The sentimental life of international law: literature, language, and longing in world politics

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THE SENTIMENTAL LIFE OF INTERNATIONAL LAW
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INTERNATIONAL
LAW
LITERATURE, LANGUAGE, AND LONGING
IN WORLD POLITICS
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As these things were going through my mind I was watching the sand martins darting to and fro over the sea. Ceaselessly emitting their tiny cries they sped along their flight-paths faster than my eyes could follow them. At earlier times, in the summer evenings during my childhood when I had watched from the valley as swallows circled in the last light, still in great numbers in those days, I would imagine that the world was held together by the courses they flew through the air.


At the height (or in the depths) of the Great Terror in 1937, Joseph Stalin came across Boris Pasternak’s name on an NKVD list of those to be liquidated. He crossed Pasternak’s name off the list, appending the words: ‘Do not touch this cloud-dweller’. Pasternak, of course, was a cloud-dweller who wrote *Dr Zhivago*, the novel that, for some western readers in the post-war era, defined the Soviet enterprise.

This book, in a way, belongs in the clouds, far removed from the cut and thrust of international legal life. There is hardly a word on foreign investment law or collective security or the Paris Treaty on climate change. But in another sense—and looking at clouds, as we must, from both sides—this book is an argument against cloud-dwelling, against the idea that bodies of law exist in a space detached from the earthbound lives (sentimental, literary, material, friendly, pastoral) of international lawyers and their subjects, and that, instead, our world—with its sociopathically unequal distribution of life chances and its casual everyday cruelties, its enclaves of redemptive hope and human kindness—is held together by the courses of law and language as they fly through the air.

Many people helped me hold the world of this book together by reading chapters, offering comments, urging me on. I want to single out, though, my two research assistants, Quito Tsui and Tanmay Misra, as well as my various readers (especially my sisters, Linda Reavley and Sheena Carmichael) and six of my international law friends—friends who happen to be international lawyers or honorary international lawyers but with whom I rarely talk about international law: Sundhya Pahuja, Raimond Gaita, Philippe Sands, Barry Hill, Matt Craven and Catriona Drew (who has had faith in me ever since I came second in the 1984 Jurisprudence course at the University of Aberdeen, confirming the old adage that no one ever remembers who came first).

All of this would have been impossible without the support, over the past few years, of my many colleagues and friends at the two law schools I have been most closely associated with, the London School of Economics Law Department and the University of Melbourne Law School.

Impossible without the kindness of Laura Corsini and Ged Lethbridge in 2014 and 2015.

Impossible without the lucky break I experienced when I first met Esther Freud one wintry evening at ‘The Flask’ in Hampstead Village.

And impossible without my golden daughters, Hannah (who helped me with chapter vii) and Rosa. Hannah Arendt’s old apartment was very close to me as I sat writing parts of this book in Ruti Teitel’s apartment in the East Village, the ‘Rosa Luxemburg Stiftung’ was thirty blocks north on Madison Avenue.

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What differs from the existent will strike the existent as witchcraft.

Theodor Adorno, *Negative Dialectics* (Continuum, 2007)

I’m sentimental, if you know what I mean . . .

list of abbreviations

ASIL American Society of International Law
GATT General Agreement on Tariffs and Trade
ICC International Criminal Court
ICJ International Court of Justice
ICTR International Criminal Tribunal for Rwanda
ICTY International Criminal Tribunal for the former Yugoslavia
IMT International Military Tribunal
IMTFE International Military Tribunal for the Far East
NAM Non-Aligned Movement
TWAIL Third World Approaches to International Law
UNDHR Universal Declaration on Human Rights
UNGA United Nations General Assembly
WTO World Trade Organization
i

a plea for new international laws

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‘In considering this strangely neglected topic’, [the dissertation] began.
This what neglected topic? This strangely what topic? This strangely neglected what?

Kingsley Amis, Lucky Jim (Victor Gollancz, 1954)

i. language and crisis

This is a book about our age-old longing for a decent international society. It is published, though, as public international law seems to be enduring, perhaps relishing, its latest crisis—an apparent deepening of the recession experienced since the end of a starry-eyed, post–Cold War interregnum. There is a fair bit of unease around: a disaffection with the foreign investment regime, a lot of muttering about the spate of withdrawals and would-be withdrawals from the International Criminal Court (ICC) and about judicial institutions incapable of making appointments, a nagging worry that the split between Europe and Britain or between the United States and
the liberal democratic consensus prefigures something unpleasant, a belief that a highly personalised, capriciously authoritarian politics is displacing the long, slow boring of legal-diplomatic holes or a concern that international lawyers fresh from coming in from the cold are about to be again cast out into it.

As always, we need to be alert to the possibility that these are symptoms of a more fundamental problem. In 2017, I saw at the National Theatre in London a play called *Consent* about the fractious relationship between the private idioms of love, betrayal and regret, and the jurisprudential languages of guilt, responsibility and punishment. The characters—including an earnest lawyer rarely seen without his collapsible bike—struggle to reconcile a language of rationality and cool wit with the turmoil of the human heart. Inevitably, the proximate matters—a divorce, an alleged sexual assault—end up in trial proceedings. But as the Programme Notes informed us: ‘The courts are a poor place for a resolution’. In the end, the law runs out of road, and whenever the characters in the play speak law to passion, it sounds faintly prim or maladroit, sometimes even disabling.

In this book, I want to think about how we might be disabled by the governing idioms of international lawyering and, then, importantly, re-enabled, by speaking different sorts of international law or by speaking international law in different sorts of ways. To a certain extent, this initially might be approached or read as another glum assessment of a world gone wrong, but the glumness here is not directed at specific individuals (Bezos, Erdogan, Johnson, Musk, Modi, Afwerki), catastrophes in the making (fires, floods, extinction, viruses) or even the obviously structural causes of cruelty and maldistribution, but instead at the prison-houses, holding pens and detention centres of language itself. And along with diagnosis, I want to offer, too, if not hope then at least solace. Auden wrote that ‘poetry makes nothing happen’. The same could be said of this book. But each chapter does end with a promise of, or description of, some redemptive practice or thought, a message in a bottle. Sometimes this will be a pointer towards writing history that is not ‘method’ (chapter v, ‘after method’), sometimes a modest prescription (chapter iv, ‘the experience of bathos’), sometimes a rush of

2. W. H. Auden, ‘*In Memory of W. B. Yeats*’. *Collected Poems* (Faber and Faber, 1940).
blood to the head (chapter vii, ‘gardening, instead’), occasionally a plea for some ironic hopefulness (chapter iii, ‘comic international law’) and sometimes a romantic aside (chapter vi, ‘a declaration on friendly relations’). At the very least, I like to think it might alleviate the odd discontent or lift the occasional mood.

The preoccupations of the book are organised around a series of questions. Are we at the point where enunciating our collective tragedy in the language of international law risks a degree of bathos or absurdity, when to keep speaking it might invite a certain cynicism not so much from its opponents but from within the field itself: cynicism as a condition of necessity? Is international law—as a prescription for a good life—no longer compatible with living well, or has it become/has it always been a cluster of promises that obscure and inhibit the conditions for flourishing? Is international law subject to ‘cruel optimism’? Could it be that we are not thinking and writing about the world in quite the right way? Might it be the case that the imperatives of authority, relevance, solemnity, seriousness and conviction are part of our collective problem? In short, is international law an apt way to think about and change the world?

Describing the problem is at least one aspect of this study. Here I assume the dominance of a certain way of going about international law: a mode of thought, method, speech and a set of professional expectations and instincts that define the field every bit as much as the content of its rules. These are what Edward Said referred to as the ‘pressures of conventions, predecessors, and rhetorical styles’. Mostly these constitute or limit the parameters of the field by exiling some work to the margins or wilderness. International law is not alone in doing this, but since it tends to think of itself as a discursive exercise par excellence (a form of persuasion, technical agility, world-making word play), these conventions become unusually constitutive. This book, then, is intended to be part of a broader project to open up the space in which international lawyers can live and work.


5. Edward Said, Orientalism (Pantheon Books, 1978) 13. (He goes on to say that it is these conventions and styles that ‘limit what Walter Benjamin once called “the overtaxing of the productive person in the name of . . . the principle of “creativity””‘.)

But there is no getting away from the fact that work like this will be experienced as interesting or, perhaps, compelling only by those with an awareness that the distribution of material, moral and cultural power in the world is askew and that it is necessary to act and think in dramatically different ways in order to reverse this distribution. And even people who think like this will worry that writing a book about what it might mean to write a book about international law may not be the most direct way to challenge these existing wrongs (as I write this, commuters are dragging a man off the roof of a London Underground train for daring to protest about the coming climate disaster, Chilean students are being tear-gassed and shot in the eyes with rubber bullets as they gather to call for a more equal society, and an experiment in political self-determination is being slowly suffocated in the Rojava province of Northern Syria). Yet, international lawyers are a privileged caste in society. What we say and think matters (though it has been a tendency of public international lawyers to claim that this isn’t so). As teachers of international law, in particular, we have in our care each year hundreds of students. For some of them, our course will be their only exposure to sustained reflection about global politics. There is a responsibility and power in this.

ii. relevance and play (the ‘last of the humanities’)

This is all especially pertinent in a period when the humanities are under threat (from technology, from cuts in funding, from perpetual auditing). In a melodramatic gesture, then, I want to think of international law as the ‘last of the humanities’: the final resting place in an over-professionalised curriculum for a relatively unfettered and playfully serious account of the world around us—an account that does not entirely give itself up to the demand for absolute utility. Isobel Armstrong has said that the best way to defend the humanities is to practise them.7 This book, then, attempts a practice of the humanities that is more than the instrumentalised transmission of knowledge.

In 2004, I gave a public lecture in Melbourne on the Iraq War (arguing against it, declaring it illegal, providing illustrative examples, suggesting a peaceful solution, warning about the fragmentation of the Baathist

state). After the speech, people gathered round me with various words of encouragement and praise while I ran through an itinerary of self-effacing gestures. A former prime minister approached me and said that he had found my lecture . . . ‘relevant’. A little bit of me died in that moment. And yet, this book was born. ‘Away with relevance and utility!’, as Nietzsche might have said. A few years ago, the editors of a book for which I was writing a chapter came back to me with tremendously useful comments. In my chapter was a passage that I was especially proud of. Beside it, one of the editors had written, ‘Beautifully written, but is it necessary?’ The idea of necessity and usefulness, then, is one target of the book. My former LSE colleague, Stan Cohen, resisting the idea that history or text could simply be mined for lessons, once said of the trial of Klaus Barbie in Lyon that it was ‘a postmodernist trial—a text from which no-one could learn very much’. The culmination of this train of thought would be an Adorno-esque refusal of language itself, but, though it is all too possible to not-publish a book, it is not possible to publish a non-book: a book that refuses to publish. One must attempt to eff the ineffable. So, this book belongs in the tradition (but it can’t be anything as po-faced as ‘a tradition’) of the proverbial rather than the philosophical: a clandestine, barbarian international law of misreadings, perverse readings, marks, jokes, slips, accidents, (unintended) verbal resonances.

Joe Smith, my teacher in Vancouver when I was first a postgraduate student,

8. A few weeks before that lecture I was taking part in a debate at the Institute of Contemporary Arts in Pall Mall, and when I said all of this, the right-wing commentator on the other side of the debate said: ‘That’s the trouble with people on the Left, they are all so pessimistic’.
9. The recent government-mandated research exercise in the UK has asked scholars to account for the ‘impact’ their research has had, as if scholarship was an asteroid colliding with the world of work and finance. Imagine my delight, then, when I read recently that a former director of the LSE, Sir Alexander Carl Saunders, is alleged to have ‘proscribed all non-academic publication by anyone identifying himself as a member of the LSE’. Stefan Collini, *Absent Minds: Intellectuals in Britain* (Oxford University Press, 2007) 379 fn. 391, quoting Kathleen Burk, *Absent Minds: The Life and History of A. J. P. Taylor* (Yale University Press, 2000) at 206.
12. This is a phrase of Samuel Beckett’s.
13. See also Jacques Derrida, *The Post Card: From Socrates to Freud and Beyond* (University of Chicago Press, 1987). ‘Proverbial’ in the sense that I intend to speak not describe international law, and ‘clandestine’ in the sense that it involves an indirect approach on the subject. Meanwhile, I am happy to connote ‘barbarian’ in its many senses here. The barbarian has always been understood as savage, or foreign, of course, but also as pagan (not conforming to the Christian orthodoxy). David Hume described Oliver Cromwell as a barbarian, though not one ‘insensible to literary merit’: *Oxford Shorter English Dictionary* (Oxford University Press, 1993). And another Edinburgh Scot, James Lorimer, was happy to place the Ottoman Empire
argued relentlessly for this sense of legal theory as both psychoanalytic investigation and playful lily-hopping. Later he wrote at length about the importance of doing political and theoretic work for its own sake:

We can, through social action, accomplish limited set tasks such as preserving park land . . . alleviating specific distress . . . not because any of this will make a substantive difference to the world but because it is what we want to do at the time. This is action as play rather than action as pathology.

In any event, I want to engage in a kind of belle-lettirist insurgency: an underground skirmish in the struggle to outflank the desire to be relevant, or an agonistic rejoinder to international law’s rational-technocratic life-world or a book-length de-instrumentalisation of the field. Another way to put this is to say that you hold in your hands the most useless book in the history of international law.

Either way, it’s a strangely neglected topic.

iii. sentimental life

But what is this book about? One way to answer this question is to say that it is about what it means for something to be ‘about international law’. In particular, I ask what it might be to engage in a professional practice that has become, to adapt a title of Janet Malcolm’s, not just impossible but difficult. I do this by making the effort to discern, or better still to bring to the surface, international law’s ‘hidden literary prose’: its bathetic underpinnings (chapter iv), its friendly relations (chapter vi), its neurotic foundations, its screened-off comic dispositions (chapter iii), its anti-method (chapter v), the life-worlds of its practitioners (chapter ii).

in the category of a barbarian civilisation (neither savage nor quite civilised but occupying the borderland). Peter Fitzpatrick has talked about the way in which non-European peoples were ‘called to be the same yet repelled as different, bound in an infinite transition which perpetually requires it to attain what is intrinsically denied to it’. See Peter Fitzpatrick, ‘“We Know What It Is When You Do Not Ask Us”: Nationalism as Racism’, in Peter Fitzpatrick (ed.), Nationalism, Racism, and the Rule of Law (Dartmouth, 1993) 11.

17. The phrase ‘hidden literary prose’ belongs to Jean-Paul Sartre in Situations IX (Gallimard, 1965). For a historical study arguing that pre-platonic language was mythic, narrative and proverbial, see Jan Swaringen, Rhetoric and Irony (Oxford University Press, 1991) 20–38.
But why a ‘sentimental life of international law’? The phrase and title are an effort to encapsulate at least three ideas or suppositions. The first involves what might also have been termed a literary life of international law. Here I treat international law as a form of writing and thought capable of being understood as a literary endeavour, capable, perhaps, of being written in a self-consciously literary form. So, on one hand, the book applies some literary devices to certain aspects of international law (e.g. bathos and the history of war crimes law) or juxtaposes international legal forms (solemnity, professionalism) with comic irony. On the other hand, it takes what might be regarded as literary themes or objects (friendship, gardening) and brings them into relations with international law (sometimes this involves a reading of literary texts such as Alice Goodman’s libretto for *Nixon in China*, George Steiner’s *The Portage to San Christobel* of A. H. or Voltaire’s *Candide*) in order to bring to the surface a certain possibility in international lawyering.\(^\text{18}\)

Second, this is a literary life of international law. Like many others, I take the field to be composed of more than its text-based rules or ethico-political diktats. Instead, it is a life lived by people as international lawyers with a bundle of professional orientations (e.g. chapter ii), a technology for organising life on the ground and a micro-politics of political and personal interaction governed by standards and prospectuses (of friendship, chapter vi; of writing styles, chapter v).\(^\text{19}\)

Third, this is a sentimental life, the title of an essay from which this book was originally derived. I chose this word partly because of its associations with Sterne’s *Sentimental Journey* and the sentiments at the heart of a Scottish Enlightenment understanding of culture and society, partly because sentimentality, while itself a literary form, also encompasses a broader field than the literary (it includes professional sensibility, feelings, instincts and so on) but partly, too, because ‘sentimental’ has a double meaning (the lachrymose absence of proportion and the presence of a human, anti-technocratic sensibility) that haunts the life and practice of international lawyers (this is discussed in the next chapter).\(^\text{20}\)

\(^{18}\) For work in this vein, see Peter Goodrich, Maks Del Mar, Joseph Slaughter, Desmond Manderson and Vasuki Nesiah.

\(^{19}\) In this context, see the work of Luis Eslava, David Kennedy and Sally Engle Merry.

I have found it useful here to think through all of this drawing from a diverse group of writers (such as Diogenes, Sterne, Nietzsche, Rebecca West) who were willing to rethink and unthink playfully, rebelliously and scurri-
ously with a view to upending convention. So, for example, I return at the end of the book to the figure of Diogenes and the concepts of ‘kynicism’ that have grown up around him—not ‘cynicism’ as in the failure to live by a set of beliefs or an attitude of sneering dismissiveness, or a Faragist manipulation of voting preferences or the cynicism of ‘inexpert rule’—but a kynical sensibility—derived partly from Diogenes himself, partly from the ironies of modernist thought—that puts international law into conversation with the dirty materialism of gardening and with the genre of comedy. The idea, then, will be to get to a place where we can combine cynicism with speculative hopefulness, where we might become kynics without cynicism, where we might uncover a sentimental international law of passionate, puckish, kind-hearted scepticism.

How might we discover—even create—this sentimental life of international law? I explore this possibility through a combination of indirection and bricolage. First, the book will enact the virtues of a slow, meandering, circuitous, approach to legal and literary material, one that privileges the tentative over the authoritative, indirection over coming to the point. I have no doubt that this will be understood as a book about theory to be contrasted, say, with a book about the law of the sea or about treaty law. One of the ‘ways of seeing’ that international law insists on—indeed it is a law of international law—is that there are two separate domains of theory and practice/doctrine. But the idea that international law can be disassembled in this way is both highly politicised and insidious. I cannot begin to count the number of times I have been told sotto voce, before a conference presentation, that I could ‘deal with the more theoretical issues’, or—this usually a compliment—that my presentation was not ‘too theoretical’. Here, ‘theory’ is understood as deliberate abstruseness or over-complication or ‘influenced by unreadable continental philosophers’ or self-indulgent. This book does advance a ‘theory’ of international law, but it does so through stealth and

21. I take this to be the argument Derrida is making at the beginning of The Post Card when he talks about the bad reader, the reader who wants to finish her reading, wants her reading to confirm some sort of pre-reading, wants to move onto another reading and declare the original reading ‘read’: (n 13) 5.

22. Another law of international law is that most people claim to be committed to breaking down this barrier. I taught a course at LSE with Sundhya Pahuja and Christine Chinkin called ‘The Theory and Practice of International Law’, but the students immediately concluded that it was about ‘theory’ (everyone knew this from the title and teachers).
indirection, the international legal tonalities pursued through the book representing a kind of Dickinsonian international law: ‘tell all the truth but tell it slant, success in circuit lies’.  

There is often a moment in psychoanalysis at the beginning of a session when the analysand will describe what she has been doing, who she has seen, where she has travelled: an itemisation of the conscious life designed to precede the disclosure of, or conceal, her deepest preoccupations. In an old cartoon, the analysand is busy describing this surface life while the analyst is depicted writing a shopping list on her notepad: ‘eggs, milk, bread . . .’. Increasingly international lawyers, too, are rejecting these surface manifestations of international law—‘courts, treaties, custom . . .’—in favour of an engagement with international legal diplomacy’s dark heart, its recurring pathologies, its traumatic histories, its authoritarian vibes, its forbidden materials. What can’t be done? And why not?

Public international law could still be redemptive, but this would be a flickering redemption: a modernist account of international law, then, but one that emphasises not the combination and recombination of primitive desire and formal experimentation but instead a commitment to hesitancy and delicacy in legal-political strategies.  

This might require attending to the contours of what is unsaid, or, what cannot be said. Or it might involve a reckoning with international law’s acts of unsaying (or ‘unprecedenting’, as I call them in one of the chapters here), a covert approach on Žižek’s ‘known unknowns’: the things we know but choose to ‘unknow’ by hiding them in plain sight. It might be possible, then, to catalogue or register the losses incurred when international legal language displaces earlier moral epiphanies, when, for example, Siegfried Sassoon’s ‘frantic, butchered gestures of the dead’ become ‘serious violations of the laws of war’.

23. This is from Emily Dickinson’s poem, ‘Tell All the Truth’ (1868), in The Poems of Emily Dickinson (Harvard University Press, 1998), No. 1263.
25. Virginia Woolf has one of her characters say that he wants to write a book about silence, the things people don’t say. See Virginia Woolf, The Voyage Out (Duckworth Books, 1913).
26. This is the gravamen of Maria Aristodemou’s Law, Psychoanalysis, Society: Taking the Unconscious Seriously (Routledge, 2014).
27. Siegfried Sassoon, Counter-Attack and Other Poems (1918); Rome Statute of the International Criminal Court, Article 8 (1998).
In one of a small number of brilliantly accomplished psychoanalytic encounters with international law, Maria Aristodemou, paraphrasing Lacan, describes a world in which we kill God, but he refuses to die—refuses to be abolished—and becomes instead unconscious. Here, (international) law is just one more of the placeholders for the dead/unconscious God (along with Father, Mother, Man, Markets, Freedom, Human Rights). But now, the substitutes themselves are busy dying. In the case of international law, the act of dying is a distinguishing preoccupation of the field itself. It is often found advertising its own death, or failure to come to life (the ‘vanishing point of a vanishing point of a vanishing point’ or ‘a discipline in paralysis’). Maybe it’s time then to search again for international law’s unconscious soul?

J. C. Smith argued thirty years ago that the foundations of the social order were largely neurotic. This is why that ‘order’ seems so irrational to so many people (15,000 nuclear weapons? Brexit? The 2 trillion dollar corporation?). The policies and practices underwriting that order attend to our neurotic needs or unconscious desires and cannot be understood—indeed are encountered as enigma or absurdity—in the absence of an attention to these needs and desires.

It is not my intention, and it is beyond my capacity in any case, to put international law on the couch. But I do draw on at least two Freudian insights in this work. First, the idea that the unconscious presents itself or reveals itself through indirection, error, quip, pun, juxtaposition. International law is a language, and that language has its conscious life (the effort to say something or many things in its texts and utterances) and its unconscious life, perhaps to be gestured at, indirectly, through the application of literary theory (bathos, chapter iv) or present in its comic life (chapter iii), or revealed in its private life (chapters i and vi) or found in image (film, painting) or literary text or material object (chapter vii).

29. Calling for an attention to the place as opposed to the thing in its place, see Gilles Deleuze, *Pure Immanence* (Zone Books, 2001) 71.
30. The original quote is from Thomas Holland, *Elements of Jurisprudence* (1924).
31. Smith (n 15).