Prologue: consistency and conceptual variations

International lawyers, and especially legal academics, like to think of international law as an all-integrated notion. They let themselves (and their action) be guided by one single concept of international law that is supposedly exclusive in the way it describes, explains and makes demands on the world. One's understanding of international law ought to apply consistently across the board, informing anything one does in relation to (or in the name of) international law. This faithfulness to a single concept of international law *per capita* is usually strictly enforced among international lawyers. Failing to demonstrate fidelity to one single concept of international law often comes with severe social, professional and institutional opprobrium, most of the time under the holy offence of inconsistency.

There certainly are virtues in conceptual consistency but far less in the forced dogmatic consolidation of concepts. International law can be given many different facets – that is, it can be constructed in many different ways – without one having any ascendency over the other. What is more, I am convinced that variations in one's concept of international law, albeit the occasional cause of incommensurable views on the world explained or called for by international law, enrich rather than diminish the value of one's work. In the opinion of this author, the descriptive, explanatory or normative incommensurability produced by the variations in one's concept of international law necessarily creates contradictions. After all, contradictions only arise between qualities or facets that are commensurable.[1] Provided that one sufficiently discloses one's conceptual choices for the argumentative move at stake, there is not necessarily any inconsistency in *simultaneously* thinking of international law as a set

[1] For a discussion on the question of rational argumentation between incommensurable positions see G.-L. Lueken, *Inkommensurabilität als Problem rationalen Argumentierens*, Stuttgart/Bad Cannstatt 1992. This was brought to my attention by V. Priuli.

of rules and institutions,[2] a set of authoritative processes,[3] a combination of rules and processes,[4] a set of legal relations,[5] a discourse,[6] a tool to create authoritative claims,[7] a political project,[8] etc. It may be time to bring an end to the impoverishing social expectation that each international lawyer constantly and invariably abides by the same one-dimensional concept of international law and commend those who have built for themselves a large portfolio of cognitive standpoints on which they can draw to create different images of international law and its practice. This certainly does not mean valuing those argumentative tactics that purposely promote semantic instability.[9] Conceptual self-awareness dictates that variations in one's concept of international law always ought to be acknowledged and delineated. That international law can equally be looked at from very diverging but equally valid perspectives should make it socially acceptable to let one's concept of international law fluctuate to

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[2] In a previous work, I have pondered the theoretical difficulties associated with a dynamic rule-based approach to international law and especially the problem of infinite regress or of normative arbitrariness behind the empirical foundations of a rule-based system. See J. d'Aspremont, *Formalism and the Sources of International Law* (Oxford University Press, 2010) (reprinted as paperback in 2013).

[3] It is the well-known legacy of the New Haven School of International Law to think of international law as a process.

[4] It is Hart's merit to have offered a concept of law that combines the idea of law as a product and law as practice. On this aspect of Hart's theory, see W. van der Burg, "Two Models of Law and Morality", 3 *Associations* (1999) pp. 61–82, at 68.

[5] Ph. Allott, "The True Function of Law in the International Community" 5 *Global Legal Studies Journal* 1998 391, at 400.

[6] M. Koskeniemmi, "Law, Teleology and International Relations: An Essay in Counterdisciplinarity", 26, *International Relations*, 3, at 3; see also M. Koskenniemi, "Methodology of International Law", *Max Planck Encyclopedia of Public International Law*, para. 1. For some critical remarks on the move to discourse, see Onuf, "Do Rules Say What They Do? From Ordinary Language to International Law", 26 *Harvard International Law Journal* 385 (1985), at 393.

[7] See J. d'Aspremont, *Customary International Law as a Dance Floor: Part I* at http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-i/ and J. d'Aspremont, *Customary International Law as a Dance Floor: Part II*, at http://www.ejiltalk.org/customary-international-law-as-a-dance-floor-part-ii/; J. d'Aspremont, "Wording in International Law", 25 Leiden *Journal of International Law* (2012), pp. 575–602.

[8] M. Koskenniemi, "The Fate of Public International Law: Between Technique and Politics", *The Modern Law Review*, 1997, 1–30, at 1.

[9] For a criticism of those argumentative tactics, see below chapter 8.

produce contrasts in the way international law describes, explains and makes demands on the world[10] and should not be socially reprehensible, but rather, valued.

[10] I nonetheless agree with MacIntyre that perspectivism *sensu stricto* is an oxymoron as variations in perspectives always unfold within a certain tradition. See A. MacIntyre, *Whose Justice? Which Rationality?*, Duckworth, 1988, at 352–3.