importance. The distinctions between hard and soft law, rules and principles, regular norms and *jus cogens*, for instance, are suspect: these only betray political distinctions with which the lawyer should not be too concerned. Two well-known criticisms have been directed against this approach. First, it has remained unable to exclude the influence of political considerations from its assumed tests of pedigree. To concede that rules are sometimes hard to find while their content remains, to adopt HLA Hart's expression 'relatively indeterminate' is to undermine the autonomy which the rule approach stressed. Second, the very desire for autonomy seems suspect. A pure theory of law, the assumption of a *Volkerrechtsgemeinschaft* or the ideal of the wholeness of law – a central assumption in most rule approach writing – may only betray forms of irrelevant doctrinal utopianism. They achieve logical consistency at the cost of applicability in the real world of state practice.

The second major position in contemporary scholarship uses these criticisms to establish itself ... Roscoe Pound's programmatic writings laid the basis for the contemporary formulation of this approach by criticising the attempt to think of international law in terms of abstract rules. It was, rather, to be thought of 'in terms of social ends'.

According to this approach – the *policy approach* – international law can only be relevant if it is firmly based in the social context of international policy. Rules are only trends of past decision which may or may not correspond to social necessities. 'Binding force' is a juristic illusion. Standards are, in fact, more or less effective and it is their effectiveness – their capacity to further social goals – which is the relevant question, not their formal 'validity'.

But this approach is just as vulnerable to well-founded criticisms as the rule approach. By emphasising the law's concreteness, it will ultimately do away with its constraining force altogether. If law is only what is effective, then by definition, it becomes an apology for the interests of the powerful. If, as Myres McDougal does, this consequence is avoided by postulating some 'goal values' whose legal importance is independent of considerations of effectiveness, then the (reformed) policy approach becomes vulnerable to criticisms which it originally voiced against the rule approach. In particular, it appears to assume an illegitimate naturalism which – as critics stressing the liberal principle of the subjectivity of value have noted – is in constant danger of becoming just an apology of some states' policies.

The rule and the policy approaches are two contrasting ways of trying to establish the relevance of international law in the face of what appear as well-founded criticisms. The former does this by stressing the law's normativity, but fails to be convincing because it lacks concreteness. The latter builds upon the concreteness of international law, but loses the normativity, the binding force of its law. It is hardly surprising, then, that some lawyers have occupied the two remaining positions: they have either assumed that international law can neither be seen as normatively controlling nor widely applied in practice (the sceptical position), or have continued writing as if both the law's binding force as well as its correspondence with developments in international practice were a matter of course (idealist position). The former ends in cynicism, the latter in contradiction ...

The difficulty in choosing between a rule and a policy approach is the difficulty of defending the set of criteria which these put forward to disentangle 'law' from other aspects of state behaviour. For the rule approach lawyer, the relevant criteria are provided by his theory of sources. For the policy approach, the corresponding criteria are provided by his theory of 'base-values', authority or some constellation of national or global interest and need, because it is these

criteria which claim to provide the correct description of social processes themselves. To decide on the better approach, one would have to base oneself on some non-descriptive (non-social) theory about significance or about the relative justice of the types of law rendered by the two – or any alternative – matrices. Such a decision would, under the social concept of law and the principle of the subjectivity of value, be one which would seem to have no claim for objective correctness at all. It would be a political decision ...

The formality of international law makes it possible for each state to read its substantive concept of world society as well as its view of the extent of sovereign freedoms into legal concepts and categories. This is no externally introduced distortion in the law. It is a necessary consequence of a view which holds that there is no naturally existing 'good life', no limit to sovereign freedom which would exist by force of some historical necessity. If this kind of naturalism is rejected – and since the Enlightenment, everybody has had good reason to reject it – then to impose any substantive conception of communal life or limits of sovereignty can appear only as illegitimate constraint – preferring one state's politics to those of another.

It is impossible to make substantive decisions within the law which would imply no political choice. The late modern turn to equity in the different realms of international law is, in this sense, a healthy admission of something that is anyway there: in the end, legitimising or criticising state behaviour is not a matter of applying formally neutral rules but depends on what one regards as politically right, or just.[25]

International law is not rules. It is a normative system. All organised groups and structures require a system of normative conduct – that is to say, conduct which is regarded by each actor, and by the group as a whole, as being obligatory, and for which violation carries a price. Normative systems make possible that degree of order if society is to maximise the common good – and, indeed, even to avoid chaos in the web of bilateral and multilateral relationships that that society embraces. Without law at the domestic level, cars cannot safely travel on the roads, purchases cannot be made, personal safety cannot be secured. Without international law, safe aviation could not be agreed, resources could not be allocated, people could not safely choose to dwell in foreign lands. Two points are immediately apparent. The first is that this is humdrum stuff. The role of law is to provide an operational system for securing values that we all desire – security, freedom, the provision of sufficient material goods. It is not, as is commonly supposed, only about resolving disputes. If a legal system works well, then disputes are in large part *avoided*. The identification of required norms of behaviour, and techniques to secure routine compliance with them, play an important part. An efficacious legal system can also *contain* competing interests, allowing those who hold them not to insist upon immediate and unqualified vindication. Of course, sometimes dispute resolution will be needed; or even norms to limit the parameters of conduct when normal friendly relations have broken down and dispute resolution failed. But these last elements are only a small part of the overall picture.

The second point is that, in these essentials, international law is no different from domestic law. It is not, as some suppose, an arcane and obscure body of rules whose origin and purpose are shrouded in mystery. But, if the social purpose of

25 Martti Koskenniemi, 'The Politics of International Law', in (1990) 1/2 *EJIL* 4 at pp 9–13, 31.

international law and domestic law is broadly similar, there are important differences arising from the fact that domestic law operates in a vertical legal order, and international law in a horizontal legal order. Consent and sovereignty are constraining factors against which the prescribing, invoking, and applying of international law norms must operate.

...

There is a widely held perception of international law as 'rules' – rules that are meant to be impartially applied but are frequently ignored. It is further suggested that these rules are ignored because of the absence of effective centralised sanctions – and, in turn, that all of this evidences that international law is not 'real law' at all.

The view that international law is a body of rules that fails to restrain states falls short on several counts. In the first place, it assumes that law is indeed 'rules'. But the specialised social processes to which the word 'law' refers include many things besides rules. Rules play a part in law, but not the only part. I remain committed to the analysis of international law as process rather than rules and to the view I expressed many years ago, when I said:

> When … decisions are made by authorised persons or organs, in appropriate forums, within the framework of certain established practices and norms, then what occurs is legal decision-making. In other words, international law is a continuing process of authoritative decisions. This view rejects the notion of law merely as the impartial application of rules. International law is the entire decision-making process, and not just the references to the trend of past decisions which are termed 'rules'. There inevitably flows from this definition a concern, especially where the trend of past decision is not overwhelmingly clear, with policy alternatives for the future.[26]

Thus 'rules' are just accumulated past decisions. And, if international law was just 'rules', then international law would indeed be unable to contribute to, and cope with, a changing political world. To rely merely on accumulated past decisions (rules) when the context in which they were articulated has changed – and indeed when their content is often unclear – is to ensure that international law will not be able to contribute to today's problems and, further, that it will be disobeyed for that reason.

The rejection of the perception of law as 'rules' entails a necessary consequence. It means that those who have to make decisions on the basis of international law – judges, but also legal advisers and others – are not simply 'finding the rule' and then applying it. That is because the determination of what is the relevant rule is part of the decision-makers' function; and because the accumulated trend of past decisions should never be applied oblivious of context. Although this reality has been regarded as anathema by many traditionalists, it was well understood by Sir Hersch Lauterpacht. He rejected the notion that the judicial function meant finding the appropriate rule in an impartial manner. The judge, he argued, does not 'find rules' but he 'makes choices' – and choices 'not between claims which are fully justified and claims which have no foundation at all but between claims which have varying degrees of legal merit'.[27]

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26 R Higgins, 'Policy Considerations and the International Judicial Process' (1968) 17 *ICLQ* 58 at pp 58–59.

27 H Lauterpacht, *The Development of International Law by the International Court*, 1958, London: Stevens at p 399.

The reason why some insist that international law is 'rules', and that all international lawyers have to do is identify them and apply them, are not hard to find. They are an unconscious reflection of two beliefs, deeply held by many international lawyers. The first is that, if international law is regarded as more than rules, and the role of the authorised decision-maker as other than the automatic applier of such rules, international law becomes confused with other phenomena, such as power or social or humanitarian factors. The second reason is that it is felt by many that only by insisting on international law as rules to be impartially applied will it be possible to avoid the manifestation of international legal argument for political ends.

I want to deal with each of these reasons in turn, and tell you why I do not agree with them. To seek to contrast law with power (in which task the perception of law as 'rules' plays an essential task) is fundamentally flawed. It assumes that law is concerned only with the concept of authority and not with power or control. International law *is* indeed concerned with authority – and 'authority' not just in the sense of binding decisions, but in the broader sense of jurisdictional competence, and more. Myres McDougal has explained:

> By authority is meant expectations of appropriateness in regard to the phases of effective decision processes. These expectations specifically relate to personnel appropriately endowed with decision-making power; the objectives they should pursue; the physical, temporal and institutional features of the situations in which lawful decisions are made; the values which may be used to sustain decision, and so forth ... [28]

So far, so good. But it is not the case, as is frequently supposed, that international law is concerned with authority alone, and that 'power' stands somehow counterpoised to authority, and is nothing to do with law, and indeed inimical to it. This view – which banishes power to the outer darkness (that is to say, to the province of international relations) – assumes that authority can exist in the total absence of supporting control, or power. But this is a fantasy. The authority which characterises law exists not in a vacuum, but exactly where it intersects with power. Law, far from being authority battling against power,[29] is the interlocking of authority with power. Authority cannot exist in the total absence of control. Of course, there will be particular circumstances when power overrides authority. On such occasions we will not have decision-making that we can term lawful. But that is not to say that law is about authority only, and not about power too; or that power is definitionally to be regarded as hostile to law. It is an integral element of it.

What then of the other argument – that a perception of international law as other than neutral rules inevitably leads to bias and partiality? A classical statement of this view was made by Judges Fitzmaurice and Spender in the *South West Africa* cases in 1962, when they wrote:

> We are not unmindful of, nor are we insensible to, the various considerations of a non-judicial character, social humanitarian and other … but these are matters for the political rather than for the legal area. They cannot be allowed

28 M McDougal, H Lasswell, and M Reisman, 'The World Constitutive Process of Authoritative Decision' (1966) 19 *Journal of Legal Education* 253 at p 256.

29 For expression of this view, see G Shwarzenberger, 'The Misery and Grandeur of International Law', inaugural lecture 1963; see also M Bos, *A Methodology of International Law*, 1984, Amsterdam: North-Holland, esp Chapter XI.

> to deflect us from our duty of reaching a conclusion strictly on the basis of what we believe to be the correct legal view.[30]

This formulation reflects certain assumptions: that 'the correct legal view' is to be discerned by applying 'rules' – the accumulated trend of past decisions, regardless of context or circumstance – and that 'the correct legal view' has nothing to do with applying past decisions to current contexts by reference to objectives (values) that the law is designed to promote.

The classical view, so brilliantly articulated by Fitzmaurice but shared by very many others, is that international law can best perform its service to the community exactly by distancing itself from social policy. As the International Court of Justice put it in 1966: 'Law exists, it is said, to serve a social need; but precisely for that reason it can do so only through and within the limits of its own discipline. Otherwise, it is not a legal service that would be rendered.' [31] Of course, the International Court of Justice thought it self-evident as to where law does draw 'the limits of its own discipline'. But what is self-evident to one is merely question begging to another.

Reference to 'the correct legal view' or 'rules' can never avoid the element of choice (though it can seek to disguise it), nor can it provide guidance to the preferable decision. In making this choice one must inevitably have consideration for the humanitarian, moral, and social purposes of the law. As I have written elsewhere:

> Policy consideration, although they differ from 'rules', are an integral part of that decision making process which we call international law; the assessment of so-called extralegal considerations is part of the legal process, just as is reference to the accumulation of past decisions and current norms. A refusal to acknowledge political and social factors cannot keep law 'neutral', for even such a refusal is not without political and social consequence. There is no avoiding the essential relationship between law and politics.[32]

Because I believe there is no avoiding the essential relationship between law and policy, I also believe that it is desirable that the policy factors are dealt with systematically and openly. Dealing with them systematically means that all factors are properly considered and weighed, instead of the decision-maker unconsciously narrowing or selecting what he will take into account in order to reach a decision that he has instinctively predetermined is desirable. Dealing with policy factors openly means that the decision-maker himself is subjected to the discipline of facing them squarely (instead of achieving unconsciously desired policy objectives by making a particular choice, which is then given the label of 'the correct legal rule'). It also means that the choices made are open to public scrutiny and discussion.

All this being said, there is still a problem we have to address. If international law is not the mere application of neutral rules in an impartial fashion, but requires choices to be made between alternative norms that could, in the context, each be applicable, then do we really have something other than a justification of the end by the means? This is the serious question, made the more so by the

30 *South West Africa* cases [1962] *ICJ Rep* at p 466.

31 *South West Africa* cases [1966] *ICJ Rep* 6 at para 49.

32 Higgins, 'Integrations of Authority and Control: Trends in the Literature of International Law and Relations', in B Weston and M Reisman (eds), *Towards World Order and Human Dignity*, 1976, New York: Free Press.

events of the early 1980s. During the administration of President Reagan, the United States engaged in various acts of foreign policy which were designed not only to secure national goals but to secure certain objectives perceived as being in the interests of international order and justice. In particular, there occurred military interventions to remove totalitarian rulers and to allow a democratic freedom of choice to the peoples of the countries concerned. We may cite military action in Nicaragua in 1983, in Grenada in 1983, and in Panama in 1989. There has also been military action to punish perceived terrorism: here we may cite the US bombing of Libya in 1986. Each of these actions occasioned significant debate, among Americans and friends of the United States as much among others. There were widely differing views as to the lawfulness of these various actions under international law. The Legal Adviser to the Department of state and the scholars who supported the military interventions very much emphasised the social purposes of international law in their analysis of what was and was not permitted under the United Nations Charter and under customary international law.

My intention is not to enter the fray on the substance of these matters … Rather, I ask this question: if one shares the belief in the preferability of democracy over tyranny, and if one is committed to the policy-science approach to international law, whereby trends of past decisions are to be interpreted with policy objectives in mind, does it necessarily follow that one would have viewed all these actions as lawful? I think not.

In the first place, I do not believe that the policy-science approach requires one to find every means possible if the end is desirable. Trends of past decisions still have an important role to play in the choices to be made, notwithstanding the importance of both context and desired outcome. Where there is ambiguity or uncertainty, the policy-directed choice can properly be made. Some will say that, in a decentralised legal order, to allow one party to interpret the law to achieve desirable outcomes merely will allow another, less scrupulous party to claim to do the same. I am not greatly impressed with that argument. There is no escaping the duty that each and every one of us has to test the validity of legal claims. We will each know which are intellectually supportable and which are not, and it is a chimera to suppose that, if only international law is perceived as the application of neutral rules, it will then be invoked only in an unbiased manner. But it is in the common interest that some prohibitions should be absolute (for example, the prohibitions against some kinds of weaponry);[33] and it is in the common interest that other kinds of limitation on conduct should be regarded as compelling, even if, on any single occasion, that prevents the achievement of an outcome otherwise to be regarded as desirable.

That being said, it is still quite wide of the mark to suggest, as some do, that, in the absence of third-party determination, the policy-science approach means simply whatever the policy-maker wants. It really carries matters no further for critics to say that this approach 'can lead to international law being used by states as a device for *post facto* justifying decisions without really taking international law into account'.[34] This simply begs the question of what international law is. Such a comment merely presupposes that there is a 'real' international law that all men of good faith can recognise – that is, rules that can

33 See Chapter 14 and 'the Legality of the Use by the state of Nuclear Weapons in Armed Conflict' [1966] *ICJ Rep* at p 1.

34 GJH Van Hoof, *Rethinking the Sources of International Law*, 1983, Deventer: Kluwer at p 43.

be neutrally applied, regardless of circumstance and context. And that is where the debate began.

Of course the debate on legal theory is not only about whether international law is 'rules' or 'process'. But this is a critical aspect. Emphasis on rules is associated with, but not limited to, legal positivists – that is to say, those who conceive of law as commands emanating from a sovereign. Austin, the founding father of legal positivism, put it thus: 'Every positive law, or every law simply and strictly so called, is set by a sovereign individual or a sovereign body of individuals, to a person or persons in a state of subjection to its authority.'[35] Kelsen, seeking to give meaning to positivism in a horizontal, decentralised international legal order, where command and sovereignty are notably lacking, proposed the existence of a *Grundnorm* – the highest fundamental norm from which all others derived their binding force.[36]

Some leading scholars have sought to reconcile the 'rule' and 'process' approaches. Yet others, while showing an interest in these matters, have sought to avoid taking positions, insisting that they will merely address the substantive problems of international law on a pragmatic level. My view is that, superficially attractive though 'reconciliation' or 'synthesis' or 'middle views' may seem (as writers frequently want to claim to offer these attractive middle ways), they avoid or blur the essential questions rather than provide an answer to them. And pragmatism itself entails certain assumptions about legal philosophy, no matter how much it seeks to cut clear of the argument.[37]

More recently, and coinciding with the rise of the critical legal studies movement, there has been an increase in interest in international legal theory. Writers such as Anthony Carty, David Kennedy and Philip Allott have all made valuable contributions to this area of study by re-examining the nature of international law. A major reason for the increase in interest has been the perceived decline in the influence of the sovereign state, particularly in the light of events in the Balkans and elsewhere in Eastern Europe. Characteristic of the new approach is the view that the traditional ideal of international law is based on contradictory premises. Social conflict is resolved by political means and law is just one of the political weapons available. Such theorists argue that a universal definition of law is not possible and instead maintain that the study of law should involve analysis of the way in which states behave and the way in which they justify their behaviour.

'Critical' international legal studies constitute a so-called post-modern approach to international law. This is to assert that the discipline is governed by a particular, historically conditioned discourse which is, in fact, quite simply, the translation onto the international domain of some basic tenets of liberal political theory. It opposes itself to the positivist international law, as representative of an actual consensus among states. The crucial question is simply whether a positive system of universal international law actually exists, or whether particular states

35 J Austin, *Lectures on Jurisprudence or the Philosophy of Positive Law*, 5th edn, 1885, London: John Murray at p 34.

36 H Kelsen, *General Theory of Law and State*, trans A Wedberg, 1949, Cambridge, Mass: Harvard University Press at p 113.

37 Rosalyn Higgins, *Problems and Processes, International Law and How We Use it* (1994), Oxford: Oxford University Press at pp 1–8. The book is a revised version of Rosalyn Higgins' General Course in International Law delivered to the Hague Academy of International Law.

and their representative legal scholars merely appeal to such positivist discourse so as to impose a particular language upon others *as if it were a universally accepted legal discourse*. So post-modernism is concerned with unearthing difference, heterogeneity and conflict as reality in place of *fictional* representations of universality and consensus …

… There is a contradiction within international legal practice which consists in a virtually unending process of reification[38] of the discourse of state consent into actually existing, constraining rules independent of states, which have only to be identified for problems of authority in relations between states to be resolved. In practice this leads to sterile and acrimonious attempts to 'demonstrate' that 'the other side' has 'consented' to a viewpoint which one prefers, an elusive exercise, given that the starting point will usually be a conflict of interest which supposes that neither party is 'consenting' to what 'the other' wishes.

The critical approach, far from denying the very existence of international law, allows a way out of this impasse precisely because it recognises the character of liberalism as a tradition. It does this by means of two devices. It recognises the absence of a central international legal order as an impartial point to which state actors can refer, ie the simple meaning to be given to the phrase 'the disappearance of the referent'.[39] At the same time it favours a mature anarchy in international relations, the recognition of states as independent centres of legal culture and significance, which have to be understood, in relation to one another, as opposing to one another very fragile, because invariably partial, understanding of order and community.

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 phoney, reified, would-be universalist legal discourse in favour of the recognition of the inevitably restrictive and exclusive nature of individual state discourse. Above all this calls for the development of a new critical standard which is concerned with penetrating through the cultural symbols of pseudo-universalisation thrown up by individual state to assert themselves against one another. It is not the ambition of the critical international lawyer to substitute another pseudo-impartial legal order, but to facilitate the development of the process of inter-state/inter-cultural dialogue and understanding which may allow a coming together, however temporary and fragile. What is called for is scholarly work of legal translation, itself attempting to be impartial, to stand outside the circles of meaning projected by individual states.[40]

## 1.3 Is international law really law?

One particular aspect of the discussion about international law has been the questioning by some writers of the very claim made to legal status. Much of the debate surrounding international law's status as law can be traced to the

38 Reification means simply to consider or to make an abstract idea or concept real or concrete.

39 Referent means the object or idea to which a word or phrase refers. A major thesis of post-modernism, very closely linked to the concept of reification is that words have, to a very significant extent, lost any outside referents, that concepts merely refer to one another in a process of mutual differentiation within language.

40 Anthony Carty, 'Critical Legal Law: Recent Trends in the Theory of International Law' (1991) 2 *EJIL* 66 at pp 66–68.

positivist legacy of John Austin. In his major theoretical work, *The Province of Jurisprudence Determined*, he wrote:

> Laws properly so called are a species of commands … And hence it inevitably follows, that the law obtaining between nations is not positive law: for every positive law is set by a given sovereign to a person or persons in a state of subjection to its author ...
>
> The positive moral rules which are laws improperly so called, are laws set or imposed by general opinion: that is to say, by the general opinion of any class or any society of persons. For example, some are set or imposed by the general opinion of persons who are members of a profession or calling: others by that of persons who inhabit a town or province: others, by that of a nation or independent political society: others, by that of a larger society formed of various nations ...
>
> The body by whose opinion the law is said to be set, does not command; expressly or tacitly, that conduct of the given kind shall be forborne or pursued. For, since it is not a body precisely determined or certain, it cannot, as a body, express or intimate a wish. As a body, it cannot signify a wish by oral or written words, or by positive or negative deportment. The so called law or rule which its opinion is said to impose, is merely the sentiment which it feels, or is merely the opinion which it holds, in regard to a kind of conduct ...
>
> The law obtaining between nations is law (improperly so called) set by general opinion. The duties which it imposes are enforced by moral sanctions: by fear on the part of nations, or by fear on the part of sovereigns, of provoking general hostility, and incurring its probable evils, in case they shall violate maxims generally received and respected.[41]

HLA Hart also questioned the nature of international law contrasting the 'clear standard cases' of law constituted by the legal systems of modern states with the 'doubtful cases' exemplified by primitive law and international law.[42]

> Many serious students of the law react with a sort of indulgence when they encounter the term 'international law', as if to say, 'well, we know it isn't *really* law, but we know that international lawyers and scholars have a vested interest in calling it law'. Or they may agree to talk about international law *as if* it were law, a sort of quasi-law or near-law. But it cannot be true law, they maintain, because it cannot be enforced: how do you enforce a rule of law against an entire nation, especially a superpower such as the United States or the Soviet Union?

## I THE 'ENFORCEMENT' ARGUMENT

> One intriguing answer to these serious students of the law is to attempt to persuade them that enforcement is not, after all, the hallmark of what is meant, or what should be meant, by the term 'law'. As Roger Fisher observed, much of what we call 'law' in the domestic context is also unenforceable. For example, where the defendant is the United States, such as in a case involving constitutional law, how would the winning private party enforce his or her judgment against the United States? Upon reflection, we see that the United States, whenever it loses a case ... only complies with the court's judgment because it wants to. The winning party cannot hold a gun to the head of the

41 Austin, *The Province of Jurisprudence Determined*, 1955, London: Weidenfeld and Nicholson, at pp 133, 140, 141.

42 See *The Concept of Law*, 1961, Oxford**:** Clarendon Press at p 3.

United States to enforce compliance, even if there were a natural meaning to the term 'head of the United States'. We can go even further than Professor Fisher did: every criminal law prosecution is a case of an individual pitted against the state (or the 'people' of the state). What is to stop the state from saying, 'you were acquitted by the jury, but that was a travesty of justice, so we're going to imprison you anyway'? How does the defendant, in handcuffs, stop the state from going ahead? In some countries, at some times, we have heard of dictators or military regimes proceeding with the imprisonment and execution of defendants who were acquitted by their own courts. In terms of power, there is nothing to stop the United States from disregarding adverse judgments of its own courts. In this sense, therefore, a great deal of what we normally call 'law' in the United States is unenforceable by private parties against the state.

It is no objection to this line of reasoning, by the way, to dismiss it as far-fetched. If one objects that the United States, in any event, routinely complies with adverse judgments of its own courts, then the international lawyer can answer that the same is true of rules of international law. As Louis Henkin put it, 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.

But a more substantial critique of Professor Fisher's analogy between cases involving the government as a party and international law cases is that *most* domestic litigation, after all, does not involve the government as a party. Most cases involve one citizen against another ('citizen' including artificial persons such as corporations), and to *those* cases the law is enforced by the full sovereign powers of the state against the losing litigant. This majority of cases, then, tends to define what we mean by 'law'; it constitutes the paradigmatic instance of law. Therefore, the argument goes, the minority of cases that do involve the state or the United States as a party are, in a sense, parasitic upon the paradigmatic instance. We tend to regard this latter minority of cases as 'law' only because they share certain attributes with the generality of cases. But if we look hard at this minority of cases where the government is a party, we must concede that they are not really 'law' because, at bottom, they are unenforceable. They only appear to be law when looked at uncritically. In short, this line of argument concedes Professor Fisher's major premise – that international law cases are similar to domestic cases where the government is a party – but denies his minor premise, that such cases are instances of 'law'. Hence, international law is no more 'law' than constitutional law or even criminal law. As John Austin stated, both constitutional and international law are merely 'positive morality'.

… Let us then consider a second line of reasoning against the proposition that enforcement is the hallmark of law. This argument is not associated with any particular writer, because it relies on early conceptions of law and also on the philosophy of law itself. If we consider what law is not, we soon realise it is not a rationale for the application of force. It is not a system of 'might makes right' in the sense that the state constantly has to compel people, at gunpoint, to behave in a certain way. If you look through a volume of cases, or even a volume of statutes or annotations, you will find that most of the matters therein concern the working-out of private arrangements in a complex society. Most of 'law' concerns itself with the interpretation and enforcement of private contracts, the redress of international and negligent harms, rules regarding sales of goods and sales of securities, rules relating to the family and the rights of members thereof, and other such rules, norms, and cases. The rules are obeyed not out of fear of the state's power, but because the rules by and large are perceived to be right, just, or appropriate. No state could possibly compel people to obey all these rules

at gunpoint; there would not be enough soldiers and policemen to hold the guns (a sort of extreme Orwellian vision of society), they would have to sleep sooner or later, and then anarchy might break out.

... If law is not, by and large, a body of rules that are enforced at gunpoint, what is an individual rule of law? Is it, as the 19th century positivists maintained, a command of the state that is backed by the state's enforcement power? To be sure, some 'laws' might be just that: a dictator issues a command for his personal indulgence or whim, and if he has sufficiently satisfied his close advisors and the military in other areas, they will probably enforce his command. But most laws will not have this characteristic. Indeed, looking at the matter more microscopically, what is it that forces a judge to decide the case before her on the basis of precedent and statutes? Is another judge holding a gun to her head? Does she examine whether the law will be enforced to see whether it is law? How does she know, in advance of her own decision, what will be enforced?

This point came up in the famous case of *Marbury v Madison*,[43] famous to generations of American law students but often misinterpreted. In that case, Chief Justice Marshall's 'bottom line' was that the Supreme Court has no original jurisdiction to issue writs of *mandamus.* In short, there was no power to enforce that which the plaintiff demanded. If 'law' were coincident with enforceability, then, since under Marshall's reasoning there was not power of enforcement in the Supreme Court because it lacked jurisdiction, nothing Marshall said in his opinion would have had any legal significance. To put it another way, lacking a 'remedy', the plaintiff would have no 'right', not even a right to get a decision from the Court on the question of 'right'.

But Marshall took an entirely different tack. He began with the question: does the plaintiff have a right? He then asked the second question: if the plaintiff has a right, does he have a remedy? And his third question was, if the plaintiff has a remedy, can the relief issue form this Court? By putting the questions in this order, Marshall did the opposite of what the positivists would require. By dealing first with the question of 'right', Marshall was able to address that question wholly apart from whether there was a remedy or whether the remedy was available from the Supreme Court. As all law students know, Marshall answered his own question that there was indeed a right, and secondly, there being a right meant that the plaintiff had a remedy. By going through this reasoning, Marshall was able to establish the groundwork for his path-breaking assertion of judicial review of questions of constitutionality. He held that, in the face of a right and remedy, the congressional statute purporting to grant that remedy to the Supreme Court as a matter of original jurisdiction violated the Constitution. Marshall would not have been able to make his assertion of judicial review if he had begun and ended his opinion with the simple sentence, 'we have no jurisdiction; case dismissed'. Hence, we see that in a case where by the Court's own admission it lacked jurisdiction and the power of enforcement, nevertheless the Court was able to establish a point of fundamental substantive significance.

Marshall's persuasiveness was dependent upon a consensus at the time he wrote his opinion that there could be such a thing as a 'right' without a legal remedy. This was part of a larger conviction in those days that the 'law' itself was not something that only works when a policeman is standing by ready to enforce it physically. Law indeed is something that is opposed to force. Right is not the

43 5 US (1 Cranch) 137 (1803).