

## Duelling Agendas: International Relations and International Law (Again)

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On a sunlit summer's day in the Chiltern Hills, five men are seen running towards the same spot in the middle of a field. The object of their attention is a hot-air balloon containing a small boy. The boy's uncle (the balloon's pilot) is holding onto the balloon's ropes in an increasingly frantic attempt to prevent the balloon and boy from being swept into the sky. The (now) six men then engage in a collective effort to bring the balloon under control but this becomes difficult as the wind picks up and the problems of collective action emerge. With each new gust of wind the dilemma becomes more acute. The balloon is lifted higher and higher off the ground, and, yet, it does seem as if the six men might just command the weight and strength to hold down the balloon. But no one is entirely sure. Who is the first to let go? No one is sure of that either but someone releases the rope and tumbles onto the ground. The balloon rises a little higher. Another man lets the rope go and drops to the ground. In the end, there is one man, Dr John Logan, hanging on to the rope of a rising balloon. He begins climbing up the rope (now high in the sky), but this is to no avail. The first Chapter of Ian McEwan's novel, *Enduring Love*,<sup>1</sup> ends with Logan dropping to the ground from a great height.

We watched him drop. You could see the acceleration.  
... He fell as he had hung, a stiff little black stick. I've  
never seen such a terrible thing as that falling man.<sup>2</sup>

Logan is the victim of a community without a leader. There are no rules, at least none specific enough to allow predictability, no norms, at least none determinate enough to guide collective behaviour, and no laws except the unforgiving laws of nature. Who can blame the others for letting go? Who can fail to blame the others for letting go?

I want to think about Logan in this short article on international law's fraught relations with the 'political'. Is Logan the Amazon Rainforest or the Arctic ice-caps or the prohibition on the use of force: he should be saved but he cannot be saved—not in this society, not at this moment in human history? Is it the case that international

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<sup>1</sup> Ian McEwan, *Enduring Love* (New York: Anchor Books, 1998).

<sup>2</sup> *Ibid.* at 17.

law can get people to the scene of the accident but cannot quite mandate effective action when they are there? This, of course, is the classic collective action dilemma but instead of re-examining it directly, I want to uncover some of the myths about international law that have emerged from this image of cooperation and defection. Logan's death is foretold, as it were, by the weakness of the normative structure within which the men collaborate. For many observers, international law's failures can be understood in the same way: a perpetually falling man and failing law. Logan's death occurs because the norms that might have proved capable of binding the rescuers together are weak and under-elaborated, and because the laws that do concretise community operate largely in the sphere of the everyday and not the realm of the exceptional.

This article makes some preliminary moves in the direction of disturbing this image as it is applied to international law. In particular, I want to explore three fantasies about international law. In the first, international law is viewed as essentially peripheral and metaphysical. The norms elaborated are imaginary or impractical. The prescription is a dose of realism (or functionalism). This image of international law I draw from Hans Morgenthau's critique of positivism published in international law's flagship journal, *The American Journal of International Law*, in 1944. It is an image that relies on an unsustainable vision of international law as somehow 'truly' contextual but at the same time super-normative. The second fantasy revolves around another popular trope in International Relations (IR) scholarship. Here, international law is articulated as two fields masquerading as one. There is real international law (concrete, functional, determinate) on one hand, and the projections and aspirations of optimistic scholars or hubristic international organizations on the other. This division, though, cannot work because it assumes the existence of technocratic spaces where the work of law can be done unmediated by the political, and political spaces where law must, by definition be absent. Neither of these spaces exists. The third image is that of international law as a one-off mechanism for constraining reluctant sovereigns. I suggest, in the end, that this fantasy, too, gets in the way of our understandings of international law. In Ian McEwan's novel the moment of collaboration followed by defection is a minor part of the plot. Instead, the breach of convention—the release of the ropes—can only be properly understood in the way it subsequently 'constitutes' the characters of the novel.

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The pilot was shouting instructions at us, but too frantically, and no-one was listening. He had been struggling too long, and now he was exhausted ....<sup>3</sup>

In 1940, Hans Morgenthau published his famous critique of international law's foundations in positivism.<sup>4</sup> Morgenthau's classical realism manifested itself as an impatience with international lawyers, and their impractical and untested schemes for imposing international order on a reluctant world. Morgenthau indicted Public International Law on three principal grounds: it was divorced from the social and political context within which it purported to operate; it obscured and denied its foundations in metaphysical premises; and it over-stated the stability and readability of legal norms. The instructions were being shouted, to be sure, but no one was listening, least of all political scientists.<sup>5</sup> This lawyer's legalism, as I have argued elsewhere, was regarded as naïve, dangerous, and morally dubious.<sup>6</sup> It resulted in the application of principles that threatened the very existence of those states relying on such principles.<sup>7</sup> It encouraged total war by applying standards of guilt, justice and culpability to the conduct of war.<sup>8</sup> It was a vain attempt to extend the 'social sympathies of individuals' from the national to the international level.<sup>9</sup> For George Kennan even the buildings of the era were implicated. The Department of State was described as 'a quaint old place, with its law-office atmosphere.'<sup>10</sup> By the end of World War II international relations scholars and many foreign policy analysts were convinced that the post-war order was to be

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<sup>3</sup> *Ibid.* at 10.

<sup>4</sup> Hans Morgenthau, 'Positivism, Functionalism and International Law' (1940) 34 *Am. J. Int'l L.* 260.

<sup>5</sup> In fact, by this time, not many international lawyers were listening either. Morgenthau was beating on a dead horse. See Georg Schwarzenberger, 'The Rule of Law and the Disintegration of the International Society' (1939) 33 *Am. J. Int'l L.* 56; J.L. Brierly, 'The Shortcomings of International Law' (1924) 5 *Brit. Y.B. Int'l L.* 4; W. Eric Beckett, 'International Law in England' (1939) 55 *L.Q. Rev.* 257.

<sup>6</sup> Gerry Simpson, 'The Situation on the International Legal Theory Front' (2000) 11 *Eur. J. Int'l L.* 439.

<sup>7</sup> See Hans Morgenthau's claim that the legalistic solutions favoured in the dispute over Finland in 1939 might have led to a general war between a Franco-British alliance and a Soviet-German coalition in Hans Morgenthau, *Politics Among Nations*, 5th ed. (New York: Knopf, 1978) at 12-13.

<sup>8</sup> George Kennan, *American Diplomacy, 1900-1950* (Chicago: University of Chicago Press, 1951) at 101.

<sup>9</sup> Reinhold Niebuhr, *Moral Man and Immoral Society: A Study in Ethics and Politics* (New York: Scribner, 1932) at 92.

<sup>10</sup> *Supra* note 8 at 92.

carved using the tools of realism.<sup>11</sup>

But Morgenthau's prescriptions are curious. He calls international lawyers to engage in three tasks. First, there is to be a greater recourse to ethico-normative principles. These, according to Morgenthau, anchor the system, and they are to be the subject of legal enquiry. To be sure, this is a 'dangerously uncertain procedure,' but such principles are discoverable in the 'general moral ideas underlying the international law of a certain time, a certain civilisation, or *even, a certain nation*.'<sup>12</sup> Second, there is to be a focus on 'actual juridic experience' or what the law actually is rather than what it should be. This is a call to the actual experience of states rather than the normative projections of international law scholars.<sup>13</sup> In particular, Morgenthau demands an accounting of the socio-economic context within which international lawyers work. Positivists, according to Morgenthau, cannot and will not see that treaties, rules, norms and so on must be (and are) interpreted in the light of changing historical circumstances. Morgenthau points to three phases in the life of *The Treaty of Locarno* or the impact of developments in international relations on the meaning of Article 16 of *The League of Nations Covenant* as evidence of law's permeability. Third, Morgenthau argues, positivists fetishize the written text, regarding it as superior to 'experience'. Yes, positivists have custom but this is a theoretically incoherent panacea. The mysticism of customary international law is no substitute for the hard realities of practice and function. By the time Morgenthau was writing, international lawyers ought, perhaps, to have been exhausted. They had shouted their way through the inter-war period but the time was ripe for a new discipline of realistic international study. Utopia was out of fashion, and with it much of international law.

This picture of the post-war period has attained the status of truth partly because of Morgenthau and his fellow realists and partly because everyone agreed that the League of Nations (with which international law was somehow bound up) had been an abject failure. But international lawyers have not recognised this picture, and for a number of important reasons. Indeed, the peculiar aspect of Morgenthau's broadside is that it is directed at an unspecified target: a group of international lawyers who are not named and who, it might be said, have been conjured into existence by Morgenthau. He does quote

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<sup>11</sup> In fact, although post-war United States foreign policy was made in the image of the realists, the international order created at San Francisco was an amalgam of legalism and realism. See Anne-Marie Slaughter, 'The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations' (1994) 4 *Transnat'l L. & Contemp. Probs.* 377.

<sup>12</sup> *Supra* note 4 at 268 [*italics added*].

<sup>13</sup> *Ibid.* at 284.

extensively from international law scholarship but almost all of the writers referred to (Brierly, Lauterpacht, Jessup, Hudson, Friedman) seem to support Morgenthau's 'functionalism'. Many agreed that validity was largely determined by efficacy and that social forces determined or, at least, influenced the content and interpretation of law. Indeed, Morgenthau, far from wounding some international law orthodoxy, is simply describing two of the traditions that came to dominate the post-war era: the legal positivism of people like Kelsen who were concerned to locate law in the practice of states, and the policy-oriented sociological jurisprudence of scholars like McDougal who implemented a research strategy designed to accommodate the cultural and the social. The pilot, as it turns out, was simply restating the terms of the discipline.

Even the legal-utopians, the obvious target of the critique, were far from vanquished.<sup>14</sup> E.H. Carr was right (even though this is not what he is remembered for) to argue that that no social system could exist in the absence of normative structures and that, therefore, realism was not (nearly) enough. The *Charter of the United Nations*, by the standards of any other era, was a monumental effort to tame anarchy through law. It tied the hands of the Great Powers by fixing the rules on the use of force both procedurally and substantively. Yes, the Great Powers could act unilaterally, but only if they could make a clear case for self-defence under Article 51 of the *Charter of the United Nations*, and yes, they could act collectively, as they had done, in a previous age, in repelling Napoleon or carving up Africa, but only if they secured the votes in the Security Council (including those of non-permanent members). Morgenthau's functionalism, instead of undermining international law, has simply produced another elaboration of its reliance on 'ideals and things.'<sup>15</sup> Functionalism, it turns out, is the same old amalgam of 'actual experience', ethical projection, institutional constraint and Great Power particularism that marks international law's internal structures. There is no resolution only further argument.

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I didn't know, nor have I ever discovered, who let go first. I'm not prepared to accept that it was me. But

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<sup>14</sup> A key inter-war utopian is Philip Noel-Baker, the LSE Professor and author of *The League of Nations at Work* (London: Nisbet, 1926). Legalist-Utopians flourished during the post-war era too, albeit in different incarnations. See e.g. Grenville Clark & Louis Sohn, *World Peace Through World Law* (Cambridge, Mass.: Harvard University Press, 1958).

<sup>15</sup> James Boyle 'Ideals and Things: International Legal Scholarship and the Prison-House of Language' (1985) 26 Harv. Int'l L.J. 327.

everyone claims not to have been first. What is certain is that if we had not broken ranks, our collective weight would have brought the balloon down to earth ... there was a deeper covenant, ancient and automatic, written in our nature. Cooperation ... [b]ut letting go was in our nature too. This is our mammalian conflict: what to give to others and what to keep for yourself.<sup>16</sup>

This summer, I spoke at a meeting of former Heads of State in Vienna and Salzburg. After I had presented on the question of intervention, one of the participants, a former Cabinet rank member in the Carter Administration, commended me on an 'interesting' paper before going on to assert that there was no such thing as international law. Of course, such a criticism is hardly new to international lawyers who have to live with such ontological sallies on a weekly basis. My response was fairly standard, too: international law ought to be judged by its successes as well as its failures; it was more than simply enforcement; the system remained inchoate and, in some ways, primitive; municipal law, the gold standard, turned out not to glisten as brightly as we might hope; and, finally, weren't there powerful new international legal norms in existence now that would have been regarded as impossible whimsy in the time of Morgenthau? I used the international economic order as an example of the latter. My interlocutor replied that indeed there were international norms (as with some IR scholars he could not quite bring himself to use the word 'law') in some areas such as economics or civil aviation but that in spheres such as the use of force or human rights what we had were unenforceable aspirations.

This dual image of international law has played a powerful role in constituting the way in which IR has approached Public International Law (PIL) over the years. This idea goes back, at least, to Morgenthau, again, who contrasted 'two obviously different types of international law.' One international law (functional international law) was based on the 'deeper covenants' of cooperation or 'permanent or stable interests' while the other was transient, fluctuating and barely juridical.<sup>17</sup> This duality was reflected, too, in the notion of the *jus necessarium*, and, according to Morgenthau, in the distinction between territorial and extra-territorial rules. These two fields required two sciences and two methodologies. This distinction is there, too in the implicit contrast between high politics (force, dispute resolution, arms control) and low politics (economics, maritime resource allocation), and in the contrast made in the functionalist literature between quasi-law and real law. Recent writing has also embodied something of this. Robert Jackson,

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<sup>16</sup> McEwan, *supra* note 1 at 15.

<sup>17</sup> *Supra* note 4 at 278.

with greater conceptual clarity, distinguishes the norms arising out of classical international law (rules intended to buttress sovereignty and the pluriverse of states) and a more recent 'declaratory' tradition in which ideals are transformed into legal norms.<sup>18</sup> The classical mode encompasses the standard rules of international engagement, for example the laws of war, the right to make treaties, the immunities of diplomats and title to territory, while the declaratory mode (Morgenthau's political international law) includes trading rules designed to alleviate inequalities between states, laws prohibiting gender discrimination, rules requiring that democracy be a condition for membership of international bodies and laws invoking a common heritage of humankind (common ownership of the sea-bed, for example). These are all given the kiss of death—they are described as 'worthy and humane'—before being consigned to the category of aspiration.

According to the dual image of international law, 'political law' is *opportunistic*, like the product of a temporary confluence of circumstances or a response to an immediate situation (treaties in this category are those that purport to stabilize temporary alliances and friendships or put in place regimes 'preparatory to close political ties'); it is *indeterminate* (subject to 'contradictory interpretations');<sup>19</sup> and it is *aspirational* (it fails to reflect the realities of the inter-state order).<sup>20</sup>

Neither this distinction, nor the particular ways in which it is understood, survive close examination. The mammalian conflict, what we give to others and what we keep for ourselves, is everywhere in law and politics. The Charter of the United Nations, bruised in various encounters with the Great Powers, remains a key foundation of the international legal and political order and yet was, of course, also an 'opportunistic' response to a particular and immediate situation (the consequences of German aggression in 1939). Indeed, it is difficult to see how international norms could develop at all if this was a test for their legitimacy. International society, largely, is the product of post-trauma constitutional architectures from Westphalia to Vienna to San Francisco. Indeed, Morgenthau himself calls on us to understand the relationship between underlying social factors and the rules of international law. Meanwhile, the indeterminacy of international law's constitutive forms of argument has by now been well established.<sup>21</sup> It is

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<sup>18</sup> Robert Jackson, *The Global Covenant: Human Conduct in a World of States* (Oxford: Oxford University Press, 2000) at 122-30.

<sup>19</sup> Morgenthau, *supra* note 4 at 279.

<sup>20</sup> Jackson, *supra* note 18 at 123-4.

<sup>21</sup> For a discussion see Andreas Paulus, 'Towards Renewal or Decline of International Law?' (2001) 14 *Leiden J. Int'l L.* 727.

no longer possible to go back to a position whereby we regard some rules as having some pre-interpretive essence. The desire to cleanse international law of aspiration is a venerable project of legal positivists, of course. But even Morgenthau could not maintain this animus toward naturalism. Towards the end of his essay, he seems to embrace a variant of the very normativity he rejects. Functional international law, it seems, would have to embody two distinct fields of operation: the laws as derived from the *mores* and practices of a particular existing order, and the norms drawn from the ends towards which that order is working. But these latter norms look awfully like the very norms proposed by the inter-war utopians he disparages and the aspirational category described by Jackson.

In general, it has become difficult to distinguish between pristine legal rules (the product of innocent interaction), and those forged in post-war environments or those that are aspirational or indeterminate. Such distinctions require a repudiation of much of what someone like Morgenthau seems to stand for and a return to the very formalism he rejects. But this will not work either. After all, even technical norms, like all norms, will consist of a combination of indeterminate readings of the present and deeply contentious prescriptions for the future.

This whole problem is illustrated by Morgenthau's categorisation of norms. For example, the very categories he insists we see as innocent and apolitical are those that go to the heart of sovereignty, and have been the subject of intense dispute. Extradition, territorial jurisdiction, and maritime law have each given rise to quite serious conflict in recent years. The indeterminacy of international law on the law of the sea will be familiar to anyone who has perused the World Court's docket over the past three decades. Indeed, so indeterminate is the law in some areas that the Court has had to rely on equity (*Gulf of Maine*) or equitable principles (*North-Sea Continental Shelf*) to resolve competing claims. Extradition, too, has excited enormous amounts of interest in recent years where both decisions to extradite (*Re Pinochet*) and refusals to extradite (*Soering v. United Kingdom*) have given rise to claims of policisation.<sup>22</sup> Questions of territorial jurisdiction, meanwhile, go the very heart of inter-state relations and attempts by states extend that jurisdiction over non-nationals or state officials have led to fundamental conflicts about the future development of the law (*Arrest Warrant Case*, *Guatemalan Genocide Case* (Spain)).<sup>23</sup>

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<sup>22</sup> *Re Pinochet*, [1998] H.L.J. No. 52, online: <<http://www.parliament.the-stationery-office.co.uk/pa/ld199899/ldjudgmt/jd990115/pino01.htm>>; *Soering v. United Kingdom* (1989), 11 E.H.R.R. 439.

<sup>23</sup> *Decision of the Spanish Supreme Court concerning the Guatemala Genocide Case*, [25 February 2003] 327/2003, online: <<http://www.derechos.org/nizkor/>



The assumption that international law can be divided into rules that are secure and certain, and those that are idealist projections, is found, too, in Jackson's dualism, which seems to rely on a distinction between rules that arise from state practice (the classical tradition) and those that are the product of non-state aspirations to improve the substance of international order (the declaratory approach). But the international legal rules placed in each category hardly bear this out. Is it really the case that the laws of war and the obligation to obey the terms of treaties are norms that states-people 'were usually prepared to recognise and observe in their relations'?<sup>24</sup> In fact, the practices related to these norms have been subject to serious dispute. The laws of war have been every bit as indeterminate as other political or aspirational laws (such as human rights). Chris Jochnick and Roger Normand have written on the open-textured nature of much international humanitarian law and the deference to politics at its heart in the military necessity rule.<sup>25</sup> Treaty law, too, though it appears to be under-girded by the *pacta sunt servanda* super-norm, is subject to all sorts of conditioning norms (*rebus sic stantibus*, coercion), which have the effect of rendering at least some treaty obligations unstable. On the other hand, it is not at all clear why laws on gender discrimination, or the collectivisation of the seabed, or those rules of trade favouring weaker economies should be regarded as quasi-law. These are, often, fairly explicit prohibitions attracting high degrees of compliance (the Law of the Sea) or are norms with almost universal support embodied in treaties (Human Rights Law) or are norms subject to continual legitimation through adjudicatory procedures (International Economic Law). Why is the obligation to comply with treaties a foundational norm of the classical tradition while the obligation to comply with human rights norms is merely a matter for the worthy and humane? This does not make structural sense. Meanwhile, the norm of democratic governance (or promotion of democracy), which Jackson casts into the weaker, aspirational category, is both remarkably robust<sup>26</sup> and far from novel.<sup>27</sup>

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guatemala/doc/stsgtm.html>.

<sup>24</sup> Jackson, *supra* note 18 at 122.

<sup>25</sup> Chris Jochnick & Roger Normand, 'The Legitimation of Violence: A Critical History of the Laws of War' (1994) 35 Harv. Int'l L.J. 49.

<sup>26</sup> Thomas M. Franck, 'The Emerging Right to Democratic Governance' (1992) 86 Am. J. Int'l L. 46.

<sup>27</sup> Gerry Simpson, *Great Powers and Outlaw States* (Cambridge: Cambridge University Press, 2004). These various spheres of law are composed of bundles of norms in which defection and cooperation vie for primacy. As Franck has shown (in *The Power of Legitimacy Among Nations* (Oxford: Oxford University Press, 1990)), law does not fall into rigidly demarcated categories of 'soft' and 'hard' but instead operates along a spectrum of legitimacy.

Most of all, this concern to distinguish ‘real’ international law from international political morality proceeds from a view of law that is now unsustainable. International law, as we shall see in the final section, is not enforced in entirely transparent manner. In this sense, it is not entirely unlike domestic law.<sup>28</sup> When Western states, in the name of promoting safety, began to criminalise certain practices on the factory floor (for example *The Factories Act 1961*), this did not result in widespread prosecutions, nor was there a lack of enforcement. Instead, bargaining and reform occurred in the shadow of the law using a variety of techniques encompassing threat and persuasion, and often resulting in self-enforcement. Laws criminalizing insider trading are only rarely enforced because of problems related to proof and political will. Traffic violations are enforced on an extraordinarily ad hoc and sometimes arbitrary fashion. It would be unusual (and not particularly useful) to describe these laws as political or quasi-laws. The attempt to discern an apolitical law promises a return to the very abstracted legalism that Morgenthau seems so keen to rid us of. Ultimately, the protean, and occasionally recondite, nature of law simply cannot be captured by these crude mechanisms of distinction. Instead, the normative universe, like that of the political, is an endless negotiation between holding on and letting go.

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We were running towards a catastrophe, which itself was a kind of furnace in whose heat identities and fates would buckle into new shapes. At the base of the balloon was a boy, and by the basket, clinging to a rope, was a man in need of help.<sup>29</sup>

McEwan’s novel is not about what happens in the balloon on the day. It does not concern the one-off mechanisms of permission and constraint that guide the protagonists at the foot of the balloon. Instead, the action continues ‘at home’ where identity is buckled into shape. What do the protagonists ‘do’ with their guilty behaviour? How do they adjust their beliefs as a consequence of the events of that day? The moment of collaboration/defection is not the essence of international law but the fantasy of punishment and enforcement continues to dog international law’s public image.

From the onset of the Iraq crisis of 2003, this fantasy emerged as two familiar models for understanding the law/politics nexus. The

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<sup>28</sup> There are other respects in which the two legal orders are quite different, of course.

<sup>29</sup> McEwan, *supra* note 1 at 3.

standard realist response to the war concerned the apparent failure of international law to restrain the hegemons. Despite the effort of international lawyers, the plain prohibitions of the *Charter of the United Nations*, and the extensive jurisprudence declaring the *ultra vires* nature of regime change, the United States-United Kingdom coalition nonetheless invaded Iraq.<sup>30</sup> They did so in the pursuit of a belief that their interests demanded it. For the Bush Administration, it was a case of 'go find me a way', for Blair's Government it was the imperative of sustaining the 'special relationship' and bridging a widening gulf between Europe and the United States. Either way, there were legitimate security concerns that simply had to prevail (and *ought to have prevailed*) over international law.<sup>31</sup> As Plato put it, why choose the crudities of law over the intelligence of leaders?

Meanwhile, from the perspective of a fairly unreflective legalism, the decision to go to war demanded a response from law. On one hand this led to an embrace of, what Judith Shklar called 'tribunality'.<sup>32</sup> There were demands that Bush and Blair be held to account in criminal trials. Wasn't this what the establishment of the International Criminal Court had promised? And wasn't the International Criminal Court the consummation of a process begun during the inter-war period where international political life would be overseen by an extensive network of judicial and quasi-judicial organs (this was the legalism against which IR had reacted after 1940)? Failing that, the United States and the United Kingdom had to be held to account either by judicial bodies (attempts were made<sup>33</sup>) or through sanctioning mechanisms available at the international level. When none of this came to pass, the legalists begin to despair of international law itself. This legalist model, then, is self-destructive. Since the United States is not constrained by law, or because law can be interpreted ('manipulated') to suit the Great Powers, or because the International Criminal Court does not have jurisdiction over President Bush and

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<sup>30</sup> For the definitive statement on regime change in international law see *Case concerning Military Activities in and against Nicaragua (Nicaragua v. U.S.A.)*, Judgment of 26 November 1984 (Admissibility), [1984] I.C.J. Rep. 392, and Judgment of 27 June 1986 (Merits), [1986] I.C.J. Rep. 14, online: <<http://www.icj-cij.org/icjwww/icasces/inus/inusframe.htm>>.

<sup>31</sup> For discussion in relation to Kosovo, see Michael J. Glennon, *Limits of Law, Prerogatives of Power* (New York: Palgrave, 2001).

<sup>32</sup> Judith Shklar, *Legalism* (Cambridge, Mass: Harvard University Press, 1964).

<sup>33</sup> In two cases, *Doe v. Bush*, 322 F.3d 109 (1st Cir. 2003), and *CND v. Blair*, [2002] E.W.C.H. 2759, online: <[http://www.courtservice.gov.uk/judgmentsfiles/j1458/cnd\\_v\\_prime\\_minister.htm](http://www.courtservice.gov.uk/judgmentsfiles/j1458/cnd_v_prime_minister.htm)>, heard in United States and United Kingdom courts respectively, the judiciary declined to adjudicate the matters, regarding them as non-justiciable political matters.

Prime Minister Blair, the law must be irrelevant (as the realists warned us) or weighed in favour of the powerful (as the legal purists have always suspected).

Realists and legalists, then, share a particular orthodoxy about law drawn from a model of legality that no longer commands much support among those who have studied the varieties of law at the domestic, regional and international levels. In other words, the stand-off between IR and PIL occurred because the dominant camp in each group *shared* a view of the law. What the Iraq imbroglio has demonstrated is that this image of law needs to be subject to serious inquiry. In particular, we need to accept the existence of something we might characterise as *modest normativity*. International law works in mysterious ways.<sup>34</sup> The United States and the United Kingdom, for example, were not constrained (in the strong sense) from making war on Iraq in 2003, and yet there was law and, most of all, there was the promise of law *and* constraint. Where was it? This is certainly not the place to catalogue law's presence before, during and after the Iraq crisis. But law was a powerful language through which argument was made and remade, butted and rebutted. The illegality of the war provoked mass protests, and may have contributed to the fall of at least one governing party (in Spain). Law shaped the way in which the debate about international society and the use of force was conducted. The Blair Government worked hard on a lengthy legitimacy strategy part of which required a full commitment to arguing a legal case. Admiral Boyce, then Chief of Defence Staff, was so worried about the ambiguous nature of the legal advice prior to war that he insisted on a clear legal mandate before committing ground forces to war.<sup>35</sup> As Boyce stated in March 2004: 'I required a piece of paper saying it was lawful ... [i]f that caused them to go back saying we need our advice tightened up then I don't know.'<sup>36</sup> The United States' failure to do likewise may have its costs in international credibility, operational legitimacy and a degradation in other forms of legal constraint. And international law on the use of force came home. International law was relied upon by the defendants in various criminal prosecutions brought in the United Kingdom against those who committed criminal acts in order to oppose the war. The prosecution of Katherine Gun under the *Official Secrets Act* case was dropped after Ms Gun's lawyers demanded to see the Attorney

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<sup>34</sup> See e.g. Dinah Shelton, ed., *Commitment and Compliance* (Oxford: Oxford University Press, 2003); Christian Reus-Smit, 'The Politics of International Law' in Christian Reus-Smit, ed., *The Politics of International Law* (Cambridge: Cambridge University Press, 2004) 14.

<sup>35</sup> *The Guardian* (1 March 2004) 4.

<sup>36</sup> Sarah Hall & Richard Norton-Taylor, 'Pressure on Blair increases over legality of going to war' *Guardian Weekly* (11-17 March 2004) 9.

General's full, unpublished advice to the Prime Minister.<sup>37</sup> When the Prime Minister of the United Kingdom said, as he was quoted as saying in the *CND v. Blair* case, '[w]e always act in accordance with international law,'<sup>38</sup> he created a series of expectations about the war, and about the role of law in international affairs. The *Sunday Telegraph* in an editorial disparaging international law as marginal reasoned that '[i]f a solid majority of the British people can be persuaded that the war was right and just, then Mr Blair's problems will be at an end.'<sup>39</sup> But it is hard, as the Prime Minister has discovered, to persuade people that illegal wars are just and right.

International law, in the end, is enforced in all sorts of ways. It is 'a kind of furnace' and many 'identities and fates' are shaped and buckled by it. For example, perhaps, the Prime Minister is now viewed as no longer a plausible multilateralist but a misadventurer willing to spurn international institutions. Meanwhile, the United States may have finally lost its claim to be the guardian of the San Francisco Consensus.

Wars are the outcome of arguments, armies move by the force of ideas. And law is a powerful idea. It is the power of this idea that ought to provide the inspiration for collaborative work between international lawyers and IR scholars.<sup>40</sup>

.....

Mostly, we are good when it makes sense. A good society is one that makes sense of being good.<sup>41</sup>

The idea of embracing a less illusioned (and less disillusioned) and more nuanced picture of the operation of global law represents perhaps the most fruitful possibility for intellectual exchange between the two disciplines. But this will require an earthbound critique of the fantastic; represented in our obsessions by the notion that utopia is out there and we are back here, or that law must be either political or cleansed of politics, or that punishment and enforcement are either present or absent here and now, or not at all.

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<sup>37</sup> Richard Norton-Taylor & Ewen MacAskill, 'Spy Case casts fresh doubt on war legality' *The Guardian* (26 February 2004) 1; see also 'Casualties of Terror' *The Guardian* (26 February 2004), online: Guardian Unlimited <<http://www.guardian.co.uk/Iraq/Story/0,,1156637,00.html>>.

<sup>38</sup> U.K., H.C., *Official Report*, col 482 WA (14 March 2003).

<sup>39</sup> 'A legal fiction', Editorial, *Sunday Telegraph* (29 February 2004) 24.

<sup>40</sup> For some examples of this sort of work, see Reus-Smit, *supra* note 34.

<sup>41</sup> McEwan, *supra* note 1 at 16.