

Iraq and Climate Change: The Mainstream Lawyer's Survival Guide

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I. Introduction

This paper seeks to consider one simple question, namely how does an international lawyer—especially a mainstream international lawyer (be that academic or practitioner)—respond and adapt to problematic circumstances in international affairs? Of course, we would like to think that we handle difficult situations reasonably well. Which of us would not be able to sign up to the general view that “international law is inexorably intertwined with the international system in which it operates”?¹ Understanding, applying, and perhaps even rewriting international rules to the changing international scene are fundamental—and continuing—aspects of our discipline.² But, scratching the surface a little deeper, is it always true that as international lawyers, we cope when the circumstances on the ground do not align neatly with the rules in the book?

Of course, by asking this, one immediately gets ensnared in definitional issues as to what is meant by a ‘mainstream’ international lawyer. For pure ease of reference, I take that to be the vast majority of those who practice, study, teach, and advise on international law: those who approach their subject from a largely, though not necessarily exclusively, doctrinal position. In other words, even if they are interested in the theoretical, the contextual, and the political, the ‘mainstream’ international lawyer will always seek to under-

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1. Rosalyn Higgins, *International Law in a Changing International System*, 58 CAMBRIDGE L.J. 78 (1999).

2. Anne-Marie Slaughter Burley, *International Law and International Relations Theory: A Dual Agenda*, 87 AM. J. INT'L L. 205, 205-15 (1993). “International legal rules, procedures, and organizations are more visible and arguably more effective than at any time since 1945. If the United Nations cannot accomplish everything, it once again represents a significant repository of hopes for a better world. And even as its current failures are tabulated, from Yugoslavia to the early weeks and then months of the Somali famine, the almost-universal response is to find ways to strengthen it. *The resurgence of rules and procedures in the service of an organized international order* is the legacy of all wars, hot or cold.” *Id.* (emphasis added).

stand, above all else, the current state of the law.³ And for this majority, a changing world presents many normative difficulties as they learn to assimilate new situations, especially those that sit uncomfortably with the status quo or contradict the established way of doing things.⁴ Of course, these lawyers are undoubtedly caricatures;⁵ all of us—perhaps sometimes subconsciously—make our own individual judgments as how to best reconcile law with circumstance.⁶ Nevertheless, as purveyors of authoritative opinion,⁷ it is also important for mainstream lawyers to be *seen*, to be able to assimilate such circumstances, and to advise or comment accordingly.⁸

To give one example of a question that most of us have been asked by students—if you like the classic fly-in-the-ointment irritant from the far too clever student—“you’ve just told us that customary international law requires both a generality of state practice and a settled *opinio juris*, but if that is the case, how come torture is contrary to international law when most states in the world practice it in some form or other?”⁹ Similarly, in my international environmental law class, my students seem underwhelmed when I talk about the obligation on states not to cause or permit significant harm beyond their territorial boundaries;¹⁰—law and fact again seem to diverge significantly. Of course, we all know what the standard response is, and while we all have our ‘stock-in-trade’ answers to such questions, do we ever stop and ponder why we give the answers that we give? And even for those of us who do acknowledge the limitations of the formal law in our response, do we recognize the discrepancy between our, perhaps grudging, cognizance of the role

3. See Martti Koskenniemi, *The Pull of Mainstream*, 88 MICH. L. REV. 1946 (1990). “Ever since the Grotian tradition became little more than an object of ritualistic invocation in keynote speeches at conferences of learned societies, international lawyers have had difficulty accounting for rules of international law that do not emanate from the consent of states against which they are applied. In fact, most modern lawyers have assumed that international law is not really binding unless it can be traced to an agreement or some other meeting of wills between two or more sovereign states.” *Id.*

4. *Id.* at 1958-61.

5. See Guglielmo Verdirame, *The Divided West: International Lawyers in Europe and America*, 18 EUR. J. INT’L L. 553 *passim* (2007) (addressing the methodological and theoretical divisions between European and American international lawyers—which at many levels must itself be a caricature!).

6. Koskenniemi, *supra* note 3, at 1961.

7. See Oscar Schachter, *The Invisible College of International Lawyers*, 72 NW. U. L. REV. 217, 220-21 (1977). “[A] judgment among competing principles by an independent jurist can be made and justified on grounds that are valid for the relevant community of states, rather than on grounds held by the individual alone, or by his government. This, at least, is the position that must be taken by international lawyers who are acting as nonofficial experts and not as advocates of a government or special interest.” *Id.*

8. See *id.* at 220-23.

9. See, e.g., Christopher Joyner, *Teaching International Law: Views From an International Relations Political Scientist*, 5 ILSA J. INT’L & COMP. L. 377, 377-87 (1999) (addressing issues surrounding the teaching of international law).

10. See U.N. Conference on Env’t and Dev., June 3-14, 1992, *Rio Declaration on Environment and Development*, Principle 2. “States have, in accordance with the Charter of the United Nations and the principles of international law, the sovereign right to exploit their own resources pursuant to their own environmental and developmental policies, and the responsibility to ensure that activities within their jurisdiction or control do not cause damage to the environment of other States or of areas beyond the limits of national jurisdiction.” *Id.* See also *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion, 1996 I.C.J. 226, 241-42 (July 8). The existence of the general obligation of States “to ensure that activities within their jurisdiction or control” respect “the environment of other States or of areas beyond” national control is now part of the corpus of international law relating to the environment. *Id.*

global politics plays in international law and our persistent principled adherence to an international system premised upon the rule of law?¹¹

It is perhaps worth just saying a few words on why this matter has come to the forefront recently for me. In fact, it largely has sprung from two very different political events—though I recognize that while these events are contemporarily important, on both issues, international law has been here before,¹² and thus it is important to play down the hyperbole that often surrounds the identification of particular situations for our own ends.¹³ First, I listened to the evidence to the independent inquiry on Iraq in the U.K. (the Chilcot Inquiry),¹⁴ especially in relation to how international legal advice within government was sought (or, in some instances, not sought), considered, and ultimately ‘managed.’ Second, I watched the collapse of the Copenhagen Climate Change negotiations in December 2009 and the apparent move away from multilateral governance towards something much more selective, discretionary and, most of all, political.¹⁵ Though extremely different in scope and content, there is a general sense that both situations illustrate the inherent limitations of international law (and the international lawyer) to affect, and where necessary, constrain political action, which is contrary to normative expectations.¹⁶

II. Pragmatist—Theorist—Mainstream International Lawyer

Of course, for those who might consider themselves either ‘pragmatists’ or ‘theorists,’—thus consciously moving away from straight doctrinal positivism—things look slightly different. And, though the pragmatist and the theorist are, in their outlooks, worlds apart, I have always thought that there is little material difference between them when they are presented with new situations or a changed set of circumstances in international affairs. In particular, both would seem to possess the necessary methodological ‘devices’ to adapt to—or encounter confidently—new challenges, as well as having an awareness of the importance of retaining the political within the law.¹⁷ The pragmatist, by definition, will take new situations or circumstances in stride; the pragmatist’s lack of commitment to any paradigm permits him maximum flexibility to vary his approach with the changing tide.

11. See *Sustainable Development and the Instinctive Imperative of Justice in the Global Order*, in GLOBAL JUSTICE AND SUSTAINABLE DEVELOPMENT 33 (Duncan French ed., forthcoming Oct. 2010). “[T]he international community will ultimately be judged by the *measures* that it takes. But without concepts and overarching principles, the international community neither has the foundations on which to act nor a sense of direction in which to head.” *Id.* (references omitted).

12. Hilary Charlesworth, *International Law: A Discipline of Crisis*, 65 MOD. L. REV. 377, 377 (2002) (relying on INTERNATIONAL INCIDENTS: THE LAW THAT COUNTS IN WORLD POLITICS 15 (W. Michael Reisman & Andrew R. Willard eds., 1988). “Michael Reisman has argued that crises or ‘incidents’—defined as ‘overt conflict[s] between two or more actors in the international system’—should be at the heart of teaching and scholarship in international law.” *Id.* (references omitted).

13. See *id.* at 382-84.

14. See Iraq Inquiry, <http://www.iraqinquiry.org.uk/> (last visited Aug. 2010).

15. See Navroz K. Dubash, Commentary, *Copenhagen: Climate of Mistrust*, 44 ECON. & POL. WKLY. 8, 10 (2009), available at <http://www.indiaenvironmentportal.org.in/files/COP.pdf>. “Despite this, the final ‘Copenhagen Accord’ only barely papered over what was an almost complete collapse of negotiations. The outcome calls into question whether the community of nations can, in fact, craft an effective response to climate change.” *Id.*

16. See *id.* at 8-11.

17. See Burley, *supra* note 2, at 239 (“In the end, law informed by politics is the best guarantee of politics informed by law.”).

The theorist may struggle a bit more, but will often, through his usual ingenuity, discern a necessary exception to, or occasionally even a wholesale modification of, his general understanding of the world.

On the other hand, the mainstream international lawyer often seems to struggle to absorb and adapt to changing circumstances. The individual lawyer will, of course, respond intuitively—and no two individuals will react in quite the same way—but will often seem to lack confidence in his doctrine. Nevertheless, there are perhaps three standard responses. First, the mainstream international lawyer may simply play down the significance (the legal influence) of new or difficult situations by dismissing them as temporary, aberrant, or (staying on trusted legal territory) lacking the necessary “norm-creating character”¹⁸ to rise above the normative *de minimis lituus* test of relevance.¹⁹ Moreover, as the International Court noted in *Nicaragua*: “[I]nstances of State conduct inconsistent with a given rule should generally have been treated as breaches of that rule, not as indications of the recognition of a new rule.”²⁰ As a general mantra for the mainstream international lawyer, this seems wholly apposite.

Second, when new circumstances cannot be ignored, the mainstream international lawyer may feel that the easiest way to respond is simply to fit those changes within established legal rules and processes, believing it important to show the seamless nature of the international legal system and that current law already regulates and explains each and every state of affairs. After all, nothing is beyond law’s regulation.²¹ To quote *Oppenheim’s International Law*: “[E]very international situation is capable of being determined as a matter of law.”²² Or, to paraphrase altogether more timeless words: “[T]here is nothing new under the sun.”²³

Third, circumstances may arise that are wholly novel in character, and in these situations international lawyers may decide that they have little choice but to engage; however, the engagement will always be decisive. Mainstream lawyers have the authority and the capacity, whether they acknowledge it or not, to convey their understanding of a new state of affairs. They may not be able to impose their views of the world on everyone, but

18. *North Sea Continental Shelf* (Ger./Den.; Ger./Neth.), 1969 I.C.J. 3, 42 (Feb. 20). This is, of course, somewhat of a misuse of the International Court’s term, which specifically refers to the emergence of new rules of customary law. *Id.* at 41-42. Nevertheless, the term more generally reflects the “gatekeeper” function which both judges and lawyers have in determining which (and when) factual situations are considered to have legal effect.

19. See Matthew D. Adler, *Why De Minimis?*, 2-3 (Univ. of Pa. Law Sch. Pub. Law & Legal Theory, Working Paper No. 07-26, 2007), available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=992878.

20. *Military and Paramilitary Activities in and Against Nicaragua* (Nicar. v. U.S.), 1986 I.C.J. 14, 98 (June 27).

21. Perhaps the most controversial example of this idea is the Martens Clause, under which it has been argued that, notwithstanding the lack of treaty or customary humanitarian law, “inhabitants and the belligerents remain under the protection and the rule of the principles of the law of nations, as they result from the usages established among civilized peoples, from the laws of humanity, and the dictates of the public conscience.” Convention Between the United States and Other Powers Respecting the Laws and Customs of War on Land, preamble, Oct. 18, 1907, 36 Stat. 2277. See also Antonio Cassese, *The Martens Clause: Half a Loaf or Simply Pie in the Sky?*, 11 EUR. J. INT’L L. 187 (2000).

22. 1 OPPENHEIM’S INTERNATIONAL LAW 13 (Robert Jennings & Arthur Watts eds., Longman 9th ed. 1996).

23. *Ecclesiastes* 1:9 (NIV) (The full quotation is: “What has been will be again, what has been done will be done again; there is nothing new under the sun.”).

undoubtedly their opinions count—and, by and large, they know it. Their opinions will be respected and have an influence above and beyond their own discipline. In short, how they perceive a situation will often color how others come to interpret it. As Hilary Charlesworth noted in the aftermath of the 1999 Kosovo conflict and the unresolved status of humanitarian intervention in international law, “[i]nternational lawyers revel in a good crisis. A crisis provides a focus for the development of the discipline and it also allows international lawyers the sense that their work is of immediate, intense relevance.”²⁴ Of course, Charlesworth rejects this approach, going on to remark that a system that dwells exclusively upon crisis “shackles international law to a static and unproductive rhetoric.”²⁵ On this basis, she was surely correct to highlight how many international lawyers innately are attracted to and respond to new states of affairs.²⁶

Issues as diverse as the recent global financial crisis,²⁷ the rise of the threat of cyberwarfare,²⁸ the possibility of using geo-engineering techniques to tackle global environmental harm,²⁹ and, of course, the perennial matter of the use (or misuse) of state military force³⁰ all demand a response from the mainstream international lawyer. And is not the modus operandi of any lawyer the assertion of a definitive position, backed up by a belief in his own confident understanding of the law? Let political scientists debate; international lawyers inform and tell. But this confidence in our position is shallow for critics (both those within and without our own discipline);³¹ mainstream lawyers lack the appropriate methodology and insight to truly grasp a changing world—our understanding is either simply too limited to capture the fast-changing nature of social, political, and economic phenomena or we are seen as forever playing catch up to events already passed. In 1997 Philip Alston wrote of the ‘myopia of the handmaidens.’³² He was particularly noting the changing role of the state in the light of the changes wrought by globalization, but his comment that “these changes seem often to be noted or analysed [by “much of the

24. Charlesworth, *supra* note 12.

25. *Id.*

26. Even when the “new state of affairs” is not a crisis per se, but rather the emergence of a new discipline or sub-discipline within international law (for instance, international environmental law or international criminal law), significant academic attention seems naturally to flow toward the change, perhaps at the expense of more general, traditional areas of the law.

27. See, e.g., Detlev F. Vagts, Editorial Comment, *The Financial Meltdown and Its International Implications*, 103 AM. J. INT’L L. 684 (2009).

28. See, e.g., Jeffrey T.G. Kelsey, Note, *Hacking Into International Humanitarian Law: The Principles of Distinction and Neutrality in the Age of Cyber Warfare*, 106 MICH. L. REV. 1427 (2008).

29. See, e.g., John Virgoe, *International Governance of a Possible Geoeengineering Intervention to Combat Climate Change*, 95 CLIMATIC CHANGE 103 (2009).

30. See, e.g., Russell K. Jackson, *Lawlessness Within a Foreign State as a Legal Basis for United States Military Intervention to Restore the Rule of Law*, 187 MIL. L. REV. 1 (2006).

31. Anthony Carty, *Critical International Law: Recent Trends in the Theory of International Law*, 2(1) EUR. J. INT’L L. 66 (1991). “The crucial question is simply whether a positive system of universal international law actually exists, or whether particular states and their representative legal scholars merely appeal to such positivist discourse so as to impose a particularist language upon others *as if* were a universally accepted legal discourse. So post-modernism is concerned to unearth difference, heterogeneity and conflict *as reality* in place of *fictional* representations of universality and consensus . . . The role of the international lawyer in such an acutely relativised, self-reflective culture is now, more than ever, crucial. It is his function to resist phony, reified would be universalist legal discourse in favour of the recognition of the *inevitably* restrictive and exclusive nature of individual state discourses” (emphasis in original). *Id.*

32. Philip Alston, *The Myopia of the Handmaidens: International Lawyers and Globalization*, 3 EUR. J. INT’L L. 435, 448 (1997).

mainstream of international law scholarship”] in an almost perfunctory manner in order to demonstrate a degree of analytical completeness,³³ seems to me to be greatly relevant here.

Thus, in a situation where the mainstream lawyer is perceived as needing to formally assimilate global change, but lacks the necessary analytical wherewithal to be able to truly decipher it, the mainstream lawyer seems to be continually pitched between two opposing positions. Alternatively phrased, it would appear—at least on the surface—that the mainstream international lawyer constantly struggles within the paradox between, on the one hand, believing in the existence of an objective normative framework which can constrain political acts and, on the other, recognizing (but concurrently often seeking to ignore) the inherently political context within which international law must inevitably operate.³⁴

The remainder of this paper, accepting that this paradox is at the heart of international law—and the work of the international lawyer—seeks to suggest, however, that such a view is primarily a caricature of our position; that to quote Daniel Bodansky, most international lawyers are not “one-dimensionally normative” but are indeed capable of seeing the “world in a multi-dimensional way.”³⁵ Saying this is not to provide a rather easy ‘defense’ to the claim that the mainstream international lawyer is ineffective in the face of circumstances that fall outside his or her traditional certainty and field of inquiry. Rather, and more specifically, I think it is about seeking to replace the caricature with a much more nuanced appreciation of the position of the majority of international lawyers.

III. Iraq and Climate Change: ‘plus ça change, plus c’est la même chose’

It is probably not too surprising that I have chosen Iraq and climate change as two recent examples of where law and politics seem to have diverged. Of course, individual views will vary, and even within the international legal community itself, there will be genuine and diverse opinions not only on the substance of both of these matters, but also on the implications of the outcomes. Nevertheless, there is still an overall assumption made by some, I would suggest, that international lawyers either struggle to comprehend the dynamics of these situations or, even if we can comprehend them, seek to assimilate them artificially, and without principle, into our own normative ‘world-view.’

First, I will consider the evidence before the Chilcot Inquiry on the use of international legal advice to British government ministers preceding the 2003 Iraq conflict.³⁶ Much interest has come out concerning the inner workings of the U.K. government, both generally and specifically in the period before, during, and after the immediate conflict.³⁷ We were, of course, alerted to inner tensions within the Foreign Office by the resignation of Elizabeth Wilmshurst as Deputy Legal Advisor just days prior to the conflict in March

33. *Id.* at 435, 446.

34. Martti Koskeniemi, *The Politics of International Law*, 1 EUR. J. INT’L L. 4, 12 (1990). “Mainstream doctrine retreats into general statements about the need to ‘combine’ concreteness and normativity, realism and idealism, which bear no consequence to its normative conclusion.” *Id.*

35. Daniel M. Bodansky, *International Law in Black and White*, 34 GA. J. INT’L & COMP. L. 285, 289-90 (2006), available at <http://ssrn.com/abstract=887767>.

36. Richard N. Taylor, *Chilcot Inquiry: Iraq Papers Show Lord Goldsmith’s Warning to Tony Blair*, GUARDIAN (U.K.), June 30, 2010, <http://www.guardian.co.uk/uk/2010/jun/30/chilcot-inquiry-lord-goldsmith-blair>.

37. *Id.*

2003.³⁸ We have now learned much more about the way the international law officers, and their advice, were treated at this time.³⁹ The testimony of both the politicians and the then law officers has thus been intriguing in this regard.⁴⁰ But I do not want to dwell on the substance, or even how the Attorney General's final opinion fundamentally shifted in both tone and content immediately preceding the use of military force.⁴¹ What has particularly interested me is the release of confidential correspondence within government, the oral testimony at the Inquiry, and what this tells us about how legal argument and international law were perceived at this time.⁴²

Four passages struck a particular chord:

- "I have been very forcefully struck by a paradox in the culture of government lawyers, which is that the less certain the law is, the more certain in their views they become . . . On the one hand, in well-rehearsed areas of domestic law the advice I am offered has usually been acute, but also admitted to a range of possibilities. On the other hand, in issues of international law, my experience is of advice which is more dogmatic, even though the range of reasonable interpretations is almost always greater than in respect of domestic law."⁴³
- "[B]ecause there is no court, the legal adviser and those taking decisions based on legal advice, have to be all the more scrupulous in adhering to the law. . . ."⁴⁴
- "I am as committed as anyone to international law and its obligations, but it is an uncertain field. There is no international court for resolving such questions in the manner of a domestic court."⁴⁵
- "Why has this been put in writing?"⁴⁶

Of course, there is much that one could say. One could, for instance, highlight the inappropriateness of so-called "sofa government" (i.e., decisions taken in the absence of formal procedures often with special advisors)⁴⁷ and the way legal advice was sought, managed, and largely ignored—as well as, in this case, externalized through the seeking of

38. Richard N. Taylor, *War Resignation Letter Censored*, GUARDIAN (U.K.), Mar. 24, 2005, <http://www.guardian.co.uk/politics/2005/mar/24/uk.iraq>.

39. *Id.*

40. *Britain's Iraq Inquiry Panel Travels to US to Question Officials Over Errors in 2003 Invasion*, FOX NEWS, May 18, 2010, <http://www.foxnews.com/world/2010/05/18/britains-iraq-inquiry-panel-travels-question-officials-errors-invasion/>.

41. See Philippe Sands, *LAWLESS WORLD: MAKING AND BREAKING GLOBAL RULES* (2006), for more on this issue and why it matters in international relations.

42. Christopher Hobe, *Iraq Inquiry: Secret Government Documents Could Contradict Public Evidence*, TELEGRAPH (U.K.), Feb. 8, 2010, <http://www.telegraph.co.uk/news/worldnews/middleeast/iraq/7190630/Iraq-inquiry-Secret-Government-documents-could-contradict-public-evidence.html>.

43. Letter from Jack Straw MP, then British Foreign Secretary, to the then Attorney General, Lord Goldsmith (Feb. 6, 2003), available at http://www.iraqinquiry.org.uk/media/43520/doc_2010_01_26_11_05_30_485.pdf.

44. Testimony of Sir Michael Wood, then Foreign Office Legal Advisor, to the Chilcot Inquiry (Jan. 26, 2010), available at <http://www.iraqinquiry.org.uk/media/44205/20100126am-wood-final.pdf>.

45. *Id.*

46. Chris Ames, *Why Has This Been Put Into Writing?*, IRAQ INQUIRY DIGEST, Jan. 27, 2010, <http://www.iraqinquirydigest.org/?p=6592> (the alleged reaction in Downing Street to a confidential paper written by Michael Wood looking at the potential consequences of engaging in an illegal war, including the commission of the crime of aggression).

47. Max Hastings, *The Sofa Government of Blairism Has Been An Unmitigated Disaster*, GUARDIAN (U.K.), May 16, 2006, <http://www.guardian.co.uk/commentisfree/2006/may/16/comment.labour>.

independent legal opinions.⁴⁸ As Wilmshurst noted, the decision-making process was “lamentable.”⁴⁹ Or, one could consider the way certain Ministers seemed to resist the constitutional practice of allowing government legal advisers to give the “advice which they honestly consider to be correct.”⁵⁰ But moving away from the minutiae and towards a more general perspective, what has most struck me has been the conflation of legal argument and the law itself—as Jack Straw (so inelegantly) said: “I am committed as anyone to international law and its obligations, but it is an uncertain field.”⁵¹ With one sentence, it would seem that we have moved from a normative system of law to law as an instrument of political efficacy; or, taken to the extreme, to the abandonment of legal certainty and the subversion of legal principle. Law is but the argument that one wishes to construct at any particular time. Realists and critical legal scholars have always sought to argue that this—or something like this—is the case.⁵² But how do mainstream lawyers respond to such arguments, without either appearing to fall into the trap of accepting the fatalism inherent within such remarks or rejecting them and being seen to endorse the idealism of extreme legal positivism, which would simply reaffirm the caricature?

I now turn to the 2009 Copenhagen session of the climate change Conference of the Parties.⁵³ The stalling of the multilateral negotiations, the negotiation by a select few of the Copenhagen Accord, and the ultimately unsuccessful attempt to parachute the latter into the former suggested to many the death knell of the multilateral process.⁵⁴ As Rajamani has noted,

The Copenhagen Accord was reached among twenty-nine states, including all major emitters and economies, as well as those representing the most vulnerable and least developed. The Conference of Parties (CoP) neither authorized the formation of this group to negotiate the accord, nor was it kept abreast of the negotiations as they evolved. . . [W]hen the accord was presented to the CoP for adoption late on December 18, it was categorically rejected by, among others, Bolivia, Cuba, Nicaragua, Sudan, Venezuela and Tuvalu. They did so both because of the manifest procedural irregularities in the negotiation of this accord as well as the substantive weaknesses they perceived in it.⁵⁵

48. *UK Legal Process on Iraq ‘lamentable’, Says Ex Adviser*, BBC, Jan. 26, 2010, <http://news.bbc.co.uk/1/hi/8481111.stm>.

49. *Id.*

50. Note from Lord Peter Henry Goldsmith, U.K. Attorney General, to Jack Straw, U.K. Foreign Secretary (Feb. 3, 2003), available at http://www.iraqinquiry.org.uk/media/43514/doc_2010_01_26_11_04_38_615.pdf.

51. Note from Jack Straw, U.K. Foreign Secretary, to Michael Wood, Foreign and Commonwealth Office Chief Legal Advisor (Jan. 29, 2003), available at http://www.iraqinquiry.org.uk/media/43511/doc_2010_01_26_11_04_18_456.pdf.

52. *The United Nations Climate Change Conference in Copenhagen*, UNFCCC, http://unfccc.int/meetings/cop_15/items/5257.php (last visited Sept. 15, 2010).

53. See Daniel Bodansky, *The Copenhagen Climate Change Conference: A Post-Mortem*, 104 AM. J. INT’L L. 230, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1553167.

54. *Id.*

55. Lavanya Rajamani, *Copenhagen Accord: Neither Fish Nor Fowl*, CPRINDIA.ORG, available at http://www.india-seminar.com/2010/606/606_lavanya_rajamani.htm (last visited Sept. 15, 2010).

Some, more optimistically, hoped the Accord would be a first step to galvanize the global talks that are to take place in the last two months of 2010.⁵⁶ Others felt the Accord was itself adequate and the need for a further legally binding text would be an unnecessary turn to law, whereas global politics had already moved on.⁵⁷

Whatever the actual long-term impact of the Accord, the climate change debate has changed, perhaps irrevocably. It is slowly transforming itself from being an exclusively inter-governmental debate into a transnational one as well, where domestic regulation and national policy of especially the leading players (both in the developed and developing world) are able to have as much impact upon international behavior as global negotiation and 'law-making.'⁵⁸ The commitments made by individual countries annexed to the Copenhagen Accord are themselves evidence, if undoubtedly controversial, of a move away from obligations agreed within and as part of a global binding deal.⁵⁹ Is it not the case that such voluntary commitments lack the necessary normative imprint that international law bestows and requires? These commitments are, ultimately, no more or no less than voluntary pledges of national action.⁶⁰ As the Executive Secretary to the Climate Change Convention had cause to note:

The phrase "In light of the legal character of the Accord . . ." should be read in its context. In using the phrase, the secretariat sought to convey two facts regarding the legal nature of the Accord. First, that since the Conference of the Parties neither adopted nor endorsed the Accord, but merely took note of it, its provisions do not have any legal standing within the UNFCCC process even if some Parties decide to associate themselves with it. Secondly, that since the Accord is a political agreement, rather than a treaty instrument subject to signature, a simple letter or note verbale to the secretariat from an appropriate authority in Government is sufficient to communicate the intention of a Party to associate with the Accord.⁶¹

Thus, not only is the Accord arguably indicative of the failure of multilateralism as a model of governance (in this instance, in any event) but also of the emergence of a new dynamic between domestic law and global objectives without the necessary intervention of international law. Whatever one's view of the Accord, as an approach to global negotia-

56. See Alister Doyle & Gerard Wynn, *New Climate Talks Set for 2010; Gloom for Treaty*, REUTERS, Apr. 11, 2010, <http://www.reuters.com/article/idUSTRE6372AT20100411>.

57. For discussion, see Bodansky, *supra* note 53, at 230, 235, 238-40.

58. Moreover, in addition to the attempt by some States to affect the activity of other States, a related feature is the emergence of "network administration" and "hybrid and private administration," on which Kingsbury highlights the increasingly complex forms of regulation and administration that are now involved in international environmental governance. As he notes, the traditional model (what he terms "distributed administration"—an action "performed largely by organs of national governments, acting pursuant to international agreements"—is increasingly challenged by the use of other administrative forms, such as networks of (more informal) government officials, private standard-setters, and hybrids of both public and private actors. See Benedict Kingsbury, *Global Environmental Governance as Administration: Implications for International Law*, in *THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW* 64, 79-81 (Daniel Bodansky, Jutta Brunnée & Ellen Hey eds., 2007).

59. See U.N. Climate Change Secretariat, Clarification Relating to the Notification of 18 January 2010, (Jan. 25, 2010), available at http://unfccc.int/files/parties_and_observers/notifications/application/pdf/100125_noti_clarification.pdf.

60. *Id.*

61. *Id.*

tion—perhaps even to global regulation—its potential significance to both climate change and on other subjects cannot be ignored. But how should the mainstream lawyer respond? Do we resort to a grudging acceptance of the *realpolitik* while hoping for a better normative future? Or do we somehow seek to interpret a political settlement in legal terms—to take legal ownership of it? Either position would surely condemn us to being the type of lawyer mentioned by Alston, who notes or analyzes change in an “almost perfunctory manner.”⁶²

IV. Moving Beyond the Caricature: The ‘Skeptical’ Mainstream Lawyer

In both instances—the evidence before the Chilcot Inquiry and the negotiation of the Copenhagen Accord—established norms and procedures have seemingly been either ignored or jettisoned in favor of something much more pliable and acceptable.⁶³ Wasn’t it always this way? Perhaps. And certainly there is nothing new here in the abandonment of legal principle or the rejection of global governance for reasons of politics or international relations. Nor is it too controversial to say that most international lawyers innately find such instances a rather sad, if often inevitable, indictment of the limitations of our discipline. But straying beyond that, isn’t it a rather jaded perception of the mainstream international lawyer to suggest he or she is unable to cope with such challenges?

I would suggest that it is, but refuting the claim is not enough. What one also needs to do is then to go on to find an appropriate rejoinder to such a caricature. One attempt to highlight the need for international lawyers to move beyond focusing just on the challenges we face was contained in Charlesworth’s 2002 *Modern Law Review* article.⁶⁴ She noted that “[a] concern with crises skews the discipline of international law. Through regarding ‘crises’ as its bread and butter and the engine of progressive development of international law, international law becomes simply a source of justification for the status quo.”⁶⁵ Thus, one response to difficult questions is to recognize that, although there will inevitably be bumps in the road, we should not dwell upon them; rather we should ‘refocus’ the discipline into “an international law of everyday life.”⁶⁶ In other words, we should seek to develop a discipline that concentrates upon the ordinary—the concerns of the majority—or what Charlesworth refers to as the “non-elite groups.”⁶⁷ This leads me to wonder whether Thomas Franck was also right when he argued:

The moral pursuit of distributive justice should engage us because, like Socrates, our intellects should harbor an ‘all-engrossing eagerness for answers to moral questions, beginning with the most urgent of all: how should we live?’ The question of fairness

62. Alston, *supra* note 32, at 436.

63. It might, however, be argued that these two instances have less in common than I suggest. As one colleague noted in response to an earlier draft of this paper, “Iraq focuses on the interpretation of existing law and the role of the lawyer within a very political context whereas the Copenhagen Accord arguably reflects the beginning of a fundamental change in which rules/regimes are negotiated or developed” (email on file with author). Though this is an extremely incisive understanding of these two situations, I still believe that both raise fundamental questions as to how we, as international lawyers, respond to difficult international situations.

64. Charlesworth, *supra* note 12, at 391.

65. *Id.*

66. *Id.*

67. *Id.*

encompasses that moral issue because fairness supposes a moral compass, a sense of the just society. The law must create solutions and systems which take into account society's answers to these moral issues of distributive justice, for we are moral as well as social beings.⁶⁸

There is a great deal of merit in this kind of approach. Not responding in a knee-jerk fashion to every instance of seeming defiance of a legal norm or the occurrence of an incidence which is outside of our normative comfort zone, but rather acknowledging that our more fundamental purpose—our *raison d'être*—is to focus upon, and seek to tackle, the perennial dilemmas of international society.

Personally, I have always been attracted to this type of approach, and it is obviously needed, if only to act as a counterbalance to the paradigm of being seen to react to singular events. But is a shift in focus itself enough to prevent the formation of the view that mainstream lawyers are obsessed by form over substance and that mainstream lawyers are unable to cope with difficulty and change? Perhaps what we also need to do is engage—and to be seen engaging—more productively and less reactively with the view that international law (and the international lawyer) does not operate within a sealed vacuum of rules, principles, and institutional processes, but rather that law (and the lawyer) is very much at ease in the messy world of the political. As I noted earlier, this means seeing the world in a “multi-dimensional way.” One attempt to grasp this nettle was set out, if only in passing, by Daniel Bodansky in his review of Goldsmith and Posner's 2005 book, *The Limits of International Law*.⁶⁹ The book propounds the use of “rational choice theory” in international law.⁷⁰ Many of its central claims are made by implicitly contrasting its approach with that of supposed mainstream lawyers, who (as Bodansky notes) are presumably “uncritical believers in the normative force of international law.”⁷¹

But this is where the argument surely fails; mainstream lawyers—in Bodansky's view—share many of the fundamental premises of those more obviously critical of the international legal system.⁷² Namely, (i) that states have their own national interests which they will pursue for their own ends; (ii) that rules of international law generally reflect these interests; (iii) that state interests also impact the nature and level of compliance with international law; (iv) that states will interpret international law as far as possible in light of their interests; and (v) that power—in its infinite variety of shades—plays a significant role in the development and enforcement of the law.⁷³

In agreeing with Bodansky as to the simplicity of the view that we are all “uncritical believers” what I would suggest is that we more actively, and more honestly, grapple with the challenges of the international system—accepting all the apparent impurities within the normative order that this will mean.⁷⁴ This is not so that international law simply becomes an instrumental exercise in explaining state behavior or to agree with Jack Straw

68. THOMAS M. FRANCK, *FAIRNESS IN INTERNATIONAL LAW AND INSTITUTIONS* 8 (1995).

69. Bodansky, *supra* note 35; JACK L. GOLDSMITH & ERIC. A. POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005).

70. Bodansky, *supra* note 35, at 285.

71. *Id.* at 288.

72. *Id.*

73. *Id.* at 288-89.

74. *Id.* at 289.

that international law is innately “uncertain.”⁷⁵ Nor even to view international law as ‘law-in-context’ writ large; we are not seeking to place international law within the social, economic, and political global order for its own sake. Rather, we do so to better clarify how to make international law work effectively in the light of the realities in which it must operate. We are all aware that the positivist mainstream lawyer is, by and large, a parody; what interests me is that we often fall back into this mode when the political world becomes too unclear and indeterminate.

So how does one then respond, in the particular instances, of the issues presented by the Chilcot Inquiry and the Copenhagen Accord? Though space prevents a detailed analysis, let me make three brief comments building upon the previous analysis. First, we must continue to assert the role of international law in international affairs. Though we accept the politics of a situation, this does not mean that we should be swayed in all directions because of them. There is nothing odd in the argument that as lawyers we continue to prefer an international system that is built on the precepts and rules of international law, rather than the bare power so emblazoned still within the *realpolitik*.

Even in those situations where law is purposively or recklessly absent, it is the role of the international lawyer (among others) to seek to bring it back to a normative framework or reference point as soon as possible. This is not the same as defending the indefensible or seeking to apologize for everything that is not law. Rather, it is about recognizing that the international community itself has learned that over time, long-term progress only usually happens when all participants decide to speak again the same language, and that language remains international law.⁷⁶ This is not to eschew the question of legal responsibility when breaches do occur, but to recognize that finding a violation is not the principal goal of any legal system. So, in throwing up our hands on listening to statements such as Jack Straw’s (reflecting, as a microcosm, the views of a number of people at the time in disregarding the letter of the UN Charter prior to the Iraq conflict), this should not divert attention away from the role international law can play in affecting positive change, most conspicuously within a normatively-ordered framework.⁷⁷

Second, such a belief in international law should not disguise the fact that legally binding rules are not the only way forward in an ever-complex international society. As d’Aspremont notes:

Many recent developments—like networks among governmental officials or transnational law—have shown that non-legal instruments may prove more adapted to the speed and complexity of modern international relations and are more and more re-

75. *Iraq: Jack Straw Defiant over Ignoring Legal Advice*, BBC, Jan. 27, 2010, http://news.bbc.co.uk/2/hi/uk_news/politics/8483506.stm.

76. Cf. Carty, *supra* note 31, at 11-12 (“[Koskenniemi] stresses how far the evasive rhetoric of the contemporary practice of the discipline serves to continue a guarantee of the professional autonomy which comes from the modernist/formalist approach to law . . . International legal language sees each discursive topic (e.g. sovereignty) to be constituted by a conceptual opposition. Indeed the opposition is what the topic is about. Disagreement persists because it is impossible to prioritize one term over the other. These terms turn out to depend upon one another.”).

77. James Chapman, *Iraq War Was a Crime of Aggression: The Damning Verdict of Top Whitehall Lawyers Which No.10 Refused to Accept*, DAILY MAIL, Jan. 27, 2010, <http://www.dailymail.co.uk/news/article-1246312/Chilcot-inquiry-Iraq-. . .verdict-Whitehall-lawyers-invading-Iraq-ministers-refused-accept.html>.

sorted to in practice. Non-legal instruments can be at least as integrative for a community as legal ones.⁷⁸

As lawyers, we have come to acknowledge, or arguably had no choice but to accept, soft law, and perhaps it is also time to engage with it more positively. Indeed, it is important to note that despite the political nature of the Copenhagen Accord and its avoidance of international law, it has not avoided the international process.⁷⁹ Thus, whatever the relative merits and weaknesses of the Copenhagen Accord, one of its strengths is the fact that it sought endorsement from the Conference of the Parties as a means of enhancing its legitimacy.⁸⁰ The fact that the Conference of the Parties merely took note of the Accord, despite enormous pressure to embrace it fully, says something, many believe, about the enduring quality of multilateral governance.⁸¹

In any event, law has never been restricted to an analysis of the rules. We should equally be concerned with the nature and scope of law-making and decision-making processes, the institutions that build up around such rules and processes, the means of promoting compliance and dispute settlement, as well as asking why in certain situations law has remained relatively intangible and soft. Lawyers should also be prepared to critically analyze who is participating (and who is marginalized) in the law and decision-making process.⁸² An assessment that restricts itself to looking only at rules is bound to misrepresent the true nature of international law. Thus, the Copenhagen Accord may be a political document, but it cannot be understood without reference to the broader legal and institutional narrative in which it must share space. In other words, as lawyers, we should affirm the international process without a slavish commitment to traditional styles of obligation as the only way forward in *all* situations.

Third, we might do well to dwell on—yet subtly invert—the traditional positivist canon, as most clearly stated by the Permanent Court in *The Lotus* (1927), namely that “[r]estrictions upon the independence of States cannot therefore be presumed.”⁸³ The strength of positivism is that it continues to emphasize the overriding significance of state practice in explaining the development of international law. Whilst it has been right to denounce the absolutist nature of how this most famous of dictums from *The Lotus* has been understood,⁸⁴ perhaps we should not completely disregard the kernel of important truth that it contains. Namely, that states jealously guard their independence, even in an

78. Jean d’Aspremont, *Softness in International Law: A Self-Serving Quest for New Legal Materials*, 19 EUR. J. INT’L L. 1075, 1088-89 (2008).

79. Cf. Bodansky, *supra* note 53, at 238-39. “The Copenhagen Accord asserts that it will be ‘operational immediately,’ but fully operationalizing its terms will require further acts . . . The terms of the Accord presume that this work will be carried out by the COP [the treaty’s Conference of the Parties]. But given the COP’s inability to adopt the Copenhagen Accord, this presumption appears tenuous at best.” *Id.*

80. Dubash, *supra* note 15, at 8.

81. Jacob Werksman, “*Taking Note*” of the Copenhagen Accord: *What It Means*, WORLD RESOURCES INST., Dec. 20, 2009, <http://www.wri.org/stories/2009/12/taking-note-copenhagen-accord-what-it-means>.

82. See Karen Morrow, *Sustainable Development and the Instinctive Imperative of Justice in the Global Order*, in GLOBAL JUSTICE AND SUSTAINABLE DEVELOPMENT 89, 89-107 (D. French ed., forthcoming Oct. 2010).

83. The Case of the S.S. “*Lotus*” (Fr. v. Turk.), Judgment No.9, 1927 P.C.I.J. (ser. A) No. 10, at 14 (Sept. 7).

84. See Vaughan Lowe & Christopher Staker, *Jurisdiction*, in INTERNATIONAL LAW 319 (M. Evans ed., 2010). “Even if the characterization of international law as fundamentally consensual is accepted, it does not follow that a sovereign State is free to do what it wishes.” *Id.*

era of globalization and interdependence. Perhaps it might thus be said that restrictions upon the independence of states *should* not easily be assumed. We risk a disservice to the international community if we conflate too readily what we would like the law to be with what the law is. Some might suggest that this conflation of perspectives is intrinsic to much of international legal scholarship. Koskenniemi has, for instance, had occasion to remark that international law “exists as a promise of justice.”⁸⁵ It is true, as he goes on to say, that such justice “cannot be enumerated in substantive values, interests or objectives,”⁸⁶ but nevertheless there is an aspect to international law that is “the announcement of something that remains eternally postponed.”⁸⁷ Of course, giving effect to certain fundamental societal values that are embedded within our doctrine is one thing; contemporaneously denying that we do this in favor of a supposed objective narrative is a very different matter altogether. Moreover, as Weil had occasion to note:

Vigilance, however, is imperative, lest too high a price be paid for the progress of international law towards greater moral substance and greater solidarity . . . [T]he waning of . . . positivity in favor of ill-defined values might well destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose.⁸⁸

Even if one finds an approach to international law that is exclusively focused on state behavior as too limited—as indeed most mainstream lawyers actually do—it surely still behooves us, at the very least, to be aware of where the current law ends and the *desideratum* begins.

V. Concluding Comment

At the end of her article, Charlesworth refers to “that pleasurable sense of internationalist virtue that comes with being an international lawyer,”⁸⁹ but suggests that this may have to be given up if we are to become more self-critical (or at least self-reflective) of the role we do have. I wouldn’t disagree, but I would add that one of the facets of that “internationalist virtue” is also a responsibility on us to promote and support the international legal system. Though the argument that international lawyers owe some kind of professional duty to the advancement of the legal system in which they work or study must itself be another paper,⁹⁰ what I really want to emphasize—and, in fact, conclude on—is that such a responsibility is best served when we engage with the untidiness of the world, with situations that fall outside our neat box of preordained legal outcomes.⁹¹ What doesn’t serve the international legal system is if the international lawyer simply writes off such

85. Martti Koskenniemi, *What is International Law For?*, in Malcolm Evans, *INTERNATIONAL LAW*, (Oxford University Press, 2003), at 111.

86. *Id.*

87. *Id.*

88. Prosper Weil, *Towards Relative Normativity in International Law?*, 77 AM. J. INT’L L. 413, 423 (1983).

89. Charlesworth, *supra* note 12, at 392.

90. See Schachter, *supra* note 7, at 226. “Since the governments of the world are likely to be ambivalent about ‘*la conscience juridique*,’ the role of the nonofficial community of lawyers in giving that conception specific meaning and effect may well constitute the noblest function of our invisible college.” *Id.*

91. See Alston, *supra* note 32, at 447 (relating the issue of power). “[I]nsufficient attention has been paid to the questions of the nature of the international agenda and who sets and implements it.” *Id.*

difficulties as temporary aberrations, facts that the current system already answers or, worse of all, that we feign arrogance of possessing the right—and only—answer. Rather, as Hurrell notes, “[i]t is certainly the case that both the strength and the fragility of international law derive from the need to maintain connections with both murky practice and normative aspiration.”⁹² Perhaps because we are generally uncomfortable with the former, we have almost come to ignore it altogether and have focused a little too much on the latter. But residing in the latter proves equally problematic, certainly if we are to enter—and to be seen to be engaging with—the untidy politics of international relations.

Of course, we should not deny our professional competence. When Elizabeth Wilmshurst was asked by a member of the Chilcot Inquiry whether she felt it had been difficult providing legal advice because Jack Straw as Foreign Secretary was a trained lawyer, her reply—brutally swift—was, “[but] [h]e’s not an international lawyer.”⁹³ Asserting our specialism is one thing; pretending that we exist and operate in splendid isolation from the politics of international law is, however, another. Mainstream international lawyers might want to learn from Odysseus, the Homeric king of Ithaca, as an example.⁹⁴ Described as being *polytropos*, “[t]he man ‘of many turns,’”⁹⁵ he was wily, cunning, and adapted to anything that was thrown at him by the gods, so that he never lost sight of his goal. Seeking to inculcate some of these characteristics might not do the mainstream international lawyer any harm at all.

92. Andrew Hurrell, *Conclusion: International Law and the Changing Constitution of International Society*, in *THE ROLE OF LAW IN INTERNATIONAL POLITICS* 332 (M. Byers ed., 2001).

93. Paul Reynolds, *Straw’s Clash with Lawyers Laid Bare at Iraq Inquiry*, BBC, Jan. 26, 2010, http://news.bbc.co.uk/1/hi/uk_politics/8481588.stm.

94. Thanks to Dr. Etienne Dunant, a historian of ancient Greece, for this analogy.

95. See PIETRO PUCCI, *ODYSSEUS POLUTROPOS: INTERTEXTUAL READINGS IN THE ODYSSEY AND THE ILIAD* 14–15, 128 (Cornell Univ. Press 1987).

