Reasonable stability vs. radical indeterminacy
A disanalogy between domestic rule of law and humanity-based international law

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Non domandarci la formula che mondi possa aprirti,
si qualche storta sillaba e secca come un ramo.
Codesto solo oggi possiamo dirti,
ciò che non siamo, ciò che non vogliamo.

Eugenio Montale, “Non chiederci la parola”, in Ossi di Seppia (1923)¹

The main argument of this article is based on a functional disanalogy between what I shall call ‘international humanity-based law’ constituted by human rights and criminal law on the one hand, and domestic rule of law on the other. If we adopt a functionalist approach, for the purpose of dealing with indeterminacy, our attention has to focus both on the pragmatic objective of the rule of law, i.e., reasonable stability, and on its means, i.e., formalism and legality. Do international key players share these values embedded in the political project of the rule of law? Does humanity-based international law fulfill the requirements of the rule of law? The conclusion of this paper is that the institutions and mechanisms which legal scholars usually refer to when they state that a legal order is a rule of law are almost absent from humanity-based international law. This implies that radical indeterminacy is, in issues of humanity, too formidable an obstacle to achieving the ideal of the rule of law.

Keywords: rule of law, formalism, international law, humanity, deep conventions, indeterminacy

1 INTRODUCTION

In this paper, by identifying some deep differences between domestic and international law, I shall present some arguments about what international law is not, and about what its key players do not want. If I am right, there is a risk

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¹ “Don’t ask me for formulas to open worlds for you: all I have are gnarled syllables, branch-dry. All I can tell you now is this: what we are not, what we do not want.” Translation by W. Arrowsmith, in E. Montale, Cuttlefish Bones (1994).
that some discourses on international law – those that underestimate these differences – sacrifice neutrality on the altar of an ideological pursuit or are, at the very least, victims of irrational hope.²

Of course, the fact in itself that a theory has a normative goal is not a problem at all. The problem arises when the line between description and prescription is blurred.³ Statements about actual law lose all pretension to scientificity if there is an evident mismatch with the reality they pretend to purport.⁴ Such statements would be meaningful if and only if we reinterpreted them as statements about the ought of a legal order⁵ or about a possible future world. And, if this future world appeared very remote or clearly unbelievable to the majority of observers, it would belong to the utopian discourse.⁶ Utopia may be a good thing as long as all confusion is avoided. Nevertheless, when a utopian attitude is very powerful and pervasive, observational activity may be, even if unconsciously, distorted.

The issue is not trivial. Although some have argued that “if as international lawyers we want to participate and find consolation in the utopian project of international law, we need to do this not as scholars, but as practitioners”⁷ others have replied that, given an appropriate distinction between a ‘realistic’ and an ‘illusionary’ utopia, the first one is “emphatically the province of legal scholars”.⁸ Maybe this province is not monolithic, and this reply makes sense only if we refer to (mainstream liberal) constitutionalist legal scholarship.⁹ This contrast shows that there is a plurality of international legal theories (and scholars). The realistic utopia proposed by Cassese in his recent book¹⁰ seems to be a para-

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² About the concept of hope and its rationality, see Pettit 2004.
³ According to Kennedy (2011), this overlap between description and prescription, theory and practice, conceptual analysis and critical reform, is probably a typical trait of the post-realist legal scholarship.
⁴ This is the case, according to Condorelli (2012: 156), of the hope for a future judicial review of the UN Security Council resolutions.
⁵ As underlined by Mégret (2012: 75), from an idealist perspective, “[i]nternational law is, in a sense, because it must be”.
⁶ When we believe, for certain, that something will not happen, there is no room for rational hope: this belief belongs to the typical (irrational) utopian domain. See Pettit 2004: 154.
⁷ Feichtner 2012: 1157.
⁸ Peters 2013: 552.
⁹ Johns 2009: 5. About the liberal mainstream in international legal scholarship, see Kennedy 2011.
¹⁰ Cassese 2012a. There is no room here for a full reconstruction of Cassese’s theory. Nonetheless, the book itself and the articles recently published on the topic – see Feichtner 2012, Peters 2013, and Ruiz Fabri 2012 – are clear and rich enough to offer a general idea of his reformist approach. In this article, I shall spend some more lines on the reconstruction of the Dworkinian approach to international law, not only because it is less known amongst internationalist scholars than Cassese’s works, but also because it shares some form of optimism with Cassese.
gmatic example of the reformist trend. The prominent reformist Lauterpacht once said that “the more international law approaches the standards of municipal law, the more it approximates those standards of morals and order which are the ultimate foundation of all law”; the strongest reason that he had for defending the improbable domestic analogy was the fight against the deniers of the legal nature of international law and their “insistence on the so-called specific character of international law”. As long as the reformist attitude is, at least genealogically, deeply related to the domestic analogy, I think that taking the difference between domestic and international law seriously is salutary. If this difference is too deep, then reformists (those who believe in a realistic utopia) have to be reclassified as idealists (those who believe in an illusionary utopia). To understand how some difference can be deep, I shall introduce the notion of ‘deep convention’ and the notion of ‘value-based law’, suggesting that rule-based law and value-based law are not built on the same deep convention. Then, I shall establish a connection between a rule-based model of decision-making as proposed by Schauer, the concept of the ‘rule of law’ and the value of stability, and I shall argue that some universalising style of legal reasoning sets forth on a path to reconciling the sceptical particularist claim with the formalist claim of stability. Finally, I shall claim that, even if indeterminacy potentially affects both domestic and international law in a similar way, only the first, by virtue of a more formalistic judicial reasoning, maintains itself as a relatively stable legal system. For a domestic legal system to be a rule of law, key players have to share the need for a high level of predictability. Even if in many cases they disagree about what the right answer is, they agree about the necessity of making decisions that could constitute, at least potentially, a precedent.

12 Lauterpacht 2011: 440. As pointed out by Paz (2012a: 242), Lauterpacht’s extension of “the tradition of the ‘rule of law’ … to the international level” is perfectly understandable. About the problem of the transplantation syndrome, see Puppo (2012: 220), and, about Dworkin’s philosophy of international law specifically, see Jovanović (2015: 451-453) and Çali (2009: 822).
13 It is probably not true that the domestic analogy is constitutive of the reformist approach. I recognise this point as long as it is not always true that the reformist scholar bases her approach on the domestic analogy. Nevertheless, it is still true that, from Kelsen through Lauterpacht to Cassese, the ideal which is supposed to inspire the reform of international law is constructed on the basis of the best expressions of domestic law, that is, the constitutional state. In other words, as long as the reformist takes the train of global constitutionalism, it is difficult to deny that such a train is moved (or has historically been moved) by a domestic locomotive.
14 In the last section, I shall take into account the philosophy of international law proposed by Dworkin (2013) as an example of both the domestic analogy and utopianism.
16 The deep relation between the technique of stare decisis and the value of stability is stressed by Schauer (2012: 43-44) and Waldron (2012).
By contrast, international law mismatches the model of the rule of law because of a deliberate de-formalisation of law-ascertainment\(^\text{17}\) and legal reasoning. The difference between domestic and international law is, therefore, placed on the level of legal institutions as responses to some deep purposes, social needs or, in the case of humanity-based law, *oceanic feelings* (4).

The key idea of my argument is a functional conception of the rule of law. Despite the global constitutionalist mainstream that grounds the concept of an international rule of law on domestic analogies, I shall base my argument on a disanalogy. Given a functionalist conception of the rule of law, my conclusion will be that the institutions, which we refer to when we affirm that a legal order fulfils the requirements of the rule of law, are absent from international law, at least in some of its paradigmatic expressions, such as humanity-based law.

### 2 HUMANITY-BASED LAW VS. THE RULE OF LAW: A FUNCTIONALIST APPROACH

Deep conventions say something about the function of the game, while surface conventions say something about the functioning (or the structure) of the game.\(^\text{18}\) There is one game, but two social practices. The second practice identifies the sources of international law; it is the practice of law-ascertainment.\(^\text{19}\) The first practice, normally invisible, constitutes the legal game itself. If we are actively looking for the rule which is applicable to some international case, when we disagree, for example, about the existence of a particular international customary norm – and perhaps even about the function of international law – it is because we agree about the possibility and the valuable character of the game (international law) and the existence of some social sources.

Such a distinction is ultimately relevant because of the existence of two fundamental legal practices and two questions about the legal game. The first question is “Why do we play?”, and the second “How do we play?”. If there is a difference between domestic and international law, it can be found at a deeper level. Even if domestic and international players can play together in an apparently harmonic way, the reasons that they have for playing and, consequently, the definitional properties of the game are profoundly different. To the extent that

\(^{17}\) About the actual tendency towards de-formalisation, and the need for rejuvenating and revitalising a formalist approach (in law-ascertainment), see d’Aspremont 2011a.

\(^{18}\) The distinction between deep and surface conventions has recently been introduced in analytical legal theory by Marmor 2009. The same intuition, perhaps most articulated, was formulated by Tuori (1997) and developed by Siltala (2000: 151-267). For a deeper analysis of this concept, its relation to the rule of law, and an extensive bibliography, see Puppo 2011.

\(^{19}\) See d’Aspremont 2011, resting his formalist approach to the practice of law-ascertainment on the positivistic *sources* thesis.
I take seriously the answer to the question “Why do we play?”, I have adopted a functionalist point of view.

My functionalist approach emphasises the institutional character of law, the inseparability of law and social needs, but it does not deny that the functioning of such institutions relies on rules and even less that it can be aimed at satisfying the requirement of stability or, in Llewellyn’s terms, of *reckonability*, taken as *reasonable regularity*.20 In a nutshell: the realist or functionalist approaches are, in my view, perfectly compatible with a rule-based explanation.21

My point here is that the deep convention of a non-pathological domestic law is certainly related to the notion of the rule of law.22 Because everyone interested in legal and political questions probably has their own definition of the rule of law, it is here necessary to stipulate a working definition. I shall adopt a formalist/procedural23 conception of the rule of law, as originally proposed by Dicey.24 This stipulation is not arbitrary, because it most likely reflects a relevant contemporary tendency amongst international scholars25 and legal philosophers.26 Dicey distinguishes between three meanings of the *rule of law*. I am, above all, interested in the first two. The first one is as follows: “[it is] the absolute supremacy or predominance of regular law as opposed to the influence of arbitrary power, and excludes the existence of arbitrariness, of prerogative, or even of wide discretionary authority on the part of the government”;27 and the second: “[it is] the equal subjection of all classes to the ordinary law of the land administered by the ordinary Law Courts”.28

A similar approach has been proposed by Waldron who identifies four features of the formal/procedural concept of the rule of law:29

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21 It should be noted that, contrary to the reading of American realism divulged by Hart (1994: ch. 7), Schauer (2011) suggests that Llewellyn has never doubted the possibility for judges to decide on the basis of pre-existing rules.
22 In this sense, a pathological legal system is still an instantiation of what we could call ‘law’, but it does not fulfil the requirements of the rule of law.
23 About the classical distinction between formalist and substantive conceptions, see Craig (1997).
24 Dicey 1915. According to Dyzenhaus (1999: 10), “[i]n the public law model of England and in those legal orders which follow the English model, the most influential understanding of the rule of law remains that put forward in 1885 by Albert Venn Dicey”.
26 See Waldron 2012; Schauer 2012: 30-55; MacCormick 1999: 165. The same conception – as stated by Dyzenhaus (1996: 644) – is implicit in Weber’s rational authority: “all that legal order can do is to make social life relatively stable by making it to a large extent certain and predictable”.
27 Dicey 1915: 198.
28 Dicey 1915: 189.
1. a requirement that people in positions of authority should exercise their power within a constraining framework of public norms rather than on the basis of their own preferences or ideology;

2. a requirement that there be general rules laid down clearly in advance, rules whose public presence enables people to figure out what is required of them, what the legal consequences of their actions will be, and what they can rely on so far as official action is concerned;

3. a requirement that there be courts, which operate according to recognized standards of procedural due process or natural justice, offering an impartial forum in which disputes can be resolved, and allowing people an opportunity to present evidence and make arguments before impartial and independent adjudicators to challenge the legality of official action, particularly when it impacts on vital interests in life, liberty, or economic well-being;

4. a principle of legal equality, which ensures that the law is the same for everyone, that everyone has access to the courts, and that no one is above the law.

The descriptive question of the function of international law can then be formulated in terms of the rule of law. If we adopt a functionalist approach, our attention has to focus both on the pragmatic objective of the rule of law, i.e., reasonable stability, and on its means, i.e., formalism and legality. Do international key players share these values embedded in the political project of the rule of law? Does international law fulfill the requirements of the rule of law? A negative answer to the second question is problematic if and only if we give an affirmative answer to the first one. As long as scholars seem to agree about the correctness of the negative answer to the second question, the real disagreement concerns the first one. If the answer is negative, the requirements of the rule of law are seemingly irrelevant in the international context. Such irrelevance neither means nor implies the negation of the mere existence of a legal system at the international level; it only means that such an international system cannot be judged – and its performance measured – on the basis of the criteria usually considered to be constitutive of the rule of law.

To answer these questions, it is necessary to introduce a working definition into the second element of the sketched disanalogy, that is, to define what I shall consider to be the reference of the expression ‘international law’. As long as it is true that international law is characterised by fragmentation and is, therefore, a multi-dimensional practice, I shall identify, amongst several dimensions of international legal reasoning (or judicial function), a paradigmatic one, which probably aims to solve what Morgenthau calls tensions,30 and which I shall take as my case study.

30 Morgenthau opposes disputes and tensions. On this distinction, elaborated in his doctoral dissertation and refined in Morgenthau 1948: 342-349, see Jütersonke (2012: 51 and Scheuerman (2008: 38). A tension is a situation “involving a discrepancy, asserted by one state against another, between the legal situation on the one hand and the actual power relation on
The key players of this dimension are the “organs of a value-based international community”, whose first strong performance was the consequence of World War II crimes, and whose main goal is the protection of humanity; this dimension’s paradigmatic case is human rights and criminal courts. In the humanity-based dimension, judges (and scholars) consider themselves to be part of a mission, the very purpose of a Kantian project: the global constitutionalist project and the universal path to perpetual peace are undoubtedly two paradigmatic features of this dimension.

I think the increasing presence of international law in both legal and political discourse is due to this dimension, probably because many international legal scholars imagine the future of international law through this potentially supranational and imperative dimension, as if it were the telos of international law. The realistic utopia of international scholars is inseparable from this telos.

A foundational moment in the development of this dimension was undoubtedly the introduction of jus cogens in the Vienna Convention. That experience shows paradigmatically what I try to demonstrate: international indeterminacy as a result of a deep disagreement between states, and probably as a result of the need to preserve the liberty of states. Taking into consideration that it was impossible to come to an agreement about which principles deserve the status of jus cogens, states introduced jus cogens as a validity criterion, but did not specify a formal list of jus cogens norms. So, a fundamental step in the construction of the value-based dimension of adjudication was characterised by a choice which avoided all formal criterion, a choice in favour of indeterminacy, a choice against rules, formalism and, finally, against the rule of law, a choice which inevitably sacrifices the value of stability, which the next section is dedicated to.

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31 Von Bogdandy & Venzke 2013: 52.
32 Von Bogdandy & Venzke 2013: 63-68.
33 See, as a paradigmatic example, Cassese (2012b: 170) and the penetrating analysis by Ruiz Fabri (2012: 1053). According to Mégret (2012: 75-76), “[t]his idea that there is something prior – and, unmistakably, higher – than the state is the defining mark of idealism, and is particularly apparent in contemporary discourse that emphasizes the importance of human rights, for example, as a basic precondition of legitimate statehood”.
34 It is possible to consider jus cogens norms in a different way: such norms work as the ultimate criterion of validity, and it is precisely due to this that they contribute to the enhancement of determinacy at the international level. This would be true if international courts determined the content of such norms effectively. This is the thinking, I guess, of many international scholars insisting on the positive contribution of the International Court of Justice (ICJ) and the International Law Commission on the Responsibility of States to determining the content of jus cogens norms. I could agree with this statement if the judicial international context was limited to the ICJ and the European Court of Human Rights. But, if one takes into account the contribution of the Inter-American Court of Human Rights – which attributes the status...
3 RULE OF LAW AND RELATIVE STABILITY: TAKING UNIVERSALISABILITY SERIOUSLY

Functionally, legality is, above all, a powerful tool to plan and control the behaviour of individuals, especially those who, in a given social group, do not share the planners’ intentions.\textsuperscript{35} It is probable that determinacy and stability were the needs which legality mechanisms satisfied. These needs explain the obvious formalistic preference for written legal sources, as well as for legal arguments based on the text, rather than on the spirit of law.\textsuperscript{36}

This connotation, if historically justified, could be replaced with a better one: a rejuvenated (neo- or functionalist) formalism\textsuperscript{37} is an important tool to understand how lawyers think\textsuperscript{38} and eventually to impose a normative framework, especially in international law, a framework which is able to limit the effects of an increasing deformalisation of legal sources.\textsuperscript{39}

If we take rules seriously, we necessarily adopt a formalist-like point of view. If rules are not bad, then neither is some kind of formalism. In his book \textit{Playing by the Rules}, Schauer defends a rule-based model of decision-making, according to which law is a set of rules, and rules work as entrenched generalisations.\textsuperscript{40} The rule-based model of decision-making is not a guarantee of right answers or a miraculous remedy against indeterminacy. It is, plausibly, what we need if our purpose is to limit arbitrariness without denying the judicial use of discretion, discretion being a situation in which “some institution with the power to control or review will let stand a multiplicity of quite different decisions, including some that the controlling institutions might think wrong”.\textsuperscript{41} How could this miracle be possible? How could discretion satisfy the requirements of the rule of law? By, in our view, a neo-formalist insistence on the possibility of universalising discretionary decisions, that is, by conceiving a world in which indeterminacy and an acceptable level of stability are compatible.

Despite the inevitable feature of over- and under-inclusion, the stability of a national legal system is preserved if and only if the model of decision-making is of \textit{ius cogens} to an increasing quantity of norms – the resulting panorama is nearer to what I claim in this paper than to the one considered by such optimistic opinion.

\textsuperscript{35} Shapiro 2010.
\textsuperscript{36} Schauer 2012: 30. See also Leiter 2010.
\textsuperscript{37} About the international theory side, see Koskenniemi 2006 and d’Aspremont 2011a. On a purely theoretical point of view, see Shapiro 2010, Marmor 2009 and Schauer 2012.
\textsuperscript{38} Schauer 2012.
\textsuperscript{39} To the extent that the most relevant social practice, from the positivist perspective shared by d’Aspremont (2011a: 51-62), is a judicial practice, I think that switching from formalism in law-ascertainment to formalism in judicial decision-making is not an arbitrary move.
\textsuperscript{40} See Schauer 1991: 17 and 47 (on the entrenched feature).
\textsuperscript{41} Schauer 2012: 191.
rule-based and not a particularistic model (according to which judges, in each case, apply the solution that best satisfies the underlying justification of a rule).  

The rule-based model treats “the form of a legal rule as more important than its deeper purpose”. Conversely, according to a particularistic model “no rule is more important than the reason for which it is enacted”. Notwithstanding the possible injustice of a solution, the rule-based model satisfies the value of relative stability. This value is essential to the rule of law, whose social function is to establish the best conditions for agents to follow plans without solving difficult moral questions. From Hayek to Waldron, several theorists have recognised constancy, stability and predictability as values protected and/or pursued by the rule of law. According to Hayek, the rule of law makes it possible “to foresee with fair certainty how the authority will use its coercive powers in given circumstances and to plan one’s individual affairs on the basis of this knowledge”. When the virtue of the rule of law is absent, “people will find it difficult to find out what the law is at any given moment and will be constantly in fear that the law has been changed since they last learnt what it was”. The fact that many of “the rule-of-law arguments for constancy involve the values of certainty, predictability and respecting established expectations” has been perfectly captured by Schauer:

there is an important group of values – predictability of result, uniformity of treatment […] and fear of granting unfettered discretion to individual decision-makers […] – that the legal system, especially, thinks it valuable to preserve. These values often go by the name of the Rule of Law, and many of the virtues of the Rule of Law are ones that are accomplished by taking rules seriously as rules.

This requirement of relative stability is, in my opinion, compatible with the recognition of another need, the particularistic need for adequacy. Even if, as

42 About the distinction between the two models, see Schauer 1991: 51.
45 Shapiro 2010.
46 Hayek 2007: 112.
47 Raz 1979a: 214. In some way, according to Raz, (a formalist conception of) the rule of law is the virtue that can limit the dangers of both naked power and morality. On that, see also Koskenniemi (2002: 174), referring to a turn to ethics in international law: “In such a situation, insistence on rules, processes, and the whole culture of formalism now turns into a strategy of resistance”. This is so because “formalism is precisely about setting limits to the impulses – ‘moral’ or not – of those in decision-making positions in order to fulfill general, instead of particular, interests.”
48 Waldron 2012: 28. See also Beckett (2006: 1068), who reconstructs Koskenniemi’s neoformalism: “Although any given legal norm can bear any desired meaning, the only formally valid interpretations are those capable of universalisation, of repetition.”
49 Schauer 2012: 35.
has rightly been noted by Atria, the need for certainty could not be satisfied without sacrificing the need for adequacy. I nonetheless think that the need for reasonable or relative stability is able to capture what we could call a meta-need embracing a sustainable dose of the above two needs. Neither absolute certainty nor absolute particularism is desirable. If absolute certainty is the archetypical formalist noble dream, then relative stability is the realist version of this noble dream. Actually, relative stability is what we can fulfil if we recognise that intrinsic indeterminacy affects any normative order.

By the way, the notion of indeterminacy is very ambiguous. If we understand indeterminacy to be the absence of a determinate response to some relevant question, it seems plausible to me to distinguish between four levels of indeterminacy. The first concerns the applicability of a determinate rule to some real situation (e.g., is a given situation a case of genocide?). The solution is indeterminate because we disagree about how we are to juridically qualify the facts of the case. The second concerns the identification of the meaning of some legal provision (e.g., what does the term ‘genocide’ mean in the Statute of the International Criminal Court?). The third concerns the identification of legal sources (e.g., does a specific customary practice exist?). The fourth concerns the function or purpose of the whole institution. What is international law for?

Only the last form of indeterminacy is deep or radical indeterminacy. The first three categories of indeterminacy are, in some way, a normal feature of any domestic legal system and are perfectly compatible with the formalism of the rule-based model of decision-making. What I mean to say is that the realist claim about indeterminacy is perfectly consistent with the formalist approach to decision-making. Radical indeterminacy, if present, underdetermines the other three levels: “we simply cannot (determinately, objectively or authoritatively) answer the question of what law says until we have answered the question of what law is”.

Of course, this last statement needs some further explanations. According to the mainstream positivist approach, what the content of a legal system is does not depend on what law is for. The identification of legal norms depends on social facts, and not on ontological considerations about the nature and/or purpose of a legal order whose content has to be identified. But this approach, in some cases, as in Raz’s theory, is explicitly limited to municipal law, precisely because of the social sources (such as legislation) that have historically characterised

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50 Atria 1999: 82.
51 See Hart 1983: 138, where he classifies Llewellyn’s realist conception of adjudication closer to the noble dream than to the nightmare.
54 See Raz 1979b.
municipal legal orders. When no strong social source exists – or, at least, when some crucial sources (such as customs, principles and *jus cogens*)\(^{55}\) are difficult to identify – and when there is no supreme court whose rulings can authoritatively establish (even if not permanently, at least for a while) the normative content of a system, it is possible that what the content of law is will depend on some judgment about the deep values that are supposed to provide legal norms with moral justification.

If such values are perfectly determined or, at least, judicially determinable, and there is no conflict between them, relative stability can be reached or, from a Dworkinian perspective, even judges could be able to formulate the right answers. But if such deep values are radically undetermined, uncertainty at the deepest level will inevitably project itself onto a more superficial level, that is, the level at which judges are supposed to apply the rules – previously identified – to individual cases, as in the Ferrini case, a real international affaire that I shall take, in the next section, as an illustration of radical indeterminacy.

If we cannot deny that judges decide with discretion (whether great or small, it is beside the point), we can still think that when they use discretion or when they create a new rule, they can be limited by a universalisability test,\(^{56}\) that is, by adopting the point of view of people who will potentially be affected in the future by this new rule, and it is from that point of view that they would accept the new rule as the best solution.\(^{57}\)

Universalisation gives form to the substance of a particular situation.\(^{58}\) Even though, because of the indeterminacy of law, a solution is inevitably the consequence of some use of discretion, discretion is not necessarily arbitrariness\(^{59}\) if judges submit themselves to the *universalisability test*. The prescription created is universalisable if judges think that the solution adopted will work in similar future cases, and it is due to this that it is able to create expectations.\(^{60}\)

 Nonetheless, this is not always the case. In some cases, such as the Nuremberg Trials, as long as the solution is ultimately the consequence of the application of a set of rules created by a contingent winner to judge and criminalise a contingent loser, we have strong moral reasons to avoid all generalisations. As stressed by Kelsen:\(^{61}\) what would happen if the case was that wars are not always won

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55 See Puppo 2017.  
56 See Hare 1952.  
57 Beckett 2006: 1069.  
58 Jouannet 2007: 386. In that sense, “‘[f]ormal’ does not mean ‘vacuous’ […]; formal law always formalizes a particular content or subject-matter”.  
60 See Koskenniemi 2002b: 174.  
61 Kelsen 1947: 171. Elsewhere (Puppo 2016), I develop Kelsen’s rich and ambiguous stance on the Nuremberg Trials and his eventual departure from positivism. In a nutshell: even if Kelsen (1945) clearly defends the humanity-based decision, he does not try to do this – contrary to
by the good guys? The risk, underlined by Koskenniemi referring to Kosovo, is that “a beneficial illegality today makes it easier for my adversary to invoke it tomorrow as precedent for some sombre scheme of his”.62

When a solution is a universalisable solution, then judges can entrench the generalisation. To say that judges create a rule, if we use Schauer’s theory,63 means that – starting from the observation of a particular case and taking seriously a particular solution because of its universalisability – judges formulate the solution in terms of the consequence of a general rule.

If indeterminacy involves the necessary use of judicial discretion, the universalisability test works as a technique against arbitrariness. There are several ways of creating new law: not all solutions are equivalent. If it is true that judges, like legislators, make law, it is also true that the two institutions do not enjoy the same creative freedom.64 Neo-formalistic reasoning excludes solutions that seem inevitably arbitrary as long as they are not universalisable.65

If a solution seems to us to be universalisable, it is not because judges have adopted a neutral point of view. Actually, it is impossible for judges to neutralise their preferences. However, precisely because of this impossibility, the requirement of transparency and universalisability with respect to judges’ preferences and decisions is an essential feature of predictable legal reasoning and finally of a formal-procedural, yet thick, conception of the rule of law;66 formal because no substantive element is constitutive of it; thick because it is still an exigent conception according to which many legal systems, apparently ruled by law, would not satisfy the requirements of the rule of law.

many international positivist scholars – from a positivist perspective (see Garibian 2007). Such an attempt would have, I guess, perverted the deep value (legality or the rule of law) justifying the positive legal system. The decisions were just, but they had no legal justification, they only had a moral one. In this way, Kelsen does not renounce his methodological positivism, which assumes, at the very least, a distinction between the law that is and the law that we desire. Nevertheless, neither does he adhere to an ideological form of positivism (or ethical legalism), according to which what is legal is also morally correct, and so it has to be obeyed. The law of the Nazi was (probably) legal and the law of Nuremberg was (probably) illegal, but there were strong moral reasons for preferring, in this case, illegality to legality. To defend the Nuremberg rulings on the basis of (an argument derived from) positive law would have threatened that which makes positive law be something valuable. More generally, on Kelsen’s blurred lines between the purity of theory and the pacifism of ideology, see Puppo 2015.

63 On the relation between the rule-based model and discretion, see Schauer 1991: 190.
66 Transparency is, therefore, an essential feature of the culture of formalism. See Jouannet (2010: 294) and Paulus (2010: 209). An example of a thick formal-procedural conception would be the conception proposed by Waldron. See Section 2 of this paper.
4 DEALING WITH RADICAL INDETERMINACY: THE RULE OF LAW VS. OCEANIC FEELING

I shall take, as a starting point, an international case of radical indeterminacy: given the conflict between the jurisdictional protection of human rights on the one hand, and state immunity on the other, in the first case decided by the Italian Court of Cassation the protection of human rights overrode the protection of sovereignty, while in a subsequent decision, decided by the International Court of Justice, the opposite occurred. If international law is a human construct and if its goal is the satisfaction of a bizarre combination of moral (a matter of human beings) and political needs (a matter of sovereignty), it is easy to see that its indeterminacy depends, above all, on the manifest incompatibility between these two needs:

[T]he claim of indeterminacy […] is not at all that international legal words are semantically ambivalent. It is much stronger (and in a philosophical sense, more “fundamental”) and states that even where there is no semantic ambivalence whatsoever, international law remains indeterminate because it is based on contradictory premises.

If we read the ICJ sentence and Cançado Trindade’s dissenting opinion, we can clearly perceive the source of radical indeterminacy: the premise about the purpose of international law that the majority of judges accepted deeply contradicts the premise that the former judge of the Inter-American Court of Human Rights accepted. This case is clearly an example of international tension, in which it seems that domesticating judicial discretion is very difficult. Not surprisingly, judges, both domestic and international, are particularly unclear about the purposes, sources and finally the factual predicates to which they have to impute legal consequences.

In this section, I shall argue that, while non-pathological domestic legal systems are able to deal with radical indeterminacy, because of some profound

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67 See respectively: Ferrini v Germany, Italian Court of Cassation, No. 5044/2004, 11 March 2004 reported in (2006) International Law Reports (128) 658 (“Ferrini”); Jurisdictional Immunities of the State (Germany v Italy; Greece Intervening) (Judgment) (International Court of Justice, General List No. 143, 3 February 2012) [28]. Note that recently, in October 2014, the Italian Constitutional Court decided that the Italian Statute imposing the execution of the UN Charter is unconstitutional in the part in which it establishes “the obligation to Italian courts to comply with the ruling of the International Court of Justice (ICJ) of 3 February 2012, which requires that jurisdiction in cases of war crimes and crimes against humanity committed by a foreign state be declined” (URL: http://www.cortecostituzionale.it/actionSchedaPronuncia.do?anno=2014&numero=238).

68 Koskenniemi 2006: 590. Another way of stressing radical indeterminacy is by recalling the deep paradoxical character that international law has been exhibiting since its very beginnings. On this topic, see Jouannet (2007: 379): “international law, past and present, is the reflection of a particular – Western – culture, whilst at the same time claiming not only to internationalize but also to almost universalize the values that it conveys”
institutional and cultural differences, international law is irremediably affected by it.

The importance and efficiency of the formalist approach in domestic legal reasoning and the deformalising tendency in international law can be explained from an institutional and a functionalist perspective. The comparison makes sense especially if we refer to international judges resolving *humanity* issues of criminal law and human rights violations – the judicial dimension in which a “turn to ethics” has been accompanied by an “increasing deforma lisation”.

In many domestic legal systems, judges receive some legal education, and perhaps they share a common legal culture, formalistic in nature in some sense. Judges – as it is impossible to satisfy the formalist requirement of refraining from creating law – fulfill their duty by creating new general rules to which they would be ready to submit themselves. To the extent that international judges are often international scholars, they have a different view of their role. They cannot rest on the existence of a democratic government that deals with law reform. They have to play an active role, as they have been educated to be reformers and not just the guarantors of stability that characterises the rule of law: the philosophical background of the very influential German international scholarship was “the philosophy of optimism and action, struggle for progress and the perfection of the world”. The paradigmatic example was certainly Lauterpacht, “who never was tired of believing in human goodness and the ability of reason to find this goodness, even in the darkest moments of European history.”

So, if both domestic and international law suffer from the consequences of indeterminacy, only domestic courts have the tools, the culture and the institutional context to manage it consistently with the requirement of relative stability. By contrast, to the extent that international courts are often confronted with difficult or even unique cases, universalisability is not an achievable goal and is, therefore and rightly so, not a priority. As Morgenthau had already sharply grasped seventy years ago that, unlike the domestic field, a “political situation in the international field is not likely to repeat itself, since the variety of factors of

69 Koskenniemi 2006: 159.
70 Leiter (2010: 128) confirms the same about the US: “formalism [...] is quite obviously the official story about adjudication in the public culture in the United States”.
71 The best way of fulfilling this duty is probably through what Llewellyn (1960) calls the *Grand Style* of judicial decision-making, that is, a judicial style perfectly in accord with the “standards of legality [...] deeply rooted in the institutional history and tradition of a political community” (Jovanović 2015: 452) and clearly absent from the international community.
72 Koskenniemi 2002a: 199. For a brilliant analysis of the contribution of Jewish German-speaking scholars to international law, see Paz 2012a.
73 Paz 2012b: 423.
which it is composed makes for an indefinite number of possible combinations. Hence only a strictly individualized rule of law will be adequate to it”.

I maintain that such an institutional difference deeply reflects different social conventions, tending to satisfy basic needs or to achieve fundamental moral aims.

Domestic law could seem justified, morally or socially, by virtue of its capacity to solve moral problems in a relatively stable form. What matters is that it solves problems, and not how it solves them. Given some “circumstances of legality”, which “obtain whenever a community has numerous and serious moral problems whose solutions are complex, contentious, or arbitrary”, we can understand the purpose and authority of law. Because of the existence of a legal plan, we can avoid entering a balancing activity about what, in given circumstances, the best moral reasons for acting are. Koskenniemi shares the same point when he affirms that, in normal domestic situations, “it is possible to live with automatic rules because the alternative is so much worse”.

When international law (in matters of criminal or human rights law) tries to guide behaviours, it is confronted with two obstacles. Some subjects refuse to be led, maybe because they “disagree on what is good”. When states reject a model of conduct, they contribute to the introduction or the elimination of some customary law, and so to its indeterminacy. Invoking imperative norms (jus cogens norms) is probably the only way not to bend against the dogma of the consent of states. These norms, however, cannot have a social source, and therefore tend to increase the formalisation of legal sources.

Such a solution, i.e., invoking imperative norms, unfortunately creates the second obstacle: the problem of the radical indeterminacy of moral values that justify the identification of jus cogens norms. In this state of indeterminacy, international law is not able to provide any plan; it can only generate a set of individual decisions in particular cases, often in situations characterised by a moral or political emergency. Obviously, this is not true if, as some international

74 Morgenthau 1940: 271.
75 Shapiro 2010: 170. The same idea was already formulated by MacCormick (1994: 6): “one vital point of legal institutions is exactly that they exist (inter alia) to settle authoritatively for practical purposes what cannot be settled morally”.
77 Koskenniemi 2012b: 165.
78 About the problem of uncertainty in customary law, see Kammerhofer 2010.
80 It seems to me that Cassese (2012b: 164), in approaching the issue of identifying jus cogens norms by international judges, implicitly adopts a formalist-like point of view.
81 About the bombing of Serbia, see Koskenniemi 2002b: 171. See also Anghie (2005: 314), who argues that “international law is in a permanent state of emergency”. About the relation between the state of exception and the rule of law, see Puppo 2013.
human rights judges and scholars think, the identification of *jus cogens* norms is not subjective but objective, because it reflects an *oceanic feeling*. Nevertheless, I believe that the burden of proof of the existence of such a universal criterion, of universal objective values, does not rest with me. I shall only sketch an argument against what could be named a Dworkinian trend in international law. For example, Cassese’s approach – without stating the existence of universal values – shares the Dworkinian noble dream of a judicial world enlightened by the values inherent in international law, a world with correct answers.

Even if we admit that a Dworkinian approach might be useful for explaining (some) domestic legal order, it would nevertheless be completely useless in the international context, which is characterised, as we have seen, by deep disagreements about moral values, and by the absence of both a supreme judicial body and a democratic legislative power, which are potentially able to solve, at least momentarily, these very disagreements. Because of the deep character of international tensions, “it is naive and even counterproductive to expect them to be effectively resolved by judicial or arbitral devices”.

Some points that make the Dworkinian theory implausible (unless it is a utopian one) could briefly be mentioned.

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82 According to Freud (1962: 11), who borrows the expression from his friend Romain Rolland, an oceanic feeling is “a feeling as of something limitless, unbounded – as it were, ‘oceanic’. This feeling [...] is a purely subjective fact, not an article of faith; it brings with it no assurance of personal immortality, but it is the source of the religious energy which is seized upon by the various Churches and religious systems [...]. One may [...] rightly call oneself religious on the ground of this oceanic feeling alone, even if one rejects every belief and every illusion”. This notion of “oceanic feeling” is related to religions, but could also, more interestingly, be associated with a quasi-religious theme, such as international law. On this matter, see Koskenniemi (2012: 11): “Although the ‘oceanic feeling’ may certainly be real to the extent that the speaker actually feels it, this is no proof of its universal reality, either in terms of being available to others, or its having some objective presence in the world.” Not surprisingly, Dworkin takes very seriously the notion of *jus cogens* and quotes judge Cassese as an example of “the moralized approach to international law that [Dworkin is] now defending” (Dworkin, 2013: 26).

83 See Feichtner 2012: 1152.

84 Feichtner 2012: 1152; see also Kratochwil (2000: 42), who recalls that “neither a constitutional text nor a doctrine of *stare decisis* apply in international law”; Beckett (2001: 635): “the role of law, and the avoidance of radical indeterminacy in the Dworkinian analysis are all predicated on the centrality of the courts, or at least on the possibility of unilateral recourse to the courts. Dworkin relies on the courts to stabilize the law (and thus authoritatively determine which values are in the system), but in PIL they simply cannot play this role.” While it is plausible that the requirement of relative stability can generate, in a domestic context, and this according to Dworkin, some kind of associative obligation, “it is doubtful, to say the least, whether, first, states can meet those psychological requirements, even through their legitimate representatives, and second, whether, even under this assumption, we can meaningfully speak of a sort of international community that generates associative obligations in the Dworkinian sense of the word” (Jovanović, 2015: 454).

85 Scheuerman 2008: 38.
Firstly, to the extent that Dworkin seems to start from the radical conflict between human rights (essential in his theory) and sovereignty (essential, according to him, in any positivistic conception),\(^86\) his position “is hardly in line with his general vision of the unity of value”.\(^87\)

Secondly, Dworkin seems to recognise the deep institutional difference between the domestic and the international contexts, specifically with respect to adjudication, when he affirms that “no such structure, in any but the most rudimentary form, is yet in place in the international domain, and none can be expected soon”. Consequently, he describes his project – I ignore just how ironically – as a “fantasy upon fantasy”.\(^88\)

Finally, it is interesting to summarise the conclusion that Dworkin sketches regarding the NATO bombing of Kosovo. He argues that it was perfectly justified on the basis of the international law having been interpreted in its best light.\(^89\) It is, nevertheless, surprising that Dworkin recognises that the legal interpretation implicit in his right answer “would be fresh legislation, of course, rather than an interpretation of the Charter as it stands”.\(^90\) Definitively, it is unclear whether what he proposes is a realistic theory of international law or just some personal vision of what international law could/should be in some imaginable future.

## 5 CONCLUSION

If, because of its radical indeterminacy, it is very difficult to know which rules are valid at any given time, international law could be conceived of not as a set of rules,\(^91\) but as a set of particular solutions to virtual unique events.\(^92\)

Of course, this claim needs some nuances. It is true that the phenomenon of radical indeterminacy, as long as it depends on the moral values incorporated into a legal system, is not exclusive to international law. Recent jurisprudence on jurisdictional immunity is evidence of this. In Italy, the Court of Cassation first invoked higher values, and then an emergent customary norm, only to ultimately abandon its jurisprudence in order to comply with the international ruling of the ICJ and with a new piece of Italian legislation. After this, the

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\(^{86}\) On the anti-positivistic claim and on the conflict between human rights and sovereignty respectively, see Dworkin 2013: 5 and 17-19.

\(^{87}\) Jovanović 2015: 447.

\(^{88}\) Dworkin 2013: 14.

\(^{89}\) Dworkin 2013: 23-26.

\(^{90}\) Dworkin 2013: 26.

\(^{91}\) For several examples in which it seems that rules do not play a significant role in international issues, see Johns 2013.

\(^{92}\) For many striking examples of international events, see Johns, Joyce & Pahuja 2011.
Constitutional Court decided to reaffirm the same values implicit in the first ruling of the Court of Cassation and declared the Italian legislative provision to be unconstitutional. All this seems to demonstrate the deep indeterminacy of the rule of recognition. But, even if this is accepted, if a pluralist conception is endorsed, one could claim that the Italian Constitutional Court had the final word on the matter, and so relative stability was achieved.

Such relative stability is the result of the reiteration of domestic judicial cases. For the same legal problem, in the international arena, only one case, the above mentioned Germany vs. Italy case, was decided, so that it is still unclear what the solution to potential future cases could be. An important difference that also strengthens my argument is that the final word in the Italian saga was founded on the constitutional text, and not on a customary norm. This difference is relevant because the existence and the content of international customary law was precisely the object of the disagreement between the Italian and the International Court of Justice.

The history of international relations is maybe the history of “plans which brought about results different from those intended.” The deep need satisfied by international law is probably not, or not only, legal and social stability, which is essential in the construction of a domestic rule of law. This might be only a matter of fact or lead to a serious ontological question: what is international law for? If it is meaningless to take the need for stability as an answer, it is not extravagant to suspect that its purpose is radical indeterminacy itself which, far from being a “structural deficiency”, could maximise – despite the good intentions of many (reformer) international scholars and the rhetoric of the United Nation – the political freedom of states, even in the context of humanity-based law.

93 See Corte Costituzionale, Sentenza n. 248/2014, in which the sequence of the Italian judicial and legislative interventions is reconstructed.
94 Morgenthau 1947: 129.
95 Koskenniemi 2006: 591.
96 I have to acknowledge that the United Nations aim to guarantee international peace and security, which is comparable to social stability at the domestic level. Nevertheless, this statement has to be relativised both at the empirical and the normative level. Empirically, it is a fact that an international intervention with the purpose of re-establishing peace and security can be stopped by a veto, so that the states that have the right to stop such interventions can maximise their freedom, and so threats against peace and security remain actual. In other words, without a serious reform of the functioning of the UN Security Council, the argument is not convincing. The reason why such a reform has not been introduced is precisely because it would reduce the freedom of some states. In this sense, the empirical difficulty has to be understood to be the result of a normative stance aimed at protecting the liberty of states, or at least of some powerful states.
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Case-law