CHAPTER 7

INTERNATIONAL LEGAL EXPERTISE: INNOVATION, AVOIDANCE, AND PROFESSIONAL FAITH

Across the twentieth century, as law expanded its reach into global political and economic life, legal professionals transformed their understanding of what law is and how law works. As legal expertise became sophisticated, plural and eclectic, law became an ever more powerful strategic tool for people struggling for advantage on the global stage. Today, a map of legal exposure, risk, and opportunity is part of the basic toolkit for political and economic actors operating transnationally. Yet when people reflect on the role of law in global affairs, they rarely focus on law as an instrument of distribution or cause of inequality. They may use legal argument and assertion ruthlessly for political or economic gain, but they think about international law more benignly as a sign of the potential for order and justice in global affairs. This chapter explores the relationship between these two sides of contemporary international legal expertise: an expanding practice of struggle wrapped in the promise of justice. It is a relationship sustained by a kind of professional faith or practice of fealty that strengthens law's authority while weakening the profession's sense of responsibility. The chapter ends with a suggestion for turning the internal diversity and pluralism of contemporary global legal activity toward a more responsible professional practice.

A possible explanation for the profession's aversion to exploring law's engagement with conflict, distribution and inequality might be a disconnect between the hard-boiled view of practitioners and the preoccupations of scholars arguing for international law's larger significance and potential. In the late nineteenth and early twentieth centuries, for example, as practitioners were

expanding law's role in transnational commercial affairs and building new public institutions, many scholars were focused on clarifying and limiting the norms that would count as legally valid, shrinking the corpus of international legal rules just as practitioners were pushing the boundaries in all directions. Practitioners engaged in global struggle today are also more likely to think of law first as a strategic tool or frustrating limit than are academics focused on legal activity as constitutive of global legal order. Military professionals understand law as a tool for shaping the battlefield, businesspeople have become strategists of regulation, harnessing public and private standards to define their brand, defend their market, and distribute gains across global value chains, and lawyers promote their skills to anyone with an international project who might find it useful to assess the status of forces affecting its realization. Scholars do tend to see something else: a fragile and virtuous legal order of imperfect rules foreshadowing a future cosmopolitan order for a world of political conflict and economic competition.

But the relationship between practical savvy and scholarly vision is more complex. Scholars routinely adjust their ideas with an eye to their practical impact. They work hard to reinterpret what might be visionary as practical and what works as visionary. This double agenda is useful and reassuring for people who use legal assertion in struggle. Their legal assertions are also visionary, linked to order and justice. When you ask international lawyers, academic or practical, about their ongoing projects, proposals, and engagements, they readily describe the immediate terrain of their struggle with clarity. If you ask them to reflect on that experience—what it says about law and the world—they interpret their activity in a vocabulary that foregrounds a larger purpose for law as a contribution to order and justice rather than as a tool of distribution and instrument of struggle. To realize the promise of an ordered and just world, today's tentative shoots must be nurtured and honored. Increasingly, these perspectives have merged: people struggle technically for particular projects by making arguments about law's larger purpose, promise, and destiny and see its larger purpose prefigured in their ongoing technical projects.

Both activities are undertaken in the shadow of faith, a faith that precludes some kinds of self-reflection. Law's role in distribution, inequality, and conflict are leeched out: they belong to politics or to economic competition. Law is a nobler thing. Perhaps this explains the strange professional attachment to the idea that law remains a weak overlay on a political and economic world for which it has no responsibility. Both the profession's strategic pragmatism and its ethical self-confidence are on the line. To focus on law's role in conflict and

injustice not only tarnishes law's usefulness in particular struggles but may compromise a noble promise for humanity. As a result, although the imagination and methodological inventiveness brought to legal work opened the door to understanding law's ubiquity as a mode of power, international lawyers—scholars and practitioners—have not stepped through.

The turn to faith emerged as scholars grappled with two intellectual puzzles that plagued their efforts to retheorize an ever more expansive, diverse, and plastic legal practice and corpus of legal materials: the problems of international law's "legality" or normative authority and of its enforcement or practical power. After a century of intellectual work in the shadow of a proliferating legal practice, these puzzles are no closer to resolution. The result is a kind of disenchantment with explanation and a merger of technical and intellectual work sustained by professional faith rather than confident theory or compelling sociology. The modern international legal profession is a case study of sophistication through disenchantment.

I tell the story here from an American perspective, although it took different forms in different places. Scholars have been divided among themselves about how best to light the path by which practical work might promote the legalization of international affairs. Their differences have defined schools of thought and national traditions, divided the profession within the United States, distinguished it from European thinking about the field, and affected the shape of national traditions everywhere.[1] Theoretical differences within the field have sometimes become linked with doctrinal or national positions and been articulated in political struggle. In the run-up to World War II, the Roosevelt administration proposed to think about international law more flexibly to abrogate or avoid what had seemed to be clear obligations of neutrality, and their Republican opponents fought back in the name of the international legal order as a whole.[2] The Manhattan and Yale schools of public international law disputed the wisdom and legality of the Vietnam War and other American Cold War interventions in methodological terms: was international law a matter of limiting rules or fundamental values?[3] Differences in legal theory divided supporters and opponents of the Iraq War both within the United States and internationally. The academic debate between European constitutionalism and the distinctly American blend of "policy pragmatism" and neoformal "rule of law" tracks closely the broader ideological debate between European social democracy and American neoliberalism. The association of theories with opposed political projects has diversified the field and given all theories a tendentious and overdrawn feel. These differences continue to offer a repertoire of moves for people in struggle. For the discipline, a shared sense that none of the theories emerged triumphant from a century of debate has become prevailing wisdom. To be a sophisticated international law scholar or practitioner anywhere today is to be an eclectic and jaded borrower, enlisting arguments from across the spectrum of ideas about international law's legality and power to sustain its promise.[4]

Not every international lawyer or legal tradition is comfortable with this new sensibility. Periodically, anxiety about the effectiveness or existence of so plastic a medium arises and new theories and empirical studies are brought forward to demonstrate that international law really does bind and is effective and that people do comply with it "as law." The fragmentation of international law has also raised anxieties about its integrity and coherence as a constituted legal order. When this happens, new constitutionalist visions and projects arise alongside new interpretations of law's coherence and new techniques for managing a fragmented corpus of materials and arguments. From the other side, neoformalists push back against international law's creative expansion, consigning ever more activity to the political or the economic. These bursts of renewal and attack are increasingly short-lived. A sophisticated and disenchanted professional sensibility no longer needs them: technique has embraced the plurality of theory as it harnessed the fragmentation, deformalization, and reformalization of norms. This is not the only destiny for legal pluralism, but it seems to be where we are. The chapter ends with a suggestion about what else might be imagined.

THREE INNOVATIONS: PRACTICAL INNOVATION AND SCHOLARLY REINTERPRETATION

The eclectic sophistication and disenchantment of the contemporary international legal profession were hard-won. They arose in part from a century of technical innovations wrought in struggle as people grappling with one another wrestled with the legal fabric, extending its reach and internalizing their differences within it.[5] The contemporary professional sensibility is also the product of scholarly reflection and theoretical innovation: the disenchantment that comes with a century of unsatisfactory answers to foundational questions. Although I focus on the theoretical side of the story to draw attention to the turn from unsatisfactory theory to practices of faith, it is worth recalling the drama of law's engagement with world historic struggles.

The expansion of law's reach in global affairs and the breadth of practical innovation since the late nineteenth century are difficult to overstate. The

dispersion and globalization of economic life have made the legal arrangements that hold it together a focal point for struggle everywhere. Colonialism was a complex and diverse legal institution that became ever more institutionally and doctrinally nuanced as empires transitioned to mandate supervision and self-determination. Decolonization and the integration of imperial dominions into the global political and economic order have turned out to be more complex still. The spice trade, slave trade, and opium trade all generated legal innovations. Trade during and after industrialization sharply expanded the density and diversity of transnational legal forms. The global mobilization of commodities from sugar to oil, waves of expansion in the territory available for capital investment, and the integration of global labor markets into world production process each required new legal doctrines and institutional arrangements. New institutions and bargaining arrangements, a body of common principles and precedents to draw on, and a proliferation of new topics and new actors, both public and private, have made the contemporary law of trade more complex still. Consular and diplomatic life in the nineteenth century was the site of great innovation: special statuses, new remedies and modes of dispute resolution, specialized courts and tribunals. The institutional transformation of diplomacy in the aftermath of the world wars, decolonization, and the end of the Cold War produced an institutional terrain for global political conversation that crisscrosses governments, corporations, and civil society, all of which search for a common language of engagement. The story has been told many times: new kinds of law, new actors, new subjects, new institutions. And every year more of each.

This was not the result of a smooth global reform extending the role of law across new problems and territories. It was the result of struggle: of colonial expansion and resistance, of Cold War decolonization and nonalignment, of hot and cold conflicts between contending ideologies, commercial powers, and political blocks. Wars were fought and victories enforced in legal terms. There were, after all, Soviet and Nazi theories and practices of international law, just as there were Western liberal ones.[6] For elites in the world's semiperiphery, international law was a tool of self-invention and promotion just as it has been for Republicans and Democrats in the United States.[7] People promoting and opposing labor rights, environmental protections, or civil and political rights have done so in legal terms. The war on terror has harnessed the legal architecture of global finance to pressure outlier nations, individuals, and groups. Global financial institutions and wealthy investors have expanded their power

over cities and nations alike. Industrial sectors have battled for dominance as corporations have struggled for exclusive access to resources and markets. In each of these struggles, people have pulled and pushed on the legal fabric, searching for ways to expand their quiver of powers and open chinks in their opponents armor.

At the same time, "internationalists" associated with global legal and institutional arrangements have also had projects: to secure the peace by collective security; to complete the state system through self-determination and the management of national minorities; to strengthen global regulatory and administrative authority; to advance the project of legalization by promoting the use of legal precedents, principles, and institutions by new actors in new fields of endeavor; and to promote things like free trade, human rights, or international criminal law and the institutions built to implement them in the name of universal values. It should not be surprising that people promoting legalization would find opportunity in the diversity of legal arrangements and arguments thrown up by ongoing struggle and seek to internalize them within an ever more comprehensive and sophisticated legal field. In one sense, of course, law reflects winners. The UN Security Council affirms that there were five great powers in 1945, although Germany and Japan had only recently almost been more powerful than all of them. The internal diversification of the legal fabric, however, reflects not only wins but games played. Whether global struggles are won or lost, each side had something to say that drew on, expanded or reframed law's vocabulary. The sophisticated eclecticism and internal diversity of the field reflect this history of arguments and assertions made.

The expansion of the international legal world was accompanied by a century of innovation in the field's vision of what international law is and how one should reason within it. From the mid-nineteenth century, as "law" came to be associated with national sovereignty, "international law" became an act of imagination and argument by analogy. A scholarly profession developed rapidly to undertake and promote that imaginative construction, developing theories—arguments, really—for the existence, scope, and content of international law in a world of national sovereigns. Over the next century, scholars urged an ever more realistic understanding of law diffused through the fabric of interaction and communication among all the actors on the global stage, reinterpreting the legal order in functional terms. This way of thinking about law further expanded international law's scope. Once law could be identified by its functions—as a technique of reciprocal enforcement, advocacy,

dispute resolution, norm generation, consensus building, problem solving, or administration—wherever those functions are performed, there is law. International lawyers expanded their field's aperture to include national law and private law rules that affect transnational economic activity as well as informal or customary arrangements that function as law in global society. In a world where anything could be an avatar of law, much will depend on what people interpret law to be: law will become whatever people treat as if it were law. This sociological and interpretive expansion opened the way to grasping law's constitutive and distributive role in global political economy as well as its social power, legitimating and delegitimating as people denounce and defend global action in legal terms.

In the process, international law became a more dispersed and fragmented affair. The expansion of law's range was matched by an internal proliferation of legal principles, arguments, and doctrinal materials. The possibility to say ever more things in legal language increased the number of people who found it a useful vocabulary for self-assertion. As international materials multiplied, they became increasingly flexible. Rules were displaced by principles and differences in kind were reinterpreted as matters of degree. An ever more plural legal vocabulary embraced contradictory principles and purposes more readily. Nor were all legal rules of equal value or validity: some were more persuasive than others. Soon it became possible to use law both to make and to unmake familiar distinctions—war and peace, public and private, politics and economics, international and national—and to express a range of sharply different political viewpoints, enhancing law's potential as a tool of struggle. Law offered a way to do things with words: to denounce and defend, legitimate and delegitimate, define and redefine the battlefield or the market. Awareness of law's internal flexibility also increased the significance of professional interpretation. As international law came to embrace broad principles and require the balancing of conflicting interests, more would depend on the wise judgment of those who use legal tools.

Although these innovations might have made it easier to see the role of transnational legal arrangements in conflict and injustice, most averted their eyes. International lawyers and scholars did understand that disaggregating the legal order, merging it with social forces, loosening its claims to coherence and encouraging its strategic mobilization by people with all kinds of projects at various levels was a gamble: will legalization tame political and economic forces or be tamed by them? The answer, they could see, is as much a matter of interpretation as of fact, and ultimately, where one cannot know, one must choose to

believe. The decision to embrace a disaggregated law as a functional cosmopolitan order is an affirmation of faith that now demands professional fealty.

It has the advantage of being a convenient faith, affirming the virtue of the professional project while strengthening individual claims made in its name. The idea that simply using international law contributes to a better world is an appealing thought for practitioners who frame their parochial claims as steps to a virtuous universal order. Scholars could imagine anyone using international legal institutions and arguments as a (perhaps unwitting) foot soldier promoting world peace through world law. Although many particular interests advanced in the name of international law might turn out to impede progress toward global order, international lawyers were hopeful. Practitioners might be transformed by using the tools of law and come to share the ambition for a better world. They might come to inhabit law as believers rather than use it as strategists, accepting law's limits for themselves as they urge them on others. Or it might turn out that as international law materials are used successfully, a legal order would sneak up on sovereigns, subordinating them to its limitations. Suddenly there would be institutional arrangements and argumentative paths it would be impossible to ignore. The profession was hopeful about a shared fiction: by interpreting the dispersed entanglements of law with everyday struggle *as if* they were or would become a global public order able to solve global problems, express shared values, and implement humanitarian aspirations, that day may be brought ever nearer.

This double project—making international law diffusely useful while lauding the results as ethical progress—requires careful interpretation and strategic skill by both practitioners and scholars. No longer the jurist waiting to be asked what is and is not legal, the international lawyer has become a strategic partner for businesspeople, civil society advocates, politicians, and military commanders, while *also* thinking strategically on behalf of international law. International lawyers play for gains and for rules—and also for a better world. Even the most focused advocate is rarely indifferent to international law's future. The tools work and the arguments persuade only when they can be linked to a future order that will civilize conflict and implement universal values. Whether you are prosecuting a war criminal or drafting a code of corporate responsibility, you are playing a long game for the legal order as much or more than you are struggling for victory in the case. Their eyes on a long game, international lawyers have a powerful motive not to investigate law's role in conflict, injustice, or inequality. These are better seen as stubborn facts to be addressed by a revitalized cosmopolitan law in the hands of inspired practitioners.

FAITH AGAINST DOUBT: THE ORIGIN OF A PROFESSIONAL RIDDLE

To believe in international law's future you need to accept its existence. To see the hand of *law* in so diverse a practice of global push and pull you need to believe that people would not have fought, won and lost in the same way without the normative pull of legal obligation. Unfortunately for international lawyers, just as their field was expanding dramatically, doubts on this point were at their peak. How can a legal order be built on the horizontal political interactions of sovereign states? In what sense can we say that international norms, institutions, arguments, and assertions are really "law"? Perhaps they are just power in a pretty dress, "compliance" nothing but lipstick on interest. A hundred-year rearguard action against such doubts turned out to be a blessing in disguise, however, propelling the emergence of the sophisticated and disenchanted professional sensibility we encounter in the profession today.

The classic formulation of the philosophical problem was by the English legal theorist John Austin in *The Province of Jurisprudence Determined.*[8] As the title suggests, his intellectual project was to understand the distinct nature of law by determining its boundaries and limits. Law, he maintained, is the command of the "sovereign," a power whose authority is backed by sanction, is routinely or habitually obeyed, and is itself not subject to the command of another. Sovereignty, for Austin, is outside of, above, or before law.

> Whether a given government be or be not supreme, is rather a question of fact than a question of international law. A government reduced to subjection is actually a subordinate government, although the state of subjection wherein it is actually held be repugnant to the positive morality which obtains between nations or sovereigns. Though, according to that morality, it *ought* to be sovereign or independent, it is subordinate or dependent in practice.[9]

As Austin saw it, the absence of a higher sovereign power meant that international law was not law "properly so-called" but a matter of morality called "law" only by analogy.

> The so called law of nations consists of opinions or sentiments current amongst nations generally. It therefore is not law properly so called.[10]

> The positive moral rules which are laws improperly so called, are laws set or imposed by general opinion: that is to say, by the general opinion of any class or any society of persons. Some are set or imposed by the general opinion of persons who are members of a profession or calling; others, by that of persons who inhabit a town or province; others, by that of a larger society formed of various nations. . . . And laws or rules of this species, which are imposed upon nations or sovereigns by opinions current amongst nations, are usually styled the law of nations or international law. Now a law set or imposed by general opinion is a law improperly so called. It is styled a law or rule by an analogical extension of the term.[11]

Had international lawyers not started with Austin, they might have interpreted the nineteenth-century expansion of sovereign power differently: not as a threat to the existence of international law, but as a permissive shift in the content of the rule system from mutual restraint to an order more respectful of autonomy. To see the autonomy of sovereigns instead as a matter of political and historical *fact* excused international law from responsibility for what was permitted or possible in its absence. Even after international law's dramatic twentieth-century expansion, it remains common to associate it only with constraint, rather than to acknowledge its role in privileging what sovereigns do, whether despoiling the environment or making war.

Austin's conceptual challenge to the "legality" of international law has animated international law practice and thought ever since. Not because international lawyers *agreed* with Austin, nor even because they felt he was particularly significant. Some did, many did not. Rather because international lawyers and scholars were determined to reconcile their own acceptance of national political sovereignty with a passionate dream of a better and cosmopolitan international order achieved through law. Austin gave voice to an anxiety they felt. Modern international law was born in the paradoxical relationship between the dream of an international legal order and a sense that both the practical reality and conceptual significance of "sovereignty" stood in the way.[12] Resolving the tension between the "fact" of sovereignty and the promise of law gave international lawyers a common intellectual and practical project.

There was a lot of work to be done. By the end of the nineteenth century, international law had worked itself into a corner. An international law handbook for diplomats in 1800 would have contained a wide range of sensible strategic advice and information about what to expect when representing your country: part Machiavelli, part Robert's Rules, and part Emily Post.[13] The law of nations was as much a part of the accepted background for global political and economic life as the common law was for Americans at the same time. Lots of people asserted "rights" rooted in the law of nations: sovereigns, property

holders, diplomats. Sovereign rights were exercised by aristocratic authorities, corporations, and private parties: privateers could exercise rights of war, the East India Tea Company could exercise sovereign powers, and the world was divided into all manner of overlapping political entities with varying degrees of autonomy. What we now distinguish as international public and private law were all mixed up. King Leopold of Belgium was said to "own" the Congo in what would later seem a strange fusion of property and sovereignty. Moreover, far from a uniform terrain of homologous states, the world itself was understood to be divided among civilizations and between those who were and were not "civilized." Legal powers and players were different within and between these domains.

By the end of the nineteenth century, the situation was altogether different. Within the legal field, distinctions had sharpened between law and politics, law and morality, national and international, and public and private international law. The domain for "international law" kept getting smaller and more conceptually distinct. Diverse arrangements of "sovereign rights" gave way to the idea of a single type of actor: the "sovereign" nation-state. This was a novel and not altogether persuasive proposition when most of the world remained part of various colonial and imperial dominions. Nevertheless, echoing Austin, the unique authority of "sovereigns" was understood to be more than the sum of their legal entitlements: it resided in history and expressed the priority of politics over law. As late as 1924, British legal scholar Percy Corbett gave expression to this idea in analyzing the League of Nations' authority over the Saar, where it exercised all the rights of sovereignty without qualification but did not possess what he called the *nuda proprietas* of sovereignty. That remained with Germany.[14] The absent *nuda* was not simply another legal interest—the right, say, of reversion—but a more elemental form of political power that an artificial creature of law like the league could not possess. The consolidation of "sovereignty" in the imagination as a singular and absolute kind of political figure placed international law under suspicion and opened rules long understood to be valid to suspicion and challenge. In response, international lawyers developed theories about—and arguments for—the "legality" of international law just as the global normative order was expanding.

The explosion of innovation that launched the renewal of international law and opened the door for its modernization took place in percussive bursts. Martti Koskenniemi focuses on the emergence of a cosmopolitan liberalism of a generation of international lawyers in the Europe of the 1870s.[15] World War I sparked another remarkable period of intellectual and institutional innovation in Europe among political scientists and international lawyers.[16] The two dozen years after 1945 saw a further expansion of international legal materials, legal institutions, and professional communities fueled by decolonization, the United Nations, and American hegemony. The scholarly center then was the interdisciplinary discussion in the United States—in New Haven and New York—that interacted with the world of the United Nations and legal intellectuals from the postcolonial world. The proliferation of sites for international adjudication and advocacy that began in the 1970s and exploded after 1989 with the rise of the human rights movement gave another generation the opportunity to reimagine the field.[17]

As each generation faced a wave of technical innovation and expansion demanding interpretation, people found new ways to blend the reality of sovereign power and the promise of law's normative power. As people reimagined the field, they also extended its reach and added to the toolkit available for people in struggle. The projects that followed considered both the normative and the enforcement side of the legality problem: how could legal norms be distinguished from other norms, and how could legal enforcement be distinguished from the exercise of unrestrained political power? Any number of scholars might be chosen to exemplify the kinds of intellectual moves that reinvigorated the field in the shadow of Austinian doubt. For Koskenniemi, Hersch Lauterpacht's centrality to the technical practice and academic sensibility of midcentury international law makes him exemplary.[18] I have always associated this set of moves with Hans Kelsen, whose turn from sociological realism to faith is right on the surface.[19]

Kelsen begins by rejecting the notion, familiar from Austin, that law has behind it the absolute power of "sovereignty" or the "state."

> The assertion that back of the legal order is a power means only that the legal order is by and large efficacious, that its norms are actually observed. . . . The state as a power back of law, as sustainer, creator, or source of the law—all these expressions are only verbal doublings of the law as the object of cognition, those typical doublings toward which our thinking and our language incline, such as the animistic presentations according to which "souls" inhabit things; dryads, trees; nymphs, springs. . . .[20]

Reasoning about law on the basis of mental images and abstract concepts should be replaced by a more realistic assessment of law's actual effectiveness. The "state" we imagine is "only a picture."

> The state is conceived of as having existence in space, and, accordingly, events are distinguished as happening within the state and without the state. We speak of internal and external affairs of the state. The object of national law is *within* the state; the object of international law is *without* the state . . . [however] the idea of the state as a body in space having an "inside" and "outside" is only a picture.[21]

The key to law's validity is the fact of coercion: "Law . . . is a coercive order not because the idea of the legal norm induces men to proper behavior, but because the legal norm provides a coercive measure as a sanction."[22] When a national legal order successfully harnesses sanctions to normative propositions, Kelsen imagines it resting on a *grundnorm* articulating the law that is "efficacious."

Turning to international law, Kelsen asks whether the same might be said. Here the importance of interpretive articulability is front and center: *can it be said* that international law is efficacious in the same sense?

> International law is law in this sense if a coercive act on the part of the state, the forcible interference of the state in the sphere of interests of another, is permitted only as a reaction against a delict and the employment of force to any other end is forbidden—only if the coercive act undertaken as a reaction against a delict can be *interpreted* as a reaction of the international legal community. *If it is possible to describe the material which appears in the guise of international law* in such a way that the employment of force directed by one state against another can be *interpreted* only as either delict or sanction, then international law is law in the same sense as national law.[23]

What began as a turn from abstraction to the real world of coercion becomes a matter of interpretation.

Kelsen acknowledges, moreover, that interpretation is a matter of choice. War, he reflects, has been interpreted in two ways: as outside of law—"neither a delict nor a sanction"—and as "forbidden in principle" by international law and therefore either delict or sanction.[24] "It would be naïve," he says, "to ask which of these two opinions is the correct one, for each is sponsored by outstanding authorities and defended by weighty arguments."[25] The interpretive choice is a political and ethical one: do we choose law or a world unrestrained?

> The situation is characterized by the possibility of a double interpretation. . . . It is not a scientific, but a political decision which gives preference to the *bellum justum* theory. This preference is justified by the fact that only this interpretation conceives of the international order as law. . . . From a strictly scientific point of view a diametrically opposite evolution of international relations is not absolutely excluded. That war is in principle a delict and is permitted only as a sanction is a possible interpretation of international relations, but not the only one. We choose this interpretation, hoping to have recognized the beginning of a development of the future and with the intention of strengthening as far as possible all the elements of present-day international law which tend to justify this interpretation and to promote the evolution we desire.[26]

The result is a professional project: to affirm and "promote" the significance of law in international affairs. If you—and others—chose to look at international law as an order, it would be one. Anything less would be to choose a world of unrestrained conflict.

A turn away from concepts to reality, a confrontation with the pluralism of that reality and the indeterminacy of interpretation, and a renewal of the will to interpret for order and to promote a future of ever more effective international law: across the twentieth century, generations of scholars and practitioners made these Kelsenian moves in one or another way. As they did, they came to see law everywhere, dispersed throughout global society and available for people with projects of all types and to reinterpret power as law made visible. In 1989, for example, the *Harvard Law Review* reexamined the relationship between jurisdiction and statehood to encourage courts to consider transnational solidarities and interests alongside national interests in assessing assertions—and refusals to assert—national jurisdiction outside a state's territory:

> Rethinking jurisdiction . . . requires rethinking the state itself. It requires envisioning a state not as natural, bounded, and enclosed, but as constructed, boundless, and open, a constellation of authoritative behavior, or authoritative exercises of jurisdiction over individuals, events, and property. The "state," in this view, is the ever-changing snapshot emerging from these jurisdictional assertions, the very pattern of assertions of jurisdiction, *not* an entity that ponders whether to assert jurisdiction or not. It has no permanent inside and outside, no identifiable interests. In short, the state does not define the scope of its jurisdiction; rather, it is the jurisdictional decisions themselves that define the state.[27]

Nevertheless, the need to "promote the evolution we desire," in Kelsen's words, remained acute. The dream that legalization would enable a global

humanitarian and cosmopolitan consensus, restrain self-interest in the name of global objectives, or offer effective tools to address global policy challenges remained on the horizon. Fealty to this dream would blunt recognition of what might otherwise be obvious: if people everywhere use law in struggle, it must be implicated in outcomes, just and unjust.

THE PROBLEM OF RULES: THE LIMITS OF CONSENT

For the international law profession, the scholarly road to agnostic eclecticism can be seen in changing answers to two central theoretical questions: how do we identify binding rules, and how are they made effective as law in the world? The late nineteenth-century solution to the first problem was consent. The distinction between law and policy or morality was sovereign intention of the sort expressed in treaties. Yet nineteenth-century international law contained many rules not established by treaty: it would be necessary to determine which could be said to rest securely on sovereign will. Even treaties would need to be assessed to ensure consent had not been vitiated by things like mistake, fraud, duress, or changed circumstances. The result was a new doctrinal tool—"sources of law"—for assessing the provenance of rules, codified in the 1924 Statute of the new Permanent Court of International Justice to guide the justices in their search for law. Unfortunately, the validity of norms was hard to prove and easy to challenge.

The 1900 US Supreme Court decision in *The Paquete Habana* illustrates the problem.[28] After a very lengthy and detailed historical investigation, the Court found that seizing "fishing smacks" as prize in war was contrary to customary international law. The recitation of sovereign practice was remarkable in its extent—page after page—and in the consistency of state practice. For many centuries, no sovereign seems to have seized a fishing smack. After affirming the rule, the Court applied it to the American Navy, striking a blow for the legality of international law more generally: "International law is part of our law, and must be ascertained and administered by the courts of justice of appropriate jurisdiction as often as questions of right depending upon it are duly presented for their determination."[29] *The Paquete Habana* is routinely cited as a textbook example of sources doctrine at work, illustrating the proper way to demonstrate the validity of a customary rule, and as the leading American authority on the binding power of international law itself. Prior to 1900, no authoritative ruling on this point was needed. It was simply obvious that international law, like the common law, was part of the nation's legal system. The need for articulation marked the beginning of the end for customary international law in American courts. More importantly, if every customary rule would now need historical proof as elaborate and uncontradicted as that in *Paquete Habana*, there would be very few norms of customary law. Much that had been legally regulated no longer would be.

International lawyers tried all kinds of things in the following decades to flesh out the normative catalog. Some launched private projects of "codification" to restate the norms in force with clarity and precision. They promoted codification by treaty, despite the limitations this placed on the norms that could be articulated. They worked to articulate a default rule to permit resolution of a dispute where no legal norm could meet the new pedigree requirements.

Perhaps a court could decide on the basis of equitable criteria, *ex aequo et bono* in the words of the Permanent Court Statute. Perhaps a solution could be deduced from the nature of sovereignty itself. In 1927, for example, the Permanent Court held in the *S.S. Lotus* case that the territorial bonds of sovereignty are superior to bonds of citizenship because sovereignty *was* by nature territorial, while admitting there was no rule of custom or treaty to this effect. Once it was possible to reason from the nature of sovereignty, the door was open to finding duties as well as rights, and looking to the nature of the international legal system as a whole to find principled means for settling disputes. In 1974, United Nations sought to clarify these background entitlements of sovereignty in the Charter of Economic Rights and Duties of States, whose multiple and conflicting terms further widened the scope for international legal argument and assertion.

Already in the Hague Conventions, a move from legal rules to broad principles was under way. It was difficult to come to agreement on rules of war beyond the prohibition of a few weapons and protocols for the treatment of medics and prisoners. Such narrow rules seemed to affirm that the rest of war was outside law all together. Perhaps the few rules we had could be seen to embody underlying principles of more general application. Or perhaps agreement could more easily be reached at the level of principle. A principle might also slide more easily into the reasoning processes of military professionals. The principle that military force must be "necessary" and "proportional" to its objective brings the entire battlefield into law while mirroring the military's own logic: concentrate your force, no wasted effort. It echoes the kind of moral distinction soldiers and citizens will want to make: no wanton destruction or unnecessary killing. Over the next decades, as hundreds of "codifying"

treaties were adopted, the search for multilateral consensus generated ever more broadly framed provisions, often of uncertain normative status or meaning, which might be useful but require interpretation.

The turn to principles brought political and ideological differences into the legal fabric, softening the line between law and policy or morality. Rather than a threat to the legality of law, jurists saw confirmation of law's increasing strength and usefulness as a kind of principled gravitational field for sovereign interaction. It could serve as a general vocabulary of statecraft and toolkit for innovative solutions rather than simply a checklist of obligations, limits, and entitlements. Oscar Schachter put it this way in 1962, praising what he saw as UN Secretary-General Dag Hammarskjold's skillful use of international legal principles in diplomacy:

> Hammarskjold made no sharp distinction between law and policy. . . . He viewed the body of law not merely as a technical set of rules and procedures, but as the authoritative expression of principles that determine the goals and direction of collective action. . . . [He felt] the fundamental principles of the Charter and international law embodied the deeply-held values of the great majority of mankind and therefore constituted the moral, as well as the legal, imperatives of international law.[30]

The technique of fusing these opposing elements into workable solutions cannot be easily described; it is more art than engineering and blueprints are not likely to be available. Certainly, an essential feature lay in the nature of the general rules which guided him. They were, in the main, principles derived from Articles 1 and 2 of the Charter; in that basis they already commanded, in a psychological and political sense, high priority among the values formally accepted by the governments of the world. They were flexible in that they did not impose specific procedural patters or detailed machinery for action; they left room for adaptation to the particular needs and the resources available for a given undertaking. . . .

It is also of significance in evaluating Hammarskjold's flexibility that he characteristically expressed basic principles in terms of opposing tendencies (applying, one might say, the philosophic concept of polarity or dialectical opposition). He never lost sight of the fact that a principle, such as that of observance of human rights, was balanced by the concept of nonintervention, or that the notion of equality of states had to be considered in a context which included the special responsibilities of the Great Powers. The fact that such precepts had contradictory implications meant that they could not provide automatic answers to particular problems, but rather that they served as criteria which had to be weighed and balanced in order to achieve a rational solution of a particular problem.[31]

Schachter was correct: the abundance of principles—very often in tension with one another—greatly increased the usefulness of international law in diplomatic struggles. Parties on all sides of conflict were increasingly able to articulate their political positions in legal terms.

Whether this would lead to a "rational solution of a particular problem," however, was at best uncertain. The ability to express interests in legal terms may also strengthen everyone in the belief that their cause is just and compromise uncalled for. It may encourage weaker parties to overplay their hand—or stronger parties to press beyond what makes long-term sense. Schachter had confidence that the flexibility afforded by the "dialectical polarity" of law would be in good hands with Dag Hammarskjold because he shared faith in the promise and objectives of international law.

> He regarded himself as a man of law, in part because of his formal legal training, in part, it seemed, because of his intellectual delight in the subtleties of legal analysis. There was also perhaps an element of personal sentiment in his attitude, for he had a manifest pride in his family's legal background and especially in the contribution made by his father, Hjalmar Hammarskjold, and his brother, Ake [Ake Hammarskjold, registrar and later judge at the Permanent Court of International Justice]. Much more important, however, than these considerations was the conviction, which he increasingly expressed, that the processes of law, and, as he put it, the principles of justice were crucial to the effort to avert disaster and to achieve a secure and decent international order. That this conviction went far deeper than the conventional homage paid to the rule of law soon became evident to one who shared his professional interest. It was more than a belief in a distant goal; it inspired and influenced his actions from day to day, and it is not surprising that one of the first tributes paid him by an ambassador who knew him well was to describe him as "imbued with the spirit of law."[32]

In the hands of the faithful, a flexible legal fabric that embraces ethical and political differences opens the way for a forward-looking diplomacy that is "more art than engineering."

Meanwhile, a half century of reasoning and arguing had shifted the terrain for thinking about law and sovereignty. In 1949, Justice Alvarez of the

International Court of Justice had positioned himself at the cutting edge of the shift in his *Corfu Channel Case* opinion:

> By sovereignty, we understand the whole body of rights and attributes which a State possesses in its territory, to the exclusion of all other States, and also in its relations with other States. Sovereignty confers rights upon States and imposes obligations on them. . . . This notion has its foundation in national sentiment and in the psychology of the peoples, in fact it is very deeply rooted. . . . This notion has evolved and we must now adopt a conception of it which will be in harmony with the new conditions of social life. We can no longer regard sovereignty as an absolute and individual right of every State, as used to be done under the old law founded on the individualist regime, according to which States were only bound by the rules which they had accepted. Today, owing to social interdependence and to the predominance of the general interest, the States are bound by many rules which have not been ordered by their will. The sovereignty of States has now become an *institution*, an *international social function* of a psychological character, which has to be exercised in accordance with the new international law.[33]

If a sovereign was a social function constrained by rules beyond its consent, the "legality" of legal rules and principles had floated free of any Article 38 pedigree. The terms of Article 38 could still be used to *argue* for and against particular rules. Indeed, it would be an impermissible and unprofessional tactic to assert that the line between law and politics, rule and preference, did not matter or could not be drawn. It could be drawn in lots of ways. But there was no right place, no compelling theory, no ultimate juridical test of just where it should be drawn. As a tactic in struggle, everyone could insist that their preferred rule had a more solid pedigree and reject their opponent's position as a mere policy preference. This practice could now be undertaken more lightly, lawyers on all sides understanding that the line between legal rule and preference was fluid in their hands. Arguments about the status of rules could be effective, but less because they were persuasive than because they fit with professional habits and expectations. A sophisticated discipline had arrived.

In the years after the Second World War, argument in this spirit moved the goalposts for assessing the legality of international law; "legality" would now be a matter of social and political fact rather than an analytical conclusion. A determination by jurists that a norm is valid is, when you think about it, just another argument. The real question is whether the argument persuades, whether the norm functions to change behavior. This could be answered only

in practice, not by analysis of Article 38. Take the definition of customary law as "evidence of a general practice accepted as law." Lots of questions arise: How much practice? What evidence shows a practice to be "accepted as law"? Is the practice of important states more significant? States directly affected by the custom? Dissertations could be written in response, but in practice, they would just be fuel for further argument. In diplomatic practice, however, lawyers readily intuit the evidence that will be *most* compelling: recent practice of the state you are trying to persuade, practice of similar or allied states, and so forth. As a lawyer evaluating evidence to put in the diplomat's speech, one does not think "valid/invalid" but "useful/less useful" or "more persuasive/less persuasive." The result will rarely be the absolute confirmation or repudiation of a possible rule, but something more nuanced, a matter of more or less. Some people would be persuaded, others not.

This approach sharply expanded the number of actors whose responses to legal claims would be significant and who could be understood to carry a brief for international law as a whole. If nongovernmental actors could argue successfully that major corporations violated an "emerging international principle" requiring a "precautionary" approach to environmental damage, they could be understood as part of the legislative and enforcement arms of the international community, contributing to the growth of the normative fabric. Through "naming and shaming," the human rights movement would simultaneously strengthen and enforce international norms. When using international law, moreover, it often makes strategic sense to bracket the question of what is in the normative catalog. Although General Assembly resolutions themselves are not "binding," they may be authoritative in a softer way, persuasive and useful reference points in disputes about what is and is not appropriate sovereign behavior. Oscar Schachter went so far as to catalog the legal and political significance of "nonbinding international agreements," finding parallels with binding arrangements and acknowledging their usefulness as diplomatic tools.[34] If enough people argue for a sensible principle and bring their collective power to bear, they might get a result, even if the norm they proposed could never make it through the sieve of the doctrine of sources. As actors embraced this possibility, the normative material proliferated and legal arguments were increasingly part of global political practice.

Environmental activists were among the first to seize the initiative, promoting new principles only loosely tethered to international documents, reports, and scholarly tomes. Philippe Sands noted the still "limited implementation and enforcement" of international environmental law, which he felt "suggests

that international environmental law remains in its formative stages."[35] One thing it did have, however, was a catalog of principles. "Although no single international legal instrument establishes binding rules or principles of global application, several general principles and rules of international law have emerged, or are emerging in relation to environmental matters."[36] He notes that the principles "temper" one another, as in the case of the principles of "sovereignty over national resources" and "not to cause damage to the environment." Other principles that "emerged" in various international instruments and activities included "the preventive principle," "the precautionary principle," "the polluter pays principle," as well as the principles of "good neighborliness and international cooperation," "sustainable development," and "common but differentiated responsibility." Sands's principles rest on a smorgasbord of binding and nonbinding texts. To his mind, their emergence in the practices of advocacy and diplomacy are more relevant than their pedigree and might well be a matter of "more or less," depending on how far the principle had so far "emerged." To argue that norms culled from this material rose to the level of "general principles of law recognized by civilized nations" remained a heavy doctrinal lift. Nevertheless, arguments by analogy were often successful: a legal principle that worked over there might be a reasonable approach over here. Where these arguments are effective, law's march forward continues.

This shifted attention to the process by which the persuasiveness of norms could be *encouraged*. For Sands, that meant transforming them into workable and more specific "standards" and harnessing them to innovative "legal techniques" that might encourage their implementation. He had in mind reporting requirements, impact assessments, attaching liability to environmental harm in national legal systems, and "improved enforcement procedures and dispute settlement machinery."[37] The field had shifted from making norms to enforcing and implementing them. In that work, one could remain agnostic about whether they really were *legal* norms.

For the contemporary international lawyer, the problem of rules is not a problem. The legality of international law is not inherent in the norms but created in their use. As a result, everyone now speaks a loose jargon of principle and policy. The distinction between law and politics has blurred along with that between legal science and political science. Has international law devoured the political, or has politics turned international law into another language of interest? It is impossible to tell. To look at this situation with late nineteenth-century eyes is to lament the loss of law's special status. The contemporary international lawyer has simply outgrown such questions. As a sophisticate, she realizes rules have no pedigree and law has no special province to be determined. Acting as if law had normative power sometimes works and, if we believe, may yet bring us a better world.

THE PROBLEM OF POWER: LEGALIZATION WITHOUT LIMIT

The turn from validity to the persuasiveness or effectiveness of rules presented a different problem of legality: identifying the machinery of specifically *legal* enforcement. A century ago, it was obvious the machinery for enforcement was weak. Experts bemoaned the still primitive stage of international society and yearned for courts and other institutions to implement the normative catalog they were composing. Over the years, they imagined other enforcement possibilities. The horizontal interactions among sovereigns might be reinterpreted as acts not only of "auto-interpretation" but of reciprocal enforcement.[38] Together, they could be understood as a primitive functional equivalent for the vertical systems of interpretation and enforcement found in "mature" national systems. The enforcement pressures brought to bear would be not only military power or direct sanctions, but a wide range of social pressures that are part of "legitimacy." If we attribute these powers to law, we could conclude that the legality of international law resides in its social power to legitimate and delegitimate.

The picture that emerged is of a self-reinforcing legality blending normative creation and enforcement. People make assertions about what law requires. Their assertions go into the world armed with a backpack of social, political, and economic power. Where the assertions are met with acquiescence or agreement, the norms were legal. At the same time, assertions of power carry little backpacks of legal authority. When they are successful, they were legitimate. In both directions, the (successful and persuasive) use of law strengthens the legal fabric as a whole.

This is an elegant, if analytically somewhat circular approach to the problem of legality. It is hard to see how one could disentangle the social or military force brought to bear on behalf of a norm from the additional effect of law's legitimating power. If the power of law is merged with the powers that make law effective, it is hard to know whether the result is marvelously juris-generative or wild overreaching by international lawyers. If you approach international law with an attitude of suspicion, in the tradition of Austin, it would be easier to conclude that what is going on is simply the assertion and pursuit of sovereign self-interest. The legal language is nothing but a convenience to fool

whoever may be taken in. But if you are a believer, someone who chooses, following Kelsen, to see the world in legal terms, you will witness the wonderful process by which civilization rises from the plain of brute force.

Once the legality of international law attaches to the power of social sanction, international law is an expression of power and an effect of coercion. It is difficult to see how this could avoid opening the door to a consideration of law's role in injustice or the violence and death of the wars it legitimates. But it has not. Rather than seeing the hand of power in the glove of law, mainstream international lawyers focus on the glove. They see *law* acting everywhere in the world and celebrate the ability of civil society organizations, individuals, or national judges to participate in global rule making. Where the outcomes are not desirable or when bad things happen in the name of law, they prefer to see the misrule of power dressing itself in legal justification.

One result of this professional posture is a kind of winner's logic. Whoever makes legal claims successfully has not only vindicated a parochial demand but contributed to the enforcement of a collective vision. Claims validated through enforcement must have had the wind of legitimation behind them. This idea has striking parallels in many seventeenth-century views of natural law. This also makes it very difficult to imagine law implicated in injustice or distribution: when legal claims succeed, everyone benefits. Those who "won" were successful agents of the whole. When George Bush challenged the United Nations to enforce international law against Saddam Hussein—or stand by passively while the United States took matters into its own hands—we can imagine a legitimation calculus whose outcome could be known only after the campaign was completed. Had the United States brought democracy to Iraq and beyond, the United Nations would have been delegitimated as the oracle of legality. If, as it happened, the campaign was widely perceived as a failure, the United States would be delegitimated in their claim to act on behalf of global order. One might untangle the legality from the success of the venture, but it would be hard to ignore their impact on one another. At the extreme, this can lead to the kinds of claims one heard when NATO attacked Serbia in defense of Kosovo: the action was legitimate, even if not, strictly speaking, legal. One would expect the law to catch up.

In 2003, Anne-Marie Slaughter analyzed the Bush administration's legal and political position in these terms in the *New York Times*:

> With the news that the United States was abandoning its efforts to get United Nations approval for a possible invasion of Iraq, yesterday looked to be a very bad day for staunch multilateralists. . . . That view is understandable, but incomplete. . . . By giving up on the Security Council, the Bush administration has started on a course that could be called "illegal but legitimate," a course that could end up, paradoxically, winning United Nations approval for a military campaign in Iraq—though only after an invasion. . . . In 1999, the United States, expecting a Russian veto of military intervention to stop Serbian attacks on ethnic Albanians in Kosovo, sidestepped the United Nations completely and sought authorization for the use of force within NATO itself. The airwaves and newspaper opinion pages were filled with dire predictions that this move would fatally damage the United Nations as the arbitrator of the use of force. But in the end, the Independent International Commission on Kosovo found that although formally illegal—the United Nations Charter demands that the use of force in any cause other than self-defense be authorized by the Security Council—the intervention was nonetheless legitimate in the eyes of the international community. So, how can United Nations approval come about? Soldiers would go into Iraq. They would find irrefutable evidence that Saddam Hussein's regime possesses weapons of mass destruction. Even without such evidence, the United States and its allies can justify their intervention if the Iraqi people welcome their coming and if they turn immediately back to the United Nations to help rebuild the country.
>
> The United States will now claim authorization under Resolution 1441. Most international lawyers will probably reject this claim and find the use of force illegal under the terms of the Charter. But even for international lawyers, insisting on formal legality in this case may be counterproductive. . . . The United Nations imposes constraints on both the global decision-making process and the outcomes of that process, constraints that all countries recognize to be in their long-term interest and the interest of the world. But it cannot be a straitjacket, preventing nations from defending themselves or pursuing what they perceive to be their vital national security interests. . . . That is the lesson that the United Nations and all of us should draw from this crisis. Overall, everyone involved is still playing by the rules. But depending on what we find in Iraq, the rules may have to evolve, so that what is legitimate is also legal.[39]

DISCIPLINARY RENEWAL AND PROFESSIONAL FAITH: THREE EXAMPLES

Hans Kelsen responded to the undecidability of theory with a plea for faith. Modern international lawyers who inherit a century of work on the problems of normative legality and enforcement remain in Kelsen's predicament. There

is no analytically decisive answer to the riddle of international law's legality. As Kelsen observed, to see the operations of a legal order is a choice. International lawyers make all sorts of arguments about the specificity of normative pedigree, the special persuasiveness of legal norms, the singularity of legal enforcement, or the special powers of law to legitimate. Ultimately, however, an international legal argument is just an argument; an enforcement action just an exercise of power. International legal theory is just a collection of arguments you can try in discussion with a skeptic, none of them watertight. What makes international law a sophisticated and disenchanted profession is the shared realization that this is the case and a determination to forge ahead.

As a result, international law is best understood not as a philosophical mystery to be solved, but as a profession: the work of people who animate the practices, norms, and ideas that have been gathered in its name. What holds the field together is a professional identity that is part shared faith in international law's usefulness and long-term potential, part practice of fealty and strategic engagement on behalf of that faith, and part shared sensibility or posture aligning these ethical commitments and pragmatic strategies. To illustrate the importance of belief in the contemporary professional style, I revisit the arguments of three American postwar international law innovators: Myres McDougal, Harold Koh, and Louis Henkin. The choice is idiosyncratic: the selection would look quite different in other national traditions. They exemplify three subtly different American modes of professional faith associated with different professional practices and engagements with statecraft. Like Kelsen, each asks those in the profession to choose faith, responding to the failure of theory with professional responsibility.

Of the three, McDougal may be the most well known through his work with the Yale Project on World Public Order. He and his colleagues imagined the world as an open-ended "policy process" through which law is created, interpreted, and affirmed through a constant give-and-take. In 1955, McDougal described norm creation "as a process of continuous interaction, of continuous demand and response, in which the decision-makers of particular nation-states unilaterally put forward claims of the most diverse and conflicting character . . . and in which other decision-makers, external to the demanding state . . . weigh and appraise these competing claims . . . and ultimately accept or reject them."[40] It is possible to speak confidently about what the law "is" only after one has observed the outcome of the give-and-take.

At the same time, power is not an absolute prerogative backed by force: it is a more interactive and institutional effect that is often generated by people

using legal terms and legal institutions. McDougal criticizes those who fail to understand law's role in power as aggressively as those who deny power's role in law.

> The process of decision-making is indeed, as every lawyer knows, one of the continual redefinition of doctrine in its application to ever changing facts and claims. A conception of law which focuses upon doctrine to the exclusion of the pattern of practices by which it is given meaning and made effective, is, therefore, not the most conducive to understanding. . . . Formal authority without effective control is illusion: effective control without formal authority may be naked force. A realistic conception of law must, accordingly, conjoin formal authority and effective control. . . .[41]

> Law offers, as we have seen, a continuous formulation and reformulation of policies and constitutes an integral part of the world power process.[42]

Would a law so closely allied with power still be law? If so, would it still be a good thing—the cosmopolitan law of the discipline's dreams? Many of McDougal's contemporaries thought he had both abandoned and undermined international law, confusing it with policy and great power prerogative. But McDougal disagreed. The key was to appreciate the significance of ethics in power itself, and to place confidence in the powers of free people to generate a law—and a world—worthy of their aspirations. In his view, to stand with virtuous power was a personal and professional choice, and to find law there the best path to law's own triumph.

> The moral goals of people—demands for values justified by standards of right and wrong—are not mere "abstractions" without antecedents or consequences. Such goals are rather the most constructive dynamisms of conscience and character and, when shared with others, are not "sources of weakness and failure" but rather the most dependable bases of power and successful co-operation. The moral perspectives of people, no less than naked force, are commonly regarded as among the effective sanctions of law. . . . To reject these growing common demands and identifications of the peoples of the world for a "profound and neglected truth" from Hobbes that "the state creates morality as well as law" and hence, to conclude that it is moral perversion for a nation-state to clarify its interests in terms of a wider morality, is as fantastic as it is potentially tragic. Certainly it neither accurately reflects the aspirations of the free peoples of the world nor effectively promotes the clear interest of the United States in a more efficient organization of these

peoples to suggest that the issue between the free world and the totalitarian is simply one of "relative power" and that distinctions between aggressor and non-aggressor nations are mere moral illusions serving to protect vested interests. . . .

It is urgently to be hoped that attacks upon law and morality which so profoundly misconceive law, morality and power . . . will not cause many of us to mistake the real choice that confronts us. People whose moral perspectives preclude the deliberate resort to violence except for self-defense or organized community sanction, have in the contemporary world only the alternative of some form of law. The choice we must make is not between law and no law or between law and power, but between ineffective and effective law. . . . A choice in sum between . . . illusory doctrines of "old fashioned" diplomacy, and spasmodic resorts to unauthorized violence, and, on the other hand, clear moral and legal commitments to freedom, peace, and abundance which are sustained by organized community coercion and which invoke, at both national and international levels, all the contemporary instruments of power, ideological and economic as well as diplomatic and military.[43]

International law was a terribly serious business, neither irrational politics nor rational law, but an ongoing project through which the world's people have the opportunity to choose a world public order of freedom and justice. McDougal did not offer a resolution to the problem of the legality of rules and their enforcement. He modeled a posture forward from its nonresolution: to choose law as an expression of values and a mobilization of "all the contemporary instruments of power" to their realization. It is difficult to separate so bravura a profession of faith from the context of high politics in which McDougal imagined international law being made relevant. His was a voice of the postwar American political ascendency as it contemplated another global struggle against the ideologies of tyranny. The significance of international law could be seen in its relation to what he saw as the most significant political challenge of the day for which all the instruments of power would indeed be necessary. The values he had in mind were not enumerated in legal process or a catalog of rights. They were larger than that: the aspirations of the free peoples of the world. Law should be subordinated to so great a cause. It was fortunate that to choose law was also to align with that future.

A second American response to the inadequacy of theories of legality focused on the legal process across a period in which American ascendency and

world order seemed more stable and the work of law a matter of steady and often routine adjustments in commercial and government practice. The lineage for this approach runs to Philip Jessup's midcentury articulation of a transnational law and is best represented today by work on adjudicative and administrative networks. Harold Koh, past US State Department legal advisor and former dean of the Yale Law School, exemplifies the "transnational legal process" approach, although one might as easily focus on the rising tide of scholarship about "global administrative law."[44] Like McDougal, their focus is the sociopolitical process through which law is invoked, tested, and affirmed, but they have in mind the adjudicative and bureaucratic practices of commercial affairs and government. Philip Allott had famously asserted that the *travaux preparatoire* for legal agreements had no boundaries of space or time.[45] Koh identified law with its professional expression in the legal institutions of adjudication and administration within and between states.

It took intellectual work to interpret judicial and administrative bodies across the world as a kind of "network" that could be constitutive of a global legal order. Where McDougal placed his faith in the moral choices people would make—and the powers they would exercise—in the name of freedom, Koh relied on more routine patterns of interaction that would "create patterns of behavior and generate norms of external conduct which they in turn internalize."[46] For Koh, the judicial function has a direction: the transnational legal process is *normative*, generative of its own legality.

> Thus, the concept [of a transnational legal process] embraces not just the descriptive workings of a process, but the *normativity* of that process. It focuses not simply upon how international interaction among transnational actors shapes law, but also on how law shapes and guides future interactions: in short, how law influences why nations obey.[47]
>
> To summarize, the critical idea is the normativity of transnational legal process. To survive in an interdependent world, even the most isolated states—North Korea, Libya, Iraq, Cuba—must eventually interact with other nations. Even rogue states cannot insulate themselves forever from complying with international law if they wish to participate in a transnational economic or political process. Once nations begin to interact, a complex process occurs, whereby international legal norms seep into, are internalized, and become embedded in domestic legal and political processes.[48]

To use international law is to strengthen it and to find oneself transformed. The long arc of international relations can be bent toward law if people accept

the responsibility to help it along. Wherever they may work, professionals can be agents of the international legal process, and Koh urges international lawyers to accept the professional responsibility that goes with this possibility.

> [The theory of transnational legal process] predicts that nations will come into compliance with international norms *if transnational legal processes are aggressively triggered by other transnational actors* in a way that forces interaction in forums capable of generating norms, followed by norm-internalization. This process of interaction and internalization in turn leads a national government to engage in new modes of interest-recognition and identity-formation in a way that eventually leads the nation-state back into compliance.[49]

> It is sometimes said that someone who, by acquiring medical training, comes to understand the human body acquires as well a moral duty not just to observe disease, but to try to cure it. In the same way, I would argue, a lawyer who acquires knowledge of the body *politic* acquires a duty not simply to observe transnational legal process, but to try to influence it.[50]

The legality of international law has no theoretical guarantor. The legalization of global political and economic life will be a victory to be won by professional commitment and personal acts of responsibility to put law to use. Legal professionals, in whatever setting they find themselves, should nudge government toward the use of legal procedures and vocabularies.[51] Although this might be done through external agitation—Koh cites the work of the international human rights clinic at Yale as one example—international lawyers in government or private practice ought also to think of themselves as a kind of fifth column within the establishment, loyal to the larger future of law alongside the interests of clients or governments, pushing clients toward law and encouraging them to push others toward law.[52]

Working for law requires a suspension of disbelief in law's dark potential. Were the legal fabric systematically implicated in violence and injustice, the orientation Koh advocates would make little sense. Koh's exemplary outliers—North Korea, Libya, Iraq, Cuba—were doubtless chosen to emphasize that even for such states, the transnational legal process was now normative. His choice also sends the message that international law is aligned with the broad interests of the established order whose center is underwritten by American power. Work for the law and work for the client align.

The Kingsbury, Krisch, and Stewart manifesto for "global administrative law" arrives at a similar moment of affirmation.[53] They encourage us to imagine

a "global administrative space" stretching across all the diverse institutions that implement norms transnationally and to work to make that space more effective, responsible, and transparent by bringing the techniques of national administrative law to bear in one or another way on its procedures. In democratic national government, administrative law aims to link the bureaucracy to the democratic decisions of parliament under the legal control of the judiciary. Internationally, there is no democratic legislature and no controlling judiciary: global administrative law will be in some sense unmoored. Might it then become an instrument of tyranny, rendering undemocratic actors more effective?

> Our espousal of the notion of a global administrative space is the product of observation, but it inevitably has potential political and other normative implications. On the one hand, casting global governance in administrative terms might lead to its stabilization and legitimation in ways that privilege current powerholders and reinforce the dominance of Northern and Western concepts of law and sound governance. On the other hand, it might also create a platform for critique. As the extent of global administrative government becomes obvious (and framing global regulation in traditional terms of administration and regulation exposes its character and extent more clearly than the use of vague terms such as governance), the more resistance and reform may find points of focus. . . . Confronting these issues in administrative terms may highlight the need to devise strategies for remedying unfairness associated with such inequalities.[54]

That is the last we read about administrative law's dark potential. Kingsbury, Krisch, and Stewart affirm their confidence in its potential to improve the machinery of law making and application, and for the self-correcting operations of open global debate, a posture more plausible for people with long-term faith in the overall justice of the established order, whatever its current failings, than for outsiders beyond the circle of faith.

A third approach to professional faith in law's virtuous destiny focuses less on process than the remaking of consciousness among the world's elites. If people came to share an idea about the limits and direction for power, neither legal process nor all the enforcement powers of the free peoples would be required to compel it. Law could be taken out of the equation, replaced by a shared ideology of power. Although legal norms and institutions may point the way, a better world would require an awakening of spirit.

I first encountered this idea in a 1954 article by Wilhelm Roepke, a German ordo-liberal economist, reflecting nostalgically on the nineteenth-century

world order.[55] He was an opponent of efforts to construct anything like a government at the European or global level: the very idea raised the specter of collectivism. But he marveled at the way he imagined the world to have operated in the nineteenth century.

> We realize that the problem of international trade is to find for it a legal-institutional framework which is at least approximate to that which intranational trade can take for granted within the national borders. . . . But how has this been done in spite of the fact that there never was a world state? That is the capital question which we must answer.
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> The solution which the Liberal Age had found for the problem of international order was of a peculiar and complex kind, and we may characterize its main features if we call it the universalist-liberal solution. . . . The functions of the non-existent but seemingly indispensable world state have been replaced by something else for which we may find the only parallel in the Res Publica Christiana of the Middle Ages. . . . We may call this substitute of the world state the international "open society" of the Liberal Age. It was a sort of *ordre public international* . . . .
>
> The international "open society" of the nineteenth century may be regarded, in a very large sense, as a creation of the "liberal" spirit. . . . We come here to a point of extraordinary importance without which we cannot understand fully the mystery of the international order of the recent past. What we mean is the genuinely *liberal principle of the widest possible separation of the two spheres of government and economy, of sovereignty and economic exploitation, of Imperium and Dominium, or of "political power" and "economic power" (MacIver).* This means the largest possible "depolitisation" of the economic sphere and everything that goes with it.[56]

Free trade was not the disciplining creed of international financial institutions and first world governments—it was the spirit of an age, enforcing itself in the minds of elites wherever they worked, in city governments, corporate boardrooms, local central banks, and dozens of national civil services. The shared commitment to the liberal principle—plus the gold standard—functioned as an "As-If-World-Government." If institutions were to be constructed at the European or global level, they should be designed to encourage that spirit rather than to legislate or enforce it.

After 1989, legal intellectuals developed a similar picture of human rights. In this view, the peoples of the world are united in a common civilization whose normative consensus operates as a foundational limit on political life

expressed in the canon of international human rights norms. In 2001, a leading American international law text introduced the chapter on human rights by reference to Louis Henkin's 1990 argument that we had entered an "age of rights."

> The second half of the 20th century has been described as the "Age of Rights." That characterization reflects the view that, with the end of the Second World War, the idea of human rights became a universal political ideology and a central aspect of an ideology of constitutionalism. The ideology of human rights, of course, is a municipal ideology, to be realized by states within their national societies through national constitutional law and implemented by national institutions. But beginning with the promises made during the Second World War in the plans for a new world order, human rights became a matter of international concern and progressively a subject of international law. . . . What was once unthinkable had become normal by the end of the 20th century.[57]

This vision linked law's operations in the world directly to the common faith of the professional elites who govern in its name. The most significant law is not the law that is valid or persuasive or effectively enforced, but the law that is taken for granted: the law that needs no enforcement and raises no suspicion about its validity. The legality of this law is always already vouchsafed by it hegemonic position in the governing "ideology" of the global establishment. In Henkin's view, the "age of rights" has much in common with the world before Austin raised anxieties about legality in the first place. Following Henkin, we might say that when Ben Franklin packed himself off to Paris with Vattel in his satchel, international law was part of his "ideology" of what it meant to be a diplomat.

As I have argued in this book, elites do share many ideas about what governments are, what an economy is, what the appropriate objectives and tools of policy are, what problems demand attention, and which can safely be left unattended. They share ideas about law as well: what it is, what it requires, how it operates, where its limits are to be found. Their ideas are not all laudatory: a consensus that damaging the environment is a natural prerogative of sovereign power, that rules distorting economic activity ought to be withdrawn, or simply that the suffering and death caused in legitimate war is, well, legitimate. International lawyers have tended not to explore these possibilities, perhaps because it would complicate their veneration and jeopardize their effort to promote law as an ideology of governance.

The robust global machinery of advocacy and activism that has grown up around the promotion of human rights would not be necessary had they truly become axiomatic for people in power. In one sense, however, Henkin was correct. One rarely hears arguments *against* human rights. Governments routinely accuse one another of violating human rights and defend their own exercise of power on the global stage as a defense of human rights. As a vocabulary for the assertion of power, they have become hegemonic. People making assertions in their name customarily do so in a forceful style, as if the norms they represent were part of a settled global consensus that ought not to need to be asserted at all. The word "faith" is probably not the best description for the mental backdrop to these practices. Henkin does not ask his readers to "believe" in human rights or to choose law as the best interpretation of a global power process. He recounts the triumph of human rights as a historical fact: a new global political ideology has come.

The question is how to act in their name. Here, Henkin urges a complex professional posture on his followers. Where McDougal imagined international law professionals in Cold War statecraft while Koh imagined them in bureaucratic practice, Henkin imagines them as advocates bearing witness to a new truth. To act with zeal and fealty is certainly part of it. The human rights community fosters a habit of fidelity among the faithful, a shared commitment not to doubt or betray the human rights revolution before the unbelievers. But to play for ideological hegemony is also to play a long game that requires strategic and practical wisdom. One must take care: if you go to war in the name of human rights, you could both lose the war and disenchant the human rights vocabulary.

In his short 1990 book, *The Age of Rights*, Henkin offers a kind of epistle to the faithful. The book contains affirmations of faith alongside advice and possible arguments one might use when witnessing: what to say about competing "ideologies" like religion, socialism, or "development"; how to square so many violations with the existence of rights; how to handle the diversity of human rights practices in different nations; how to think about the false piety of the hypocrite; how to square the demands of an unreformed world with the fact of human rights triumph. These recall the concerns that moved Paul in his many letters to struggling communities of faith.

> Ours is the age of rights. Human rights is the idea of our time, the only political-moral idea that has received universal acceptance. . . .
>
> Despite this universal consensus, as all know, the condition of human rights differs widely among countries, and leaves more-or-less to be desired everywhere. This may suggest that the consensus I have described is at best formal, nominal, perhaps even hypocritical, cynical. If it be so, it is nonetheless significant that it is *this* idea that has commanded universal nominal acceptance, not (as in the past) the divine right of kings or the omnipotence state, not the inferiority of races or women, not even socialism. Even if it be hypocrisy, it is significant—since hypocrisy, we know, is the homage that vice pays to virtue—homage, that governments today do not feel free to preach what they may persist in practicing. It is significant that all states and societies have been prepared to accept human rights as the norm, rendering deviations abnormal, and requiring governments to conceal and deny, to show cause, lest they stand condemned. Even if half or more of the world lives in a state of emergency with rights suspended, that situation is conceded, indeed proclaimed, to be abnormal, and the suspension of rights is the touchstone and measure of abnormality.[58]

The result for human rights advocates is a subtle and shifting combination of strong assertion and strategic calculation. In my experience, it would be wrong to say that human rights advocates "believe" they represent a settled ideology. They are committed to the practice of human rights advocacy as a path to justice. They have confidence in the power of advocacy *sans peur et sans reproches.* They are careful pragmatists about when and where to engage, and how to preserve the authority of speaking in the name of norms whose legality is not open to challenge. What holds them back from exploring the costs and benefits or unanticipated consequences of their advocacy, their role in the legitimation of conflict or the reproduction of inequality is less belief or faith than a shared practice that arises for each professional as a personal identity—*here I stand*—combined with strategic cunning. It is difficult not to be reminded of a similar injunction to the believer:

> Behold, I send you forth as sheep in the midst of wolves. Be ye therefore as wise as serpents and as innocent as doves.[59]

To associate human rights with injustice or bad outcomes both betrays the community of the faithful—"I knew him not"—and is bad strategy. If you bear witness, people will come to believe and act in the name of human rights. To affirm the downsides can only delegitimate law and retard progress toward a better world. The problem of legality—like the problem of faith—can be resolved only in the practice of a community of believers who balance pragmatic awareness and strategic calculation with a calm ethical self-confidence in their materials and their common work.

In the wake of twentieth-century efforts to renew and expand the field, the expertise of international lawyers is a combination of shared ideas and points of reference, shared projects and commitments, and a common sensibility. It is not ideas or doctrines that hold the field together—these are diverse and only rarely compelling. The faith required to inhabit and use them is part fealty, in the sense of a commitment never to deny or betray the field, the legality of international law, or the promise of its future. It is faith affirmed in community, through the shared experience of routine professional work as the faithful recognize one another and celebrate what sets them apart. This faith as practice is a habit of acting as if what is believed were true, a practical project in a fallen world: the common work of promoting, expressing—or holding one's tongue—as strategically necessary in a world that will only later be able to live fully the dream of cosmopolitan legality.

RESPONDING TO LEGAL PLURALISM

The modern sophistication of the international legal profession reflects an awareness of the diverse and contradictory quality of the available ethical commitments, legal norms, institutions and legal theories.[60] The practice of professional faith—an orientation toward the virtuous future of law—makes this pluralism tolerable. As in any community of faith, however, people also struggle with belief. Doubts and anxieties arise. In periodic response, the discipline generates new theories about how it all fits together. These function as a kind of belt and suspenders on professional faith. We would expect these to come in at least two voices: the impatient idolatry of premature solution and the reassuring balm of prefiguration in a still fallen world. We should understand contemporary international legal theory in this way: a ministry to a doubting church.

If there could be a dispositive account of systemic coherence, we would not need so difficult a practice: what we believed might come could already be seen. For all the nuanced sophistication of practice in their shadow, images of a policy process, legal process, or universal ideology are meant to be reassuring in just this way. Diverse action, action taken in doubt, also somehow adds up. The whole is more than the sum of parochial interests struggling with one another. Debates about the "fragmentation" of international law or the "proliferation" of international courts and tribunals across the turn of the past century arose in moments of anxiety and doubt when worry about the integrity of the legal "order" as a whole weighed on the profession. The work of scholarship

was not to address the doubts they expressed: a dispersed and fragmented law cannot be put back together; a constitution for the world cannot be but a wish. When Austinian anxieties arise in these terms—Are we constituted? Is law whole?—all we can do is talk about it reassuringly, developing practical responses in particular situations, plowing the debate back into professional argumentative practice. Then we can again pick up the baton and return to the work of faith.

People theorizing coherence into a plural legal universe are sometimes tempted by the metaphor of constitutionalism. In public international law, scholars have encouraged the idea that the UN Charter provides a kind of "constitution," particularly when it comes to the use of force. Others have seen a "constitutional moment" in the emergence of human rights as a global vernacular for the legitimacy of power. Some have proposed the World Trade Organization as a constitutional order, perhaps in combination with the human rights canon. Specialists in comparative constitutional law sometimes find the key in relations among national constitutions. All testify to the wish that things were constituted—as well as the realization that there is as of yet no workable account of how the world's legal order coheres. In a sophisticated profession, coherence theories rarely stand the test of time. There are too many of them, they are too easily instrumentalized by people with parochial projects and the pressure of practical struggle continually reopens awareness of pluralism and returns the professional from the reassurance of theory to the practice of his faith.

Gunther Teubner's proposal for a transnational "project of constitutional sociology" is a particularly sophisticated constitutional theory.[61] Rather than privileging one doctrinal or institutional regime, he proposes to deepen the sociology of transnational regulation, adjudication, and administration to illuminate principles, rules, professional practices, and institutional arrangements, whether "public" or "private," which affect the "division of powers" among actors, sectors, and values in transnational society. The goal is to unearth the constitutional underpinnings of everyday interactions across and within semi-autonomous systems, each loosely associated with industries or domains of social practice or belief, each with its own rules and procedures, each pursuing its own particular logic: a health system, a sports system, a media system, a trade system, a pharmaceutical system, a scientific system, and so on. Governments—or diplomacy—form but one system among many. The identification of "systems" is not just description. It requires interpretation. Is there a global pharmaceutical system and an entertainment system? Or is there an

international intellectual property system? Does the sports system stand on its own, or is it part of the diplomatic system or the entertainment system? Interpretations are strategic tools: this is a system, this is its logic. And now we have returned to professional practice, atop another sediment of theoretical sophistication. It would require a break with professional faith to harness the same analytic to make visible the coercive distributive struggles in which one or another professional practice is implicated.

In the United States, we are accustomed to thinking about the rules governing relations among the federal legislature, courts, and executive as "constitutional" because they are mentioned in the official Constitution and debated as such. If we think in more sociological terms, we may want to add other things: the distinction between public and private activity, the relationship between corporate and labor power, the relative prestige of coastal and midwestern or northern and southern culture, the distribution of power between cities and suburbs. Perhaps the enduring allocation of power between white and black citizens, between men and women or between rich and poor is "constitutional." The distributional consequences of treating one as constitutional and the other as a matter of history is hard to unravel, but it is likely to affect who feels empowered to contest or preserve which arrangements. The practice of constitutionalism—or systems analysis—is itself a space of distributive struggle.

In this book, I have advanced two responses to the experience of pluralism other than redoubling the practice of a doubting professional faith or embracing the idolatry of new coherentist theory. First is to lay down the burdens of faith and see law's role in the ubiquitous struggles of global political and economic life and the injustice that results. Martti Koskenniemi expresses this shift in perspective:

> Much of mainstream Anglo-American jurisprudence . . . approaches law in this way, as a hermeneutics of interpretation that aims to ensure the coherence of the legal order—and thereby the acceptability of the system of distribution of material and spiritual values that goes with it. There is much that is right in this jurisprudence. Law is an interpretive craft. But it underestimates the open-endedness of the interpretations and mistakes "coherence" as the point of legal activity. A better view is to take one step backwards, accept the irreducible indeterminacy of interpretation and the contradictoriness of legal argument (which, in any case, most lawyers accept), and build on the way legal argument brings out into the open the contradictions of the society in which it operates and the competition of opposite interests that are the flesh and blood of the legal everyday.
>
> Law is an argumentative practice that operates in institutional contexts characterized by adversity. . . . From this perspective, law is not a supporter of social consensus but a participant in its conflicts, giving form to social adversity in order to support some values against others, to affirm or contest prevailing distributionary structures.[62]

A second and allied alternative is embrace of the experience that things don't add up, that coherence fails, that incommensurability must be acknowledged. This road opens whenever there is a personal encounter with incommensurate difference and a loss of confidence in the availability of resolution within the canons of acceptable professional discussion. Lawyers may experience it whenever there are conflicts, gaps, or ambiguities in the law and it seems, if only for a moment, that they cannot be reconciled or bridged. In chapter 5, I associated this with the professional experience of "yielding" to the argument or assertion of another. The personal experience of legal pluralism that comes with "yielding" unmoors professionals from the confident sense that their expertise grounds their action. Suddenly, there is a choice: a moment of vertigo and professional freedom.

People recoil from this experience of pluralism. Experts turn back to faith or reach rapidly for the reassurance of theory and prior practice. But there is also a long tradition praising such moments in religious and political thought: the moment when "unknowing" and "deciding" cross paths, when freedom and moral responsibility join hands. It is what Carl Schmitt had in mind by "deciding in the exception"[63] or what Max Weber spoke of as having a "vocation for politics."[64] It is what Kierkegaard described as the "man of faith,"[65] or Sartre as the exercise of responsible human freedom.[66] This is what Jacques Derrida meant by "deconstruction."[67] The sudden experience of unknowing, with time marching forward to determination, action, decision—the moment when the deciding self feels itself thrust forward, unmoored, into the experience. In that moment of vertigo, the world's irrationality makes plain the constructed nature of theories about how it all fits together and the tendentiousness of practices in their name. Professional practice suddenly has no progressive telos, and international law opens as a terrain for politics, rather than a recipe or escape from political choice. It is in such a moment that the world could look again like 1648: open to being remade.