
‘From the Wells of Disappointment’: The Curious Case of the International Law of Democracy and the Politics of International Legal Scholarship

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Abstract

It is a common impression shared by many international lawyers today that the brief ‘turn to democracy’ that occurred in some segments of international legal scholarship in the early to mid-1990s was, on the whole, little more than a detour of overly excitable imagination – not exactly a complete error of judgement or an outright frivolity, but certainly a lapse of conceptual clarity and professional rigour. Whatever changes may have occurred within the broader international legal system, the argument goes, they certainly did not amount to a ‘democratic revolution’, and any claims to the contrary were and are simply baseless. The kind of fundamental reorganization of the international legal system that was forecasted by scholars like Thomas Franck and Anne-Marie Slaughter never took place, and the main lesson one should learn from this whole episode is that international legal scholars should not give in to their utopian reflexes as quickly and as readily as the ‘pro-democracy enthusiasts’ did, but should rather exercise analytical restraint and professional judgement and attend much more carefully to matters of legal logic and technical legal reasoning. This, in a nutshell, is the received wisdom about the history behind international law’s ‘turn to democracy’, and the aim of this article is essentially to challenge it – in part by uncovering the latent theoretical fudging behind it, in part by exploring the general narrative structure that supports this received wisdom and the latter’s relationship to the broader ideology of international legal anti-utopianism.

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1 Introduction

Every generation of international lawyers has its list of signature topics. The generation of 1945 had the United Nations (UN), codification and crimes against international law. The generation that came after it had self-determination, non-proliferation and the law of peaceful co-existence. The generation that entered the scene at the start of the 1970s was preoccupied more with the broader question of law's relationship to oppression, both domestically and internationally. Its signature topics, accordingly, became the law of international human rights and the New International Economic Order (NIEO).

The generation of international lawyers that rose to prominence at the end of the Cold War had found its imagination captured by a notably unusual mix of ideas. Gone were the modest proceduralism and 'humanist neutralism' of the preceding three decades.¹ Gone were also the self-conscious anti-theoreticism of mainstream legal pragmatism² and the complex edifice of NIEO reformism³ and 'inter-bloc law'.⁴ At the root of the new worldview lay a much more radical outlook: one grounded simultaneously in the revolutionary promises of liberal globalism and free-market economics and the redemptive ambition of Fukuyamian postmodernity. History, it was declared, had ended.⁵ The march of dialectics was replaced by the march of freedom. Socialist regionalism and Third World solidarism were dead. There was only one universal international law left now – the same set of rules, values and principles to be observed by everyone, in the exact same way, at all times.⁶ No more paradigm competition, no more bipolar worlds. Going forward, the future 'would simply be the present infinitely repeated':⁷ the same basic structure, the same basic protocol of reasoning stuck forever between 'apology' and 'utopia'.⁸

Over the next few years, the peculiar body of disciplinary debates that grew out of this odd starting mix gravitated slowly towards a loose combination of moralizing normativism and moderately ambitious interdisciplinarity,⁹ converging eventually around themes and concepts like 'universal values', 'cross-cultural dialogue', 'a new world order', 'transnationalism', 'global governance' and the 'decline of sovereign

¹ See Kennedy, 'My Talk at the ASIL: What Is New Thinking in International Law?', 94 *American Society of International Law Proceedings (ASIL Proc.)* (2000) 104, at 117.

² See Brownlie, 'Recognition in Theory and Practice', 53 *British Yearbook of International Law (BYIL)* 1 (1982).

³ See M. Bedjaoui, *Towards a New International Economic Order* (1979).

⁴ See E. McWhinney, *Peaceful Coexistence and Soviet-Western International Law* (1964).

⁵ F. Fukuyama, *The End of History and the Last Man* (1992).

⁶ Henkin, 'International Law: From the Old World Order to the New', 86 *ASIL Proc.* (1992) 507; R. Higgins, *Themes and Theories: Selected Essays, Speeches, and Writings in International Law*, vol. II (2009), at 903; P. Malanczuk, *Akehurst's Modern Introduction to International Law* (7th rev. ed. 1997), at 30–33.

⁷ T. Eagleton, *After Theory* (2003), at 7.

⁸ Koskenniemi, 'The Politics of International Law', 1 *European Journal of International Law (EJIL)* (1990) 4.

⁹ See, e.g., Brunnee and Toope, 'International Law and Constructivism: Elements of an Interactional Theory of International Law', 39 *Columbia Journal of Transnational Law (CJTL)* (2000) 19; Boldizar and Korhonen, 'Ethics, Morals and International Law', 10 *EJIL* (1999) 279; Koh, 'Why Do Nations Obey International Law?', 106 *Yale Law Journal (YLJ)* (1997) 2599.

statehood'.¹⁰ The pitch of the debate rose and fell. But as the decade progressed, at the centre of this new sprawling body of discourse there emerged gradually a relatively stable framework of tropes infused by a broadly liberal, cosmopolitan and technocratic sensibility: 'universal human rights', 'multipolar world', 'compliance building', 'international community action', 'trans-governmental networks', 'failed states', 'expert recommendations', 'peace-building', 'multicultural citizenship', 'early warning mechanisms', 'good governance practices', 'regulatory convergence', etc. Different segments of the legal academe inevitably came to emphasize different aspects of this framework, resulting, in due course, in predictably divergent accounts of which particular themes and ideas may have best captured the new zeitgeist.¹¹ But whatever may have been the prevailing consensus in other disciplinary communities, in the minds of most public international lawyers, by the middle of the first post-Cold War decade, there seemed to be little doubt left that at the forefront of this new paradigm shift that had spread through their field since the fall of the Berlin Wall came the concept of the so-called International Law of Democracy (ILD) and the radical project of democratic universalism that it inaugurated and helped pave the way for. This article is a study of the internal ideological legacy of that moment: its meaning, in other words, as an event in the ideological history of the discipline of international law, i.e. the disciplinary politics which it channelled and the reactions which it induced within what one might call, for lack of a better term, the discipline's internal socio-cultural space.

The narrative surrounding the concept of ILD, as it came initially to be hypothesized, consisted of two main parts. The first part focused on the events that allegedly took place in the plane of 'real-world' international law. The second part focused on the reaction these events triggered in the medium of international legal scholarship. The real-world part of the narrative derived from the notion of *international law's democratic revolution*: a series of allegedly fundamental ruptures and shifts in the operative structure of the actually existing international legal system brought on by the fact that international law had somehow become now a mechanism and a platform for the universal promotion of liberal democratic values and principles. The international legal scholarship part centred around the idea of the '*democratic turn*': the emergence, in the light of the aforementioned democratic revolution, of an entirely new set of theoretical projects and research agendas united by the apparent intention

¹⁰ See Sands, 'Turtles and Torturers: The Transformation of International Law', 33 *New York University Journal of International Law & Policy (NYUJILP)* (2001) 527; Tarullo, 'Law and Governance in a Global Economy', 93 *ASIL Proc.* (1999) 105; Kingsbury, 'Sovereignty and Inequality', 9 *EJIL* (1998) 599; Higgins, *supra* note 6; Sur, 'The State between Fragmentation and Globalization', 3 *EJIL* (1997) 421; Trachtman, 'The International Economic Law Revolution', 17 *University of Pennsylvania Journal of International Economic Law* (1996) 33; A. An-Naim (ed.), *Human Rights in Cross-Cultural Perspective: A Quest for Consensus* (1992); Kennedy, 'Turning to Market Democracy: A Tale of Two Architectures', 32 *Harvard International Law Journal (HILJ)* (1991) 373. See also M. van Creveld, *The Rise and Decline of the State* (1999); Slaughter, 'The Real New World Order', 76 *Foreign Affairs* (1997) 183; Matthews, 'Power Shift', 76 *Foreign Affairs* (1997) 50.

¹¹ Kennedy, 'The Disciplines of International Law and Policy', 12 *Leiden Journal of International Law* (1999) 9, at 38–62.

to rethink not only the standard disciplinary assumptions about international law as a system of norms and institutions but also the essential framework of the international legal discipline as an intellectual enterprise.

For about half a decade – roughly between 1991 and 1997 – the basic picture portrayed by this two-pronged narrative seemed to enjoy an impressive degree of acceptance. And then, almost as quickly as it had risen, the concept of ILD sank into oblivion. By the mid-2000s, the notion of international law's democratic revolution had faded into virtual total obscurity, the once rich stream of celebratory publications about ILD had ceased and a growing number of international law scholars began openly to question not only the basic starting premises of the original ILD hypothesis but also the broader professional skillset, analytical competence and political motivations of those of their colleagues who had taken part in formulating it.

This article forms an initial stage in the study of this curious, largely overlooked episode of international law's disciplinary history. The larger project of which it constitutes a part seeks to examine the relatively widespread assumption that so many international lawyers in the last 20 years have come to accept – a second-order narrative about the original ILD narrative, if you will – and the underlying conventional wisdom that sustains it and that purports to explain why the whole concept of international law's democratic revolution was, in fact, fundamentally wrong, and how and why the emergence of the democratic turn in contemporary international legal scholarship, therefore, must have represented a general failure of critical reason and professional standards.

The wider context against the backdrop of which this research project takes place is shaped by two components: on the one hand, the notion of critical discourse analysis; on the other, the idea of what one might call, broadly, a theory of international law's regulatory effectivity – that is to say, a theory of all the different ways and modes in which international law and its normative frameworks, conceptual structures and institutional templates usually tend to contribute to the production of global, national and trans-national governmentality, i.e. regulatory and governance effects.¹² One of the hunches that initially triggered the present inquiry was the hazy intuition that a theoretical framework of this kind might help us gain not only a much richer and more analytically nuanced account of international law's actual experience with its so-called democratic revolution (and its enduring legacy for the international legal system of today), but also a more critically productive understanding of the whole ILD episode as a specifically intra-disciplinary historical event.

The general thesis that hovers in the background of this article is formed by the idea that the established conventional wisdom about ILD – that second-order narrative mentioned earlier – is wrong on every count. The original ILD argument was not, in fact, that far off the mark: a fundamental reorganization of the actually existing international legal system more or less along the lines suggested by the concept of

¹² An early partial attempt to articulate this theory can be found in Rasulov, 'Introduction: The Discipline of International Economic Law at a Crossroads', in J. Haskell and A. Rasulov (eds), *New Voices and New Perspectives in International Economic Law* (2020) 1, at 12–23.

international law's democratic revolution did, in fact, take place. The emergence of the democratic turn tradition in the early post-Cold War international law scholarship may, to some extent, have been a product of its proponents' general sense of historical excitement, but there was certainly a lot more to it than just that; and, in any event, its subsequent fall and decline as a theoretical project was not just a reflection of its proponents' purported lack of critical reason, scholarly rigour or professional competence. The attack under which the democratic turn scholarship came in the late 1990s to early 2000s seems at the very least to have had as much to do with the broader structure of international law's intra-disciplinary politics – the internal conflicts over the 'correct' setup and organization of the discipline's knowledge-production process – as it did with that scholarship's actual theoretical quality and content.

It would be impossible to develop every single aspect of this broader thesis within the confines of one article. The specific part of it which I propose to elaborate in these pages is consequently circumscribed thusly. First, I will unpack and deconstruct the standard narrative about ILD. In doing so, my principal aim will be to uncover its basic operative structure – the latent conceptual foundations and analytical assumptions on which it relies – and explore on that basis its similarities with other equally widespread intra-disciplinary conventional wisdoms. The second objective of this examination will be to uncover some of the more obvious slippages and 'fudgings' that sustain and enable the standard narrative about ILD *as an ideological act*. The goal here is to trace these slippages and fudgings to a certain type of *disciplinary sensibility* and, based on this, to develop some preliminary conclusions about the deeper cultural and political conflicts that induced and shaped the pro- and anti-ILD debate in contemporary international legal scholarship.

As one might guess from this synopsis, what follows below is not going to be an exercise in traditional positivist legal analysis. In the pages ahead, I will not aim to confirm or verify the exact normative content or status of any particular group of treaty provisions or customary rules. Nor will I seek to offer any views about the 'correct meaning' of the idea of democracy; explore what role democratic values have played historically, or should play ideally, in the contemporary international legal system; examine whether any segment of the global institutional architecture may or may not suffer from a deficit of democratic legitimacy; or judge the relative merits and demerits of any particular set of processes or interactions taking place in the context of regional international organizations, trans-governmental administrative networks or the global civil society. My project in these pages is of a somewhat different character. What I propose to do in this article is essentially offer a critique of a certain type of *intra-disciplinary ideology* – the one that led to the emergence of the aforementioned standard narrative about ILD – and the implicit signalling which it carries about the ideal setup and arrangement of international law as a field of knowledge practices.

By way of a brief preview: the standard narrative about ILD is fundamentally a story about a temporary lapse of judgement. The hidden theoretical framework that informs it is a combination of classical legal positivism and hard anti-utopianist ideology. The reason why this kind of theoretical framework does not belong in this context is essentially twofold. In the first place, it is almost certainly guaranteed to

conceal and misrepresent the general historical significance of the democratic turn tradition as a *specifically disciplinary event*. In the second place, and no less importantly, it is also guaranteed to obscure and distort the deeper legal reality of what actually may have happened within that broader legal-political space the abrupt fundamental reorganization of which the concept of international law's democratic revolution, as originally articulated, was intended to convey. The reason why we should recognize both of these reasons and make the effort not to conflate them is partly 'intellectual' and partly 'political'. On the one hand, quite apart from it generally being a good idea that, as international lawyers, we should usually have a clear enough understanding of what the plane of the 'real-world' international law actually looks like, it seems it would also be helpful for us to know why and how the established conventional wisdom about ILD has ended up presenting such a biased and distorted image of it. Citing the prevalence of the positivist imaginary and the detrimental effects of narrow-minded dogmatism can only get us so far. More importantly, leaving bad theoretical decisions unchallenged, in international law, is not generally a good academic practice. Bad theories usually lead to bad policies. Bad policies lead to bad real-world consequences. Oppression and tyranny can end up being rationalized instead of denounced and resisted. Wars can be made to seem just and humane when they are not. Imperialism can be legitimized, self-serving elite projects given a boost, scarce material and psychological resources – aid, goodwill, personal career choices – can end up being wasted and misappropriated. The process of academic knowledge production and the exercise of real-world power in the name of international law are often inseparable. Retaining and reproducing a fundamentally distorted picture of the actual extent of international law's alleged democratic revolution is not a politically inconsequential state of affairs. Nor, of course, is the act of portraying the scholarship that purported to celebrate this revolution as fundamentally lacking in reason and rigour.

Explaining exactly how and why this distorted picture came to form and took such deep roots in the discipline's collective imaginary is a task that, strictly speaking, lies outside the scope of this article. In its broadest contours, the answer to that question would have to be sought in what might be called the *general economy of international legal scholarship* – the basic structure for the generation and circulation of scholarly knowledge-products, the broader terms of the intra-disciplinary division of labour, the underlying taxonomy of academic capital resources and relations of power – but also the *various respective mythologies* that entrench and rationalize the socialization patterns produced by this economy. The methodology that this kind of inquiry might draw on, I imagine, would probably come in equal parts from Karl Mannheim's account of ideology, Louis Althusser's theory of knowledge production and Claude Levi-Strauss's model of myth-making;¹³ its politics from the critical sociology of

¹³ See K. Mannheim, *Ideology and Utopia: An Introduction to the Sociology of Knowledge*, trans. L. Wirth and E. Shils (Routledge & Kegan Paul, 1979); L. Althusser and E. Balibar, *Reading Capital*, trans. B. Brewster (NLB, 1970), at 28–34; C. Levi-Strauss, *Structural Anthropology*, trans. C. Jacobson (Basic Books, 1963), at 206–232. See also Rasulov, 'The Discipline as a Field of Struggle: The Politics and Economy of Knowledge Production in International Law', in A. Bianchi and M. Hirsch (eds), *International Law's Invisible Frames* (forthcoming 2021).

knowledge;¹⁴ and its theoretical ambition from first-wave critical legal theory.¹⁵ But all of that would need to be left for a different occasion.

The argument that is presented in these pages has the following structure. Section 2 starts by outlining the general contours of ILD's rise and fall as a scholarly concept and a theme. In Section 3, I describe the basic ideological slant of the general narrative complex that formed around this rise and fall idea and the conventional wisdom that underlies it. I discuss also the basic ontological status of both of these disciplinary phenomena – the standard narrative and conventional wisdom – and show that the ideology that informs the standard narrative about ILD is grounded, ultimately, in exactly the same kind of *deeply anti-utopianist sensibility* that one finds otherwise in the standard accounts about the fall and decline of the NIEO project. In Section 4, I detail the essential structure of the standard narrative and show the various points where it fudges and twists its implicit reference framework. In the concluding section, I bring all these observations together, while also outlining the background role of classical legal positivism and the basic ideological leanings of the anti-utopianist tradition in the context of the discipline's internal socio-cultural space.

2 ILD: The Rise and Fall of a Concept

Those of us who first entered the field in the late 1990s will remember how large the idea of ILD once used to loom over the discipline's collective imaginary. A notion that few international lawyers a decade or two earlier would have taken with any degree of seriousness, the idea that international law could be put in the service of promoting democratic values suddenly seemed to have captured everybody's attention. From Thomas Franck and Georg Nolte to Anne-Marie Slaughter and James Crawford, from Susan Marks and David Kennedy to Philippe Sands and José Alvarez – everyone who was anyone seemed to be writing, debating and worrying about democracy, liberalism, their possible relationship with one another and the place they should occupy in the contemporary international legal system.

Is there such a thing in international law as a human right to democracy? Could international law require the internal political structure of a sovereign state to follow any particular pattern? What ought to be the place of election-monitoring in the legal regime of statehood and recognition? Should Western states be able to form a pro-democracy 'caucus'¹⁶ at the UN in the same way in which the developing states had formed a pro-NIEO caucus two decades earlier? Can international law take the side of pro-democracy movements in their struggle against anti-democratic forces

¹⁴ For a general introduction, see Zammito, 'What's "New" in the Sociology of Knowledge?', in S. Turner and M. Risjord (eds), *Handbook of the Philosophy of Science: Philosophy of Anthropology and Sociology* (2007) 791.

¹⁵ See D. Kennedy, *A Critique of Adjudication (fin de siècle)* (1997); Tushnet, 'Legal Scholarship: Its Causes and Cure', 90 *YLJ* (1981) 1205.

¹⁶ Slaughter, 'The Liberal Agenda for Peace: International Relations Theory and the Future of the United Nations', 4 *Transnational Law & Contemporary Problems* (1994) 377, at 416–417.

without raising the spectre of neo-colonialism?¹⁷ Seemingly out of nowhere an entire library's worth of writings had suddenly arisen, addressing everything from the newly emerging 'right to live under [a] democratic . . . government',¹⁸ the law of international electoral monitoring¹⁹ and the right of guaranteed access to information and to effective judicial proceedings,²⁰ to a new customary obligation forbidding the practice of anti-democratic politics,²¹ the inherent human 'right to resist tyranny' backed up by the principle of humanitarian intervention²² and the general need for the international legal system to embrace the paradigm of 'liberal internationalist internationalism'²³ – a philosophy that, as its advocates understood it, without quite resurrecting in the open the old 19th-century ideology of the standard of civilization would, nevertheless, seek to 'permit [or], indeed mandate[,] a distinction among different types of States based on their domestic political structure and ideology'.²⁴

Even the tone of the scholarly debate seemed to have changed. Kant had replaced Grotius as the go-to authority figure. Articles began to be published about 'revolutions of the spirit'.²⁵ Claims started being made that *because* extensive empirical studies had conclusively showed that liberal-democratic regimes that instituted free-market economies were inherently less bellicose than non-democratic ones – the so-called Liberal or Democratic Peace thesis – it obviously made sense for international law to rethink *at once* all its time-tested assumptions about the principles of the non-use of force, non-intervention and sovereign equality.²⁶ Conveniently enough, at more or less exactly the same time, a new series of theoretical discoveries started to be made purporting to show, firstly, that as a matter of strict legal analysis, an 'invasion by outside forces to [shore up an] elected government', contrary to previous assumptions, would not, in fact, be incompatible with the established principles of *jus ad bellum*,²⁷ and that, secondly, democracies had also 'proven' themselves to be economically superior to non-democracies, especially in what concerns 'achieving a constant degree of growth'.²⁸ Pushing the envelope further, some scholars, after additional reflection, purported to have worked out also that democracy was actually 'the only permissible form of political organization' under international law, since it was also 'the only

¹⁷ Koskeniemi, 'Intolerant Democracies': A Reaction', 37 *HILJ* (1996) 231, at 234.

¹⁸ Cerna, 'Universal Democracy: An International Legal Right or the Pipe Dream of the West?', 27 *NYUJILP* (1995) 289, at 290.

¹⁹ Franck, 'The Emerging Right to Democratic Governance', 86 *American Journal of International Law (AJIL)* (1992) 46, at 64–77.

²⁰ Sands, *supra* note 10, at 540.

²¹ Fox and Nolte, 'Intolerant Democracies', 36 *HILJ* (1995) 1, at 38–43.

²² Tesón, 'The Kantian Theory of International Law', 92 *Columbia Law Review* (1992) 53, at 68.

²³ Burley [Slaughter], 'Toward an Age of Liberal Nations', 33 *HILJ* (1992) 393, at 396.

²⁴ Slaughter, 'International Law in a World of Liberal States', 6 *EJIL* (1995) 503, at 504.

²⁵ Burley [Slaughter], 'Revolution of the Spirit', 3 *Harvard Human Rights Journal* (1990) 1.

²⁶ See Doyle, 'Kant, Liberal Legacies, and Foreign Affairs', 12(3) *Philosophy & Public Affairs* (1983) 205; Slaughter, *supra* note 24, at 509–514.

²⁷ Reisman, 'Sovereignty and Human Rights in Contemporary International Law', 84 *AJIL* (1990) 866, at 871.

²⁸ Grossman, 'Discussion', 86 *AJIL Proc.* (1992) 267, at 269.

form of government which provides for the respect and protection of human rights'.²⁹ Crucially, it was concluded, 'many developing countries' on this view of things would have to be classified as democratic in name only, which meant that, at the end of the day, they would need to be 'eliminate[d] from being considered as democracies'.³⁰ But that, of course, did not imply anything negative, since the intention behind such elimination would have been entirely noble, as it is only by allowing international law to implement a truly rigorous test of democracy that 'the campaign for social progress and increased freedom' could really succeed on a global scale.³¹

A measure of giddiness and agitation had spread across the discipline's collective discursive spaces. Old certainties no longer seemed to hold true. All that had previously looked solid, fixed and self-evident – even the discipline's general theoretic configuration and basic sense of intellectual aspiration³² – increasingly now appeared to be transient, arbitrary, contingent and fundamentally contestable. A new age of revolution had dawned over international law, one that promised to 'change[] the underlying assumptions . . . regarding the *domaine réservé*; regarding the need for, possibilities for, and structure of international legislation; regarding the role of international adjudication [and even] an international legal "constitution"'.³³ And in the midst of all this rose the bright shiny edifice of ILD: a proud vindication of Kant's greatest prophecy, a product of a radically new political epoch, a normative anchor for an unprecedented reform project 'augur[ing] a major transformation of the ground rules of the international system'.³⁴

And then it all just went away. Almost as quickly as it had inflated, the ILD bubble burst. By the middle of the second post-Cold War decade, the narrative of international law's democratic revolution had all but disappeared from the pages of the leading international law publications. By the end of the third decade, only a small handful of legal historians and self-declared neo-Rawlsians seemed to retain any degree of interest in ILD.³⁵ What happened? How did an idea that had commanded so much attention one day lose all of its lustre the next?

In an earlier time, when international lawyers opted to view the historical course of international legal thought as the mirror of the parallel rise and fall of imperial fortunes,³⁶ the standard reflex would have been to say that all this had probably something to do with the general weakening and decline of the West – a loss of soft power, a decay of moral authority, a diminution in international standing. A typical way in which such an argument would have been made would start by establishing some kind of one-way

²⁹ Cerna, *supra* note 18, 327.

³⁰ *Ibid.*, at 328.

³¹ *Ibid.*, at 328–329.

³² Crawford, 'Democracy and International Law', 64 *BYIL* (1993) 113, 122–123.

³³ Trachtman, *supra* note 10, at 37.

³⁴ Fox and Roth, 'Introduction: The Spread of Liberal Democracy and Its Implications for International Law', in G. Fox and B. Roth (eds), *Democratic Governance and International Law* (2000) 1, at 10.

³⁵ See, e.g., Lister, 'There Is No Human Right to Democracy, But May We Promote It Anyway?', 48 *Stanford Journal of International Law* (2012) 257. A notable exception, however, was Charlesworth, 'Democracy and International Law', 371 *Recueil des cours* 43 (2015).

³⁶ See, e.g., W. Grewe, *The Epochs of International Law* (2001).

causal link between ILD's theoretical trajectory and some form of cultural geopolitical process. The narrative might begin, for instance, by rehearsing the so-called 'tainted origins' trope:³⁷ it was obvious, right from the start, that the particular version of democracy which ILD stood for was the product of a rather narrow historical-cultural setting, one that is predominantly associated with post-Enlightenment Western capitalist societies. Naturally, this not only made ILD vulnerable to a potential charge of having neo-colonial leanings, but also created the risk that, as a legal reform project, its fortunes would always remain hostage to whatever levels of goodwill the rest of the international community would retain vis-à-vis Western capitalist states. In the event, the most internationally active among these turned out to be the United States and the United Kingdom, and by the start of the new millennium neither of these nations had done much to justify any significant quantities of goodwill. From Madeleine Albright's 'we think the price is worth it' comment³⁸ to the legally suspect campaigns in Kosovo and Iraq, the war on terror, Guantanamo and the 'torture memos' – a whole cascade of events, one more chilling than the other, quickly depleted whatever moral capital the United States and the United Kingdom may have had in the eyes of the rest of the world. As the United States and United Kingdom's standing in the international arena precipitously declined, so, too, did the prospects of whatever international legal reforms the two states promoted. As ILD's fortunes sank in the plane of international legal reform, the theoretical vitality of ILD as a concept inevitably withered as well.

The tendency to build the historiography of international legal thought around geopolitical determinism has a long and illustrious pedigree in international law.³⁹ Curiously, however, the actual received wisdom about the basic reasons for ILD's Icarian rise and fall that has developed in the collective disciplinary consciousness over the last 20 years appears to be built around a fundamentally different theoretical tradition – one at the root of which lies a highly peculiar narrative complex that is articulated, on the one hand, around the themes of technical proficiency, analytical rigour and practical pragmatism and, on the other hand, around a relatively uncritical acceptance of the classical legal-positivist worldview and the accompanying residual notion of international law scholarship as a combination of sources-formalism and applied social science.

3 The Ontology of Conventional Wisdoms: ILD and the Discourse of Anti-Utopianism

Why did the democratic turn in international law scholarship unfold the way that it did and what should we, ultimately, make of that? The standard narrative that

³⁷ D. Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (2004), at 18.

³⁸ See DeGeurin, "Is the Price Worth It?" The Crippling Effects of U.N. Sanctions in Iraq', *Medium.com* (2 September 2018), available at <https://mackdegeurin.medium.com/is-the-price-worth-it-the-crippling-effects-of-u-n-sanctions-in-iraq-481d4a89bdd2>.

³⁹ One still finds its traces today, not least in discussions of socialist internationalism. See, e.g., Scobbie, 'A View of Delft: Some Thoughts About Thinking about International Law', in M. Evans (ed.), *International Law* (5th ed. 2018) 51, at 65–73; Malanczuk, *supra* note 6, at 33.

emerged on this point in the broader disciplinary consciousness around the start of the new millennium consists generally of two parts. The first part purports to address the issue of international law's democratic revolution: the essential claim here is that this revolution, in fact, never took place, and any reports to the contrary are baseless.

The second part of the narrative purports to explain how, in the light of this fact, international lawyers should now understand the phenomenon of ILD-focused scholarship. The essential argument here is that the entire democratic turn episode in post-Cold War international legal discourse was, in effect, a product of overly excitable scholarly imagination – not exactly an outright corruption of lawyerly neutrality, but definitely a lapse in professional standards, sober judgement and analytical rigour.

Note the general theme: the dual emphasis on the ideas of analytical rigour and professional competence and the implied juxtaposition of intellectual excitability and sober judgement provide an important clue to the basic cultural politics that animates this conventional wisdom. In its essential structure, the standard narrative about ILD that has emerged in the broader disciplinary consciousness around the start of the new millennium channels the exact same ideological sensibility and draws on the exact same set of tropes and rhetorical devices that had been used over the years in other parts of the traditional international law discourse to pursue what for lack of a more concise label one might call the politics of *professional anti-utopianism*.

The idea of anti-utopianism as a marker of basic professional competence, as I have discussed elsewhere,⁴⁰ marks one of the most widely spread cultural traditions in contemporary international law. It also constitutes an important part of the discipline's *internal* ideological landscape. What makes anti-utopianism an ideology, in other words, is a function of a fundamentally *intra*-disciplinary political process: the kind of struggles and conflicts one would usually associate with rivalries between formalists and anti-formalists or black-letter lawyers and legal interdisciplinarians, rather than, say, communists and neoliberals. The kind of politics that the idea of professional anti-utopianism channels is not one that maps easily on any traditional maps of political ideas, movements or traditions. Put differently, it would be pointless to try to explain its values or agenda in terms of some abstract reference scale or a universal monistic concept of Politics with a capital 'P'.

The reason why this last point is important is that, as we are going to see later, the standard anti-ILD narrative in practice has proved itself attractive to international lawyers from a rather wide variety of political backgrounds. Explaining its rise and spread across the broader spaces of international legal thought, thus, is not a task that can be so easily completed if all we have at our disposal is just a basic set of disembodied categories of right and left, conservatism and progressivism, capitalism and socialism. To engage with the narrative complex on which this narrative rests requires an engagement with a truly indigenous system of ideological symptoms and political signalling, one that is fully embedded within and determined by the internal realities of international law as a disciplinary enterprise.

⁴⁰ See Rasulov, 'The Utopians', in J. d'Aspremont and S. Singh (eds), *Concepts for International Law: Contributions to Disciplinary Thought* (2019), 879.

An exercise of that kind involves adopting a very different theory of politics to the one that is typically found in writings about international law and democracy. It involves learning to recognize as politically significant arguments, tropes and practices that do not as such channel any grand visions or theories of good life – communism, decolonization, neoconservatism, etc. – but entrench, instead, the much more mundane (and thus also much more insidious and hard-to-eradicate) biases, dispositions and preconceptions about, for example, what constitutes a ‘proper’ reasoning sequence, the ‘correct’ way to generate legal knowledge, the ‘right’ division of labour between the world of legal scholarship and the world of state practice, etc.

There is another important insight this focus on tropes and narrative structures can help us uncover. Among the most prominent targets of the anti-utopianist discourse in international law in recent decades one typically finds the idea of the so-called third generation of human rights, the concept of the international law of development and the Charter of the Economic Rights and Duties of States.⁴¹ All three of these constructs are commonly associated with the legal-theoretical legacy of the NIEO – another purported international law revolution that in the end ran itself into the sand.

What does the received memory of NIEO today look like? Even the briefest glance at the respective bodies of discourse reveals an uncanny degree of similarity between the ways international lawyers today tend to remember the rise and fall of pro-ILD scholarship and the rise and fall of the NIEO initiative. Though in the former case the focus of the narrative falls mainly on events that took place within the plane of scholarly imagination, while in the latter case it also covers events ostensibly happening in the plane of ‘real-world’ international law politics, both accounts quite unmistakably adopt the same essential template. Both narratives portray the phenomenon in question as a profoundly ill-conceived enterprise that failed, on the one hand, because of the unforgivable political myopia of its advocates and, on the other, because of being grounded in a completely incoherent and indeterminate conceptual framework. Both also imply that, in addition to being politically naïve and intellectually fuzzy, NIEO and ILD advocates fundamentally underestimated the basic conditions and requirements raised by the doctrine of sources, a lapse of judgment no prudent international lawyer would ever make.⁴²

Put differently, both narratives in addition to deploying the classical anti-utopianist trope that professionalism in law always equals hard-nosed pragmatism also make active use of one of the most popular themes in all anti-utopianist discourse: the idea of *utopianism as the opposite of technical proficiency*. Good international lawyers, the implied argument goes, are good not just because they are worldly and sensible, but because they are also good legal technicians. They understand the basic ‘physics’ of the

⁴¹ GA Res. 3281 (XXIX) – Charter of the Economic Rights and Duties of States, 12 December 1974. See, e.g., Alston, ‘Conjuring Up New Human Rights: A Proposal for Quality Control’, 78 *AJIL* (1984) 607; Donnelly, ‘In Search of the Unicorn: The Jurisprudence and Politics of the Right to Development’, 15 *California Western International Law Journal* (1985) 473; Brower, ‘Remarks’, 69 *ASIL Proc.* (1975) 231.

⁴² Generally, on the doctrine of sources and its legal-theoretical significance for the discipline, see Schachter, ‘International Law in Theory and Practice’, 178 *Recueil des cours* (1982-V) 9, at 60–62.

international legal form, the inner workings of international law as a system, the objective strengths and limits of international law as a medium and a mechanism. They have, in other words, a solid grasp of law as the expert craft and an in-depth familiarity with all the mundane practicalities and routines that its performance entails.⁴³

One does not need an extensive exposure to contemporary NIEO historiography to see how central the theme of utopianism as the failure of legal technique has become to the disciplinary memory of NIEO. Most international law accounts of the rise and fall of the NIEO initiative, whether written from the right⁴⁴ or the left,⁴⁵ draw on it in one way or another. The general template includes three parts. First, mention is made of the essential short-sightedness of NIEO's legal politics. Then comes the customary reference to the inherent fuzziness of NIEO's basic conceptual framework and reference points: the principle of compensatory inequality, the right to development, the concept of economic self-determination, etc. In the third place comes the doctrine of sources argument segueing quickly to the idea that, in addition to having been dealt a weak political hand, the NIEO camp also got outplayed on the legal-technical front. Instead of focusing on custom and treaties, the legal strategy it adopted centred mostly around UN resolutions. The only way this strategy could succeed would be if the rest of the international community agreed either to view these resolutions as reflective of custom or to recognize them as a separate source of international law. Given the content which the proponents of NIEO put into those resolutions, most Western states, naturally, rejected both of these options, and since international law is a system built on diplomacy and consent, that basically spelled the end of the road for NIEO. Not only did the NIEO initiative, thus, fail because it was badly thought through at the level of its conceptual framework. It also failed because it was disastrously executed at the level of legal technique.⁴⁶ Or at least that is what the received wisdom that has formed over the last 40 or so years seems to suggest.

But what exactly should one understand by this idea of a received wisdom? In the course of the last few pages, references were repeatedly made to concepts like 'standard narrative', 'conventional wisdom' and 'received memory'. What is the exact status of these decidedly unfamiliar to most international lawyers objects? Where should we look if we want to see international lawyers 'doing', 'reproducing' or 'recycling' any of these things?

One way to start answering these kinds of questions would be to say that what we are dealing with here is, essentially, a species of *intra-disciplinary mythology or folklore*. Like the idea of 'world peace through adjudication',⁴⁷ the 'savages, victims, and

⁴³ Rasulov, *supra* note 40, at 886.

⁴⁴ See, e.g., I. Seidl-Hohenveldern, *International Economic Law: Texts, Cases and Materials* (1989), at 3–9, 37–44.

⁴⁵ See, e.g., B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (2003), at 73–94; A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (2004), at 211–222, 237.

⁴⁶ See Franck, 'Lessons of the Failure of the NIEO', 15 *Canadian Council on International Law* (1986), 82, at 97.

⁴⁷ See, e.g., Tams, 'World Peace through International Adjudication?', in H.G. Justenhoven et al. (eds), *Peace through Law: Can Humanity Overcome War?* (2016), 215.

saviours' tradition⁴⁸ or any one of the numerous international-law-as-progress masterplots,⁴⁹ the received/conventional wisdom about ILD exists in the form of a *collective (un)consciousness*. One can think of it as a kind of *doxa* or a pre-theoretical belief structure, as Jean d'Aspremont would put it,⁵⁰ an unspoken presumption that the members of the discipline mostly just take for granted without ever explicitly reflecting on it. It never quite realizes itself in the same open form as a full-fledged doctrinal argument, such as the narrative that Article 51 of the UN Charter authorizes anticipatory self-defence, or an expressly stated theoretical thesis, such as that international law is grounded in the consent of states.⁵¹ It exists and operates, rather, at the level of the shared ideological sensibility, the implicit common-sense of the profession.

Needless to say, not every member of the 'anti-ILD camp' shared the same belief system or experienced the truth of the anti-ILD narrative and its implicit coherence with the exact same degree of intensity. None of this means, however, that the anti-ILD narrative is not therefore 'real' or that its reality is any less empirically verifiable than that of expressly stated theoretical arguments or formally declared research agendas.⁵² What it

⁴⁸ Mutua, 'Savages, Victims, Saviors: The Metaphor of Human Rights', 42 *HILJ* (2001), 201.

⁴⁹ See T. Skouteris, *The Notion of Progress in International Law Discourse* (2010).

⁵⁰ See generally J. d'Aspremont, *International Law as a Belief System* (2018).

⁵¹ Charter of the United Nations, 24 October 1945, 1 UNTS 16, Art. 51.

⁵² For a further discussion of the practical verifiability of such 'hidden frameworks of ideas', see R. Unger, *Knowledge and Politics* (1976), at 7–12. An important detail that has to be remembered here is the basic difference between structuralism and phenomenology. Generally speaking, one should not conflate the study of collective belief structures that exist and express themselves in the form of objective social practices with the study of the individual thought-worlds (inner intellectual lives) of concrete men and women that may or may not take part in those practices. Think of this as a version of Barthes's 'death of the author' argument: the empirical individual who writes articles about ILD and the discursively mediated subject persona in whose 'voice' the arguments made in these articles are put forward are analytically rather distinct phenomena. (See R. Barthes, *Image Music Text*, trans. S. Heath (Fontana Press, 1977), 142–148.) It would be wrong to assume that, at the subjective level, all 'anti-ILD' scholars shared the same personal visions, ideals and agendas. Quite on the contrary, it is highly likely that they did not, and the only thing that they did share, in fact, was access to the same lexicon or repertoire of tropes. But the unity of a discourse 'lies not in its origin but in its destination' (*ibid.*, at 148). The ideology of technical proficiency and professional pragmatism that the narratives they collectively produced brought to bear on the democratic turn tradition may not have occupied the same pride of place in each of their individual thought-worlds. And from the standpoint of their personal life stories this may be an all-important historical fact. But from the standpoint of the *objective effects* produced by their discourse – including the impact this discourse had on the evolution of the discipline's collective (un)consciousness – it is not. A different way of thinking about this would be to view it as a basic extension of 'the semiotic argument': all language is Procrustean; no speaker is ever really in control of their discourse; most of the time we can neither mean all that we say, nor really say all that we mean; each of us is always-already estranged from every structure of communication available to us. (See Kennedy, 'A Semiotics of Critique', 22 *Cardozo Law Review* (2001) 1147, at 1179–1180.) Though Marks might not have placed the same kind of faith in the rigour-inducing powers of legal empiricism as Carothers, and Koskeniemi's broader theoretical agenda for the discipline may have differed wildly from that of Alvarez (cf. S. Marks, *The Riddle of All Constitutions* (2000); Carothers, 'Empirical Perspectives on the Emerging Norm of Democracy in International Law', 86 *ASIL Proc.* (1992) 261; Alvarez, 'Do Liberal States Behave Better? A Critique of Slaughter's Liberal Theory', 12 *EJIL* (2001) 183; Koskeniemi, *supra* note 17), each of them, to be able to join the broader conversation about ILD, had had to give up a certain part of their 'internal individuality'. Since that conversation eventually ended up constructing ILD as an essentially utopian phenomenon – when and

does mean, though, is that, just like with all those other master-plots and folkloric elements that were mentioned earlier, the collective (un)consciousness that we are looking at in this case can be detected in practice only through the study of its *direct theoretical effects* and *epistemic consequences*,⁵³ or, as Carlo Ginsburg puts it, in a decidedly 'semiotic' manner.⁵⁴

4 The Conventional Wisdom about ILD: Structure and Content

The basic theoretical complex around which the conventional wisdom about ILD is constructed consists of three main elements: the claim that ILD enthusiasts completely blew out of proportion the actual reality surrounding international law's alleged democratic revolution; the claim that pro-ILD scholarship suffered from an unacceptable lack of conceptual clarity and precision and that its attitude towards matters of evidence was essentially irresponsible; and the claim that the rise and fall of the democratic turn in international law scholarship, ultimately, was a reflection of the political biases of the respective scholars but also of how much rigour and technical legal skill were brought to the ILD debate – the moment international lawyers started to approach the ILD hypothesis with the kind of rigour and skill that they should have brought all along, the whole house of cards erected by ILD enthusiasts fell apart.

The central reference point behind the first claim was the general idea of international law's democratic revolution. As commonly presented by ILD enthusiasts, the essence of the new international legal regime supposedly produced as a result of international law's ongoing democratic revolution, in terms of its doctrinal expression, came down to four distinct components:⁵⁵

- (i) the so-called 'democratic entitlement': a putative universal human right to live under a democratically constituted government;⁵⁶
- (ii) the obligation to hold 'periodic free and fair elections' and, in doing so, to submit to some form of election monitoring;⁵⁷

why did that first happen? we do not know – there was little choice left for them but to invest into that set of voices, arguments and tropes which in the course of the discipline's immediately preceding course of history had come to signal the basic 'feeling' of anti-utopianism. That some of these scholars (e.g., Marks and Koskeniemi) did so more haltingly and more hesitantly than others, e.g., Alvarez and Carothers represents, in this context, an interesting but ultimately not very significant detail.

⁵³ On the detection of theoretical effects and epistemic consequences in international legal discourse, see generally J. d'Aspremont, *Epistemic Forces in International Law* (2016); Rasulov, 'Imperialism', in d'Aspremont and Singh (eds), *supra* note 40, at 422, 422–424.

⁵⁴ See C. Ginsburg, *Clues, Myths, and the Historical Method*, trans. J. and A. C. Tedeschi (Johns Hopkins University Press, 1989), 96.

⁵⁵ See, for further discussion, Fox and Roth, *supra* note 34, at 10–12.

⁵⁶ Franck, 'The Democratic Entitlement', 29 *University of Richmond Law Review* (1994) 1.

⁵⁷ Fox, 'The Right to Political Participation in International Law', 17 *Yale Journal of International Law* (1992) 539; Cerna, *supra* note 18, at 290, 327–328. See also Franck, *supra* note 19, at 81–84.

- (iii) a duty of mandatory non-recognition of non-democratic states and regimes;⁵⁸ and
- (iv) the putative right to use limited force and intervene in the domestic affairs of other states with a view to strengthening and promoting therein the workings of democratic governance.⁵⁹

Importantly, as Susan Marks points out, not all ILD scholars had agreed with every detail of this purported model: ‘the [ILD] argument is by no means a unitary one. Rather, it is made up of various contributions which bear certain “family resemblances” to one another, but which also exhibit differences and are not all, in fact, framed [the same way].’⁶⁰ The idea that the ILD enthusiasts’ depiction of ILD was plagued by internal inconsistencies forms one of the most frequently repeated motifs in the anti-ILD narrative. It is also a central building block of the second main element of the standard theory about the rise and fall of ILD and a bridging point to that part of the conventional wisdom that proposes to dismiss the entire democratic turn episode as essentially a product of insufficient rigour and a lapse of scholarly standards.

Despite Marks’s reservations, however, this tetrapartite vision in its general contours seemed to enjoy a sufficiently wide acceptance within the ILD discourse to form a recognizably common point of departure. Taking it as a reference point for deducing the general contours of the original ILD hypothesis, the first pattern that becomes evident from looking at it is just how openly statist and statocentric its normative orientation essentially was: the irruption of the pro-democracy agenda in international law in the aftermath of the end of the Cold War, in the original ILD context, was not expected to extend beyond the level of nation-states.⁶¹

The second immediately detectable pattern is that the doctrinal legal reforms supposedly induced by international law’s democratic revolution were apparently meant to create a new system of legal relations not only among states but also between states and their citizens but only in the same way in which this had been previously done in international human rights law (IHRL). Like IHRL, the new ILD regime would thus channel both an inter- and a supra-national normative ambition: ‘each state owes an obligation of democratic governance to all other states as a price of its membership in the community of nations’, ‘each government . . . owes to each of its citizens the acknowledgement of [a] right to participate meaningfully in the process of governance [a remedy for which] may lie in an appropriate international forum.’⁶² Like IHRL, too, taken to its logical conclusion, the ILD regime threatened to subvert the essential

⁵⁸ Tesón, *supra* note 22, at 100; Franck, *supra* note 19, at 47.

⁵⁹ Reisman, *supra* note 27, at 871–872.

⁶⁰ Marks, *supra* note 52, at 37.

⁶¹ This despite the fact that, on its surface, a large part of the democratic turn tradition revolved around the idea of ‘disaggregating the state’. See, e.g., Slaughter, *supra* note 24, at 534–535. See also more generally Crawford, ‘Chance, Order, Change: The Course of International Law’, 365 *Recueil des cours* 9 (2013) 294 (‘for international law democracy remained an idea about how States are internally governed, with little relevance to other sites of political authority’).

⁶² Franck, *supra* note 56, at 7.

operative logic of the Westphalian stocentric order.⁶³ Indeed, no set of legal reforms proposed under the rubric of traditional IHRL had ever gone so far in explicitly challenging the doctrine of sovereign equality and the principle of non-intervention in domestic affairs,⁶⁴ or accepted so casually the possibility of being described as a revival of the 19th-century-style standard of civilization.⁶⁵

Between them, these two patterns – a basic commitment to statism and a residual parallelism with IHRL – signalled a general atmosphere of modest reformism. International law's democratic revolution was meant to subvert the traditional Westphalian order, but it was not meant to bring any significant changes in the legal form of international law. It was probably going to restore some form of civilizing mission to international law's politics, but it was not going to create a structurally novel modality of international legal regulation. Seen in these terms, the effects of international law's democratic revolution, on closer inspection, appeared – according to the original ILD hypothesis – to take place at two different levels. In the first place, there were three areas of international law that ILD would impact directly and explicitly: the international law of elections and election-monitoring, the law of statehood and recognition and the law of non-intervention. In the second place, all other changes that would occur within the international legal system would come by as a result of knock-on effects and chain reactions. For instance, the more the duty to submit to election-monitoring took hold, the more the requirement of democratic legitimacy would supposedly enter into those legal regimes that regulated the disbursement of international loans and the use of the most-favoured-nation terms of trade.⁶⁶ The more states embraced liberal democracy as a political system, the more the law of state responsibility would supposedly decline in importance because greater reliance would be placed on 'vertical enforcement through domestic courts'.⁶⁷

The reason why these four points are significant – quite apart from the fact that they provide an important insight into the underlying politics of the pro-ILD discourse and the general worldview of ILD enthusiasts⁶⁸ – is that, all things considered, this was, from the standpoint of the anti-ILD narrative, all anyone could say with any degree of confidence about the pro-ILD scholars' general concept of international law's democratic revolution, and the implications this lack of concreteness raised were certainly very significant.

⁶³ See H. Bull, *The Anarchical Society: A Study of Order in World Politics* (4th ed. 2012), at 146.

⁶⁴ For a good illustration of how these principles were understood in the time before ILD, see, e.g., Ouchakov, 'La compétence interne des États et la non-intervention dans le droit international contemporain', 141 *Recueil des cours* (1974-I) 1.

⁶⁵ Slaughter, *supra* note 24, at 506.

⁶⁶ Franck, *supra* note 56, at 8.

⁶⁷ Slaughter, *supra* note 24, at 532–534.

⁶⁸ Note, for example, that this conception of international law's democratic revolution does not envisage any reforms in the law of international investment protection, the law of international organizations or the law of sovereign debt. Whatever may have been its official rhetoric, in terms of its actually exhibited trends, the ILD narrative had its politics firmly rooted in the thought-horizon of the classical liberal tradition: governments were presumed to be separate from markets, politics was separate from economics, popular accountability was a policy that had to be pursued only in respect of national-level public institutions.

Over a five-year period between 1992 and 1997, a group of scholars including Thomas Carothers, Brad Roth, Susan Marks and Martti Koskenniemi gradually began to develop the narrative that, among various other things, consistently zeroed in on the idea of ILD's general fuzziness and total lack of conceptual clarity.⁶⁹ What exactly did pro-ILD scholars have in mind when they talked about the right to live under a democratically constituted government? Was this right meant to give its right-holders the freedom to demand that their governments introduce some form of separation of powers or did it only entitle them to some form of internal self-determination? How and who exactly was supposed to determine if elections were 'free and fair'? Was the concept of democracy presupposed under the principle of democratic non-recognition substantive or merely procedural? Did the right of pro-democracy interventions presuppose the observance by the intervening party of some basic core of human rights obligations? If so, which ones? And what exactly did the concept of 'democracy' itself actually stand for: a majority-rule political system, republicanism, a market economy under a rule of law, a separation of powers or just some form of popular sovereignty and free elections? The problem with the broader body of discourse exalting international law's alleged democratic revolution, its critics concluded, was that it seemed to support all of these interpretations simultaneously which meant that it not only lacked sufficiently stable conceptual reference points but also tried to become, like the development discourse before it, all things to all men.

The effects of the anti-ILD critique did not take long to take root. Less than a decade after it was first put forward, Franck's assertion that the concept of democracy had finally attained a sufficient degree of determinacy to be deployable in legal settings increasingly came to be rejected.⁷⁰ The best one could say about democracy as an international legal category by the end of the 1990s was that it was an opaque 'riddle'⁷¹ and that the entire premise of international law's democratic revolution had been based on a mix of 'facile universalism' and an entirely 'superficial empirical account';⁷² the worst, that for international lawyers to have developed such a sudden interest in it was a symptom of millenarian frenzy.⁷³ Neither conclusion implied anything flattering about the intellectual and professional qualities of the pro-ILD camp.

Traditionally nothing more than 'a pejorative term in the writings of . . . political philosophers', wrote Roth,

'democracy' has in recent parlance been transmogrified into a repository of [concepts]: rule ratified by a manifestation of majority will (popular sovereignty); orderly mediation of political conflict through participatory mechanisms (polyarchic constitutionalism); individual freedom under law (liberalism); broad popular empowerment to affect the decisions that condition social life (democracy, properly so called); *et cetera*.⁷⁴

⁶⁹ See Carothers, *supra* note 52; Roth, 'Democratic Intolerance: Observations on Fox and Nolte', 37 *HILJ* (1996) 235; Marks, 'The End of History? Reflections on Some International Legal Theses', 8 *EJIL* (1997) 449; Koskenniemi, *supra* note 17.

⁷⁰ Franck, *supra* note 19, at 56–77. See also, in a similar vein, Fox, *supra* note 57, at 607.

⁷¹ Marks, *supra* note 52.

⁷² Carothers, *supra* note 52, at 262–266.

⁷³ See Marks, *supra* note 69; Marks, *supra* note 52, at 45.

⁷⁴ Roth, *supra* note 69, at 236.

The problem with this endless transmutation, remarked Roth, of course, was that no concept could mean so many different things and still 'continue to mean anything'.⁷⁵ The less easily identifiable the essential core of a concept was, the more difficult it was to build a functional legal regime around it.

There was nothing political about this protestation: it was just a matter of good legal technique, noted Roth, that legal concepts had to be built as rigorously and tightly as possible. Except, of course, that not having a good legal technique always brought with it huge political risks:

The consequence of this indeterminacy is that 'democracy' becomes identified with whichever choice engages our sympathies. All too often, democracy is equated with freedom and power for those members of foreign societies who most closely resemble ourselves.

The idea of an emerging right to democratic governance transfers this problem from the realm of rhetoric to the realm of legality. Once there, the problem migrates inexorably from the area of human rights to that of peace and security . . . The ultimate danger is that ideological legitimism, seen most recently in the form of the Reagan Doctrine, will capture international law. Even benevolent ideological legitimism will deprive international law of its indispensable role as an overlapping consensus among societies that otherwise radically differ on fundamental matters . . . A less benevolent ideological legitimism will make international law the plaything of interventionist powers.⁷⁶

Lack of critical self-reflection, failure to observe standard concept-building procedure, egregious political short-sightedness – every professional failing and flaw of which one could accuse an international law scholar gradually started to be cited by ILD critics against the democratic turn scholarship.

A particular pride of place in this litany of criticism belonged to the apparent inability of ILD enthusiasts to distinguish between reality and wishful thinking. What stood behind the whole democratic turn episode, hypothesized Carothers, was really nothing more than the lamentable 'American tendency to universalize at the drop of a hat and to disregard deeply rooted historical patterns'.⁷⁷ As a consequence, while in 'fact . . . many nations do not practice democracy and do not ascribe to it as an aspiration', ILD enthusiasts, writes Carothers, have gone on to imagine otherwise, giving in to 'a sweeping and simplistic view of the world' and blithely ignoring the fact that their egregious misrepresentation of the 'democratic tide' as a universal phenomenon 'actually [only] highlights [a] West versus non-West division and . . . the fact that [democracy] is, at root, a Western system that Western countries are seeking to apply to the entire world'.⁷⁸ In failing to attend to these important limitations, ILD enthusiasts have not only become the advocates of 'overstated universalism' but also have helped entrench an unjustifiably loose understanding of democracy that was simultaneously over- and under-inclusive and, as a result, had neither any diagnostic

⁷⁵ *Ibid.*

⁷⁶ *Ibid.*

⁷⁷ Carothers, *supra* note 52, at 263–264.

⁷⁸ *Ibid.*, at 264–266.

nor any programmatic value.⁷⁹ Predictably, all this in the long run threatened to ‘do harm rather than good’.⁸⁰

The theme of the simultaneous over- and under-inclusiveness of ILD’s theory of democracy also became an important nodal point in Marks’s argument. Noting, like Carothers, the tendency among ILD enthusiasts to reduce the idea of democracy to elections, Marks diagnoses the democratic turn scholarship as generally advocating what she terms a ‘low-intensity theory of democracy’. And yet, even though in practice many ILD scholars ‘act as if low intensity democracy were adequate or, at any rate, necessary, rational and normal’, she adds immediately, there can be little doubt that they also ‘look forward to the day when [this] spare notion of political democracy is supplemented’ by a more robust ‘commitment . . . to social . . . and pluralist democracy’.⁸¹ The resulting fuzziness of reference points, Marks’s argument implies, not only muddies the parameters of the original ILD hypothesis. It also creates room for masking and legitimizing a wide range of different forms of inequality and domination, since any criticism directed against ILD scholars’ apparent endorsement of a shallow proceduralist notion of democracy could be easily deflected by pointing towards their simultaneous endorsement of a more robust substantive notion and vice versa. The politics of this sort of enablement obviously serves neither left-leaning nor liberal emancipatory political causes. The only explanation that can make sense of it, in terms of ideology critique, then, is that the whole ILD project must have had an impressively close relationship with some form of neo-imperialism,⁸² a reading that seems to be reinforced, Marks notes, whenever one considers also the decidedly descriptive elements of the ILD discourse, such as, for instance, Slaughter’s depiction and interpretation of the apparent transnationalization of contemporary decision-making processes⁸³ or Franck’s continuous downplaying of international economic relations in favour of public international law and national-level institutionalism.⁸⁴ ‘One reason’ for the democratic turn scholarship being so ‘excessively optimistic’ about international law’s alleged democratic revolution, concluded Marks, was that, by focusing only on the more traditional public international law questions, it consistently ‘le[ft] out of consideration the impact of neo-liberal economic values, practices, and institutions’, including questions of ‘malnourishment, lack of access to basic education, [and] inadequate provision of health care’, making sure that ‘transnational business and associated agencies scarcely figure’ in the picture it paints.⁸⁵

There was nothing inevitable, of course, about this turn of argument. There was no overwhelming reason why the democratic turn scholarship had to meet precisely that set of tests which its critics posed at precisely that point in time when they did so. Nor

⁷⁹ *Ibid.*, at 265.

⁸⁰ *Ibid.*, at 266.

⁸¹ Marks, *supra* note 52, at 62.

⁸² *Ibid.*, at 54–62, 70–75.

⁸³ *Ibid.*, at 90–92.

⁸⁴ *Ibid.*, at 94–95.

⁸⁵ *Ibid.*, at 91.

was there any obvious reason why its programmatic vision necessarily had to include, in addition to those issues it covered, those issues that it did not, given that the issues it did cover already included such a broad range of problems: national-level institutionalism, human rights, public international legal system, trans-governmental networks, etc. What counts as rigorous legal scholarship and how much time should be allowed to a school of thought or a research agenda before its members can be criticized for inconsistency or lack of conceptual precision is neither self-evident nor objectively fixed. When the critics of ILD chose that line of attack against the democratic turn scholarship that they did, they carried out a 'move' that was as nakedly ideological in terms of its immediate effects as it seemed to be in bad faith in terms of its motivation.

No legal concept is 'born' fully determinate. What was required for the idea of democracy to become legally operative, as ILD scholars themselves consistently acknowledged, was a certain amount of follow-up secondary law-making and authoritative interpretation.⁸⁶ In the event, neither the former nor the latter seemed to have occurred – but only in the context of traditional international law sources and only if one assumes that these sorts of processes can be legitimately expected to occur within the extremely tight time-frames presumed by ILD critics.

No doubt: when it came to translating ILD's tetrapartite model into legal materials, no formally binding treaty regime had emerged by the end of the 1990s and no clearly discernible body of custom could be confirmed to have formed either. There was, however, more than enough evidence of a wide-ranging shift happening in the plane of the so-called 'soft law' sources: the Copenhagen and the Moscow Documents of the then Conference on Security and Cooperation in Europe (CSCE), a whole series of statements by various UN treaty bodies, several *obiter* pronouncements by European and inter-American human rights bodies, as well as a 1999 resolution by the then UN Commission on Human Rights on 'Promotion of the Right to Democracy'.⁸⁷ What is more, with barely more than five years to complete their conversations, the only way in which the democratic turn scholars could be expected to have worked out a uniform, logically coherent vision of ILD would be if they truly had become a cult or a conspiracy.

To claim, under these circumstances, that the ILD hypothesis fundamentally lacked a sufficiently determined conceptual core seemed to give much less of an insight into what the international consensus on ILD really was than what the critics of the ILD project assumed, i.e. that it is (a) the only way a fundamental legal reform can be effected in international law and (b) the only valid way the process of scholarly discourse in international law should develop.

But note now how closely the general argument structure of the anti-ILD narrative at this point follows the basic argument template used by the critics of NIEO. First come the references to professional naivety and the general lack of realism and hard-headed pragmatism: 'a sweeping and simplistic view of the world', 'universalizing at the

⁸⁶ Franck, *supra* note 19, at 56.

⁸⁷ UN94 Doc. E/CN.4/RES/1999/57 (27 April 1999). For further discussion, see Fox and Roth, *supra* note 34, at 2–4.

drop of a hat', a lack of critical self-reflection leading to 'ideological legitimism' that threatens international law's co-optation by imperialism. Then come the emphasis on conceptual fuzziness and enduring indeterminacies: the simultaneous over- and under-inclusiveness of definitions, the constant reliance on both shallow and robust notions of democracy, the tendency to assign terms and concepts far too many different meanings. And in the background behind all this slowly unfolds the parallel argument about technical proficiency and the mastery of the doctrine of sources. All this fervent theorizing done without any regard to the traditional tests imposed by the traditional doctrine of sources – could there be a greater sin for any serious international lawyer?

Taking the emergence of the latter trope as the litmus test for the assemblage of the full anti-utopianist narrative complex, looking back, it is not difficult to pinpoint the exact moment when the conventional wisdom about ILD as a lapse of reason and professionalism started to take root.

Consider the evolution of the general disciplinary consensus concerning the so-called principle of democratic legitimacy. The early 1990s had seen the greatest measure of enthusiasm for the idea. '[T]he law of recognition', writes an early exponent of the ILD project Fernando Tesón in the January 1992 issue of *Columbia Law Review*, 'should prohibit' the recognition of democratically illegitimate regimes: 'only democratic governments that respect human rights should be allowed to represent [states]', 'the law of diplomatic relations should be amended to deny diplomatic status to representative of illegitimate governments', 'conditions of admission and permanence in the United Nations' have to be amended accordingly and 'only democratic states [ought to] be accepted as new members' of the international community.⁸⁸ Note the tone and the timing of Tesón's argument: the article is published only a month after the dissolution of the USSR and the claims he is putting forward are still couched in the form of a policy proposal ('international law should') rather than a factual claim ('international law does'). The idea of the democratic revolution has not yet fully peaked and the politics of the democratic turn is still oriented towards the ideal and the imaginary.

Over the next few months, the situation rapidly changes. Alongside Tesón's, a number of other pro-ILD writings emerge that make it look like at the very least there is now a growing body of scholarly opinion in support of the principle of democratic legitimacy. The tone of the argument these writings advance, however, increasingly switches from the tentative idealism of the 'ought' to the assured positivism of the 'is'. In an article published in the summer of 1992, citing first the 1991 Moscow Document of the CSCE and then the contemporaneous statements of the Organization of American States regarding the coup in Haiti, Gregory Fox puts forward the idea that a momentous shift in the customary law of non-recognition may already be well under way.⁸⁹ A few months before that, Franck, in his ground-breaking work on the

⁸⁸ Tesón, *supra* note 22, at 100.

⁸⁹ Fox, *supra* note 57, at 539, 586, 607.

right to democratic governance, arrives in passing at an essentially similar conclusion: the rule 'which requires democracy to validate governance', he claims, has changed 'from [being] "mere" moral prescription to law . . . to impose new and important legal obligations on states'.⁹⁰ In the April 1993 issue of the *American Journal of International Law*, Slaughter repeats the same claim: '[t]he current criterion of "government" as one of the elements of statehood must logically give way to "democratic government"'.⁹¹

International law is what international lawyers ultimately say it is. The impact this litany of arguments had outside the ILD camp did not take long to become visible. A little more than a year after the appearance of Tesón, Franck and Fox's articles, the third edition of Louis Henkin and Oscar Schachter's highly influential *International Law: Cases and Materials* signals a cautious endorsement of the idea that the principle of democratic legitimacy may have already entered the general framework of the customary law of statehood and recognition. Like Franck and Fox, where Tesón and Slaughter had postulated an 'ought', Henkin and Schachter have something that looks very close to an 'is'. The brief review of the September 1991 speech by the then US Secretary of State, James Baker, and the December 1991 European Communities (EC) Declaration on the Guidelines on the Recognition of New States⁹² is formulated in terms implying that not only the obligation of 'safeguarding of human rights' but also the principle requiring 'support for democracy and the rule of law' were, if not already an established international custom, then at the very least a norm that was well on its way to becoming that.⁹³

The same year, commenting on the work of the Badinter commission, Alain Pellet, a rumoured co-author of some of the commission's opinions⁹⁴ and not a scholar generally known for easily departing from his positivist roots, pushed the argument slightly further. Not only, he writes, has the hitherto nearly unlimited freedom of states to grant or withhold recognition from one another become now constrained by the duty to confirm whether the new regimes have agreed to observe the norms of *jus cogens*, but it was also entirely right and proper that the principle of democratic legitimacy should have likewise become a part of the existing international law.⁹⁵

But that, in the end, is as far as it ever gets. By the middle of the decade, the tide started to turn. Writing in 1995, Antonio Cassese decides to qualify the EC's 1991 decision to make recognition conditional on democratic legitimacy as an idea so 'innovative . . . one could even term it revolutionary'.⁹⁶ To be sure, he adds immediately,

⁹⁰ Franck, *supra* note 19, at 47.

⁹¹ Slaughter Burley, 'International Law and International Relations Theory: A Dual Agenda', 87 *AJIL* (1993) 205, at 236.

⁹² EC Declaration on the Guidelines on the Recognition of New States in Eastern Europe and in the Soviet Union, 16 December 1991, (1992) 31 *ILM* 1486.

⁹³ L. Henkin et al. (eds), *International Law: Cases and Materials* (3rd ed. 1993) 250, at 250–251.

⁹⁴ See Fox, 'Self-Determination in the Post-Cold War Era: A New Internal Focus?', 16 *Michigan Journal of International Law* (1995) 733, at 750 n.82.

⁹⁵ Pellet, 'L'activité de la Commission d'arbitrage de la Conférence européenne pour la paix en Yougoslavie', 38 *Annuaire français de droit international* (1992) 220, at 228 ('Il est . . . bon et sain que le principe de légitimité . . . fasse irruption dans le droit').

⁹⁶ A. Cassese, *Self-Determination of Peoples: A Legal Reappraisal* (1995) 268.

‘the great emphasis laid by the [EC states] on respect for democracy and the rights of minorities . . . as a condition for the international endorsement and legitimation of independent statehood’, ‘coupled with the formal upholding of the principles of democracy by . . . developing countries’, are both ‘clear indications’ of an ‘emerging normative trend’.⁹⁷ But all that this means, he concludes, is that customary international law in this area is ‘in the process of changing’, nothing more.⁹⁸

Similar reservations appeared also in Rosalyn Higgins’s *Problems and Process* published in 1994. The ‘making of recognition conditional upon . . . the representative quality of a government’, writes Higgins, represents ‘a growing tendency’ in international law and can certainly be considered a sign of a rather commendable trend on the part of the international community ‘to harness every means at its disposal to encourage democracy and free choice’.⁹⁹ But it is still only a ‘policy’, she adds immediately, not an actual rule of customary law.¹⁰⁰

Over the next few years, the trend intensified. The most Peter Malanczuk could say about the principle of democratic legitimacy in 1997 was that it represented ‘a common position’ of the ‘European Community and its member states’, carefully avoiding making any pronouncements about its legal status.¹⁰¹

Two years later, Sean Murphy, a former legal adviser at the US State Department, arrived at an even more sceptical conclusion. While it is certainly plausible, he writes, that ‘the international community is [becoming] increasingly interested in democratic legitimacy as a factor in its recognition practice’,¹⁰² ‘it is difficult to see that [it] has taken the . . . step of crystallizing this notion as a legal norm, or is even over time moving towards such a legal norm’.¹⁰³ Relegating the principle of democratic legitimacy to the status of ‘just another policy element’, Murphy continues, may seem like ‘an unattractive conclusion’, but there is, alas, nothing in the existing international practice or treaty law that signals anything to the contrary. As things stand, he concludes, international law seems to have recognized neither a ‘norm obligating States not to recognize an emerging State simply because its political community is not democratic in nature’, nor ‘a norm permitting intervention so as to establish a democratic government’.¹⁰⁴

An only marginally less harsh verdict was delivered the same year by Brad Roth¹⁰⁵ and Thomas Grant.¹⁰⁶ Democracy had been repeatedly and ‘overtly declared a principle relevant to recognition’, writes Grant, but the patterns of state practice certainly

⁹⁷ *Ibid.*, at 338.

⁹⁸ *Ibid.*

⁹⁹ R. Higgins, *Problems & Process: International Law and How We Use It* (1994), at 44.

¹⁰⁰ *Ibid.*

¹⁰¹ Malanczuk, *supra* note 6, at 89.

¹⁰² Murphy, ‘Democratic Legitimacy and the Recognition of States and Governments’, 48 *International and Comparative Law Quarterly* (1999) 545, at 580.

¹⁰³ *Ibid.*, at 574.

¹⁰⁴ *Ibid.*, at 580.

¹⁰⁵ B. Roth, *Governmental Illegitimacy in International Law* (1999), at 142–152.

¹⁰⁶ Grant, ‘Defining Statehood: The Montevideo Convention and Its Discontents’, 37 *CJTL* (1999) 403.

put the lie to this idea.¹⁰⁷ And while, in principle, the criterion of democratic legitimacy could be something that a hypothetical drafting body charged with the task of codifying the future law of statehood and recognition might want to look into,¹⁰⁸ given its inherently political nature, adding it to the list of international legal criteria would certainly not help 'promote the rule of law'.¹⁰⁹

By the early 2000s, the turnaround had been completed. By the time the first edition of Malcolm Evans's collected volume *International Law* came out in 2003, the principle of democratic legitimacy, under the pen of Colin Warbrick, was safely relegated to the status of a merely 'discretionary test', the test itself was declared 'inchoate', the practice relating to its use was found to be at best 'inconsistent'¹¹⁰ and the 1991 EC Guidelines on the Recognition of New States – the very document that earlier had so excited Henkin and Schachter and encouraged Cassese and Higgins – was dismissed as nothing more than an attempt 'to take advantage' of a normatively unstable situation.¹¹¹ To believe that the principle of democratic legitimacy – or for that matter any other component of the purported new legal regime posited by ILD scholarship in the early 1990s – had any grounding in international law is now viewed as a sign of either ignorance born essentially of dilettantism and unprofessionalism or a lack of analytical rigour and good faith.

The theme of unprofessionalism and lack of rigour forms the most bellicose motif in the broader rhetorical complex of the anti-ILD standard narrative. Its greatest exponent at the start of the 2000s was the then Columbia Law School professor José Alvarez. The argument followed a familiar structure. Focusing on the specifically legal aspect of ILD scholars' arguments, noted Alvarez, inevitably made one question how any of them could have passed the test of good legal scholarship. The accuracy of their descriptive claims was in the best-case scenario questionable, and the wisdom of their prescriptive suggestions did not necessarily seem very sound either.¹¹² For instance, the explanations ILD scholars typically offered of how and why liberal democracies tended to act in the international legal arena did not seem to be borne out by any reliable evidence of state practice, but appeared to rely instead on entirely deductive and 'troublesome . . . assumptions'.¹¹³ Some of these shortcomings could probably be explained away as a by-product of a still-unfinished theoretical process.¹¹⁴ But many of them could not. Despite purporting to describe an international legal revolution that supposedly was universal, ILD scholarship, for instance, seemed to have nothing of value to say to any 'non-democratic countries' – other than, of course, that they should stop being non-democratic.¹¹⁵ What is more, much of what it also proposed in

¹⁰⁷ *Ibid.*, at 444.

¹⁰⁸ *Ibid.*, 450.

¹⁰⁹ *Ibid.*, 453.

¹¹⁰ Warbrick, 'States and Recognition in International Law', in M. Evans (ed.), *International Law* (1st edn.: 2003) 205, at 228.

¹¹¹ *Ibid.*, 256.

¹¹² Alvarez, *supra* note 52, at 193–194. See also *ibid.*, at 234.

¹¹³ *Ibid.*, at 195, 203–204, 207, 209.

¹¹⁴ *Ibid.*, at 192 n.57.

¹¹⁵ *Ibid.*, at 233.

respect of some of the less frequently noted international legal regimes, such as, for instance, the international law of civil aviation, seemed to be so ill-thought-through that, if realized in practice, they could only lead to completely disastrous or downright absurd consequences.¹¹⁶

No less conspicuous, continued Alvarez, was ILD scholars' tendency for serious analytical lapses, not least with regard to their failure to recognize the deep normative tensions between the logic of democratic governance and the general principle of the international rule of law. Even though '[f]ears that international obligations may be used to "short-circuit" democratic "checks and balances" are . . . at least as old as the [1920] US Supreme Court decision in *Missouri v. Holland*',¹¹⁷ and the continuing prevalence of precisely this scenario in practice offers actually a far better interpretative lens through which one can explain the general pattern of United States' interaction with many international legal regimes,¹¹⁸ there did not seem to be any recognition of this idea in the discourse produced by ILD enthusiasts such as Slaughter. Nor did there seem to be any recognition of just how anti-democratic, in fact, many of ILD scholars' second-order policy prescriptions were, such as, for example, their advocacy of highly non-transparent and unaccountable transgovernmental networks.¹¹⁹

In the end, the closer one looked at the democratic turn scholarship, Alvarez concluded, the more examples one found of questionable 'inferential leaps',¹²⁰ sloppy classifications, uncritical connotations between the unique and the general,¹²¹ 'large circularity problem[s]',¹²² 'false dichotomies',¹²³ 'vast' oversimplifications,¹²⁴ 'decidedly odd' uses of illustrations 'that fail[] to cite' well-known facts and examples of state practice 'despite their obvious relevance'¹²⁵ and overly enthusiastic generalizations that 'leap to conclusion[s]' based on little more than 'conjecture and anecdotal evidence'.¹²⁶ The result was an overwhelming impression of a scholarly project that was driven much more by the political prejudices of its proponents, dilettantism and a careless unfocused imagination than by sober reasoning, hard-headed professionalism and informed judgement.¹²⁷

A large part of the pro-ILD discourse, writes Marks, seems to revolve around the postulate that a 'right to vote and stand as a candidate in periodic multiparty elections' is linked directly to 'extend[ing] the scope of universally recognized human rights'. And yet even the briefest moment of critical reflection should be enough to work out

¹¹⁶ *Ibid.*

¹¹⁷ *Ibid.*, at 201.

¹¹⁸ *Ibid.*, at 202.

¹¹⁹ *Ibid.*, 228–230.

¹²⁰ *Ibid.*, at 221.

¹²¹ *Ibid.*, at 222.

¹²² *Ibid.*, at 208.

¹²³ *Ibid.*, at 212.

¹²⁴ *Ibid.*, at 213.

¹²⁵ *Ibid.*, at 215. See also discussion at *ibid.*, at 218–219.

¹²⁶ *Ibid.*, at 205, 219.

¹²⁷ *Ibid.*, at 239–240.

that a right to democratic governance might instead serve to reduce the scope of universally recognized rights, by reinforcing pressures to detach . . . civil and political rights from economic, social, cultural, and group-based rights and . . . legal relationships within nation-states from legal relationship which stretch across national boundaries.¹²⁸

The fact that no such critical reflection appears to have been attempted once again exposes a deep fundamental truth about pro-ILD scholarship. It may be confident in its optimism and fervent in its advocacy, but its mastery of legal reasoning is superficial, its awareness of legal technique is amateurish and its broader view of international law's place in the world is naïve and politically short-sighted. Whatever normative proposals it is likely to come up with, in the long run they are almost certainly going to bring more harm than good.

5 Conclusion: ILD and the Politics of Anti-Utopianism

Conventional wisdom holds that the entire ILD episode was essentially a product of overly excitable scholarly imagination. Whatever changes may have occurred within the broader legal-political space of global governance in the early post-Cold War period, they most certainly did not amount to international law becoming a platform for the universal promotion of democratic values. The right to democratic governance did not take root in the existing international legal system. The principle of democratic legitimacy did not supplant the rule of sovereign equality. Election monitoring did not evolve into a binding international custom. The idea of international law's democratic revolution was essentially nothing more than a fantasy, and the claims made about it by the supporting body of scholarship were wildly blown out of proportion. The kind of fundamental reorganization of the international legal system that was forecast by ILD enthusiasts like Franck, Fox and Slaughter never, in fact, took place, and the main legacy of that whole debate that their scholarship triggered is that international legal scholars should generally exercise a lot more analytical sobriety and restraint than was shown by the democratic turn tradition, and the best way to ensure that is to control one's political biases, exercise judgement and attend much more carefully to matters of technical legal reasoning.

This, in a nutshell, is the received memory of ILD – the content which this concept allegedly stood for and the disciplinary battles it eventually gave rise to – that has taken root in the broader disciplinary consciousness of the international law profession since the start of the new millennium, and the basic narrative on which this received memory relies, I want to suggest, is fundamentally wrong.

For starters, the only thing which the proponents of this narrative have actually been able to show international law's allegedly failed democratic revolution has truly failed at is (1) that it is taking place very quickly; and (2) that it is taking place specifically within the traditional parameters of the classical positivist doctrine of sources. Looking at what sort of reasoning would be able to justify equating this kind of record

¹²⁸ Marks, *supra* note 52, at 110.

with the idea of complete outright failure, it is difficult to see how the received memory of ILD could be considered a product of balanced, insightful or reasonable judgement.

To assume that any given claim about the alleged changes in the general structure of the international legal system can only be assessed by ascertaining how much of the proposed legal-political reform has been directly incorporated within the so-called ‘hard law’ materials seems at best question-begging. Unless one is a dyed-in-the-wool classical legal positivist, it is also an extremely arbitrary (not to say entirely illogical) approach to take.¹²⁹ The life of international law is not – either historically or discursively – limited by the structure of textual forms welcomed before the International Court of Justice. The idea that one can gauge the reality of any given international legal regime by inquiring after its formal status in the light of a century-old taxonomy of judicial argument templates – and one, moreover, that has been shown countless times to have no immediate connection to the actual realities of the international legal intercourse taking place outside the courtroom – is essentially an international lawyer’s equivalent of dropping one’s car keys in a dark alley and then deciding to search for them instead under the nearest streetlight because it is more convenient and there is more light there.

The argument which the conventional wisdom makes against the democratic turn tradition, however, does not limit itself to the claim that pro-ILD scholars had got the basic extent of international law’s democratic revolution wrong. It goes further than that. In the first place, it also suggests that the general theoretical attitude and analytical culture adopted by pro-ILD scholars were both fundamentally dilettantish (the bad legal technique claim) and politically irresponsible (the political short-sightedness claim). There was far too much lazy generalizing, far too much tolerance for conceptual indeterminacy, far too much speculative reasoning. In the second place, it argues, there was also not nearly enough theoretical prudence, analytical rigour and basic appreciation for matters of legal logic. In the third place, the democratic turn tradition, it claims, had also suffered from the general deficit of critical self-awareness – especially when it came to matters of neo-colonialism – and failed to pay sufficient attention to the potential implications of its proposals for the less obvious segments of global governance, such as access to healthcare or international civil aviation.

¹²⁹ Historically, as Roberto Ago points out, the principal *raison d’être* of the positivist turn in modern social theory was its promise of theoretical liberation from speculative dogma. See Ago, ‘Positive Law and International Law’, 51 *AJIL* (1957) 691, at 696. The key to this promise lay in positivism’s unwavering commitment to no-nonsense empiricism: by restricting the object of scientific inquiry only to those matters that could be verified by rigorous empirical observation, positivism, explains Ago, enabled modern social theory to free itself from all forms of speculative metaphysics, thus giving it the opportunity to concentrate its efforts on understanding the social reality in its full, historically given complexity. When positivism ‘arrived’ in the legal field, however, this basic model became quickly corrupted. Instead of staying true to its empiricist origins, writes Ago, positivism collapsed into *formalist solipsism*: ‘Not only was it stated that law created by formal sources is the only true law, but all those acts which are not direct or indirect manifestations of the will of the state [were] excluded from the category of “formal sources” of positive law’ (*ibid.*, at 698). From that, it was only a small logical step before one arrived at ‘the idea that legal science has no other means of knowing the legal force of a norm in any given system but to ascertain whether it was “laid down” historically by a “formal source” of that system’ (*ibid.*, at 701).

Like with most ideological arguments, there was, inevitably, a certain grain of truth behind most of these claims. Few of the charges raised by the anti-ILD camp against the democratic turn tradition were entirely baseless, and many seemed essentially justified. Still, the overall narrative they combined to produce, on the whole, was neither neutral nor particularly even-handed. It fudged some points and overemphasized others, added a little spin here and there and sidestepped and passed over a number of important details.¹³⁰ Most importantly, it subjected the democratic turn scholarship to tests and demands no theoretical project in a comparable position would have been able to pass.¹³¹

Much could be inferred from this *rhetorical setup*. The most important thing to note here, however, is that what stands behind it, ultimately, is not any grand political agenda – Politics with a capital 'P' – but rather a much more localized form of political sensibility, the kind that focuses on issues such as the task and purpose of international legal scholarship or the general division of labour within legal academia. And what was particularly significant about this sensibility in the present context was that its essential bias was deeply and unreservedly conservative.

Note the emphasis placed on the concept of the rhetorical setup. It is not the individual tropes – the building blocks of an argument – but the anti-ILD narrative itself – the overall construct that is built from these blocks – that channels this kind

¹³⁰ One of these fudgings was the constant flattening and essentialization of the democratic turn tradition. What the critics of the ILD project presented as a fundamentally solid, internally undifferentiated monolith, on closer examination often came across as much more of a patchwork – a constellation of several fairly distinct projects and traditions that had come together only at a relatively late stage. To take but the most obvious example: for most of the 1970s and the 1980s, the left-leaning, human rights-focused international liberalism championed by the likes of Franck, a long-time supporter of the NIEO cause and a critic of US hegemony, had placed itself in conscious opposition to the Cold-War hegemonic democratic crusaders led by the likes of Reisman. The cascade of ideological implosions that ran through the discipline's socio-cultural space at the end of the Cold War threw temporarily the two camps into the same lobby. But it certainly did not fuse them. Whatever rifts had existed between them continued to remain, a fact that is perhaps evident nowhere more clearly than in the sharp theoretical distinctions between the basic analytical protocols each of them proposed to follow to prove the emergence of ILD. Compare, for example, Reisman's aggressive use of deductive teleological reasoning that constantly draws on abstract legal concepts as if they were self-evident natural law-style facts, as illustrated in Reisman, *supra* note 27, with Franck's attempt to combine a moderately critical version of sociolegal jurisprudence with relatively traditional formalist positivism that 'simply' ended up attributing too much probative value to soft law instruments, as illustrated in Franck, *supra* note 19. (Note that this sort of structuralist distinction is still different from the sort of non-structuralist distinctions described in note 52 above.)

¹³¹ No one doubts, for example, that the principle of self-determination has solid enough roots in contemporary international law. But how much theoretical consistency or conceptual determinacy can one find within the corresponding scholarly discourse? Compare, e.g., C. Tomuschat (ed.), *Modern Law of Self-Determination* (1993); T. Musgrave, *Self-Determination and National Minorities* (1997); B. Bowring, *The Degradation of the International Legal Order?* (2008), at 9–38; Fernandez, 'The Arab Spring: A New Season for Self-Determination', 47 *NYUJILP* (2015) 647. How much attention has this discourse typically paid to the fact that advocating the right of every people to determine its own political and legal regimes can jeopardize the smooth functioning of international civil aviation or is unlikely to address the disparities in access to healthcare? No less importantly: how much of the content commonly ascribed to the concept of self-determination could actually be traced to 'hard law' sources within the first decade of its promulgation?

of intra-disciplinary politics. There is nothing inherently conservative or progressive about the argument that sloppy reasoning is bad or the idea that proficiency in matters of technical legal analysis should be generally encouraged. It is how these and other related tropes are actually put together and articulated vis-à-vis one another – and in response to what theoretical battles – that gives the respective piece of discourse its conservative or progressive ideological charge.

The function of all mythologies, explains Levi-Strauss, is to work out imaginary resolutions to irresolvable social contradictions.¹³² The intra-disciplinary ideology that gave meaning to the kind of attacks that were launched against the democratic turn scholarship around the start of the new millennium was grounded, ultimately, in one of the oldest mythologies in international law – the fantasy of international legal thought as a form of quasi-scientific knowledge production grounded ostensibly in the empiricist study of the external realities of state practice. Despite its scientific pretensions, the basic model for the division of intellectual labour implied by this mythology has no immediate parallels in any natural, social or human sciences. Its setup is fundamentally communitarian, its structure is relentlessly dualist and its culture is deeply hierarchical. At its root lies a worldview not unlike that of Nietzsche's 'ascetic ideal'¹³³ and a mechanism of misrecognition once described by Ludwig Feuerbach under the rubric of 'alienation'¹³⁴ and Jean-Paul Sartre under the rubric of 'bad faith'.¹³⁵ What is it exactly that gives this ideology an ascetic flavour? Where does the misrecognition element come from? What sort of political implications does its persistence raise for international law as a *governance project* and a *learned profession*? None of these questions lends itself to a quick and easy answer. The argument that explores them in sufficient detail, will have, for now, to be postponed.

Where does this leave the rest of this argument then? The answer should not be too hard to work out. The difficulty of grasping the broader significance of the ILD episode, in the end, comes down precisely to that fundamental distinction between politics with a capital 'P' and the more local, specifically disciplinary ideological struggles noted above. The two domains often find themselves in tension, and the *politics of the vision* propounded by ILD enthusiasts offers a textbook illustration of this tendency. The *ideological content of the actual arguments* they put forward about *international law as a legal system* leaned unmistakably in a direction that most international lawyers who had been brought up against the background of the Cold War and the post-decolonization debates about neo-colonialism would readily recognize as a fundamentally reactionary political agenda. But the *ideological practice of the scholarly discourse* by means of which these arguments were entered into the disciplinary debate expressed at the same time, though never coherently or self-consciously, a vision of an *international*

¹³² Levi-Strauss, *supra* note 13, at 229.

¹³³ See F. Nietzsche, *On the Genealogy of Morality*, trans. C. Diethe (Cambridge University Press, 1994), at 72–128.

¹³⁴ See L. Feuerbach, *The Essence of Christianity*, trans. G. Eliot (Prometheus Books, 1989), at 213–235.

¹³⁵ See J.-P. Sartre, *Being and Nothingness: An Essay on Phenomenological Ontology*, trans. H. E. Barnes (Routledge, 2003), at 70–94.

legal discipline freed not only from the shackles of the old formalist doctrine of sources but also from the broader project of classical positivist reason. Chastising pro-ILD scholars for failing to follow the traditional protocols of disciplinary competence and professional judgment offered a good strategy for neutralizing the potential impact of their discourse in the broader world outside the intra-disciplinary cloisters. But the fact that this strategy had to rely on reinforcing a fundamentally conservative model of legal scholarship helped at the same time to re-legitimize not only the old Victorian belief that the process of knowledge production in 'international legal science' should really only draw on those data that are supplied to it by the world of 'international legal practice',¹³⁶ i.e. that are left behind for it by some *hazily defined community of legal practitioner-beings*,¹³⁷ but also the assumption that when it comes to judging the quality of its final knowledge-products, the value of international legal scholarship should only be determined in reference to those criteria that are rooted in *that community's supposed economy of intellectual needs and concerns* – rather than, say, the broader economy of interdisciplinary knowledge-exchanges or the post-modern economy of theoretical inspiration. Or, to put it slightly more bluntly, to limit the democratic turn's potentially reactionary impact in the external dimension, the anti-ILD camp had ended up re-entrenching within the discipline's internal socio-cultural arena an ideology of knowledge production whose general political bias, *from the standpoint of its broader implications for the organization of the academic labour process*, seems to be not only alienating and hierarchical but also essentially right-wing.¹³⁸

¹³⁶ See, e.g., Oppenheim, 'The Science of International Law: Its Task and Method', 2 *AJIL* (1908) 313.

¹³⁷ David Kennedy captures this theme quite clearly:

The key here is that there is another group of people called 'practitioners', for whom scholars are doing this work and who will judge its persuasiveness and ultimate value. However argumentative and critical this work may be, it will ultimately be judged not by other scholars on the basis of its arguments, but by practitioners on the basis of its usefulness. When scholars do judge this sort of work, they do so by reference to the often imaginary eye of the practitioner[, presuming that] when practitioner-beings assess things, they do so with their eyes wide open, unaffected by the fashions and egos that can befuddle scholars. Their focus is relentlessly on the real world where the rubber meets the road, and it is their judgment, or predictions about their judgment, that guarantees the pragmatism and political neutrality of the field's development. . . . So long as it is the practitioner-being who selects among the ideas on offer, we can be sure that the dominance of one idea over another, or the distribution of ideas in the field at any given time, is the result of an idea's usefulness, of its 'merit' in the world.

Kennedy, 'When Renewal Repeats: Thinking against the Box', 32 *NYUJILP* (2000) 335, at 399.

¹³⁸ Again, not all anti-ILD scholars would have experienced the politics of their intervention the same way. It would be incorrect, in this regard, to ignore the multiplicity of the ideological impulses carried by different pieces of anti-ILD writing or the generally overdetermined character of each individual act of anti-ILD scholarship. For instance, Marks's *The Riddle of All Constitutions* (*supra* note 52) and Carothers's 'Empirical Perspectives' (*supra* note 52) quite obviously channel very different conceptions of what good international legal scholarship ought to be. Given the level of each text's theoretical ambition, one might say there is certainly a lot more to both of them than them just being 'anti-ILD texts'. But see again the discussion in *supra* note 52 and the surrounding text: what the present argument focuses on is the body of collective belief that these different acts of scholarship help reproduce, not the individual texts themselves or the personal phenomenologies of their authors.

