

# SZIER

Schweizerische Zeitschrift  
für internationales  
und europäisches Recht

# RSDIE

Revue suisse  
de droit international  
et européen

24. Jahrgang

1/2014

24<sup>e</sup> année

**«Die Geister, die ich rief...»**

**Zum Ja der Schweiz zur Masseneinwanderungsinitiative  
und zum umgekehrten «Drei-Kreise-Modell» der EU**

CHRISTA TOBLER

**Abfallrecht in der EU:**

**Ausgewählte Aspekte unter besonderer Berücksichtigung  
der Verwirklichung des Verursacherprinzips im Abfallrecht**

ASTRID EPINEY

**La gestion des déchets en droit administratif international**

MINH SON NGUYEN

**What Should Remain of the Critical Approaches  
to International Law? International Legal Theory as Critique**

TILMANN ALTWICKER & OLIVER DIGGELMANN

**Praxisberichte / Chroniques**

**La pratique suisse en matière de droit international public 2012 (CAFLISCH)**

**Chronique de la jurisprudence de la Cour internationale de Justice en 2013 (Kolb)**

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[www.szier.ch](http://www.szier.ch) / [www.rsdie.ch](http://www.rsdie.ch)

**Herausgegeben von / Édité par:**

Schweizerische Vereinigung für internationales Recht (SVIR)

Website / Kontakt: [www.svir-ssdi.ch](http://www.svir-ssdi.ch)

Société suisse de droit international (SSDI)

site / contact: [www.svir-ssdi.ch](http://www.svir-ssdi.ch)

**Publiziert mit Unterstützung der Schweizerischen Akademie für Geisteswissenschaften**

**Publié avec le soutien de l'Académie suisse des sciences humaines et sociales**

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**Verlag und Abonnementsverwaltung /**

**Edition et administration**

Schulthess Juristische Medien AG, Zwingliplatz 2

Postfach, 8022 Zürich, Telefon: 044 200 29 19

Fax: 044 200 29 08

E-Mail: [zs.verlag@schulthess.com](mailto:zs.verlag@schulthess.com)

Internet: <http://www.schulthess.com>

Erscheint 4mal jährlich / Paraît 4 fois par an

Abonnementspreis / Prix de l'abonnement

CHF 250.–

Einzelnummer / Prix du numéro

CHF 71.–

ISSN 1019-0406

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# Inhaltsübersicht/ Table des matières

**Tagungen/Workshops** ..... 2

## **Aktuell/Actualité**

CHRISTA TOBLER

«Die Geister, die ich rief ...»

Zum Ja der Schweiz zur Masseneinwanderungsinitiative

und zum umgekehrten «Drei-Kreise-Modell» der EU..... 3

## **Artikel/Article**

ASTRID EPINEY

Abfallrecht in der EU:

Ausgewählte Aspekte unter besonderer Berücksichtigung

der Verwirklichung des Verursacherprinzips im Abfallrecht ..... 11

MINH SON NGUYEN

La gestion des déchets en droit administratif international ..... 45

TILMANN ALTWICKER & OLIVER DIGGELMANN

What Should Remain of the Critical Approaches to International Law?

International Legal Theory as Critique ..... 69

## **Praxis/Chronique**

LUCIUS CAFLISCH

La pratique suisse en matière de droit international public 2012 ..... 93

ROBERT KOLB

Chronique de la jurisprudence de la Cour internationale

de Justice en 2013 ..... 153

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# What Should Remain of the Critical Approaches to International Law?

## International Legal Theory as Critique

by **Tilman Altwicker<sup>1</sup>** & **Oliver Diggelmann<sup>2</sup>**

*The article explores what should remain of the ‘critical approaches’ to international law. The notion ‘critical approaches’ is used as an umbrella term and refers to a bundle of loosely related approaches including the ‘new approaches to international law’ (NAIL) or ‘newstream’, the ‘Third World Approaches to International Law’ (TWAIL) and the ‘feminist approaches’. The article argues that their common denominator is a specific project of ‘critique’. The aim of ‘critique’ is to identify underlying structures and fundamental shortcomings of international law and to assess the rational potential of the international legal order. The article sheds light on the ‘critical toolkit’ and international law’s biases, as a key topic of critique. It identifies three candidates for the role of enduring contributions to the discipline: the claim for context sensitive doctrinal work, the analysis of the ambivalent roles of seemingly ‘progressive’ discourses, such as, e.g., those on human rights and on ‘international law and democracy’, and the insights of critique into the role of subjectivity in the work of international lawyers. The article comes to the conclusion that most contemporary strands in international legal theory underestimate this ‘critical heritage’.*

### Table of Contents

- I. Introduction: What Makes A Critical Approach?
  - A. Project: Critique of International Law
  - B. Critique as Legal Science: Analytical and Normative Dimension of CIL
  - C. CIL and CLS: More than an Offshot
- II. Critique At Work: How to Exercise Critique of International Law?
  - A. Critical Toolkit: Language, Social Structures, and History
  - B. Central Issue: International Law’s Biases
  - C. Positive International Law: Resistance or Reform or Both?
- III. The Critical Heritage: What Should Remain?
  - A. Doctrine: Making Doctrine Context Sensitive
  - B. ‘Progressive’ Discourses: Ambivalences
  - C. Lawyers and Their Law: Bringing Subjectivity Back In
- IV. Conclusion: International Legal Theory in Post-Critical Times

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## I. Introduction: What Makes A Critical Approach?

Approaches associated with ‘critical international law’ (CIL) are often regarded as a kind of ‘younger sister’ of critical legal studies (CLS). The best days of CLS are long gone, CLS was even famously declared ‘dead’ by Duncan Kennedy, one of the major figures of the critical legal studies movement.<sup>3</sup> This raises the question whether or to which extent CIL is present in the current international legal discourse or whether it shares the same fate as CLS. Even if one does not follow Kennedy’s apodictic view and considers CLS ‘alive’ in the sense that its agenda has – at least partly – been mainstreamed,<sup>4</sup> the implications of the demise of CLS for the role of CIL remain unclear. Opinions about the current role and significance of CIL vary within the discipline of international legal theory. Some consider the critical approaches irrelevant. To support their view, they point to the relatively few citations of critical authors by international tribunals.<sup>5</sup> This opinion derives its plausibility mainly from the fact that theory-skeptical positivism is still (and always was) dominant during the last decades, and that the reputation of an international lawyer does not depend on whether he or she pays particular attention to international legal theory.<sup>6</sup> Others would argue contrarily. As a matter of fact, vast literature has been written in the name of NAIL, TWAIL or international feminism in the last decades. CIL triggered fierce debates and provoked strong resistance.<sup>7</sup> It is worth mentioning in this context that some critical authors have become – not without unintended self-irony – part of the discipline’s establishment. Networks among CIL-authors are a power factor within the discipline. Proponents such as David

<sup>3</sup> The remark stems from a workshop at Yale, see ROBERT C. ELLICKSON, *Trends in Legal Scholarship: A Statistical Study*, 29 *Journal of Legal Studies* (2000), p. 517, 525. CLS is regarded by many as either entirely irrelevant or simply devastating to orthodox legal thinking because of the purity of its negativism, see MOTOAKI FUNAKOSHI, *Taking Duncan Kennedy Seriously: Ironic Liberal Legalism*, 15 *Widener Law Review* (2009), p. 231, 232.

<sup>4</sup> Mark Tushnet, another prominent CLS author, pointed to the role of CLS in contemporary legal thinking and argued that central insights of CLS have become ‘the common sense of the legal academy, see MARK TUSHNET, *Survey Article: Critical Legal Theory (without Modifiers) in the United States*, 13 *Journal of Political Philosophy* (2005), p. 99, 100.

<sup>5</sup> The search engine of the International Court of Justice shows no citation of eminent TWAIL authors such as Antony Anghie and Bhupinder S. Chimni or of feminist protagonists such as Hilary Charlesworth or Shelley Wright. The document search for ‘Koskeniemi’ shows 35 results (by October 10, 2013).

<sup>6</sup> A remarkable denouncement of ‘theory’ was formulated by Brownlie who compared ‘theory’ with ‘a bank of fog on a still day’, see IAN BROWNLIE, *Recognition in Theory and Practice*, in: Ronald St. J. Macdonald & Douglas M. Johnston (eds.), *The Structure and Process of International Law*, The Hague 1983, p. 197, 197.

<sup>7</sup> DUNCAN KENNEDY & KARL E. KLARE, *A Bibliography of Critical Legal Studies*, 94 *Yale Law Journal* (1984), 461.

Kennedy and Martti Koskeniemi have actively and successfully sought to create such networks.<sup>8</sup>

The article addresses the question what ideas or concepts of CIL should remain in the discourse on international legal theory. We argue that it is its specific project of ‘critique’ and some practical insights gained by it that should be preserved. Understood as ‘critique’, the critical project must be considered to have continuing relevance for problem-conscious doctrinal analysis, assessing ‘progressive discourses’ and for a realistic self-perception of lawyers.

The article proceeds as follows: In the introductory remarks (I.), we address the question of what makes a theoretical approach to international law a ‘critical’ approach. We argue that it is the element of ‘critique’ which is central. The second part (II.) considers how ‘critique’ of international law looks like in practice. What are the conceptual ‘tools’ and methodological parameters it employs? How does CIL seek to accomplish its normative mission? The third part (III.) isolates three ideas or insights which we consider candidates for the role of enduring contributions to the discipline. We conclude on a critical note (IV.) by arguing that most currently prominent approaches to international law underestimate the ‘critical heritage’ as envisaged by this article.

## A. Project: Critique of International Law

What makes an approach to international law a ‘critical approach’? There are three ways to answer the question. First, one may regard an approach ‘critical’ if it has its *intellectual roots* in the critical legal studies movement. Most CIL-literature is in one way or another ‘critical’ in this sense by taking up CLS topics and concepts and by adapting them to the international context. For example, CIL criticizes ‘mainstream scholarship’ in familiar CLS style for unduly reducing problems of law and government to questions of doctrinal problem solving.<sup>9</sup> Second, one may associate the notion ‘critical’ with the leftist agenda for *change in favor of the disadvantaged*. Such an understanding of ‘critical’ is material or justice-oriented. In most ‘newstream’, TWAIL and feminist literature, a ‘critical spirit’ in this sense or ‘empowerment ambition’ is at work. David Kennedy, an early and particularly influential voice associating with CIL, writes: ‘We must

<sup>8</sup> DAVID KENNEDY, *When Renewal Repeats: Thinking Against the Box*, 32 NYU Journal of International Law and Politics (2000), p. 335, 476–500; DAVID M. TRUBEK, *Looking Back and to the Left: From the Bremen Conference to the Present*, 12 German Law Journal (2011), p. 28, 32–33.

<sup>9</sup> BHUPINDER S. CHIMNI, *An Outline of a Marxist Course on Public International Law*, in: Susan Marks (ed.), *International Law on the Left: Re-examining Marxist Legacies*, Cambridge 2008, p. 53, 53–54.

grasp the depth of the injustice of the world today and the urgency of change'.<sup>10</sup> Finally, one may understand 'critical' as referring to a specific understanding of 'critique'. 'Critique' in this sense means the reflection on the *potential and limits of reason* in the discourse on international law. 'Critique' can be distinguished from 'criticism'. 'Critique' is, first of all, a particularly scholarly agency, while 'criticism' denotes the result of a process of evaluation. More importantly, 'critique' is more ambitious, more fundamental than mere 'criticism'. Being 'critical' in the sense of CIL implies the will to 'unveil' what is 'really' going on in the international legal sphere, to expose the inherent shortcomings of international law and, in some instances, outline the path for 'new' international law responding to the critique. This understanding of 'critical' is – remotely – related to the 'Kantian tradition' that is committed to explore the potential and limits of reason.<sup>11</sup> CIL – as a bundle of projects of 'critique' in this sense – analyzes 'deep structures' of international law, to employ Noam Chomsky's term, which made its career also in international legal scholarship.<sup>12</sup> It seeks to unveil the premises on which judicial and scholarly arguments are based and explores the potential for change. CIL-authors are willing to take the risk that the foundations of daily legal work become insecure. This risk which non-critical approaches avoid is necessary to understand the spirit of CIL. CIL is based on the strong belief in the power and potential of critique. In our view, this spirit is essential for the critical project.<sup>13</sup> Martti Koskeniemi describes his undertaking in 'From Apology to Utopia' as a 'formal-structural analysis of the "conditions of possibility" of international law as an argumentative practice.'<sup>14</sup> The crucial term is 'conditions of possibility'. It implies the ambition to shed light on the fundamental premises of the legal order and reminds – tellingly – of Kantian semantics. We consider the project of critique to be the best description for a common denominator of CIL.

<sup>10</sup> DAVID KENNEDY, *Preface*, in: José Maria Beneyto & David Kennedy (eds.), *New Approaches to International Law: The European and the American Experiences*, The Hague 2012, p. IX.

<sup>11</sup> See OTFRIED HÖFFE, *Immanuel Kant*, Marshall Farrier transl., Albany 1994, pp. 33–34. See also Jason E. Whitehead, *From Criticism to Critique: Preserving the Radical Potential of Critical Legal Studies Through a Reexamination of Frankfurt School Critical Theory*, 26 *Florida State University Law Review* (1999), p. 701, at n. 1. Kant used the term 'critique' primarily in the context of his a priori theory of knowledge and action.

<sup>12</sup> The term 'deep structure' originally stems from linguistic theory. It has found its way into international legal theory through the work of CLS author Roberto Mangabeira Unger. See in particular ROBERTO M. UNGER, *Knowledge and Politics*, New York 1984, p. 8.

<sup>13</sup> See, *mutatis mutandis*, WHITEHEAD, *supra* note 11, p. 701.

<sup>14</sup> MARTTI KOSKENIEMI, *The Gentle Civilizer of Nations, The Rise and Fall of International Law 1870–1960*, Cambridge 2002, p. 1. Koskeniemi rejects to be 'labeled', his work is commonly associated with the critical legal studies movement though, see REIN MÜLLERSON, *The Gentle Civilizer of Nations*, 13 *European Journal of International Law* (2002), p. 727, 732.

The bundle of approaches we label as ‘critical approaches’ is highly heterogeneous. The ‘new approaches to international law’ (NAIL) or ‘newstream’,<sup>15</sup> the ‘Third World Approaches to International Law’ (TWAIL)<sup>16</sup> and the ‘feminist approaches’<sup>17</sup> are loosely united in the sense that they are all on a ‘mission’ to decipher fundamental endemic shortcomings of the international legal order and to ask about alternative paths. They do not work with the same premises though. The critical international legal movement comprises a rich variety of strands which are in some cases hardly reconcilable or even incompatible. For example, those strands of feminism which advocate equal rights for women and men have a completely different focus than, for example, ‘critique of rights’-feminism has.<sup>18</sup> Rather, the latter criticizes the preoccupation of the first with rights, which it considers narrow-minded and insensitive to other and more constructive forms of social problem-solving. As a solution, it suggests working towards the establishment of a different culture which is more sensitive to the situation and needs of women. We do not intend to downplay these and other differences among the various approaches coming under the label of CIL. Our focus is on what unites the strands, i.e., the project of critique, and on what should remain as their enduring contribution.

## **B. Critique as Legal Science: Analytical and Normative Dimension of CIL**

The ‘critical project’ has two dimensions. It has a descriptive-analytical and a normative dimension.<sup>19</sup> ‘Critique’ of international law is, first of all, an analytical project. It is about understanding what is ‘really’ going on in the international legal sphere, and it typically employs a specific analytical ‘toolkit’ for this analysis. We will discuss this ‘toolkit’ in some detail in section II.A. It suffices to mention that CIL is concerned with understanding the ‘operating mode’ of international law. For this, CIL does not rely on simple doctrinal analysis in

<sup>15</sup> Influential ‘newstream’ authors include, i.a., David Kennedy, the early Martti Koskenniemi, Philip Allott, Tony Carty, Jan Klabbers, Thomas Skouteris, Lauri Mälksoo.

<sup>16</sup> Influential authors are, i.a., R.P. Anand, Mohammed Bedjaoui, Bhupinder S. Chimni, Antony Angie, Makau Mutua, Balakrishnan Rajagopal, James T. Gathii, Yasuaki Onuma.

<sup>17</sup> Influential representatives i.a.: Hilary Charlesworth, Christine Chinkin, Shelley Wright, Karen Knop, Anne Orford, Diane Otto.

<sup>18</sup> For a survey of the several strands of thought within feminism see HILARY CHARLESWORTH & CHRISTINE CHINKIN, *The Boundaries of International Law: A feminist Analysis*, Manchester 2000, pp. 38 ff.

<sup>19</sup> Recently, Anne Peters has suggested distinguishing not only an analytical and a normative dimension of legal scholarship, but a doctrinal, an empirical, a theoretical, and an ethical dimension ANNE PETERS, *Realizing Utopia as a Scholarly Endeavour*, 24 *European Journal of International Law* (2013), p. 533, 545–549.

the sense of 'logical semantic analysis'.<sup>20</sup> Rather, its analytical quest for understanding the 'operating mode' of international law draws from insights of sociology, linguistics, economic theory, political philosophy, psychology, and social anthropology. CIL incorporates new perspectives on law that enable unveiling blind spots, inconsistencies, and biases in the discipline of international law. Typical critical research uncovers implicit assumptions underlying mainstream doctrine. It tries to show that doctrine often is under-theorized and that it, in some cases, allows for arbitrary results.

The normative dimension is the 'natural companion' to the analytical element of critical thinking.<sup>21</sup> Here, a specific idea of justice is used as a yardstick for measuring positive international law. In such a setting, the normative conception provides both the analytical perspective and, normatively, the direction of possible solutions. TWAIL author Bhupinder S. Chimni's work provides an example. He states that the task of the international lawyer is 'nothing short of the peaceful transformation of the global relations of production, consumption and distribution.'<sup>22</sup> The 'alienation of international law from the poor', Chimni argues, should be overcome and be replaced by 'ethical forms of global societal relations'.<sup>23</sup> Feminist authors often argue in an analogous manner. Some of them describe their project as the scientific response to the political goals of feminist struggles.<sup>24</sup> The significance of the normative dimension varies in CIL. In some critical works it appears rather peripheral compared to the analytical part. Martti Koskenniemi's claim for a socially conscious 'relatedness' of the international lawyer to the world is a good example.<sup>25</sup> It is a corollary to his analytical findings that international law lacks objectivity and impartiality. Koskenniemi describes his normative dimension explicitly as 'normativity in the small'.<sup>26</sup> The comparatively modest role of the normative dimension earned him the criticism of complicity with mainstream writing.<sup>27</sup>

The analytical and the normative dimensions are sometimes merged. In these cases, the normative goal decides on which insights are acceptable as an-

<sup>20</sup> PETERS, *supra* note 19, p. 545.

<sup>21</sup> See for example the edited volume by Richard Falk, Balakrishnan Rajagopal & Jaqueline Stevens (eds.), *International Law and the Third World: Reshaping Justice*, Abingdon 2008.

<sup>22</sup> BHUPINDER S. CHIMNI, *The Past, Present and Future of International Law: A Critical Third World Approach*, 8 *Melbourne Journal of International Law* (2007), p. 499, 514.

<sup>23</sup> CHIMNI, *supra* note 22, p. 514.

<sup>24</sup> HILARY CHARLESWORTH, *Feminist Methods in International Law*, 93:2 *The American Journal of International Law* (1999), p. 379, 380.

<sup>25</sup> MARTTI KOSKENNIEMI, *From Apology to Utopia: The Structure of International Legal Argument*, Cambridge 2005, p. 548.

<sup>26</sup> KOSKENNIEMI, *supra* note 25, p. 555.

<sup>27</sup> ANTHONY CARTY, *Liberalism's 'Dangerous Supplements': Medieval Ghosts of International Law*, 13 *Michigan Journal of International Law* (1991), p. 161, 171.

alytical findings and which are not. Such an ‘analysis’ evidently transgresses the scientific discourse as it immunizes itself against rational counter-arguments. In some feminist and TWAIL literature, such fusions can be observed. The analytical project then becomes, as feminist author Hilary Charlesworth admits, ‘a political agenda rather than to strive to attain objective truth on a neutral basis’, it may then appear as ‘personal rather than detached’.<sup>28</sup> A strength of critical literature – being the opposite of anemic scholarliness – here turns into a fundamental shortcoming. The two dimensions of critique, being a descriptive and a normative project at the same time, are connected both with strengths and dilemmas. On the one hand, critical literature is a vital challenge to any technocratic denial of social responsibility. On the other hand, the close relationship between the analytical and the normative ambition can result in a precarious one-sidedness or even blindness concerning counter-arguments and aspects that do not fit into the picture. Some critical authors, thus, ultimately fall prey to the same criticism they formulate.

### C. CIL and CLS: More than an Offshot

The relationship between CIL and CLS needs some clarification. CLS is, first of all, the most important source of inspiration for CIL.<sup>29</sup> It triggered a new era of critical literature on international law since the 1980s.<sup>30</sup> It is important to note though that NAIL, TWAIL and feminist approaches to international law can hardly be viewed as mere offshots of CLS. CIL is, to come back to the metaphor at the outset, rather the ‘half-sister’ of CLS. The relationship between CLS and CIL is more complex. There was critical literature on international law long before the rise of CLS. Socialist literature of the early 20<sup>th</sup> century on imperialism is an example. Also TWAIL’s predecessor, the decolonization movement, was prominent already in the 1950s and 1960s and has early roots in the decolonization movement of the 19<sup>th</sup> century in Latin America and in even earlier epochs.<sup>31</sup> Early TWAIL – now often called TWAIL I by contemporary TWAIL-ers<sup>32</sup> – received a strong boost and transformation through CLS. CLS-sensitiv-

<sup>28</sup> HILARY CHARLESWORTH, *supra* note 24, p. 380.

<sup>29</sup> For an accessible survey of CLS thought see ROBERTO M. UNGER, *The Critical Legal Studies Movement*, 96 *Harvard Law Review* (1983), p. 561.

<sup>30</sup> See, e.g. the criticism by Lea Brillmayer that Koskenniemi borrows from CLS reasoning wholesale and applies it ‘virtually without alteration to the international setting.’ See LEA BRILLMAYER, *Book Review: From Apology to Utopia: The Structure of International Legal Argument*, 85 *The American Political Science Review* (1991), p. 687, 687.

<sup>31</sup> CHIMNI, *supra* note 22, pp. 500 ff.

<sup>32</sup> ANTONY ANGHIE & BHUPINDER S. CHIMNI, *Third World Approaches to International Law and Individual Responsibility in Internal Conflicts*, 2 *Chinese Journal of International Law* (2003), p. 77, 79.

ity for the functioning of the discourse led to new insights on how international law could remain an instrument of domination in the post-colonial era, long after the former colonies had gained independence. More than CLS, TWAIL focuses on the Third World. Analogous considerations apply to the relationship between feminist approaches and CLS. International feminism – the Women’s Rights Movement – had been on the rise since the mid-19<sup>th</sup> century.<sup>33</sup> Already in 1915, an International Congress of Women took place at the Hague with more than 1500 women participating.<sup>34</sup>

Some CLS-ideas or topics are of particular importance for CIL. In the following, we outline three CLS ideas which significantly influenced CIL: the ‘indeterminacy thesis’, the ‘contradiction thesis’, and the ‘social plasticity thesis’. CIL employed and adapted these ideas in various forms to the international sphere and international law. A thesis of strategic relevance for CIL is the classical CLS thesis concerning law’s indeterminacy. One of CLS’s main thrusts was to formulate a pitiless attack on any ‘naive’ belief in law’s objectivity and neutrality. CLS radically calls into question the distinction between ‘objective’ doctrinal work and ‘subjective’ political thought. Duncan Kennedy’s essay ‘Form and Substance in Private Law Adjudication’ is the classical text.<sup>35</sup> He claims that any legal argument is connected with underlying visions of society – that doctrinal work is never merely a question of judicial logic. It is impossible therefore to maintain a categorical distinction between legal and political thought.<sup>36</sup> The argument is developed in the domestic context, but constitutes an invitation to international legal scholarship to explore whether similar considerations apply to the international legal order. David Kennedy, Martti Koskeniemi and others spent much energy on showing that the indeterminacy thesis is valid in the international legal sphere, too, and maybe to an even higher degree.

The second thesis is the ‘contradiction thesis’. At its core lies the claim is that the concept of ‘freedom’ is connected with a fundamental contradiction concerning the role of ‘the others’. The authoritative text is another essay by Duncan Kennedy entitled ‘The Structure of Blackstone’s Commentaries’.<sup>37</sup> Kennedy explains, in one of the most well-known CLS-passages, that the fundamental problem with freedom is that relations with others are *both* indispen-

<sup>33</sup> DEBORAH STIENSTRA, *Women’s Movements and International Organizations*, New York 1994, pp. 47 ff.

<sup>34</sup> MARY E. HAWKESWORTH, *Globalization and Feminist Activism*, Oxford 2006, p. 56.

<sup>35</sup> DUNCAN KENNEDY, *Form and Substance in Private Law Adjudication*, 89 *Harvard Law Review* (1976), p. 1685.

<sup>36</sup> KENNEDY, *supra* note 35, p. 1776.

<sup>37</sup> DUNCAN KENNEDY, *The Structure of Blackstone’s Commentaries*, 28 *Buffalo Law Review* (1979), p. 209.

sable to freedom and incompatible with it.<sup>38</sup> ‘The others’ are at the same time a prerequisite of freedom and a threat to it. What are the implications of this claim for international law? Most international lawyers imagine sovereignty as ‘State freedom’<sup>39</sup> and the ‘international’ society as composed of a large number of free, sovereign States.<sup>40</sup> The ‘contradiction thesis’ raises the question whether the concept of sovereignty suffers from the same contradictions as the concept of freedom. If – according to the ‘contradiction thesis – the very idea of freedom is unclear, however, then the concept of sovereignty and its legal content may be challenged, too.

The third thesis is the ‘social plasticity’-thesis. It concerns the options available for a society to shape its future. The main idea of the ‘social plasticity’ thesis is that we should widen the horizon of our imagination and become conscious of our intellectual routines if we want to make use of the full potential of rationality in our societies. The main references are two works by Roberto M. Unger in which he denounces thinking in ‘false necessities’.<sup>41</sup> Unger argues that we should stop imagining the development and organization of societies in simplistic schemes or patterns, in predetermined stages. Such self-limitations are connected to what he calls our ‘formative context’, our intellectual background which determines on the patterns of our thought on conflict and conflict resolution. There are no ‘natural laws’ in the development of societies, there is social and organizational plasticity. Unger considers societies to be open to re-modeling in accordance with ‘real’ needs and demands. He emphasizes contingency and urges to seize the opportunity to reshape the reality and the law. For critical international lawyers, Unger’s work is a call to reimagine the international society and international law’s role without taboos.<sup>42</sup> Martti Kosken-

<sup>38</sup> ‘[T]he goal of individual freedom is at the same time dependent on and incompatible with the communal coercive action that is necessary to achieve it.’ See KENNEDY, *supra* note 37, p. 211.

<sup>39</sup> On this analogy see KOSKENNIEMI, *supra* note 25. See also KAREN KNOP, *Re/Statements: Feminism and State Sovereignty in International Law*, 3 *Transnational and Contemporary Legal Problems* (1993), p. 293, arguing against the analogy by pointing to the diversity of groups within a State and the variety of functions a modern State has to perform.

<sup>40</sup> See Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations, GA Res. 2625 (XXV), 24 October 1970; UNYB 24 (1970) 788.

<sup>41</sup> ROBERTO M. UNGER, *Social Theory: Its Situation and its Task*, Cambridge 1987; ROBERTO M. UNGER, *False Necessity*, London 2001 (new edition).

<sup>42</sup> In the new edition of ‘False Necessity’ published in 2001, Unger describes the goal in the form of a question: ‘How can we make ourselves greater, individually and collectively, we who live in a restless peace, after the slaughters and crusades, the catastrophes and the posturings, the illusions and the disillusionments, that filled the 20<sup>th</sup> century? How can we make ourselves greater, when an unforgiving skepticism has destroyed our inherited faiths?’ See UNGER, *supra* note 41, p. XVII.

niemi explicitly refers to the cited works.<sup>43</sup> In a similar fashion, Karen Knop, a feminist CIL scholar, has called for the ‘real to be transformed by the imagination.’<sup>44</sup>

## II. Critique At Work: How to Exercise Critique of International Law?

The second part exposes how the critique of international law works. We begin by stating some key elements of the ‘critical toolkit’ and then address *the* central topic of CIL, international law’s biases and some of the most influential claims in this field. Finally, we comment on the dilemmas connected with the normative question ‘resistance or reform?’.

### A. Critical Toolkit: Language, Social Structures, and History

A key element of the ‘critical toolkit’ is the analysis of the relationship between language and law. CIL addresses the link between the operation of language and international law. It draws – as CLS – on important insights by structural linguistics. Among the core ideas of structural linguistics is the claim that the whole (of the language) is more than its single components (the linguistic expressions). There exist ‘underlying structures’ which are crucial for the functioning of the whole.<sup>45</sup> The idea proved appealing to social and legal theory, and through CLS and CIL, it reached international legal scholarship. The subtitle of ‘From Apology to Utopia’ is ‘The *structure* of international legal argument’ (our emphasis).<sup>46</sup> David Kennedy published a book with the title ‘International Legal *Structures*’.<sup>47</sup> In this work, Kennedy fleshes out ideas he developed in an essay written in 1980 (‘Theses about international law discourse’). In the latter he said that his method can be called ‘structuralist’ because he seeks to explain the patterns of the international legal discourse.<sup>48</sup>

<sup>43</sup> KOSKENNIEMI, *supra* note 25, p. 547.

<sup>44</sup> KNOP, *supra* note 39, p. 344.

<sup>45</sup> DE SAUSSURE, *Cours de linguistique générale*, Paris 1916 (1979 reprint).

<sup>46</sup> Koskenniemi calls his approach ‘deconstructive’: See KOSKENNIEMI, *supra* note 25, p. 6. For a critique of this label for Koskenniemi see NIGEL PURVIS, *Critical Legal Studies in Public International Law*, 32 *Harvard International Law Journal* (1991), p. 81, 124.

<sup>47</sup> DAVID KENNEDY, *International Legal Structures*, Baden-Baden 1987.

<sup>48</sup> DAVID KENNEDY, *Theses about International Law Discourse*, 23 *German Yearbook of International Law* (1980), p. 353, 355.

Structuralist search for underlying patterns is often combined with post-structuralist ideas. It may be worth reminding that poststructuralism is not, as the notion might suggest, a counter-project to structuralism. Rather, it is a further refinement and response to questions formulated by structuralism. Post-structuralism does not challenge the structuralist idea that the whole is more than its single components. Its key topic is the relationship between the language and the social world. It is interested in whether the language is something like a ‘mirror image’ of the real world or something different. It claims that linguistic expressions do not represent ‘real things’, language is not the ‘mirror image’ of reality.<sup>49</sup> Linguistic expressions – including legal expressions – have no given meaning, no essence.<sup>50</sup> They are connected with *each other*. Language is a ‘system of references’. The meaning of an expression is created – this is the crucial point – through linguistic practice.<sup>51</sup>

Acceptance of poststructuralist ideas significantly impacts the international legal scholar’s research interests. The practices of the discourse become central. The focus is no longer on the single expression – the single legal term –, but shifts to the patterns of the discourse in general. The discourse creates meaning, social options and intellectual categories.<sup>52</sup> The poststructuralist mindset proved appealing to CIL as it is sensitive for any form of use and abuse of power. It is open for the diversity of actors in the international sphere and their interplay. There is no artificial limitation of the perspective. Poststructuralism challenges a particularly important premise of traditional legal thinking. It questions that law-making and legal interpretation can be categorically distinguished. They are in the poststructuralist perspective just two practices in the legal discourse. This changes the perception of the role of States as ‘traditional’ lawmakers and of courts such as the ICJ as ‘adjudicative bodies’. The premise that law-making and interpretation are distinguishable constitutes a baseline in liberal legal thinking. The distinction hinges on the assumption that linguistic expressions have a more or less determinable core. The distinction only makes sense if this is the case. The poststructuralist view is incompatible with this premise. It considers meaning not as something which can be found ‘in’ the text of a norm, but which is determined by the discourse, by something ‘outside’ the expression and the norm itself. The discourse decides on the meaning of the norm. In this

<sup>49</sup> PETER BROOKER, RAMAN SELDEN & PETER WIDDOWSON, *A Reader’s Guide to Contemporary Literary Theory*, Harlow 2005, p. 145.

<sup>50</sup> ZSUZSA BAROSS, *Poststructuralism*, in: Irene R. Makaryk (ed.), *Encyclopedia of Contemporary Literary Theory: Approaches, Scholars, Terms*, Toronto 2000, p. 158, 159.

<sup>51</sup> ZSUZSA BAROSS, *supra* note 50, p. 159.

<sup>52</sup> See, e.g. DIANE OTTO, *Disconcerting ‘Masculinities’: Reinventing the Gendered Subject(s) of International Human Rights Law*, in: Doris Buss & Ambreena Manji (eds.), *International Law: Modern Feminist Approaches*, Portland 2005, p. 105.

perspective both law-making and interpretation become mere discursive acts. The specificities of interpretation – and of the work of the judge in particular – can no longer be categorically distinguished from law-making. The single expression, the individual norm and its history are no longer at the center of the enquiry. Instead, discourse patterns that decide on the range of acceptable arguments become crucial. The concentration on discourse pre-structures the perception: As there are, in reality, always actors that influence the outcome of a discourse more than others, the meaning of law becomes *a priori* precarious and biased. The distinction between law and politics is necessarily blurred. Structuralism and poststructuralism change the perception of what international law is and how it operates, they suggest a subversive view of established institutions.

A second key element of the ‘critical’ toolkit can be labeled ‘analysis of international social structures’. CIL deals with structures that create domination, e.g., political, economic, and cultural structures. Particular attention is paid to those that influence the legal discourse. In a poststructuralist world where norms have no fixed meanings, these structures decide on access to ‘conceptual commandeering’. ‘Conceptual commandeering’ means that one party is in a position to introduce new concepts into the discourse and to ultimately impose them on others. The rise of the concept of ‘global governance’ is a good example. It was formulated by first world actors as if it were an expression of a natural and unchallengeable logic.<sup>53</sup> Such concepts are connected with a set of ideas about the rational State, desired development, necessary rights etc. These ideas influence the way the social reality is shaped and works.<sup>54</sup> Even if the concept of ‘global governance’ were not imposed on the Third World in a formal sense, it has become a sort of self-evident part of the international ‘legal realm’. As some TWAILers would put it: The idea of global governance forms part of the setting of neo-colonial dominance. The first world ‘dictates’ what ‘global governance’ requires, while others are expected to accept that determination. A similar argument can be found in feminist scholarship. Feminists argue that the international legal discourse is controlled by males. This in turn is believed to lead to male conceptions of key notions, for example in the human rights

<sup>53</sup> BHUPINDER S. CHIMNI, *Third World Approaches to International Law: A Manifesto*, 8 International Community Law Review (2006), p. 3, 15.

<sup>54</sup> See, e.g. the formulation of ‘challenges’ for future TWAIL in: IBIRONKE T. ODUMOSO, *Challenges for the (Present/Future) of Third World Approaches to International Law*, 10 International Community Law Review (2008), p. 467.

discourse where concepts such as ‘inhuman treatment’<sup>55</sup> and ‘refugee’<sup>56</sup> were originally tailored – so the argument runs – to the typical situation of men. These concepts are considered to have been adjusted to the situation of women only gradually.

A third element of the ‘critical toolkit’ is history. CIL frequently engages history for a critical purpose. It has no ‘archivist’ agenda, it turns to history for the purpose of exercising critique of international law.<sup>57</sup> History can help unmask false assumptions about the origin of legal norms, arguments or conceptions. TWAIL authors, for example, have engaged historical research to prove wrong the ‘Western’ narrative of the history of public international law as a history of progress.<sup>58</sup> TWAIL tried to show that concepts such as sovereignty – to take a prominent example – are not ‘logical elaborations of a stable, philosophically conceived sovereignty doctrine’, but should be conceived ‘as being generated by problems relating to colonial order.’<sup>59</sup> In the view of TWAILers, it was not some abstract ideal about ‘law’ that inspired the concept of sovereignty, but the ambition to uphold existing patterns of domination.<sup>60</sup>

## B. Central Issue: International Law’s Biases

The central issue pursued in most of CIL-writing is international law’s biases. There exist two main versions of the bias-thesis: a substantive bias-thesis and a structural bias-thesis. The substantive bias-thesis claims that the international legal order, as it stands, produces unfair results. This criticism draws on the tradition of confronting ‘positive’ international law with an imagined ideal order. It resembles a modern variant of the natural law discourse on international law. Two examples may illustrate this. The first one concerns international law’s formal conception of consent and equality. For example, critical authors reject the common understanding of equality and consent that allows ‘consensual’

<sup>55</sup> AMY FARRELL & PATRICE McDERMOTT, *Claiming Afghan Women: The Challenge of Human Rights Discourse for Transnational Feminism*, in: W. Herford & W. Kozol (eds.), *Just Advocacy? Women’s Human Rights, Transnational Feminism, and the Politics of Representation*, New Brunswick 2005, p. 33.

<sup>56</sup> JACQUELINE GREATBATCH, *The Gender Difference: Feminist Critiques of Refugee Discourse*, 1 *International Journal of Refugee Law* (1989), p. 518, 519–520.

<sup>57</sup> ANDREAS L. PAULUS, *International Law After Postmodernism: Towards Renewal or Decline of International Law?*, 14 *Leiden Journal of International Law* (2001), p. 727, 738.

<sup>58</sup> OBIORA C. OKAFOR, *Newness, Imperialism, and International Legal Reform in Our Time: A TWAIL Perspective*, 43 *Osgoode Hall Law Journal* (2005), p. 171, 178.

<sup>59</sup> ANTONY ANGHIE, *Imperialism, Sovereignty and the Making of International Law*, Cambridge 2008, pp. 6–7.

<sup>60</sup> This view neglects the specific European context of the rise of the concept of sovereignty and its contribution to the pacification of the continent after the confessional schism.

transfer of toxic waste from Northern to Third World States.<sup>61</sup> In their view, a proper understanding of equality among States would prohibit such self-destructive contracts.<sup>62</sup> The second example relates to core ideas of international economic law. Critical authors argue that WTO rules on trade in services placed highly sensitive areas of domestic policy under the ‘banner of simple commercial activity’, thereby depriving Third World States of important aspects of self-determination.<sup>63</sup> Some argue that GATS is an imperialistic project, devised by the US and supported by the OECD.<sup>64</sup> Substantive biases can be discovered in almost any field of international law.

The structural bias-thesis is more fundamental. It claims that international law is *incapable* of being objective and impartial. It categorically challenges the ‘objectivist’ understanding of the law, i.e. the idea that the content of rules can be identified and applied without regard to factors such as personal world views of law-interpreters, their social roles, their experiences etc.<sup>65</sup> The structural bias-thesis concerns the very ability of international law to live up to the ambition of being a neutral order which most lawyers would consider to be implied in the notion of law. Some CIL-authors detect structural biases, e.g., in the too dominant role of the legal discourse in the debate on international conflict resolution. They criticize – in the tradition of CLS ‘critique of rights’<sup>66</sup> – the interplay between law and other forms of social conflict resolution and claim that legal conflict resolution typically prefers some outcomes over others. They attack the cultural hegemony of legal thinking. Some CIL authors consider the concentration on legal questions to be a key obstacle to dispute resolution as other forms of social interaction such as conversation and dialogue are constantly repressed.<sup>67</sup>

<sup>61</sup> LAURA A. PRATT, *Decreasing Dirty Dumping? A Reevaluation of Toxic Waste Colonialism and the Global Management of Transboundary Hazardous Waste*, 35 William & Mary Environmental Law & Policy Review (2011), p. 581.

<sup>62</sup> CYRIL UCHENNA GWAM, *Travaux Préparatoires of the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and Their Disposal*, 18 Journal of Natural Resources & Environmental Law (2003–2004) p. 1.

<sup>63</sup> MOHSEN AL ATTAR & REBEKAH THOMPSON, *How the Multi-Level Democratization of International Law-Making Can Effect Popular Aspirations towards Self-Determination*, 3 Trade, Law & Development (2011), p. 65, 77.

<sup>64</sup> CLAIRE CUTLER, *Toward a radical political economy critique of transnational economic law*, in: Susan Marks (ed.), *International Law on the Left*, Cambridge 2008, p. 199.

<sup>65</sup> JAN-R. SIECKMANN, *Objectivity of Law*, in: *IVR Encyclopedia*, 2009, [http://ivr-enc.info/index.php?title=Objectivity\\_of\\_Law](http://ivr-enc.info/index.php?title=Objectivity_of_Law) (last accessed 11/10/13).

<sup>66</sup> DUNCAN KENNEDY, *The Critique of Rights in Critical Legal Studies*, in: Wendy Brown & Janet Halley (eds.), *Left Legalism/Left Critique*, Durham 2002, p. 178.

<sup>67</sup> CHARLESWORTH, *supra* note 24, p. 379.

The most prominent accounts on structural biases in international law are provided by David Kennedy and Martti Koskenniemi. Already in 1980, Kennedy wrote that the principles and rules of international law dissolve far too easily into ‘thin disguises for assertions of national interests’, and he attributed this problem to the manipulability of the basic norms around which the international legal discourse is organized.<sup>68</sup> Koskenniemi devotes a large part of ‘From Apology to Utopia’ to showing that the way international legal argument works is incompatible with the idea of an objective order. The ‘objectivist dream’ was, in his opinion, ‘faulted from the outset’.<sup>69</sup> He attributes the failure to the very concept of law in the international sphere where two mutually exclusive categories of argument are acceptable: arguments referring to concrete social practices of international agents (‘concrete’ arguments) and arguments reflecting considerations on justice (‘normative’ arguments).<sup>70</sup> Both categories are needed if one seeks to defend a *legal* argument against the criticism that it is merely utopian speculation or just apologetic of existing State practice. The fundamental problem is, according to Koskenniemi, that a norm cannot be concrete (factual) and normative (contra-factual) at a time. There is no ‘correct’ solution to legal problems, any international legal argument remains vulnerable to arguments of the opposite category. David Kennedy formulates the dilemma as follows: ‘One may imagine law to be either critical of or grounded in State behavior, and neither understanding is sufficient.’<sup>71</sup> To provide an example: One may interpret the notion of ‘armed attack’ in Art. 51 of the UN Charter either by referring to State practice or by invoking a vision about the international legal community and the role of self-defense therein. Whatever position one adopts, though, it will always be possible to come up with an argument of the other category, leading to a *regressus ad infinitum*.

The discussion of international law’s biases in critical international legal scholarship is ambiguous. On the one hand, it increases the sensitivity for international law’s blind spots. Feminist analysis, for example, influenced important developments in fields such as refugee law,<sup>72</sup> gender-mainstreaming in international organizational law,<sup>73</sup> conflict resolution<sup>74</sup> and international criminal law.<sup>75</sup>

<sup>68</sup> KENNEDY, *supra* note 48, p. 359.

<sup>69</sup> KOSKENNIEMI, *supra* note 25, p. 515.

<sup>70</sup> KOSKENNIEMI, *supra* note 25, p. 58–69.

<sup>71</sup> KENNEDY, *supra* note 48, p. 383.

<sup>72</sup> ALICE EDWARDS, *Transitioning Gender: Feminist Engagement with International Refugee Law and Policy*, 29 *Refugee Survey Quarterly* (2010), p. 21.

<sup>73</sup> EMILIE HAFNER-BURTON & MARK A. POLLACK, *Mainstreaming Gender in Global Governance*, 8 *European Journal of International Relations* (2002), p. 339.

<sup>74</sup> See in particular SC Res. 1325, 31 October 2000 concerning women, peace and security.

<sup>75</sup> See in particular SC Res. 1820, 19 June 2008 concerning sexual violence as a tool of war.

TWAIL has raised the sensitivity for direct and indirect patterns of post-colonial domination of the Third World, and the Kennedy-Koskenniemi-argument exposed the fragility of legal arguments in the international sphere. On the other hand, doubts remain whether this criticism really fits the ‘big picture’. Are the biases as severe as described? What about the achievements of positive international law, how are shortcomings and achievements to be balanced? What about the conflicts that did not take place because of international law? The critical perspective seems to be unconcerned with a more comprehensive picture which includes both the shortcomings and achievements of international law.<sup>76</sup>

### **C. Positive International Law: Resistance or Reform or Both?**

If acceptance of critical arguments is sought outside the community of critical legal scholars, the question arises to which degree a critical approach is prepared to accommodate international law as it currently stands.<sup>77</sup> The crucial question is: reform or resistance? Those who advocate mere reform risk being attacked for complicity with mainstream lawyers, those who favor ‘re-imagination’ of international law and resistance to the contemporary order risk their reputation as serious professionals. Reformism can be both, a strategy of realizing the possible or a contribution to the perpetuation of ‘wrong’ structures and solutions. Resistance can be both, too: a necessary strategy to trigger desired developments or an expression of self-satisfied ivory-tower blindness for the real world. The dilemma is inescapable. Some CIL authors seek to get around it by advocating reform *and* revolution which is contradictory as the two stances logically exclude each other.<sup>78</sup> Makau Mutua, for example, writes that ‘the radical and reformist trends form a progressive whole that accounts for the com-

<sup>76</sup> Koskenniemi’s second major work ‘The Gentle Civilizer of Nations’ (2002) can be seen as a reaction to his insight into this deficit of the critical perspective. See KOSKENNIEMI, *supra* note 14.

<sup>77</sup> Some feminist authors have addressed the problem of ‘feminist soliloquy’. They deplore that feminist authors often work in a ‘scholarly ghetto’ and that their contributions are rarely taken up by other members of the discipline. There is evidently some truth in the view that feminist perspectives have often been deliberately ignored by mainstream literature. However, feminist concentration on instances of ‘male’ power can lead to blindness for the real power structures and existing opportunities of women. Additionally, it may give rise to an attitude which confers the responsibility to change the situation only on others. For a thoughtful discussion of the topic see HILARY CHARLESWORTH, *Talking to Ourselves? Feminist Scholarship in International Law*, in: Sari Kouvo and Zoe Pearson (eds.), *Feminist Perspectives on Contemporary International Law*, Oxford 2011, p. 17.

<sup>78</sup> For TWAIL’s characteristic ‘double engagement’ with reform and resistance vis-à-vis international law see, e.g. LUIS ESLAVA & SUNDHYA PAHUJA, *Between Resistance and Reform: TWAIL and the Universality of International Law*, 3 Trade Law & Development (2011), p. 103.

plexity and diversity of TWAIL.<sup>79</sup> This may sound reconciliatory, but it is hardly more than a semantic trick to veil the dilemma.

Three main attitudes of CIL towards positive law can be distinguished. The boundaries between them are not rigid. The first can be described as ‘moderate reformism’. At the end of the day, a considerable part of CIL authors advocate modest reforms in international law. For example, feminist claims for gender-mainstreaming in international economic institutions and dismantling of barriers to equal rights can be realized within the framework of current international law.<sup>80</sup> A second group of authors advocates intermediate positions. They radically criticize contemporary international law, but they recognize that – despite all shortcomings – it provides important guarantees to the less powerful, such as human rights guarantees and the right to self-determination, that should not be put in danger. These authors are aware that there is something to lose, they warn of the ‘traps of nihilism’.<sup>81</sup> TWAIL authors such as Bhupinder Chimni or Anthony Anghie belong to this group. Finally, there are the radical positions. TWAIL authors such as China Miéville or some radical feminist authors belong to this group. Some feminist positions, especially those inspired by Catherine MacKinnon’s work, advocate total rejection of positive law.<sup>82</sup> These authors blame those taking more moderate positions for betraying the critical project. Such positions are often inspired by Marxism and its skepticism towards law in general. In this perspective, law is part of the ‘superstructure’ and ultimately determined by the economic base.<sup>83</sup> The very existence of international law itself is an object of criticism, a cardinal suspect accused of serving just the aims of the powerful. Approaches relying on a Marxist conception of law are inherently critical of the law as it currently stands.<sup>84</sup>

<sup>79</sup> MAKAU W. MUTUA, *What is TWAIL?* American Society of International Law, Proceedings of the 94th Annual Meeting (2000), p. 31, 32.

<sup>80</sup> See JACQUI TRUE, *Mainstreaming Gender in Global Public Policy*, 5 *International Feminist Journal of Politics* (2003), p. 368, raising the question whether feminist scholarship can afford *not* to engage with institutions of international power.

<sup>81</sup> CHIMNI, *supra* note 53, p. 26.

<sup>82</sup> In this perspective, the problem is not just ‘male’ law, but law as such. Law itself is suspected of only reflecting and perpetuating power structures which obstruct meaningful discussions on the international legal order. Anne Peters refers to a ‘double trap’ feminist jurists face: They have to struggle with the androcentricity of law and the ‘too high rank’ of law in the hierarchy of knowledge. See ANNE PETERS, *Völkerrecht im Gender-Fokus*, in: Andreas Zimmermann & Thomas Giegerich (eds.), *Gender und Internationales Recht*, Berlin 2007, p. 199.

<sup>83</sup> Interestingly for our purpose, Marx himself never dealt with international law. See MARTTI KOSKENNIEMI, *What Should International Lawyers Learn from Karl Marx?*, 17 *Leiden Journal of International Law* (2004), p. 229.

<sup>84</sup> See, e.g. CHINA MIÉVILLE, *Between Equal Rights: A Marxist Theory of International Law*, Leiden 2005.

### III. The Critical Heritage: What Should Remain?

In this part, we discuss three candidates for the role of enduring contributions of CIL to the discipline of international law. Our remarks are meant to be a subjective sketch of what should be considered the critical heritage.

#### A. Doctrine: Making Doctrine Context Sensitive

One of the lasting contributions of CIL to international legal theory is its call for context sensitive doctrinal work. Its insights about the structural bias-problem, but also those about the indeterminacy problem in general, make this claim an imperative for acceptable scientific legal work. Context sensitivity is the logical corollary of some unavoidable, basic features of international law. One may call it a 'second-best' solution, but it is a sincere answer to the indeterminacy problem. Context sensitivity, as Koskenniemi observes, is more than pragmatism, it is also not just a plea for an 'anything goes'-morality.<sup>85</sup> It is a claim to be conscious of the indeterminacy of law and of the relativity of our knowledge. Doctrinal rigidity and dogmatism are incompatible with international law's nature and structure. Doctrinal precision is essential, but it is not sufficient. It is a central achievement of CIL to have shown why international lawyers need to be open to insights of other disciplines such as sociology, psychology, economics and historiography: It is because lawyers have to make use of the wide margins for acceptable legal solutions in the best informed way. CIL authors have shown at an unprecedented level that it is inadequate to treat the international legal discourse as a self-contained legal discourse.<sup>86</sup> Due to CIL, it has become more difficult for international lawyers to ignore the question how they want to deal with the wide margins for possible, i.e. methodologically acceptable, legal arguments. In dealing with, e.g., problems of human rights, international economic law or questions of statehood or extraterritoriality, international lawyers symptomatically face a number of diverse options. Many high-profile cases of international courts and tribunals could have turned out with a completely different outcome.<sup>87</sup> The Kosovo Advisory Opinion of the ICJ or the Jurisdictional Immunities Case between Germany and Italy are good

<sup>85</sup> KOSKENNIEMI, *supra* note 25, p. 536.

<sup>86</sup> KOSKENNIEMI describes the problem as follows: 'For the judge, it must ultimately remain an incomprehensible dilemma and source of professional frustration [...] why it is that equally competent lawyers, with equal amounts of professional integrity constantly come up with conflicting solutions to the same problems.' See KOSKENNIEMI, *supra* note 25, p. 551.

<sup>87</sup> MARTTI KOSKENNIEMI, *International Law in a Post-Realist Era*, 16 Australian Yearbook of International Law (1995), p. 1, 13.

examples.<sup>88</sup> Regarding the Kosovo Advisory Opinion, it is legitimate to argue that the ICJ should have given much more weight to the necessity to respect the sovereignty of existing States, and in the Immunities Case, it could have elaborated more on the limits of state immunity under exceptional circumstances. The call for context sensitive doctrinal work is the response to the basic conditions of international legal argument.

## B. ‘Progressive’ Discourses: Ambivalences

The second enduring contribution is CIL’s criticism of ‘progressive’ discourses. Skepticism towards any naïve understanding of progress in international law has been a central tenet of CIL ever since. CIL has the merit of having shown important ambivalences in discourses which are generally regarded as ‘progressive’.

The most important of these discourses concerns international human rights. The advancement of human rights is generally associated with increased value-orientation of international law, i.e. as ethical improvement, and it is therefore regarded as an ally of progress.<sup>89</sup> However, as the criticism by CIL seeks to demonstrate, this view may be too optimistic. For example, freedom of religion can result in the protection of both acceptable and harmful behavior. It guarantees respect for elemental religious needs, but can at the same time be used – as feminist legal authors have emphasized – for many forms of oppression, typically, but not exclusively, of women and children.<sup>90</sup> Analogous considerations apply to the right to privacy. It provides both a cherished state-free sphere, which enables self-determination and retirement from the world.<sup>91</sup> At the same time it may foster dominance over and oppression of weaker family members. Critical authors point to the ambiguity of concepts such as ‘family life’ or ‘home’. They argue that it is precisely the positive connotation of such concepts

<sup>88</sup> Accordance with International Law of the Unilateral Declaration of Independence in Respect of Kosovo, Advisory Opinion, ICJ Reports (2010) 403; Jurisdictional Immunities of the State (Germany v. Italy), Judgment, ICJ Reports (2012) 189.

<sup>89</sup> See TILMANN ALTWICKER & OLIVER DIGGELMANN, *How is Progress Constructed in International Legal Theory?*, European Journal of International Law (forthcoming 2014), arguing that ‘proving increased value-orientation’ of international law is a ‘technique’ to construct progress narratives.

<sup>90</sup> See, e.g. KARIMA BENNOUNE, *Secularism and Human Rights: A Contextual Analysis of Head-scarfs, Religious Expression, and Women’s Equality under International Law*, 45 Columbia Journal of Transnational Law (2006–2007), p. 367; Susanne Baer, *A Closer Look at Law: Human Rights as Multi-Level Sites of Struggles Over Multi-Dimensional Equality*, 6 Utrecht Law Review (2010), p. 56, 65.

<sup>91</sup> OLIVER DIGGELMANN, *Grundrechtsschutz der Privatheit*, in: Veröffentlichungen der Vereinigung der Deutschen Staatsrechtslehrer (ed.), *Der Schutzauftrag des Rechts*, Berlin 2011, p. 50.

which makes it difficult and sometimes impossible to effectively challenge oppressive structures. Some argue – in line with CLS ‘critique of rights’ – that the rigid focus on rights is often an obstacle to political action and cultural improvement.<sup>92</sup> Observation of human rights is imperative; however, we should not expect to find the desired objective standpoint in a human rights perspective. The human rights perspective – so the crucial insight of CIL – is not a guarantee for ethically unequivocal results.

A related ‘progressive’ discourse concerns ‘democracy and international law’. The dissemination of the democratic ideal tends to be associated with increased value-orientation and therefore with progress, as well. The role of the discourse on democracy is more ambiguous though. On the one hand, there are strong reasons to believe that it contributes to a climate which fosters desirable changes in international relations. The claim that there is an ‘emerging right’ to democracy in international law is in principle in the interest of the poor and oppressed as it is, after all, a debate on the control of elites.<sup>93</sup> On the other hand, CIL has pointed to a hidden and questionable agenda. Aspects of the internal organization of States become increasingly internationalized through the discourse on ‘democracy and international law’, but also through the sophistication of international human rights doctrine.<sup>94</sup> Such questions are addressed in international political *fora* and, increasingly, in international judicial and expert bodies.<sup>95</sup> Some TWAIL authors see a neo-colonial spirit at work.<sup>96</sup>

CIL’s rigorous scrutiny of ‘progressive’ discourses is likely to enduringly influence international legal scholarship. We mentioned only two of these discourses, but there are others such as, e.g. the discourse on global constitutionalism or on the global rule of law. With CIL’s criticism in mind, it seems more

<sup>92</sup> PETERS, *supra* note 82, pp. 265 ff.

<sup>93</sup> THOMAS M. FRANCK, *The Emerging Right to Democratic Governance*, 86 *American Journal of International Law* (1992), p. 46.

<sup>94</sup> For the contribution of human rights in designing and ‘harmonizing’ domestic organizational law, in the context of the European Convention on Human Rights, see TILMANN ALTWICKER, *Convention Rights as Minimum Constitutional Guarantees? – The Conflict between Domestic Constitutional Law and the European Convention on Human Rights*, in: Armin von Bogdandy & Pal Sonnwend (eds.), *The European Constitutional Area and Constitutional Crisis in Europe*, forthcoming 2014.

<sup>95</sup> In few instances, the Security Council dealt with the internal organization of a state. In 1993, it addressed the internal situation of Haiti (SC Res. 841, 16 June 1993), and in 2011 it denounced attempts to subvert the result of the election in the Ivory Coast when Laurent Gbagbo refused to leave office after the elections (SC Res. 1975, 30 March 2011). The essence of this development is that internal structures of States increasingly come under scrutiny and that they are measured with the yardstick of (Western) democracy. See also Venice Commission on Hungary’s new constitution (CDL-AD (2013) 012).

<sup>96</sup> See, famously, BHUPINDER S. CHIMNI, *supra* note 53, p. 8, claiming that the internal structure of States is increasingly ‘under the scrutiny of international law’.

difficult for States today to use them to cover hegemonic intentions.<sup>97</sup> CIL is not opposing these discourses, of course. Rather, it is a critical observer that is highly sensitive to their abuse.

### C. Lawyers and Their Law: Bringing Subjectivity Back In

The last contribution of CIL that merits – in our view – preservation is CIL's turn to subjectivity.<sup>98</sup> It relates to the first (i.e. the claim for context sensitivity of legal doctrine), however it does not concern 'the law', but the person behind the law: CIL has the merit of having re-established the scientific interest in the international lawyer as a social agent. Fleshing out the consequences of the objectivity problem in international law, it rediscovers the international lawyer as a scientific object of study and calls for a modified identity.<sup>99</sup> Outi Korhonen is right when she says that there are good reasons to re-examine the profession of international lawyers from the lawyer's own perspective.<sup>100</sup> Legal questions look different when you consider at them through the eyes of the professional lawyer, when the focus is on the lawyer's objective and subjective constraints. CIL stresses the socially conditioned character of our knowledge and draws the interest to the lawyer's knowledge, background and constraints.

Subjectivity poses a huge challenge for the international legal discourse. The notion of law is traditionally associated with objectivity and impartiality. Viewing the lawyer as an 'engineer' of social facts, driven by subjective factors, constitutes a provocation to a legal culture founded upon these two ideals. Nevertheless, as CIL has set out, what international law 'is' cannot be explained entirely by reference to the object, 'the law', alone. We agree with CIL that the role of the 'lawyer', or, in general, the author of the single legal act and his background should be given more attention in international legal theory.<sup>101</sup> It seems essential for understanding how international law operates.

<sup>97</sup> See, e.g. the criticism concerning the concept of a 'responsibility to protect' in JESSICA WHYTE, *Human Rights: Confronting Governments? Michel Foucault and the Right to Intervene*, in: Costas Douzinas, Matthew Stone & Illan Rua Wall (eds.), *New Critical Legal Thinking: Law and the Political*, Abingdon 2012, p. 11.

<sup>98</sup> PAULUS, *supra* note 57, p. 739–743.

<sup>99</sup> KOSKENNIEMI, *supra* note 25, p. 548.

<sup>100</sup> OUTI KORHONEN, *International Lawyer: Towards Conceptualization of the Changing World and Practice*, in Jens Ivar Drolshammer & Michael Pfeiffer (eds.), *The Internationalization of the Practice of Law*, The Hague 2001, p. 373.

<sup>101</sup> This has recently been taken up by a number of scholars: See for example ANTONIO CASSESE, *Five Masters of International Law: Conversations with R.-J. Dupuy, E. Jiménez de Aréchaga, R. Jennings, L. Henkin and O. Schachter*, Oxford 2011, p. 258 and the defense of Cassese's approach as a proper part of "legal scholarship" in PETERS, *supra* note 19.

## IV. Conclusion: International Legal Theory in Post-Critical Times

Current approaches to international legal theory do not seem to care much about the ‘critical heritage’ that we outlined above. Rather, they appear united in their distance to CIL.<sup>102</sup> Contemporary approaches such as ‘new formalism’ or ‘global constitutionalism’ can properly be considered as a reaction or counter-models to CIL. Other approaches, like ‘global legal pluralism’, appear in some sense as a sort of reaction to CIL insights into the relativity of knowledge about law. In the following, we briefly sketch why we think that contemporary approaches underestimate the ‘critical heritage’.

An approach that seems to gain currency is ‘new formalism’.<sup>103</sup> In its core it is an attempt to install a new theory-based positivism that has to be distinguished from unreflected ‘mainstream positivism’ which is categorically skeptical of ‘theory’. Proponents of ‘new formalism’ try to re-establish the old boundaries between law and non-law that have been under attack from critical legal scholarship. The aim is to bring order into a complex international legal world. For that purpose, ‘new formalism’ employs a strictly defined concept of international law, mainly with the help of established authorities of positivism such as Hans Kelsen and H.L.A. Hart.<sup>104</sup> Formalist authors criticize, i.a. the role of academic lawyers in the process of law-making. There is in their view an undue change of roles between academic lawyers and lawmakers.<sup>105</sup> They advocate doctrinal precision and a specific, formalistic consciousness of methodology as a solution. In our view, new formalism’s main shortcoming is the way it treats the determinacy-problem. Kammerhofer, for example, writes that international law is not ‘categorically more uncertain than any other legal system’.<sup>106</sup> ‘New formalism’ seems to be guided more by an ideal of how a legal system

<sup>102</sup> BARDO FASSBENDER, *Optimismus und Skepsis im Völkerrechtendenken der Gegenwart*, 65 *Die Öffentliche Verwaltung* (2012), p. 41, 46; ANTONY CARTY, *Critical International Law: Recent Trends in the Theory of International Law*, 2 *European Journal of International Law* (1991), p. 1.

<sup>103</sup> JEAN D’ASPREMONT, *Formalism and the Sources of International Law*, Oxford 2011; JÖRG KAMMERHOFER, *The Benefits of the Pure Theory of Law for the International Lawyer*, 12 *International Legal Theory* (2012), p. 5.

<sup>104</sup> On the contribution of legal positivism to international legal theory (with a focus on Kelsen and Hart) see TILMANN ALTWICKER, *Völkerrecht und Rechtspositivismus – Eine Annäherung mit Kelsen und Hart*, 10 *Zeitschrift für Rechtsphilosophie* (2012), p. 46.

<sup>105</sup> See JÖRG KAMMERHOFER, *Law-Making by Scholarship? The Dark Side of 21st Century International Law “Methodology”*, in James Crawford & Sarah Nouwen (eds.), 3 *Selected Proceedings of the European Society of International Law* (2012), p. 115; for criticism see PETERS, *supra* note 19.

<sup>106</sup> JÖRG KAMMERHOFER, *Uncertainty in International Law*, Abingdon 2011, p. 2.

*should* work and less interested in the specificities of the law of the often ‘anarchical’ international society, to borrow from Hedley Bull.

Another prominent contemporary approach is global constitutionalism.<sup>107</sup> The question whether there is international constitutional law or not has stimulated a lively debate in international legal scholarship over the past fifteen years. Global constitutionalism is, in its core, a decidedly law-centered debate that seeks conceptual and legal stability in the global political constellation after the end of the Cold War. The idea of hierarchical global law – global law as a constraint to both lower-ranking international law and domestic law – is expected to provide the basis for further international integration and to forge an international community based on shared ‘constitutional’ values. From a CIL perspective, global constitutionalism is likely to fall prey to the ambivalences of ‘progressive’ discourses. The debate is connected to a number of discourses, such as the one on human rights, on an international rule of law, and on international law and democracy. It is difficult to see how CIL’s insights into the ambivalences of ‘progressive’ discourses could be reflected in the debate, not to forget that ‘constitutionalism’ is itself a ‘progressive’ discourse.<sup>108</sup> The debate tends to immunize itself against critical questions. It perceives the international realm through a constitutionalist lens. It re-labels what it sees in a constitutionalist language. The dominance of law and of legal thinking in the constitutionalist world view shadows basic problems of international law’s ambiguities and indeterminacy.

The last strand to be addressed is ‘global legal pluralism’. It, too, currently receives a lot of scholarly attention,<sup>109</sup> which seems at least partly due to the positive connotation of its key notion ‘pluralism’. The aim is to better understand the heterogeneous international legal realm and to develop a plausible answer to this heterogeneity.<sup>110</sup> The core idea is: The ‘plurality’ of legal orders

<sup>107</sup> A good survey of the debate is provided by the collection of articles in vol. II of 16 *Indiana Journal of Global Legal Studies* (2009). For a seminal text: BARDO FASSBENDER, *The United Nations Charter as Constitution of the International Community*, 36 *Columbia Journal of Transnational Law* (1998), p. 529. For the merits of the debate in particular: ANNE PETERS, *The Merits of Global Constitutionalism*, 16 *Indiana Journal of Global Legal Studies* (2009), p. 397. For a critical analysis of the debate: OLIVER DIGGELMANN & TILMANN ALTWICKER, *Is There Something like a Constitution of International Law? A Critical Analysis of the Debate on World Constitutionalism*, 68 *Heidelberg Journal of International Law* (2008), p. 623.

<sup>108</sup> ULRICH KLAUS PREUSS, *Constitutional Revolution: The Link between Constitutionalism and Progress*, Amherst 1995.

<sup>109</sup> MIREILLE DELMAS-MARTY, *Ordering Pluralism*, Oxford 2009; NICO KRISCH, *Beyond Constitutionalism: The Pluralist Structure of Postnational Law*, Oxford 2010; PAUL SCHIFF BERMAN, *Global Legal Pluralism*, Cambridge 2012.

<sup>110</sup> GREGORY SHAFFER, *International Law and Global Public Goods in a Legal Pluralist World*, 23 *European Journal of International Law* (2012), p. 669, 671.

should be overcome in favor of a ‘pluralist’ ordering. Pluralists advocate a shift from separateness of orders to ordered diversity without a gravitational center or hierarchy.<sup>111</sup> While ‘global constitutionalism’ borrows from public law principles, ‘global legal pluralism’ relies on organizational ideas which were developed in international private law and with respect to transnational markets.<sup>112</sup> It focuses on interactions between legal systems. The approach is an attempt to formulate a positive vision of the international legal realm which does not ignore the skepticism towards universal values and the persisting debate on fragmentation.<sup>113</sup> From a CIL perspective, one notes that the concept of ‘diversity’ is largely consonant with CIL ideas. It implies, e.g., sensitivity concerning the ambivalent roles of ‘progressive’ discourses and the insights into the necessity to take the context of legal questions into account. However, CIL-authors would ask about the consequences of the decision to make ‘diversity’ the strategic notion of the approach. Who benefits from a ‘diversity’ approach to international law? Who loses? Who decides on what ‘diversity’ means and excludes?

All three current approaches in international legal theory strive for a theory-informed positive vision of international law. They aspire to be perceived as constructive alternatives to the ‘negativism’ generally associated with CIL. In our view, they discard CIL’s insights too easily. In our view, future ‘theorists’ of international law may be well-advised to take a fresh and unbiased look at the potential encapsulated in CIL and its project of ‘critique’ of international law. ‘Critique’ and ‘being critical’ is not merely about asking uneasy questions or challenging doctrinal positions. ‘Critique’, rightly understood, is about persistently asking foundational questions, such as: ‘Under which conditions is international law truly universal?’ or ‘Under which conditions is international law really “law”?’ In our view, despite all shortcomings and exaggerations one might find in CIL-literature, we need more, not less, critical theories of international law.

<sup>111</sup> SHAFFER, *supra* note 110, p. 671.

<sup>112</sup> SHAFFER, *supra* note 110, p. 671.

<sup>113</sup> KRISCH, *supra* note 109.