioms, why look at the practical reality at all?

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<sup>143</sup> "In concluding, then, I would like to stress again that the fault-line of the changes experienced in the international legal system runs straight through the sources of international law. Indeed, soft law epitomizes the shifting characteristics of the international legal order. To understand soft law requires an understanding of this larger context." (Id., 373.)

<sup>144</sup> Although, as Felix Cohen suggests, the reports have not been confirmed. See Cohen, *supra* n.73, 810, n.4.

The parallels between Euclid and Fitzmaurice are simply impossible to overlook. So are, of course, the differences. Euclid never claimed to know the answer to the problems of conflict and cooperation in the international arena.

The historico-materialist approach to the interpretation of the social reality *absolutely* rejects every instance of formalist sensibility. According to the historico-materialist method, there can be no meaningful understanding of the logic of juridical relationships without a rigorously practice-oriented investigation of the juridical processes. The reality of the juridical instance does not exist outside the context of its dialectical interaction with other components of the social whole. The only “site” in which the factuality of the juridical order can be validly perceived is the *totality of all those effects* which it produces in the objective disposition of the social process, or, to use the Hauriol terminology, the structure of the bargaining situation. For that reason, if a close historical examination establishes the view that the conceptual distinction between the two entities called “hard law” and “soft law” is unsupported by the objective dynamics of the practical social process and is, therefore, irrelevant for the accurate understanding of the practical functionality of the international legal order, then it must inevitably follow that the analytical category “soft law,” at least at this stage of the discourse, must be discarded completely and categorically.

*c. The Patterns of the ILTMC RSA Functionality*

A question inevitably arises at this point: how can we then begin to know what the contents of the international legal order really are? How can we identify the objective practical effects of the juridical instance in the space-process of the complex whole?

Taking into account everything that has been said earlier about the difference between the discursive process of knowledge and the practical processes of the external reality cognized through it, it would be extremely foolish, of course, for anyone to assume at this point that it should be possible to gain an immediate access to the “truth” of the legal reality. Facts never arrive “neat and pure,” cleaned from the traces of their cognitive production. Every act of cognition is rooted in some sort of perspective. Perspectives, in their turn, are all products, in one way or another, of pre-discursive framings. A framing is an outcome of a process requiring a set of starting points and a productive formula by which they must be connected. The formula in question in our case has been provided

already by Althusser and Hale. The central concern facing our inquiry at the present stage, consequently, must be: where should we obtain the starting points of our analysis?

To answer this question correctly, let us return once more to the theory of the parallax view. In the historico-materialist theory of cognition, as Karel Kosík correctly pointed out,<sup>145</sup> every starting point is always, of necessity, relative. There is *no* single right starting frame for the interpretation of the reality of the social process. Every studied phenomenon must necessarily be studied from several different angles at once. It is only through their complex dialectical combination and continuous cross-illumination that a more or less reliable practical understanding of it can be constructed.

Transposing this theory into the present context, it seems to follow that while we certainly can recognize what angles of empirical examination would be *definitely* wrong for the purposes of our investigation, we can never insist that there should be only one angle for the examination of the contents of the new ILTMC regime. Moreover, recalling Ilyenkov's comments about the logic of permissible abstractions, whatever angles we do end up selecting in our examination, the first and the most pressing task will always be to justify those choices. Only an abstract approach based on a conjuncturally justified abstraction can supply valuable insights.

What follows, then, is a sequence of three separate but interconnected takes on the factuality of the hard law-soft law divide in the context of the new ILTMC project's practice. Each of the three takes produces a story situationalized on its own terms. Each offers its own perspective and supplies its own bit of information that can be then "plugged" into the Hlean algorithm. The basic logic underlying the selection of the three perspectives was dictated by the immediate structure of the practical bargaining situation: the first account corresponds to the delivering perspective of the new ILTMC project; the second to the perspective on its receiving end; the third to the perspective of the authors of the outside discourse dedicated to its description.

The background understanding of what has to be examined and analyzed from the point of view of each of the selected perspectives was derived on the basis of what appeared to be the most typical patterns characteristic of the corresponding experience fields. Considering the nature of the issue, that particular choice was made largely for want

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<sup>145</sup> See Chapter II, Section 2, at p. 153, above.



of a more optimal framing alternative. It is offered here without any prejudice to the general resolution of the question.<sup>146</sup>

(i) The Practice of the New ILTMC Project: the View on the Delivering End

A detailed examination of the formal attitude patterns adopted by the most noticeable producers of the new ILTMC project unmistakably indicates that in the eyes of the new ILTMC's RSA operators the differences drawn by the mainstream formalist scholarship between "hard law" and "soft law" are effectively totally irrelevant. Moreover, judging by the recent patterns of its evolution, the chief driving force behind the new ILTMC regime appears to operate predominantly through the instrumentality of soft-law mechanisms. Any attempts to make the suggestion that in the practical functionality of the ILTMC project

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<sup>146</sup> From the formal theoretical perspective, it could, of course, be said that the introduction of these background understandings will, nonetheless, predetermine the course of the subsequent discussion inasmuch as depending on which sets of initial data each story is going to focus on, one may obtain a range of completely different understandings of the studied field, which in its turn may then inspire a range of completely different methodological implications for the purposes of this study. From the functionalist dialectical perspective, however, this argument simply does not hold. First, there can be no such thing as presuppositionless thought. Every discussion is always predetermined by at least *some* kind of pre-framing. It is simply impossible to find a starting condition that is free of that kind of pre-determination. Since it is impossible to achieve that, it follows that it simply does not make sense to invalidate an analytical project for the sole reason that its cognitive course may have been predetermined by some sort of formal pre-framing. If one gets that radical about the purity of reasoning, there will be nothing left to reason about. After all, how does one know one is not simply imagining things? (As Bertrand Russell said, none of us can produce a guarantee that the universe was not invented fifteen seconds ago.) Second, if pre-framings are epistemically inevitable, then it necessarily follows that the only thing we can do to ensure we retain the required level of rigour in our subsequent analysis is to select only those pre-framings which on a *prima facie* empirical inspection would seem to be less likely to fall outside the "core meaning" area. Clearly, making that choice can never be a matter of "exact science,"; nevertheless, however agnostic one may be about the whole ILTMC question, it is difficult to imagine that either the FCNM or the HCNM will not usually find themselves at the core of what should be understood as the field of the new ILTMC project. Besides, to the extent to which the question asked of each account presented below is "how effective have the hard-law ILTMC sources been in structuring the minority-majority bargaining processes in the ECE region?", the task we are facing does not seem to be particularly tricky. The rules for identifying hard-law sources in international law, after all, have all been long defined.

the soft-law instruments may be anyhow deficient are, thus, completely and categorically misguided.

Indeed, even the most casual empirical survey would immediately point out that not only are there very few “proper” treaties in the ILTMC field – if we discount all bilateral *traité-contrats*<sup>147</sup> and the general human rights treaties that touch on the ILTMC problematic only in passing, such as the ICCPR or the European Convention on Human Rights, there would appear to be left only two<sup>148</sup> “proper” international treaties directly concerned with the traditional ILTMC problematic (the 1992 European Charter for Regional or Minority Languages<sup>149</sup> and the 1995 FCNM) – but that they also (i) establish no robust enforcement mechanisms;<sup>150</sup> and (ii) are essentially identical in terms of their contents with the main pre-existing soft law instruments, in particular, the CSCE Copenhagen Document. Furthermore, despite the famous declaration by the Badinter Committee that the rule requiring the demonstration of respect for the “rights of minorities” has now become part of *jus cogens*,<sup>151</sup> it also remains doubtful how much of the

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<sup>147</sup> As Max van der Stoel quite correctly observed, in the area traditionally covered by the ILTMC project bilateral treaties have been far more a monument to political compromise than an instrument of legal regulation. See Max van der Stoel, “Political Order, Human Rights, and Development”, in ZELLNER AND LANGE, *supra* n. 19, 71, 75-6.

<sup>148</sup> The formal status of the 1994 *Central European Initiative Instrument for the Protection of Minority Rights* (reprinted in PENTASSUGLIA, *supra* n.125, 299) is rather unclear. In any event, its practical causal impact on the development of the ILTMC RSA functionality appears to be negligible.

<sup>149</sup> *European Charter for Regional or Minority Languages (ECRML)*, 1992, CETS No. 148; reprinted in PENTASSUGLIA, *supra* n.125, 272.

<sup>150</sup> Both the FCNM and the ECRML are enforced by the COE Council of Ministers aided by respective advisory committees. Although the committees are authorized to examine periodic state reports and to solicit and receive further information from non-governmental sources, they are expressly mandated not to act as judicial bodies. Cf. V. Crnic-Grotic: “The Committee is not a judicial body; it is not authorized to bring judgments on State Parties. It is authorized [only] to monitor the implementation of the Charter and receive information to that end.” (quoted in THORNBERRY AND ESTEBANEZ, *supra* n.125, 156).

Cf. Article 26, *FCNM*:

“1. In evaluating the adequacy of the measures taken by the Parties to give effect to the principles set out in this framework Convention the Committee of Ministers shall be assisted by an advisory committee, the members of which shall have recognised expertise in the field of the protection of national minorities.

2. The composition of this advisory committee and its procedure shall be determined by the Committee of Ministers within a period of one year following the entry into force of this framework Convention.”

<sup>151</sup> See *infra* n.213.

new ILTMC regime has actually made its way into general international law. Certainly, as late as the early 1990s, it was still possible to claim that even the right reflected in “Article 27 [of the 1966 ICCPR] appears to be a right granted by a treaty without wider repercussions in customary law.”<sup>152</sup> In more recent times the general scholarly opinion seems to have become slightly more enthusiastic. Nevertheless, even on the most optimistic reading the general consensus today hardly seems to go beyond the view that it is only the “[b]asic aspects of protection under Article 27, such as the right to the equal enjoyment of one’s culture, and, in particular, to assert and preserve it free of any attempt at assimilation against one’s will [that] enjoy nowadays [sufficiently] wide support from the international community” to be “arguably, ... considered as strong candidates for customary law.”<sup>153</sup> The brunt of the regulatory burden, however one goes about it, from the perspective of the ILTMC’s producers and executors, thus, falls mostly on the “shoulders” of the soft law instruments.

The same pattern seems to hold true also when one considers the scope and the weight of the practical contributions made by juridical (hard-law) and political (soft-law) bodies. Thus, while the actual impact of the European Court of Human Rights on the development of the new ILTMC project has been generally insignificant,<sup>154</sup> the impact left by the OSCE HCNM and the EC organs,<sup>155</sup> through their implementation of the 1993 Copenhagen criteria for EU accession,<sup>156</sup> has been truly colossal.<sup>157</sup>

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<sup>152</sup> THORNBERRY, *supra* n.1, 246.

<sup>153</sup> PENTASSUGLIA, *supra* n.125, 111.

<sup>154</sup> For further discussion, see Geoff Gilbert, *The Burgeoning Minority Rights Jurisprudence of the European Court of Human Rights*, 24 HRQ 736 (2002).

<sup>155</sup> Although the Community institutions have never developed a substantive ILTMC policy of their own, they have been very active in upholding, borrowing, and relentlessly promoting the ILTMC regimes created by other international organizations. For further discussion, see THORNBERRY AND ESTEBANEZ, *supra* n.125, 19-20; PENTASSUGLIA, *supra* n.125, 145.

<sup>156</sup> The 1993 criteria for accession to the EU membership established by the Copenhagen European Council established the “stability of institutions guaranteeing democracy, the rule of law, human rights and respect for and protection of minorities” as one of the main pre-requisites that have to be fulfilled by the candidate states. As with the subsequent association agreements, the practice related to the implementation of the Copenhagen criteria clearly and unequivocally indicates the EC’s adoption of the CSCE/OSCE minority protection regimes as its practical litmus test. For further overview of the question, see *id.*, 154-5.

That said, the general situation is not as straightforwardly black and white.

If one considers closely the practice of the various ILTMC bodies, such as, for instance, the COE Advisory Committee on the FCNM, a decidedly non-judicial organ created to act as only a monitoring body,<sup>158</sup> it will quickly become clear that, regardless of their formal status as juridical or political organs, in their regular discourse such bodies frequently tend to adopt linguistic and discursive conventions most commonly associated with juridical practice. Furthermore, a close reading of the Advisory Committee's statements, for example, suggests that in its pronouncements on the member states' compliance patterns, the Committee is as likely to make regular references to formal hard-law sources, such as, for instance, the FCNM itself, as to the explicitly soft-law instruments, such as the Recommendations of the COE Committee of Ministers,<sup>159</sup> *sui generis* political agreements,<sup>160</sup> or even the recommendations of the European Committee for the Prevention of Torture.<sup>161</sup> The structure of the language formulas used – “the Committee urges,” “the Committee welcomes,” “the Committee stresses,” “the Committee considers it essential” – implies the adoption of the same attitude for all prescriptions issued by them,

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<sup>157</sup> Even before the 1993 Copenhagen Criteria were adopted, the EC had been very influential in the promotion of the new ILTMC project. The 1991 EC Guidelines on the recognition of new states and the authoritative statements issued by the Badinter Commission on their basis have, arguably, done more for the advancement of the ILTMC regime in the ECE region than the ICCPR and the FCNM taken together. As in the case with the Copenhagen criteria, the sole ILTMC provision in the text of the Guidelines refers in fact to the normative regime created within the framework of the CSCE. For further information on the drafting of the Guidelines, see T. M. Franck, “Postmodern Tribalism and the Right to Secession”, in CATHERINE BRÖLMANN ET AL (EDS.), PEOPLES AND MINORITIES IN INTERNATIONAL LAW 3, 24-5 (Dordrecht: Martinus Nijhoff Publishers, 1993).

<sup>158</sup> Alan Phillips, “FCNM: From Analysis to Action”, *MRG Briefings*, September 2002, at 2.

<sup>159</sup> See, e.g., Opinion on the “former Yugoslav Republic of Macedonia”, 27 May 2004, ACFC/INF/OP/I(2005)001, §§55, 78 (mentioning Recommendations (97) 20 and (2000) 4) and §29 (expressing dissatisfaction in the context of discussing compliance with Article 4 of the FCNM with the decision of the Macedonian government not to comply with the recommendations of the European Commission against Racism and Intolerance).

<sup>160</sup> *Id.*, §§10, 12, 13, 49 (mentioning the 2001 Ohrid Agreement signed by the Macedonian government and the representatives of Macedonia's all main political parties and countersigned by the special envoys of the European Union and the United States in Macedonia).

<sup>161</sup> See, e.g., *id.*, §53

regardless of the formal origin (hard law or soft law) of the underlying normative provisions. The same pattern also holds true for the OSCE HCNM.<sup>162</sup>

Outside the FCNM context, the source of most COE activities on the front of minorities policy has been the Parliamentary Assembly an organ that has purely consultative rather than legislative functions.<sup>163</sup> The second most influential COE structure, in terms of showing influence on the development of the ILTMC policies, has been the European Commission for Democracy through Law (the Venice Commission) established in 1990 as a partial agreement of 18 COE members. The Commission is composed of independent experts, mostly senior academics with extensive background in constitutional and international law. Most of the Commission's policy-making activities take the shape of advisory opinions and unbinding reports. In practical terms, however, it has been extremely influential, having supplied much of the ideological content of the 2001 Ohrid Agreements in Macedonia, the 1999 Rambouillet Interim Agreement for Peace and Self-Government in Kosovo, and the Constitutional Charter of Serbia and Montenegro and having effectively adjudicated a series of important intra-regional disputes, including not least those involving Hungary's infamous 2001 Act on Hungarians Living in Neighbouring Countries.<sup>164</sup>

(ii). The Practice of the New ILTMC Project: the View on the Receiving End

A detailed examination of the common experiences of the principal addressees of the new ILTMC project in the ECE region essentially confirms the correctness of the regimes theory critique of the general formalist position on the question of soft law: the degree of the "source-hardness" of any given normative standard has no actual bearing on the effective patterns of its observance. From the point of view of the ECE states and the respective ethnic communities, the involvement of the international RSA functionality in the structuration of the interethnic bargaining processes has been most immediate and intensive in cases involving decidedly soft-law normative instruments. At the same time, the soft-law nature of the original sources notwithstanding, if one looks closely at the tone

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<sup>162</sup> See the discussion in sub-section (iii) below.

<sup>163</sup> THORNBERRY AND ESTEBANEZ, *supra* n.125, 22.

<sup>164</sup> *Id.*, 24-5. See also DIACOFOTAKIS, *infra* n.193, 90-2.

of the rhetoric and other discursive patterns of that involvement, it will appear that on many occasions they have retained an essentially juridical (hard-law) appearance.

Consider the cases of Latvia and Estonia.<sup>165</sup> One of the central factors in the constitution of the polity-forming dynamics in the Baltic States in the last twenty years has certainly been the question of the minority/majority language policy. Prior to the dissolution of the USSR, it has provided one of the most important points of reference for the organization of the indigenous nationalist movements. Following the attainment of independence in 1991, in two cases out of three it became a central criterion for the definition of the citizenship base, turning in the ensuing years into a principal instrument for the distribution of the inter-ethnic power balance, ensuring, on the one hand, a direct “isolation of the Russian-speaking community from politics,” and, on the other hand, providing a means for the exercise of “ethnic control” over it in the areas of social security, labour market,<sup>166</sup> and even, to some extent, property market.<sup>167</sup> A great deal of the language legislation provisions adopted in Latvia and Estonia over the last seventeen years have thus had a direct and immediate impact on the political and economic well-being of the respective Russophone minority communities, whose proportionate shares in the total

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<sup>165</sup> For background information, see further Vello Pettai and Klara Hallik, *Understanding Processes of Ethnic Control: Segmentation, Dependency and Co-optation in Post-Communist Estonia*, 8 *Nations and Nationalism* 505 (2002); Vadim Poleshchuk, “Legal Aspects of National Integration in Estonia and Latvia”, *ECMI Report No. 33*, September 2002; Aadne Aasland and Tone Fløtten, *Ethnicity and Social Exclusion in Estonia and Latvia*, 53 *Eur.-Asia Stud.* 1023 (2001); Boris Tsilevich, *Development of the Language Legislation in the Baltic States*, *MOST J. Multicult'l Soc.* Vol. 3/2 (2001), <http://www.unesco.org/most/vl3n2tsilevich.htm>; GRAHAM SMITH ET AL., *NATION-BUILDING IN THE POST-SOVIET BORDERLANDS* (Cambridge: Cambridge University Press, 1998); Geoffrey Evans, *Ethnic Schism and Consolidation of Post-Communist Democracies: the Case of Estonia*, 31 *Comm. & Post-Comm. Stud.* 57 (1998); Jeff Chinn and Lisa Truex, *The Question of Citizenship in the Baltics*, 7 *J. of Dem'cy* 133 (1996); Lee Kendall Metcaff, *Outbidding to Radical Nationalists: Minority Policy in Estonia 1988-1993*, 2 *Nations and Nationalism* 213 (1996); GRAHAM SMITH (ED.), *THE BALTIC STATES: THE NATIONAL SELF-DETERMINATION OF ESTONIA, LATVIA AND LITHUANIA* (New York: St. Martin's Press, 1994); Raivo Vetik, *Ethnic Conflict and Accommodation in Post-Communist Estonia*, 30 *J. Peace Res.* 271 (1993).

<sup>166</sup> Pettai and Hallik, *supra* n. 165, 513-4, 516-8.

<sup>167</sup> See Erik Andre Andersen, *The Legal Status of Russians in Estonian Privatisation Legislation 1989-1995*, 49 *Eur.-Asia Stud.* 303 (1997).

population of these countries at the beginning of the 1990s constituted, according to the most conservative accounts, at least between 25% and 33%.<sup>168</sup>

Rather unsurprisingly, considering the fact that even the most liberal representatives of the two titular nations in question accepted the view that the domestic language policies adopted by their governments served in fact to isolate and disempower the Russophone population,<sup>169</sup> many of these policies have been frequently described to run counter to the central tenets of the established hard-law ILTMC canon.<sup>170</sup> After several years of anxious hand-twisting, the restrictive provisions were finally eased to some degree in the early years of the new century, allowing the representatives of the ethnic Russian communities to regain some of the political and economic rights removed from them following the dissolution of the Soviet Union. Considering the general patterns of those communities domestic passivity, it would appear, the achievement of such an outcome to a significant extent must be attributed to the role of the various international factors. A close examination of the available record, however, unequivocally indicates that whatever international pressure may have been applied to ensure the achievement of this concrete outcome at this concrete stage, virtually without exception came either from the European

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<sup>168</sup> See Kees Groenendijk, *Nationality, Minorities and Statelessness: the Case of the Baltic States*, 4 Helsinki Monitor 13 (1993). Cf. Aasland and Fløtten, *supra* n.165, 1023: “barely two-thirds of the Estonian population are ethnic Estonians, while little more than half of the Latvian population are ethnic Latvians.”

<sup>169</sup> On the isolation and disempowerment of minorities in Estonia and Latvia generally, see *id.*, 1046: “Belonging to the Slavic minorities in Estonia and Latvia means more often lacking the rights associated with citizenship such as voting rights in national elections and being able to hold leading public positions. Furthermore, it seems the Slavic population also faces lack of integration into several other arenas in society more often than the titular groups. They are less integrated and feel less secure in the labour market, they participate less often in civil and political activities and they more often report that economic hardships restrict them from participating in social activities.” The authors then go on to observe that “[e]ven though there is a significant relationship between ethnicity and different forms of social exclusion, and the presence of cumulative exclusion, the most important variable to explain social exclusion seems to be education. People with a low level of education are more often excluded along all the dimensions studied here.” (*Id.*) On the restrictive measures concerning the use of the Russian language in education, see further Tsilevich, *supra* n. 165, §§7.1-7.9; Poleshchuk, *supra* n.165, *passim*.

<sup>170</sup> A fact duly, if somewhat belatedly, recognized by the Human Rights Committee in *Antonina Ignatane v. Latvia*, Communication No. 884/1999, CCPR/C/72/D/884/1999 (2001).

Community's organs acting within the parameters of the Copenhagen criteria or the OSCE structures.<sup>171</sup>

Extending the scope of the scrutiny to the rest of the region, the same common pattern can also be detected in the cases of Romania,<sup>172</sup> Slovakia,<sup>173</sup> Hungary,<sup>174</sup> Ukraine,<sup>175</sup>

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<sup>171</sup> Cf. Tsilevich, *supra* n. 165, §5.1: "The language laws of all three Baltic states prescribe obligatory proficiency in the state language for employees in certain fields. Provisions enshrined in the earlier versions of Latvian and Estonian language laws caused protracted controversy in that the new laws extended the application of the language requirements to include employees working in the private sector. Only after the OSCE High Commissioner on National Minorities and the European Commission became actively involved, was a compromise achieved." *Id.*, §8.10: "Thus far, internal dialogue has often been replaced with dialogue with, on the one hand, the OSCE, the Council of Europe and the European Union, and with the Russian Federation on the other." Further on the impact of the OSCE HCNM on the formation of Estonian minorities policy, see Margit Sarv, "Integration by Reframing Legislation: Implementation of the Recommendations of the OSCE High Commissioner on National Minorities to Estonia 1993-2001", *CORE Working Paper No.7*, 2002; Li-Ann Thio, *Developing a 'Peace and Security' Approach towards Minorities' Problems*, 52 *ICLQ* 115, 143-4 (2003); Sergey Khrychikov and Hugh Miall, *Conflict Prevention in Estonia: the Role of the Electoral System*, 33 *Security Dialogue* 193 (2002).

<sup>172</sup> The central ILTMC-related question in Romania in the post-Cold War era has been the status of the Hungarian minority, in particular in Transylvania. The immediate catalyst for the eruption of the minority-majority tensions in many cases was the issue of the Hungarian-language University in Cluj. For further review of the general patterns of international contribution to the shaping of the Romanian position on this front, see the impressively comprehensive István Horváth, "Facilitating Conflict Transformation: Implementation of the Recommendations of the OSCE High Commissioner on National Minorities to Romania 1993-2001", *CORE Working Paper No.8*, 2002.

<sup>173</sup> Like in Romania, the central ILTMC-related question in Slovakia is the status of the Hungarian minority. Further on the international contribution to the shaping of the Slovak domestic minority communities regime, see Georrey Pridham, *The European Union's Democratic Conditionality and Domestic Politics in Slovakia: the Mečiar and Dzurinda Governments Compared*, 54 *Eur.-Asia Stud.* 203 (2002); Geoffrey Pridham, *Complying with the European Union's Democratic Conditionality: Transnational Party Linkages and Regime Change in Slovakia 1993-1998*, 51 *Eur.-Asia Stud.* 1221, 1223-6 (1999). For further background information, see Pál Czáký, *Experiences from Cooperating with the OSCE HCNM: the Case of the Slovak Republic*, 8 *Int'l J. Min & Gr. Rts* 21 (2001); Martin Brusis, *Ethnic Rift in the Context of Post-Communist Transformation: the Case of the Slovak Republic*, 5 *Int'l J. Gr. Rts* 3 (1997); Šarlota Pufflerová, *National Minorities in Slovakia*, 5 *Helsinki Monitor* 52 (1994).

<sup>174</sup> Hungary, of course, presents a slightly more difficult case than other ECE states. First, its very detailed minorities legislation was adopted quite early on following the end of the Cold War (the preparatory work had begun already in 1989) and has been little changed since. Second, its famous 1993 Act LXXVII on the Rights of National and Ethnic Minorities does not seem to have been influenced by any concrete international sources and, indeed, in several crucial aspects appears to strike a completely different note from



and Macedonia.<sup>176</sup> Whenever any substantial international contribution to the development of the domestic minorities question policy was felt in any of these states, it almost always came as a result of a soft-law pressure issuing from the political institutions of the OSCE, the European Union,<sup>177</sup> and, to a lesser extent, the NATO and the so-called international civil society. Although formally speaking the hard-law influence has not been entirely absent,<sup>178</sup> in the large scheme of things, the contribution of the international apparatuses

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the one usually replicated in the main ILTMC instruments. See further Timothy William Waters and Rachel Guglielmo, *“Two Souls to Struggle With ...”: the Failing Implementation of Hungary’s New Minorities Law and Discrimination against Gypsies*, 9 Harv. Hum Rts. J. 297, 301-2 (1996). The common understanding on the issue, however, seems to be that the Hungarian minorities legislation was essentially passed “for foreign policy reasons” (id., 300, 312) with a view to preparing the requisite moral-political ground for the transnational mobilization of the Hungarian diasporas in the neighbouring states and simultaneously earning the approval of the international community for its progressive stance (id., 312). See on this further Michael R. Geroe and Thomas K. Gump, *Hungary and a New Paradigm for the Protection of Ethnic Minorities in Central and Eastern Europe*, 32 Col. J. Transn’l L. 673, 688-9 (1995); Gwyneth E. Edwards, *Hungarian National Minorities: Recent Developments and Perspectives*, 5 Int’l J. Min. & Gr. Rts 345, 349 (1998); Andrea Krizsán, *The Hungarian Minority Protection System: a Flexible Approach to the Adjudication of Ethnic Claims*, 26 J. Ethnic & Migr. Stud. 247, 249-50 (2000); Ferenc Eiler and Nóra Kovács, “Minority Self-Governments in Hungary”, in KINGA GÁL (ED.), *MINORITY GOVERNANCE IN EUROPE* 173, 175 (Budapest: Open Society Institute, 2002). For background information on the Hungarian diasporas, see also generally Edwards, op.cit.; Krizsán, op.cit.

<sup>175</sup> The two main bones of contention in Ukraine on this front have been the question of the Russian-speaking minority and the question of the Crimean Tatar autonomy. For further discussion of the international contribution to the resolution of these two questions, see Volodymyr Kulyk, “Revisiting a Success Story: Implementation of the Recommendations of the OSCE High Commissioner on National Minorities to Ukraine 1994-2001”, *CORE Working Paper 6*, 2002 (esp. at pp. 127-8); Oxana Shevel, *Crimean Tatars and the Ukrainian State: the Challenge of Politics, the Use of Law, and the Meaning of Rhetoric*, 1(7) *Krimskii Studii* 109 (2001); John Packer, “Autonomy within the OSCE: the Case of Crimea”, in MARKKU SUKSI (ED.), *AUTONOMY: APPLICATIONS AND IMPLICATIONS* 295 (The Hague: Kluwer, 1998).

<sup>176</sup> See further Farimah Daftary, *Conflict Resolution in FRY Macedonia: Power-Sharing or the ‘Civic Approach’?*, 12 *Helsinki Monitor* 291 (2001); Arie Bloed, *New High Commissioners on National Minorities Commences His Activities*, 12 *Helsinki Monitor* 220 (2001).

<sup>177</sup> For a further discussion of the soft-law influence exercised on the ECE states by the EU political institutions, see also Geoffrey Pridham, “The European Union, Democratic Conditionality and Transnational Party Linkages: the Case of Eastern Europe”, in J. GRUGEL (ED.), *DEMOCRACY WITHOUT BORDERS* (London: Routledge, 1999).

<sup>178</sup> Several minorities-related cases from the region came before the European Court of Human Rights. See further Gilbert, *supra* n.154.

enforcing the execution of hard-law sources-derived standards has been effectively negligible.

An attentive examination of the bilateral ILTMC treaties produced in the region throughout the examined period similarly indicates that on most occasions their production and execution was directly determined by the impact of the international soft-law instruments. Article 15 of the 1995 Slovak-Hungarian treaty on good-neighbourly relations<sup>179</sup> provides in this regard a particularly telling illustration.<sup>180</sup>

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<sup>179</sup> For further discussion of the treaty, see Bart Driessen, *A New Turn in Hungarian-Slovak Relations? An Overview of the Basic Treaty*, 4 Int'l J. Min. & Gr. Rts. 1 (1997). On the Treaty's incorporation of the international soft-law instruments, see *id.*, 9-13.

<sup>180</sup> Article 15, Treaty on Good-Neighbourly Relations and Friendly Cooperation between the Republic of Hungary and the Slovak Republic, 1995 (available from [http://www.htmh.hu/en/?menuid=06&country\\_id=Slovakia&id=212](http://www.htmh.hu/en/?menuid=06&country_id=Slovakia&id=212)):

“(2) The Contracting Parties, in protecting the national minorities and the rights of persons belonging to those minorities, are guided by the following principles:

(a) Membership of a national minority shall be a matter of free personal choice and no disadvantage shall result from the choice of such membership;

(b) All persons belonging to a national minority shall be equal before the law and have equal protection of the law. In this respect, any discrimination based on belonging to a national minority shall be prohibited;

(c) Persons belonging to national minorities shall have the right, individually or in community with other members of their group, to freely express, maintain and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects;

(d) Reaffirming the aims of their general integration policy, the Contracting Parties shall refrain from policies and practices aimed at assimilation of persons belonging to minorities against their will, and shall protect these persons from any actions aimed at such assimilation. The Contracting Parties shall refrain from measures that would alter the proportions of the population in areas inhabited by persons belonging to national minorities and which aim at restricting the rights and freedoms of those persons that would be to the detriment of the national minorities;

(e) Persons belonging to national minorities shall have the right to establish and operate, in conformity with their respective legislation and with the objective of maintaining, development and transfer of their identity, their own organisations and associations, including political parties and educational, cultural and religious organisations. Both Governments shall create legal conditions to this effect;

(f) persons belonging to national minorities shall have the right to take part effectively at the national, and where appropriate, at the regional level, in the decisions affecting the minorities or the regions inhabited by the minorities, in the manner which is not incompatible with domestic legislation;

(g) persons belonging to the Hungarian minority in the Slovak Republic and those belonging to the Slovak minority in the Republic of Hungary shall have the right to use freely, individually or in community with other members of their group, orally or in writing, their mother tongue in public or private life. They

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shall also have the right, in conformity with the domestic law and with the international commitments undertaken by the two Contracting Parties, to use their mother tongue in contacts with official authorities, including public administration, and in judicial proceedings, to display in their mother tongue the names of municipalities in which they live, street names and names of other public areas, topographical indications, inscriptions and information in public areas, to register and use their first names and surnames in this language, to have - without prejudice to the learning of the official language or the teaching in this language - adequate opportunities in the framework of the State educational system for being taught their mother tongue or for receiving instruction in their mother tongue and the right of access to public mass media without discrimination and the right to their own media. The Contracting Parties, in accordance with their international commitments, shall take all the necessary legal, administrative and other measures for the implementation of the aforementioned rights unless their respective domestic law already contains such provisions;

(h) in accordance with point (c) of this paragraph they shall create the necessary conditions enabling the persons belonging to national minorities to preserve their material and architectural memorials and memorial sites constituting their cultural heritage, history and traditions.

...

(4) The Contracting States declare

(a) that as regards the regulation of the rights and obligations of persons belonging to national minorities living within their respective territories they shall apply the Framework Convention for the Protection of National Minorities adopted and signed by the Contracting Parties on 1 February, 1995, as from the date of ratification of the present Treaty and of the above Framework Convention by both Contracting Parties, unless their respective domestic legal systems provide a broader protection of rights of persons belonging to national minorities than the Framework Convention,

(b) that without prejudice to the content of the previous paragraph (a), they shall apply, in defending the rights of persons belonging to the Hungarian minority in the Slovak Republic and the Slovak minority in the Republic of Hungary, the norms and political commitments laid down in the following documents as legal obligations:

- Document of June 29, 1990 of the Copenhagen Meeting of the Conference of Human Dimension of the Conference on Security and Co-operation in Europe;

- Declaration 47/135 of the General Assembly of the United Nations on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities;

- Recommendation 1201 (1993) of the Parliamentary Assembly of the Council of Europe, respecting individual human and civil rights, including the rights of persons belonging to national minorities.

(5) Nothing in this Article shall be interpreted as implying any right to engage in any activity or perform any act contrary to the fundamental principles of international law and in particular of the sovereign equality, territorial integrity and political independence of States.

(6) The Contracting Parties shall co-operate to assist one another in following the implementation of the content of this Article. They shall therefore consider the manner by which they can, in the framework of their mutual co-operation, and on the basis paragraph (1) of Article 5 of the present Treaty and in the spirit of mutual understanding and confidence, exchange information about, and experience with, questions relating to

(iii) The Practice of the New ILTMC Project: the View of the Outside Observer

Reviewing the field of the contemporary scholarship dedicated to the study of the new ILTMC project similarly leaves no room for doubt about the practical relevance of the hard-law/soft-law distinction in the implementation of new ILTMC project.

For Gaetano Pentassuglia, for example, it appears beyond doubt that “[i]n fact, beyond the language of ‘hard’ or ‘soft’ law in the mould of which minority rights norms have been, or may be, cast, lies the deeper aspect that compliance seems most directly linked to the existence of effective and independent scrutiny,” and that of the many available scrutiny mechanisms in the ILTMC area the most typical example of one “with teeth” is not a juridical (hard-law) mechanism of the European Court of Human Rights but the completely political (soft-law) mechanism for the manipulation of the EU conditionality criteria assessment.<sup>181</sup>

A telling pattern also emerges in a recent magnum opus by Patrick Thornberry and María Amor Martín Estébanez, entitled *Minority Rights in Europe*.<sup>182</sup> From the opening section on “The new awareness” through to the last chapter on the COE Human Rights Commissioner, the study eschews drawing *any* practical distinctions between hard law and soft law sources. The discussion in the introductory chapter of the UN practice, for instance, explicitly brings under a single heading, revealingly labelled “United Nations Standards,” both hard-law (ICCPR) and soft-law instruments (1992 Declaration), refusing to distinguish between them in terms of their formal standing under the ICJ Statute.<sup>183</sup>

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the application of the present Article. To this end, they shall set up an intergovernmental joint commission, entitled to make recommendations, consisting of section whose composition will be determined as they deem necessary. In monitoring the implementation of their commitments in the field of protection of national minorities, the Contracting Parties shall apply the rules of the Council of Europe and the Organisation for Security and Co-operation in Europe that are binding upon both Contracting Parties.”

<sup>181</sup> PENTASSUGLIA, *supra* n.125, 253-5. For a different argument tending towards the same general conclusion, see John Packer, “The Contemporary Protection of Minorities”, in MORTEN BERGSMO (ED.), *HUMAN RIGHTS AND CRIMINAL JUSTICE FOR THE DOWNTRODDEN* 470, 480-3 (Leiden: Nijhoff, 2003) (observing that the hard-law supervisory mechanisms in the ILTMC field have been largely ineffective and that “notwithstanding the limits and peculiarities of his mandate, the HCNM has been the most active instrument for the protection of minorities in Europe and, indeed, in the world”).

<sup>182</sup> *Supra* n.125.

<sup>183</sup> *Id.*, 12-6.

Departing from the UN context, the authors move in a single breath from a consideration of the 1989 ILO Convention on Indigenous and Tribal Peoples (a typical hard-law instrument) to a detailed summary of the OSCE documents and the programmatic policy statements of the European Commission (all unmistakably soft-law instruments),<sup>184</sup> observing along the way that not only is it true that, “as the experience of the OSCE shows, a great deal can be achieved in minority protection through methods other than the ‘hard law’ approach,”<sup>185</sup> but that it also was the “OSCE standards concerning minorities” that “clearly influenced the drafting of UN and Council of Europe texts”<sup>186</sup> and set the plank in virtually every area of the new ILTMC dogma, from the question of the relationship between official and minority languages to the question of the minority communities’ right to territorial autonomy, any “departures from which may provoke controversy.”<sup>187</sup>

Turning directly to the experience of the OSCE structures, in a recent study published in the *NYU Journal of International Law and Politics*, Steven Ratner asserts that on the basis of the evidence he collected during a year-long in-field investigation, it clearly appears that a key factor behind the brilliant record of OSCE achievements in the field is its rather promiscuous approach to sources-invocation:

the [OSCE HCNM] routinely cite[s] a spectrum of norms in his communications with governments and minorities. These range from the harder ICCPR and the European Convention on Human Rights to the softer OSCE documents and the U.N. Declaration on Minorities. [From the start of his involvement in the field] the High Commissioner has avoided giving any particular attention in his letters and discussions to positivism’s legal/non-legal distinction. Instead, he has relied upon the notion of “international standards” as a sort of umbrella to describe the ... the accumulated body of law and policy ... regardless of the authority of the body promulgating the standard to make law.<sup>188</sup>

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<sup>184</sup> Id., 16-20.

<sup>185</sup> Id., 18.

<sup>186</sup> Id., 17.

<sup>187</sup> Id., 17.

<sup>188</sup> Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. Int’l L. & Pol. 591, 659 (2000).

Reflecting on Ratner's observations, two basic points immediately seem to spring to attention. First, in the eyes of an outside observer trained both in the disciplines of international law and international relations, the HCNM's practice clearly appears to ignore all the basic differences between hard law and soft law. Second, from the same perspective, the HCNM also comes across as someone who is not even trying to cover up the fact that he pays no attention to the questions of mandate/source/institutional competence when considering which "international standards" should be applied as part of his international contribution. Both observations, on reflection, suggest an effective absence in the HCNM's practical paradigm of any awareness of the soft-law problematic as well as indicate the presence of a deep-seated belief: (i) that not only the procedure by which the given state may have consented to a given norm, but also the fact of the provision of the state consent itself are not actually important;<sup>189</sup> (ii) neither the degree of transparency nor the procedural rigour followed in the adoption of the given standard ultimately has any bearing on deciding how appropriate it is to invoke it. Or, in other words, what matters is what the HCNM thinks about the substance of the standard, not its normative pedigree – a typical symptom of a technocratic/standards-are-an-embodiment-of-objective-expertise sensibility.

Of course, observes Ratner, whenever the state in question turns out to be a party to a binding treaty that addresses the issue at hand directly, the HCNM's "practice suggests he will make his argument in terms of the treaty."<sup>190</sup> Nevertheless, "while he might note, in the context of citing a convention, that a state is party to it, he often and without qualification makes arguments based on treaties to which a state is not party or treaties that have not yet entered into force."<sup>191</sup> At the end of the day, concludes Ratner, it remains quite clear that in his practice the HCNM has an unmistakable propensity to marshal "whatever arguments [he] can muster" to support his points, which basically means that

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<sup>189</sup> Indeed, continues Ratner, it is not unusual to discover in the HCNM's communications and formal letters addressed to the OSCE member states and the corresponding minority communities side by side with references to the ICCPR references to documents issued by the OSCE, the COE Parliamentary Assembly, and even the COE Higher Education and Research Committee (see *id.*, 660).

<sup>190</sup> *Id.*

<sup>191</sup> *Id.*, 659.

whenever he is pressed to do so, the HCNM will cite all “international standards he can find to back up his position, even if, in effect, in some cases they may only be standards because he says they are.”<sup>192</sup>

If all that were not enough, the final straw arrives in a recent monograph written by Yeorgios Diacofotakis, a Greek diplomat. Reviewing the patterns of the HCNM’s norm-entrepreneurial practice, Diacofotakis observes:

while his tools may be political, his blueprints are based on international legal standards. He regards them as the minimum level of acceptable behaviour towards persons belonging to national minorities and as general principles, guiding both governmental policies and his own involvements in states faced with inter-ethnic problems. In fact, he always refers to and compares them with existing state practices. Besides, he further elaborates on them to guarantee the unimpeded development of the minority identity, beyond minimum requirements. His everyday toolbox contains the Copenhagen Document, the UN Declaration on the rights of persons belonging to minorities and the Framework Convention of the Council of Europe. He considers their full and effective implementation an essential prerequisite for lasting peace and stability in Europe. What really matters for him is the spirit of the international standards, whether political or legal, and not their letter alone.<sup>193</sup>

The spirit of the law, of course, is a rather notorious animal, all claims of familiarity with which in a secular environment have always been treated as symptoms of an essentially *legislative* sensibility. And that, of course, concludes Diacofotakis, is often exactly the kind of sensibility which the HCNM’s institutional practice exhibits:

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<sup>192</sup> Id., 661 (emphasis added).

<sup>193</sup> YEORGIOS I. DIACOFOTAKIS, EXPANDING CONCEPTUAL BOUNDARIES: THE HIGH COMMISSIONER ON NATIONAL MINORITIES AND THE PROTECTION OF MINORITY RIGHTS IN THE OSCE 28 (Athens: Ant. N. Sakkoulas Publishers, 2002) (emphasis added). Cf. Thio, *supra* n.171, 148 (observing that the HCNM certainly “contributes to the development of the pool of soft norms. Where references to vague notions such as ‘autonomy’ do not provide much guidance, he makes suggestions, sometimes stemming from general ideas or the other states’ practice to elaborate on these concepts.”). On the real weight of the HCNM’s suggestions, see further Chapter I, Section 2, p. 34, above.

The work of the HCNM shed light on ambivalent or little defined notions. He gave meaning to words and, thus, he put together theory on and practice of minority rights. Being a de facto standard-implementing instrument, he expressed his thoughts in speeches, statements and recommendations to states. The non-binding character of the OSCE commitments became then more and more binding through many of his activities and initiatives. His recommendations to states contained specific measures and described the tasks ahead. They could hardly be termed as non-binding. Besides, his well-founded policy-oriented arguments, both political and legal, were backed by the Permanent Council and the other OSCE organs and institutions.<sup>194</sup>

In short,

[t]he whole process and its outcome leads to the conclusion that a) the HCNM's involvement had an effect on the states concerned, b) states were invited to seriously consider to apply his advice, and c) monitoring of the states' subsequent steps and compliance with his recommendations was done by the HCNM, the OSCE and its member-states. In brief, states concerned were shown a concrete path to follow, which was based on international standards and common sense, having due regard of the political realities in all circumstances.<sup>195</sup>

What more needs to be said?

If the totality of norms created through the Article 38 sources is, indeed, what constitutes the international *corpus juris*, then, perhaps, Pashukanis was right after all, when he wrote of the inevitable *withering away of the law*.<sup>196</sup> Perhaps, the era of the hard-law-making – by formal treaties and state consent – is now over in international law, and a new mechanism of international standard-setting has emerged to replace it, one in which former Dutch foreign ministers, using their common sense and theories of what might be the spirit

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<sup>194</sup> DIACOFOTAKIS, *supra* n.193, 141 (emphasis added).

<sup>195</sup> *Id.* (emphasis added).

<sup>196</sup> See generally E. PASHUKANIS, *SELECTED WRITINGS ON MARXISM AND LAW* (ed. by Piers Beirne and Robert Sharlet; transl. by Peter B. Maggs; London: Academic Press, 1980).



of the law, are entrusted to make up whatever “international standards” they desire the “states concerned” to follow, have them elevated to the rank of international “expertise” of “good governance practices,” getting all of that duly backed up by all the sticks and carrots that the OSCE Permanent Council can muster, encouraged by whatever dubious “coalitions of the willing” may be lurking in its shadows, waiting for the green light to be lit for another diplomatic demarche against another recalcitrant East European prime-minister. Perhaps, all this is only the beginning of something far greater and more far-reaching. Perhaps. Or perhaps not. In any event, what matters for the purposes of the present inquiry at the present stage does not yet require answering any of the grand questions haunting this paragraph.

The common refrain of the three accounts presented above delivers a single, clear bottom-line message confirming the utter irrelevance of the traditional distinction between hard-law and soft-law sources adopted in the legal formalist discourse and pointing out the basic outlines of the new ILTMC’s RSA functionality, the practical foundation of the effectively existing new ILTMC regime.

*d. Mapping the New ILTMC: the Concept of the Minority Community*

No question provides a better introduction to the functional logic of the new ILTMC regime than the way it conceptualizes the social factuality of the minority communities. To start with the obvious, there is no official definition in the existing international legal order of what exactly it tends to understand under the rubric of “minority community.”<sup>197</sup> The absence of a formal definition, as the classics of liberal political theory suggest, usually tends to indicate the presence of what Schmitt described as the “sovereign decision”<sup>198</sup> and Beccaria simply called tyranny.<sup>199</sup> Or, in other words, whoever gets to operate an RSA

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<sup>197</sup> For further discussion, see PENTASSUGLIA, *supra* n. 125, 55 et seq.; Packer, *supra* n.15.

<sup>198</sup> See CARL SCHMITT, *POLITICAL THEOLOGY* 5-10 (transl. by George Schwab; Cambridge, Mass.: MIT Press, 1985).

<sup>199</sup> See CESARE BECCARIA, *ON CRIMES AND PUNISHMENT* 12-3 (transl. by David Young; Indianapolis: Hackett, 1986).

functionality without being bound by a publicly known formula setting out the limits of that functionality's applicability is where the sovereignty (*suprema potestas*) effectively resides.

In the case of the new ILTMC regime's application in the ECE, the sovereignty resides with the international civil servants, such as, for instance, the OSCE HCNM, and the various international experts employed by them. Recall once more Diacofotakis's observations about common sense: "Even though I may not have a definition of what constitutes a minority, I would dare to say that I know a minority when I see one."<sup>200</sup>

From the substantive point of view, of course, this is not at all a novel position in the general ILTMC practice. The same sensibility, one will recall, had been lurking, for instance, in the jurisprudence of the Human Rights Committee as far back as the early 1980s. Then, having picked up on the Permanent Court of International Justice's famous dictum that the membership of a minority community is ultimately always "a question of fact and not one of intention,"<sup>201</sup> the Committee famously pronounced, in the *Lovelace* case, that the decision of the Canadian authorities to exclude the applicant in question from enjoying some of the rights accruing to the Native American communities under the then Canadian domestic legislation had led to an unquestionable breach of the applicant's rights under Article 27 of the ICCPR because, despite the fact that the applicant had previously moved out from the Tobique Reserve and thus left the respective minority community for a number of years, she still continued to remain "ethnically a Maliseet Indian," which meant, therefore, that she was fully entitled "to be regarded as 'belonging' to this minority."<sup>202</sup> Without providing any actual explanation for the socio-theoretical reasoning which it used to justify this finding of facts – what was it exactly that made the applicant a member of the respective community? the fact that she was registered at birth as "Maliseet Indian"? the fact that she grew up on the Tobique reserve? why were the Maliseet traditional views on the matter not made the main criterion for resolving the membership dispute? why was the tribal council's decision to decline the applicant's request to rejoin the tribe ignored? – the Committee, effectively, sent out a message to all the Covenant's parties

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<sup>200</sup> Max van der Stoep, "Case Studies on National Minority Issues: Positive Results", in ZELLNER AND LANGE, *supra* n. 19, 45, 45.

<sup>201</sup> *Rights of Minorities in Upper Silesia (Germany v. Poland)*, 1928, PCIJ, Series A, No. 12, 32.

<sup>202</sup> See §14 of *Sandra Lovelace v. Canada*, Communication No. R.6/24, UN Doc. Supp. No. 40 (A/36/40), 166 (1981).

indicating that so long as its members' common-sense judgment of an individual's position suggested that she was a member of a protected minority group, the Committee would not allow itself to be deterred by the absence of any formal definition of the concept of minorityhood in the text of the Covenant itself, even if one of the main customary principles of international law (reiterated famously in the *Lotus* judgment) had long been that, unless clearly stipulated otherwise, all ambiguities in the applicable international rules had to be interpreted in a way allowing the greatest measure of freedom for sovereign states.<sup>203</sup>

An expression of an aspiration on the part of an international civil servant to act as a Schmittian sovereign on the account of protecting the spirit of the ILTMC project, thus, is not, in itself, a novel phenomenon.<sup>204</sup> What is novel, however, is the scale of the aspiration and the reach of the aspirant's self-aggrandizement. At no point before had anyone attempted to get as much mileage out of their alleged expertise in knowing "what minorities really need."

The silent bottom-line message inscribed in the patterns of the HCNM's practice – the issuance of the countless "country recommendations," the continuous promulgation of "thematic expert recommendations," the pursuit of numerous policy interventions, keynote addresses, and topical press releases, all the while no official definition binding on the Commissioner in the elaboration of the most central aspect of his mandate has ever been produced – says more, perhaps, about the functional nature of the new ILTMC project than any number of its official self-descriptions ever could. For a legal realist ear, it says exactly what one needs to know in order to begin producing a Hlean map of the new

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<sup>203</sup> See Chapter I, Section 2, p. 39, above.

<sup>204</sup> For other examples of the HRC's Schmittian tendencies in the application of Article 27, see, e.g. *Ivan Kitok v. Sweden*, Communication No. 197/1985, CCPR/C/33/D/197/1985 (1988), in which the Committee declared, firstly, that although it had no standing to intervene with "the regulation of an economic activity," "where that activity is an essential element in the culture of an ethnic community, its application ... may fall under article 27" (§9.2), and, having failed to leave in the process any meaningful clues as to how the "essential elements" ought to be identified in practice, that, secondly, "the right to enjoy one's own culture in community with the other members of the group cannot be determined in *abstracto* but has to be placed in context," thus effectively indicating that, in the end, it is pretty much up to the Committee itself to decide what exactly should be included under the heading of "minority culture" (§9.3).

ILTMC regime. It gives the answer to the question every Holmesian bad man always wants to have answered more than any other: where exactly does the buck stop?

With this as our next point of departure, let us turn now to the main task of this chapter itself.

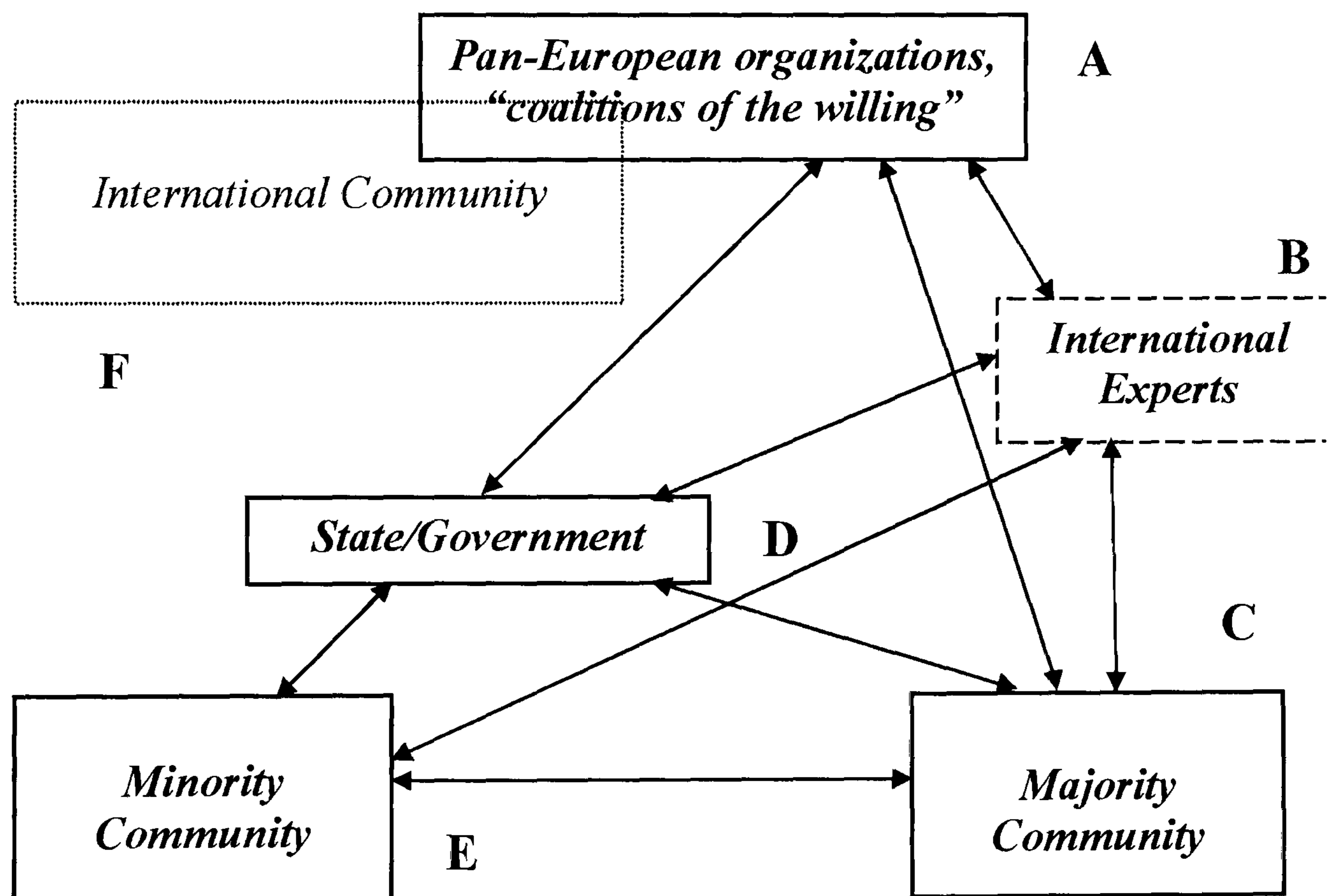
### Section Three

#### The Real New ILTMC Regime

*a. The Portrait*

As the old saying puts it, a picture is worth a thousand words. A close examination of the practical patterns of the new ILTMC's RSA functionality identified in the previous section suggests that the new ILTMC regime's portrait can be essentially reduced to the following diagram.

*The Effectively Existing Legal Regime Established by the New ILTMC Project in the ECE Region*



*b. The Addressees of the New ILTMC Regime (Participants of the Bargaining Situation)*

- (i) *Minority Community, Majority Community, and State/Government.* The first thing that has to be said about the legal status of minority and majority communities is that in the eyes of the currently existing ILTMC regime, they are not recognized as legal subjects. Even though its provisions directly affect the bargaining interests of both minority and majority communities, by the terms of its functional organization the new ILTMC regime addresses itself exclusively to sovereign states.<sup>205</sup> As a result of such a state of affairs, the amount of the bargaining “boost” the two types of communities receive from the international legal order *qua* communities is radically diminished. Where other political subjects (e.g. trade unions) may be strengthened in their relative bargaining positions thanks to different international remedies, minority and majority communities are essentially abandoned by international law to their own devices and left to fend for themselves. With the exception of several situations where a set of remedies may accrue through an indirect jurisdictional effect (as, for instance, would be the case when the members of a minority community act in pursuit of its interests under the Convention on the Elimination of All Forms of Racial Discrimination<sup>206</sup> or Article 27 of the ICCPR),<sup>207</sup> all their interests *qua* communities are relegated into the category of potential *damnia absque injuria*, which means that almost any outcome their bargaining counterparts may achieve in the course of their open and sublimated conflicts with the communities in question will be effectively legitimated by the international legal order. Thus, even though from the narratological point of view both types of communities are clearly present in the body of the regime’s

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<sup>205</sup> Technically, of course, only states, not governments, are subjects of international law. However, the general ideological dynamics operated by the new ILTMC project, especially in situations involving the alleged violations of the ILTMC standards, regularly tends to seek to decouple the concept of the “state” from that of the “people,” thus in effect reducing the ontological plane occupied by the former to the entity commonly identified in the domestic arena as “government.”

<sup>206</sup> *International Convention on the Elimination of All Forms of Racial Discrimination*, 1966, 660 UNTS 195.

<sup>207</sup> See also Opinion 1 of the Badinter Committee, *infra* n.213, which through a linguistic imprecision can be interpreted to have made certain minority communities into beneficiaries of a *jus cogens* norm.

discourse actantially<sup>208</sup> and sometimes may even be invoked in it directly (as background references used to contextualize, for instance, the general requirement to preserve a cultural balance),<sup>209</sup> neither of them receive any bargaining support from the international juridical instance. There are no centrally provided supranational remedies created for the protection of either type of community interests. The only RSA-use potentiality left available, consequently, is communal self-help. The terms of the existing regional regimes on the use of force, terrorism, and non-intervention in internal affairs, however, indicate that neither minority nor majority communities residing in the ECE area may ever resort to self-help involving the use of armed violence, especially when acting on a transnational scale.<sup>210</sup> The scope of permissible tactics left by the new ILTMC regime within the communities' reach is thus very severely limited.

- (ii) *International Community, Pan-European Organizations, and "Coalitions of the Willing."* Even though a close actantial analysis of the regime's discourse suggests otherwise,<sup>211</sup> there is, in fact, no such participant as "international community" within the plane of the new ILTMC regime. All its effective rights and functions are exercised immediately by the totality of pan-European organizations with their bodies of international civil servants (most notably the OSCE HCNM) and their constituent member states acting as their executive organs. Whenever the interest of the "international community" is, thus, at stake, it is they in fact who act in pursuit of its enforcement, either through the instrumentality of international bureaucracy (e.g. periodic reporting procedures, country recommendations) or the various "coalitions of the willing," as was, for instance, the case with the 1999 NATO campaign in Kosovo and the various diplomatic demarches organized by the United States and a number of West

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<sup>208</sup> On actantial presence, see Chapter I, Section 2, p. 57, n.129, above.

<sup>209</sup> See, e.g., Article 12.1 of the Framework Convention:

"The Parties shall, where appropriate, take measures in the fields of education and research to foster knowledge of the culture, history, language and religion of their national minorities and of the majority."

<sup>210</sup> This particularly affects the bargaining position of the Roma.

<sup>211</sup> From the Paris Charter onwards, all provisions of the new ILTMC regime in one way or another are ascribed to the will/values/and spirit of the international community.

European states in support of the OSCE HCNM's position on Slovakia. In effect, one can, thus, think of the international community as either a functional equivalent of the Spinozist absent cause that is present only in the form of its effects (i.e. its representatives: the pan-European organizations and the "coalitions of the willing"), or as a primitive ruse concocted for ideological reasons. In any event, it would still seem to make ample sense not to omit Figure F from the diagram, since (i) it is in the name of the international community that the unquestionable curtailment of the sovereign rights of D and the autonomy/self-determination rights of C and E is carried out; (ii) as the Badinter Committee's<sup>212</sup> opinions<sup>213</sup> made it abundantly clear, at least within the European context, the norm requiring D and C to show a *bona fide* respect for the foundational norms of the new ILTMC is a norm of *jus cogens*.<sup>214</sup>

(iii) *International Experts*. Using, on the one hand, the ideological capital supplied by the theory of international-law-as-the-technocratic-replacement-of-politics<sup>215</sup> and on the other hand, the reasoning pattern suggested by the Badinter Committee's generous use of the language of *jus cogens* and the 1991 Geneva Meeting's observation that "[i]ssues concerning national minorities ... are matters of legitimate international concern and consequently do not constitute

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<sup>212</sup> The Arbitration Committee of the International Conference on Yugoslavia, also known as the Badinter Committee (after its chairman, Robert Badinter), was created in August 1991 by the decision of the Extraordinary Meeting of the Foreign Ministers of the then European Community.

<sup>213</sup> See in particular Opinion 1, reprinted in 3 EJIL 182 (1992) (declaring that "the peremptory norms of general international law and, in particular, respect for the fundamental rights of the individual and the rights of peoples and minorities, are binding on all the [newly independent states]") and Opinion 2, id., 183 (observing that "the – now peremptory – norms of international law require states to ensure respect for the rights of minorities"). Neither opinion specifies which particular rights in question are included in this scope.

<sup>214</sup> The traditional definition of *jus cogens* is provided in Article 53 of *Vienna Convention on the Law of Treaties*, 1969, 1155 UNTS 331:

"Article 53. Treaties conflicting with a peremptory norm of general international law (*jus cogens*)

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character."

<sup>215</sup> For further discussion, see Chapter I, Section 2, above.



exclusively an internal affair of the respective State,”<sup>216</sup> the representatives of the “international community” have de facto expropriated from D all lawmaking and law-applying powers that would normally accrue to it under general international law. Because of the internal logic of the technocratic theory, however, the ideological condition of the new ILTMC project did not allow a direct appropriation of these powers by any “coalition of the willing.” Nor did it provide full support for their exclusive assignment to the international civil servants themselves. As a result an intermediate body of assignees – a functional equivalent of a board of trustees – was set up, dubbed in accordance with the logic of the technocratic masterplot “international experts.” Within the plane of the established legal regime, “international experts” is presented as an ontologically separate body, discursively autonomous and politically independent both from the pan-European organizations and the “coalitions of the willing.” In reality, however, the former have an unlimited power of appointment and dismissal over all international experts,<sup>217</sup> free from the restraint of any sort of judicial review, just as the latter

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<sup>216</sup> See *id.*, p. 28.

<sup>217</sup> None of the available accounts of the selection of experts for the HCNM-endorsed sets of “expert recommendations” sheds light on what procedure might have been followed and to what extent the decisions made on its basis were public, transparent, and based on objective criteria (the fact that ten of the eighteen experts consulted on the question of what constitutes “good governance” practices in the area of ethnic governance and how the patterns of inter-ethnic democracy can be practically optimized were university-based legal academics strongly suggests they were not). What is clear, however, is that none of these decisions were subject to challenge or could be appealed.

The experts who sit on the Advisory Committee established under Article 26 of the FCNM are appointed by the COE Council of Ministers “at its pleasure”:

- “1. In evaluating the adequacy of the measures taken by the Parties to give effect to the principles set out in this framework Convention the Committee of Ministers shall be assisted by an advisory committee, the members of which shall have recognised expertise in the field of the protection of national minorities.
2. The composition of this advisory committee and its procedure shall be determined by the Committee of Ministers within a period of one year following the entry into force of this framework Convention.”

Consider, furthermore, ALAN PHILLIPS, *THE FRAMEWORK CONVENTION FOR THE PROTECTION OF NATIONAL MINORITIES: A POLICY ANALYSIS 4* (London: MRG International, 2002): “The members of the [Advisory Committee] are unpaid, with expenses covered by the CoE. Consequently, this can limit the availability of candidates.”

have full and complete political control over the former. Despite its continuous reliance on them as an ideological element, the new ILTMC regime grants international experts no autonomous bargaining power in their relations with the “international community” or states/governments.

*c. The Patterns of the New ILTMC Regime’s Distributive Impact: the Unseen Dimensions*

By the logic of its repressive-political functionality, the new ILTMC regime produces a direct distributive impact on at least four different transactional contexts. The official discourse of the new ILTMC project, however, recognizes this fact with regard to only one of them: the bargaining interaction between the minority community, the majority community, and their state/government. Because of that, several important dimensions of the new ILTMC’s political functionality tend to go effectively unnoticed by the international law community. The contribution made by the new ILTMC project to the formation of the post-Cold War pan-European space-process, consequently, continues to remain radically underappreciated, its political impact being unrecognized and essentially misdiagnosed.

In order to rectify these fundamental shortcomings, it appears necessary to begin our analysis of the new ILTMC regime’s practical RSA functionality precisely with a consideration of these three unrecognized contexts. For the purposes of this inquiry, they are: (i) the bargaining interaction between the state/government as the addressee of the ILTMC obligations and the rest of the international community as the ultimate instance/source in whose name and on whose authority these obligations are imposed; (ii) the interaction between the minority community as the alleged beneficiary of the new ILTMC regime and the international community as the ultimate authority seeking to safeguard the minority community’s interests; (iii) the interaction between the majority community as the indirect addressee of the ILTMC obligations and the international community as the ultimate source of these obligations.

(i)

*Transactional context:* State’s interaction with the International Community.

*Transactional structure:* State/Government, International Experts, Pan-European Organizations/“Coalitions of the Willing” (triangle DBA).

*Main issue at stake:* practical sovereignty (exercise of supreme authority in governance/decision-making matters).

*Pattern of distributive impact.* At the first sight, it would seem that even despite the Geneva Meeting’s pronouncement and the Badinter Committee’s findings about the peremptory nature of some aspects of the new ILTMC regime, both of which, of course, continue to remain “good law” for the new ILTMC project’s purposes, the ultimate locus of sovereignty remains with the state/government.<sup>218</sup> A more accurate examination of the RSA practice, however, suggests that both the lawmaking and the law-interpreting powers with regard to the new ILTMC canon have been long removed from state/government to international experts acting as the de facto front for what used to be considered the Western bloc of the CSCE, and which in the context of the new ILTMC’s functionality has become the “coalition of the willing,” at whose full pleasure the international expert body serves.<sup>219</sup> It is the representatives of that bloc whose ideological input transmitted by way of international expertise underlay the gist of the Hague, Oslo, and Lund Recommendations and the jurisprudence of the UN Human Rights Committee and the Advisory Committee

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<sup>218</sup> The argument about the formal relationship between sovereignty and international law made by Judge Anzilotti in the *Customs Regime* case continues to hold true. See individual opinion of Judge Anzilotti in *Customs Regime between Germany and Austria*, 1931, PCIJ, Series A/B, No.41, §3: “It follows that the legal conception of independence has nothing to do with a State’s subordination to international law.”

<sup>219</sup> Since the nature of the expertise-based decision-making is such that the experts are always understood to act impartially (unless they are challenged\*) and because the remit of the experts’ power is determined exclusively by their objective competence, the practice of expert-appointment does not follow the same pattern as the practices of appointment to other types of decision-making bodies. In the present case, although their candidatures are sometimes subject to the negative (veto) control by the representatives of the member states, all experts in question are de facto appointed at the discretion of the civil and political officers of the pan-European organizations. Compare that with the traditional practice of international arbitration/litigation in which both of the involved parties (in our case, A and D) would have the right to appoint their candidates.

\* There is no established clear and transparent procedure for challenging the competence/impartiality of an international expert under the new ILTMC regime.

of the FCNM. It was they also who in the same fashion came to rule<sup>220</sup> what exactly “the rights of ethnic and national groups and minorities in accordance with the commitments subscribed to in the framework of the CSCE” mentioned in the 1991 EC Guidelines on the recognition of states<sup>221</sup> – that seemingly innocent soft-law instrument purportedly addressing a completely non-legal issue<sup>222</sup> whose practical role, however, was to serve as both the king, the judge, and the kingmaker for all newly-independent entities emerging from the rubble of the socialist federations, deciding which of them and under which procedures would stay on as independent states<sup>223</sup> and which would have to “go back” to whatever larger entity they tried to secede from<sup>224</sup> – meant.<sup>225</sup> It was they, finally, who

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<sup>220</sup> For examples of the actual arguments presented by the international experts in justification of such self-aggrandizement, see, e.g., Interlocutory Decision (Opinions 8, 9, and 10) of the Badinter Commission, reprinted in 4EJIL 84 (1993).

<sup>221</sup> *Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union* (16 December 1991), reprinted in 4 EJIL 72 (1993).

<sup>222</sup> The traditional position on the question of recognition in international law states that the acts of international recognition take place exclusively in the domain of politics, not law. Increasingly, however, there seems to be some room for the argument that by virtue of the new customary law, formed, *inter alia*, on the basis of the 1991 EC Guidelines, the practice of recognition is rapidly returning within the pale of legal regulation. For an introductory overview of the question of recognition in international law, see, e.g., IAN BROWNLIE, *PRINCIPLES OF PUBLIC INTERNATIONAL LAW* 86-96 (5<sup>th</sup> edn.; Oxford: Oxford University Press, 1998); Thomas D. Grant, *Defining Statehood: the Montevideo Convention and Its Discontents*, 37 Col. J Trans'l L 403 (1999) (in particular, at 441-4, observing at some point: “The Guidelines indeed reached a broad audience of operative decision-makers –diplomats, politicians, and writers. The frequency of reference to them during the Yugoslav recognition crisis suggests that they might well have informed international practice.”).

<sup>223</sup> Compare what happened to Slovenia, Croatia, Macedonia, and Bosnia and Herzegovina, on the one hand, and Republica Srpska, Kosovo, and Transdniestria, on the other. See, in particular, Opinion 2 of the Badinter Committee, reprinted in 3 EJIL 183 (1992).

<sup>224</sup> Again, the traditional view on the matter is that the act of international recognition, being an exclusively political act, can only be declaratory, and never formally constitutive, of the legal fact of statehood. A close functionalist examination of the actual patterns of international practice unencumbered by the weight of such smokescreen wisdom, however, tends to indicate that this is not at all the case, especially when one takes into account the various examples of failures to attract the sufficient number of recognitions: Republic of China (Taiwan), Southern Rhodesia, Transkei, Republic of North Cyprus, Manchukuo, Transdniestria, etc. Cf. Grant, *supra* n.222, 446-7: “Most writers today assume that recognition itself does not create statehood. State practice continues to suggest, however, that recognition in certain situations can be important in the process of state creation. Recognition of Bosnia-Herzegovina and of the European micro-states are possible cases.”

supplied the ideological contents for the relevant parts of the CSCE Copenhagen Document and Recommendation 1201 of the PACE, on the basis of which all subsequent international treaties, i.e. those documents which afforded the states/governments of the ECE region their only real opportunity for the exercise of formal sovereignty, were adopted. Every effective attempt on the part of the state/government that is not part of the “coalition of the willing” to challenge the opinions of the international experts will lead to immediate pressure on the part of the pan-European organizations and the respective coalition.

*Effectively existing Hohfeldian structure:* (i) A holds an effective right to dictate to D its obligations under the rubric of the ILTMC; (ii) D is under an effective duty to respect A’s will and to comply with A’s decisions under (i); (iii) B serves at the pleasure of A and is its delegate under (i).

*Remedies (enforceability of the rights structure and the RSA-triggering potential available to the right-holder):* Although a number of centrally provided remedies exist, none of them would be available to D if it decided to protect its bargaining interests against A. For reasons of legal standing, justiciability, and conflict of interest, it would not be able to bring a legal suit or to bring the matter at hand before a global international organization. As regards the possible use of self-help, the existing regime does not provide it with any new bargaining powers. To affect a change in the A’s course of conduct, D would thus have to resort either to the tools of general diplomacy or try to initiate a constitutional reform of the pan-European organization in question. Neither option, from a realistic point of view, appears particularly promising. On the other hand, whenever D violates the effective duties it owes to A, the existing legal regime allows the latter both to invoke a series of centrally provided remedies (e.g. bring the matter before the UN Security Council) and to resort to various forms of self-help, whose tactical manifestation may range from public denunciations (e.g. diplomatic demarches against the Mečiar government in Slovakia) and targeted withdrawal of large-scale subsidies in a situation of intense competition (e.g. Slovakia’s relegation to

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<sup>225</sup> The task on that occasion fell to the Badinter Committee (after December 1991, Commission). See, in particular, Opinions 4-7, reprinted in 4 EJIL 74-84 (1993). Cf. Grant, *supra* n.222, 440-1 (overviewing the Commission’s “judgment” on Bosnia’s suitability for independent statehood).

the back of the EU-accession queue)<sup>226</sup> to pro-active use of armed force (e.g. 1999 NATO campaign in Kosovo).

(ii)

*Transactional context.* Minority Community's interaction with the International Community.

*Transactional structure.* Minority Community, State/Government, International Experts, Pan-European Organizations/"Coalitions of the Willing" (quadrangle EDDBA).

*Main issue at stake.* choice of ends and means in the pursuit of minority nationalism (struggle for greater communal autonomy)

*Pattern of distributive impact.* International law does not award minority communities any protection in their relations with the pan-European organizations and the "coalitions of the willing" when it comes to the latter's interference in their pursuit of communal autonomy. Under the existing ILTMC regime, the representatives of the "international community" are free at their discretion to receive any communications from the aggrieved minority communities and to bring them up later in their interaction with the relevant states/governments. They are also free to ignore them completely. More importantly, as the very fact of the new ILTMC project shows, the existing legal regime also entitles the pan-European organizations to dictate and determine the exact choice of means used by minority communities in their pursuit of communal autonomy. The judgments passed by the international civil servants and the international experts on the legitimacy of minority community's demands/requests/actions in this context are final and not subject to any kind of review. The doctrine of *stare decisis* does not apply, and there seems to be very little consistency in the patterns of their recent practice beyond the obvious certainty that in their relationship with the ECE minority communities the representatives of the pan-European organizations are free to act any way they please. Thus, while some recent cases involving an aggrieved ECE minority community (Kosovo, Transylvania) have seen the pan-European organizations take a very pro-active pro-minority stance, others (most notably the Baltics) bear witness to a completely different approach.<sup>227</sup> Furthermore, in a

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<sup>226</sup> See Chapter I, Section 2, p.34, n.89, above.

<sup>227</sup> As one commentator observed, "[t]he investigation of Estonia's laws [as of 1995] has not revealed any systematic violation of [minority rights]. None of the major international fact-finding missions that have in a

significant number of cases the officers of the pan-European organizations and Western diplomats representing the states most commonly participant in the “collations of the willing” seem to have turned a complete blind eye to every attempt by the minority

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great number visited Estonia in the recent time has come to a different conclusion.” (Manfred H. Wiegandt, *The Russian Minority in Estonia*, 3 Int'l J Gr. Rts 109, 133 (1995).)

Meanwhile, immediately after the dissolution of the USSR, by virtue of the new law on nationality which linked the automatic reception of Estonian citizenship to the ability to demonstrate a direct sanguine descent from a full-righted citizen of the pre-1940 Estonian republic, more than 400,000 people (ca. 40% of the country's total population) permanently domiciled in Estonia at the time of independence, an overwhelming majority of them of ethnic Russian origin, were summarily relegated into the category of stateless aliens. The strict naturalization procedures established by the new legislation, including the national language proficiency requirements, over the course of the next three years have meant that less than 50,000 of them were able to claim Estonian citizenship (Wiegandt, *op.cit.*, 124). Several years later, the situation had hardly changed. In the meantime, in line with the established international standards, citizenship under the new Constitution was declared a formal pre-condition not only for the enjoyment of all voting rights (with the exception of those pertaining to local government elections, participation in which was opened to some categories of resident aliens in 1993) but also for the right to form and join any kind of political parties. What this meant in effect, thus, was that more than a third of the country's permanent population was excluded from all forms of immediate participation in the democratic political process, a development most vividly illustrated by the fact that “[w]hereas during the March 1991 independence referendum 1,144,309 people (irrespective of citizenship) had been eligible to vote, during the June 1992 referendum this number (citizens only) dropped to some 669,100 – a decline of around 475,000, or 42 per cent” (Vello Pettai and Klara Hallik, *Understanding Processes of Ethnic Control: Segmentation, Dependency and Co-Optation in Post-Communist Estonia*, 8 Nations and Nationalism 505, 513 (2002)). Other pieces of legislation adopted around the same time further restricted the aliens' rights with regard to the ownership of land, travel, privatization of state-owned and municipal property (including state enterprises), and post-independence share of privatization vouchers, as well as effectively tying their prospects of forceful expulsion to their ability to retain permanent employment (see Erik Andre Andersen, *The Legal Status of Russians in Estonian Privatisation Legislation 1989-1995*, 49 Eur.-Asia Stud. 303 (1997).)

The common position adopted by the various representatives of the “international community,” at the same time, was to describe Estonia as “the shining star of the Baltics” (1999), include it in the first wave of the EU eastward enlargement (1995), and close down the OSCE's country mission in Tallinn on the premise that the local authorities have proven themselves sufficiently competent to deal successfully with all problems within the ambit of the Organization's interest without its continuous presence (2001). Only occasionally did anyone pay some residual lip-service to the idea of advocating the need for a gradual relaxation of the naturalization procedures.

communities in question to protect their internationally recognized communal interests, thus openly reneging on their earlier promises issued on that front.<sup>228</sup>

*Effectively existing Hohfeldian structure.* (i) E has no right to demand A's assistance in its pursuit of communal autonomy; (ii) A has a privilege of using the information received from E at its discretion; (iii) A also has a privilege of prescribing the limits of permissible behaviour for E; (iv) B serves at the pleasure of A and is entrusted with the procession of information it receives from E and the articulation of A's will in its interaction with E; (v) D has a duty to comply with A's decisions under (ii) and (iii).

*Remedies.* There are no centrally provided remedies that E can use against A. Moreover, if one considers the matter closely, the existing legal regime also appears to have severely curtailed E's rights to resort to any kind of self-help. Whatever coercive tactics E may decide to apply against A to compel it to change its course of conduct in its relationship with E, it will do so completely at its own risk. International law does not afford E any potential grounds for complaint against a mistreatment by A. What is more, it expressly threatens E with severe political sanctions in case it exceeds the boundaries of A's goodwill. E has no right to blackmail the "international community" other than in the mildest possible way. Any resort to measures involving the threat or the use of armed violence, under the existing legal regime, will be immediately classified as acts of "terrorism," rising potentially to the level of a "threat to international peace and security." The remedies available to A in such cases will range from the privilege to trigger the internal RSA mechanism of the respective state/government in which E resides by

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<sup>228</sup> Consider again the case of Estonia. In July 1993, two local referenda were held in the towns of Narva and Sillamae. In both cases, an overwhelming majority of those who took part (97% and 99% respectively – Khrychikov and Miall, *supra* n.171, 196), having followed the established procedure, expressed their support for the creation of a Russian national territorial autonomy in the two towns concerned. Several days later, the Estonian Supreme Court declared both referenda null and void, apparently on the account that they had been organized without Tallinn's prior approval (although, it must be noted, the Tallinn authorities, despite receiving a sufficient notice of the referenda, did not try to stop them from taking place). The official reaction of the representatives of the "international community," led by the newly established CSCE HCNM, was to welcome the Court's decision with some degree of enthusiasm and to urge the parties involved to resolve all their differences at the negotiating table. Cf. §35 of the Copenhagen Document: "The participating States will respect the right of persons belonging to national minorities to effective participation in public affairs, including participation in the affairs relating to the protection and promotion of the identity of such minorities."



ordering/sanctioning the use of police action against a recalcitrant minority community (cf. the internationally sanctioned government campaign against the Kurdish community in South-Eastern Turkey) to the privilege to direct an armed intervention on behalf of the “international community” (e.g. NATO peace-restoring campaign against the Albanian minority in Macedonia in 2001).

(iii)

*Transactional context:* Majority Community’s interaction with the International Community.

*Transactional structure:* Majority Community, State/Government, Pan-European Organizations/“Coalitions of the Willing,” International Experts (quadrangle CDAB).

*Main issue at stake:* choice of ends and means in the pursuit of majority nationalism (enjoyment of position of communal domination)

*Pattern of distributive impact:* Unless it qualifies as a “people” for the purposes of the law of self-determination (as manifested, for instance, in Article 1 of the ICCPR),<sup>229</sup> for which, however, there is no established procedure, the majority community will not be able to receive *any* bargaining “boost” from international law when it comes to its relations with the pan-European organizations or the “coalitions of the willing” in the course of its enjoyment of its position of communal dominance *vis-à-vis* other cultural communities residing in the same state. Moreover, even when it does manage to pass the threshold of Article 1, the majority community will hardly be able to obtain any additional protection against the representatives of the “international community” if the latter decide to intervene in its exercise of self-determination, unless such intervention clearly and unequivocally would lead to colonialism, alien domination, or some other form of overt

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<sup>229</sup> A minority community cannot, by definition, qualify as a people in the eyes of Article 1 of the ICCPR. See further CASSESE, *infra* n.230, 339; PENTASSUGLIA, *supra* n.125, 162 *et seq.* Furthermore, not all communities that qualify as “peoples” for the purposes of some part of the international legal order necessarily also qualify as “peoples” for the purposes of Article 1 of the ICCPR. Indigenous and tribal peoples, famously, are not automatically considered to be “peoples” entitled to self-determination. See Article 1(3) of *Convention concerning Indigenous and Tribal Peoples in Independent Countries*, 1989, 72 ILO Off. Bull. 59: “The use of the term ‘peoples’ in this Convention shall not be construed as having any implications as regards the rights which may attach to the term under international law.”

political subjugation of the majority community.<sup>230</sup> Even then, it remains completely unclear what exactly the majority community could claim from international law in its struggle against the pan-European organizations. Moreover, since from the formal point of view virtually all existing ILTMC provisions and procedures are addressed to other subjects (state/government and “persons belonging to the minority community”), a majority community will not be normally in the position to show, even if it could find a forum competent and capable to take/sanction any remedial action, that the pan-European organizations’ actions have had a frustrating effect on its ability to pursue its legally protected interests. Not only that, however, but also, as the adoption of the Lund Recommendations, for instance, makes clear, on a number of fronts the new ILTMC regime has in fact given a bargaining “boost” to the pan-European organizations and their representatives in their dealings against the ECE majority communities, insofar as it de facto clothed them with an authority to lay down the exact codes of conduct within which an ECE majority community must enjoy its process of communal self-determination.

*Effectively existing Hohfeldian structure:* (i) if it passes the threshold established by the law of self-determination, C has a formally recognized right to self-determination consisting, on the one hand, of a Hohfeldian privilege to achieve a position of communal dominance and, on the other hand, of a Hohfeldian right not to be subjected in the process to overt political subjugation; (ii) A has a privilege to prescribe the choice of means for C’s pursuit of its right of self-determination; (iii) A has a residual duty not to subject C to overt political subjugation; (iv) C has no right to resist A’s curtailment of its ability to enjoy its position of communal domination; (v) B serves at the pleasure of A and acts as its delegate under (ii); (vi) D has a duty to comply with A’s decisions under (ii).

*Remedies:* The new ILTMC regime does not afford C any remedies it did not have already. At the same time, it empowers A to use a wide range of remedies – formally against D, but in reality against C – if C decides not to comply with A’s prescription of the limits of its permissible behaviour, including the pro-active use of force (e.g. 1999 NATO campaign in Kosovo). In short, the bargaining position which C enjoys in its relationship with A follows more or less the same lines as the position enjoyed by D but is at the same

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<sup>230</sup> On the content of the effectively existing right of self-determination under contemporary international law, see further ANTONIO CASSESE, *SELF-DETERMINATION OF PEOPLES: A LEGAL REAPPRAISAL* (Cambridge: Cambridge University Press, 1995).

time substantively worse than that by several registers, essentially thanks to the fact that C is not a recognized subject of international law.

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A very interesting picture begins to emerge when one considers at length the general patterns of the distributive impact produced by the new ILTMC regime in these three generally overlooked contexts. To most students of the ILTMC subject, it will look probably quite strange and unfamiliar. Indeed, it is not one that can be normally glimpsed from within the plane of the new ILTMC's official discourse or the mainstream scholarship dedicated to its discussion. *Indeed*, one may even say, it tends to be consistently covered up by the new ILTMC producers as much as possible.<sup>231</sup> On closer reflection, such state of affairs, however, should not, perhaps, be surprising, especially if one considers that the basic story which this picture tells us about the actual state of the post-Cold War European political order, however strange it might seem to the latter-day students of the new ILTMC, would probably look quite familiar to the students of the mid-19<sup>th</sup> century history. For it is a story, in effect, of a new concert of Europe, a new *family* of nations, the standard of civilization, and armies of foot-soldiers marching across the continent left and right to put down any rebellion threatening to destroy the stability of the established order. The only major difference between then and now seems to be that the foot-soldiers have mostly given way – in some cases to foreign experts, in others to NATO pilots.<sup>232</sup> The rest has largely – and eerily so – remained the same.

And so, inevitably, a series of uncomfortable questions starts to emerge. Why has this picture been so carefully covered up by the producers of the new ILTMC project? Had they agreed to admit at least partially the existence of all those distributive impacts which they so clearly seem to prefer not to discuss, what would have happened to the new ILTMC regime? Would it have retained its integrity, success, and ideological coherence? Would it have lost its legitimacy, crumbled, and disintegrated?

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<sup>231</sup> Consider *any* representative sample of the existing mainstream works on the new ILTMC project (see, e.g., Chapter I, Section 1, n.1 at p.4). Not *a single one* of them spends *any* significant amount of time on analyzing or recording the distributive impact patterns produced by the newly established ILTMC regime in these three transactional contexts. The whole problematic of the ILTMC's practical contribution to the political structuration of these bargaining situations does not even seem to have been noticed by any of these authors.

<sup>232</sup> But some of them still remain in demand: SFOR, KFOR, and all other regional peacekeepers, of course, are ground-troops-based armies.

A close symptomatic reading (*lecture symptomale*) of the official discourse accompanying the new ILTMC regime clearly indicates that the official fiction underlying the new ILTMC project has been formulated in such terms which make its continuation essentially incompatible with an effective acknowledgement that the new ILTMC regime may in fact perform any other functions than those presupposed by the ideas of regional peace and security and the theory of liberal multiculturalism. Any identification of an in-built structural bias (achieved, for instance, through a demonstration of a consistent pattern of power distribution) that serves causes other than these, especially if they turn out to be of an essentially imperialist character, would be a de facto anathema for the new ILTMC project as a whole.

The bottom-line message imparted by the legal realist analysis of the new ILTMC regime's RSA functionality in the three transactional contexts reviewed above provides exactly that.

*d. The New ILTMC Regime and Its Impact on the Social Contract: the Real Face of "Good Governance"*

Less than a year after his appointment, delivering a keynote address to the CSCE Human Dimension Seminar in Warsaw, Max van der Stoep announced:

Some people are of the opinion that if the requirements of a democratic framework and those of the general observance of human rights are met, nothing else needs to be done concerning minorities. I tend to disagree with this sweeping assumption. ... To be sure, ... the protection of minorities starts with the respect of general human rights which are applicable to all people including persons belonging to national minorities.

However, there are many different situations where minorities are concerned and each case has to be assessed in the light of its particular aspects and circumstances. Moreover, as I said in the introduction of my statement, minorities' questions are so intimately connected to issues which go to the heart of the existence of states that an approach based exclusively on human rights aspects would be very incomplete and therefore insufficient. ...

[As the CSCE HCNM, I believe the minorities policy ... ha[s] to be the result of a balanced and equitable approach which reconciles the interest of the minority and the majority on the one hand and the interests of human being (individually or collectively) and the state on the other hand. Very often, such a policy will entail a combination of three elements. Firstly, in its policies the state should observe non-discrimination on grounds of belonging to a certain minority. Secondly, the state should make efforts to promote tolerance, mutual acceptance and non-discrimination in society. For both these elements applies that "equality in fact" should accompany "equality in law". Thirdly, persons belonging to minorities should dispose of appropriate means to preserve and develop their language, culture, religion and traditions without this leading to discrimination of persons belonging to the majority.<sup>233</sup>

In a nutshell, this has remained the basic summary of the new ILTMC project's official story about its standard-setting programme ever since. The same themes which were outlined by van der Stoel in 1993 have remained the gist of what the new ILTMC's project's producers present as the most accurate portrait of the new ILTMC regime to this day.

Theme One. The regulatory effect achieved by the general human rights and democratization project has not been enough to meet the objective challenges raised by the minorities question. A separate regulatory project is required to be set up. That project is what the new ILTMC ultimately had to become.<sup>234</sup>

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<sup>233</sup> Van der Stoel, *supra* n. 200, 46-7.

<sup>234</sup> Compare WILL KYMLICKA, *MULTICULTURAL CITIZENSHIP: A LIBERAL THEORY OF MINORITY RIGHTS* 2-5 (Oxford: Oxford University Press, 1995): "Various efforts have been made historically to protect cultural minorities, and to regulate the potential conflicts between majority and minority cultures. ... After World War II, it was ... hoped that the new emphasis on 'human rights' would resolve minority conflicts. Rather than protecting vulnerable groups directly, through special rights for the members of designated groups, cultural minorities would be protected indirectly, by guaranteeing basic civil and political rights to all individuals regardless of group membership. ... [Over time,] however, it has become increasingly clear that minority rights cannot be subsumed under the category of human rights. Traditional human rights standards are simply unable to resolve some of the most important and controversial questions relating to cultural minorities. ... The problem is not that traditional human rights doctrines give us the wrong answer to these questions. It is rather that they often give no answers at all. ... To resolve these questions fairly, we need to supplement traditional human rights principles with a theory of minority rights."

Theme Two. Although it is a separate project from the general human rights project, the new ILTMC project, nevertheless, forms its integral part. A successful execution of the latter presupposes a full compliance with the requirements set by the former.<sup>235</sup>

Theme Three. The new ILTMC project addresses issues that are more immediately related to the organization of statehood and government than the general human rights project. These issues involve the balance of political interests between the minority communities, the majority, the individual, and the government. The main pillars of the new ILTMC regime are, consequently, the preservation not only of equity, but also of balance.<sup>236</sup> The main principles at the heart of the new ILTMC regime, consequently, are (i) the prohibition of any form of discrimination against the members of the minority communities; (ii) active promotion of tolerance and mutual acceptance; (iii) the advancement of the substantive equality in fact over the formal equality in law; (iv) the provision of various forms of communal autonomy required to ensure an adequate development of the minority community's culture and collective identity subjected to the requirement of preventing every form of de facto discrimination of the members of majority.

All these themes, as one can immediately recognize by inspecting their ideological pedigree, are ultimately the themes of the classical liberal multiculturalist theory.<sup>237</sup> The four main principles, for instance, can all be traced directly to Rawls's *Theory of Justice*.<sup>238</sup> Every other aspect of the proposed programmatic vision finds close parallels in the works of Rawls's modern-day successors, such as, most notably, Will Kymlicka and Yael Tamir.<sup>239</sup>

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<sup>235</sup> See also *id.*, 6. Cf. Packer, *supra* n.181, 472-3.

<sup>236</sup> For a lengthy investigation of the traditional ideological justifications of the ILTMC project, see generally ATHANASIA SPILIOPOULOU ÅKERMARK, *JUSTIFICATIONS OF MINORITY PROTECTION IN INTERNATIONAL LAW* (London: Kluwer Law International, 1999).

<sup>237</sup> See *supra* nn.234-6.

<sup>238</sup> See further JOHN RAWLS, *A THEORY OF JUSTICE* 266-7 (rev. edn; Oxford: Oxford University Press, 2000).

<sup>239</sup> See *supra* n.234; Yael Tamir, *Liberal Nationalism* (Princeton: Princeton University Press, 1993). For further discussion of the relationship between the liberal multiculturalist theory and the new ILTMC project, see, e.g., Bill Bowring, "Multicultural Citizenship: a More Viable Framework for Minority Rights?", in DEIRDRE FOTTRELL AND BILL BOWRING (EDS.), *MINORITY AND GROUP RIGHTS IN THE NEW MILLENNIUM* 1 (The Hague: Kluwer, 1999).

The multiculturalist themes intertwine closely with the new-security-challenges mantra.<sup>240</sup> Together they delimit that ideological foundation around which the new ILTMC project claims to organize itself and on which it stakes the legitimacy of all its standard-setting exercises.

The basic question that remains to be answered now, consequently, is: to what extent is this portrait of the new ILTMC project really accurate? Or, to put it slightly differently, how much does the official self-image of the new ILTMC project contribution to the bargaining context involving the minority and majority communities correspond to the effectively existing reality established on the basis of its RSA functionality? How much does are the four main principles observed in the new ILTMC's functional reality?

a. The Contents of the Effectively Existing International Legal Regime Governing the Position of the Minority Community in Its Interaction with the Government and the Majority

The transactional structure of the fourth transaction context directly affected by the distributive impact of the new ILTMC regime involves in reality not three, but five different players: minority community, state/government, international experts, pan-European organizations/"coalitions of the willing," and majority community (pentagon EDABC).

From the perspective of the minority community, the factuality of the new ILTMC project in this context effectively appears in the shape of the following general regime:<sup>241</sup>

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<sup>240</sup> See further Chapter I, Section 2a, above.

<sup>241</sup> For the original sources, see further the *FCNM*; *Copenhagen Document*; *Hague Recommendations*; *Oslo Recommendations*; *Lund Recommendations*; *Declaration on the Rights of Persons belonging to National or Ethnic, Religious or Linguistic Minorities*, UNGA Resolution 47/135, 18 December 1992, UN Doc. A/47/49; Asbjørn Eide and Erika-Irene Daes, "Prevention of Discrimination against and the Protection of Minorities: Working Paper on the Relationship and Distinction between the Rights of Persons Belonging to Minorities and Those of Indigenous Peoples," UN Doc. E/CN.4/Sub.2/2000/10. See also WALTER A. KEMP (ED.), *QUIET DIPLOMACY IN ACTION: THE OSCE HIGH COMMISSIONER ON NATIONAL MINORITIES* (The Hague: Kluwer Law International, 1998); *COUNTRY RECOMMENDATIONS BY THE HIGH COMMISSIONER* (available at <http://www.osce.org/hcnm/documents.html?lsi=true&limit=10&grp=++>).

- (1) There are no centrally provided remedies under international law available for minority communities to protect their legal entitlements as communities. With the exception of the rights protecting them against genocide and, possibly, apartheid, all minority community interests in the ECE region are protected on the international legal plane exclusively through the instrumentality of individual rights accruing to their members. Since there is no formal definition of what constitutes a particular type of a minority community – national, ethnic, religious, or linguistic – there is no guarantee *every* member of a minority community will necessarily be able to enjoy that protection.
- (2) The only internationally provided juridical remedies for the protection of the interests of minority communities residing in the ECE region are those created and sustained within the framework of the European Convention on Human Rights and its additional protocols, none of which incorporates any minority rights in excess of the residual right to equal treatment. All other internationally provided remedies are of a political character and are provided at the discretion of the corresponding institutions. There is no right of individual access to the OSCE HCNM.
- (3) Minority communities are prohibited from resorting to violence as a measure of self-help.
- (4) States are obliged to protect minority communities against “assimilation.” Promoting “integration” and insisting on the civic obligations owed to the majority community, however, is allowed. There is no clear guidance as to the practical difference between “assimilation” and “integration.” The decision on the matter, in the final analysis, belongs to “international experts.”
- (5) Members of the minority communities enjoy the same level of human rights protection as the members of the majority community. They have no affirmative action rights. Whatever affirmative action regimes may be created in their favour, will be created at the discretion of the respective states/governments. An affirmative action regime may not result in the creation of an undue burden on the members of the majority community.



What counts as an “undue burden” will normally be decided by the state/government itself, subject to review by the “international experts.”

- (6) Although they may be obligated by the state/government to learn the language of the majority community and to pass a formal test to prove their knowledge, members of minority communities enjoy an unlimited right to use their mother tongue in private and, subject to considerations of legitimate public interest, for business purposes. What counts as “legitimate public interest” is again decided by the state/government, subject to review by the “international experts.”
- (7) Where they consider it appropriate, legitimate, and in line with their national security considerations, states/governments are obliged to take general measures with a view to promote the conditions contributing to the protection and development of minority communities’ cultural identity, *provided such development does not endanger the promotion of the general democratic and human rights values*. The subject-matter areas in which the “international community” normally expects such measures to be taken include education (more identity-promoting measures at the level of primary education, less at the level of secondary education, virtually none at the level of tertiary education), broadcasting (more measures) and print media (less measures), and participation in public life (more measures on the front of organizing consultative bodies, less on the front of proportionate representation).
- (8) Minorities have no right to secession, territorial autonomy, proportionate representation, or any extensive form of communal self-governance. If any of these may be awarded, it is solely at the discretion of the state/government.
- (9) Members of minority communities are generally allowed to set up minority-language schools and various kinds of educational, religious, and cultural centres, but exclusively at their own expense. They are allowed to seek and attract external funding and apply for funds from the state budget, but they are not guaranteed any share of public spending.

## b. The Difference between the Official Portrait and the Reality

Clearly, the effectively existing ILTMC regime is nowhere near the shiny portrait of it painted by the official ILTMC discourse.

The first and the most important difference, of course, concerns the immediate logic of the legal protection dynamics. The official portrait couched in terms of minority rights suggests the existence of what in Hales terms has been described as the “private government” dynamics. As our observations in point (2) indicate, however, there only genuinely exists a “public government” dynamics, by the means of which the representatives of the “international community” at their discretion enforce the provisions of the new ILTMC regime against individual states/governments.

The second observation that immediately invites itself to be made is that, if we look at the actual patterns of the effective legal functionality behind the façade of the new ILTMC regime, it will immediately become clear that neither the minority communities themselves, nor their individual members enjoy a genuine equality in fact and in law with the members of the majority community. Consider, for instance, the question of minority-language education (point (9) above). The official discourse of the existing ILTMC regime suggests that by providing the members of the minority communities with a possibility of establishing privately-funded schools the new ILTMC project has *effectively* guaranteed them an equal footing with the members of the majority. Private schools, however, are a very expensive business to run. Where are the funds required to sustain them going to come from? Article 13 of the FCNM leaves no uncertainties in this regard: even though “persons belonging to a national minority have the right to set up and to manage their own private educational and training establishments,” “the exercise of this right shall not entail any financial obligations” for the signatory states. Put differently, it may be entirely legitimate for an ethnic Arcadian living in Ruritania to want to send her children to an Arcadian-speaking primary school. But it is also entirely legitimate for the Ruritanian government not to contribute any budgetary funds to enable her to realise that aspiration while continuing to spend all the available budgetary funds on setting up Ruritanian-speaking schools without giving the Arcadian family in question any kind of commensurate tax relief. If the members of the Arcadian community intend to protect the cultural identity of their children, it follows then that, in effect, they will have to pay *twice*: the first time to the actual

private school to which they will send their children, the second time to the state budget to finance a publicly-provided education system their children will not use. The sole reason for the heavier financial burden imposed on the ethnic Arcadians in these circumstances, it appears, will be the fact of their difference from the rest of the Ruritanian population in “their religion, language, traditions and cultural heritage.”<sup>242</sup> How such a state of affairs can be reconciled with the notion of a “full and effective equality between persons belonging to a national minority and those belonging to the majority”<sup>243</sup> or the idea that “no disadvantage shall result from the choice [to be treated as a person belonging to a national minority] and the exercise of the rights which are connected to that choice”<sup>244</sup> eludes any immediate understanding.

Law, let us recall Hale’s observation, always gets implicated in the structuration of the power distribution pattern, even when it remains silent on a given issue. The ILTMC’s consistent failure to extend the principle of minority differential treatment to the fields of tax collection and budgetary expenditure has a clear distributive impact on the relative bargaining positions of the two communities. By legitimising the ethnic Ruritanians’ propensity to oppress the ethnic Arcadians through taking advantage of their weaker bargaining power (there simply are not enough ethnic Arcadian MPs to veto the objectionable budget when it passes through the Ruritanian parliament), the new ILTMC regime not only does not remain substantively neutral and promote a state of effective equality between the two communities, but also, in fact, throws its weight on the side of the (already winning) majority community.

The third observation that invites itself to be made is that, despite all its claims to the contrary, the new ILTMC regime is not in fact a regime designed to protect the cultural diversity of the respective polities but, rather, a regime designed to determine the limits within which the project of cultural uniformization of the same polities can be carried out. By subordinating every measure designed to protect and promote minority identity to the overarching requirement of promoting the general democratic and human rights values (point (7) above), the new ILTMC regime in effect prohibits the development of all cultures opposed to the modern mainstream liberal tradition.

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<sup>242</sup> Article 5.1 of the *FCNM*.

<sup>243</sup> Article 4.2, *id.*

<sup>244</sup> Article 3.1, *id.*

The fourth observation relates to the fact that the general pattern of the actual formulation of its provisions prevents the new ILTMC regime from being able to provide an adequate level of protection to the general interests of the minority communities. As the modern scholarship on the practice of collective action has long shown, the dynamics of the realization of a general group interest in many cases tends to be very different from the cumulative dynamics of the realization of the particular interests of the group's individual members.<sup>245</sup> Put differently, there will always be insufficient incentivization on the part of the individual members to secure the goods required by the community as a whole. Moreover, some community projects involve such considerable transaction costs that they can only be carried out when the project is executed by community in question acting as a single agent. By only recognizing individuals as legal subjects and not minority communities (point (1) above), the new ILTMC regime, thus, effectively "chills" the latter's capacity for a meaningful protection of their legitimate communal interests.<sup>246</sup>

The fifth observation relates to the conclusion that, in a functionalist perspective, that part of the new ILTMC regime which is reflected in point (8) above is effectively indistinguishable from the 18<sup>th</sup> century theory of awarding legal protection against competitive injury. Consider the following passage from Morton Horwitz classical first volume of *The Transformation of American Law*.

In an underdeveloped society, with little available private capital, a policy of encouraging development required that the legal system provide legal arrangements that guaranteed private investors certainty and predictability of economic consequences. Perhaps the most important of these guarantees was protection against ... competitive injury. To accommodate this policy, courts promulgated rules reflecting a view of property as essentially exclusive and

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<sup>245</sup> For a classical introduction to the topic, see further MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION* (Cambridge, Mass.: Harvard University Press, 1971).

<sup>246</sup> There do, of course, exist a number of very good reasons for not awarding the status of legal subjects to non-incorporated collective bodies. None of them, however, tends to be so absolute as to warrant the conclusion that one must insist on a complete refusal of all claims to legal personality in the case of minority communities. For further development of the argument, see James W. Nickel, "Group Agency and Group Rights", in IAN SHAPIRO AND WILL KYMLICKA (EDS.), *ETHNICITY AND GROUP RIGHTS* 235 (New York: NYU Press, 1996).

monopolistic, so that every attempt to draw business away from an existing enterprise was usually treated as an injury to property itself. [As] Justice Story in his *Charles River Bridge* dissent [put it], there was [believed to be] ‘no surer plan to arrest all public improvements, founded on private capital and enterprise, than to make the outlay of that capital uncertain, and questionable both as to security, and as to productiveness.’<sup>247</sup>

As the general level of economic welfare increased, the

expectations that had grown up in a static and underdeveloped society [started to] giv[e] way to a conviction that ownership of property in a dynamic and changing environment necessarily entailed many risks and uncertainties for which the law could offer no protection.<sup>248</sup>

What came out eventually from that conviction was the doctrine of the free market and the basic blueprint for the anti-trust theory.

Seen against this background, the existing ILTMC regime, one could say, still inhabits the world of Justice Story. Although it clearly conceives of minority communities essentially in the same way in which one would normally conceive of a tennis club or some other voluntary public association<sup>249</sup> – what with all these suggestions that “[t]o belong to a national minority is a matter of a person’s individual choice”<sup>250</sup> – it still perceives the context of the bargaining situation between minority communities and majority communities as one in which the statal/nation-building project undertaken by the latter deserves an ever-increasing protection against any sort of competitive injury delivered by the former.

The sixth observation is the reverse side (or a logical continuation, if you will) of the fifth. Its ultimate point of reference is the failure of the new ILTMC regime to create a right to a system of proportionate representation for minority communities. With its

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<sup>247</sup> MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW 1780-1860* 111-8 (Cambridge, Mass.: Harvard University Press, 1977).

<sup>248</sup> *Id.*, 131.

<sup>249</sup> John Packer is a notorious advocate of that sensibility. See *supra* n.15.

<sup>250</sup> §32 of the *Copenhagen Document*. See also Article 3 of the *FCNM*.

effective consecration of the majoritarian-democratic model of government, the new ILTMC regime has, in fact, given a new lease of life to the ideology of the 19<sup>th</sup> century classical economics.

The two foundational assumptions of the 19<sup>th</sup> century classical economic thought<sup>251</sup> were that: (i) the general structure within which the economic process takes place has to be organized in the shape of a free market; and (ii) the general characteristic of the economic process is that “people labor to produce objects desired by others. The labor imparts market value. Each person then freely exchanges the products of his labor for the products of the labor of others.”<sup>252</sup> The economic actors are thus free “both to produce anything they want and to sell it for whatever price it will bring in the market.”<sup>253</sup> Because everyone is free in this way and because the invisible hand aligns every supply dynamics with every pattern of demand, the relative prices are directly commensurate with the relative labour costs expended by each economic actor, which is another of saying everyone gets out of the game exactly what they deserve – “all incomes reflect[] the labor contribution of the income recipient to the social process of production”<sup>254</sup> – i.e. the game is structurally fair. Whoever can pay more deserves to obtain the goods he pays for because the capacity to pay more is itself deserved. You prosper only inasmuch as you earned it with your contributions.

Consider now the ideal image of the ideal political process inscribed in the theory of majoritarian democracy. All the political actors are citizens of the given polity.<sup>255</sup> All citizens participate in the political process solely in the exercise of their freedom. Whoever does not want to participate in the political process does not have to. Nobody can force

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<sup>251</sup> For further overview of the classical economic thought, see generally ERNESTO SCRIPANTI AND STEFANO ZAMAGNI, *AN OUTLINE OF THE HISTORY OF ECONOMIC THOUGHT* (transl. by David Field; Oxford: Clarendon Press, 1993); MARIAN BOWLEY, *STUDIES IN THE HISTORY OF ECONOMIC THEORY BEFORE 1870* (London: Macmillan, 1973); ERIC ROLL, *A HISTORY OF ECONOMIC THOUGHT* (London: Faber and Faber Ltd., 1962).

<sup>252</sup> Duncan Kennedy, *The Role of Law in Economic Thought: Essays on the Fetishism of Commodities*, 34 *Am. U. L. Rev.* 939, 943 (1985).

<sup>253</sup> *Id.*, 944.

<sup>254</sup> *Id.*, 943.

<sup>255</sup> Refugees, migrants, and stateless people are present in the IHRL only as unfortunate aberrations. They are temporary phenomena that, if everything goes well and according to plan, the IHRL-guided politics will soon put an end to.

anyone to join any political party or show up at the regional elections. Everyone is free to engage in whatever legitimate politics he wants to and form whatever alliances and blocs that politics enables him to form in the context of his body politic. Because everyone is free in this way and because the structure of the political field is a majoritarian democracy, the size and the intensity of the personal contribution to the political process are guaranteed to be directly commensurate with the size and the intensity of the acquired political power. If a rival political party commands more weight in the parliament than yours, then it absolutely deserves to form the government because this shows that more citizens have given their political capital to it in the exercise of their freedom. The political process is a process of market-like meritocracy. Even political ideologies are said to operate in a kind of a marketplace.<sup>256</sup>

Now, one of the central characteristics of the classical economic thought, famously, was that it took an extremely austere view on the subject of wealth redistribution. Anyone who ends up losing out in the course of the economic competition, declared the classics, essentially deserves that. If you had not been sloppy at readjusting yourself to the structural terms of the market, which are all fair and just, you would not have been where you are now.

Once you adopted the background assumptions of the classical economic theory:

[i]t followed that collective attempts to make particular groups better off could succeed only by depriving some people of the products of their labor and bestowing those products on others. Such an unnatural course could be accomplished only by restricting the freedom either of production (state enforced monopolies of manufactures and labor unions) or of exchange (protective tariffs, minimum wage, or maximum hours legislation) or both. It would be unjust because it would be indistinguishable from theft. It would lead to suboptimal output because it would destroy, as theft always destroys, the incentive to work.<sup>257</sup>

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<sup>256</sup> The term originally comes from *Abrams v. United States*, 250 U.S. 616, 630 (1919).

<sup>257</sup> Kennedy, *supra* n. 252, 947.

Transferring this logic to the question of proportionate representation, it follows that, from the point of view of the majoritarian-democratic theory, what makes proportionate representation so undesirable is that it tends both to be essentially unjust and to “chill” the democratic momentum by rewarding the less talented political entrepreneurs at the expense of the more talented ones. As far as the majoritarian-democratic theory is concerned, a system of proportionate representation creates an essentially suboptimal political regime by allowing minority parties to obtain a disproportionately greater presence in the parliament than the patterns of their democratic support would otherwise allow them.

The basic problems with elevating that kind of sensibility into the rank of an ILTMC policy should not be that difficult to identify. Firstly, not “all [political] incomes reflect the [political] labour contribution of the income recipient.” Secondly, all people deserve to be treated equally, and equality, as the new ILTMC regime itself admits, means something more than simply having the same set of formal opportunities as those who are in a better position to realize them. Thirdly, the political market is different from the economic market. When you lose out as an entrepreneur in the market for legal services, you can still usually requalify and become a law librarian. You cannot do the same when you lose in a political competition. And if you lose it because the minority party which you support is also a party of a minority community, and you realize that the voting patterns in the elections were based not on the objective logic of political supply-demand but on racial, religious, or ethnic prejudices, you are very unlikely to come to the conclusion that it is a just and equitable outcome and that all your woes are solely the product of your own sloppiness. And when that happens, chances are, some of you may decide you should lose more than just your goodwill.<sup>258</sup>

The listing of critical comments could go on for far longer. But the general message that emerges from the constantly repeating patterns is already sufficiently clear. First, the objective reality of the new ILTMC project is not what its official self-portrait claims it to be. As far as the ECE minority communities are concerned, it is certainly far darker and more sinister. Second, if we take on board Hale’s point about the practical impact of normative gaps (permissions to injure) and recall Hohfeld’s point that *damnia absque injuria*

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<sup>258</sup> What may happen next can be learned from Amy Chua’s recent book on the link between ethnic conflicts, economic reform, and democratization. See AMY CHUA, *WORLD ON FIRE* (London: William Heinemann, 2003).



never *just* happen, they are always brought about by a conscious decision, we could say that the practical effect of the new ILTMC regime is such that not all of the existing minority communities in the ECE region will be allowed to survive in the “new Europe” world brought about by its producers, but only those whose existing political, cultural, and economic resources are sufficiently big to enable them to absorb all those blows which the respective majority communities with the tacit approval of the pan-European organizations can legitimately throw at them.

## In Lieu of an Afterword

In its own eyes, the story of the mid-19<sup>th</sup> century concert of Europe, whose several traces, as I have shown in this work, we can regularly find today behind the elaborately mystified façade of the new ILTMC project, was, of course, a story of a bright utopia. It articulated a vision of freedom, prosperity, and universal values, expressing it in the confident profession of faith in the inexorable march of progress and the unquestionable virtues of benevolent paternalism. The same basic ideological elements, as I have shown in the previous pages, can also be found today in the official discourse of the new pan-European project so candidly called “the new Europe.” So can, of course, the various undersides they so carefully seek to hide. In the mid-19<sup>th</sup> century Europe these undersides included the rising gap in the distribution of wealth and power between the rich and the poor; the growing disenchantment of the disenfranchised masses; the cruel stifling of every political project capable of mounting an effective challenge to the existing status quo. One and a half centuries later, how much of an overstatement would it really be to claim a sense of a *déjà vu*?

But if there is anything we should have learned from Althusser here, it is, of course, that no historical conjuncture can ever be entirely like any other. The mechanisms of the post-Cold War pan-European RSA functionality compare to those of the mid-19<sup>th</sup> century concert of Europe like heaven compares to earth. No more can we find a plain paternalism of direct interventions uncaring about the formalities of international sovereignty. The new regime of regional imperialism is built on an unending exaltation of the equal rights and duties of all states; it is the latter, indeed, that so often enable it to advance ever further.

No more can we find also a group of easily identifiable tsars and chancellors commanding and ordering about the continent. The archetypal examples of the power elites behind the “new Europe” project are the faceless Eurocrats, international experts, and – what a wonderful euphemism! – the Transnational Norm Entrepreneurs.<sup>1</sup> No more are there left

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<sup>1</sup> For a lengthy discussion of the OSCE HCNM as a transnational norm entrepreneur (TNE), see Steven R. Ratner, *Does International Law Matter in Preventing Ethnic Conflict?*, 32 N.Y.U. J. Int'l L. & Pol. 591 (2000). For the development of the concept of the TNEs, see further Harold Hongju Koh, *Bringing International Law Home*, 35 Hous. L. Rev. 623, 647 (1998). A noteworthy fact: TNEs are sometimes also described as “transnational moral

any traces of an open order of threat and suppression. The new imperial technology is the technology of the Foucauldian discipline,<sup>2</sup> replete with its elaborate mechanisms of observation<sup>3</sup> (European Commission, ODIHR, HCNM, FCNM Advisory Committee) and grids of spatial distribution<sup>4</sup> (the Schengen zone, the EMU, the COE area, the OSCE area, association agreement zones, the groups of accession), routine collective exercises<sup>5</sup> (pointless periodic plebiscites and high-level summits) and regular confessions<sup>6</sup> (reporting procedures under international regimes), elaborate time-tables (implementation of *acquis*) and “collective and obligatory rhythms”<sup>7</sup> (cyclic assessment reports). It is a system of governance that has methodically substituted the use of the normalizing judgments<sup>8</sup> (good governance benchmarks, soft-law international standards, world-best practices) for the imposition of condemnatory ones<sup>9</sup> (violation of hard-law obligations). No more a project of straightforward restriction and unadorned oppression: from the media spotlight of the Charter of Paris to the archival obscurity of Ambassador Monteiro’s statement,<sup>10</sup> the new pan-European vision has been an

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entrepreneurs” (Ratner, *op.cit.*, 657). Depending on one’s perspective, this, of course, can be seen to cast the matter in a completely different dimension, as it seems to raise, on the one hand, the spectre of the missionary activity and, on the other hand, considering the strength of the historical links between the Western European missionary movement and the spread of European imperial project, the spectre of indirect imperialism.

<sup>2</sup> See MICHEL FOUCAULT, *DISCIPLINE AND PUNISH: THE BIRTH OF THE PRISON* (transl. by Alan Sheridan; New York: Vintage Books, 1995).

<sup>3</sup> *Id.*, 170-7.

<sup>4</sup> *Id.*, 141-7.

<sup>5</sup> *Id.*, 152-3.

<sup>6</sup> On the significance of confession in the exercise of disciplinary power, see further MICHEL FOUCAULT, *THE HISTORY OF SEXUALITY: AN INTRODUCTION 17 et seq.* (transl. by Robert Hurley, New York: Vintage Books, 1990).

<sup>7</sup> See further FOUCAULT, *supra* n.2, 149-52.

<sup>8</sup> *Id.*, 177-80.

<sup>9</sup> *Id.*, 182-3: “[T]he art of punishing, in the regime of disciplinary power, is aimed neither at expiation, nor even precisely at repression.

<sup>10</sup> See Chapter I, Section 2, above, at pp. 24-7.

enterprise directed at *training and production*, a *moulding* of a new and better European polity.<sup>11</sup> Certainly, as the numerous symptomatic events from Kosovo to Narva have shown, the new imperial regime is a system of power that “can also be direct, physical, pitting force against force, bearing on material elements,”<sup>12</sup> but what characterizes it far more exhaustively than all that is the fact it “is not exercised simply as an obligation or a prohibition on those who ‘do not have it’.”<sup>13</sup> Of course, its actual “technology is [quite] diffuse, rarely formulated in continuous, systematic discourse; it is often made up of bits and pieces; it implements a disparate set of tools or methods,” but it is not for all that any less real – it does exist, it is constantly *felt* by those on whom it turns its attention, even if it is not always recognized for what it is – or weak or emasculated.

It is a system of imperial domination that has a very clear territorial tone on its receiving end, but none on its delivering one. There are no real traces of any of those nationalist sensibilities that were such a common feature of the classical 19<sup>th</sup> European imperial project. The new imperial system lodges *directly* in the international space-process – in this case, the space-process of the “new Europe” project – but its effectiveness is not for all that limited only to the *international* arena. Its reach is ubiquitous, its arsenal of tactics is breathtakingly wide, and it extends into every fibre of the modern social space down to its very last bottom, not stopping at the frontier between the nation-state and the international community or at the fig leaf of popular sovereignty. It is a truly awesome system of government – and the original meaning of “awesome,” let us remember, is “appalling and dreadful”<sup>14</sup> – and in the last decade and a half the new ILTMC project described and analyzed in these pages has been one of the many façade structures serving to cover it up, conceal the fact of its existence, and give it, by this induced twilight, an ever greater opportunity to spread, mature, and grow.

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<sup>11</sup>“The chief function of the disciplinary power is to ‘train’, rather than to select and to levy ... It ‘trains’ the moving, confused, useless multitudes of bodies and forces into [an organized] multiplicity of individual elements.” (FOUCAULT, *supra* n.2, 170.)

<sup>12</sup> *Id.*, 26.

<sup>13</sup> *Id.*, 27.

<sup>14</sup> OXFORD ENGLISH DICTIONARY (2006); available from <http://dictionary.oed.com>.

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A slightly more charitable conclusion would be perhaps that the main thing that has gone wrong with the new ILTMC regime was that its producers have failed to separate their subjective dreams from their socio-theoretical diagnoses. Too many ideologues and architects of the new ILTMC regime over the last twenty years have been haunted by the stubborn belief that the liberal democratic polity portrayed by the disciples of Rawls and Kymlicka was in fact both a reliable description of what the North Atlantic West has become in practice and an accurate portrait of what the Hegelian *telos* – the final end of perfect becoming, the ideal state of political being after reaching which history will end and the future will become the same as the present – was in theory.

Against this background, one of the central merits of legal realism, as well as of the historico-materialist method in general, has been precisely the fact that in dealing with such questions it has managed to thrust aside all the grand chimeras of the liberal political philosophy, from classical economics to liberal individualism, with all their self-confirming prophecies that “simply regurgitate the stale terminology of the most traditional spiritualist metaphysics.”<sup>15</sup> True, from the pages where its main problematic was first posed to its actual resolution this thesis has taken a very long way. But it seems it would be quite short-sighted to propose that it was an unjustified delay. Perhaps, the main reason why so much of the mainstream ILTMC scholarship these days has become so irretrievably lost within its own daydreams is not because there has been some deliberate ruse or ill-will on the part of its producers, but because not enough attention was paid to the questions of method, epistemological conventions, and the need to appreciate the dialectical complexity of the conjuncture.

For the genuine problems are too serious and complex to be resolved by pompous and ultra-simplistic generalizations that have never succeeded in explaining anything whatsoever.<sup>16</sup>

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<sup>15</sup> NICOS POULANTZAS, *STATE, POWER, SOCIALISM* 20 (transl. by Patrick Camiller; London: Verso, 2000).

<sup>16</sup> *Id.*, 21.

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