LETTER TO THE EDITORS OF THE SYMPOSIUM[†]

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As I started to think about how to respond to your kind invitation to participate in the symposium on method in international law, and what to write to the readers of the *Journal*, I soon noticed that it was impossible for me to think about my—or indeed anybody's—"method" in the way suggested by the symposium format. This was only in part because I felt that your (and sometimes others') classification of my work as representative of something called "critical legal studies" failed to make sense of large chunks of it whose labeling as "CLS" might seem an insult to those in the American legal academy who had organized themselves in the 1970s and early 1980s under that banner. You may, of course, have asked me to write about "CLS" in international law irrespectively of whether I was a true representative of its method (whatever that method might be). Perhaps I was only asked to explain how people generally identified as "critics" went about writing as they did. But I felt wholly unqualified to undertake such a task. Dozens of academic studies had been published on the structure, history and ideology of critical legal studies in the United States and elsewhere. Although that material is interesting, and often of high academic quality, little of it describes the work of people in our field sometimes associated with critical legal studies—but more commonly classed under the label of "new approaches to international law."[1] In fact, new writing in the field was so heterogeneous, self-reflective and sometimes outright ironic that the conventions of academic analysis about "method" would inevitably fail to articulate its reality.

[†] *Editors' note:* This contribution was originally submitted in the form of a letter. Its salutation and complimentary closing are not reproduced here.

[1] For overviews, see David Kennedy, *A New Stream of International Law Scholarship*, 7 WIS. INT'L L.J. 1 (1988); Nigel Purvis, *Critical Legal Studies in Public International Law*, 32 HARV. INT'L L.J. 81 (1991); Outi Korhonen, *New International Law: Silence, Defence, or Deliverance?* 7 EUR. J. INT'L L. 1 (1996); and the essays in *Special Issue: New Approaches to International Law*, 65 NORDIC J. INT'L L. (Martti Koskenniemi ed., 1996). *See also* David Kennedy & Chris Tennant, *New Approaches to International Law—A Bibliography*, 35 HARV. INT'L L.J. 417 (1994).

HeinOnline -- 36 Stud. Transnat'l Legal Pol'y 109 2004

I had difficulty with the suggested shopping-mall approach to "method," the assumption that styles of legal writing are like brands of detergent that can be put on display alongside one another to be picked up by the customer in accordance with his/her idiosyncratic preferences. It is not only that, like many others, I dislike being labeled and marketed in accordance with the logic of consumer capitalism. I am aware that from your perspective, such an attitude may seem a rather predictable and boring product of an overblown ego, the offshoot of an elitist unwillingness to put oneself up for popular scrutiny, perhaps disguising the fear that the market's preference will not be for oneself.

But at least since Marx and McLuhan, it has been conventionally accepted that the form of the market and the value of the commodity are not independent of each other. The liberal-pluralist approach to method suggested by the image of the shopping mall or the electoral campaign is a reifying matrix that makes apparent from the plethora of styles through which we approach and construct "international law" only those qualities that appear commensurate so as to allow comparison. In the case of this symposium, the commensurability criterion suggested in your letter was contained in the request "to explain how your method helps a decision-maker or observer appraise the lawfulness of the conduct at issue and construct law-based options for the future." To participate in the symposium on those terms, however, would have been to subsume what I think of as a variety of different, yet predominantly anti-instrumentalist, legal styles into an instrumentalist frame: "who is going to be the diplomat's best helper?" This seemed to make no sense.

The main reason for my unease, however, may be rephrased as follows: what is the method through which I should write about the "CLS method"? The problem, I think, should be apparent. It has to do with the very structure of a liberalism from the perspective of which the symposium and the shopping mall seem eminently beneficial contexts of human interaction. The difficulty lies in the assumption that there is some overarching standpoint, some nonmethodological method, a nonpolitical academic standard that allows that method or politics to be discussed from the outside of particular methodological or political controversies. Just as political liberalism assumes itself to be a nonpolitical, neutral framework within which the various parties can compete for influence in society, so your

HeinOnline -- 36 Stud. Transnat'l Legal Pol'y 110 2004

question—your *initial* question—assumed the existence or accessibility of some perspective or language that would not itself be vulnerable to the objections engendered by the academic styles that carry labels such as "positivism," "law and economics," "international law and international relations," "legal process," "feminism," and "critical legal studies." But there is no such neutral ground: like the shopping mall, the symposium is a mechanism of inclusion and exclusion, of blindness and insight (where were the methods of "ethics," "natural law," "postcolonialism". . . ?). The problem, as I see it, is not about which of the brands of detergent is best, most useful, accessible or whatever. The problem lies in the shopping mall, or the symposium format, the way it flattens out difference and neutralizes critique, silently guaranteeing the victory of an apathetic consumerism.

Your memorandum did, however, canvass the possibility that "some of" the contributors might not wish to adopt the shopping-mall approach. Those who did not were then called upon to explain themselves. The foregoing has, I hope, provided the beginnings of an explanation. To elaborate, I need to start from elsewhere. If there is no (credible) external perspective on "method," then I need to commence from the inside, biographically as it were, and in the course of my discussion hope to show that my occasional substitution of the word "style" for your chosen signifier—"method"—in the above text was no slip of the pen.[2]

I.

Early on, I assumed that there were available to academic lawyers several different methods from which they were to choose one or two in order to carry out their scholarly pursuits. My legal education certainly suggested to me that I needed some such method that would provide me with a standpoint (a set of problems, intellectual tools, a language) that was external to my subjective idiosyncrasies, political preferences or layman's prejudices. This method would allow me to develop the distance between myself and the object of my study—international law—that would enable the

[2] The following text draws on my *Tyyli Metodina* (Style as Method), which appeared in MINUM METODINI 173 (Juha Häyhä ed., Helsinki 1998).

HeinOnline -- 36 Stud. Transnat'l Legal Pol'y 111 2004

production of neutral, objective, perhaps even scientific statements about it. (This is how most of the contributors to the symposium, too, have understood their task[3]—with the exception of Hilary Charlesworth.[4]) The method would guarantee that the results of my work would enjoy scientific reliability or professional respectability (which always seemed to denote one and the same thing).

The Finnish legal academy was (and still is) liberal and pluralist and readily accepted that there was no one method through which one could approach international law. One could be a positivist, a hermeneutic, a Marxist, a legal realist, a critical positivist, or whatever. The main thing was that one had to be *something* other than what one was in the pureness or corruption of one's heart in order to be a good participant in the common venture of (international) jurisprudence. This was the call for objectivity, or putting aside one's idiosyncratic ideas, passions, and desires. Method connoted science and science drew—so I assumed—on what is universal, not on what was particular.

Yet this academic discourse was normatively tinged. Some choices were held in more esteem than other choices. There was a story about progress in our discipline that one needed to learn in order for one's science to get going. This was a narrative about a series of methodological transformations that went somewhat like this: The origins of (international) jurisprudence lay in a naturalism that was initially theological but became secularized in the course of the Reformation. This was superseded in the nineteenth century by a historical school and theories of sovereignty that were themselves

[3] Dunoff and Trachtman hope to find in "law and economics" "a firmer and less subjective basis for argumentation." Simma and Paulus opt for a positivist reliance on formal sources in order to avoid "arbitrariness or postmodern relativism." O'Connell chooses "legal process" as a response to realists, seeking to demonstrate how law "constrain[s]" inevitable judicial lawmaking so that it "should not be done with the view of realizing a judge's personal view of policy." Abbott is enthusiastic about international relations inasmuch as it enables both the reproduction of the distinction between "science" and "norms" and the reliable prediction of future events and design of institutions. Wiessner and Willard maintain that "policy orientation" makes it possible to address systematically the contextual concerns of the various participants in the relevant processes, while its "conscious" taking of the observer's standpoint does not amount to "complete subjectivization" but, on the contrary, increases critical awareness.

[4] Her feminist methodologies "may clearly reflect a political agenda rather than strive to attain an objective truth on a neutral basis."

HeinOnline -- 36 Stud. Transnat'l Legal Pol'y 112 2004

overtaken by a positivism of the pure form in the early twentieth. Formal or logical approaches fell, however, under the attack of various "realistic" schools, an orientation toward law as process or as a means of social engineering.

The alternative orientations of method implied in this story stood in contrast to the dominant domestic legal theory of the time. The most up-to-date jurisprudential debates as I went to law school in the 1970s espoused a continental hermeneutics that stressed the quality of legal truth as a meeting of interpretive horizons, adopting a complex *Verstehen*-language that aimed at reflecting the uncertainty that was embedded in any effort to make general statements about the law, whether understood as texts or forms of social behavior. The move from an empirical-technical to a softer, "humanist" understanding of the law, emphasis on language and on law as literature, empathy toward social agents, and the ready acceptance of social or linguistic indeterminacy—all that seemed to respond adequately to the complexity of late modern social reality. Law became argumentation, "language-games," rhetoric—a linguistic practice oriented toward social reality.[5]

Examined from the perspective of this jurisprudential debate, international law seemed a hopelessly old-fashioned repertoire of formalist argumentative dicta. Where were complexity, the fusion of horizons, *Vorverständnis*, indeterminacy, and social critique? The only methodological arguments one encountered in international legal writing seemed to be those that conventionally classed scholars as more or less "formalists" ("idealists") or "realists," depending on the degree to which they added references to treaties or policies in commenting upon recent diplomatic events. Either "method" equaled discussion about formal sources or it referred simply to techniques of finding the collections of documents from which authoritative statements about the law could be found.[6] On the other hand, however, from the perspective of international law as practice, much of such high-brow methodological debate seemed quite pointless. Legal disputes arose and were settled routinely; states and international organizations seemed to be quite satisfied with the services

[5] *See, e.g.*, AULIS AARNIO, DENKWEISEN DER RECHTSWISSENSCHAFT (1979).

[6] *See, e.g.*, MAARTEN BOS, A METHODOLOGY OF INTERNATIONAL LAW (1984); SHABTAI ROSENNE, PRACTICE AND METHODS OF INTERNATIONAL LAW (1984).

HeinOnline -- 36 Stud. Transnat'l Legal Pol'y 113 2004

that international lawyers had to offer—however unsophisticated their methodologies might appear to the academics.

II.

As I wrote *From Apology to Utopia: The Structure of International Legal Argument* (Helsinki, 1989) at the end of the 1980s, my aim was to examine international law from a standpoint that would be in some ways systematic, perhaps even scientific. My starting point was an observation I had made in the course of having practiced international law with the Finnish Ministry for Foreign Affairs since 1978 that, within the United Nations and elsewhere in international fora as well as legal literature, competent lawyers routinely drew contradictory conclusions from the same norms, or found contradictory norms embedded in one and the same text or behavior. I never thought that this was because they were simply cynics, manipulating the law to suit the ends of their governments. In some ways what I learned to call the law's indeterminacy was a property internal to the law itself, not introduced to it by "politics" from the outside. As I learned from David Kennedy, the legal argument inexorably, and quite predictably, allowed the defense of whatever position while simultaneously being constrained by a rigorously formal language. Learning to speak that language was the key to legal competence. Such competence was not mere imagination. It was not possible to say just anything that came to one's mouth and pretend that one was making a legal argument. Among other practitioners I had the ability to distinguish between the professionally competent and incompetent uses of legal language—but this ability had little or nothing to do with the identity of the norm or the behavior to be justified or criticized.

I wanted to describe this property of international legal language—its simultaneously strict formalism and its substantive indeterminacy—in terms of a general theory. Hermeneutics was helpful inasmuch as it allowed focusing on law as language. Its interpretive orientation, however, proved disappointing. The search for a "fusion of horizons" seemed altogether too vague and impressionistic to sustain a solid "method." Looking elsewhere, I found that much in the way critical legal scholars in the United States argued sought to

grasp precisely this aspect of the law: its formal predictability and substantive indeterminacy.[7]

In search of a method with a critical bite and with some degree of resistance to the most obvious criticisms from recent social and linguistic theory and postanalytical philosophy, I became attached to (classical) French structuralism, its differentiation between *langue/parole* (or "deep structure" and "surface") and its ability to explain in a hard and positivist—"scientific"—way the construction of language or cultural form from a network of limited possible combinations. Following mainstream structuralism, I described international law as a language that was constructed of binary oppositions that represented possible—but contradictory—responses to any international legal problem. I then reduced international legal argument—what it was possible to produce as professionally respectable discourse in the field—to a limited number of "deep-structural" binary oppositions and transformational rules. To this matrix I added a "deconstructive" technique that enabled me to demonstrate that the apparently dominant term in each binary opposition in fact depended on the secondary term for its meaning or force. In this way, an otherwise static model was transformed into a dynamic explanation as to how the binary structures of international law (rule/exception, general/particular, right/duty, formalism/realism, sovereignty/community, freedom/constraint, etc.) were interminably constructed and deconstructed in the course of any argument, through predictable and highly formal argumentative patterns, allowing any substantive outcome. I felt I had reached a scientific optimum where I had been able to reduce a complex (linguistic) reality into a limited set of argumentative rules.

III.

Now, however, a new problem emerged. If international law consisted in a small number of argumentative rules through which it was possible to justify anything, what were the consequences to

[7] As early examples, I am thinking particularly of David Kennedy, *Theses about International Law Discourse*, 23 GER. Y.B. INT'L L. 353 (1980); and DAVID KENNEDY, INTERNATIONAL LEGAL STRUCTURES (1987); as well as the work of Duncan Kennedy and, for example, Clare Dalton's *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985).

HeinOnline -- 36 Stud. Transnat'l Legal Pol'y 115 2004

legal dogmatics (the description and systemization of valid law) or indeed to my practice in the legal department of the Foreign Ministry? Or more accurately: I posed no question but continued writing articles about valid law and memoranda to the Minister arriving at definite interpretive statements. The rule *R* and not –*R* was valid and was to be interpreted in situation *X* in the way *Y* and not –*Y*. This seemed puzzling to my academic colleagues. Had I not just argued that international legal arguments were indeterminate and that the rule –*R* was in every conceivable situation as valid as the rule *R* because, in fact, *R* and –*R* entailed each other? How come I now produced texts in which I interpreted treaties and practice just like any other lawyer?—as if my materials were somehow free of the indeterminacy that I claimed elsewhere to be the most striking reality of international law.

This was the problem of the relationship between academic theory/doctrine (I always have difficulty in distinguishing the two from each other) and practice, or of the relations between my (external) description of the structure of legal argument and my (internal) participation in that argument. It soon seemed clear that, however that relationship might be characterized, there was, at least, no direct logical entailment between the one and the other: external description did enhance the facility to make a professionally persuasive argument, but it did not "produce" its outcomes. Such theory/doctrine did not provide readymade solutions for social conflict or suggest institutional arrangements that could only be "applied" and would then have the consequences they were supposed to have. Which way one's argument as a practitioner went still depended on what one was ready to think of as the "best" (or least bad) or workable, reasonable, humane solution—as well as on what one's client wanted. It was a merit of this theory, however, that it demonstrated that to achieve these strategic goals, the contexts of legal practice offered many different styles of argument. It was sometimes useful to argue as a strict positivist, fixing the law on a treaty interpretation. At other times it was better to conduct an instrumentalist analysis of the consequences of alternative ways of action—while at yet other times moral pathos seemed appropriate. Each of these styles—or "methods" in the language of this symposium—was open-ended in itself, amenable to the defense of whatever position

HeinOnline -- 36 Stud. Transnat'l Legal Pol'y 116 2004

one needed to defend. None of them, however, gave the comfort of allowing the lawyer to set aside her "politics," her subjective fears and passions. On the contrary, to what use they were put depended in some crucial way precisely on those fears and passions.[8]

None of this is to say that lawyers are, or should become, manipulative cynics—apart from the sense that it is a crucial part of professional competence for the lawyer to be able to construct her argument so as to make it credible to her targeted audience. Outside the relationship between the argument and the context, however, there was no external "method," no "theory" that could have proven the correctness of one's reasoning, the standpoint that one was called upon to take as part of one's professional practice.

What works as a professional argument depends on the circumstances. I like to think of the choice lawyers are faced with as being not one of method (in the sense of external, determinate guidelines about legal certainty) but of language or, perhaps better, of style. The various styles—including the styles of "academic theory" and "professional practice"—are neither derived from nor stand in determinate hierarchical relationships to each other.[9] The final arbiter of what works is nothing other than the context (academic or professional) in which one argues.

From this perspective, the tension between academic theory and practice disappears: they, too, are styles that are taken on in a particular context. The "deconstruction" I used in my book provided an effective language and a technique—but only in the academic

[8] There is a nice contrast in the papers of this symposium between the tropes used to connote scientific objectivity and those for moral pathos. Objectivist associations are created by the personification of the method (instead of the lawyer) as the speaker (sometimes by the use of an informal acronym: ILP, L&E, IR—perhaps also "CLS")—"ILP speaks," "L&E asks," "IR theory reminds us." The erasure of the author's voice is precisely the consequence "method" is expected to attain. On the other hand, all authors desist from normative closure: positivist rules receive substance through (moral) interpretation; law and process awaits morality to give substance to soft law and general standards; law and economics is silent about conditions of market access; international relations only "helps" normative analysis; and the base values of policy orientation are "posited" and not defined. Only TWAIL appears to adopt an authorial voice—though not its own. Instead, it claims to speak for "the lived experience of Third World peoples." But to decide whether it has succeeded in this is made no easier by the unwillingness of the TWAIL authors to reveal their theory of representation.

[9] *See also* my *Hierarchy in International Law. A Sketch,* 8 EUR. J. INT'L L. 566 (1997).

HeinOnline -- 36 Stud. Transnat'l Legal Pol'y 117 2004

environment that thinks highly of the linguistic conventions and cultural connotations of deconstruction. More precisely: the academic context is defined by the kinds of cultural conventions—styles—of which that kind of critique forms a part. By contrast, the languages of legal sources, "base values," or economic efficiency are effective in those contexts of legal practice that are identified precisely through those styles. To write a deconstructive memorandum for a permanent mission to the United Nations would be a professional and a social mistake—not unlike ordering a beer in a Viennese Heurigen. European rule-positivism might seem hopelessly old-fashioned in front of a postrealist American audience—while informal American arguments about policy goals or economic efficiency associate with European experience in bureaucratic authoritarianism. "Process" language might find a positive echo when debate is about the jurisdiction of international functional organizations, yet feminist and Third World styles might better articulate the concerns of activists of nongovernmental organizations, and so on.

It is hard to think of a substantive or political position that cannot be made to fulfill the condition of being justifiable in professionally competent legal ways through recourse to one or another of the legal styles parading through this symposium. The "feel" of professional competence is the outcome of style, more particularly of linguistic style. For international law in all its stylistic variations always involves translation from one language to another. Through it, the languages of power, desire, and fear that are the raw materials of social conflict are translated into one or another of the idiolects expounded in the contributions to the symposium. Translation does not "resolve" those claims, but it makes them commensurate and susceptible to analysis in the professional and bureaucratic contexts in which it is used. But translation is not completely devoid of normative consequences, either.

When Kenneth Abbott in his contribution speaks about acts of massive injustice and responses to them in terms of "atrocities regimes," not only language but also the world undergoes a slight transformation. When Dunoff and Trachtman translate "criminal law" as "a pricing mechanism," they simultaneously effect a change in the way we understand and interpret the relevant acts. Wiessner and Willard expressly observe that their conceptual "mapping procedures" can identify "particular features and combinations of

HeinOnline -- 36 Stud. Transnat'l Legal Pol'y 118 2004

features that are problematic in specific contexts"—presumably features that "normal" legal analysis would miss. Indeed, Hilary Charlesworth and the TWAIL authors expressly focus on the ways such alternative languages create silences that sustain gendered or otherwise biased practices. But let us not make the mistake of thinking that there is a natural legal language which these idiosyncracies seek to pervert. As Sir Robert Jennings has reminded us, all legal argument is reductionist. International lawyers

> need this *reduction* of the matter to a series of issues, distinct from the arguments supporting or attacking the parties' contentions . . . . This reduction, concentration, refinement, or processing (many expressions suggest themselves) of a case is also to an important extent to modify its character. It looks different from how it was before being reduced to, and embroidered in, the submissions.[10]

Though necessary, sometimes reduction (or translation) loses what is significant so that a conclusion that proceeds on that basis will seem irrelevant, unable to articulate a relevant understanding, or perhaps will positively distort a participant value. One need not be a Marxist to perceive that as the law compels the wage laborer to think of parts of himself—his labor, his time—as a commodity, it cannot but miss many of the aspects of his life that are suspended by the labor contract. The sentimental relations with his family are severed, his ability to cater to their needs diminished by the contract. Analogously, it has been argued, for example, that systems of international copyright or protection of cultural property have excluded or failed to articulate indigenous understandings of ownership and possession, underwriting biased assumptions about art and culture.[11] It is a commonplace that many key notions of international law—the concepts of sovereignty, legal subjects or sources—fail to give voice to communities or informal understandings of the good in a way that may be experienced as unjust. In their different ways,

[10] Robert Y. Jennings, *The Proper Work and Purposes of the International Court of Justice*, *in* THE INTERNATIONAL COURT OF JUSTICE: ITS FUTURE AFTER FIFTY YEARS 33, 33–34 (A. Sam Muller, D. Raic & J. M. Thuránszky eds., 1997).

[11] *See* Rosemary J. Coombe, *The Properties of Culture and the Politics of Possessing Identity: Native Claims in the Cultural Appropriation Controversy*, *in* AFTER IDENTITY: A READER IN LAW AND CULTURE 251 (Dan Danielsen & Karen Engle eds., 1995).

HeinOnline -- 36 Stud. Transnat'l Legal Pol'y 119 2004

the papers of this symposium suggest alternative languages that seek to deal precisely with such problems.

The distinctive contribution of alternative styles lies in their ability to shed light on mainstream law's hidden priorities, the way legal translation articulates some participant values but fails to do so for other values. Much feminist and postcolonial writing has undertaken precisely this task. The introduction of human rights or environmental claims into the law is a familiar outcome of such renewalist "imagining" earlier in the century. Nonetheless, struggle is always involved and just as a novel legal articulation may strengthen some voices, so may it limit and weaken other voices, undermining their passionate appeal by including them as parts of bureaucratic routine.

In this way, any style of legal argument may work as a mechanism of blindness. There is, for instance, something about genocide, or massive attack on core community values, that makes the application of formal legal language about it not only irrelevant but positively harmful.[12] To submit such values to legal demonstration is to infect them with the uncertainties and indeterminacies that inhabit all such demonstration—the play of the rule and the exception, principle, and counter-principle, or the "canons of interpretation." How should "base values" be understood? What price should be given to the values protected or destroyed in alternative courses of action? The harm lies in the suggestion that law—in any of its stylistic transformations—may condemn evil, however massive, only if legal technique allows this, when this technique always contains a justifying principle as well: perhaps genocide by nuclear weapons resulted from self-defense, was an unintended consequence of action, or was necessary to prevent some greater evil. Perhaps the acts did not fall under some definition of "war crime" or "torture," the claimant lacked *locus standi*, or the lawyer was devoid of jurisdiction.

In such cases, available professional styles are by definition unable to provide a translation for the experiences, fears, and passions that are involved.[13] An appeal from the bench, however articulate

[12] I have argued this point in greater detail in *Faith, Identity and the Killing of the Innocent: International Lawyers and Nuclear Weapons*, 10 LEIDEN J. INT'L L. 137 (1997).

[13] This is not to say that any other specific language would necessarily provide a more reliable or authentic translation of those experiences, fears, and passions.

HeinOnline -- 36 Stud. Transnat'l Legal Pol'y 120 2004

and sincere, is always an appeal from formal authority, defined by its claim to universality and neutrality. Where the conventions about universality and neutrality break down, however—as they do at that undefined point where the very conditions of rationality are put to question, where events are singular and their objective meaning cannot be detached from their subjective sense—there a neutral (juridical) humanism becomes, as George Steiner once remarked, "either a pedantic artifice or a prologue to the inhuman."[14] What could be sillier—or more dangerous—than to argue, for instance, that the validity of the prohibition of torture outside specific conventional frameworks is dependent on the presence of the formal conditions of customary international law?

The problem lies with the inverted relationship between what we think can be presented as legal conclusion and what as evidence for it. In legal rationality, we hope to establish the truth of a normative proposition by linking it to a factual proposition that we already assume to be true. In this way:

(1) Does *X* have the obligation *O*?
(2) *X* has concluded a treaty that reads that *X* should do *O*.
(3) Hence, *X* is obliged to do *O*.

The validity of the normative conclusion (3) depends on our ability to prove that (2) is indeed true. (By "proof" I here mean only a subjective sense or a "feel" of certainty.) However, sometimes such proof is not forthcoming. We are in fact more certain of the conclusion than of the evidence. In such a case, insisting that our conclusion (3) is nonetheless a consequence of the truth of our evidence (2) will infect (3) with all the uncertainty we have about (2). We "know" that torture is prohibited. But is there in fact a treaty, binding on *X*, that would allow us to characterize the acts of certain persons, alleged to be members of the secret police of *X*, as "torture"? A host of uncertainties arise: Is the treaty applicable? Does what we can prove of the acts amount to "torture"? Were the persons in fact acting as agents of *X*? Proceeding through legal language, the fears and passions linked with "torture" are transformed. Torture becomes another "atrocity regime" (Abbott), a

[14] GEORGE STEINER, LANGUAGE AND SILENCE 87 (1985).

HeinOnline -- 36 Stud. Transnat'l Legal Pol'y 121 2004

part of bureaucratic formalism—this form of violence is torture, that not. In an institutionalized "torture discourse," all the normal legal exceptions and defenses are available—and must be so—and we as lawyers are called upon to employ them. It can only be speculated what it may mean, socially and for ourselves, to integrate "torture" as part of the routines of bureaucratic culture instead of holding it as an exceptional evil, defying technical articulation, and grasping us, as it were, through our souls.

IV.

Legal styles are styles of argument, of linguistic expression. The accounts of method contained in the symposium readily accept this and seek to establish a firm relationship between that language and the world that it is assumed to reflect. In order to describe or assess the relationship between language and the world, however, there should be some way that is independent of language to which the forms of language could be compared. There is, however, no such way. The languages create worlds and do not "reflect" them. But if legal method, too, is (only) a set of linguistic conventions and relations between them, then the attempt by any method to show why it is better than its competitors in a noncircular fashion becomes impossible. *Methodenstreit* takes place (as Thomas Kuhn and others have shown) through a ritualistic exchange of expressions between closed ("auto-poietic") systems that can justify themselves only by reference to their own conclusions. None of the protagonists can be convinced by the force of the arguments of the others because one's own premises allow only the acceptance of one's own conclusions.

The reality of law, as of science, is, in this sense, historically and synchronically discontinuous. There is no methodological development that could be explained by reference to improvement, judged from the perspective of some nonmethodological standpoint; transformations of legal style are linked (in nonlinear ways) to more general changes in the contexts of social and cultural identification. For example: "I do deconstruction because I associate it with the kinds of friendship, literature, and cinema that I like." Or: "I argue as a positivist because I value effective action and do not wish to waste my time on useless babble." Instrumentalism will win the day where

HeinOnline -- 36 Stud. Transnat'l Legal Pol'y 122 2004

connotations of economic efficiency and exact measurability are preferred to moral pathos or strictures of administrative form. Positivist distinctions between law and not-law carry conviction where traditions of professional solidarity and responsibility are valued.[15]

It also follows that different legal language-games do not possess greater or smaller distance from something that could be called an independent "reality." The methods create their own "realities." They exist as linguistic conventions—styles—that have as such no hierarchical relationship to each other. Because we are not entitled to presume the existence of a "metastyle," it is pointless to be anxious, for example, about the relationship of academic theory/ doctrine and diplomatic practice. Incommensurate objects cannot enter into contradiction: a novelist need not face an identity crisis when drafting an income tax declaration.

It follows, finally, that no special "method" exists somewhere outside the contexts of practice or theory that would lead these into some particular direction. "Method" is a style of speaking, writing, and living in a relationship with others. It is not a superficial phenomenon, but it is what unifies and identifies a group of people as a community (of diplomats, practitioners, academics). It is not necessary (but is in fact altogether pointless) to assume that behind such styles there would exist individuals or communities that would "choose" their styles in accordance with what they "will"—as suggested by the image of the shopping mall (or that of a "veil of ignorance"). A group of people does not first exist as a minority and only then start to speak a minority language. It speaks a minority language—and therefore feels itself a minority.

The same applies to the various styles of law—including international law. The distant and impersonal language of authority employed by the International Court of Justice stands in sharp

[15] Such connotations are, however, culturally embedded and not fixed; hence, stylistic associations may sometimes take surprising turns. Strict formalism may sometimes be avant-garde—just as policy orientation may be the language of cultural conservatism. This is also why—as the TWAIL authors note—formalism may sometimes be enlisted as an anti-imperial devise irrespectively of its substantive indeterminacy. The "internal morality" of formalism may only be a set of cultural conventions. But this does not mean that those conventions would not be politically valuable. See further my *What is International Law For?*, *in* INTERNATIONAL LAW (Malcolm Evans ed., 2003), especially pp. 100–11.

HeinOnline -- 36 Stud. Transnat'l Legal Pol'y 123 2004

contrast to the passionate advocacy of Amnesty International or Greenpeace. To mix up the contexts would be a professional mistake—witness the way Bosnia was compelled to replace its initial American counsel because of the style of presentation he elected to use.[16] The style of a law review article on the law of the sea cannot be identical with that of a doctoral dissertation examining the argumentative structures of international law—however much having done the former might increase the facility of doing the latter. The end result falls short of being a contribution to the "law of the sea" (whatever other merit it may have) if practitioners in that field never recognize it as such.

To describe legal method as style is to bracket the question of law's referential reality. As such, it may be assumed to lead into an "anything goes" cynical skepticism, the giving up of political struggle and the adoption of an attitude of blasé relativism. This would, however, presuppose the internalization of an unhistorical and reified conception of the postmodern in which the truth of skepticism would be the only truth not vulnerable to that skepticism. But "deconstruction," too, is only a cultural or historical convention, a style with an emancipatory potential but which—just like Kantian universalism—is always in danger of being transformed into a means of status quo legitimation.

Today this universalism and the conventions of science, technique, and economy associated with it are being developed into a globalized, liberal lingua franca. Not to fall under the spell of that shopping mall requires focusing on its dangers, discontinuities, and mechanisms of exclusion. If "deconstruction" is able to bring out that dark side, the reality of the mall at night, it may provide a means for critical identification and practice. That liberalism—like the shopping mall—can be placed under critical scrutiny only by adopting a style that breaks the liberal conventions, by adopting an ironic distance. This may be done by replacing the conventions of formalism or pathos with a radically personalizing language: by

[16] For Bosnia's initial team, its application and its submissions, see Application of the Convention on the Prevention and Punishment of the Crime of Genocide, Provisional Measures, 1993 ICJ REP. 3, 4–25, and 325, 326–50 (Apr. 8 & Sept. 13). For the new team and reformulated submissions, see *id.*, Judgment, Preliminary Objections (July 11, 1996) <www.icj-cij.org>.

HeinOnline -- 36 Stud. Transnat'l Legal Pol'y 124 2004

looking at legal process in terms of the play of ambition, influence and insecurity never far below the surface.[17]

No style is neutral. A legal language-game has no difficulty in expressing hegemony—indeed, this is what it is supposed to do. But it is also expected to articulate experiences of injustice. No language-game, however, can express every subjectively felt violation. In order to articulate violations that are repressed in the dominant language-game, a change of style may be necessary. Martha Nussbaum once pointed out that justice may sometimes be realized only by giving up the conventions of generalizability and commensurability that are typical of law—and perhaps by writing a novel.[18] It is not always necessary to aim that high: a letter may sometimes suffice. But a break is needed if what is sought is critical distance from that diplomatic or academic consensus to the articulation of which the styles of international law have been devoted.

[17] For brilliant examples, see David Kennedy, *Spring Break,* 63 TEX. L. REV. 1377 (1985); and his *Autumn Weekend, in* DANIELSEN & ENGLE, *supra* note 11, at 191. See also the concluding reflections in Hilary Charlesworth's contribution, *infra* this volume, at 179.

[18] MARTHA NUSSBAUM, LOVE'S KNOWLEDGE: ESSAYS ON PHILOSOPHY AND LITERATURE, esp. 35–50 (1990). *See also* her POETIC JUSTICE: THE LITERARY IMAGINATION IN PUBLIC LIFE (1995).

HeinOnline -- 36 Stud. Transnat'l Legal Pol'y 125 2004

HeinOnline -- 36 Stud. Transnat'l Legal Pol'y 126 2004