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Inter-legality and the Conceptual Crises of Law

Jan Klabbers

I. Introduction

International lawyers – perhaps lawyers generally – often talk of crises, and when they do, they often mean to say that the rules are not sufficiently reflective of social realities, or the rules are not complied with often enough, or that there should be more rules, more courts, or all of the above.[1] And once the crisis is thus identified, the international lawyer often takes a seemingly well-deserved moral holiday, having done his or her bit for humanity.[2] What is often ignored amidst all the crisis talk is that any sense of impending or acute crisis may stem not so much from a deficiency in legal and judicial organization, but may instead be related to epistemic concerns. Put simply: it rarely crosses our collective minds that the problems reside not so much with rules and institutions, but rather with our concepts. And when this is dimly realized, it usually takes the form of a nostalgic yearning for better days, the days when international lawyers (to which I shall by and large limit myself) still knew how to recognize customary international law, or knew how to separate the *lex lata* from the *lex ferenda*.[3]

And yet, most (perhaps all) of the central concepts of international law are hopelessly outdated. The international law we teach was developed largely in the late nineteenth and early twentieth century, roughly between the 1880s and the 1930s. These were the years in which the ICJ's Statute was drafted, with its limited and limiting list of the sources of international law. These were the years in which arbitration panels and mixed commissions developed the broad outlines of the law on state responsibility, on the basis of a fairly limited set of claims concerning a particular topic: the expropriation of foreign-owned property. It was during this period that the two dominant ideas about the relations between domestic law and international law came to see the light in the form of the doctrines of dualism and monism. And these were the years in which the relevance of state sovereignty (and the concomitant exclusion of any other actors) was positively reinforced in landmark judicial decision.[4] In the roughly hundred years since then there have been some tweaks and refinements, but no fundamental reorientations. An imaginary international law textbook published in 2022 claiming that states are the only subjects of international law, claiming that international law exclusively comes in the form of treaty and custom, claiming that responsibility arises regardless of intent or damage, and claiming that international law enters domestic law through either formal transposition or direct incorporation would look

[1] The current text is in part based on my Gaetano Morelli lectures, delivered at La Sapienza University, Rome, in October 2021. I am indebted to Enzo Cannizzaro for the invitation and to him and Gianluigi Palombella for many conversations on aspects of the topic.

[2] The concept was first developed by William James and signifies a collective preference for easy (and easily tweetable) but not necessarily effective solutions, akin to suggesting cancer can be treated with a few band aids. See William James, *Pragmatism* (Indianapolis IN: Hackett, 1981, Kulick ed.) 36.

[3] Classic examples include Prosper Weil, 'Towards Relative Normativity in International Law?', (1983) 77 *American Journal of International Law*, 413-442, and Sir Robert Jennings, 'What is International Law and How Can We Tell It When We See It?', (1981) 37 *Annuaire Suisse de Droit International*, 59-88. It is possibly no coincidence that both titles are framed as questions.

[4] See further Jan Klabbers, *International Law*, 3rd edn (Cambridge University Press, 2020) 25-27.

mildly eccentric perhaps, a minor throwback to earlier days, but would still look credible enough. Its author would be deemed conservative, but not incompetent.[5]

The natural response might be to develop a general concept of law and then squeeze in international law, but such is no longer credible. This is so for at least two reasons. First, concepts of law are developed in response to particular issues or questions: Fuller's idea of law having an inner morality responded to the outrage of Nazi-law,[6] a question less obviously bothering Hart,[7] while Dworkin aimed to come to terms with the ever-greater role of rights in legal thought and practice.[8] Second, much of what is currently at issue concerns the interplay among legal orders, rather than what goes on in decontextualized manner in individual legal orders.

In what follows I will first lay out, in Section II and ever so briefly, that international law's central concepts are no longer very useful: we no longer understand how and by whom legally relevant authority is exercised, or to whom this authority should apply. Sections III and IV will present an alternative vision, linking authority to epistemic prowess and inter-legality. Section V concludes.

II. An Epistemic Crisis of Humungous Proportions

The textbooks tend to portray the world of international law in somewhat stylized, hermetic fashion. In the standard view, international law is made by duly authorized representatives of sovereign states. These have a 'meeting of the minds', reach agreement, and present it to their taskmasters back home, whether parliament or the local dictator. The domestic authorities approve of the agreement, and government representatives can accordingly ratify, after which the agreement will enter into force. The expectation is, moreover, that it applies not just to the states concerned, but also to those within the state, although it is left to domestic traditions to figure out how to achieve that result. The end-product is a hermetically sealed system where authority on the international level is justified on the basis of domestic delegation, and trickles back down again to that domestic level. At the same time, domestic authority is legitimized by the international, with international law having the final say on statehood. There are no gaps in terms of authority or in terms of legitimation, unless one starts to look outside the system and query the democratic legitimacy of deals made by dictatorial regimes or by circumventing parliament. Within the system though, everything fits, and it can unproblematically be said that treaties rest on consent, and even that customary international law rests in some sense on state consent. And since states are supposed to be the central actors, whatever these states agree upon therewith comes to be relevant also for others, whether located within the state (companies, individuals) or beyond the state (international organizations in particular). And this relevance within the state more often than not results from the successful application of doctrines of dualism or monism – *tertium non datur*.

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[5] Compare the reception of Gennadi Danilenko, *Law-making in the International Community* (Dordrecht: Martinus Nijhoff, 1993) some three decades ago. See, e.g., the review by Nick Onuf, (1995) 89 *American Journal of International Law*, 661-663.

[6] Lon Fuller, *The Morality of Law*, rev. edn (New Haven CT: Yale University Press, 1969).

[7] H.L.A. Hart, *The Concept of Law* (Oxford: Clarendon Press, 1961).

[8] Ronald Dworkin, *Law's Empire* (London: Fontana, 1986).

This vision goes back to roughly the turn of the twentieth century yet, elegant as it may be, it is no longer persuasive, if it ever was.[9] This much is often realized: it is by no means novel to suggest that sources doctrine has problems incorporating new instruments; or that minorities may be considered subjects of international law, or that there is more to the relationship between international law and domestic law than dualism and monism. But what has yet to happen is a complete overhaul of international law (and therewith, in part, of domestic law as well).
In fact, this relationship was already problematic in the late 1920s when the Permanent Court of International Justice (PCIJ) held that the terms of a treaty could be directly effective in a domestic legal order if the parties so intended, if only because the PCIJ did not quite allow for the possibility of a state sealing itself off against such direct effect.[10] Three decades later, Philip Jessup observed that contracts between private persons and international organizations may escape the existing binary system altogether: these would neither be governed, or so it seemed, by international law nor domestic law, and yet the electrician doing a job at the UN would probably wish to be paid. The same Jessup and his colleagues at the International Court of Justice struggled to make legal sense of the mandates, supervised by the League of Nations and thereafter, it seems, by the United Nations. A little later, the EU decided that the effect of EU law in the legal orders of its member states no longer rested on the wished of those member states. And another three decades later an English court had great difficulties in justifying why the Arab Monetary Fund, an international organization of which the UK was not a member, could nonetheless have standing to sue in the UK – and found the answer, somewhat incredulously, in the notion of equity.
In the 2020s, interactions between legal orders defying established categories of thought are common practice. Investment treaties often contain so-called 'fork-in-the-road' clauses, asking international arbitrators to assess whether the case before them is essentially a repeat of an earlier domestic case. Conversely, domestic courts may be asked to review the exercise of jurisdiction by international arbitral tribunals, as happened most conspicuously in the endless *Yukos* saga. The Gambia recently took Facebook to court with a view to shedding light on an international claim pending before the International Court of Justice, while diamond traders are subjected to international scrutiny through the Kimberley process which itself departs from international trade law by permission. And China, in the meantime, invests in countries such as Angola in exchange not for money but for oil, raising questions about whether such arrangements are 'law' to begin with and whether they are governed by international law, Chinese law or Angolan law, or something else entirely.
If the division between domestic and international law is becoming ever more porous, it is also becoming increasingly unclear what international law is – or better perhaps, it has never been entirely clear. A classic conundrum is the question whether treaties create 'law' or merely 'obligations',[11] and even more classic is whether the result can be anything else than 'positive morality'. Of more recent provenance, there are numerous possible manifestation that do not neatly fit our accepted categories of 'treaty' and 'custom'. What to make of states concluding 'memoranda of understanding', which may or may not be treaties? Or classic instruments such as the Helsinki Final Act of 1975, which looks like a

[9] Jan Klabbers, 'The Cheshire Cat That is International Law', (2020) 31 *European Journal of International Law*, 269-283.
[10] See *Jurisdiction of the Court of Danzig*, [1928] Publ. PCIJ, Series B, no. 15.
[11] Sir Gerald Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law', in F.M. van Asbeck et al. (eds.), *Symbolae Verzijl* (The Hague: Martinus Nijhoff, 1958), 153-176.

treaty in all respects but is under its own terms not eligible for registration under Article 102 UN Charter? International organizations promulgate codes of conduct, best practices, or govern by indicators or even mere rankings; they produce manuals and handbooks aiming to influence behaviour, and have since their early days promulgated resolutions of uncertain provenance and legal effect. To call all of this 'soft law' merely begs the question - such would perhaps be useful if soft law was itself an established category, but nothing could be further from the truth.

Likewise, assuming international law can still be made, the category of actors deemed capable of making it is, with the exception of states acting together, rather muddled. There is uncertainty whether international organizations can make law, let alone when it comes to private associations of businesses or professionals, companies, public-private partnerships, high-level summitry in the form of G7 or G20, or entities such as the Basel Committee. Wat is clear is that much of the output of such entities is normatively relevant, aimed as it is at engendering legal effect – but the legal discipline is at a loss when it comes to trying to make sense of all this.

To make a long story short: our conceptual categories (treaty, custom, law, law-maker, authority, sovereignty, consent) have been devised between the 1880s and the 1930s, and have not kept pace - some have observed that today's international law is characterized, instead, by output informality, process informality, and actor informality.[12] If our categories were once useful in both helping to understand the world around us and in guiding the actions of people, this is no longer the case. We struggle to make sense of the Basel Committee Guidelines, the PISA rankings, or even such generally accepted documents as the Universal Declaration of Human Rights, usually explained as providing a basis for subsequent state practice and *opinio juris* and thus of legal relevance through the customary process. But even then: surely not all provisions of the Universal Declaration can claim to have become part of customary international law. The right to paid holidays, e.g., provided for in article 24 of the Universal Declaration, has remained largely illusory, as has the right to decent working hours in highly competitive Western economies, to say nothing about poorer parts of the globe.

III. Changing Authority: Towards Presumptive Law

The standard textbook version of international law (cognizable sources resting on domestically validated consent) has the advantage of elegance and rigorous simplicity, but it is not very helpful – as Kratochwil once put it, "elegance and rigour very often stand in competition with informational value".[13] It cannot explain the world around us, and it fails to provide guidance to people. So, obviously, our categories need to be re-considered.

One problem here is that epistemology itself is not very helpful. Social realities, including the reality of global governance, are always and by definition dependent on practices and beliefs of social actors, as Humpty Dumpty already realized. In consequence, there is

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[12] Joost Pauwelyn, Ramses Wessel and Jan Wouters, 'Informal International Law as Presumptive Law: Exploring New Modes of Law-making', in Rain Liivoja and Jarna Petman (eds.), *International Law-making* (Abingdon: Routledge, 2014), 75-102.

[13] Friedrich Kratochwil, 'Ten Points to Ponder about Pragmatism', in Harry Bauer and Elisabetta Brighi (eds.), *Pragmatism in International Relations* (Abingdon: Routledge, 2009) 11-25, 13. Kratochwil's arrows were directed at theorizing in the discipline of International Relations, but are easily applicable to much work in the discipline of International Law.

nothing to be gained by trying to figure out what 'really' constitutes a treaty, or what custom 'really' entails.
Aiming to overcome this will require two related intellectual moves. The first of these is best referred to as accepting the possibility of law being 'presumptive' rather than fixed; the second is to accept the interwoven nature of legal systems. Together, these two moves can respond to the epistemic crisis. This follows the methodology (if that is the word) set up by Jessup: coming to terms with transnational law means, in part, coming to terms with new modes of law-making, but it also involves coming to terms with the effects of law across recognized legal orders. In other words, there is little point, as Jessup realized, in identifying law, if it cannot be applied where this application is necessary.[14]
My contention is not that the idea launched here will solve all problems; but I do contend that it will better be able to make sense of current developments than the traditional notions of authority and law. And since there is no law-maker on the conceptual level (no legislator ever created concepts such as 'custom', 'jurisdiction', or 'dualism'[15]), it stands to reason to assume that if the approach sketched here is persuasive, it may also come to have normative ramification– the epistemic authority of the academic is something to be reckoned with.
The first step then is not to get buried in 'essentialism', but aim to the opposite, counter-intuitive as it may seem at first sight – one could refer to this as 'presumptive law'.[16] It has been suggested that law generally is a matter of presumption and rebuttal. When it comes to criminal law, we are presumed innocent, unless proven guilty. In tax law it is often the other way around: I am assumed to owe a certain amount unless I can demonstrate that I should pay less. A signed document with the required signatures will be presumed to be a valid will, unless a flaw can be detected. And an arrest warrant will be deemed a valid legal instrument unless the suspect's name or abode is misspelled.
The same applies to law-making. A document emanating from parliament and passed by the required majority will be presumed to be valid legislation, unless it can be shown that there was something wrong. Perhaps not all who voted were actually entitled to vote; perhaps the bill should have first been reviewed by an advisory body; or perhaps the bill is *ultra vires* parliament. The point is, that few would maintain that any document coming out of parliament with the required majority is always and by definition, irremediably, a legally valid piece of legislation – instead, we tend merely to presume that this is the case, leaving room for possible rebuttal. The rebuttal rarely materializes, but that is not particularly relevant as long as it meaningfully can materialize, and generally speaking this seems to be the case in most, perhaps all legal systems.
If so, there should be no problem of principle in adopting a presumption of legality also with respect to other normative utterances: the guidelines, the codes of conduct, the benchmarks and best practices. This is supported by a number of further considerations. Perhaps the most important of these is that the drafters of guidelines, codes of conduct et cetera typically aspire these to have normative effect: an agency adopting a code of conduct typically wants people to follow the terms of the code of conduct – if the agency were

[14] Philip C. Jessup, *Transnational Law* (New Haven CT: Yale University Press, 1956).
[15] 'Treaty' is a partial and problematic exception, as the very attempt to define 'treaty' in the works leading up to the Vienna Convention on the Law of Treaties also made it possible and plausible to define the non-treaty – and arguably, a definition was not needed. See further Jan Klabbers, 'Governance by Academics: The Invention of memoranda of Understanding', (2020) *Heidelberg Journal of International Law*, 35-72.
[16] This is inspired by Frederick Schauer, *Playing by the Rules* (Oxford: Clarendon Press, 1991).

indifferent, it would most likely not take the trouble. The reasons for adopting such a code instead of ordinary legislation or some other ordinary instrument will usually reside in factors unrelated to the goal of compliance, but rather relate to considerations of expediency or fears that the required parliamentary majority may be out of reach – that sort of thing. Usually, the problem for authors of codes and related instruments is not so much that they wish these to remain without effect, but rather the opposite: in order to affect social behaviour, it is thought more practical not to adopt the regular legal route. And if the desired result is akin to the result achieved by formal law, then surely there can be no principled objection to a presumptive law approach.[17]

Courts, in turn, are asked to apply the law, and generally do not seem to hesitate to treat unusual instruments as presumptive law, an appeal to which is either to be honoured or rejected. The point for present purposes is that no matter how fine distinctions legal academics and foreign office lawyers can make, courts invariably treat instruments before them in binary fashion, as either law or non-law. In other words, courts are not in the habit of treating instruments as 'a little bit binding', or 'non-legal yet binding'. They either accept the code of conduct or the guideline as (legally) binding, or will decide not to apply it. This attitude is perfectly compatible with a presumptive law approach, but not compatible with a 'more or less law' attitude.[18]

A preliminary point to note is that presumptive law will somehow be 'binding', and will need to be construed as binding.[19] It has become *bon ton* to think of norms as binding, non-binding, or anything in-between (gradations of bindingness) but this way of thinking is highly confused. It is the hallmark of a norm – any norm – that it be normative: to speak of a non-normative (i.e. non-binding) norm is a contradiction in terms, albeit a popular one. Whether this binding nature is best expressed as 'law' is of secondary relevance, but is a useful convention, as it has been so addressed since times immemorial – it is only since the 1950s that some started to think of the intentional creation of norms of behaviour in terms other than law, a position that cannot coherently be maintained.[20] Where actors aim to influence others by the adoption of norms, in whatever form, those norms are aimed at binding their addressees – or else they are not norms. Telling others that they should get vaccinated against the covid-19 virus is telling them to change their behaviour, and thus normative, and thus in principle susceptible of being 'law'. Telling others that they need not get vaccinated is, by contrast, not setting a norm. The point is not that *all* statements are binding, of course; instead, the point is that *normative* statements aim to bind, and that we might just as well call this 'law'. Whether it actually is law is a follow-up question, and owes something to questions of validity.

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[17] Note how convoluted the discussion has become: pointless as it is to make a distinction between formal and informal law, it is nonetheless required because a dominant discourse thinks 'non-legal yet binding is a meaningful category. For an early critique, see Jan Klabbers, *The Concept of Treaty in International Law* (Dordrecht: Kluwer, 1996).

[18] See, e.g., Joost Pauwelyn, Ramses Wessel and Jan Wouters (eds.), *Informal International Lawmaking* (Oxford University Press, 2012).

[19] By contrast, some suggest that bindingness is "not an attribute inherent to law". Schieder approvingly attributes this position to the New Haven School: see Siegfried Schieder, 'Pragmatism and International Law', in Bauer and Brighi (eds.), *Pragmatism*, 124-141, 132.

[20] This is so because there are no alternative normative orders in existence that can intentionally be employed: one cannot 'legislate' moral obligations, and to conclude a 'politically binding' but non-legal agreement is likewise highly implausible: it confuses the existence of politics as an activity with politics as an employable normative order. See further Klabbers, *The Concept of Treaty.*

Another relevant preliminary consideration is that since law is a social construct, it might be useful to regard as law whatever people usually regard as law, and as legislative authority what people usually understand by that term.[21] Law, one might conclude, has little or no essence other than being itself: it does not depend on enforcement, or remedies, or particular institutions, or particular formulae – although all of these may play a role. Leaving it to the social construction *du jour* is admittedly open-ended, but possibly not very risky, as most people will roughly agree: few would consider the mafia as exercising legislative authority, or the Pope.

Two important questions present themselves. First, are there minimum conditions for the validity of presumptive law, or is it the case that 'anything goes'? Second, the question naturally arises under which circumstances, or through which factors, the presumption of law can be rebutted.

Law generally, all over the world, has to operate within a liberal epistemology, an epistemology that places the individual and her autonomy at the heart of political philosophy. This has been the case for centuries and, as Dumont explains in a seminal set of essays,[22] applies even (somewhat counter-intuitively perhaps) to the most communitarian and authoritarian of regimes. These too have to present themselves as somehow paying respect to the autonomous individual who, in such a case, merely chooses to consent to the greater good for the sake of community, the party, or the state. The relevance of consent is therewith pivotal, and most obviously visible in Western-style democracies (with legislation ultimately being traceable to the abstract consent of the electorate) and in the traditional view on international law-making, with treaties and even customary international law being said to rest on the consent of states. In order to have any chance of success then, a theory of law-making must incorporate the requirement of consent: anything else is incompatible with basic political philosophy – 'software' ignoring the requirement of consent will not fit the consent-based 'hardware' of the system, so to speak.

But consent need not be strictly construed. What matters more is the ultimate possibility of expressing or withholding consent, in much the same way as the theory underlying customary international law accommodates the possibility of customary international arising without a particular state's participation as long as that state has at least the theoretical possibility of opting out – the 'persistent objector' doctrine. That this doctrine is rarely actually resorted to is irrelevant,[23] and only strengthens the point: what matters is its existence, as a safety valve.

Consent furthermore can attach to particular legal instruments, but also to those who aim to exercise authority – it can be delegated either expressly (preferably, no doubt) or by implication. Again, the construction as such is very familiar: no one is asked to consent to particular resolutions adopted by the Security Council of the UN (other, naturally, than its fifteen members). But that said, it is generally accepted that decisions validly adopted by the Council are binding on all the member states of the UN – their consent is traced back to the moment they join the UN and promise to accept and carry out decisions of the Security Council. And in a more hypothetical vein, each of us can be deemed to have consented through our governments, who have joined the UN. It helps if these governments are democratically elected, but for the theory of delegation such seems to be of little relevance: individuals are thought to be represented by their states regardless of whether those states

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[21] Brian Tamanaha, *A General Jurisprudence of Law and Society* (Oxford University Press, 2001).

[22] Louis Dumont, *Essais sur l'individualisme* (Paris: PUF, 1983).

[23] James Green, *The Persistent Objector Rue in International Law* (Oxford University Press, 2016).

are run by democratically elected leaders. A theory of presumptive law is agnostic towards the democratic qualities of law, but at least does not necessarily represent a regression. Consent remains the ultimate validity criterion, and can be expressed in manifold ways. Most easily identifiable is if consent is expressly conferred: through signature, ratification or similar act. But consent can also be tacitly expressed, as is evident from the discussion of customary international law above. Additionally, consent can be deduced from behaviour: acting in conformity with a set of norms - and without being coerced to do so - may well be construed as consenting to those norms. A theory of law-making that *only* sees to behavioural regularities ('normative ripples') is problematic, but viewing such normative ripples as one of several possible manifestations of consent is considerably more plausible.[24]
As consent remains the main validity criterion, it sheds light on the question whether the presumption of bindingness can be meaningfully rebutted. Obviously, the absence of consent would do the trick: an unratified treaty (where ratification is prescribed) will not normally become law, although it is not impossible that consent will be expressed in other ways – typically through behaviour. It is in this sense that unratified treaties are sometimes said to form the basis of a rule of customary international law, and in rare instances there have been cases where acting in conformity with a treaty without ratifying it has given rise to legal commitment.
Further rebuttal may devolve from the lack of authority of the individual or agency making normative claims. An injunction by a tax law professor that major corporations should pay their taxes, while relevant perhaps on some level, will not be seen as law: the tax law professor speaking alone lacks normative authority. The same instruction by a professional association of tax law professors will count for more: the association of tax law professors may rely on a form of epistemic authority not easily achievable by individual tax law professors. And the same group of tax law professors issuing the same instruction as a sub-organ of the OECD may resonate stronger still. Nonetheless, matters may still depend on the formal law-making powers of the OECD, in that it cannot be excluded that the forum was chosen deliberately precisely because it would lack legislative authority – this consideration dampens the temptation to be too generous in attaching definitive legal effect to resolutions adopted by organs without formal law-making powers.
Rebuttal may also follow from the contents of the alleged norm. A rule suggesting that it is to be applied 'on a voluntary basis' will not be considered mandatory, nor will a rule stipulating that its addressees 'may' (as opposed to 'shall' or 'will') respond in particular manner. This is, again, a perfectly acceptable construction: no Foreign Office lawyer would ever read into Article 5 NATO, allowing parties 'to take such action as they deem necessary' in case one of them is attacked, as anything other than a discretionary norm. That said, empirical work has found very few examples of 'completely open norms'.[25] Further, some instruments contain broad ideas rather than clearly demarcated obligations. A celebrated (thought oft-misunderstood) example is the 1941 Atlantic Charter, with Churchill and Roosevelt suggesting what the post-war world order could look like, but without committing themselves unduly, other perhaps than their promise to 'seek no aggrandizement, territorial or other'.

IV. Changing Relations: Presumptive Law and Inter-legality

[24] José Alvarez, *International Organizations as Law-makers* (Oxford University Press, 2005).
[25] Pauwelyn et al., 'Presumptive Law', 92.

The legal world is experiencing a potpourri of instruments and agencies claiming normative, and thus legal, relevance. This, in turn, entails that the borderline between international and domestic law has lost much of its utility, and can no longer meaningfully be policed by the doctrines of dualism and monism. Regulators may still think they are alone in their little universes, and that the addressees of 'their' norms should exclusively follow those norms. But those addressees are often in a far more complicated position, within normative claims coming at them from all possible directions. This was no problem in a world that was hierarchically organized, whether construed with international law or domestic law as superior. But with a multitude of norms coming at us from a multitude of directions, and many of these claiming the authority of law, such formal hierarchical constructions have passed their sell-by-date. It is awkward to set aside an equitable provision just for the sake of formal hierarchy, and courts have started to recognize this, in a practice that has been referred to as 'inter-legality'.[26]

Perfect harmony between norms emanating from different legal orders was most likely always a chimera, but has become increasingly untenable with the proliferations of legal orders and instruments and accompanying fragmentation. As a result, the individual (or legal person) can be confronted with a multitude of normative claims, all pointing in different directions. This applies to individuals making employment decisions, buying goods on-line, selling services across boundaries, et cetera, but is most easily visible perhaps at the apex, with respect to international organizations. Many decision-making constellations, even in everyday life, have becomes sites of inter-legality. An infrastructure project in, say, Belize will typically involve a variety of actors: the World Bank may sponsor it in part, typically with supplementary loans offered by regional development banks and even private sector lending. The work on the ground will involve construction and engineering firms. The project may be expected by its sponsors to be cost-effective, and may be expected to take place with respect for human rights and norms protecting the natural environment. These norms, in turn, may be derived from domestic and instrumental legal instruments, and may be backed up politically by strong NGOs. Belizean citizens may care less about cost-effectiveness and be more immediately concerned with whether it works for them, and whether or not their livelihoods are affected. There may be all sorts of unexpected side effects, ranging from mudslides to the outbreak of diseases brought by workers on the project. In those circumstances, it may well be that the World Bank Articles of Agreement point in different directions than the norms to which regional development banks may be subject. It may well be that the private banks' legal regimes point in different directions than the environmental protection norms. It may well be that the wishes of the local population are difficult to reconcile with the desires of (often Western) NGOs. And it may well be that the demands of cost-effectiveness of Western member states may come to affect the labour conditions under which the infrastructure project is actually to be carried out. In those circumstances, it becomes almost absurd to prefer one set of norms over another: the demands of the labour force or the local population are no less legitimate than those of the private sector banks or the World Bank's member states. Hence, the only thing one can turn to in this uncoordinated patchwork of legal regulation and entanglement is the old idea of doing justice in individual cases. Any formal notion of hierarchy, whether relating

[26] See generally Jan Klabbers and Gianluigi Palombella (eds.), *The Challenge of Inter-Legality* (Cambridge University Press, 2019). Related but geared more towards achieving regulatory efficiency is Nico Krisch (ed.), *Entangled Legalities beyond the State* (Cambridge University Press, 2021).

to the relations between legal orders (dualism, monism) or between legal rules (lex specialis, lex prior, lex posterior) is bound to remain unsatisfactory.
And what applies to mega-projects carried out by international organizations and conglomerates of other actors, also applies in the more minimalist setting of our everyday lives. When hiring staff for the local pizza parlour, buying an airplane ticket for the much-needed winter break, offering television streaming abroad, organizing a reception at city hall – any activity of some complexity will be embedded in a set of legal norms, some stemming from domestic sources, others from international sources; some resting on formalized instruments, others on less formal but no less relevant instruments.
The point that emerges then is sometimes these norms may point in different directions: hiring a pizzeria waiter may involve professional qualifications (candidate A has superior papers) but also possible discrimination (candidate B belongs to an ethnic minority), charitable concerns (candidate C has a family to feed) or formal status (candidate D is an undocumented immigrant). In such circumstances, it is likely that injustice enters the picture, as one cannot satisfy all normative injunctions simultaneously.
The question then is what sort of injustice one wants to be doing. One can no doubt justifiably prioritize local rules over foreign or international rules; one can no doubt do exactly the converse as well, by suggesting that international rules are hierarchically superior. One can no doubt prioritize the application of company-specific rules and guidelines over more general injunctions, perhaps by invoking some sort of subsidiarity principle; and again, one can no doubt do the opposite as well. One can apply the rule that is latest in time (presuming it can be identified), but can also prioritize the rule deemed most important. One can prioritize on the basis of functional thought (the need for a qualified staff member), but that only diverts the problem: how to define 'qualified'?
The best that can be done in all likelihood, in such circumstances, is to try and do justice in the individual case, realizing all too well that some will be disappointed, and that in the process some of the norms applicable to the situation will be disrespected. This is not a tragic choice in the classic sense, as few will necessarily suffer seriously as a result of the choice, but some element of choice is inevitable. The formal decision-making devices (hierarchy rules, supremacy rules, conflict rules) no longer suffice.
Decision-making of any kind inevitably involves choice, including choice between different injunctions coming from different directions, and earlier mechanisms to help select plausible injunctions are no longer available in helpful ways. In those circumstances, there is nothing left but trying to do justice in the individual case, resorting to casuistry and knowing full well that tomorrow's decision in a similar case may turn out radically different – precisely because circumstances are likely to be different.

V. Final Remarks

International law suffers from an epistemic crisis: its central concepts (sources, subjects, relations with domestic law) are no longer very useful, if they ever were. This paper has suggested that the crisis can be confronted with two related intellectual operations. First, the very idea of international law needs to be re-conceptualized; second, the relations between international law and domestic law need to be re-thought. The present paper aims to sketch the contours of a novel approach, whose originality resides in the bringing together of ideas about epistemic authority and inter-legality. The point of the present contribution is to suggest that bringing together work on epistemic authority in and of

international law, and the interwoven nature of legal orders, may result in a way of looking at (international) law that has greater explanatory force and potential than the stylized version of the textbooks. The days of carefully calibrated and delegated political authority resulting in a limited set of generally accepted legal instruments, are far behind us – it is perhaps time for international lawyers to catch up.