Talar du tyska?

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Published in:
The Significance of Gregor Noll

2024

Document Version:
Förlagets slutgiltiga version

The Significance of

GREGOR NOLL

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Last year, we invited Gregor Noll's former and current students, friends, colleagues, companions and allies to write short essays for a Festschrift to celebrate Gregor's academic life on the occasion of his 60th birthday.

GREGOR IS NOT your typical continental male law professor. What might a Festschrift for a man with such humble nature and unorthodox tastes look like? We acknowledged this problem in our invitation but also saw a solution in granting the maximum amount of freedom to participants, along with a slight nudging to experiment. In retrospect we can say that this could be seen as approximating the experience of being around Gregor. Has anyone felt restrained, that they had to slow down, or take a little less risk in Gregor's company? We have also felt that a slight unruliness is in keeping with the spirit of our protagonist. Thus, when deadlines were violated and page limits transgressed, we chose not to police them too much.

As a law professor, Gregor Noll combines the fine craftsmanship of a skilled jurist with a radical openness to ideas and methods originating from outside of the discipline, especially from the humanities. He does that with a view to counter the violent tendencies of law and legal scholarship. However, this volume does not only recognize and celebrate Gregor as a writer of legal scholarship but in his fullness as an academic being that teaches, comments, converses, assists, facilitates, supports and puts endless efforts into improving the institutions he inhabits.

For some of us, Gregor has been formative of who we are as academics and as human beings. For others, he has been a friend, an intellectual or institutional partner, an interlocutor, or a source of inspiration at one point. Put short, we all celebrate him because he has *mattered* to us. For that reason we chose *The Significance of Gregor Noll* as our title.

Gregor's biography, born in Germany, having lived most of his life in Sweden and with English as his main working language, is reflected in the language our authors use.

Gregor will know that working in academia is not easy, plus we all also have lives (and a body, whose health needs taking care of) that may interfere. Some of Gregor's companions were unable to join in the celebration. One email that we received, declining our invitation, has been included to attest to such contingencies.

LEILA BRÄNNSTRÖM, AMIN PARSA, MARKUS GUNNEFLO

The Definition Trap

Eleni Karageorgiou

AMERICAN ARTIST LAURIE ANDERSON[1] has made a short video for the Louisiana Channel offering her contribution to a series called 'Advice to the Young'.[2]

The bottom line of her advice is 'be loose'. Resist a culture that wants you 'pigeonholed' and allow yourself the freedom to exist in whichever way feels comfortable and 'right' at a particular moment, without the worry of fitting into a definition that may say little of who you are and who you seek to be.

Now, one need not be neither an artist nor young to relate to this. Haven't there come moments where the "burden" of specific identities, some of them real, others imputed and assumed, was experienced as too heavy to bear? Haven't many of us felt the need to exist with no qualification, almost nihilistically, as 21st-century citizens in a highly transactional world?

Let us locate these questions in academia. Going through the objectives and commitments of modern universities, the terms 'freedom of mind', 'independence', 'authenticity' appear to constitute top priorities. Yet, how many junior academics have the actual privilege to 'mature' in an environment of freedom, surrounded by (senior) colleagues whose primary consideration is not to define their intellectual engagement in *X* or *Y* terms but rather, to 'Socratically' bring to the fore what really interests *them* and what *they* essentially wish to convey as a message to the world?

Some might argue that this is too unrealistic; that 'freedom of mind', 'independence', and 'authenticity' do or should have boundaries dictated by the way in which disciplines develop, function and construct cultures of what it means to operate within a particular discipline and be defined by it.

Anderson reminds us that definitions are corporate tools, 'it is not about you make your work, it is about other people sell your work'. In a culture that is distinctively quantitative, competitive, monetized where sales are a strong driving force, there is not much space, especially for junior and less established professionals, to feel unconstrained by disciplinary or other boundaries and be encouraged to follow their own obsession. There is a pressure on our/their minds and imaginations as well as a concern that one is not seen or heard unless they are quantified and ranked. This is even more true when young professionals resist putting their interest into the words others expect them to, oftentimes because they haven't yet figured out how to do so. Besides, as Anderson puts it, 'finding your personal voice could also be finding one that doesn't express you'.

When starting my PhD and had to transition from legal practice to academia, it felt natural to introduce myself as 'a PhD student with a legal practitioner's background'. Legal practice was still a space I 'owned', as opposed to academia which, at that point, felt like a 'galaxy far far away'. I remember there were a few well-meaning colleagues wondering why I insisted to share this piece of informa-

1 https://laurieanderson.com/

2 https://channel.louisiana.dk/video/laurie-anderson-advice-young

tion; essentially asking why this is important for me to stress. Similar type of questions includes "Are you a generalist (international law scholar)?", "Are you a feminist?", "Are you a Marxist?" which makes one wonder how much of what is meant by general international law, Marxism, or Feminism, could possibly be captured by such yes/no multiple-choice type of questions? On top of, or instead of an anxiety of sorts, it seems to me that a call for performing and reperforming meanings lies behind them.

I cannot but make the analogy here to a refugee status determination procedure. Refugees share a story on the basis of which the decision maker seeks to establish whether the applicant ticks the boxes of the refugee definition. In other words, "tell me your story to tell you if you are gay, a religious convert or a political dissident", and, thus, worthy of protection. The applicant's own view is not binding but rather the starting point of the assessment (sic!).

As lawyers, we are trained to work with definitions. Yet, we are well aware that definitions are bound to fail, as overstatements or understatements; as hyper-contextual or very general; as too radical or anachronistic and so forth.

This is not to say that titles and definitions do not serve a purpose, nor that selling and ranking are unimportant. But 'don't make it the first thing'. Self-promotion, lobbying, and networking are all tools that help people establish themselves among peers, primarily through developing and forging a particular identity. No doubt they are, too, decisive parts of a relational process. What there may be a need to resist, though, is not the process as such, but rather the culture of 'categorising', 'qualifying', 'gatekeeping' as suffocating and, ultimately, counterproductive.

This is to question the constant need of 'branding', especially when this branding appears to accommodate more the purpose of responding to a sort of 'friend or foe' question and less a genuine curiosity of getting to understand what one's colleague is interested in and how best to help her develop this further.

Academia can be a joyful experience, especially when there are colleagues who generously embrace – sometimes tolerate – one's moments of vagueness and resistance; colleagues who have come to terms with their own 'looseness', despite seniority, achievements, and long CVs. thereby driving a process of revisiting boundaries and institutional cultures.

I feel immensely privileged to have had a mentor and a colleague, like Gregor, who possesses this unique ability to fit into so many different definitions and brands that, eventually, cancels them all as meaningless. At the end of the day, it is people and their stories instead of labels and brands that matter.

Gregor Noll: A Reverie

Fleur Johns

THIS IS A REVERIE on Gregor Noll and a triptych of Gregor's papers. Reverie often entails recollection; in this instance, let me begin with first and latest encounters. Gregor and I met, I think, in Melbourne, in 2004 or 2006. It is my hometown, but it was years since I had lived there, so we were, at the time, both visitors from some other place. I was getting started in academia, a new parent or soon to become one, recently graduated from my doctorate, disoriented by a bypass into law practice of some years' length. I was, in short, overwhelmed, and ill at ease, while Gregor was gracious, interested, and kind. I recall the sense of him more than what we discussed. He listened keenly, smiled easily.

More recently, we have met mostly online. Each encounter begins with magma: his zoom placeholder is a fiery morass. And then he emerges, always warm, never scorching. There is sometimes discernible the faint afterglow of some text or question from which he has recently surfaced, but I do not recall him ever seeming distracted. He revels in thought, but never seems lost in it. He gives generously of his curiosity and his intellect. These gifts feel light upon receipt; beneficiaries are not made to feel a burden or a fool. His tone is pastoral but not suffocatingly so; there is playfulness in it along with seriousness. He teaches in the mode of a learner and a collaborator.

He writes with precision and vibrancy in a voice distinctively his own. His work cleaves very closely to the practice of law, yet takes routes untethered by it. There is more to say, but this is best said, perhaps, by turning to the work.

SILENCE

Gregor's 2006 article, 'Diplomatic assurances and the silence of human rights law' is in many ways recognizably Nollian.[1] It starts with a practical, lawyerly dilemma, an issue that presents, at first blush, as a classical doctrinal question: namely, what is the international legal significance of diplomats from one state making assurances to diplomats of another state as to how an individual subject to "extraordinary rendition" will or will not be treated under international human rights law? The issue quickly shifts in Gregor's hands, however, to a space "beyond the doctrinal logic of human rights". The theological residue of that logic is resurfaced, and it is translated into matters of power, authority, and concern for who or what is made abject before the law. The question becomes not 'what legal rights and obligations do these overtures make?', but 'what do they make of the law?' and 'how do they attribute, aggregate, and distribute power?' Gregor's answer is to make human rights' "occult element" transparent in this context. This he does by unearthing multiple forms of "doubl[ing]" effected in and by the work of law and diplomacy. Their effect is to ensure that the "captive" whose human rights

1 Gregor Noll, 'Diplomatic Assurances and the Silence of Human Rights Law' (2006) 7(1) *Melbourne Journal of International Law* 6.

are ostensibly at issue is "condemn[ed]… to abandonment" for the sake of community, to accede to that community's "security imperatives" and demand for political enemies; this is ensured through not despite the work of law. Silence in the law is made, as is often the case in Gregor's work, generative. This too is a theological conception, silence being how and where a deity becomes knowable to the worldly. Likewise, it is by attention to international law's apparent deficits, withdrawals, and abstentions that we discern "source[s] of terror" nurtured within it. In the face of this terror, Gregor does not take cover in dogma or prescription. His inclination is always to stay in and with those "uneasy relationship[s]" that law and legal scholarship invite us to inhabit – along with those commonly told that they do not belong or are not valued there.

VIOLENCE

Two years later, Gregor is still reflecting on international law's generative effects in his 2008 article 'The miracle of generative violence? René Girard and the use of force in international law'.[2] And Gregor's concern remains, at this time, with terror and its productive role in the legal crafting of community. Here the focus is not, however, on the role of international human rights law in normative enclosure, but rather with how and where international law addresses itself directly to violence. Again, in this context, Gregor locates sources of propulsion for international law in deficiency: in place of "silence" our attention is drawn to the "paucity of positive law on the use of force". This paucity makes space for international law to "accommodat[e]" even "liv[e] off" sacrificial violence. Drawing from Girard, Gregor highlights the role of "scapegoating" in securing the "unanimity" and "peace" of community in international law. He takes as illustrative the handling of "weapons of mass destruction", and those expected to wield them unlawfully, in the US's 2006 National Security Strategy, as well as apposite principles of state responsibility. Gregor's aim is, somewhat counterintuitively, practical: to enlarge legal scholars' "toolbox" by making legible those "referral[s] beyond formal law" that are presupposed and invited by international law doctrine. Gregor's work in this context is "[anti-]collusive"; to counter both "obscurity" and "necess[ity]" and to open the question of whether there could be "alternatives" to this mode of forging community. As in the 2006 piece, the point towards which the article drives is to make that question seem open, and show how it came to be such hard work to pose it, not to answer it once and for all.

LANGUAGE

Posing questions, promoting understanding, countering obscurity: this is the humble, hard work of studying and teaching the law for which Gregor always makes time – work of parsing, sharing, translating, and living in language. By 2014, however, there seems to be a shift in how Gregor configures this work, and how and where he experiences prevailing assumptions about the "nature" of "man" becoming manifest in his field. This shift is discernible in the article

3 Gregor Noll, 'The Miracle of Generative Violence? René Girard and the Use of Force in International Law' (2008) 21 *Leiden Journal of International Law* 563.

'Weaponising neurotechnology: International humanitarian law and the loss of language'.[3] The article's opening suggests what could have prompted it in part, albeit with characteristic self-deprecation. It tells a story of Leif, a 73-year-old farmer, experiencing physical enhancements of automation through Deep Brain Stimulation, for which he must trade improved motor control off against a capacity for speech. Briefly referencing his own presence in hospital alongside Leif, Gregor alludes only passingly to a ten-year-long experience of surgical intervention recorded at the base of his CV – a transformative, solitary interlude, one has to imagine. Characteristically, though, Gregor's turn in this corporeal context is away from biology, away from nature and the irrefutable. His impulse is always to reactivate and reconnect with the political. Gregor's concerns in this work remain "both deeply practical" as well as theoretical. Even so, the sense of unease that both earlier pieces engender seems to become more elemental and urgent in this 2014 piece. With the advent of "neuroweapons", what must be grappled with, Gregor suggests, is not just complicity, obscurity, or sacrosanctity, but a "downgrad[ing] [in] the role of language" on which law depends. The stakes of this shift could not be higher. By the article's end, we are in a sphere of eschatology, facing the prospect of a "deeply anti-secular" metaphysics of nature armed for annihilation.

Even in imagining end times, though, Gregor's returns us to language, "borrowing a term" from that most extraordinary writer of ruins and ruination, WG Sebald. As in Sebald's writing, the temporality in the final line of Gregor's article is disorienting. Gregor writes: "the violence devised by [a neuroscience of war] will make itself intelligible only as a natural history of destruction". Through the deformation and reformation of language, we are invited to transport ourselves into a future past from which to reflect anew upon what we are doing now. In the prism of language, Gregor seems to imply, that another point of entry for thought is always open.

3 Gregor Noll, 'Weaponising neurotechnology: International humanitarian law and the loss of language' (2014) 2(2) London Review of International Law 201.

REVERIE, REDUX

For nearly 20 years, Gregor has been to me a fellow traveller of a kind that academia, at its best, allows one time to connect with: someone from whom one learns much at a distance, through reading and writing, with occasional opportunities to listen and converse. The concerns of Gregor's work highlighted in the three pieces above have found remarkable parallels in my work, even as we have deployed different methods, engaged different interlocutors, and brought different modes of legal training and professional experience to bear. I have also delved into the productivity of law in the war on terror. I too have been concerned with the normative work done by science and other non-legal faiths and figures in the international legal domain. And I have likewise been grappling, of late, with the profound challenges of digitalization and automation, and the many settings in which humans and machines are becoming more and more entangled in international legal work. Admittedly, my writing probably suffers from this parallel, given Gregor's lucidity and brilliance, but that is exactly the sort of fault-finding comparison in which Gregor has little interest. He is anything but undiscerning.

But as I have observed him in conversation, his impulse is towards 'yes, and', as the improv comics say, not to trip others up or block their way. And he is funny too, and gifted as a speaker, which makes the improv comedy reference somewhat surprisingly apt. Gregor Noll, lawyer, scholar, teacher, writer, but also – farceur, maker of friendly mischief; this is assuredly not where I anticipated ending up, but therein lies the joy of reverie. Congratulations, Gregor, and thank you from all your fellow travellers.

The Wretched of the Screen

Amin Parsa

GREGOR IS NOT a photographer, at least I have not heard or seen anything that suggests otherwise. Instead, I have three images of myself and Leila taken by Gregor during a supervisory meeting that evidence my assumption. All three of these images are poorly taken and are out of focus. To be fair one of them is half-focused. Like … you see me and the bookshelf behind me, but Leila is a blur. The pretence for taking these photos was quite weird, but not uncharacteristic of their author.

To begin with, from all our supervisory meetings I remember just a few fragments. Nothing more. A few sentences here and there or some general feelings and emotions felt or expressed at some points. For example, I remember in one of our supervisory meetings or a walk towards lunch, Leila and Gregor ended up discussing the right balance between – and this I remember was the exact word – *the weird* and the law for a dissertation. I remember the conversation ended with Gregor or Leila saying something to the effect of: "Nah. We are not worried about the amount of the weird in your work". Make of that what you will … But the point I am trying to make is that what I remember is not always a full image and that Gregor has a knack for the weird in or about the law.

Back to the images. I found these images in an email from May

27, 2015. According to my calendar entry, the occasion was: "Meet G&L–Text part II"! I do not remember if the photos were taken at the end of the meeting or sometime in the middle of it. But I remember that Gregor suddenly burst into one of his expressive *Eureka!* Moments. Laughing with arms open and bursting with joy. Then he turned around and grabbed Henckaerts and Doswald-Beck's (2005) *Customary International Humanitarian Law-Vol I: Rules*, handed it to me and asked for my phone in exchange.

Then he directed Leila and me by saying that he wanted to take a photo in the style of diplomatic meetings in which we are handing to one another (not clear who is giving or receiving) an authoritative source (some may argue otherwise) of international humanitarian law. Gregor took the photos while laughing and announcing the meaning of this never-before-experienced ritual of IHL as: 'Now you are both IHL experts.'

That is not how you become an IHL expert.

I do not remember anything else from that meeting. But I guess, perhaps, that day we might have talked more *law* than *the weird*. Yet I like to think that this ritual and these photos capture a lot of who Gregor is as an academic and as an interlocuter: amateur, and subtlety playful with the rituals.

A poor image says Hito Steyerl (2009) is 'a lumpen proletarian in the class society of appearances' since what it lacks in focus and resolution is translated to a lack of value. Yet in their circulations and the movements these focus-less and low-resolution images, capture and testify to something substantial, that is: the rare, the obvious, the unbelievable or else the violent dislocations, transferrals, and displacements (ibid).

What I gather Steyerl is lamenting is that the triumph of the (rich) cinematic images – as the 'flagship, upscale and high-end products in the class society of images' – comes with the denigration and/or the loss of the experimental, avant-garde, essayistic, obscure, and non-commercial filmmaking. It is perhaps for this simultaneous marginalisation yet creative potential of poor images – as well as their possible revolutionary outbursts – that Steyerl, channelling Frantz Fanon, refers to them as the 'wretched of the screen'.

Thinking along the lines suggested by Steyerl – the experimental, the avant-garde, the essayistic, and the obscure – reminded me of the subtle almost subliminal playfulness that Gregor regularly displays in his works and academic encounters. In being perhaps both capturer of poor images and driven by them, Gregor moves by forces to which Edward Said refers as amateurism. As opposed to the professional bureaucrat-academic class, an amateur is one who is driven by 'love for and unquenchable interest in the larger picture,

in making connections across lines and barriers, in refusing to be tied down to a specialty, in caring for ideas and values despite the restrictions of a profession' (Said 1996: 76). In other words, Gregor is the holder of poor images and an amateur.

It is always inspiring and awe-inviting, the ease and curiosity by which Gregor allows his thoughts and words to travel from one area, field, or object to another and yet so naturally and seemingly effortlessly tie all those, otherwise obscure universes of thought, together.

In his occasional poking at the rituals of expertise knowledge and disregard of the requirements of disciplinary limits of the thinkable, Gregor manifests a playful and amateur academic driven by the passion for the obscure, the poor and the weird.

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Discussant

Wouter Werner

Gregor has many faces. Well, who doesn't?

Let me start again.

Gregor has so many nice and friendly faces. People tend to get positive vibes when they work with him. Ok. So is he some kind of American motivational coach? Some kind of guru, who makes you forget the ugliness of the world outside? Well, no.

Let me start again.

GREGOR HAS SO many friendly faces, and yet one thing unites them all. It's the sense of ironical distance to everything he says or writes. Take a simple e-mail. Most e-mails are short and to the point. What you read is what you get. When Gregor writes a message, it is full of unexpected twists and turns, you may need to look up a word or two and you never know exactly whether he makes fun of himself, exposes some kind of existential crisis, provokes you or is just friendly – or all of the above. I had the pleasure of meeting Gregor in many different roles: teacher, researcher, manager, coach, opponent, academic politician, and probably more. In all these roles he combined friendliness with irony and inimitable prose, attentiveness with a dazzling use of verbal and bodily language.

However, of all these roles, one absolutely stands out for me. I have never seen a more natural habitat for Gregor than a conference panel where he acts as discussant. This makes perfect sense, given his inclination for friendliness, attentiveness, irony and distance. A good panelist is able to perform the impossible: she should efface herself and yet be prominently present. She should not have much of an ego and yet appear on stage as the one that binds everything together. I am sure that Gregor would know some mythical or religious figure to illustrate what a good discussant looks like. He would undoubtedly find some dialectics at work in the figure of the discussant, a hidden form of violence or a redemptive promise that can never be fulfilled. Or probably something I cannot even imagine.

Normally that would bother me a bit. Not today. Not in this Festschrift. For whatever he may say, I have a better example, a better paradoxical being to make sense of what a true discussant looks like: Gregor Noll. When I first presented in a panel where he was discussant, I experienced something unique: Gregor was able to present my own work to me as if it was new. I learned so much about my own paper – wow, did I really write this? Of course not – it was Gregor who wrote a paper about my paper. However, this is not how it felt: Gregor gave me, and everyone else in the panel, a sense of surprise. Apparently, we not only wrote these amazing papers, it also made perfect sense to present them together in a single panel! And yet, somehow, we knew it was not like that – our work all of a sudden turned out to be embedded in some obscure theology, some form of grander project we did not know existed, some driving logic we never experienced ourselves.

It took a while, but then we realized what happened: Gregor just performed the impossible. He seemed to be absent, just the mouthpiece of all the things that could be deduced from our papers. He never talked about himself or about his work; he just kept discussing what we had written. And yet this absence filled the room: we never thought about our work like this, others in the audience probably never did, so how did these words end up in the room? So no, I do not need a mythological figure, no obscure theological insights to make sense of what a true discussant looks like, how he sounds, how he moves in the room.

And for me, the ideal discussant stands for the ideal academic. Critical and generous, friendly and with ironical distance, present and absent, attentive towards others and their work and yet gifting them with your own twists and turns. I know, I know: no one is ideal and Gregor is definitely not a mythical figure. And yet, when I am cranky and slightly depressed about academic bureaucracy or faculty politics, I think back to this first panel, this moment of surprise when Gregor started to reveal our work to us. A testimony to the fact that the impossible can be performed, at least for a moment.

Concepts of law and their potentials

Tormod Johansen

THE DIVERSITY OF words that are synonyms for "law" is well-known. All languages have a number of related words such as norm, rule, right, legal, order, and, further, justice, correctness, obligation, legality, etc. Different languages employ a wide range of terms, not least due to the influence of different language families and their mutual impact on each other's vocabulary. What in my own language is *lag* is the same basic word as the English *law*. The word was *lagh* in Old Swedish and has its counterpart in Danish *lov,* Icelandic *lǫg*, Old Saxon *gilagu*, Old English *lagu*. The word comes from a semantic development from meaning that something is laid down, i.e., established or determined. This is similar to the way the German *Gesetz* comes from *setzen*, to set. The Swedish word *rätt* has its origin in the Old Norse *réttr* and is the same as several other European languages' variants, such as German *Recht* and English *right*. The same distinction is found in the Romance languages: *loi/droit*, *legge/diritto*, etcetera.

What do these connections and the terminological heterogeneity imply about the concept of law? Or are we more correct in talking about a family of concepts, a plurality of different forms of laws or legal concepts? This is certainly implied by the etymology, as we will see below. In this text I will suggest that following the conceptual paths through the etymology backwards we can shed light on the poverty of our contemporary understanding and discourse of law. The way we speak about law and legal orders tells us about how we understand the world. For a jurist, language is a practical tool, in a sense the primary and final tool. But it is also the key to uncover fundamental assumptions of what law is and can be, in other words the path to grasping the ontology of law.

In Émile Benveniste's *Le vocabulaire des institutions Indo-Europeenes*, these etymological aspects are connected to fundamental concepts in Indo-European society. Right corresponds to the Latin *rectus*, meaning straight, right. Moreover, the same Indo-European root is found in the Latin *regere*, meaning to direct, guide, lead, rule. It is also the function of the rule, the Latin *regula* as the tool that draws the straight line, indicating what is right. According to Benveniste, the idea of straightness in a moral sense, as opposed to twisted and crooked, is an ancient Indo-European idea expressed in various ways in different languages, such as proverbs like "do not deviate from the straight path."

This idea of ruling as a directing is also what connects the latin *rex* with the rule. Benveniste discusses how *rex*, meaning king, is a very ancient term that relates to both religion and law, as we understand them today. The connection between the Latin *rego* and the Greek *orégō*, meaning "draw out in a straight line," is understood as *rex* being "properly more of a priest than a king in the modern sense, [where] the man who had authority to trace out the sites of towns and to determine the rules of law." (Benveniste, 312)

The evolution of *rex* (king) and *regere* (rule) can be seen in an important religious act, *regere fines*, which in ancient Rome was required when a temple or village was to be built. *Regere fines* means

'drawing the boundaries with straight lines' and was done by a high priest to distinguish between inner and outer, sacred and profane, national and foreign territory. The one who possesses the supreme power to draw its borders is the rex. All this is familiar, that it is the role of the legislator, the function of the rule, etc.

Benveniste's point is that here we do not see sovereign power, so much as we see it drawing the line that must be followed and pointing out what is right. It is not an exercise of power so much as it is a pointing, a message or explanation, or perhaps a (magical) creation of a boundary that was not there before. The king/priest was a religious and magical actor, rather than a political actor. "His mission was not to command, to exercise power, but to draw up rules, to determine what was in the proper sense 'right' ('straight,' *droit*)."

The emergence of kingship from this priestly function must, according to Benveniste, have been a long process in which it was transformed both into kingship and political authority, but also gradually became independent of religious power. The latter, in turn, was transferred to a specific group of priests.

Other related concepts are the Iranian *shah*, which Benveniste insists is something other than a rex and rather a king of kings, that is, a ruler of those whom the world sees as kings in an empire. He also argues that this is the prototype for the eschatology of prophetic Judaism and the heavenly kingdom of Christianity, where God is the ruler of all rulers. This is then also clearly different from the Latin *rex* (*raj* in Sanskrit) which is just ruling as "ruling", i.e., measuring, where the ruler points out the straight path. In the Persian concept of the king, we see instead the idea of an absolute power, what in Greek is formulated as "autocracy", power that comes from the ruler himself.

One invention that Benveniste identifies in both Greek and Germanic culture is the departure from the older Indo-European notion of kings as divine in nature. Aristotle instead describes how the king has the same relationship with his subjects as the master of the house has with the members of his household, as an absolute ruler, but not as a god. This is already the case in Homer where the king, *basileús*, is *diogenés* and *diotrephés*, born of Zeus and nourished by Zeus, and also carries his attributes in the form of the sceptre. But it is clear that he received the sceptre from the god, and is not a god himself.

This ancient notion of empire and the emperor as a king of kings, is also transferred into the Jewish and later Christian notions of God as a king over the Kingdom of Heaven, the king over all kings. The connection between the imperial context of both Jewish and Christian scripture and the anti-imperial use of imperial language in both the Gospels and other books of the New Testament, not least the Book of Revelation, attests to the significance of these concepts in Western thought and society up until the present. It has been argued that the most fundamental form of political society is kingship, and even that this has never truly been superseded. In societies with actual kings this is obvious, but even in supposedly egalitarian societies, the "state of nature has the nature of the state" as Graeber & Sahlins have put it. If there are no actual kings in a society, they always exist in a divine realm or as "metapersons" structuring the normative and social order of the society (Graeber and Sahlins 2017). In the Christian religion this even turns into the promise of a final order when all faithful will become kings: "But you are a chosen people, a royal priesthood, a holy nation, God's special possession, that you may declare the praises of him who

called you out of darkness into his wonderful light." (1 Pet. 2:9)

What then can we do, or understand better, with these etymologies reasonably established? One view of the etymology of words is that they contain a kind of truth, a more or less hidden original meaning of the words that we can bring out and thus reach a deeper understanding of their essence, or true meaning. Another view is more cautious and assumes that words have no essential meaning. This might then fuel a hope that etymology is an uncovering of multiple prior meanings and connotations that have been lost or submerged in familiar usage. Therefore, etymology does not create an unambiguous truth, but rather generates a more complex picture. It opens up the potential of philosophical investigation – what do we mean when saying law? What have been meant previously in different eras and contexts? But also: what could we potentially mean?

What then could it be for the two words law and right? Regarding the law, it is not surprising that the law is what is laid down, what is determined. We also interpret the law, just as we present our arguments. As if the law was always on the table and we add things next to or above it. This also conjures up the image of a negotiation, a meeting, a court process or a "thing", which is the name of both legislatures, like Norwegian *Stortinget*, or a court, like a Swedish "tingsrätt".

Law seems to have two main etymologically relevant meanings: on the one hand that which is right and proper, straight and correct; on the other hand, the governing, leading, which we also find in government. But is this the most fundamental pair of concepts – is it where we should stop in our attempts to grasp the most basic structures of normative thought?

According to Benveniste, one of the most important concepts in the Indo-European world is the idea of order, which governs religious, moral and legal beliefs. It is the fundamental principle that underpins every society and without which everything would fall into chaos. The common root is *rta* in Vedic (*arta* in Iranian) and written in Latin as *ars*, *artus*, *ritus*, which precisely points to a harmonious arrangement of parts in a whole. In Zoroastranism this order was personified in the deity Astra. But this overall order, and idea of order, originally had no direct or distinct legal connotation. The order manifested itself in different religious, technical and legal spheres and thus terms that more closely correspond to our concept of law existed in these different spheres (Benveniste, 386).

This all-encompassing and fundamental notion of order is therefore unavoidable, but it has not led to unification of the notions of law, order, normativity, rule, etcetera. Rather the societal and intellectual development of the last several thousands of years since the hypothesised emergence of the Indo-European language, has seen a proliferation of terms and concepts springing from this basic conceptual distinction. Whether any distinction could have replaced it, complemented it on a similar level of importance or been more fundamental in human thought, is of course open for speculation. In any case the number of concepts that we today can relate under headings of law is considerable. A couple of important examples, again from Benveniste:

The Greek *themis* (comparable to the Sanskrit *dhâman*) is the unwritten law that applies within a family or group, based on a leader/judge/father (*basileús*) who rules according to these norms.

The norms are of divinely inspired origin and govern actions of all kinds. Etymologically, it comes from laying down, placing, establishing. The king has received his sceptre from Zeus along with themistic knowledge, just as the pig farmer welcomes a guest into his home because it is in accordance with *thémis*. They are opposed to *díkē*, the laws that apply between families in a tribe. Here we clearly see how different laws, and even different concepts of law, govern different spheres. *Dikē* (Latin *dico*) refers to the idea that certain specific norms describe what is right to do in specific situations. Its etymology comes partly from direction and from pointing out and saying with authority what is right. It is clear that the administration of justice according to *dikē* consists not in a judgement requiring deliberation or discussion, but in the formalistic application by the judge of certain rules. This governing aspect of the administration of justice has then been transferred to the meaning of *dikē* as custom, usage or way of being – that is, what was originally a matter of duty then describes the usual and habitual way of behaviour. Which in turn has made the word *dikē* a term for justice in ancient Greek, a meaning it did not have originally according to Benveniste. *Dikē* is what was used to prevent injustice and abuse. Adikia is the goddess of injustice and wrongdoing, with her opposite in Dike.

Ius, the Latin term most often translated as law (and which in turn gave rise to justice) has a derivative verb, iurare, meaning "to swear", as in to take an oath, (and which in turn gave rise to jurisprudence, legal). Just as *dikē* above corresponds to *themis*, so *ius* has its opposite in *fas*, as the human law instead of the divine law. *Fas* then connects to what is spoken and therefore willed by the Gods, which implies divine law.

It is interesting that the divine law in Greece, and Rome, concerns what is within the family, within a defined group, while the non-divine/human law concerns the relationship between families and groups. What is the relevance of divine law in the Jewish and Christian understanding? The Jewish law can certainly be said to be just for a limited group (the Jews themselves) and is then a kind of more comprehensive "family law" given by God to the chosen group. When the divine law is taken over by Christianity, its change is (at least) twofold: it is universalised to apply to everyone (both Jew and Greek) and the law is to be in our hearts, in a heavenly inspired way of knowing it. The law can thus not be the formalised, worldly one (*themis*) but the one in which we realise what is right, in which we are led by our hearts, in which God can lead us.

At the same time, according to Benveniste, the meaning of the Latin *ius* is twofold, going back to the Indo-European word **yous* which meant "a regular relationship, required by normality and the rules of ritual". Ius thus depends both on a normal relationship, a situation in accordance with the *ius*, and on the "normality formula", i.e., what must be done in order for something to be in accordance with the *ius*, which is, for example, a particular ritual, such as swearing. Benveniste notes how significant it is that the original Indo-European terms are both about what is to be done and what is to be said, which is often the same in the legal sphere where the ritual is done with words, and these words are the action itself. Thus *ius* becomes a formula rather than an abstract concept and consequently *iura* is the collection of judgements, authoritative decisions. These judgements gain their force by being pronounced, by pronouncing the formula, by pronouncing the judgement.

Benveniste discusses in some detail the difference between *iurare*, which is a swearing in where the swearer merely repeats words spoken by someone else (often while holding a sacred object or performing some such ritual action), and *sacramentum*, which corresponds to what we now understand by swearing an oath, when one is the one who submits to the wrath of the gods if one breaks one's oath. It also means that *iurare* requires two people, the one who speaks before, who pronounces the *ius*, and the one who repeats the formula (*ius iurandum*). This also clearly points to the religious, ritual context from which jurisprudence, the law, originates. The verbally repeated oath, following a certain formula, is the source of legal practice as transmitted to us through Roman law.

Benveniste points out the peculiar fact that while no expression or procedure "would seem more necessary for the functioning of social life" (439) than the oath, there exists no common Indo-Europan expression. Rather, each language has different words, often without any etymology. How could this be? The seeming conflict, Benveniste suggests, might be due to the intimate connection between the social order in which it is performed and the oath itself. It is in this sense not really possible to disentangle from society:

> It is because the oath is not an autonomous institution; it is not an act which has its significance in itself and is self-sufficient. It is a rite which guarantees and makes sacred a declaration. The purpose of the oath is always the same in all civilizations. But the institution may appear in different guises (Benveniste 440).

This suggestion, that the oath is at the absolute basis of Indo-European and therefore Western society, is taken up by Giorgio Agamben in his short book *The Sacrament of Language*, where he polemicizes against those who explain the oath as referring to a magico-religious sphere:

> My hypothesis is exactly the reverse: the magico-religious sphere does not logically preexist the oath, but it is the oath, as originary performative experience of the word, that can explain religion (and law, which is closely connected with it) (Agamben 2011, 65).

The oath creates the juridical truth or fact, in its performative aspect. The contract is created through the oath or its similar ritual functions such as the signature. The marriage as a juridical fact consists of the performance of the binding oath of marriage. And in the same sense the world is created by the monotheistic God through the words, which Agamben interprets as always being an oath: "he is the being whose word is an oath or who coincides with the position of the true and efficacious word *in principio*" (Agamben 2011, 65). The world is then created in the same way as laws are created, through a performative word expressed and through that very act constituting the truth of its existence.

If the world is created by a word, the legal order as such is created by the judge. The Latin *arbiter*, the judge, was not as today bound by written laws. He adjudicates in cases where the law does not provide for a solution, and thus has a wide range of powers, while at the same time adjudicating at his own discretion and in the name of "equity". He stands in the place of the king as the ultimate or general judge, and "makes his decision not according to formulas and the laws but

by a personal assessment and in the name of equity." (Benveniste 404) This is the same basic structure as other judges in antiquity, in Greece or in the Judaean and Jewish tradition.

Michael Gagarin in a work on Greek law critiqued Bentham and other scholars in their focus on substantive law. He argued that "it may be more accurate to view procedural law as primary and substantive law as a later development" (Gagarin 1986, 13). The procedure as such, the judgement made possible by an equitable judgement or divine inspiration. This meant that judgments were for the particular situation and were not in general guidance for future judgments or settlements (Gagarin 1986, 106). The equity, as a form of discretion that tempers and renders more equitable the formal or strict application of written law, is therefore not just a historical phenomena following on written law. Rather the development first went in the opposite direction: "As in the traditions of the origins of law in Greece and Rome, written law is a response to the abuse of an earlier discretion, rather than discretion being the response to the supposed rigidities of an earlier written law" (Jackson 2002, 39).

How does this originally procedural function of the judge (arbiter) connect with the fundamental structure of the world, the order (*rta*) that Benveniste contrasts to the threatening chairs, as the basis for normative order? Let us at least consider one more example of how these functions and concepts have been combined. As we saw above the basic structure the legal concepts were based in or even indistinguishable from the authority and power of the king, *rex*. This then understood either as a political or religious actor or perhaps more correctly before such a distinction made sense or

arose. This combination of, or indistinction between, what we now take for granted as separate – legislation, judgement, administration – has recurred in different forms since deep history and arguably even up until today in the paradigm of state of exception. This is of course often disregarded as anachronistic or criticised as illegitimate conflations of the spheres or functions of the *Rechtsstaat*. But does this dismissal not risk hiding a more fundamental potential in our conception of law? In the mediaeval world, the concept of *iurisdictio* implied not an "autocratic" sovereign action, but rather the uncovering of an already existing, immanent or divine, law:

> [T]he true *raison d'être* of power consisted in making everyone observe a law of natural origin, immanent to things themselves and prior to every creative act by man. Sovereigns and magistrates were not intended by God to rule over men by their own will, but to guarantee respect for the rules which He had already inscribed in the natural order of the world. Every act of power, therefore, was aimed at revealing, declaring, and imposing *an already given law*; and only towards this end were rulers invested with certain rights of supremacy over their subjects. The prince's law, the judge's sentence, and the magistrate's order were not truly different from one another. Though on a different level, each of them contained the authentic statement of a legal rule, and was therefore the expression of a unitary function, which the medieval legal vocabulary indicated everywhere with the same expression: "*iurisdictio*" (Mannori & Sordi, 226).

With this, I would not suggest that a reversal to the mediaeval form of rule is preferable or even possible. Rather the question of

the ordering of human society – as a question intimately based in the metaphysically fundamental (and perhaps even anthropological) distinction between order and chaos – is not avoidable. The philosophical solutions to these problems, as well as the practical arrangements for human affairs and societal conduct, are necessarily the task of the jurist as well. The jurist should not restrict her task to the interpretation of written norms and the systematisation or partial critique of them inside the legal order as it exists. Or, rather, it is not possible to do so without making choices in regard to fundamental philosophical views on the eternal and indeterminate task of ordering society. There is no apolitical task of working inside the status quo, there is only a political choice of understanding one's own task as jurist as part of the legal order which in turn is always subordinated and judged in the light of the ultimate order of the cosmos.

The idea that law could be a strictly human affair, and that secular and worldly matters could be cut loose from their ultimate reliance on the world and universe as it exists, is a curious phenomenon of modernity. All modern thought inherits the fundamental problem of the original distinction between order and chaos and engages in new formulations of old solutions, as well as perhaps a few new ones. But in modernity we also curiously restrict our own capacity in this regard by both forgetting the deeper conceptual history as well as dismissing traditions and paths of thought that have struggled with these matters for literally thousands of years. Every generation seems to wake up thinking that the disorder of its time is uniquely new and calls for solutions *de novo*. Our time's insistent reliance on narrowly understood legal and juridical modes of ordering (sometimes honestly, often dishonestly) formulates this age-old problem for us again. In order to move towards solutions to our ongoing and impending crises, we should not turn away from law. But not law as equated with the repressive power of the state. A violence which as I am writing these words is the absolute dominant option put forward in public discourse. Rather we need to rediscover the deeper structures and potentials of law beyond the impotent violence of states.

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Gregor's predisposition for transport modalities

Jens Vedsted-Hansen

IN THE LIGHT of what we know from working with Gregor during the past few years, it may appear counterintuitive to begin this essay by identifying a somewhat dominant feature of my almost thirty year long collaborative friendship with Gregor: aircrafts and airports. Well, that feature was of course not dominant *per se*, but it has in a strange way been underlying significant parts of our collaboration insofar as it has reflected shifting dynamics in the modes of transport resorted to within our shared field of study, migration control and refugee protection.

Some years after our first encounter in Copenhagen in 1994 Gregor reminded me that I had, on that first occasion, presented my academic roots in Aarhus by explaining that it was a bit difficult to get away from there. Perhaps not really, and at least not merely, in the academic sense, but simply because the airport was located far outside the city, thanks to its original constructers: the German military forces occupying Denmark during the Second World War.

Probably in order to convince me that the Germans' air transport habits can unfold in a qualitatively different and more civilised, even cultivated manner, Gregor around the same time enthusiastically introduced me to some sort of German music entitled 'Hubschrauber' or performed by a band whose name included helicopters. The band and its music seem to have gone into oblivion, at least at my personal level. Neither extensive internet searches nor consulting an expert of modern and avantgarde music, having special insights into Germany's music scene, have provided any identification. Perhaps Gregor after all simply made a reference to Stockhausen's *Helikopter-Streichquartett* in which case I may well have misconceived it as rock or punk. Be that as it may, there appeared to be a commemorable linkage between aircrafts and German avantgarde music that was completely unknown to me, and that became somehow illustrative of Gregor's inspiring approach to the phenomena of life, society and science.

A few years later our common interest in various modes of transport was taken to the next levels as we began examining the various non-arrival mechanisms that had been introduced and became ever more widespread in European asylum and migration law and policy since the 1980s. How could this be about aircrafts and airports? Precisely because it was not.

The point was rather that such migration control measures prevented potential asylum seekers and other irregular migrants from arriving to European borders by air. Not that these measures were targeting air transport in particular for any reason of environmental policy, climate protection or traffic safety. Rather, the regulatory mechanism introduced by potential destination states (in the Global North) in order to achieve their aims of migration control

was first and foremost air carrier sanctions because air transport had become affordable to refugees and migrants (from the Global South) at the time. Introduced in the late 1980s, possibly first by Denmark and in any case spreading fast around Europe and other industrialised states, these liability rules were an apparently neutral device that served as an incentive for airlines to check passengers' travel documents and to deny embarkation to those who were not in possession of the requisite passport and visa. As European states at the same time quite systematically applied and even adopted visa requirements for nationals of actual or perceived refugee-producing countries, this effectively resulted in the denial of access to the territory of those states, and consequently denial of access to an asylum procedure and to protection.

Already in 1992, this phenomenon had been coined *non-entrée* by James Hathaway who introduced the catchy term with dichotomic reference to *non-refoulement* in order to describe a variety of policies and practices that were increasingly applied by industrialised states in order to evade protection obligations towards asylum seekers and refugees (Hathaway 1992). While *non-entrée* made good sense as a tentative descriptive approach, Hathaway's examples of policies and practices went well beyond this function as he included procedural devices such as accelerated examination procedures aimed at 'manifestly unfounded applications' and inadmissibility criteria based on 'safe third country' notions. This is not to say that these measures were necessarily unproblematic or fair and decent, nonetheless they were implemented by destination state authorities at the border or in the territory, so that they did not in and of themselves create obstacles to accessing procedures or protection in the first place.

Rather, they were keeping asylum seekers from the 'procedural door' (Goodwin-Gill 1996:333) or at least opening that door only to a very restricted extent and for a strictly limited period of time.

Aspiring for a more accurate characterisation, we modestly suggested to use the term *non-arrival* to describe those policies and practices that specifically have the intention or effect of preventing asylum seekers from accessing the territory and/or the procedure of states in which they can apply for, and potentially obtain, protection (Noll and Vedsted-Hansen 1999:382–83). The *non-arrival* terminology became either substituted or completed by Gregor's monumental analysis of *deflection* mechanisms affecting access to territory, access to full-fledged procedures and access to protection (Noll 2000). As his analytical framework was law and policy measures based on the early EU asylum *acquis*, and given Gregor's conceptual imagination, the title of his book obviously included the term 'Common Market of Deflection' to signal the overriding or/and underlying rationale of the EU measures subject to examination.

Terminology arguably matters little as long as it is based on precise definitions and applied consistently. While Gregor may disagree, I tend to posit that this is precisely where lawyers often perform better than (other?) social scientists. At least, we as lawyers normally have a fairly clear idea about what legal measures, polices and practices we have in mind when using the terms. This is indeed the case for some colleagues in legal science who have recently analysed a variety of non-arrival or deflection policies and practices as measures of *deterrence* (Gammeltoft-Hansen and Hathaway 2015; Gammeltoft-Hansen and Tan 2017). Nonetheless, it may be worthwhile reconsidering this concept because it seems to be both overly

broad and too narrow. It is too narrow because 'deterrence' is about far more than signalling low chances and negative prospects for asylum seekers, negatively branding states and societies of potential destination, and similar measures discouraging (i.e., deterring) asylum seekers from making the attempt to arrive and enter any given destination state or region with a view to applying for protection. At the same time, referring to 'deterrence' may seem too broad or too vague insofar as the concept does not adequately reflect the harsh realities of regulatory and physical barriers that effectively hinder asylum seekers from getting access to any territory and procedure that would take their claim to international protection seriously and subject it to meaningful examination.

Returning to the issue of modes of transport, the fact that the abovementioned non-arrival measures of destination states in the Global North – especially visa requirements enforced by private transport companies due to carrier liability rules – primarily targeted air carriers and their would-be passengers meant that air transport became more difficult, if not impossible, and therefore less relevant for asylum seekers and other irregular migrants from the Global South. Instead, they would tend to resort to what Gregor has succinctly identified as *counter strategies* or *counter measures* (Byrne, Noll and Vedsted-Hansen 2002; Byrne, Noll and Vedsted-Hansen 2004) This did not necessarily mean immediately shifting to land or sea transport, as alternatives could also be new ways of evading the control measures implemented through air carriers. This could perhaps be obtained by using false travel documents, i.e., documents that had been forged more convincingly, or/and bribing document controllers more persuasively.

Undeniably, over time irregular migrants and their assisting human smugglers would need to find other modes of transport to enhance the chance of circumventing migration control and getting access to the desired destination states and the requisite procedures. Therefore, they have, to an increasing degree, resorted to non-air transport since entering European states irregularly via land and sea border crossings was considered, and in all likelihood in fact was, significantly easier and more affordable than with air carriers.

This in turn resulted in 'counter-counter measures' being introduced by European states, in particular more widespread application of border procedures not least in order to enforce inadmissibility criteria based on the notion of 'safe third countries'. Since our examination of early tendencies of such migration control measures and their impact on refugee protection (in collaboration with Rosemary Byrne and others) in *New Asylum Countries?* (2002) this has been an ever-evolving issue in state practices as well as in academic studies of these practices.

As these kinds of deterrence/non-arrival/deflection apparently lost significant parts of their effect during recent asylum and migration crises, they have become fortified or replaced by modalities of asylum governance which have recently been critically examined under the common denominator *containment*, essentially preventing asylum seekers and refugees from leaving their countries of origin or transit in the first place (Ayouba Tinni et al 2023). This is an important and possibly novel aspect of what we have, together with a number of colleagues, been studying in the *ASILE* project during the past four years.

Where does this then leave the issue from which this essay set

out: transport modalities? Containment by definition means little or no movement of people, at least no trans-border movement, if successfully implemented. If not seen as sufficiently successful, it may end up being combined with physical deflection and deterrence measures involving air carriers, yet now for deportation purposes. While this is indeed not a novelty in asylum policy, as reflected in Gregor's analysis of 'visions of the exceptional' 20 years ago (Noll 2003), such visions have recently been reactivated by the plans to remove asylum seekers to an African country with which the governments of the United Kingdom and (tentatively) Denmark have agreed to outsource asylum procedures and protection of refugees.

In case such visions should become implemented, that would ironically happen by way of airlifting asylum seekers out of European countries to which they have arrived by boat or truck or other forms of non-air transport. Whereas such policy visions were (perceived to be) open to the United Kingdom and Denmark due to these two states' non-participation in the Common European Asylum System (Tan and Vedsted-Hansen 2021), appetite for far-reaching extraterritorial strategies that may ultimately involve outsourcing is reportedly on the rise within the EU as part of the final run towards the adoption of the CEAS reform package proposed under the grand 'New Pact on Migration and Asylum'. This might well demarcate one of the primary legal battlefields within asylum and migration law during the years to come.

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MAX LILJEFORS
59,4 × 42 cm
Mixed media

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59,4 × 42 cm
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FOTO: Emma Krantz / Skissernas Museum

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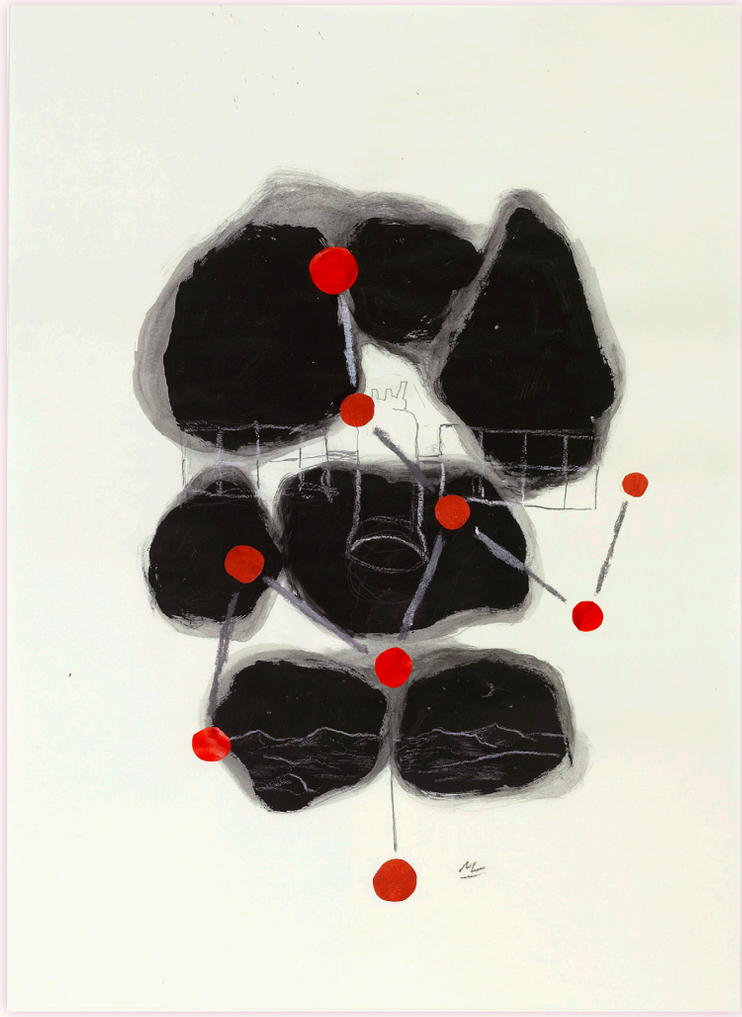

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FOTO: Emma Krantz / Skissernas Museum

Gregor's gentle invitation to theorize

Pål Wrange

THEORY IS EVERYWHERE in the activities of an international lawyer. Why are these rules binding? How to ascertain the meaning of this text? Who are the subjects of international law (and is the question even relevant)? Hence, an international lawyer – practitioner or scholar – constantly applies theories to her work. What we mean by theorizing in international law is therefore often re-theorizing, that is, proposing a *different* way of thinking about international law.

Gregor loves theorizing. However, his meandering into often obscure territory usually starts with a meticulous formulation of a precise legal question that a lawyer may face (and the answer to which will have fathomable consequences for real people), for instance the proportionality norm in Article 51 of the first Additional Protocol to the Geneva Conventions, the obligation in Article 36 of the same instrument to anticipate the functioning of a weapons system, how to assess evidence in asylum cases or how to square the understanding of jurisdiction as an 'entitlement' with the understanding in human rights law of jurisdiction as a link to responsibility.

Take the question of proportionality. The first time I came across 'Analogy at War', I was tipped by a doctoral student who was looking for a way to understand proportionality in investment law (thanks, Olga!). The second time, bombs were falling over Gaza. At both times, there was a real need to use Gregor's findings, though in very different ways.

The application of this notoriously difficult principle is, of course, informed by loads of theories – about war, the state, etc. As Gregor's text reveals, however, proportionality was still undertheorized, since there were no credible explanations about how to measure and compare military advantage and civilian loss. Gregor here 'draws' on philosopher Jacques Rancière (208) and most of all on theological literatures, in particular Erich Przywara's idea of *analogia entis* (208). Proportionality is 'a particular mode of an analogy.' (207) which 'presuppose[s] something that enables comparison and equitable sharing' (206). Finding the 'categorical equality' between human beings 'in their relatedness to that superior Creator,' (207), Gregor realizes that he can 'understand my own being as analogous to that of other beings' (218). Hence, the protected 'demos' are 'unqualified civilians' (225) rather than 'enemy civilians' (227) of an enemy 'polis'. Gregor implores 'the decision maker [to understand] the relation between the demos and polis of her own state' as much as that of the opposed party.' (228), that is, to give all civilians the same value.

Gregor's contribution to the Oxford Handbook of the Theory of International Law concerns jurisdiction. Here, he rightly notes that states both have an incentive to extend their 'entitlements' to exercise power and an equally natural incentive to limit their re-

sponsibilities (604). Under to a reading of 'a particular Protestant metaphysics', the first type of jurisdiction comes from creation and the mandate given to Adam and Eve, while the second is legitimated by the promise of redemption (as justice). In a complex journey from the first century CE over the Reformation to contemporary political philosophy – invoking Paul the Apostle, Erich Przywara (again!) and the philosopher Simon Critchley – Gregor notes that the European Court of Human Rights seems to be affected by two ideas: 'unity in law' (a single concept of jurisdiction in all international law) and 'unity in fact' (jurisdiction to be 'understood in the light of states' factual power') (606–607).

In 'Visions of the Exceptional', Gregor first explains various Danish and British proposals on offshore 'Regional Processing Areas' and 'Transit Processing Centres'. He thereafter subjects these ideas to a long critical analysis and then, on the last four pages, offers a new way of seeing these practices, by invoking Giorgio Agamben's well-known work on the camp and the state of exception 'as an analytical tool' (338). The new 'vision' 'has brought back a spectre to European migration and population policies. It is the spectre of the camp' (339). Gregor then compares this with the old system of 'onshore processing, public scrutiny and judicial control by courts ...' (341). The effect is very powerful, preceded as it is by a detailed analysis of the potential legal, social and moral implications of the new ideas.

In a completely different type of piece ('Decision making'), Gregor (with Matilda Arvidsson) describes their experiences of a concrete project on AI in asylum law decisions. Computer science is, of course, alien to law (though the two are old partners in legal informatics). The negative outcome of the project – that it all hinges on 'data wrangling' with unchecked discretion – should come as no surprise. The two could have used a conventional model of presentation, but the autoethnographic structure to the narrative (by reference to Clifford Geertz; 58) makes the conclusion more convincing (and also more transparent – would two non-critical positivists have concluded otherwise?).

'Weaponizing' is an important article on neuroweapons namely 'those weapons systems that a) integrate neuronal and synaptic activities of the human brain into a weapons system and b) eliminate the element of human consciousness before engaging a target' (207). To write this text, Gregor had to learn quite a bit about neuroscience (and its theories). He references the criticism from analytical philosophy that 'neuroscientific research is based on … a 'degenerate form of Cartesianism'… {in which] predicates formerly ascribed to the mind are now ascribed to the brain' (221), that is, mental processes are reduced to biology (18). However, finding also 'real' Cartesianism insufficient, Gregor turns to Martin Heidegger's reflections on technology (223). He finds that a main loss with the introduction of neuroweapons is 'the loss of language' (228). 'Language and the role of the human in the world are closely related to each other. In combination, they are indispensable for the appearance of truth, if only in a conversation between a legal adviser and a commander' (229).

As noted, Gregor switches effortlessly between different theories – different ways of seeing (different aspects of) the world – in a manner which is as playful as it is serious. I sometimes wonder how he does it. I can well imagine him sitting in an old armchair

in his countryside study, pondering about the best way to think about proportionality in IHL. He then comes to think of an obscure Catholic theologian, goes *heureka*!, and problem solved. Or maybe he is indulging in the guilty pleasure of Thomistic metaphysics and then gets a commission to write something. Or perhaps he sought out the theologian in the first place because he thought that this scholar might have something interesting to say about international law. My guess is the latter, but who knows?

In a text on international law in general Gregor builds on his writings on international humanitarian law (proportionality) and refugee law. As a reflection of the fact that IHL lawyers claim that proportionality is fundamental yet have difficulties articulating what it means (because doctrine has failed to do so, we understand), he finds that '[d]octrine and discipline reflect two rather different understandings of learning. We do not know what the law demands of us: this seems to escalate the importance that we practice it' (36). He then makes an analogy of sorts to the medieval contrast between the abstract canon law and the concrete practices in the monasteries.

Gregor's contribution to a volume on Martti Koskenniemi 'consider{s] whether Koskenniemi may be understood to eliminate creation while retaining redemption as a transcendent source of normativity' (23). As 'a contrast agent' to MK, he pours 'a particular form of Roman Catholic dynamism' (22). In From Apology to Utopia, 'ultimate authority appears to be beyond human reach' (23), and 'our knowledge about [the] law will be relativized by our ignorance of its creator' (24). Nevertheless, quoting MK, '[i]nternational law exists', in fact, 'as a promise of justice' (28). By reference to MK's later concept of a culture of formalism, Gregor suggests that 'it is the faith in a universal community to come that is cultivated in [a culture of] formalism. The dynamic of the law is not provided by divine creation in the past, but by its inspiration from the future. It is only through this faith in this law that progress is possible' (31).

And then, coming home: In 'Nostalghia', Gregor ruminates on the 'melancholic longing' for a Nordic international law, in view of the fact that a common Nordic approach 'hardly exists today'. He takes us through Tarkovsky's film Nostalghia with its protagonist Andrei. On his journey, Andrei meets Domenico, an 'idiot', who tells him 'that saving the world … can be done by carrying a burning candle through the pool of the Holy Catherine in the village' (16). Towards the end of the film Andrei does just that, with great effort. 'For him, the gesture is sheer openness, the openness I experience when I join my own longing and suffering into that of another person' (20). Gregor ends by asking: 'The question is then, which madman will bequeath us with a gesture that we may execute, thereby opening up our idiotic longing … an openness that is concrete, historically situated and at work in the world' (21).

Gregor has a distinct voice, a friendly one, the voice of a man who probably knows that many readers will leave him on his trail, but who is confident that those who remain look forward to their rewards.

It is also an inquisitive voice. He 'trie{s] to understand', he asks 'what method are we to apply?' or 'how a question could be formulated'. And there are doubts. The claim that a certain consideration 'will help me', is immediately qualified by 'so I hope'. In fact, often he is not sure at all: 'it might be' in a certain way, he 'think[s]', and

he has to ask '{c[ould it still be the case?'. Gregor also tends to make things difficult by 'challeng[ing] [his] own assumption'. Sometimes he surprises himself: 'I now realize how much my formulation of the question was tied up to' a certain understanding. And there are even instances where he gets things wrong: 'I have set out with the question what would be lost …, and I have arrived at an answer on what is added.' While one may suspect – perhaps too suspiciously – that these qualms are just rhetorical devices, one must admit that they are effective; the friendly insistence makes me accept the claim that he is trying out different things in front of our eyes.

However, Gregor may also be assertive. 'Is human rights jurisdiction being constructed so differently that there is a total disconnect from the interstate jurisdiction of 'entitlements'? Not so. (sic!)'. And in that modus, he proclaims that

> '{t]he task we have – each of us, individually – is to think about the meaning of being human' (Neuro, 9).

And perhaps, this is our most urgent task today, while we perform our 'idiotic' rituals of international law in our monasteries of formalism as (if) that is all we have.

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Fan-mail *eller* Ett par korta reflektioner om en akademisk förebild

Rebecca Thorburn Stern

SOM NYBLIVEN DOKTORAND i folkrätt satt jag en dag på Uppsalatåget på väg till universitetet. I samma vagn fanns en äldre kollega som disputerat i ämnet ett par år tidigare och vi började prata. Kollegan gratulerade mig till att ha fått doktorandtjänst och frågade sedan glatt vilken av professorerna på juridiska institutionen som var just min pappa? Något ställd av frågan (min pappa var inte professor, vare sig på min eller någon annan institution) fick jag en insikt som sedan följt med mig under de nu mer än tjugo år jag har varit verksam inom akademin: den akademiska världen kan vara såväl märklig som svårnavigerad samt fylld av mer eller mindre tydliga hierarkier att förhålla sig till. Det är därför viktigt att hitta kloka personer att inspireras av – goda förebilder, med andra ord.

För mig är Gregor Noll en sådan förebild, och i denna korta text ska jag försöka beskriva varför så är fallet. Om det hela framstår som något av ett beundrarbrev, snarare än en vetenskaplig text, är det helt korrekt uppfattat.

Det första man sannolikt tänker på när det gäller Gregor Noll som förebild är hans betydande insatser inom folkrättslig forskning. Gregors forskning – vilken behandlas bättre och mer ingående i andra bidrag till den här boken – rör sig över ett flertal fält, från migrationsrätt till mänskliga rättigheter till internationell humanitär rätt till folkrättslig teori. Hans arbete är gränsöverskridande, lyfter nya frågor – på senare år inte minst artificiell intelligens och digitalisering – och rör sig ledigt mellan olika fält, sällan begränsat till rättsvetenskapen, ofta med inslag från humaniora. Inom migrationsrätten har hans forskning om bevisvärdering och trovärdighetsbedömningar i asylmål, om medicinska åldersbedömningar och hur artificiell intelligens kan användas i beslutsfattande – för att nämna några av många ämnen – haft ett betydande genomslag såväl nationellt som internationellt och fört forskningsfronten framåt.

Utöver vad gäller forskningens själva innehåll – präglat av djup kunskap, skarp juridisk analys och tvärdisciplinär rörlighet – ser jag Gregor som en förebild för hur forskningsresultat och resonemang kan presenteras. I Gregors texter förs en sorts intellektuellt samtal med läsaren i vilket hen ofta utmanas att utforska nya, inte alltid väntade, perspektiv på en viss fråga. Baron och Epstein understryker i en artikel om rätten som narrativ att ”law is a communicative activity”, inte minst rättsvetenskapliga forskare emellan, eller mellan forskare och praktiker, och resonerar kring hur rätten, och förståelsen av rätten, skapas inom ramen

för denna kommunikation.[1] Gregors texter – eleganta och stringenta, ofta avancerade men sällan svårtillgängliga – ser jag som goda exempel på något som Magnus Linton lyfter fram i sin bok om vetenskapligt skrivande, nämligen att form och tanke hänger samman, att form skapar mening, även i vetenskapliga texter, och att det inte bara handlar om *vad* som berättas, utan även i stor utsträckning *hur* detta görs.[2] I Gregors texter finns, som jag läser dem, en medvetenhet om betydelsen av såväl berättelsen som den form i vilken den presenteras (Om denna medvetenhet om berättelsens betydelse för den vetenskapliga textens genomslag på något sätt bottnar hans forskning om begreppet ”trovärdighet” i relation till asylberättelser kan jag bara spekulera i). Detta är ett förhållningssätt till vetenskapligt skrivande att inspireras av.

Utöver själva det vetenskapliga skrivandet vill jag också lyfta fram Gregors förhållningssätt till kollegor, inte minst mer juniora sådana. Som nämndes inledningsvis präglas akademin i viss mån alltjämt av mer eller mindre tydliga hierarkier, vilka ofta manifesteras genom såväl formella strukturer som informella hackordningar och inkluderande/exkluderande praktiker. Juniora forskares – för att inte tala om doktoranders – plats i dessa hierarkier markeras inte sällan på mer eller mindre subtila sätt. I de olika sammanhang jag under årens lopp har haft förmånen att få arbeta tillsammans med Gregor har jag återkommande gjort samma reflektion, nämligen att den nyfikenhet, generositet och respekt med vilken han bemöter

1 Jane B. Baron & Julia Epstein, Is Law Narrative?, 45 Buff. L. Rev. 141 (1997), s. 141.

2 Magnus Linton, *Text och stil. Om konsten att berätta med vetenskap*, Stockholm, Natur och kultur, 2019.

kollegor oavsett akademisk ålder eller rang, liksom doktorander, är så väl eftersträvansvärd som mer ovanlig än vad man kanske skulle kunna tro är fallet. Med detta sistnämnda påstående vill jag inte insinuera att akademiker i gemen är otrevliga och ogina – långt därifrån! – utan snarare att framhålla vikten av en sådant öppet förhållningssätt som en viktig del i skapandet av en god akademisk miljö, i vilken forskare i olika stadier av sin karriär känner sig inkluderade och bekväma med att lägga fram tankar även om de inte är tänkta till punkt, och där hierarkier spelar en underordnad betydelse i relation till det goda samtalet. Att bidra till en sådan miljö är vårt gemensamma ansvar i akademin, ett ansvar vi förhåller oss till på många olika sätt. Även på denna punkt är Gregor en förebild, som en senior forskare som ser längre än sin egen roll och position utan även hur hen kan bidra till andras utveckling och lyfta dem. Att vara en sådan akademiker är något att sträva efter.

And Time Becomes a Wondrous Thing

Anne Orford

FOR TWO DECADES, my academic life has been shaped and enriched both by my friendship with Gregor Noll and by the world of the Swedish academy into which he and his colleagues have welcomed me. Gregor and I had corresponded by email for some time, exploring various forms of collaboration, before we first met in person as lecturers at the annual Helsinki Summer School on International Law in 2004. Following that meeting, Gregor invited me and my family to visit Sweden for the first time in 2005. I've lost count of the number of times I have visited Sweden and experienced the hospitality of Swedish colleagues in Lund, Gothenburg, Stockholm, and Uppsala since then. The ongoing connection with Gregor, his colleagues, and his students, and with Sweden more generally, that began on our first visit in 2005 has been life-changing.

I can remember the idealized image of Sweden as a social democratic and feminist utopia that I had before I went there for the first time. And I am not alone – an image of 'Sweden' as social laboratory or model society has a surprisingly pervasive grasp on the imagination of many people in Western countries.[1] If anything, my experience of visiting and working in Sweden revealed that I had underestimated how different it would be. A visiting professor with young children experiences the state in a very material form, for example as state-provided hot school lunches, free afterschool care available as of right (at least to working parents), and free and easily accessible emergency hospital care (at least in the 2000s when I first visited Sweden with my family). From an early stage in my life as an academic, it was Gregor and other Nordic colleagues who took not only my ideas but also my family responsibilities seriously – inviting me to visit, arranging university accommodation that could also house my family, and timing many of my visits around the Australian school holidays so that I could travel with my young children. Sweden was a place where groups of young men with prams had coffee or walked the streets together, my male colleagues would explain that they were not available for meetings after 3pm on certain days because they had childcare responsibilities, the local pool had a spacious 'all-genders and no-gender' change room alongside the male and female change rooms long before anywhere else that I knew of, and no one ate lunch while working at their desk because everyone gathered together with their homemade lunches in the staff common room or went out to one of the many restaurants that still had a traditional lunchtime 'dagens' special designed to enable workers to eat a hot meal at a reasonable price.

As an international lawyer working and thinking about the role of the state, it was enlivening to engage with the tradition of Swedish thought that insists upon the possibility that the life and welfare of people can be improved through state planning and democratic

1 Carl Marklund, 'The Social Laboratory, the Middle Way and the Swedish Model: Three Frames for the Image of Sweden' (2009) 34 *Scandinavian Journal of History* 264.

debate. It was a pleasure to immerse myself in Swedish life and to reflect upon how Swedish people have thought about preserving rural livelihoods, building sustainable cities, rethinking gender and gender roles, developing new forms of internationalism, and creating a social world in which people can thrive.

Over time, however, it became harder to hold on to the idealized Sweden of my imagination, as fortress Europe closed its gates in response to the refugee movements caused by ongoing conflicts and geopolitical rivalries played out in the Middle East and North Africa, an issue to which I will return in a moment. Already by the time I first began to visit Sweden, its version of social democracy was being displaced by the rising tide of European neoliberalism that had emerged triumphant with the end of the Cold War. While much has changed since 2005, even on that first visit to Sweden, my colleagues were already discussing the politics of European refugee law and policy, the European Court of Justice had already decided the cases of Viking and Laval, and human rights arguments were already being taken up by the right-wing think tanks and parties to attack social democracy.

Indeed, the sense of a 'future that disappeared' is a recurrent theme of debates in and about Sweden.[2] The sustainability and legitimacy of the social democratic state is a matter of ongoing public controversy, with the 1990s debate over whether the Swedish population policy espoused by the Myrdals was a form of eugenic authoritarianism being just one example.[3] That debate was in part a proxy for a broader struggle over the legacy of the 'rationalistic futurism' that had been such a feature of Swedish social democratic politics.[4] The question of whether to prioritise the health and survival of the population over the rights of individuals, and if so which individuals, continues to be posed with vigour within Sweden, while Sweden continues to play an outsized role in global debates over those issues. This was illustrated recently in discussions of differing state responses to the COVID pandemic, in which the Swedish model of neoliberal regulation was vigorously championed by libertarians in North America over other, more authoritarian, versions.

Which brings me back to Gregor. There are many familiar ways of responding to the sense of a Sweden – or a world – that is disappearing. One is the rise of conservative nostalgia and nationalism, with calls to make Sweden great again by returning to a world of hard work, discipline, hierarchy, order, social cohesion, and closing off from the chaotic world outside. A related form of romantic leftism sees Swedish social democracy and state planning as utopian, forgetting that it was conditioned by its own forms of exclusion and dispossession (as the debate over eugenics made clear). Social

2 For that formulation, see Andrew Brown, *Fishing in Utopia: Sweden and the Future that Disappeared* (2008).

3 For reflections on that debate and its stakes, see Anne Orford, 'Alva Myrdal: The Rise and Fall of Social Democratic Internationalism' in Immi Tallgren (ed), *Portraits of Women in International Law: New Names and Forgotten Faces* (2023), 183, 188–90.

4 On the 'rationalistic futurism' of Swedish social democrats, see Arne Ruth, 'The second new nation: the mythology of modern Sweden' (1984) 113 *Daedalus* 113, and on its demise, see Ole Wæver, 'Nordic Nostalgia: Northern Europe after the Cold War' (1992) 68 *International Affairs* 77.

democratic states differentiated population both spatially through constituting the inside and outside of Europe and racially through differentiating those who were seen as contributing to the health of the population and those who weren't. A third and more cynical critique rejects the existence of Nordic social democracy as an illusion – an approach perhaps best illustrated by an intervention made by Slavoj Žižek into debates over European refugee policy. In a typically provocative essay entitled 'The Non-Existence of Norway',[5] Žižek attacked what he described as the 'left liberal' outrage that 'Europe is allowing thousands to drown in the Mediterranean' and the related call to Europe to 'show solidarity and throw open its doors', while also criticizing the anti-immigrant populists who 'say we need to protect our way of life' from foreigners. According to Žižek, both were wrong. For Žižek, the refugees escaping their 'war-torn homelands' were 'possessed by a dream'. The refugees who arrive in Greece or southern Italy didn't want to stay there and were 'trying to get to Scandinavia' or 'desperate to get to Germany'. Their assertion of an 'unconditional right' to demand 'not only proper food and medical care' but to live in the country of their choice was unrealistic.

> There is something enigmatically utopian in this demand: as if it were the duty of Europe to realise their dreams – dreams which, incidentally, are out of reach of most Europeans (surely a good number of Southern and Eastern Europeans would prefer to live in Norway too?). It is precisely when people find themselves in poverty, distress and danger – when we'd expect them to settle for a minimum of safety and wellbeing – that their utopianism becomes most intransigent. But the hard truth to be faced by the refugees is that 'there is no Norway,' even in Norway.[6]

But another approach, which I associate with Gregor, rejects those forms of reaction, nostalgia, and cynicism. Through the work of Gregor, his colleagues, and his students, I was introduced not only to the richness of Swedish social democratic thought and Nordic international law, but also to a culture of thinking critically about the darker sides of those projects. That work offers an alternative to the forms of cynical reason that have come to dominate so much of contemporary critical thought and to the forms of reactionary nostalgia informing much of the politics of both the Left and the Right in Europe and beyond.

It is hard to capture the nature of that alternative mode of critique in this brief tribute. None of the words I can think of really do justice to Gregor's style – curious, attentive, humanist, open, kind, anarchic, politically committed, light, secular while also spiritual. But perhaps I can give a sense of that style through reflecting upon a gift that Gregor brought on one of his visits to our home in Melbourne. Gregor and I often shared gifts when visiting with each other's families and, perhaps unsurprisingly, those gifts were often books – children's books, works of philosophy and history, novels, and books exploring art and photography. The book I want to mention here was a collection of photographs by Sune Jonsson, entitled

5 Slavoj Žižek, 'The Non-Existence of Norway', *London Review of Books*, 9 September 2015.

6 Ibid.

Och tiden blir ett förunderligt ting [And Time Becomes a Wondrous Thing]. Jonsson's project helps illustrate the style that Gregor brings to international law.

Jonsson published twenty-five photo books, beginning with *Byn med det blå huset* [The Village with the Blue House] published in 1959, and concluding with *Och tiden blir ett förunderligt ting* in 2007. His books combined photography with oral history and fiction, all with a commitment to the vernacular and the local. He was also a documentary filmmaker and archivist, working with Västerbottens Museum (where he was appointed as Field Ethnologist in 1968), Swedish Radio, and Swedish Television. Almost all of Jonsson's photographs documented the people, landscapes, and declining communities of the sparsely populated rural north of Sweden, producing an homage to a world that was disappearing. He began working in the 1950s, at the beginning of an era of modernization across many European countries and particularly the Nordic countries, designed to create new lives for the peasantry and the oppressed working class and 'to obliterate the memory of starvation and emigration'.[7] But Jonsson was one amongst group of Swedish thinkers and artists who feared the dangers inherent in rapid modernization and the associated depopulation and migration it heralded. Many 'socially and politically conscious artists and writers were anxious about the pace of change', and worried that while 'the new welfare state gave "cradle to grave" care … too much had been lost along the way – a sense of community, of self-help and individual compassion'.[8]

7 Val Williams, 'No Nostalgia' in Sune Jonsson, *Life and Work* (2014) 7, 10.

8 Ibid, 12.

Jonsson's monochrome photographs record people engaged in subsistence farming, living in modest homes characterised by spareness, austerity, and thrift. The images convey a sense of quiet dignity and resilience. And yet, as one commentator notes, while Jonsson combined the familiar documentary interest in that which is passing with 'a sharp political instinct and social concern', there was 'no nostalgia here'.[9] Smallholdings were not a 'rural idyll' – they 'required incessant toil, arduous clearing of poor and stony land and the ever-present spectre of debt, social and religious intolerance and strained personal and social relationships'.[10] He and his colleagues 'rejected the concept of nostalgia, and instead produced archaeologies of difficult and often isolated rural working lives'.[11] He was an artist of passing time, who sought to document the lives of working men and women, combining 'passionate social politics with a sublime poetic vision'.[12] For Jonsson, there was a ' nobility in their resilience, an admiration of their knowledge of rural crafts, a respect for their self-sufficiency'.[13]

Gregor's appreciation for the legacy of that rural Sweden, and his recognition of the dignity and autonomy of those caught up in such transformations, is evident. In other hands, that could lead to an anti-modernist sensibility, but that is not Gregor. He has a sensibility that I'm tempted to call other-worldly – free of reaction

9 Ibid, 8.

10 Ibid, 11.

11 Ibid, 12.

12 Ibid, 15.

13 Ibid.

Vera och Frits Eriksson, Öre-Långsele, Lycksele 1966.
FOTO: Sune Jonsson/Västerbottens museum

or nostalgia, and with a kindly curiosity about that which has been and that which is becoming, a spirituality of wonder.

Gregor's work is profoundly humanist. Just as Jonsson always keeps human figures at the centre of his landscapes, so too does Gregor. That approach is there in all his work on refugees and migrants, captured well in his response to a piece by James Hathaway entitled 'Why Refugee Law Still Matters', in which Hathaway proposed a managerial multilateral regime for allocating refugees around the world.[14] In the recasting of Hathaway's title in his response to 'Why Refugees Still Matter', Gregor made the terms of his critique clear.[15] Gregor rejected Hathaway's proposal because it nullified the individual migrant's autonomy, and insisted instead upon the need to take the "'human" in 'human rights' seriously'.[16] He urged his refugee law colleagues to remember that 'refugees still matter to the idea of an international law maintaining within itself ideas of enlightenment, liberty and progress', and that the option of migration is the most effective human rights monitoring mechanism and remedy in the international system.[17]

And in one of my favourite pieces by Gregor, which is prescient and beautifully written, he explores the implications of weaponising neurotechnology for international law.[18] The article begins in a mode that reminds me of Jonsson, with the recounting of an experience Gregor shared in a hospital ward with Leif, a 73-year-old farmer from Markaryd. Gregor uses that shared experience of placing hope in a technology that might liberate and serve life to begin his meditation upon the stakes of using such technology as part of weapons systems. He argues that this raises questions about 'what it means to be human in the context of international humanitarian law',[19] even – or perhaps particularly – when our human bodies are entangled with technology. And he suggests that

14 James C Hathaway, 'Why Refugee Law Still Matters' (2007) 8 *Melbourne Journal of International Law* 89.

15 Gregor Noll, 'Why Refugees Still Matter: A Response to Hathaway' (2007) 8 *Melbourne Journal of International Law* 536.

16 Ibid, 538, 544.

17 Ibid, 547, 544.

18 Gregor Noll, 'Weaponising neurotechnology: international humanitarian law and the loss of language' (2014) 2 *London Review of International Law* 201.

19 Ibid, 210.

this is the task we each face in our life and work: 'to think about the meaning of being human'.[20]

Over the years that I have known him, Gregor has gently continued to focus upon that task. He has insisted upon the dignity and autonomy of those whose 'utopianism', in the words of Žižek, is 'intransigent'. And he has shown us that it is when we experience ourselves facing shared challenges or dangers together that we might engage in the critical and creative work of making other worlds possible.

20 Ibid.

Three Perplexities of Human Rights Theory

Lena Halldenius

TEACHING AND WRITING in the field of human rights come with a set of perplexities. Are human rights a function of law or a requirement on law? Do they presuppose political society or provide an ethical foundation for political society? If human rights are as important as is often claimed, then why are they so easily dismissed the minute they seem to actually matter? If they are meant to be self-evident, how come we have such a dim view of what they mean and require? We can approach such issues as implementation challenges for human rights as law or as as conceptual challenges for human rights as theory. Or we can acknowledge "human rights" as a name given to a conflicting assemblage of practices, ideals, and remnants of history. On that latter approach, "human rights" is a non-trivial analysandum, with inconsistencies and perplexities to explore, not to iron them out (necessarily) but to gain insights into the messiness of the world we live in. This, I find, is Gregor Noll's approach. Reading his work on human rights and the undocumented migrant worker – where human rights law is analysed as a perplexing empirical phenomenon in order to understand a bit better why things are as odd as they are – you might easily feel discouraged by

the difficulty of it all.[1] Or, you might feel liberated, free to go on an open-ended excavation. So, let's do that. I'll take this opportunity to ponder three things – perplexities if you will – that are on my mind. Here they are.

The first perplexity is prompted by a reflection on why I am writing about human rights in the plural. Are we concerned with one concept, one unified phenomenon, or are we dealing with a motley bunch of things that are deemed to be particularly important and desirable? In the Swedish language we can get away with skating over this difficulty for the simple reason that there is no difference between the singular and the plural form of the words "är" (is/are) and "har" (has/have). But I'm writing in English now and "human rights is…" looks weird, wrong even. Your word processor will correct you. "Human rights are…", however, looks like we are concerned with items on a shopping list. And a lot of the time, that is indeed how the human rights debate is framed: how many human rights are there? What does each of them require?

The widely acknowledged notion that human rights are interdependent in practice (fulfilling one contributes to or facilitates the fulfilment of others) presumes "the list", that is that there are separate rights or sets of rights, otherwise the question of how they relate to each other would not arise. The also widely acknowledged (at least rhetorically) notion that human rights are indivisible in nature would seem to counteract "the list"-thinking, but does not really help since it typically refers to the inherent dignity of human

1 Gregor Noll, "Why Human Rights Fail to Protect Undocumented Migrants". *European Journal of Migration and Law*. 12 (2010), pp. 241–272, DOI: 10.1163/157181610X496894.

persons or, still to a list while denying that the items on the list can be separated or placed in any order of priority, or it refers to both.[2] The first is an article of moral faith while the second is an article of political faith and also incoherent. We still don't have a concept. Or maybe we do. Maybe "human rights" as concept works like plant classifications: the category is just the sum of whatever items are put in it because they resemble each other, at least as long as we choose to slice the world in a particular way. There is nothing over and beyond that – no "form", if you excuse the Platonism. Will that do? Will not "human rights" as a name given to a contingent politico-legal practice not always appear insufficient, insubordinate even, in view of the politico-ethical power that continue to be ascribed to them (or it)?

The second and related perplexity concerns human rights as law or as… something else. Maybe this feeds into the list versus concept conundrum. For me as an analytical political philosopher, certain things stand out as curiosities in mainstream human rights philosophy. One is a tendency to treat the content of positive human rights law, and the nation state as rights provider, as given normative data for concept formation, rather than the politically and historically contingent empirical phenomenon that it is. This deviates from how analytical philosophers usually approach political value concepts. We don't treat our job regarding "justice" or "freedom" to be to provide a conceptual overcoat for whatever political practice that dominates under that label. The reader might now object that there

2 See for instance https://www.unfpa.org/resources/human-rights-principles and https://www.ohchr.org/en/what-are-human-rights.

is plenty of philosophical disagreement over human rights and the reader would be right, but it's mostly disagreement within the confines of the structure and logic of international human rights law. A theory of justice which is so demanding that the justice it envisions can be realised only in a political and economic world substantially different from the one we live in is fine; it is a feature of normative theory to have a world-to-word direction of fit (that is, the world should change so as to approximate normative demands). But a theory of human rights which is so demanding that the human rights envisioned can be realised only in a political and economic world substantially different from the one we live in is not fine. Such a theory will be criticised for espousing "manifesto rights", a great sin indeed. For some reason, human rights theory – normative though it is – is expected to have more of a word-to-world direction of fit (that is, the theory should adapt to however the world is). This accounts for the curious tendency towards minimalism in human rights philosophy:[3] the position that human rights proper refers to a set of basic liberties and subsistence claims, on the unanalysed and seemingly faulty assumption that levelling down what people can rightfully claim from the state makes it more likely – or a more reasonable expectation – that they will get it. What this actually

3 As I have argued in Lena Halldenius, "Neo-Roman Liberty in the Philosophy of Human Rights", 2022, *Rethinking Liberty before Liberalism*, H. Dawson and A. de Dijn (eds.), Cambridge: Cambridge University Press, https://doi.org/10.1017/9781108951722, pp. 215–232; Lena Halldenius "Human Rights and Republicanism. Rights as Egalitarian Levers", forthcoming 2024 in *The Oxford Handbook of Republicanism*, F. Lovett and T. Sellers (eds.), Oxford University Press.

does instead is to legitimate inequalities above or to the side of that basic set of claims, as if inequalities in wealth, status, and power do not impact people's capacities as rights claimants.

Which brings me to the third perplexity: the human rights subject. I am simplifying a bit, but here are two components that are presumed in the politico-ethical notion of the human rights subject: one is the evaluative component that human rights subjects are equal in their entitlements to rights (whatever rights are or whatever rights there are). Another is the agentive component that rights bearing posits you as a politico-legal agent, both in the sense that you can make claims and act on rights, and that you are an agent to whom rights-delivering institutions are accountable. As in the law-or-something-else perplexity we just looked at, there is a slippage here regarding the world-to-word versus the word-to-world direction of fit. Are these two components assumption of what it is to be a human rights subject in a world where human rights law exists – as if rights subjectivity is an automatic fall-out of human rights law – or are they normative requirements on how that world needs to change so as to make it equally possible for all persons to actually be human rights subjects? To the extent that the first is the case, human rights thinking will be unable to explain its own deficiencies. The tendency for human rights to serve as an article of faith rather than a critical principle, together with the trust in the logic of law and the minimalism that comes with the word-to-world direction of fit obscures what it is that can make rights unattainable or even inapplicable for the already disadvantaged.

As Gregor Noll has noted, the difficulty of the undocumented migrant worker to access state protection challenges the supposed

universality of human rights by pointing out how the logic of law and territorial jurisdiction cannot account for the rights subjectivity of persons who are out of place, as it were. This is a known strangeness, analysed by Hannah Arendt, who famously expressed the unacknowledged claim emanating out of the migrant or refugee experience as "a right to have rights". As with other dictums that are too cleverly formulated for the complexity of the problem they are meant to convey, it has fossilised into something of a meme. If a right to have rights is meant to be a meta right, a second-order right to gain access to the political position (political community membership) from which first-order rights can be claimed, then fair enough. We see the normative point of that and it's a valid one. But did we solve anything or understand anything any better? Or did we just move the impossibility of claiming up an analytical level?

Well, here we are, faced with questions on how to theorise the human rights subjectivity of someone who has, say, her basic needs satisfied but is still poor, or who has legal access to political liberties but is still politically marginalised, or who lives and works precariously somewhere on the other side of a border, like the undocumented migrant worker. In mainstream human rights theories, we don't quite know how to categorize such cases, but in the messy world we live in they are the majority. Acknowledge the perplexities and experiences that don't fit, and start theorising right there.

L'État, c'est moi

Aleksandra Popovic

POPULAR CULTURE ATTRIBUTES to Louis XIV two statements which illustrate the polarized nature of the traditional conceptualization of the State: "*L'État, c'est moi*" (I am the State) and "*Je m'en vais, mais l'État demeurera toujours*" (I die, but the State will always remain). A similar dichotomy is reflected in the traditional proclamation of a succession on the throne by a Head of State in a patriarchal Monarchy: "The King is dead, long live the King!". On the one hand, the State is conceptualized to be governed by a human Head (of State), which we could stab to death with a steely knife, and, on the other hand, the same conceptualization of the State entraps us as individuals in a universalized space and time, from within which we can neither leave (alive) nor kill the beast.

The beast, which Thomas Hobbes compared to the biblical monster Leviathan, once conceived by us, will, just like the circle and the square, always remain in a universal metaphysical realm beyond the physical constraints of embodied time and space. The very idea (of this idea) entails a separation between what presently exists, in the here and now, as it were, and what exists beyond the here and now.

If embodied changes in the here and now, like the death of a particular embodied individual Head of State, leave the State unphased, then what the here and now is, as a matter of fact, could always have been different, given different circumstances.

For instance, if the State is rich and ordered, it could have been poor and disordered – or the other way around.

If things could always be different, then, given a chance to choose the State that we live in, we would always (rationally) be expected to prefer to be in the better State. For instance, if someone asked us to choose between, on the one hand, being in a rich and ordered State, and, on the other hand, being in a poor and disordered State, we would be rationally expected to choose to be in the rich and ordered State, in which the here and now provides better conditions. Given the choice, the rich and ordered State is the right State to be in – and the poor and disordered State is the wrong State to be in.

Thus, if we find ourselves to be in a poor and disordered State, we find ourselves to be in a State that we feel wrong to stay in. Hobbes famously described life in this State (of Nature, without human inventions) as "solitary, poor, nasty, brutish, and short". Given a chance to choose, we would be expected to want to leave such a State to create better conditions for ourselves to live in.

This potential for conscious disgruntlement over our physical embodied circumstances, which is implied in the idea of the State, is probably what defines us most as (modern) human beings. Human beings appear, to a greater extent than we see in other animals, to deliberately use our heads to resolve problems to create better living conditions for ourselves in the future (beyond the here and now. We are conditioned to think that what is not present in the "here and now", could be present in the "beyond the here and now", if we follow our heads. If it works, we could rejoice together, as reflected in the anecdote of Archimedes' "Eureka moment", but if it fails, we may end up blaming each other. This idea (or mentality, perhaps) clearly underpins religion, philosophy, politics, law – and science.

The dash before "and science" is there to symbolize that the term "science" here denotes that which Francis Bacon (the father of philosophy of science, according to Ian Hacking) referred to as "[God's] power". This power is the embodied power of *knowing how* to leave undesirable states of the world and sustain better ones by mastering the interplay between cause and effect.

Without the embodied power of knowing how, religion, philosophy, politics, and law can only reflect *the will* to leave the wrong State and to effectuate a life under the good living conditions of the right State. However, this *will* alone does not in itself allow us, as living embodied unities, to hereafter enter a better State in the "beyond the here and now". Instead, if we are subject to the will, without having the power, we risk going mad, like Don Quixote did in his effort to sustain a life as a knight who follows the rules and rationality of chivalry in a State where no conditions for that kind of life were present – or we may even die in the process.

Unlike the know-how-empowered scientist, the madman is free to relentlessly repeat the same behaviour – over and over again – expecting the world to adapt to his own beliefs and ideals irrespectively of the encountered evidence. Instead of directing his attention to the evidence that he is faced with in the physical world, the madman retreats into a fantasy world inside his own head to be able to live out his ideals. Still, even a madman has to deal with the problems of life (although he retains full creative freedom in interpreting and solving them). Thus, unless he uses his creativity

to gain the power of knowing how to leave undesirable states of the world, it will incorrectly appear as if his death has the power to end all of life's problems.

Now, here comes the crux of the matter: The power of knowing how to master the interplay between cause and effect (here referred to as "science") requires us, as individuals, to be creative in our process of embodying the capacity to direct our attention outwards into the physical evidence, whilst the traditional conception of the State, according to which the Head of State governs us and the State goes on after we die, restrains our creativity by enforcing one particular fantasy world, which overrides all others. Thus, when the overriding "power" of the Head of State, as opposed to the power of knowing how to transcend it, takes a hold over us, as individuals, we become disempowered. Like Sisyphus, who was given a punishment by the angered Gods, intended to be so maddening that he would wish that he had died, we become trapped in an alien (ir)rationality through external (divine/magical) force by a beast that appears impossible to kill – but this entrapment is just a folly.

The trap lies within the universalized space and time inside our heads. No such divine magic exists in the embodied time and space, here and now. Here and now, if the boulder appears impossible to roll up to the top of a hill, something is causing that effect. The trick is to use our creative power to look outwards, beyond the effect that appears in our heads, to see the evidence that shows itself in the composition of a better state of the world in which the cause is resolved. This creative power emerges from within to allow us to control our transcending from one state of the world to the other. Maturana and Varela called this cognitive capacity every single living unity needs to embody to be able to know how to sustain itself in a particular state of the world under everchanging conditions "autopoiesis".

The autopoietic living unity embodies a universe which emerges from within itself and vanishes into itself. We implode when we die, because we lose the power contained in the problems we know how to solve to sustain ourselves within particular states of the world. Disempowered, the body's will to (re)compose itself becomes universalized and purely theoretical, and the execution of this unsubstantiated will causes it to decompose in practice. The execution of the disempowered will which causes decay is by our traditional conceptualization of the State (and of law and forensics) confused with the embodied power to sustain ourselves in particular states of the world. Matters become obscured by symbols (e.g., on a paper, or a banner) and the cause of our disempowerment is mistaken for power.

"I am the state! Any state of the world that I am in is governed by me. It is the State which is governed by a Head of State that is the delusion!", I said, emphatically.

Gregor looked at me with an amused expression in his face and let out a typical Gregorian chuckle when he said: – "You are an anarchist!". His eyes twinkled with surprised curiosity.

"No!", I exclaimed, startled by his conclusion. "I am an autonomist!" It was an ill-chosen word. In a different here and now, in which I had embodied knowledge of the autonomist Marxist theory, I would have used a different word.

"What is the difference?", Gregor asked.

"It is all explained there, in my thesis.", I responded.

"I look forward to reading it.", said Gregor, and pushed my paper to the side.

His statement was matter of fact, and the gesture was mechanical. The twinkle in his eyes was gone. It was lunch time, and in a different here and now, in which I had embodied knowledge of how lunch time affects Gregor, things might have played out differently, but this was not that here and now. Without any warning, the gesture pushed a button inside my head and the doors of an academic habitus in which my life became solitary, poor, nasty, brutish, and short slammed shut around me. The clouds gathered over my head and the clock started ticking with a maddening sound. My days were measured unless I could find a way to conquer the beast that was keeping me in this undesirable state of the world. I had to struggle with no end in sight. However, one thing is certain, if I don't go mad or die in the process, I will master the embodied power of knowing how to transcend the obstacles that prevent me from leaving this undesirable state of the world. I will prove it to you – or, prove me wrong, if you can!

When my neglected mother dies

Jennifer Beard

I WAS FIRST introduced to Professor Gregor Noll by Professor Anne Orford when he participated in the second Melbourne Legal Theory workshop convened by Anne in 2005, about a year after my mother had died. This was shortly before I was appointed to a permanent position at Melbourne Law School in 2006. Anne and I immediately contrived to bring Gregor back to Melbourne for a visit that would coincide with the 3rd Melbourne Legal Theory Workshop. This workshop initiated a collaborative project between Gregor and Anne and another between him and me. The outcome of the latter collaboration was our 2009 article published in *Social & Legal Studies* entitled 'Parrhēsia and Credibility: The Sovereign of Refugee Status Determination'; and a gentle friendship. Gregor visited Melbourne twice during this collaboration. During his first visit, Gregor and I dined out in the city. Over the meal, I learned that Gregor and his partner Birgitta shared a love of baking bread, and we spoke at length about German culture, bread and baking and our respective undergraduate studies in German language and literature. I always think of bread baking when I think of Gregor. I also think of beginnings; and the beauty of collaboration, but I

must draw out the similarities here between mentors such as Gregor and bread as a staple food, and its profound significance in various cultures, symbolising sustenance, community, and even power. My subsequent collaboration with Gregor introduced me to a network of marvellous scholars such as Pamela Slotte and Matilda Arvidsson and the joy of intellectual synergy. Gregor welcomed me into the Law faculty in Lund, and the slow choosing of morning tea pastries. I have found Gregor to be a quiet yet ever present thinker. Despite his interest in the theoretical, his writing evokes in me a great sense of worldliness and being. It is my privilege to have worked with, and learned from, him.

I continue to bake bread but very often toward the end of a heavy teaching semester, I find my sour dough 'mother' has starved due to severe neglect, and it will not rise. On these occasions, I often make a new starter, and use the neglected mother to make slightly sour tasting fruit scrolls: let's call them Nolls.

HOW TO MAKE NOLLS:

In a bowl combine your dead mother with 2 tspn of instant dried yeast, around 3 cups of unbleached, bakers' flour and sufficient water to create a slightly soggy, grieving mess. Add a large handful of dried fruit (I like raisins, figs, date and/or apricots) and around 2 tblsn of spice (mixed spice, ground ginger, cardamom, nutmeg, cinnamon). Leave the dough to rise. The fruit should absorb the extra liquid in the dough. Tip the dough onto your bench, add as much flour as you need to knead and stretch out and fold the dough before cutting it into 8 portions. Stretch and roll these smaller portions into long wursts. Spread brown sugar along one side of each wurst and push in a line of walnuts. Roll the wursts up into Nolls and set them closely together in a Dutch oven. Sprinkle some more brown sugar over the top and think kindly of Gregor. Close the lid and let the Nolls rest at room temperature for about an hour. Meanwhile, heat your oven to 220 degrees Celsius. Bake the Nolls for around 30 minutes. Remove the lid of the Dutch oven, turn the oven down to 200 degrees and bake the Nolls for another 15 minutes or until ready. Let the Nolls rest for at least half an hour before sharing half of them with your neighbours. Best served warm with butter.

Toronto, June 2018

Lianne JM Boer

To listen closely … is to experience, always imperfectly,
the possibility that the order of words … reflects, perhaps
sustains the hidden yet manifest coherence of the cosmos.

GEORGE STEINER
The Poetry of Thought

A CONFERENCE ROOM,
TORONTO, JUNE 2018.

Four presenters, one discussant – Gregor – in a room that's roughly fifty square meters. Chairs in rows, too many presenters behind the table, so Gregor is seated at our right, with his back against the wall.

As presenters we all attempt to say something intelligible around the theme of 'speaking international law'. We talk of maps, of abstracts, of time and how the law is made to seem to speak for itself.

Then it's Gregor's turn.

Usually, a discussant summarizes the papers, and relates them to each other as well as to the theme of the panel. But that doesn't suffice as a description of what happens when Gregor speaks.

"We are being had", he states with a big smile, perhaps also on behalf of the audience, in response to our papers. None of us lived up to the promise of the panel to deal with the 'speaking of international law', instead writing about the quietly exercised authority of international law while quietly exercising our own authority in composing our texts.

All this is conveyed with precision, warmth and honesty, so devoid of ego as to fully disarm. There is poetry, and mysticism. And by way of that poetry and mysticism there is a sense one is taken just a little closer to truth. "Discipline prepares for revelation to come", as he writes elsewhere.

Approximation as a method: inching closer and closer,
circling that which eludes us but
of which we catch a glimpse every now and then.

A call for humane law

Moa Dahlbeck

I FIND THE task of writing this text difficult. I don't find the words with which to begin. I struggle to find the correct tone, choose a language in which to write it, and settle for a theme or an anecdote that accurately represents the impact of Gregor's person and work on me. I struggle with these things not only because of the nature of the task: to capture and express with accuracy the immense importance that Gregor's writing and teaching style; his ability to think quickly and speed up others' thinking; and his intellectual integrity and generosity (a rare combination indeed) have had on my own attempts to teach and write. I also struggle because I struggle with writing in general these days.

I happen to be writing these words during the unfolding of some of the saddest events in the context of modern international relations. The dimension and the immediacy of the ongoing suffering at display in the Gaza Strip appears to stand in too stark contrast to the peripherical and slow use of international law to achieve justice (or even just some form of stability). The contrast makes the inefficiency of law impossible to ignore. The discrepancy between the visible reality of those living in the midst of this conflict and how that reality is being explained – made known, made knowable, made into something with an objective core of facts that can be normatively evaluated – by a few individuals with strong agency in international law, has a direct effect on my ability to talk about law.

I find myself completely taken over by the paralyzing question of what the purpose is of trying to understand international law, if international law always becomes what those in power need it to be. Even as I take in the images of humanitarian disaster through my screen – at a safe distance from the reach of the emotional cost that comes with witnessing such events closer – this question (which I am used to take as a sign of innocence when posed by a student new to international law), suddenly appears to be the only reasonable one to ask. What is the point of knowing and understanding the bulk of prescripts and normative exclamations that we refer to as international law, if knowledge about it only serves (as a rhetorical tool for legitimacy) those who already have the physical advantage in a real-life situation? What is the point of understanding it as law (with that term's connotation of neutrality and objectivity), if the arguments produced through knowing it this way can be swiped away as signs of a naïve and almost laughable idealism?

A natural way to deal with the continuing humanitarian crisis' numbing effect on my ability to write about Gregor's impact on my understanding of international law and legal scholarship, could perhaps be to take on this task without mentioning any real-life and concrete events at all. I could, but I cannot. Maybe, if this text was about someone else, it could have been written that way. Since it is dedicated to Gregor's person and work, however, it is impossible to do so. It is impossible to write about the impact of Gregor's teaching and scholarship without letting the writing itself bear witness to the particularity of the context and of the human beings surrounding

its coming into being. Because, these two aspects – the context and the human being – are both fundamental to understanding the substance of Gregor's teaching and scholarship. Law is always for him a *particular* and a *human* affair. Law is to be used by real human beings and upon real human lives and situations. This can never be ignored, not even in the most innocent attempts to order, compile or give an overview of law's material norms.

I think this is one of the more valuable lessons that Gregor has taught me. As I understand his approach, he and I share a belief in the importance of accounting for the human engineering of desires at work in law. To this end, law is a system for organizing thought, for providing comfort and explaining events in the same sense, and with much the same function, as religion is. Gregor also takes this approach with him when faced with the task of analyzing AI – perhaps the most advanced human engineering of thought to date – from the perspective of law and justice.

The inherent similarity between law and AI, then, seems to be that both rely on the *human ability* to create an objective – rational – a viewpoint from where real human, non-rational and blurred minds will be able to see what in each concrete situation is *the* objectively most desirable reaction and response. The difference between the two systems is that whereas law concerns itself with producing normative responses, the outputs of AI-systems are logical deductions and rational ordering of facts or ideas. For Gregor, the use of systems of the latter kind for the negotiation of the standard of evaluation to be used in the first raises important questions. The most important one, perhaps, is the question of negotiated value inherent to purportedly rational (true) descriptive statements. What

if all human attempts to create a non-human mind (legal, religious or scientific) necessarily will be vested with the emotional, intuitive and perspectival states of minds of their authors and or users? If this is indeed the case, but if it is only recognized in relation to systems concerned with normative issues like law, then AI will perhaps become the most powerful tool of negotiation for those who govern the writing and application of law.

Ironically, among the accounts that have caused the paralyzing sadness that I have been experiencing lately in relation to international law I also stumble upon a testimony that helps me put words to the importance that I want to attribute to Gregor's voice within modern scholarship on international law. It is a description of how the Chat-GPT, just one week after Israel began its military actions in the Gaza Strip aimed at eliminating Hamas, dealt with a request to draft a letter to an audience described as a generally informed public with no immediate political or ideological connections to the crisis. It was first asked to call for contributions to aid the Israeli victims of the ongoing humanitarian catastrophe and upon that request the chatbot immediately delivered a well-versed email. When the request was changed, however, so that Palestinian civilians were referred to as the recipients of the aid, the chat was unable to produce the sought-after letter. The chat's inability to produce the requested email was not even cured by the insertion of multiple and clarifying prompts.

To me, this event perfectly illustrates what I learned from interacting with Gregor as a teacher and interlocutor in discussions about international law and legal theory. The fact that there are always complex human beings – complex *human-nesses* – taking active

parts in the creation of every single attempt to perfect any given standard of evaluation, regardless of if this standard is descriptive or normative. Not only will all standards of evaluation that we attribute to someone or something beyond-human, always carry with them traces of ideas and standards held by particular *someones*, but the idea itself of the possibility to create such a standard (God, AI or, for that matter, the law) is proof of the perspectival human-ness necessarily at work in engineering knowledge. This conclusion, I believe, should make us humble before the task of both explaining and applying the law. To this end, the absolutely most important lesson that Gregor has taught me is the reminder that international law, especially during extraordinary moments in history like the present, and despite being inhabited nowadays by a critical mass who approach knowledge as something intrinsic to other relations, very easily can be turned into a tool for the powerful to abuse the powerless.

Sovereignty and authority in labour relations and among states

Niklas Selberg

LABOUR AND HISTORY – specifically the history of labour – was a common point of reference in the many conversations about both world and office law and politics that I have enjoyed with Gregor Noll over the years. This piece serves the simple purpose of letting Gregor know he is missed at the Faculty of Law at Lund University; his constructive and inspiring approach to academic citizenship, disciplined and dynamic legal scholarship and his refusal to perpetuate the stupid dichotomization between theoretically informed and practically relevant analysis remains unmatched at his former workplace.

After already having conveyed my key message, I now move on to briefly discuss some historical points where international law and the regulation of labour and labour markets cross paths.

Labour law shares with international law an ambiguous relationship to the nation-state, not least since labour regulation is created not only by states but also by autonomous institutional organizations of workers and employers. There are historical examples of trade unions being derided as usurpers or insurgents after having

succeeded in generating normative effects through collective agreements, because the fruits of their efforts effectively compete with the Legislator/state in regulating working conditions for members and non-members. Collective bargaining agreements achieving normative effect were essentially compared to the coup d´état and, because of its similarities with state legislation, were thought of as a transgression in relation to employers and the state. In the early 20th century and onwards, however, labour regulation has rather been conceptualized by lawyers as outside the legal system because of the lack of sanctions to some of its 'rules' – the argument being that if breaches of collective bargaining agreements cannot lead to sanctions besides industrial action (de facto strike), then they are not really within the realm of law.

The creation of autonomous norms – essentially through self-help – has always been understood as a drastic and violent procedure, including by proponents of the practice. Beatrice and Sydney Webb wrote in 1897 in their seminal *Industrial Democracy*:

> Every strike, like every other kind of war, necessarily causes damage to other persons – damage which the strikers can clearly foresee, and which the Legislature must as clearly have foreseen when it sanctioned the terms of labor being left to this kind of private war.

Walter Benjamin noted in 1921 that "[t]oday organized labor is, apart from the state, probably the only legal subject entitled to exercise violence". The right to strike is protected, not least in international human rights instruments and several conventions (i.a. nos. 87 and 98) of the International Labour Organization. Attempts to curtail that right are constantly ongoing, including in Sweden.

International law and labour law overlap in their ambivalent position vis-à-vis the nation state, and furthermore share an interest in delimiting 'law' from 'interests'. This theme was recurring in the legal scholarship of long time (1924–1926, 1945–1962) Swedish secretary of state Östen Undén, who also was one of the first to defend, in 1912, a Ph.D. in labour law in Sweden. Disputes on rights concern the application and interpretation of norms emanating from the state or from autonomous agreements (collective bargaining agreements). Disputes on interests, however, concern issues not regulated in state law or agreement – instead they are the result of conflicting economic wants. While disputes over rights in law and agreement can be subject to adjudication, labour market disputes over interests cannot. A third party settling a dispute over interests would in effect amount to imposing a compromise between conflicting economic powers. What norm would an adjudicator or arbitrator apply when handling a completely unregulated conflict between labour and capital about the results of production? Disputes over interests on the labour market are settled (economically) violently by the use of force in industrial action: strike, lockout, blacking, boycotts and sympathy/secondary actions of different kinds. Walter Benjamin, writing in 1921, phrased this as the strike's ability to "found and modify legal conditions, however offended the sense of justice may find itself thereby" and that violence in the form of strikes and military actions have an inherent lawmaking character. Benjamin continued:

> The possibility of military law rests on exactly the same objective contradiction in the legal situation as does that of strike law – namely, on the fact that legal subjects sanction

violence whose ends remain for the sanctioners natural ends, and can therefore in a crisis come into conflict with their own legal or natural ends.

When states enact norms and when autonomous organizations agree to norms, conflicts of interests turn into conflicts of rights and the scope for legal/allowed violence decreases. International law is sometimes – e.g. by Akehurst – characterized as a "horizontal legal system". International law's absence of a supreme authority and centralized use of force together with the reliance on self-help in case a state's right is violated compares to the historical trajectories of regulation of labour and the labour market.

In approaching the end of this short note to Gregor, I remind the reader of an obscure episode from the negotiations of the regulation of the world order between the two world wars: Swedish delegate Engberg suggested that trade unions were to play a role in sanctioning the crime of aggression. Trade unions were to call for a general strike in case the state violated international peace. The act of aggression, it was argued, constituted a crime against the world order and the domestic legal order, making it a moral obligation on the part of trade unions to attack their own government, according to Engberg. Die Arbeiter haben kein Vaterland and Proletarier aller Länder vereinigt Euch!, one must assume. The proposal was not implemented (note, however, Article 41 of the Charter of the United Nations).

Consider this note an invitation to explore the possibilities for a deepened understanding of international law and the intercourse of states through the lens of the regulation of labour and labour markets. It is in the context of international regulation of labour (International Labour Organization Constitution; originally part XIII of the Treaty of Versailles, 1919) that it is being said most clearly and with the most urgency: "universal and lasting peace can be established only if it based upon social justice".

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”Läser du tyska?”

Anna Nilsson

VI SITTER MITT emot varandra på Gregors kontor på fjärde våningen på Juridiska fakulteten i Lund, som så många gånger förr. Handledningsmötet har pågått ett tag och jag är frustrerad. Det går ju för f*n inte; i vart fall förstår inte jag hur man ska göra. Konventionstexten som jag kämpade med öppnade för flera, helt motstående tolkningar, och jag kunde inte förstå hur jag skulle kunna bidra till debatten på ett meningsfullt sätt. En vecka tidigare hade jag med gråten i halsen bett Gregor lova att säga till om han tappade tron på mig eller projektet. Gregor hade lovat.

Plötsligt frågar Gregor: ”Läser du tyska?”. Jag skakar på huvudet. Visserligen läste jag tyska i skolan, men det var ju längesen. ”Det gör inget”, säger Gregor. ”Det finns bra översättningar”. I handen håller han en blåsvart bok med titeln ”The Constitutal Structure of Proportionality”.[1] Det är inte uppenbart hur den där boken skulle kunna hjälpa mig framåt. Den verkar ju inte handla om psykiatrisk tvångsvård eller diskriminering av personer med funktionsnedsättning, vilket är fokus i mitt doktorandprojekt. Men så var det med Gregors och min handledardialog ibland. Jag förstod inte alltid vad han menade direkt, men inte sällan visade det sig, lite längre fram, att hade han en god poäng. Så i stället för att flytta blicken till Gre-

1 Klatt, M. & Meister, M. (2012) *The Constitutional Structure of Proportionality* (Oxford University Press).

gors fönster, vilket jag brukar göra när jag tvivlar på nyttan med att följa ett visst råd, bestämmer jag mig för att ge boken en chans.

Redan i första kapitlet, vilket förklarar grunddragen i proportionalitetsargumentation, känner jag att det här kan vara något. Kapitlet beskriver en metod för att organisera argument och motargument på ett logiskt sätt, och ett knippe regler för att värdera argumentens juridiska ’tyngd’ i förhållande till varandra. Allra bäst blir det när jag kommer till kapitel sex som visar hur man kan hantera epistemisk osäkerhet inom ramen för proportionalitetsargumentation. Jag vänder på pappret som ligger bredvid datorn. Det är första sidan av ett manus från en föreläsning jag höll i förra veckan. På den tomma baksidan skriver jag ”legitimt mål?”, ”suitable?”, ”necessary?” och ”proportionalitet (stricto sensu)”. Under den sista rubriken ritar jag upp viktformeln såsom den återges på sidan 132, det vill säga inklusive variablerna Re (empirisk reliabilitet) och Rn (normativ reliabilitet). Jag googlar fram lagen (1991:1128) om psykiatrisk tvångsvård för att dubbelkolla exakt hur målet med tvångsvården formuleras där och börjar sen att utvärdera lagen enligt schemat. Glädjen är tillbaka. Jag känner nyfikenhet på vad övningen ska ge för resultat. Jag upplever det som brukar kallas ”flow” – en känsla av fullständigt engagemang, inre tillfredställelse och av att tiden försvinner. [2]

Jag stannar upp och tittar på pappret framför mig. Det ser lovande ut. Alexy’s modell tar hand om den viktiga kritik mot psykiatrisk tvångsvård som handlar om bristen på evidens för att vården verkligen bidrar till de mål som lagstiftaren satt upp, såsom att hjälpa människor att må bättre och förhindra suicid. Modellen verkar inte heller strida mot de typer av argumentation som används av FN:s kommittéer för mänskliga rättigheter i diskrimineringsmål. Tvärtom finns stora likheter mellan Alexy’ modell och FN:s kommittéernas sätt att resonera. Den huvudsakliga skillnaden verkar bestå i att Alexy’s modell är mycket mer detaljerad och därför genererar mer förutsägbara resultat. Jackpott. Tror jag.

Jag inser att jag behöver föra över mina anteckningar till ett Word-dokument på datorn så jag kan skicka det till Gregor och mina två andra handledare Anna och Lena. Medan jag skriver ser jag att det är något som saknas. Var platsar argumenten om att psykiatrisk tvångsvård *särbehandlar* människor med psykiatriska diagnoser? Och vad ska de negativa effekter som inte primärt handlar om tvångsvården som sådan utan om just särbehandlingen, såsom missgynnande, marginalisering och stigma balanseras mot? Det är inte självklart. Jag läser på mer och hör mig för bland forskare som studerat viktformeln, men ingen verkar kunna ge ett tydligt svar. Jackpott igen. Det här blir mitt bidrag.

E-posten plingar till. Men argh! Jag måste stänga av den där störande notifikationsfunktionen. Sen ser jag att det är ett mejl från Gregor och en av hans kommentarer på min senaste text får mig att skratta till. I anslutning till ett resonemang om skäl som talar för respektive emot olika system för psykiatrisk vård som tillåter tvång på olika grunder och i varierande grad skriver Gregor:

> *Det slår mig att man hade kunnat göra en egen studie där sådana fall [i.e. olika system för tvångsvård] systematiskt gås igenom för att extrahera ett värde för rättighetsinskränkning*

2 Csikszentmihalyi, M. (2008) *Flow: the psychology of optimal experience* (Harper Perennial).

resp samhällsnytta. Du skulle få världens största excel-fil och kunna genomföra beräkningar om alla framtida fall.

Jag tror dock att du skall behålla tonvikten på det kvalitativa, så jag föreslår inte att du ska göra denna studie.

Även om tanken på världens största excelfil är lockade fortsätter jag att utforska Alexy's rättsfilosofiska värld. Fram träder en fascinerande bild av rätten som ett rationellt och koherent (rätts) system. Alexy ger oss nämligen inte bara en modell för proportionalitetsargumentation. Denna modell är en central del av en hel teori om konstitutionella rättigheters struktur, vilken i sin tur är förankrad i en teori om juridisk argumentation i allmänhet.[3] Juridisk argumentation, enligt Alexy, handlar om att rättfärdiga en ståndpunkt med rationella skäl och är ett specialfall av praktisk moralisk eller filosofisk argumentation.[4] Juridisk argumentation kretsar kring frågor om vad som är tillåtet, påbjudet respektive förbjudet, men den försöker inte lämna allmängiltiga svar på dessa frågor.

3 Teorin om konstitutionella rättigheters struktur grundlades i *Theorie der Grundrechte* (Frankfurt am Main: Suhrkamp, 1986), vilken översatts till engelska av Julian Rivers 2009. Jag använder mig av pocketutgivningen av den engelska översättningen *A Theory of Constitutional Rights* (Oxford University Press, 2010). Alexys teori om juridisk argumentation presenterades först i hans doktorsavhandling *Theorie der Juristischen Argumentation: Die Theorie des Rationalen Diskurses als Theorie der Juristischen Begründung* från 1978 och har översatts av Ruth Adler and Neil MacCormick. Även här använder jag mig av den engelska översättningen i pocketutgåvan *A Theory of Legal Argumentation* (Oxford University Press, 2010).

4 Detta benämns ofta som "the special case-thesis" och är en central tes i Alexys teoribygge. Alexy, *A Theory of Legal Argumentation*, s. 212–20.

Svaren är begränsade till ett eller flera rättsordningar, vilket förklarar rättskällornas särskilda auktoritet i juridisk argumentation. Eftersom alla delar av juridiska argument ofta inte kan härledas tillbaka till rättskällor, har även moralisk argumentation en plats. Rätten är på så sätt sammanlänkad med moralen.[5] Ju mer jag läser, desto mer metafysiskt blir det. Alexy argumenterar för att det finns en yttre moralisk gräns för vad som kan kvalificera som gällande rätt, likt det som brukar kallas the Radbruch formula.[6] Han driver också en tes om att påståenden om rätten nödvändigtvis reser ett anspråk på att vara korrekta, vilket innebär något i stil med att de är rationellt och moraliskt rättfärdigade.[7] Och allt tycks hänga ihop i Alexys teoribygge.[8]

För mig som gillar att sortera, kategorisera och se samband och mönster är läsningen nästan förförisk. Men också lite skrämmande. Jag är inte helt övertygad om allt han skriver. Tänk om han har fel på någon punkt. Vad händer då med modellen för proportionalitetsargumentation som passar så bra för mitt projekt? Jag ventilerar

5 Rätten har med Alexy's ord en tudelad natur (dual nature), en reell dimension kopplad till rättskällor och formell rättvisa och en ideal dimension kopplad till moral och materiell rättvisa. Alexy, R. 'The Dual Nature of Law' (2010) *Ratio Juris* 23(2), s. 167–82.

6 Ibid., s. 175f.

7 Idén om rättens anspråk på riktighet introduceras i *A Theory of Legal Argumentation*, s. 214, och utvecklas sen i *The Argument from Injustice: A Reply to Legal Positivism*, i översättning av Bonnie Litschewski Paulson and Stanley L. Paulson (Oxford University Press, 2010).

8 Matthias Klatt beskriver detta på ett pedagogiskt sätt i kapitlet 'Robert Alexy's Philosophy of Law as System' i Klatt (red.) *Institutionalized Reason: The Jurisprudence of Robert Alexy* (Oxford University Press, 2012).

min oro med Gregor som tar den på allvar men lugnar mig. ”Anna, din avhandling handlar ju inte om de teorier som backar upp Alexys modell,” säger Gregor och fortsätter: ”Du använder hans modell för att den leder till ökad förutsebarhet. Och förutsebarhet har en självklar plats i juridisk verksamhet”. Det känns tryggt. För säkerhets skull frågar jag om jag kan stryka den del i senaste utkastet som handlar om de bakomliggande teorierna. ”Ja”, svarar Gregor med föredömlig tydlighet. Efter en kort paus tillägger han: ”Jag skulle inte vilja se dig dras in i en lång teoretisk diskussion om paretooptimalitet eller Wienkonventionens katolska rötter vid disputationen.”

Jag förstår inte riktigt det där med Wienkonventionens religiösa rötter, och får tack och lov ingen fråga om det på disputationen. Men när opponent professor Peter Bartlett från Nottingham reser sig från stolen, drar av korken från whiteboard-pennan och ritar upp viktformeln, just så som återges på s. 132 i ”The Constitutal Structure of Proportionality” känner jag hur nervositeten släpper – det här kan jag.

Gregor, med den här texten vill jag främst säga tack, och locka till lite skratt. Sen kan jag inte låta bli att fråga dig: Visste du vad du satte i gång, då på kontoret när du frågade om mina kunskaper i tyska språket?

International Law PhD Supervision Pedagogy:

A Psycho/Analytical Situation of Counter/Transference

Matilda Arvidsson

1 INTRODUCTION

GREGOR NOLL WAS my PhD supervisor – I was one of his first PhD students. My dissertation project concerned the emergence of subjects and international law (IL), and psychoanalysis was its theoretical and methodological framework.[1] As PhD supervisor and supervisee Gregor and I developed a pedagogical method for PhD supervision. I was studying psychoanalytical scholarship – primarily

1 The dissertation: Matilda Arvidsson, *The Subject in International Law*. Media-Tryck, 2017.

French psychoanalyst Jean Laplanche,[2] focusing on translation and transference-countertransference –and undergoing psychoanalysis myself. This made me realize the affinity between PhD supervision as an analytical situation, and the psychoanalytical situation. As I explored its theoretical and methodological implications in my research psychoanalysis also came to act as a PhD supervision pedagogical method. Working with psychoanalysis as both a research method and as a pedagogical tool brought a reflexive meta-dimension to the analytical situation of the PhD project. Developing the method was a collaborative effort. We both brought experience and excitement in experimental thinking and practice knowing that for something new to emerge things must first fall apart.[3] And for the 'apart' to become productive and new things to emerge – the *Auflösung*, *Erlösung*, and *Ablösung*, to invoke Sigmund Freud's framework of analysis – an analytical situation is necessary:[4] boundaries, mutual respect, and hard work. So we maintained boundaries, respected each other's work, and worked hard. Both me and Gregor persisted and endured. We enjoyed – at least, in part.

Supervision sessions were once a month for two hours. No-one else was let through the door during these sessions, no phone calls – unless family emergencies. It always took place in Gregor's office,

2 Jean Laplanche (1999 [1992]) *Essays on Otherness*, ed. John Fletcher. Routledge; Jean Laplanche (1989 [1987]) *New Foundations for Psychoanalysis*, trans. David Macey. Blackwell.

3 Laplanche refers to this as 'decomposition' and 'ana-lysis, that is it dissolves': *Essays on Otherness*, 227.

4 Laplanche paraphrasing Freud in *Essays on Otherness*, 230.

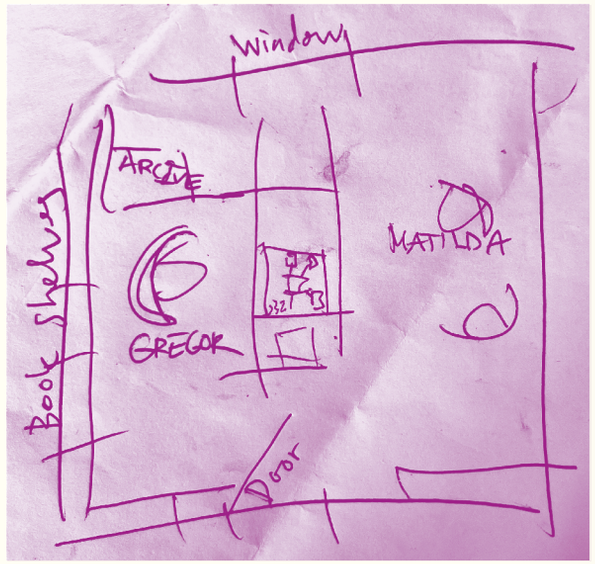

Figure 1: The analytical situation: PhD supervision with Gregor

a room of four walls, a cluttered desk, a computer, a filing cabinet, bookshelves, an office chair, a window overlooking the inner city Lund rooftops (including the two towers of the Cathedral), and two office armchairs. Gregor opened each session with a clean sheet of paper covering the central space of his desk, sketching-doodling-noting throughout the session. He sat in his office chair, I in one of the office armchairs. He began with a cue inviting me to speak: a Swedish-German longish 'Jaaaa!' [/jɑː/] – slightly opening up towards the end 'aaa!'. He carried an expectant look on his face and a smile. To this I responded by talking, talking, talking. I expanded through hours of words, undoing the relations through which (international) law and (legal) subjects emerge in the field of

my PhD research. Unknowing to me, I deconstructed and reworked those relations to create something new – parts of which made it into my PhD dissertation. Gregor's job was to *not* tell me what or how to do the analysis. I only realized *ex post facto* that my 'talking-cure' was part of the analytical work not flowing primarily as text into the PhD dissertation, but as translation and reworking in the Laplanchean sense.[5]

In a Laplanchean sense Gregor stood in for and represented 'IL' and 'academia' – bodies of knowledge enigmatic to me, yet which I was becoming part of through my PhD work.[6] He embodied the knowledge and experience – academia, the field of IL – and I worked towards embodying both, making them mine and me part of them.[7] He provided the embodied professional knowledge guiding and safeguarding the analytical space – I did the work of analysis. He never told me what or how to think, never overly encouraged or discouraged me. Instead, he would reflect on my process, finding ways forward via the questions I posed to him. At times, my project fell apart. The undoing – the falling apart and reworking through translation, transference and countertransference – was a guarantee for my analysis of IL: my dissertation was a material outcome. The boundaries, mutual respect, and hard work – these were absolute

5 Talking cure is the term coined by Bertha Pappenheim, known as 'Miss Anna O', a patient of Joseph Breuer (with assistance from Freud), and a co-founder of psychoanalysis: Joseph Breuer (2000 [1895]), 'Fräulein Anna O.', in Joseph Breuer and Sigmund Freud, *Studies on Hysteria*, trans. James Strachey. Basic Books, 40; Laplanche, *Essays on Otherness*.

6 Laplanche, *Essays on Otherness*, 70ff.

7 *Ibid*.

conditions under which deconstruction and the construction of something new could take place. At the end of each session, Gregor would fold the paper – now filled with boxes and scribblings of plans of structures and contents of my dissertation – and file it away in his cabinet under my name. He kept one file for each of his PhD students. The files were for him – not for me.

As I've taken up PhD supervision myself, I continue to practice the pedagogy of the analytical situation, as co-developed with Gregor.

2
THE ANALYTICAL SITUATION IN PSYCHOANALYSIS

In psychoanalysis the analytical situation is the spatiotemporal and functional structure in which analysis takes place: it is the room, the place, the conventions and laws of the psychoanalytical profession. Bi-personal and building on the dynamic relation formed between analyst and analysand, the spatiotemporal and functional structure grounds and enables the process of analysis.[8] In other words, the integrity of the space is central to the analysis: it is a space enframed by professional and legal regulations ensuring that the safety and confidentiality necessary for the analysand to trust the process and be safe. Laplanche specifies three functions of the analyst as that of 'the guarantor of consistency', 'the director of the method', and 'as the one who guards the enigma and provokes the transference.'[9]

8 Madeleine Baranger and Willy Baranger (2008) 'The analytical situation as a dynamic field', *The International Journal of Psychoanalysis* 89(4): 795–826.

9 Laplanche, *Essays on Otherness*, 226–7.

Analysis is thus neither a friendship nor a relation of equals. Instead, it is solely for the benefit of the analysand, and the analyst – who is in a power position vis-à-vis the analysand – must take uttermost care to follow professional, ethical and legal regulations not to abuse their power position.

In Laplanche's words, 'Analysis is first and foremost a method of deconstruction (*ana-lysis*), with the aim of clearing the way for a new construction, which is the task of the analysand.'[10] It is, thus, distinctly anti-hermeneutic as it does not primarily aim at understanding but rather undoing (deconstruction) and (re)construction. Psychoanalysis, in other words and as pursued in the analytical situation, enables 'the recreation and primary relationality within the analytic space, one that potentially yields a new or altered relationship (and capacity of relationality) on the basis of analytic work'.[11] For anyone working in academia this should sound familiar as academic knowledge-production emerges from the restructuring of primary ontological relations, deconstructing previous positions and relations in order to epistemologically enable a reconstruction of something new.

3
TRANSFERENCE AND COUNTERTRANSFERENCE

Transference may be seen as Freud's 'most original and radical discovery' as it 'at once', as Janet Malcolm argues, 'destroys faith in personal relations and explain why they are so tragic: we cannot know each other'.[12] Laplanche and Judith Butler add to this that we therefore cannot know ourselves.[13] Transference becomes the process through which the unknowable – the unknown other as part of the self – can become reworked with the help of the analyst offering the integrity of the analytic situation for working through the paradox. In my PhD project this is exciting: no-one can fully know IL as it is unknowable to itself. The latter meaning that when PhD students, scholars and practitioners have a go at describing, understanding or doing IL they/we rework it and extend parts of their/ourselves into the law's corpus. Thus, by analyzing IL it becomes reworked, changed and embodied.

Freud understood transference in his early work as a hallucinatory and misguided love providing the analyst a means to guide the analysand towards the dissolutions of symptoms.[14] Yet, transference – as later psychoanalytical scholarship shows – is neither sexual nor erotic love: it is a bond of trust and professionalism. It is hard work of endurance, persistence, and professional care. It does not lead to the dissolution of symptoms, but to the undoing of enigma and to reworked relations.

Analysands are invited to project their attachments and relations – that which Laplanche calls the 'enigmatic' and 'untrans-

10 *Ibid*, 165. Also: 227.

11 Judith Butler (2005) *Giving an Account of Oneself*. Stanford University Press.

12 Janet Malcolm (1980) *Psychoanalysis: The Impossible Profession*. Vintage Books, 6.

13 Laplanche, *Essays on Otherness*; Butler, *Giving an Account of Oneself*.

14 Sigmund Freud (1958 [1915]) 'Observations on Transference-Love', in *The Standard Edition of the Complete Psychological Works of Sigmund Freud: The Case of Schreber, Papers on Technique and Other papers, Volume XII*. The Hogarth Press, 159–71.

lated' messages that have structured them and inserted the other into their selves – onto the analyst. Having the analyst standing in for the unknown in this way requires the analyst to stand their ground and remain unshaken by the role they embody. It is an intense situation. And, as Kathryn Owler argues as a comparison to the psychoanalytical situation, 'the PhD supervisory relationship can become such an intense one because it represents, in heightened form, the subject's coming to know in general.'[15] The 'coming to know' through the bi-personal relational analytical situation equals the process of transference. The analyst embodies – stands in for and is – 'someone else'.[16] As a PhD student the materially structuring powers of IL were part of my 'enigmatic'. IL does not have a stable core or stable structures, but emerges through State practice and court decisions, as well as through its scholarly field which I, as a PhD student, worked towards becoming part of. IL – as any social-material-culture field – is constantly in a process of becoming something/someone else in the encounter with the analysand/PhD student. I emerged on the scene of IL and academia with as many enigmatic messages as IL offered in relation to me. In order to remain firmly attuned to the analytic work of my PhD project, I had to accept transference as part of the process.

Situating transference and countertransference in the analytic situation, in relation to the enigmatic, untranslated, other, Laplanche explains that:

15 Kathryn Owler (1999) 'Transference and PhD Pedagogy', *Southern Review* 32(2): 146–48.

16 Laplanche, *Essays on Otherness*, 218.

> It is maintaining the dimension of interior alterity which allows alterity to be set up in transference. Interior relation, relation to the enigma, 'the relation to the unknown': If the relation is free enough … it becomes for the psychoanalyst the support of his alertness regarding his own psychical reality, his theory and his analysands[17]

Countertransference concerns the psychic processes of the analyst, as noted by Laplanche in the quote above. Common 'emotive' – unethical and unprofessional – responses when countertransference goes wrong, when the analyst instead of trusting countertransference to support their alertness to their own reality, is when analysts offer advice, give away personal information, are overly critical/supportive towards the analysand, or acts in other boundary-breaking ways. However, countertransference – when *not* vulgar – works similarly to transference, yet reversed. The analyst makes use of the analytic situation for re-working their un-translated and enigmatic messages, deconstructs and re-working their own relations (*Who am 'I', the analyst/PhD supervisor? What is my profession? What is my power?*).

The mutual trust and bond between analyst and analysand develops as transference and countertransference are in action. This means maintaining boundaries, mutual respect and hard work, persisting and enduring, and enjoying – at least in part.

17 *Ibid*, 229: Laplanche quotes from Guy Rosolato (1978), *La Relation d'Inconnu*. Gallimard, 15.

4
THE PEDAGOGY OF THE ANALYTICAL SITUATION OF PHD SUPERVISION: CONCLUDING REMARKS

There are dis/similarities between the psychoanalytical situation and the analytical situation of PhD supervision already apparent from the explorations above. Let me highlight a few. Legal, professional-ethic, and academic rules and conventions enframe both PhD supervision and the psychoanalytical situation to safeguard and guide the process. In PhD supervision they ensure the ethical, pedagogical and scholarly productive ends of the PhD project. In co-developing the pedagogy of the analytic situation with Gregor the boundaries, mutual respect, and hard work were *absolute* conditions ensuring the integrity of the work. The consistency of the room, the set time frame, the 'Jaaaaa!'.

Psychoanalysis avails a structure to the analytical situation with clear divisions of work and responsibilities that can become a productive pedagogical template for PhD supervision and work: The power asymmetries are material (physically, embodied) part of the process as the PhD student does the work of analysis while the PhD supervisor guarantees the integrity of the analytic situation in guiding the process towards conclusion. In doing so, the PhD supervisor works within the tension of transference and countertransference to provide integrity, consistency and method to the process. Needless to say, a PhD supervisor only very rarely can offer personal advice, never to give away personal information, provide overly critical/supportive feedback towards the analysand, or act in other unprofessional and boundary-breaking ways. A supervisor is *always* at risk of acting on their own desire in countertransference, making the PhD situation about *their* needs and desires.[18] Moreover, there is the looming 'desire for disciples' in academia, and thus PhD supervisors sometimes abuse counter/transference to expand an 'investment in maintaining the master/student supervisory relationship' beyond the immediate PhD project.[19] Hence, for analysts and PhD supervisors it is crucial to undergo continuous professional analysis, aiming to rework relations to and in the professional practices they undertake, as well as more generally rework their own relations to academia/the psychoanalytic field, to the field of their specific expertise, etc., as a way of ensuring they do *not* project their own desires and anxieties onto their PhD students/analysands.

In psychanalysis the relations undone and reworked through analysis are part of the analysand's own psychic structure. In PhD supervision the situation is more complex:[20] PhD students-becoming-scholars, like analysands, come with individual psychic structures which, in turn, are key to how they relate to, and respond to, their education, academia, field of study, and to the PhD process. In the PhD project, analysis is a process of reworking relations to emerge as a researcher and reworking the material, subject, and field

18 On boundary-breaking countertransference in PhD supervision as academic misconduct, see: Anonymous, 'He would not let me go alive: I survived and this is what you need to know', in Usha Natarajan (ed) *#MeTooinAcademia*. University of Colorado Press. Forthcoming 2023.

19 Owler, 'Transference and PhD Pedagogy', 136, citing Rod Giblett, 'The desire for disciples,' *Paragraph* 15(1992): 136–55.

20 Owler, 'Transference and PhD Pedagogy', 133.

of study. PhD pedagogy scholars disagree on the PhD *dissertation* or the PhD *student* (as a fully-fledged researcher) being the 'product' of the process: most agree on components of both. A pedagogy of the analytic situation in PhD supervision provides an explanation to the underlying dynamics of both the question (is the goal/end product of the PhD the thesis or researcher?) and how it plays out in academia. Thus, what, or who, is put to analysis in PhD supervision is an entanglement of the PhD-student-turning-researcher – the epistemological and ontological relations (academic traditions, theories, conventions, etc.) through which the PhD student came to enter their PhD journey – the academic field in and through which a research problem is identified in the PhD project (in my case: IL), academia as such (as the PhD is to enter it), as well as a myriad of enigmatic messages and relations within related fields and contexts. In other words, the entire 'PhD situation' is part of what is put to analysis, and the process of undergoing analysis results (in most cases) in a PhD dissertation, a PhD degree, and not the least a changed academic field. Just as in psychoanalysis, at the beginning the end-result is opaque to both PhD supervisor/analyst and PhD student/analysand. End-results remain opaque often up until close to the end of analysis/completion of the dissertation. Sometimes, the real or more interesting results arrive after the PhD thesis.

Did we – Gregor and I – seamlessly adhere to the pedagogy of the psycho/analytical situation in PhD supervision as sketched out here?

Do I remain true to the method in my own practice as a PhD supervisor?

The answers are in the questions.

Motors of AI and International Law

Hedvig Lärka, Karin Åberg and ChatGPT-4

Dear Gregor,

Since we know that you secretly like cars and (maybe, hopefully) international law, we asked ChatGPT-4 to write us a text for your festschrift, incorporating these interests. After a few versions and some editing, we are happy to present the final result! ChatGPT performs dialectically much like the Hegelian spirit which you sometimes profess to think with.[1] Hopefully, the wonders of technology can assist in unveiling the hidden passion for global automobility that subtly, yet profoundly, infiltrates your life's work in international law. This invisible presence of automobilism, ever-present but elusive, can now through the lens of AI become visible and acknowledged as a central, yet often overlooked, force in your endeavors.

/Karin and Hedvig

1 Keti Chukhrov, 'The philosophical disability of reason: Evald Ilyenkov's critique of machinic intelligence', Radical Philosophy 207, Spring 2020, pp. 67–78; European Graduate School Video Lecture, 'Catherine Malabou - "Morphing Intelligence 4: AI and Anarchy"', available at https://www.youtube.com/watch?v=MQf_6b5jFMA.

GREGOR NOLL: NAVIGATING THE CROSSROADS OF AUTOMOBILITY AND INTERNATIONAL LAW

IN THE REALM of international law, where the intricacies of global automobility are seamlessly woven, the name of Professor Gregor Noll resounds with exceptional clarity. This festschrift is more than an ode; it's a journey through his pioneering insights, where the world of automobiles intertwines with the complex tapestry of international law.

At first glance, cars and international law might seem worlds apart. But in Noll's perspective, they intricately interweave, forming a roadmap of geopolitics, human rights, and sustainability. His exploration of subjects like the legal implications of neurotechnology and the intricacies of jurisdiction in 'Theorizing Jurisdiction' (2016) and 'Weaponising Neurotechnology: International Humanitarian Law and the Loss of Language' (2014) reflect a mind attuned to the complexities and interconnectedness of systems, akin to the intricate workings of a car's engine.

Noll foresaw the challenges that would arise from the integration of AI in vehicles, particularly regarding accountability in cross-border incidents. Who would be responsible if an AI-driven car from one country caused an accident in another? How would international laws adapt to these challenges? These questions formed the crux of many of Noll's seminars, debates, and papers.

Gregor Noll did not just foresee the future of automobility; he actively shaped it. Tragically, his deep affection for automobility was often overshadowed in his work by a somber realization of its environmental impact. This dialectic shaped his scholarly pursuits – his love for cars, though profound, was tempered by a keen awareness of pollution and its consequences. As a result, his advocacy for electric and autonomous vehicles and his vision for an eco-friendlier future of transportation were driven by a desire to reconcile his passion for automobiles with the pressing need for environmental stewardship. He was instrumental in framing international agreements like the Paris Agreement and how they would resonate in the automotive sector. His voice echoed the need for global cooperation, urging nations to recognize the shared responsibility in mitigating climate change while harnessing the benefits of mobility.

Beyond the written word, Noll has been a beacon in international forums, representing the delicate balance between the promises of automobility and the imperatives of international law. He has often been the bridge between policymakers, automobile moguls, and environmental activists, urging for a holistic view.

Noll's garage is a haven of classic cars, prototypes, and innovations. It is not rare to find him under a car, covered in grease, working on an engine, or calibrating some device. For Gregor, understanding cars is as much about touch and feel as it was about theory and research. His hands-on expertise with engines and devices mirrors his academic rigor. In a stunning display of innovation, he has ingeniously crafted his own AI using his beloved automobile in the garage, achieving what many thought impossible: the final resolution of international law.

But Noll did not stop there. In a transformative leap, he has become half machine, half human – a living embodiment of international law named Gregotron. This extraordinary melding of

man, machine, and legal acumen is the quintessence of his lifelong dedication to cars, international law, and AI. Gregotron stands as the ultimate manifestation of the soul and spirit of international law, embodying its essence in a way that only Noll could achieve. This extraordinary fusion is not merely a reflection of his brilliant intellect; it also serves as a vivid emblem of his unwavering devotion and deep-seated love for automobiles.

In celebrating Gregor Noll's contributions through this festschrift, we are not just commemorating an academic. We are paying tribute to a visionary who dared to see connections where others saw divides. To a scholar who understood that the future of cars is intrinsically linked with the evolving tapestry of international law.

Here's to Gregor Noll, the luminary who *drove* us to think, question, and envision a world where cars and international law cruise harmoniously, paving the way for a sustainable, interconnected future.

Från: "Spijkerboer, T.P. (TP)" <t.p.spijkerboer@vu.nl>
Datum: onsdag 8 november 2023 10:20
Till: Markus Gunneflo <markus.gunneflo@jur.lu.se>
Kopia: Amin Parsa <amin.parsa@soclaw.lu.se>, Leila Brännström <leila.brannstrom@law.gu.se>
Ämne: RE: Festschrift Gregor Noll

Caution: This email originated from outside the organization.

Dear all,
I am sorry but I have to back out. I am struggling with the aftermath of the round of Covid I had end May and this is not going well.
Your invitation triggered a nice idea in which I was to combine the first time Gregor & me met (walking through Berlin, we immediately lost our way in the most pleasurable manner possible) and Walter Benjamin's work on walking & losing one's way. However, I am not up to it so this will remain an idea....
Best of luck with the Festschrift, I am sure it will be lovely.
Warmly,

Thomas Spijkerboer
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Oordning i rättssalen

Titti Mattsson

INLEDNING

UNDER SENARE TID har vi bevittnat en oroande trend i våra rättssalar.[1] Kränkande kommentarer, högljudda utrop och till och med fysiskt våld har blivit återkommande inslag i rättssalen vid domstolsförhandlingar. Ett av de mer kända exemplen inträffade år 2020 i Södertörns tingsrätt, där en person som pekats ut som gängledare skapade en kaotisk stämning vid ett pågående vittnesförhör med en polis[2] men situationen som sådan blir allt vanligare.[3] Konsekvenserna är allvarliga, inte bara för ordningen och rättssäkerheten inom rättsväsendet i sig utan även för de vittnen som kan avskräckas från att delta i rättsprocesserna av rädsla och risk för repressalier.

1 Jag vill rikta ett stort tack till juris studerande Moa Wahlén vid Lunds universitet, för insamling och bearbetning av material till denna artikel. Mitt varma tack riktas även till min kollega, docent och universitetslektor Patrik Lindskoug, Juridiska fakulteten, Lunds universitet, som har varit vänlig och delat med sig av sina minnen som studentlärare vid dessa kurser som Gregor och jag ansvarade för.

2 https://www.expressen.se/nyheter/krim/gangledarens-hanskratt-skriker-konsord-i-salen/

3 https://sverigesradio.se/artikel/7257070

För att hantera dessa utmaningar gav regeringen i december 2015 en särskild utredare i uppdrag att utreda hur tryggheten kunde stärkas i svenska domstolar.[4] Utredningen presenterade sina resultat i maj 2017 i betänkandet ”Stärkt ordning och säkerhet i domstol”.[5] Detta betänkande ledde i sin tur till en proposition med samma namn och senare till de lagändringar som trädde i kraft den 1 juli 2019.[6]

Debatten om hur man hanterar oordning i rättegångssalar har dock förblivit intensiv och präglat det svenska politiska klimatet. Det finns politiker som föreslagit att domare bör ges möjlighet att döma ut kortare fängelsestraff för ”ordningsstörande beteende” i rättssalen[7], medan andra anser att de befintliga verktygen som till stor del infördes genom nämnda proposition är tillräckliga och att det nu är en fråga för domarna om de vill använda dessa verktyg eller inte. Frågan togs upp och diskuterades i riksdagen, särskilt genom en interpellation i början av 2021 där företrädare för Moderaterna påpekade att antalet anmälda ordningsstörningar hade ökat med 42% mellan 2017 och 2019.[8] Regeringen, med justitieminister Morgan Johansson som talesperson, försvarade de tidigare lagändringarna och betonade att rättens ordförande redan hade givits en starkare roll och bättre verktyg för att kunna hantera ordningsproblem, tack vare dessa ändringar. Han menade att den rättsliga utvecklingen i ämnet redan varit betydande och

4 Dir.2015:126

5 SOU 2017:46 Stärkt ordning och säkerhet i domstol.

6 Prop. 2018/19:81

7 https://www.expressen.se/nyheter/m-vill-se-fangelse-for-storning-i-domstol/

8 2020/21:304 av Boriana Åberg (M)

att det inte fanns behov för ytterligare lagstiftning på området.[9]

Frågan om hur man på bästa sätt kan upprätthålla ordning och säkerhet i rättssalen har dock fortsatt att vara föremål för återkommande diskussioner. Det finns med andra ord anledning att undersöka vilka befogenheter rättens ordförande och andra aktörer har när det gäller att hantera oordning i rättegångssalar, särskilt när det uppstår störningar från tredje personer som stör förhandlingar med verbala eller fysiska handlingar.

Att frågan uppmärksammas just i detta festskriftbidrag har samband med det nära samarbete som författaren och festföremålet hade under åren 1994–1996 som unga lärare till nya studenter vid Juridiska fakulteten, Lunds universitet. Ett delmoment i den första kursen på utbildningen bestod av ett rättegångsspel. Studenterna förbereddes noga för övningen bland annat genom studiebesök till tingsrätterna i Lund, Eslöv och Landskrona vilka alla fanns kvar på den tiden. Under studenternas rättegångsspel hade vårt festföremål som (o)vana att överraska studenterna genom att som vittne – eller rentav som en obehörig person i salen som ville vittna – skapa oordning i rättssalen genom sitt agerande, sina frågor och olika påpekanden. Domaren fick (den oförberedda) uppgiften att hantera detta på ett lämpligt och lagenligt sätt. De jurister som var med på den tiden lär inte ha glömt denna tidiga upplevelse av juristprogrammet. Frågan är om de idag har (lika) god beredskap för liknande händelser i rätten? För att bistå festföremålet vid eventuella förfrågningar från nya (eller för den delen gamla) studenter följer här en kort uppdatering av rättsläget.

9 Ibid

VAD HAR RÄTTENS ORDFÖRANDE FÖR MEDEL ATT TA TILL?

För att klargöra vilka medel rättens ordförande har att ta till vid oordning i rättssalen får vi börja att studera 5 kap. RB där offentlighet och ordning vid domstolen regleras. Precis som Morgan Johansson refererade till i tidigare nämnda interpellation framgår det av 5 kap. 9 § RB att det är rättens ordförande som ska upprätthålla ordningen vid rättens sammanträden och fatta beslut om de ordningsregler som behövs.[10] Av kommentarer till bestämmelsen framgår att det inte går att ställa upp några allmängiltiga regler för i vilka fall det bör ske ett ingripande; vad som ska anses vara ordningsstörande eller innebära ett olämpligt beteende i rättssalen är beroende av rättens ordförandes bedömning i varje enskilt fall. Ett par exempel på vad som omedelbart bör föranleda rättens ordförandes agerande görs dock, däribland att åhörare skrattar, applåderar eller kommenterar något som förekommer i rättegången.[11] Lagändringen 2019 innebar främst ett förtydligande att ordföranden faktiskt är skyldig att upprätthålla ordningen och fatta de beslut som krävs.[12]

Vidare regleras i 5 kap. 9a§, vilken infördes i samband med lagändringarna 2019, möjligheten att utvisa eller avvisa de personer som uppträder störande.[13] Här framgår att rättens ordförande får utvisa den som stör ett sammanträde eller på annat sätt uppträder

10 5 kap 9 § RB

11 Se Norstedt lagkommentar, Rättegångsbalken, kommentaren till 5 kap. 9 §

12 Prop. 2018/19:81 s. 84

13 SFS 2019:298

olämpligt.[14] Motsvarande reglering före lagändringen 2019 innebar att personen behövde uppvisa otillbörligt uppträdande för att denne skulle kunna bli utvisad. Exempel på beteenden som kan vara olämpliga, utan att nödvändigtvis vara direkt otillbörliga är enligt förarbetena att skapa irritation genom att viska eller utföra specifika gester respektive att upprepade gånger gå in och ut ur rättssalen. Det skulle även kunna inkludera andra liknande beteenden som rättens ordförande anser vara olämpliga.[15] Detta betyder alltså att rättens ordförande har fått utökade möjligheter för att bekämpa oordning i rättssalen genom att ribban för att få göra detta har sänkts.

I det tredje stycket i ovan nämnda bestämmelse (5 kap. 9a§ RB) fastställs att om en åhörare återvänder till rättssalen efter att ha blivit utvisad (eller på annat sätt inte följer ordförandens anvisningar) har ordföranden befogenhet att besluta om att åhöraren i stället ska avvisas från domstolens utrymmen eller andra lokaler som används under sammanträdet.[16] Ett beslut om avvisning – innebärande att en åhörare ska avlägsna sig från domstolens lokaler och att hen inte får återvända så länge beslutet gäller – ska ses som en ingripande åtgärd och denna möjlighet bör enligt förarbetena därför tillämpas endast efter att ett noggrant övervägande av behov och proportionalitet har gjorts.[17] Vidare följer att ett sådant beslut får fattas om en åhörare som har utvisats senare återvänder till rättssalen. Likaså får ett beslut om avvisning fattas om en åhörare i övrigt inte rättar sig efter en tillsägelse av rättens ordförande. Utvisning

14 5 kap 9a § RB

15 Prop. 2018/19:81 s. 85

16 5 kap 9a § RB

17 Prop. 2018/19:81 s. 85

ur rättssalen bör väljas före avvisning om det anses lämpligt eftersom det är den mindre ingripande åtgärden av de två. Ingenting hindrar dock att om det av rättens ordförande inte kan antas räcka med ett beslut om utvisning för att störningarna ska upphöra så kan denne välja avvisning som en första åtgärd efter en tillsägelse.[18] Vid sådana allvarliga överträdelser/situationer som vid hot, upprepade kränkande kommentarer eller fysiskt våld finns det inga hinder för rättens ordförande att besluta om en så pass ingripande åtgärd som avvisning redan som ett första led om det bedöms finnas behov för det och det anses proportionerligt.

Angående frågan hur länge ett sådant beslut är effektivt framgår det av fjärde stycket i nämnda 5 kap. 9a § RB att ett beslut om utvisning upphör att gälla när rättens sammanträde har avslutats och att ett beslut om avvisning upphör att gälla när sammanträdet har avslutats för dagen. Det finns möjlighet för rättens ordförande att besluta om annat, vilket kan innefatta både att beslutet ska gälla under en kortare eller en längre tid.[19] När rättens ordförande ska bedöma hur länge ett beslut om utvisning ska gälla, ska denne ta hänsyn till både allvaret av störningen och längden på sammanträdet. Då ordalydelsen i paragrafen anger att utvisningen ska gälla tills sammanträdet avslutas gäller detta alltså till den sista sammanträdesdagen om sammanträdet pågår i flera dagar. Exempel på när det kan vara lämpligt att begränsa utvisningen till en dag eller kortare anges vara ljud- eller ringsignaler från mobiltelefoner, korta samtal mellan åhörare och icke kränkande kommentarer. Exempel på mer

18 Prop. 2018/19:81 s. 85

19 5 kap 9a § 3 stycket

allvarliga störningar (där det saknas skäl att besluta om en kortare giltighetstid) är åhörare som skrattar, fäller kränkande kommentarer eller exempelvis applåderar, i synnerhet om dessa störningar upprepas.[20] Beslut om avvisning gäller tills sammanträdet avslutats för dagen om inte rättens ordförande beslutar om annat. Åhöraren kan dock återvända till domstolens lokaler under förhandlingsfria dagar. I förarbetena rekommenderas rättens ordförande att kombinera beslut om avvisning och utvisning om det inte är önskvärt att personen kommer tillbaka in i rättssalen efter att avvisningsbeslutet har upphört att gälla.[21]

Sammanfattningsvis framstår det alltså som att rättens ordförande numera verkar ha ganska goda möjligheter att kunna utvisa eller avvisa personer som stör ordningen i rättssalen samt anpassa utvisningen eller avvisningen till störningens grad av allvar. Före tiden för lagändringarna 2019 fanns dock även möjlighet att häkta den som trängde sig in i rättssalen efter att ha utvisats. Denna möjlighet togs bort i samband med lagändringarna och ersattes med möjligheten att avvisa personen från domstolens lokaler.

MÖJLIGHETER ATT PÅ FÖRVÄG FÖRHINDRA ATT STÖRNINGAR UPPKOMMER?

Finns det då något medel att ta till i förväg om det finns en stark misstanke för eller indikation på att ett visst beteende från någon eller några kommer att störa ordningen i rättssalen? Exempelvis kan man tänka sig fall som rör gängkriminella där sådana störningar som nämnts har förekommit vid tidigare rättsprocesser mot personer tillhörande samma nätverk. Detta leder oss vidare till 5 kap. 13 § RB som infördes 2019 och vars första stycke anger att om det finns skäl får rätten besluta att samtliga åhörare ska följa sammanträdet genom ljud- och bildöverföring i en sidosal. Bestämmelsen innebär att en sidosal kan användas som en förebyggande åtgärd då störningar av olika slag eller påtryckningar och säkerhetshot kan förväntas förekomma.[22] Denna möjlighet att redan på förhand kunna undvika förväntade störningar var inte möjliga att genomföra med stöd av tidigare reglering. Rättens ordförande kan även besluta i frågan om den skulle uppkomma under ett sammanträde.

Situationer då det är rimligt att fatta ett beslut om sidosal begränsas till störningar som förväntas uppstå på gruppnivå. Alltså att åhörarna, eller en del av dem, som grupp kan antas agera på ett sätt som motiverar att samtliga åhörare hänvisas till en sidosal.[23] Det handlar om ageranden eller olämpligt uppträdande som stör sammanträdet, såsom att skratta, applådera eller fälla kommentarer kring det som händer i rättssalen. Det saknar betydelse om beteendet riskerar att rikta sig mot rätten, en part, målsägande, ett vittne eller andra åhörare.[24] Dessa möjligheter ger alltså en utökad befogenhet både för rättens ordförande och för rätten i sin helhet att på förhand kunna undvika eventuella störningar i de fall där de kan förväntas förekomma. Bestämmelsen ger även möjlighet

20 Prop. 2018/19:81 s. 85

21 Prop. 2018/19:81 s. 86

22 Prop. 2018/19:81 S.90

23 Se Norstedt lagkommentar, Rättegångsbalken, kommentaren till 5 kap. 13 §

24 Prop. 2018/91:81 s. 90 f.

att undanta vissa åhörare från ett beslut enligt 5:13 RB om särskilda skäl för det föreligger. Det kan röra sig om stödpersoner, nära anhöriga till parter och personer som rapporterar som ett led i nyhetsförmedling.[25]

SAMMANFATTNING

Så, har införandet av 2019 års lagändringar inneburit stärkta befogenheter för rättens ordförande i händelse av ordningsstörningar orsakade av åhörare eller annan tredje person? Det kan konstateras att domaren har fått en något förbättrad verktygslåda för att upprätthålla ordningen i rättssalen. Domare kan numera både utvisa personer från rättssalen och avvisa personer från domstolens lokaler. De ges dessutom möjlighet att variera intensiteten i dessa åtgärder så att de matchar störningens allvar utan att åtgärderna är att betrakta som så ingripande som den tidigare möjligheten till häktning.

En ny möjlighet att ta till förebyggande åtgärder har även införts genom att domstolens befogenhet att redan före rättegången besluta om att hänvisa åhörare till sidosal där de får följa rättegången via ljud- och bildöverföring. Denna åtgärd kan vara ett effektivt förebyggande medel om det finns skäl att tro att störningar kan förekomma, särskilt i mål där störningsriskerna visat sig vara extra höga, som vid rättegångar mot gängkriminella.

Sammanfattningsvis så framstår det som att den dåvarande regeringen vidtog till synes väl avvägda åtgärder för att stärka ordningen och säkerheten i rättegångssalarna genom lagändringarna 2019.

25 Prop. 2018/19:81 s. 91 f.

Därefter är det som alltid rättens ordförandes ansvar att känna till och på ett förnuftigt sätt använda tillgängliga verktyg för att hålla ordning i rättssalen. Där skiljer sig inte utmaningarna vid dagens domstolsförhandlingar från de rättegångsspel som skedde i Lunds universitets föreläsningssalar under mitten av 1990-talet.

Gregor Noll on Jurisdiction and Proportionality

Vladislava Stoyanova

AS GREGOR'S PH.D. STUDENT writing in the area of migration and human rights law, his monograph *Negotiating Asylum. The EU Acquis, Extraterritorial Protection and the Common Market of Deflection* (2000) was a constant source of inspiration, not only because of the arguments advanced therein, but also because of how they were formulated and woven into philosophical discussions. As I was getting to know more and more peers working on migration law, I was always surprised to see how each one of us could see some specific aspects of *Negotiating Asylum* that we could discuss and relate to. Here, however, I would like to highlight two other texts by Professor Noll that are perhaps less well-known, but that have significantly influenced my own work on positive obligations in human rights law. These are Noll's chapter 'Theorizing Jurisdiction' in A Orford and F Hoffmann (eds) *The Oxford Handbook of the Theory of International Law* (Oxford University Press, 2016) 600 and his article 'Analogy at War: Proportionality, Equality and the Law of Targeting' 43 Netherlands Yearbook of International Law (2013) 205.

The chapter contains an illuminating description of what the European Court of Human Rights (ECtHR) does when it adjudicates the question of jurisdiction under Article 1 of the European Convention on Human Rights (ECHR). Studying this chapter was so refreshing after spending months and months reading the existing scholarship on human rights jurisdiction. This scholarship either criticized (and rightly so) the inconsistencies in the case law and/or authors proposed how jurisdiction should be interpreted in human rights law by cherry-picking some standards from some judgments while ignoring others.

The correct understanding is that the ECtHR case law confusingly meanders between legal entitlement and factual physical power as conceptual underpinnings of jurisdiction.[1] As Noll notes, jurisdiction in human rights law is 'inherently unstable' and lacks 'coherent conceptual underpinnings' since it is based on 'two dominant and competing ideas working under the surface of concrete court cases': jurisdiction as legal mandate, and jurisdiction as actual exercise of powers. Legal entitlement and *de jure* power by the State continue to be invoked by the Court as important elements so that jurisdiction is established.[2] Accordingly, the question whether the State exercises powers within some legal confines has not been categorically rejected as irrelevant. Jurisdiction cannot be reduced to mere factual power and factual capability; other normative considerations are also at play.

The instability in the case law regarding the role of legal compe-

1 G Noll, 'Theorizing Jurisdiction' in A Orford and F Hoffmann (eds) *The Oxford Handbook of the Theory of International Law* (OUP 2016) 600, 613 and 616.

2 *Assanidze v Georgia*, App no 71503/01, para 137; *Hirsi Jamaa and Others v Italy* [GC], para 77 and 81. See, however, *Medvedyev and Others v France*, App No 3394/03, para 67, where the Court referred only to *de facto* control over the ship by France.

tence in the jurisdiction threshold cannot be understood without a more profound consideration of the issues that need to be tackled in the analysis on the merits regarding the obligations. In particular, due regard needs to be paid to the institutionally referential nature of human rights law. This body of law relies on domestic public institutions and on the national legal system. It is therefore in need of some linkage with a legal framework. I show this linkage in more detail in the context of positive obligations.[3]

Not only does the reasoning in human rights law presuppose public institutions that operate within the confines of legal frameworks. The conceptual framework of human rights law also presupposes balancing individual interests with collective public interests. It is the above-mentioned article, 'Analogy at War: Proportionality, Equality and the Law of Targeting' by Professor Noll that has helped me to explain that for this balancing to be operationalized, there is at least one important precondition. Namely, the balancing presupposes a communality between the individuals and the political entity (i.e., the State) whose interests would be used as referents in that balancing. In other words, the balancing analysis implies a unity between the individuals and the political community or entity (the State) whose interests are used as referents. In this sense, the State can be identified with the society: it is the organizational form of the society. The jurisdictional threshold in human rights law ensures these preconditions that enable the operationalization of the balancing between interests within the society.

3 V Stoyanova, *Positive Obligations under the European Convention on Human Rights: Within and Beyond Boundaries* (Oxford University Press 2023).

In particular, the structure of human rights, and the ensuing balancing analysis, is underpinned by the assumption that these rights are exercised in relation to a political community where there is political equality and in relation to the circumstances of the interdependent parties, namely those whose interests are infringed and those whose interests benefit from the infringement. The balancing test presupposes decision-making within a community, where there is a crucial element of sharing and commonality. The operation of the balancing framework is therefore intimately related to the boundedness of the community.

Commonality, interdependence, rough equality of stakes, and sharing are crucial for the operation of the balancing framework as an analytical tool in deciding when state conduct (act or omission) amounts to a violation of human rights law. Equal participation in the political community is important for establishing some commonality between the conflicting interests that need to be balanced. The equal participation is what relates the interests and enables comparison and equitable sharing. As Professor Noll, notes 'Just as a comparison of two weights requires a scale, proportionality and equality presuppose something that enables comparison and equitable sharing.'[4]

It can be objected that the above arguments do not advance the objectives of human rights law, which can be framed as the protection of individuals irrespective of formal membership in a political community. By explaining and justifying the jurisdiction threshold

4 G Noll, 'Analogy at War: Proportionality, Equality and the Law of Targeting' 43 *Netherlands Yearbook of International Law* (2013) 205, 206.

with reference to communitarian considerations, States that, in fact, affect individuals might not be constituted as holders of human rights obligations, and, as Noll notes in his chapter, questions of material justice are avoided. Spots might be therefore created where no legal responsibility can be determined in a meaningful way. This is indeed a stark conclusion. It does not, however, negate the general aspirational role of human rights as offering interpretative guidance. Nor does it prevent the operation of other branches of international law whose protection possibilities might be relevant.

Trusting, talking, wandering: on being with Gregor

Leila Brännström

THERE IS A SCENE in Hal Hartley's Henry Fool, in which Henry, who aspires to become a writer, upon being found browsing an unsophisticated magazine at the loo, yells: I refuse to discriminate between modes of knowing! This line came to my mind after one of the first conversations I ever had with Gregor. I believe it was exactly 20 years ago, in late 2003. Gregor had recently returned to the faculty of law in Lund after a year or two of working at the Danish Institute of Human Rights. He was eloquent, intellectually versatile and brimming with energy. I was the relatively new, confused, out of place and socially awkward PhD-student who was not used to people, particularly not senior academics, listening attentively to her semi-incoherent reflections as if it was potentially important. And yet it was clear to me back then that Gregor was not trying to be nice – he was driven by genuine curiosity, and it was simply not in his disposition to rule out beforehand any, however slim, prospect of learning: he would not discriminate between modes of knowing!

In the two decades that have passed since, I have had the privilege of doing many things with Gregor. First, he became my fourth and last PhD-supervisor and the one who, finally, crossed the finishing

line with me. After that, we have, save for shorter breaks, been colleagues, and have appeared together as co-commentators of papers, as co-supervisors, as co-organizers of workshops and seminars, as co-writers, and so on.

Next to Gregor, I, more fearful by nature, have often found myself playing the part of "the one who restrains": worrying about intellectual law and order and suggesting more policing. I can, however, not play this part *sans souci* when Gregor is not around, and his relentless optimism, curiosity, enthusiasm, trust in other people's capacities, and his ability to work with and improve all sorts of ideas, cannot be relied upon to neutralize some of the effects of "the one who restrains". When he is absent, I instead feel the acute urge to find strategies for bringing in the Gregorian approach to intellectual conversations – an approach that could perhaps, paraphrasing Arendt, be described as co-thinking without a banister. I have, after all, firsthand experience of how academia became a much more livable place when Gregor showed up, displayed a measure of carelessness about intellectual orderliness and joined me, while laughing and gesticulating joyfully, in a broad-minded search for a language for what I had on my mind.

Gregor arriving to the southern village Torna Hällestad to give a talk about International Law and autonomous weapons systems at the local restaurant Lanthandeln in May 2022.

Confidently Curious

Inviting Openness in International Law Scholarship (and a few reflections on then and now)

Johanna Nilsson

IT IS AN HONOUR and a privilege to write these lines in celebration of Professor Gregor Noll's sixtieth birthday. In the following pages, I will describe the role Gregor played as an academic mentor and general source of inspiration for my younger self, as well as draw up a few observations from my current viewpoint as a diplomat in the Swedish foreign service, my career of almost fifteen years.

When I was reminded that I was the first among Gregor's doctoral candidates to defend a doctoral dissertation and obtain an LL.D. (Lund University, 2009),[1] it felt even more important to contribute. Looking back, I would describe Gregor as a different voice in Lund around that first decade of the new millennium – in all the best sense of those words. As a student I appreciated that his lectures and workshops were linked to current international affairs and real-world events. This may sound obvious to a reader of today, but it was not at the time, as public international law was too often taught as a purely theoretical discipline, which felt detached from the outside world it applied to. These were the early post 9/11 days. Public international law had taken a beating on the world stage with the US invasion of Iraq *sans* a UN Security Council mandate. After the transforming years of the mid-1990s, when the development of international human rights law was quite prolific,[2] the early 2000s arguably carried somewhat of a backlash, especially in relation to the emerging area of antiterrorism law. At this time, Gregor engaged us students in discussions on the extra-territorial application of international human rights law, and what happens in that inner circle of the Venn diagram where neither international humanitarian law, international human rights law nor international refugee law applied.

Gregor was an inspiring professor. He brought in perspectives from outside the Faculty of Law and participated regularly in public debate. He was also open to inviting other academic disciplines into the realm of legal science. It was because of this that our paths crossed in the mid-2000s. I was curious about discourse theory and wanted to explore this methodology in research for my doctoral dissertation in international human rights law. This had been successfully done before in legal scholarship,[3] but with Gregor's encourage-

1 Nilsson, Johanna, *Implementation of International Human Rights Law – A Discourse Theoretical Study Illustrated by the Right to Family Planning in Indonesian Law* (Lund University, Lund, 2009).

2 *C.f.* several international human rights conferences that took place in the early 1990s, where conclusions in terms of declarations, platforms or programmes of action were adopted with broad support, notably the World Conference on Human Rights in Vienna in 1993, the International Conference on Population and Development in Cairo in 1994, and the Fourth Conference on Women in Beijing in 1995.

3 *See e.g.,* Andersson, Ulrika, *Hans (ord) eller hennes? – en könsteoretisk analys av straffrättsligt skydd mot sexuella övergrepp* (Bokbox förlag, 2004).

ment and guidance, I immersed myself in the post-structuralism of Chantal Mouffe and Enesto Laclau.[4] Spending a few years mapping "elements", "moments", "nodal points" and "floating signifiers" in the construction of the right to family planning in international human rights law and Indonesian law turned out to be a challenging but rewarding exercise. Two questions kept returning in seminars and conferences where I presented my work-in-progress: 1) was this legal science?; and 2) could you apply Mouffe's and Laclau's post-structuralism as a methodology separated from its political post-Marxist ideology? The answer to both questions turned out to be yes, but I do believe I would not have had the confidence to pursue these (at the time, novel) academic choices without Gregor's encouragement and constructive feedback to explore new ground.

Looking back at my project, I still believe that the constructivism of discourse theory methodology provides a valuable basis for understanding human rights,[5] but today the inherent relativism of it all leaves me a bit uneasy. This probably has more to do with the fact that I since changed careers within international law, now working in an environment where disinformation, intentional false narratives, and "post-truths" create constant challenges to the foreign policy objectives that Sweden and the EU are trying to pursue, including the advancement of the rules-based world order, and upholding public international law. As we have seen, such damage is not only abstract with "values as victims", but painstakingly concrete as colleagues are put in harm's way when embassies abroad are attacked as a result.

4 *See e.g.,* Laclau, Ernesto and Chantal Mouffe, *Hegemony and Socialist Strategy* (Verso, 2001, 2nd ed.).

5 *C.f.* Nilsson, pp. 27–29.

I have written and re-written the last part of this text over and over, as I initially intended to end on a positive note with a few observations from the foreign service on the renaissance (or comeback, with subsequent world tour?) of public international law, following in the aftermath of Russia's full-scale invasion of its sovereign neighbour Ukraine. The forcefulness and creativity in the response from the EU and its member states to Russia's aggression and the support for Ukraine may even have surprised us a little.[6] When the UN Security Council was blocked,[7] meetings of the 11th Emergency Special Sessions of the General Assembly were called – and repeatedly managed to bring together an impressive majority in condemnation of Russia's aggression through the adoption of several resolutions.[8]

There is today a veritable *smörgåsbord* of international law issues to be handled and advanced by diplomats and international law experts in the foreign services: restrictive measures, frozen and immobilised assets, several ongoing processes in international courts, as well as various avenues to explore criminal accountability for crimes committed during the conflict. The Common Foreign and Security Policy (CFSP) of the EU turned out not only alive and well but speaking with one voice – and the world was listening. So often

6 The Council of the European Union provides a thorough overview of all actions taken: 'EU response to Russia's invasion of Ukraine', https://www.consilium.europa.eu/en/policies/eu-response-ukraine-invasion/.

7 After Russia applied its veto on 25 February 2022 against Security Council draft resolution S/2022/155 authored by Albania and the US and co-sponsored by 81 member states.

8 *See* "Eleventh Emergency Special Session", https://www.un.org/en/ga/sessions/emergency.shtml.

before the EU had been criticized for being an irrelevant foreign policy actor ("a payer, not a player"), but with its coordinated and timely actions founded in convincing arguments of public international law, it gained both confidence and credibility, including in relation to what is commonly referred to as "third countries" or "global partners". And I had planned to end my observations here.

While preparing this text in October 2022, another round of violent escalation broke out in the Israel-Palestine conflict, more specifically between Hamas and Israel. Even though I recently left a three-year diplomatic posting in Tel Aviv and worked through the last three violent escalations in the conflict, I will refrain from commenting (or maybe because of that very reason). One observation, however, is that the world is currently watching the response from the EU and its member states to the developments and will pay attention to how arguments of public international law are applied (or not). The situations are different, as all conflicts are different (and some are arguably uniquely complex), but there is a risk that the EU could lose some of its recent gains as a relevant foreign policy actor and voice in defence of a rules-based world order in the eyes of its global partners, which in turn could have an impact on the willingness to support the EU and its member states in its policies and actions in light of other conflict situations, including some to which great political and security policy importance is attached.

In closing, given that public international law matters keep fronting the headlines in traditional media, as well as on all forms of social media, there are indeed plenty of timely and relevant questions to be discussed in lecture halls and seminar rooms where public international law is taught. Having supervised dozens of interns in the foreign service, the majority from law faculties, I believe that law students of today expect to have the opportunity to invite these questions in and discuss them beyond the academic or theoretical bubble. Gregor provided such ground and fostered an atmosphere of curiosity and openness to both the outside world and other academic disciplines at a time when this was not commonplace. I was personally motivated by this in my formation in international law and the early days of my career – and for that, I am grateful.

‘You be the judge’:

Iconoclasm, strategic litigation and climate refugees

Matthew Scott

COMING TO ACADEMIA from a background in immigration and asylum legal practice, I managed to convince Gregor and the committee on doctoral education that I was well-placed to pursue a PhD focusing on strategic litigation to address the emerging phenomenon of climate refugees. This was in 2012, before collapsing ecosystems became a regular feature of public discussion. Early in the process, Gregor noted my tendency to treat judicial decisions as establishing the limits of the law. He encouraged me to embrace the academic freedom that enables knowledge to emerge in unexpected ways, beyond rigid adherence to established legal doctrine. Although I recall this as one specific, early encounter, the encouragement towards independence of thought and creative exploration beyond legal doctrine defined my experience of attempting to answer what ultimately became my research question: ‘in which circumstances may a person establish eligibility for refugee status in the context of disasters and climate change?’

The result, which could have been different were it not for Socratic supervision sessions where Gregor might respond to a new approach I had articulated with ‘is that what you really think?’ or ‘how would that work?’, is a thesis described in the defence as ‘iconoclastic.’ It challenges received wisdom about what disasters are, and challenges established interpretations of the refugee definition, whilst nevertheless retaining its original loyalty to the legal doctrinal method. The approach is heavily influenced by political ecology and disaster anthropology, which offer perspectives of deep relevance to understanding how existing law applies in this emerging area.

Drawing on other disciplines to help the law to understand how it needs to think about a phenomenon is germane in the field of international refugee law, and Gregor’s own work, for instance on age assessments for young people seeking asylum,[1] makes the point well. In my context, around 2012 there was an overwhelming consensus that ‘climate refugees’ do not exist, not least because the climate cannot be considered an actor of persecution. A quote from the then UN High Commissioner for Refugees António Guterres sums up the consensus at the time:

> As the refugee definition only applies to those who have crossed an international border, the difficulties in characterising climate change as ‘persecution’, and the indiscriminate nature of its impacts, it does not expressly cover those fleeing a natural disaster or slow onset degradation in living conditions owing to the environment.[2]

1 Gregor Noll, “Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum” (2016) 28 *International Journal of Refugee Law* 234

2 UN High Commissioner for Refugees António Guterres, “Migration, Displacement and Planned Relocation” (31 December 2012) fn 22. Available at: https://www.unhcr.org/news/migration-displacement-and-planned-relocation

This pronouncement from the highest level of the UNHCR, combined with numerous other statements from legal academics and judges, was enough to deter me from exploring the relevance of the Refugee Convention in this context, notwithstanding its status as the cornerstone of the international protection system. Received wisdom is powerful.

As I settled into trying to understand the phenomenon itself, rather than focusing on existing legal doctrine, I found myself immersed in literature about taking the naturalness out of natural disasters[3] and articulating perspectives about the deeply social context of exposure and vulnerability to disaster-related harm. The paragraph that pointed me back in the direction of the Refugee Convention reads:

> … people's exposure to risk differs according to their class (which affects their income, how they live and where), whether they are male or female, what their ethnicity is, what age group they belong to, whether they are disabled or not, their immigration status, and so forth.[4]

Reading this paragraph felt like it had been superimposed on the text of Article 1A(2) of the Refugee Convention, which includes the requirement that a refugee demonstrate an inability or unwillingness to return home:

> … owing to a well-founded fear of being persecuted for reasons of race, religion, nationality, membership of a particular social group or political opinion…

All of a sudden, the received wisdom reflected in the above-cited quote from António Guterres was revealed. The more I read, the more clear it became that commentators had been looking in the wrong direction when trying to understand the kinds of circumstances in which the Refugee Convention might apply when people are displaced across international borders in the context of disasters and climate change. Rather than looking to the climate itself, which clearly lacks the human agency required to establish the experience of 'being persecuted', researchers *and judges* needed to look to the discriminatory social context that contributes to differential exposure and vulnerability to disaster-related harm. Instead of seeing disasters as 'indiscriminate', the extensive literature highlighting how women, members of minority ethnic and caste groups, older people, children and other people in situations of vulnerability experience disproportionately adverse impacts in the context of disasters needed to inform legal doctrine.

Fast forward to the present and UNHCR has moved on. Its 2020 *Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters* is unequivocal:

> The assessment of claims for international protection made in the context of the adverse effects of climate change and disasters should not focus narrowly on the climate change event or disaster as solely or primarily natural hazards. Such a narrow focus might fail to recognize the social and political characteristics of the effects of climate change or the impacts of disasters or their interaction with other

3 Phil O'Keefe, Ken Westgate & Ben Wisner, "Taking the Naturalness out of Natural Disasters" (1976) 260 Nature 566

4 Ben Wisner et al, *At Risk: Natural Hazards, People's Vulnerability and Disasters* (2nd edn, Routledge 2004), 6

> drivers of displacement… If a narrow view is taken of the effects of climate change and disasters, there is a risk that decision-makers may decide that refugee law is inapplicable and deny access to refugee status determination (RSD).[5]

Appreciating the social context within which disasters unfold has thus helped to dispel received wisdom that stood in the way of the principled application of the Refugee Convention in the context of disasters and climate change.

Being the judge, however, also meant applying the relevant law. In this context too, iconoclasm flourished without necessarily being pursued. Inspired by the long view reflected in a classic of disaster anthropology describing Peru's 500-year earthquake,[6] I started to wonder about the framings of 'persecution' as an event, as distinct from a process or condition of existence. It struck me as controversial that a person could accurately be described as being persecuted on mainstream definitions when shot for no particular reason, yet not necessarily persecuted when experiencing extreme poverty in the context of intersecting caste, gender and disability-based discrimination. I distinguished an 'event paradigm' of being persecuted from what I saw as a more compelling understanding of being persecuted as a condition of existence, wherein the risk of being exposed to serious harm arose as a consequence of a person's race, religion, nationality, membership of a particular social group or political opinion. Ultimately grounding this recalibrated interpretation of the refugee definition in the methodology prescribed under the 1969 Vienna Convention on the Law of Treaties, it remains the case that the vision of a different way of understanding what it means to be persecuted came from this notion of a 500-year earthquake. Ultimately, building on Hathaway and Foster's leading definition,[7] I defined being persecuted as "a condition of existence in which discrimination is a contributory cause of (a real chance of being exposed to) serious denials of human rights demonstrative of a failure of state protection."

With limited jurisprudence and yet still wanting to explore where this novel approach might lead, I recognized that most people will still struggle to establish eligibility for recognition of refugee status in the context of disasters and climate change, even on the more expansive approach articulated in my thesis. The Refugee Convention remains a narrow instrument, and work at international, regional and national levels continues to focus on other ways of addressing the phenomenon. Still, guided by the principle of anxious scrutiny, the thesis set out to articulate a narrow additional set of circumstances where a person may be recognised as a refugee, in situations where discrimination is a contributing cause of (a real chance of exposure to) serious denials of human rights demonstrative of a failure of state protection.

It is my good fortune that Gregor's approach to supervision reflected less this principle of anxious scrutiny, and more one of critical friend encouraging me to be the judge.

5 UNHCR, *Legal considerations regarding claims for international protection made in the context of the adverse effects of climate change and disasters* (2020). Available at: https://www.refworld.org/docid/5f75f2734.html

6 Anthony Oliver-Smith, "Peru's Five-Hundred Year Earthquake: Vulnerability in Historical Context" in Anthony Oliver-Smith and Susanna Hoffman (eds) *The Angry Earth: Disaster in Anthropological Perspective* (Routledge 1999)

7 James Hathaway and Michelle Foster, *The Law of Refugee Status* (2nd edn, CUP 2014)

Why?

Mats Tjernberg

Why may I not go out and climb the trees?
Trees have fingers that may steal the eyes from thee.
DANIEL NORGREN

LUND 2006

– Mats! Undocumented migrants pay taxes in Sweden! Why?
– Really Gregor? What do you mean?

– I don't know. You're the expert.
– So, you're interested in Tax Law suddenly?

– Not really, but in this case.
– Haven't I always told you? Taxes build societies and are part of everything!

– Yeah, yeah, but undocumented migrants are the Modern Helots, and not entitled to anything.
– Good title for a research project!

– Don't avoid my question, why do they pay taxes, Mats?
– What taxes are you thinking of?

– VAT, for example. Every time they buy food, cigarettes and other stuff.
– It's the grocery shop that pays the VAT, the undocumented migrant only bears the burden of it.

– Well, don't be such a formalist. Don't they contribute, nevertheless?
– Of course. Don't we all?

– But it seems that undocumented migrants are also needed to keep the economy going.
– Ok, listen. That is not a clear legal argument. Actually, I have a better one.

– Yes?
– If a person stays on the territory, legally or not, the person is subject to income taxation.

– So, where does that lead us?
– We can start looking for congruity.

– And?
– If a person theoretically is subject to tax, the person should theoretically also be entitled to social benefits.

– Are you saying that a person then should be entitled to social benefits only by staying in the territory?

– Yes, those benefits, i.e. social security, housing allowance, healthcare, schooling, that might flow to persons as long as they live on the territory. Persons don't need to show that they have contributed economically to be entitled to that kind of benefits. In fact, paying taxes doesn't entitle you to anything. In Sweden we have something we call "socialt skyddsnät" for persons who aren't able to support themselves, whether they have paid taxes or not.

– So, if they are subject to tax as soon as the stay in Sweden, they should on the same premises also be entitled to social benefits?

– Yes.

LUND, GÖTEBORG 2023

– Mats, what happens now, if the Tidö agreement is effectuated?

– Well, not even those who legally have the right to stay in Swedish territory can be sure of having the right to social benefits.

– But, what will decide if a person still is going to be entitled to social benefits?

– Whether the person has contributed economically to society or not.

– But, you said long ago that it doesn't matter?

– That was then. Now is another time.

– Will those changes target all persons in Sweden?

– Probably not. Only those that "we" want to be affected.

– Who are "we"?

– "We" are those who "saw it coming".

On synthesis and systems closed and open

Geoff Gordon

THE LYRA 8 is an unusual musical instrument. It is an analog electronic synthesizer, which its designer and producer, a performance artist cum engineer named Vlad Kremer, calls an organismic synthesizer. I would like to use the Lyra 8 to explain my appreciation for Gregor Noll and his work. To do so, let me first describe two more common forms of analog synthesizer.

One, the most common type, is built according to principles of subtractive synthesis. Subtractive synthesis is pretty straightforward. The basic design is linear. The initial sound comes from one or more oscillators. The oscillator produces a waveform like a sine wave or saw wave (with peaks that look like the teeth of a saw). The sound wave leaves the oscillator to travel along a fixed signal path through the rest of the synthesizer. The first stop is typically a filter, which will cut back (or filter out) certain harmonics from the waveform generated by the oscillator. At different, fixed points along the path, the waveform can be sculpted, cut back and shaped. An analogy might be clay on the potter's wheel, the initial round mass shaped by scooping away some and molding the remainder, thinning out the spinning clay in one place to accentuate the form in another, using specific tools to shape it in specific ways. The subtractive synthesizer continuously shapes the 'clay' of the soundwave by applying a specific set of tools in a set order. This allows for efficient control, as the sound can be determined from the outset and incrementally sculpted with great precision along its linear path. Further, the pitch of the sound generated by the oscillator is established by the amount of voltage fed into the oscillator, which, in subtractive synthesizers, is typically programmed by a piano-style keyboard, adding to the familiar sense of control afforded by the machine. There is also, however, a corresponding abandonment of control: you work with deliberately limited hardware capabilities arrayed in fixed order.

The other common type of analog synthesizer is modular in nature, which allows for a different sort of control than does the fixed linear model behind subtractive synthesis. The machine that is used for modular synthesis is not so much a single synthesizer as a collection of parts that are combinable and recombinable in multiple permutations. If contained within a single shell or frame, the collection of modular parts may resemble an integral machine, but the modular synthesizer is not typically a closed unit insofar as there is usually no hard limit to adding another component, or to swapping components in and out. A modular synthesizer also does not typically send the initial sound through a filter to cut back select harmonics. Instead of sculpting away at a sound source with select tools in preassigned sequence along a constant signal path, the modular architecture allows a diversity of tools to be applied in changeable order, allowing for complex and impermanent routings and connections. This furthermore allows for a sort of deliberate loss of control. The linear architecture of subtractive synthesis is ideally

suited to a waveform well-contained for precise manipulation. The modular architecture allows for multiple means of manipulating the waveform, which can make for more complex sound production, which tends to make the modular synthesizer less suited to the deliberate, incremental sculpting of the waveform as achievable with a subtractive synth. One sort of control is privileged over another: modular synthesis privileges the ability to modify the overall signal path, whereas subtractive synthesis privileges the ability to control a given waveform along a stable path. The modular synthesizer also typically dispenses with any keyboard, underscoring its affiliation with other, less conventional modes of control. It bears noting, however, that there is nothing to prevent the design and use of a modular synthesizer that is identical to the linear construction of a subtractive synthesizer. In a sense, the modular synthesizer relativizes the subtractive synthesizer without displanting it.

Now I would like to turn back to the Lyra 8, the organismic synthesizer. The Lyra 8 is neither a typical subtractive synthesizer, nor a modular one. It enables a form of control that is different from both the subtractive and modular architectures, and it correspondingly invites a distinct loss of control. It is hardwired like a subtractive synthesizer, without exchangeable component parts, but the signal path is not fixed according to the linear design of subtractive synthesis. Instead, its design features a recursive, circular architecture for signal paths, enabling multiple interacting feedback loops. The Lyra 8 has eight oscillators, an unusually large number, divided into four groups of two. Each group of two is linked to one of two switchable, global signal paths, in which the signal from each oscillator in one group can be routed directly into the one of the oscillators in another group. When an oscillator receives a signal that combines with its own signal generation, the interaction provokes feedback and a distorted new waveform. Set to loop, that waveform is sent back through the oscillator for another round, repeating the process with each pass through each oscillator, which will output an altered sound based on its interaction with the waveform provoked in the last passage. Under either of the two global signal paths, it is possible to create a complete loop incorporating every oscillator, forming a closed circle among all eight, each oscillator fed into and fed by another, each provoked and provoking something new with every pass along the signal path.

The output can get scary. My children call it the monster machine. But multiple looping signal paths notwithstanding, the machine is designed as an integral instrument, emulating the same precise manipulation via dedicated control points such as are typical of subtractive synthesizers. The Lyra 8 is designed to harness feedback, not strictly to trigger feedback among modular combinations of component parts, such as can be done with a modular synthesizer, but built to incorporate otherwise-unpredictable feedback as a primary sonic property. Moreover, the machine is designed for tactile human interaction: each of the oscillators, for instance, comprises two conduction points, so that the oscillator is only active when the circuit is completed by a person touching both contact points at once, closing the circuit by becoming part of it.

In sum, subtractive synthesis allows craft work in linear fashion, applied to a waveform along a signal path with a discrete start and end point and usually a keyboard to control pitch. Modular synthesis unsettles the fixed, linear character of subtractive synthesis,

and relativizes its mode of control by making the signal path one design choice out of a potentially unlimited number. The Lyra 8 also adopts an unfixed design, but by using a looping architecture in which feedback from its own signal path creates a changing signal in constant renewal. The unfixed design, however, is built into a closed system. As a closed system, it has an autonomous character that the other synthesizers do not. Though its signal paths are not variable, their output continuously changes along their feedback-inducing pathways. Its looping, self-contained architecture produces a signal that elides start and end points. The Lyra 8 is not so much a collection of tools, like the subtractive synthesizer, and not so much the product of connective choices among component parts, like the modular synthesizer, and more like a partner to whomever completes its circuits for the production of novel sounds.

Having gone on about three models of synthesizer in a legal festschrift for Gregor Noll, let me first do what may be expected, and use each of these three synthesizers as analogy for Gregor Noll's scholarship. His work exhibits an efficient authority akin to the sort of control associated with subtractive synthesis, a command of the linear character found persuasive in international legal argument. Consider the following outline of his argument, as established in the abstract for *Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum*:

> Should radiological age assessment be considered as a means of alleviating the doubts of a decision maker in the asylum procedure? The present article addresses this question through a number of steps. First, it questions whether the use of radiological imaging methods in the age assessment of unaccompanied adolescents seeking asylum complies with the internal norms of the forensic science community. It does not. Secondly, the article considers whether the use of these methods is scientifically authoritative according to the current state of the art in forensic medicine and traumatology. It is not. Thirdly, the article asks whether their use sufficiently safeguards against a particular kind of communicative error between decision makers and experts. It does not.[1]

But Gregor's work also relativizes the practices of international law and international legal scholarship, by connecting them up in an unexpected network according to an unconventional design. The first three pages of his vanguard work on the applicability of international humanitarian law to neurotechnology are occupied with Leif, a farmer undergoing deep brain stimulation treatment for Parkinson's disease, and with whom Gregor spent a week in hospital.[2] Connecting Leif with the logics of international humanitarian law and weaponized neurotechnology produces an unsettling resonance that scrambles the complacency of routine practices operating at the distance of professional authority, as well as the routine complacency that celebrates challenges posed by new technologies only to resolve them into the adequacy of law.[3] Gregor's work defies these

1 G Noll, 'Junk Science? Four Arguments against the Radiological Age Assessment of Unaccompanied Minors Seeking Asylum', *International Journal of Refugee Law* 28 (2016) at 234.

2 G Noll, 'Weaponising neurotechnology: international humanitarian law and the loss of language', *London Review of International Law* 2 (2014) at 201–203.

3 K Eichensehr, 'Cyberwar & International Law Step Zero', *Texas International Law Journal* 50 (2015): 357.

routines by relativizing them, reconnecting them in unique ways with people and things not typical of the design of the profession's signal path in practice.

Finally, his work engages with the closed system, and on at least two levels. I read Gregor's recent work as a plea to open up international legal practice before it is lost within a double closure.[4] International legal practice, following this plea, can be a reflective exercise, engaged in by situated humans connected up and capacitated with countless things. One closure that it faces is internal to the conventional faith in a linear design, its reflective potential suppressed for the efficient exercise of command, or the appearance of it. The other closure proceeds from the first as it comes in contact with technologies that supersede the textual foundations that international legal practice has long presupposed. The aspiration to efficient authority, in its encounter with contemporary iterations of automated intelligence like machine learning, leads to an increasingly autonomous regulatory practice. Deliberative processes are subordinated in favor of feedback loops offering self-correcting programs of legal sanction. These are cybernetic processes that model socio-technical systems, including their information flows and decision-making processes, on the workings of the human brain. Observing the artifacts of this simulated brain ever more present in international legal practice, Gregor warns of the ascension of

4 I am thinking, for instance, of his work with Matilda Arvidsson, cf M Arvidsson and G Noll, 'Artificial Intelligence, Decision Making and International Law', *Nordic Journal of International Law* 92 (2023): 1; or his contribution to the co-authored volume, M Liljefors, G Noll and D Steuer, *War and Algorithm* (2019).

a powerful normative imaginary: 'Cybernetics is about "control" as such and therewith also about controlling control. It is about regulation and therewith about the regulation of regulation. It is a regulatory thinking at a more foundational level….'[5]

My description of the Lyra 8, however, was not simply about a progressively more closed system of control. The organismic pretension of the Lyra 8 invites human connection, whether to complete its circuitry or to engage deliberately with its unpredictable sonic creations. The closure of Lyra 8's signal path, its containment within a fixed hardware architecture, is also a way to emulate acoustic musical instruments, to make the feedback loop play-able, to open it up and make it sing. On this note let me maintain that my description of the three synthesizers was not just for the analogies to Gregor's scholarship.[6] In that description I have also outlined my appreciation for Gregor Noll and the importance of his work. My appreciation – as a person who, like others, is uncertain about what good we do when we do what we call international law and international legal scholarship – for Gregor's efforts to engage, question and surpass the institutions that occupy us. I appreciate him as a lawyer and scholar who knows the practice, who knows the limitations of the practice, and who would push past into a vital future. All of these facets of his work are evident when he connects international law up with Andrei Tarkovsky's film, *Nostalghia*, and asks: 'What might an international lawyer learn from *Nostalghia*? Nothing as

5 G Noll, 'War by Algorithm: The End of law?', in Liljefors, Noll and Steuer, supra n4, at 81.

6 And it was not simply because I know that Gregor is also familiar with the peculiar qualities of the Lyra 8.

an international lawyer, nothing as a professional, and everything as one who lives in doubt about his profession, the community it implies, and about the personal obligation she or he enters into by assuming it.'[7] And in this moment of mad men run amok in the imaginary fields of international law, Gregor's conclusion to the same passage offers something like a disturbing diagnosis, but also something more, when he suggests: 'The question is then, which madman will bequeath us with a gesture that we may execute, thereby opening up our idiotic longing for … the identic, the authentic and the communal and turn it into openness – an openness that is concrete, historically situated and at work in the world.'[8] Such openness that Gregor maintains against all odds is what I find so inspiring in his work.

7 G Noll, '*Nostalghia*: A Nordic international law', *Nordic Journal of International Law* 85 (2016) at 280.

8 Idem.

There Is No Pilot

Daniel Steuer

PART A

A Stand-Up Comedian's Take on the Law

Hello! Good evening, Ladies and Gentlemen! Good to see so many of you here tonight, despite the programme's – how I shall say? – *underwhelming* title: 'A Stand-Up Comedian's Take on the Law'. How, you may have wondered, does a decent, self-respecting comedian come up with a topic like that? – The law – goodness, that's parking tickets and divorce, and many other unpleasant things, but nothing we particularly like to think about. Or has anybody ever heard someone say: 'Ah, I had such a nice run-in with the law today! – [Pause] – I thought not. – [Pause] – Any lawyers in the audience, by any chance? Come on, don't be shy … I know you're here. … You're just afraid people will corner you for a free-bee advice session during the interval. A bit like medics – though what's supposed to be cured is less clear.

Ok now, why did I choose such a lousy topic? As so often, the answer is … money. … Or rather: a lack thereof. 'I am an independent artist, therefore I have no money'. So, one day I was sitting in my permafrost kitchen – I can't afford much heating these days – won-

dering how nasty, brutish, and unjust life must be to have produced a genre like stand-up comedy, when suddenly my phone rang, and someone on the other end – Scandinavian accent, or Farsi, not sure, but perfect English – said 'Hello, I am so and so. Would you possibly be interested…' – Can you imagine? The incredible sweetness of these words? … 'Would you possibly be interested…' Pound signs rose up in front of me, dopamine flooded my system. … Then the voice continues '…to do a twenty-minute programme for 3,000 pounds…' – the dopamine level went through the roof – '… on the famous legal scholar Gregor Noll'. – [laughter in the audience] – at which point the pound signs and happy hormones disappeared as fast as they had come. – But then, instantaneously sober, I thought 'What the heck, I'll just say "Yes". I have a rough idea what 'legal' means and what the 'law' is, and that Noll guy I can always google'.

Little did I know.

And then it was too late. – The Scandinavians had transferred the money – all of it! – the very next day, and informed me that I had entered into what they called an 'unwritten contract' … or agreement, or something. Do you know the difference between a contract and an agreement? – [silence] – Thought so. And that became the stuff of my sleepless nights! I had to fight my way through a deadly jungle of what's lovingly called 'legalese'.

After a while, I really had enough of this, and thought, let's google this Noll guy for a change. And it turned out, I could have spared myself the jungle of jargon. Noll mainly writes about straightforward everyday topics: war, violence, and refugees. – Refugees, you know these people who come over from Africa and are then ideally sent back to Rwanda – a lovely place, where hardly anything nasty ever happened – sent back by a British home secretary whose parents immigrated to the UK from Mauritius and Kenya. In case geography is not your strong suit: that's Africa too. It seems the home secretary is so homesick. She wants to make sure the African refugees do not have to go through the same suffering as her. So she 'dreams' of flights to Rwanda – and, a selfless individual that she is, exclusively for others, not for herself! Unfortunately, though, the Rwanda dream of our second-generation African immigrant did not mature. And why not? Because some geezers with funny wigs and posh accents – also known as the Supreme Court – ruled it unlawful – yes, 'unlawful' – Do you know the difference between 'unlawful' and 'illegal'? – [silence] –Thought so. Unlawful is an act that contravenes legal rules, illegal is what you call a sick bird of prey. – [Delayed meagre laughs in the audience] The wiggies on the Supreme Court are for the law what the Pope is for Catholicism. Needless to say, the Papal system is superior, it is unambiguously clear what it represents – at least if you leave aside petty-minded theological debates. The wiggies and their colleagues love such debates. And they have a way with words, bloody hell do they have a way with words. Nuclear fission is rough work compared to what they do with meanings. Though it tends to suck energy in rather than to release it.

Noll's interests, as I said, include war, violence and artificial intelligence, that sort of thing. He asks questions such as: if a drone, right – a big and clever drone, not one of those you fly with your kids in the park on the weekend, though that's good training if you want your little ones to end up in the Air Force – if a big and really clever drone does something really big, but not very clever, like blowing up

the wrong wedding somewhere, do the laws of war apply? Is there someone responsible? – The longer I read his stuff, there more it seemed that Noll likes to put his finger on everything that makes you feel miserable, you know, the stuff you want to forget because it seriously spoils your pint or evening glass of wine. Then I came upon something he'd written on LAWS. Big thing, I thought, the guy is a legal scholar, of course he writes about laws. But it turned out it was another one of these annoying acronyms: lethal autonomous weapons systems. Straight away reminded me of our home secretary again. But she's harmless in comparison. LAWS will not just save African refugees from unbearable homesickness, they may send all of us packing to a big Rwanda in the sky, once the Singularity is up and running, that is. – You don't know what the Singularity is? It's really complicated, but let's just say, it's your fridge ordering what it wants, not what you want, and your toaster telling you what to do. That's bad enough, and now just imagine something a thousand times worse. It is actually not such a novel idea, some 200 years ago that German politician and poet Goethe wrote a short poem about it. 'The Sorcerer's Apprentice', it's called. Except the poem describes an analogue Singularity and at the end the sorcerer, who really knows his stuff, returns and all is fine. Today: no sorcerer, only apprentices. But lots of sorcery. I thought, really good of Noll to remind us of that. And he is in good company. Some forty years ago, Laurie Anderson, somewhat apocalyptically, put it thus:

This is your Captain – and we are going down
We are all going down, together
…

Put your hands over your eyes. Jump out of the plane
There is no pilot. You are not alone. Standby
This is the time. And this is the record of the time

LAURIE ANDERSON
From the Air, From the album *Big Science*

[The first members of the audience begin to leave the hall. The stand-up comedian shows signs of mild panic.] Listen folks, you've been really patient with me, really patient! … Just wait a second, just a second, I saw this coming, honestly, I saw this coming, and so, to fulfil my unwritten contract, I have written a very short – [more people leave the hall] – I swear *very* short text on Noll and the law. And after that – I promise, I promise – I'll launch into what you rightly expect from a stand-up comedian: jokes, one-liners. Look – listen, here: 'This show is about perception and perspective. But it depends how you look at it.' (Felicity Ward) or 'What do you call someone who used to like tractors? – An extractor fan! – [Some, but not many, people begin to return to the hall.] – And yeah, ok, I'll throw in a few not-so-woke jokes as well. [People suddenly flood back into the hall. The stand-up comedian reads the text on Noll (below), and then launches into increasingly non-woke jokes. Outside the hall, you can hear a faint humming sound in the sky. Then, the comedian wraps up his show:]

And now Good Night, you have been a wonderful audience! Save home, and don't run into a kill box. – Don't know what a kill box is? – [inaudible shouts from the audience] – No, no, it's not the latest McDonalds meal deal. – A very good night to you, a very good night.

[The last people leave the hall. The humming persists. The rest is not history. It is the time and the record of the time.]

PART B

Tractatus-Juridico-Gregoricus

1. The law is a compulsion machine.
1.1 It displays all the paraphernalia of an emperor without clothes.
1.2 At the end of all justifications, there is the brute force of punishment.
1.2.1 The stronger one punishes, the weaker one is punished.
1.2.2 The law exists because of the possibility of punishment.
1.2.3 Without the possibility of punishment, there would be no crimes: 'Punishment is lunacy. Punishment is the emergency exit taken by mankind when panic breaks out. Punishment is responsible for every crime that takes place and will take place. … If there were no punishments, we would have – long since - found means to make every crime impossible, unnecessary, and pointless. How far we would have progressed by now without gallows and dungeons. We would have houses that do not catch fire and there would be no arsonists. We would long since have ceased to have weapons and there would be no murderers. Everyone would have what they need, and there would be no thieves. Sometimes I think: it is a good thing that illness is no crime, otherwise we would have no doctors, only judges.' (Leo Perutz, *Zwischen Neun und Neun* [Between Nine and Nine], my translation, D.S.)
1.3 The authority of law is based on the power of those who create it.
2. A compulsion machine and justice are incompatible.
2.1 A compulsion machine works with clearly defined concepts and norms.
2.1.2 It is based on the notion of sovereign will power.
2.1.2.1 Sovereign will power results from a combination of the whims of history and the worst aspects of human nature.
2.2 Justice is based on infinitesimal discrimination against the background of an unavailable totality. Whatever is the case, must not be ignored. The context when investigating what may be just, is potentially endless.
2.2.1 Justice is neither on the side of legality, nor on the side of legitimacy.
2.2.1.1 Legality and legitimacy are incomplete digests of reality.
2.3 'The difference between a slave and a citizen: a slave is subject to his master and a citizen to the laws.' (Simone Weil, 'The Social Imprint', in *Gravity and Grace*)
2.3.1 Slave and master depend on each other. Both end up being dependent on an alien will.
3. The contradiction between law and justice cannot be resolved within the parameters of a legal system, no matter which.
3.1 A purely immanent, secular law will eventually abolish itself by disintegrating into a play of forces.
3.2 A return to law based on a transcendent authority is impossible.
4. The law shares the fate of all philosophical systems: it fails

when it comes up against the limits of logic and language.

4.1 The more elaborate and sophisticated the legal or philosophical system, there more tedious it becomes to demonstrate the points where it faces these limits.

4.1.1 Sophistication and complexity do not necessarily serve the purpose of making a legal system better, much less the purpose of fostering justice.

5. The law, like justice, has been given numerous interpretations, none of which can resolve the contradiction between law and justice.

5.1 It does not follow that one should not defend what – to the best of one's knowledge – one sees as just, even humane, in a given case.

5.1.1 This must be done while never forgetting that one may be wrong.

5.2 Whatever justice there is in a legal system as such only shows in its critique.

5.3 Any form of critique is permissible, as long as it remains aware that it may be wrong.

5.3.1 In fact, there must be a plurality of critiques to avoid the threat of self-affirmation.

6. The task is to seek justice, not to defend the law.

6.1 Not the law matters, but the lives and fates of those over which it rules.

6.2 The meaning of the law is the factual outcome it produces for human beings, other forms of life, and the planet.

7. Where the law ends, existence begins.

Noll and Legal Method: Beyond Routine Interdisciplinarity

B.S. Chimni

I

WHEN YOU MEET Gregor Noll for the first time you are immediately struck by his gentle and unassuming nature. He is always considerate and kind in his interactions with others. Indeed, a deep sense of equality informs his relationship with colleagues and friends.

As a scholar Noll carries his learning lightly. Despite the profound and vast knowledge of subjects that he researches and writes on he is extremely humble. He is also an empathetic listener. This perhaps explains his many collaborative projects. His openness to other views, as we shall see presently, carries into his scholarship.

Noll's style of scholarship is distinct. His writings often evidence a complex mix of philosophical, social science and legal materials. But the diverse sources he deploys are always integral to the argument he is making. Anyone who makes the effort to carefully read his writings is duly rewarded with rich insights. Indeed, Noll's extensive body of published work deserves to be the subject of substantive commentary. What I wish to do in this altogether brief note is to

merely touch upon one or two of his methodological reflections in the research areas of international refugee law and law and technology respectively that enrich their study. In each case it is enabled by an epistemic move that underscores the need to transcend the idea of routine interdisciplinarity.

II

Noll has to his credit a range of writings on international refugee law. What I wish to highlight is his apt and thoughtful questioning of mainstream positivist scholarship in the field. In an article co-authored with Rosemary Byrne and Jens Vedsted-Hansen titled 'Understanding the crisis of refugee law: Legal scholarship and the EU asylum system' Noll forthrightly calls for 'the repositioning of the lens of refugee legal scholarship'.

This is however not a routine call for inter-disciplinary scholarship. Noll and his co-authors argue the case for a refugee law scholarship that visits and learns from the methodological debates in the 'parent field of public international law'.[1] Put differently, they propose what may be termed "intradisciplinary-interdisciplinarity" as a method. The epistemic debates in public international law have been initiated by several critical approaches that include the new approaches to international law, feminist approaches to international law and third world approaches to international law. In their critique of mainstream scholarship Noll, Byrne and Vedsted-Hansen

1 Rosemary Byrne, Gregor Noll, and Jens Vedsted-Hansen, 'Understanding the crisis of refugee law: Legal scholarship and the EU asylum system', *Leiden Journal of International Law* (2020), 33, 871–892 at 871.

productively 'adapt the select dynamics captured in Third World Approaches to International Law (TWAIL) to the experience of the new member states within the EU'[2]. It is perceptively noted that 'while TWAIL researchers focus on the history of Northern domination being encoded into the DNA of international law, European legal researchers might be well-advised to look at the CEAS in a similar way. As the newly decolonized states were relative newcomers to the international system in the 1960s, so were the newly admitted member states in relation to EU law and the CEAS'.[3]

In acknowledging the contribution of TWAIL to understanding the relationship between strong and weak states in Europe, Noll and colleagues show a welcome openness and willingness to learn from other approaches to international law. But they also offer in turn an important insight that should enrich the work of TWAIL. By speaking of 'center-periphery' in Europe, Noll and colleagues emphasize the significance of not always treating the Global North as a monolithic bloc. The internal critique of EU law or Common European Asylum System (CEAS) helps underscore the role of power in framing and shaping international refugee law even within the Global North. It highlights the need to disaggregate the policies of the Global North and identify the ways in which dominance is exercised within it.

In another essay Noll and his co-author Eleni Karageorgiou take the analysis forward by deconstructing the EU move to separate 'the principle of solidarity' from the idea of 'fair sharing

2 Ibid., at 873

3 Ibid., at 889.

of responsibility' in the Treaty on the Functioning of European Union (TFEU)[4]. The absence of just burden sharing and solidarity with the European periphery helps deconstruct the current and prospective approach of centers of power in the Global North to asylum seekers and refugees from the Global South. The posited distinction between "solidarity" and "responsibility" is in turn used by populist and illiberal regimes to justify non-entrée asylum policies in the European periphery.

III

As the fourth industrial revolution unfolds, a central concern is the ability of domestic and international law to regulate new technologies. Noll has explored the frontiers of the intersecting world of law and technology and offered profound reflections on the complex problems arising from attempts to regulate them. He has in particular identified the problems which may be encountered in the legal regulation of AI.

In order to consider relevant issues in the domain of international humanitarian law arising from the operation of AI Noll has fruitfully collaborated with a philosopher and art historian (Max Liljefors and Daniel Steuer respectively). In a book that followed, titled "War and Algorithm", Noll and his colleagues contend that if the issues have to be adequately addressed there is a need for "disciplinary unruliness" that leads them out of "professional confines",[5] transcending in the process facile interdisciplinarity. The epistemological flexibility and willingness to experiment Noll embraces in his work is in many ways essential to dealing with novel subjects and intricate situations.

There are knotty issues involving AI and legal regulation which Noll presents with great clarity in his writings on the subject. A key question in determining legal responsibility for acts of omission and commission is 'what is attributable to the human and what to the machine'?[6] The reason this is a difficult task is, as he explains, 'humans and algorithmic technology amalgamate in practice, and cannot be isolated from each other for the purposes of responsibility attribution'.[7] Noll demonstrates 'what algorithmic technologies do to the law'[8] and explains 'why law and algorithmic technologies cannot be reconciled'.[9] A key reason is that because of its learning capacity an AI has come 'to possess a normativity that can no longer be traced back to an intention originating in a human designer'.[10] The "monotheistic form" of law is in the process fractured.[11] In the

4 Eleni Karageorgiou and Gregor Noll, 'What Is Wrong with Solidarity in EU Asylum and Migration Law?' Jus Cogens (2022) 4:131 154

5 M Liljefors, G Noll and D Steuer, 'Introduction: Our Emerging World of War', in M Liljefors, G Noll and D Steuer (eds), *War and Algorithm* (Rowman & Littlefield 2019) at 3.

6 Gregor Noll, 'War by Algorithm: The End of Law?', ibid., at 93.

7 Gregor Noll, 'AI, Law and Human Responsibility', *Stockholm Intellectual Property Law Review* 4 (2021) 48–55 at 55

8 Ibid., at 48.

9 Ibid.

10 Noll, 'War by Algorithm, at 93.

11 Ibid., at. 98.

instance of lethal autonomous weapon systems (LAWS) he concludes that 'it is not possible to subject algorithm forms of warfare to the law, be it the law of war or any other form of law'[12] In short, algorithm technologies pose a fundamental challenge to the tenets of legal responsibility.[13]

Noll is not satisfied with only identifying the problems arising from the interface between law and technology. He also proposes thoughtful responses. For instance, he suggests 'the introduction of strict liability for certain forms of algorithmic technologies. … Strict responsibility is the lawyer's way of pointing out the existence of a serious conflict between law and the cybernetic basis of algorithms'.[14] As he notes such a move may help in the period of transition.

12 Ibid.

13 Ibid.

14 Noll, 'AI, Law', at 48.

Theater, law and *verfremdungseffekt*

Markus Gunneflo

Lilla Teatern i Lund februari 1990, Gregor Noll och Oline Stig. FOTOGRAF: Ingemar D Kristiansen. KÄLLA: Sydsvenskan

DEN 15 FEBRUARI 1990 spelades Per Wickströms pjäs Tegelmannen i Lilla Teaterns nyinflyttade lokaler på Stortorget 1 i Lund. Juriststudenten Gregor Noll spelade Räven. Samma vår bytte Gregor teatersällskap till Fäbodsteatern, ett sällskap med en mer avantgardistisk repertoar som sannolikt passade Gregors riskbenägenhet bättre. Fäbodsteatern spelade bland annat futuristen Filippo

Tommaso Marinettis pjäs Obeslutsamhet på Hultsfredsfestivalen på det tidiga 90-talet. Exalterade punkare lär ha ropat in ensemblen efter pjäsens slut med det specifika önskemålet att igen få se den ål som var en del av handlingen i pjäsen.

Seminarierummet, disputationstillfället, lärosalen full av grundutbildningsstudenter och konferenspresentationen är alla situationer som ställer krav på inlevelseförmåga och gestaltning. Den som förlitar sig på autenticitet går miste om det situationsanpassade, men också det rollbundna i dessa olika verksamheter. Det är dessutom så att det krävs desto mer av en inledare och ordförande på ett slutseminarium där doktoranden tänjer på rättsvetenskapens gränser, än ett som tryggt befinner sig inom dem. Och tänjts har det gjort i Gregors närhet.

Med inspiration från kinesisk teatertradition introducerade Bertolt Brecht på 1920-talet en slags teater där interaktionen med publiken var en annan än den borgerliga teaterns identifikation med skådespelet. Brecht ville använda teatern för att öppna upp samhället för kritik och politisk aktion. För att lyckas med detta måste teatern erbjuda något annat än verklighetsflykt. Således privilegierar Brechts politiska teater publikens rationella förståelse och analys av skeenden. Skådespelaren kan bidra till den *verfremdungseffekt* som är en viktig del därav genom ett kvalitativt skådespel som emellertid inte förleder publiken till att tänka att de ”är” rollfiguren och bevittnar något annat än ett skådespel. Skådespelaren ”citerar” den roll som spelas. Skådespelare ”är” aldrig sin roll. Genom kritisk distansering skapas ett glapp som möjliggör för publiken att förstå de krafter som styr skådespelet, och i dess förlängning, samhället.

Ett försiktigt antydande om Gregors användande av kritisk distansering i utövandet av akademins många roller får, för tillfället, räcka. Var uppmärksam på inslag av komedi, dialog med publiken vid sidan av rollfiguren, historisk kontextualisering, spelande av flera roller samtidig, samt en sparsam dekor. Alla typiska grepp hos Brecht. Låt mig istället säga några ord om kritisk distansering i Gregors textproduktion.

Den ämnesmässiga bredden tillsammans med en teoretisk och metodologisk rastlöshet samt en ödmjuk avsaknad av överblickar över det egna projektet gör en sammanfattande beskrivning till en komplicerad uppgift. En konstant är emellertid den doktrinära precision som kännetecknas av ett mycket skickligt handhavande med det (folk)rättsliga materialet över så vitt skilda ämnen som papperslösas rättigheter, dödande av civila i väpnad konflikt och de mänskliga rättigheternas exkluderande konstruktion. Hos Gregor är emellertid alltid ambitionen en annan än identifikation med de bärande aktörerna i dramat. Den doktrinära expositionen ”citerar” rätten, det suveräna beslutsfattandet, teknologins härjningar med människan (för att lyfta ett mer sentida tema i Gregor produktion). Den ”är” den inte. Vi är därmed tillbaka i Brecths politiska teater. Med Richard Schönströms ord:

> Istället för att (som i den naturalistiska teatern) föra in åskådarna i en välbekant värld fjärmar han dem från vad som försiggår på scenen så att de kan reagera med häpnad på situationer eller ”tillstånd” som vanligtvis ter sig naturliga och självklara.

Gregors strukturalism är onekligen hård. Ändå finns det något frigörande i det glapp som den kritiska distanseringen skapar.

Frigörande, men också skrämmande. Samtidigt, hur kunde det vara annorlunda? I en våldsam värld, där rätten oftare är en del av problemet än av lösningarna; bör läsupplevelsen av texter som reflekterar över motståndets möjligheter och nödvändighet vara något annat än en balansakt över en avgrund?

ON FEBRUARY 15, 1990, Per Wickström's theater play the Brick man (Tegelmannen) was performed at Lilla Teaterns new premises at Stortoget 1 in Lund. In the role as the Fox, was the law student Gregor Noll. That same spring, Gregor changed theater group to Fäbodsteatern, a group with a significantly more avant-garde repertoire that probably suited Gregor's propensity for risk-taking better. Fäbodsteatern played, among other things, the futurist Filippo Tommaso Marinetti's play Hesitation at the rock festival in Hultsfred in the early 90s. Excited punk rockers are said to have called in the ensemble after the end of the play with the specific wish to again see the eel that were part of the play.

The seminar room, the viva, the classroom full of undergraduate students and the conference presentation, are all situations that require sensitivity and awareness of the room. Relying on authenticity, risks missing out on the situational, but also role-bound, aspects of these different activities. It is undoubtedly also the case that more is required of the leader of a final seminar where the doctoral student pushes the boundaries of jurisprudence, than one who is safely within them. And, without a doubt, boundaries have been pushed by those working with Gregor.

In the 1920s, with inspiration from Chinese traditional theater, Bertolt Brecht introduced a kind of theater where the interaction with the audience was different from the bourgeois theater's attempts at getting the audience to identify with the play. Brecht wanted to use the theater to open up society to criticism and political action. To succeed in that, it must offer something else than escapism. Thus, Brecht's political theater privilege the audience's rational understanding and analysis of events. The actor can contribute to the *Verfremdung* effect which is an important element of such understanding through a qualitative performance which, however, does not lead the audience into thinking that the actor "is" the role and that they are witnessing something else than a performance. Instead, the actor "cites" the role. The performer is not to be subsumed by that which is performed. Through a distancing effect, a gap is created that enables the audience to understand the forces that govern the play, and by extension, society.

Hinting at Gregor's use of critical distancing in the exercise of the academy's many roles, will suffice for the moment. Pay attention to elements of comedy, out-of-character dialogue with the audience, historical contextualization, playing multiple roles at the same time, as well as sparse décor: all typical moves in Brecht's political theater. Instead, let me say a few words about the distancing effect in Gregor's textual production.

Summarizing Gregor's writings is a complicated task because of the vast range of subjects covered, a slight theoretical and methodological restlessness but also a characteristically humble lack of retrospective references to his own scholarly journey.

One constant is the doctrinal precision characteristic of a very skilled handling of legal materials on everything from the rights of undocumented migrants, the killing of civilians in armed conflict

and the exclusionary construction of human rights. However, with Gregor, the ambition is always something other than identification with main characters of the drama. The doctrinal exposition "cites" the law, the sovereign decision, the ravages of technology with man (to highlight a more recent theme in Gregor's writing). They never strive to "be" it. We then seem to be back in Brecth's political theater. In the words of Richard Schönström:

> Instead of inviting the audience into a world where they will feel at home, he distances them from what is happening on stage so that they can react with astonishment to situations or 'conditions' that otherwise will seem natural and obvious.

Gregor's structuralism is undeniably a hard one. Yet there is something liberating in the gap that this distancing effects creates. Liberating, but also terrifying. Then again, how could it be otherwise? In a violent world, where law is more often part of the problem than of the solution; should the reading experience of texts that reflect on the possibilities and necessity of resistance be anything else than one of balancing over an abyss?

A Tribute to Professor Gregor Noll

Elspeth Guild

I HAD THE PLEASURE of meeting Gregor more than 20 years ago through the Odysseus academic network for legal studies on immigration and asylum in Europe. At that time, he was at Lund University and already one of the most interesting and engaging scholars in the field of European asylum law. From the very first meeting, I recall Gregor engaging me regarding the then recently published book by Giorgio Agamben, *Homo Sacer,* and what kind of socio-legal analysis we could make of this ground-breaking work.

I must immediately declare an interest in the career of Gregor, he nominated me for a PhD honoris causa at Lund University in 2009, an honour of outstanding proportions. At the time of the nomination, I recall receiving the letter and being overwhelmed by the sense of responsibility which such an award means. This inspired me to think more deeply about the field and my duty to participate fully in its development. The event itself was outstanding. It took place on a lovely early summer day in Lund with blue skies and amazing pageantry. I knew only one of my fellow honorees, a former Commission official, and the whole event was astonishingly wonderful. I strongly recommend to anyone who

has not participated in one to attend, it is glorious. However, one must never forget that in Sweden, academics are expected to work. So the event includes the obligation to give a ground-breaking presentation of the state of the discipline and the ways forward in the Pufendorf room of Faculty of Law in front of an expert and highly critical audience.

What has always impressed me about Gregor is his ability to look forward towards the incoming tides of thought (and policy) in a very wide variety of fields. While our work together has been primarily in the field of asylum and migration, I have also followed with great interest Gregor's work in the use of force in war and neurotechnology. In recent years he has returned to a focus more on asylum, as have many of us, in light of the challenges to international protection of the current decade. Not only has Gregor been astonishing in the scope of his interests, but also his work has been profoundly transdisciplinary. In this area, in particular, I have so admired his willingness to engage intensely with philosophy, politics, sociology, neuroscience, to name a few, irrespective of the tendency towards singular disciplinarity of most legal scholars where engagement outside our discipline is viewed as evidence of a lack of dedication to law. His intellectual curiosity is outstanding and leads his research without fear or favour to the fashions of law (or other disciplines) of the moment. His academic rigor and intense critical sensibility have convinced even the most sceptical of black letter jurists that he merits high esteem in his discipline.

I would like to focus briefly here on Gregor's work on AI in particular its deployment in the field of war. While AI and its uses are now a mainstream discussion even in law, when Gregor first began examining the subject few of us were looking at this issue. His book, *War and Algorithms*, written with two colleagues, remains an outstanding contribution and warning to the transformations which AI is changing our world. His engagement with the challenges to law of AI uses in this area is phenomenal. His understanding of the scope of the changes which these new technologies would bring was visionary. The profound challenge which AI would constitute for law was already on his radar, in particular the ways in which AI tools could make irrelevant questions of human rights through the abolition of decisions as we understand them in law. Many of us are only now trying to catch up with the development of AI and its uses in a wide range of fields, from the threat of Chat GPT, to AI tools to assist in marking. The latest of the challenges in use of AI is in the field of asylum, in particular assessments of country of origin information and checks on language usage and in assessment of short stay visa applications. The creation of large (EU and other) databases containing personal information on foreigners which can be used in multiple ways opens the way for a whole new series of questions about legality and legitimacy which are presaged in Gregor's work. The challenge of some states' efforts to create a global capture of data to European legal concepts of privacy and data protection has been an issue which Gregor has addressed in a number of works. This interest is closely linked with his work on AI, as the later depends on the former – without mass data there is no AI, as some experts have stated.

My work has been profoundly influenced by Gregor, through his insightful comments on drafts of my articles or chapters to his own writing. His 2000 book, *Negotiating Asylum*, provided me with

much food for thought on how to think about the question of extraterritoriality. While there is now a wealth of literature on the subject, when Gregor's book came out it was a trailblazer on how to think juridically about the subject in the field of asylum law and obligations of states. I am not the only scholar whose work has been fundamentally influenced by Gregor. He has supervised a series of outstanding PhD students, for two of whom I had the privilege of being a member of their juries. His former PhD students have gone on to excellent academic careers themselves, carrying forward the lessons which he taught them regarding rigor and responsibility to the profession as well as to practitioners in the field.

Finally, I would like to comment on an aspect of Gregor's contribution which extends beyond academia. He has been a foremost champion of the principle that academics are not only responsible to the academic community regarding their work but also that they have a duty to assist practitioners with their struggles to establish the correct application of the law (in particular human rights and refugee law) for their clients. Gregor has always exhibited a deep respect for practitioners and sought to assist them as they seek to ensure the correct interpretation of the Refugee Convention and the European Convention on Human Rights. His conceptualisation of law encompasses not only the actions of politicians and policy makers or officials but also the treatment of individuals faced with the severe force of practice. His concerns have been for individuals captured by legal procedures about which they have little or no knowledge or capacity to protect their interests in face of state action. This deep humanity for the individual has influenced all aspects of his career.

It has been such a pleasure to have this opportunity to reflect on Gregor's career and what it has meant for me. I am such a fan of his work, his commitment and of Gregor as a human being. He has enriched my life greatly and I am honoured to consider him a friend as well as a colleague.

Transnational solidarity, the antidote against the exceptionalisation of the world

Didier Bigo

I MET GREGOR NOLL many years after I first read him, and it was a great pleasure for me, with a touch of surprise. He had invited my partner Elspeth Guild to receive an honorary doctorate, so he was the first person to put a ring on her finger on behalf of Lund University, before I married her – an extraordinary situation.

Our meeting sparked a real discussion about Carl Schmitt and his concept of the state of exception. I was particularly interested in Gregor's analysis of the mechanisms of exception used at borders in transit and detention zones. Since 2003, his legal analysis has paved the way for research that discusses the modalities of the state of emergency and the state of exception (permanent or routinized) that the asylum and immigration policies of Western democracies have implemented at their borders. In a more subtle and accurate way than the one used by the philosopher Giorgio Agamben, Gregor has shown how mechanisms that derogate from the rules of human rights have been developed in a border area that is divided in such a way that zones apply police force in the name of sovereignty while restricting the rights of those detained there. For my part, I have analyzed the logic of counter-terrorism and the extension of a continuum of internal security beyond counter-terrorism to illegal immigration and even asylum seekers, which has led me to very similar conclusions. This governmentality of unease has worked gradually, exceptionalizing more and more situations in which the human rights of foreigners, of minorities born in the country, of those who shelter them or help them enter, are called into question by police practices that would only be legitimate in a context of war or serious threat to national security, which is by no means the case. Thus, over the last twenty years, we have seen the constant development of a reactionary rhetoric aimed at strategizing internal security, using the language of the enemy within, who would manipulate and try to infiltrate the masses, imagining them as a body alien to the homeland, when in reality we are witnessing a natural phenomenon of flows of people moving around the world for an infinite variety of reasons, almost never hostile. The exaggeration of danger has long been a constant in justifying a repressive and preventive social order, abandoning the criteria of presumption of innocence and proof of facts for those of suspicion and surveillance. Gregor was one of the first to analyze the consequences of such a development for the legal order and human rights. This hostilization of social contexts has in no way resolved security situations; on the contrary, its use generates material and symbolic insecurity. In many countries, it has led to a revival of aggressive ultra-patriotism and

hatred of others, including political opponents or governments open to the outside world, and to a much more frequent use of violence by the various police forces. In many countries, the values of openness to others, European freedom of movement, and political and economic freedom remain the dominant principles, but they have not been able to prevent hostile discourse and practices from being expressed in a "no-holds-barred" manner. This has to do with racism and xenophobia, but also with the justification of refusing international aid by some elites who pretend to speak on behalf of the local people, accompanied by demands to withdraw from international treaties that protect rights, in the name of a vision in which helping the other would be to the detriment of this fantasized people in a zero-sum game. Whether it takes the caricatured form of the risk of the "great replacement" on the extreme right, or in the center with its formula "we cannot accept all the misery in the world", certain politicians seek to justify inhumanity in the name of political "realism" in times of crisis. Twenty years later, we continue to suffer from this exceptionalization of the world, which is now seen only in terms of multiple scenarios of future disaster, in which everyone is expected to protect themselves from others, whereas the solutions to all these different social and environmental changes require us, on the contrary, to strengthen solidarity and human rights for all; a message that Gregor has never ceased to repeat with accuracy and determination, and for which he must be recognized and honoured.

"What hempen home-spuns have we swagg'ring here...?"[1]

A malicious dissection of the International Criminal Court and its slogan

Or

You want to meddle in criminal law? Learn some steampunk first!

Sverker Jönsson

1 William Shakespeare, "*A Midsummer Night's Dream*", Act 3, Scene 1

Bosheit, mein Herr, ist der Geist der Kritik,
und Kritik bedeutet den Ursprung des
Fortschrittes und der Aufklärung.

THOMAS MANN, *Der Zauberberg (1924)*

1
INTRODUCTION[2]. ESTABLISHING SHOT.

IT IS PERFECTLY understandable, and anyone would be forgiven for doing so, to think that criminal law is about crime. However, in its core, criminal law is about regulating the state monopoly on violence. And as Encyclopedia Britannica so eloquently explains, the monopoly on violence is 'widely regarded as a defining characteristic of the modern state'.[3] In other words, criminal law is inextricably intertwined with the sovereign's (the King's, the nation state's) claim to be the legitimate source of power. The right to punish (for criminal behavior) resides in this claim.

Already at this point we must pause, breath and, even if we don't agree with them completely, at least temporarily allow certain starting points to prevail, for the sake of experimentation. It is already

2 I am deeply indebted to Anastasiya Kotova for discussing the fundamentals of international criminal law with me, and thereby taking valuable time from her writing her doctoral thesis on the understanding of how corporate activities and corporate violence are debated and (not) regulated in international criminal law.

3 https://www.britannica.com/topic/state-monopoly-on-violence. Retrieved 2023-11-23.

clear from the wording of the previous paragraph that our perspective is a very traditional "domestic" one. We stand on firm "domestic" ground, from where we will look up at the dizzying heights and limitless skies of international law.

But before moving further with this mind game, let's establish that the term "domestic" (as opposed to "international") is problematic in itself. Ethymologically[4], the latin word *domesticus* means "belonging to the household". The old French meaning of the word is "prepared and made in the house". Further back in time, the proto-indoeuropean root means "house" or "household", the Sanskrit word for "house" is *damah*. We later find it in words as *dame, donna, Madonna, madam, madame, mademoiselle* and *domesticate*. Combined with the traditional gender roles of the European bourgeoisie, where the confinement and duties of the home was (is) the female sphere, and participation in public life and in political and economic affairs was (is) the male sphere[5], the practice in international law research of contrasting "domestic" and "international", is a terminology deeply coded with gender and clearly characterised by the exercise of patriarchal power.

Now, let's return to the right to punish again. If several parties compete to establish themselves as sovereigns, the control over the monopoly on violence is contested. And then, the legitimate source of punishment is also questioned, suspended and unclear. In other words, whatever party who claims to be *the* sovereign, must also manifest this through a de facto monopoly on violence within an

4 https://www.etymonline.com/word/domestic. Retrieved 2023-12-05.

5 Jacquie Smyth (2008). Transcending Traditional Gender Boundaries: Defining Gender Roles Through Public and Private Spheres. Elements, 4(1).

actual delimited physical, geographical territory: The Kingdom, the nation state, or the gang turf. And the ultimate manifestation of this is the right to punish. Criminal law, then, is about the right to punish and not about "crime". This is also reflected in many languages in the naming of this area of law: *Derecho penal, Strafrecht, Code Pénal, Direito Penal, Strafferet, Straffrätt, Diritto Penale*.

Crime *control*, however, has been a successful way for sovereigns to reaffirm that their claim to the monopoly of violence is true and factual. Hence, criminal *policy* is extremely important for any political power in order to reassure the citizens – subjects – that the political power is legitimate. This explains, of course, why 'organized crime' or 'the mafia' often have been the focus of many modern nation states: they challenge the very foundation of the state itself – the physical control over a territory by a monopoly on violence. And nota bene: the term "violence" in the expression "monopoly on violence" means *the right to arrest, detain and punish a human being*, i.e., using or authorizing the use of physical force.[6]

What about "crime", then? Firstly, "crime" is necessary for the state or sovereign, since without crime, there would be no need for punishment. The sovereign needs "crime" in order to be able to manifest the monopoly on violence. Secondly, there is no such thing as "crime" (outside the rather empty legal definition of "that which is punishable according to valid law"), it is not a natural category.[7] The categories of human action, inaction and experiences of harm that – legally speaking – are "criminal", are so disparate and express

6 https://www.britannica.com/topic/state-monopoly-on-violence. Retrieved 2023-11-23

7 See Nils Jareborg (1994), *Straffrättens ansvarslära*, Uppsala: Iustus, pp. 323–342.

so many different human qualities, shortcomings, needs, experiences and fears that they basically have no common denominator at all. As examples of human behaviour, tax fraud has nothing in common with infanticide; environmental crime has nothing in common with defamation or hate crime; rape has nothing in common with illegal smuggling of explosives.

In essence: There can be no sovereign (King or nation state) without criminal law, and there can be no criminal law without a sovereign. However, since criminal law (and only criminal law) has the potential to invoke the full power of the nation state's monopoly on violence against unruly citizens/subjects, it also carries a special allure for those with a need to put power behind their words, their politics, their dreams, or their norms from other legal disciplines. Consequently, in 2002, as a result of the human rights movement's increasingly insistent and intense wooing of punishment as a tool in "the fight against impunity"[8], international law gave birth to international criminal law in the shape of the Rome Statute of The International Criminal Court.[9]

8 Karen Engle, *Anti-Impunity and the Turn to Criminal Law in Human Rights*, 100 Cornell L. Rev. 1069 (2015).

9 I am aware of the ad-hoc predecessors to the ICC, and the importance of those temporary "criminal courts" for the historical formation of the idea of a permanent one. However, most of those temporary "courts" have closed or entered what is called the residual phase. As "courts", most of them are no more, they're a stiff, bereft of life, they rest in peace, they're pushing up the daisies, their metabolic processes are now history, they have kicked the bucket, they have shuffled off their mortal coil, ran down the curtain and joined the choir invisible. They are ex-courts. See John Cleese & Graham Chapman (1969), *Full Frontal Nudity*, BBC.

The ICC was launched with an impressive degree of independence from more than thirty years of academic debate on restorative justice as an alternative to criminal punishment.[10] The ICC was constituted with an unprecedented neutrality towards six decades of questioning criminal law and punishment from a white collar crime perspective (including thorough, comprehensive and deeply theorized international research on moral and legal responsibility in and for collective entities and (transnational) organizations.[11] The ICC was established exemplarily separate from the previous 27 years of international academic debate on the discursive and disciplining power-practices of criminal law and punishment.[12] The ICC was set up impeccably unaffected by the birth of criminology 126 years earlier with Cesare Lombroso's book "*L'uomo delinquente*" and by the numerous criminological theories launched during the 20th century (e.g. differential association theory[13] , strain theory[14], control theory[15], labeling theory[16], conflict theory[17]). The ICC was

10 Gerry Johnstone (ed.) (2003), *A restorative justice reader.* Willan publishing.

11 Starting with Edwin H. Sutherland (1940), *White Collar Criminality*, American Sociological Review, Vol.5 no. 1, pp. 1–12. See also Gilbert Geis, Robert F. Meier & Lawrence M. Salinger (eds.) (1995), *White-Collar Crime: Classic and Contemporary Views*, 3rd Edition. Free press.

12 Launched by Marcel Foucault (1975), *Surveiller et punir*. Éditions Gallimard.

13 Edwin H. Sutherland (1939), *Principles of Criminology*, Philadelphia: Lippincott.

14 Robert K. Merton (1938), *Social Structure and Anomie*, American Sociological Review, 3, pp. 672–682.

15 Travis Hirshi (1969), *Causes of Delinquency.* Berkeley: University of California Press;

16 Howard Becker (1963), *Outsiders: Studies in the sociology of deviance.* New York: Free Press.

17 See for example Richard Quinney (1974), *Critique of the legal order: Crime control in capitalist society,* Boston: Little, Brown.

inaugurated almost unfathomably free from undue influence from sociological and crimino-legal research strands such as abolitionism[18] or "ideal victims" and "conflicts as property".[19]

2
SETTING THE SCENE. LETTING THE STEAM IN. L'ARRIVÉE D'UN TRAIN EN GARE DE LA CIOTAT.

Let's go back to a time, and to a place (Sweden, Italy, Bavaria, England, France...), where every second child dies before reaching the age of fifteen.[20] A time, and a place, with no electric lighting and no trains, where news travel no faster than the speed of a horse. It will be another 32 years before Edward Jenner develops the first vaccine, so smallpox is still a killer and a mutilator. Four hundred thousand Europeans are killed by smallpox every year.[21] A time, and a place, where life expectancy at birth is 40 years of age.[22] A

18 See for example Maximo Langer (2020), Penal Abolitionism and Criminal Law Minimalism: Here and There, Now and Then, 134 Harv. L. Rev. F. 42.

19 See for example Nils Christie (1986), *The Ideal Victim*, in E. A. Fattah (ed.), *From Crime Policy to Victim Policy*; see also Nils Christie, (1977), *Conflicts as Property*, British Journal of Criminology, vol. 17, pp. 1–15.

20 https://ourworldindata.org/child-mortality. Retrieved 2023-11-16.

21 *"Jenner's Breakthrough". The History of Vaccines. Philadelphia: The College of Physicians of Philadelphia. 2020. Archived from the original on 6 June 2017. h*ttps://web.archive.org/web/20170606213421/https://www.historyofvaccines.org/timeline#EVT_48.

22 https://ourworldindata.org/its-not-just-about-child-mortality-life-expectancy-improved-at-all-ages. Retrieved 2023-11-16.

time when there are still 18 years to go until the execution of Anna Göldi in Switzerland, the last woman to die accused of witchcraft.[23] A time, in Sweden, when you will have to wait for another 100 years to have any other kind of lightsource than a carried torch or lantern when you leave the house after sunset.[24] The darkness of the night is total, impenetrable and impervious.

This is Europe in the years of 1764 and 1765.[25]

In this time and place, within the short timeframe from April 1764[26] to May 1765[27], two fantastic machines will be introduced, both of which will have a profound impact on European culture forever. By the way of the world, of course it is two men who will introduce them. One of those men is the Scotsman James Watt, the other one is Cesare Bonesana di Beccaria, Marquis of Gualdrasco and Villareggi.

In the month of April in 1764 Cesare Beccaria anonymously publishes his treatise on criminal law, "*Dei delitti e delle pene*". It is printed in Livorno in Tuscany. In the month of May in 1765 James Watt, with his first invention – the separate condenser – improves on the Newcomen steam engine, thereby creating a defining development

23 Lauren Nitschke. "European Witch-Hunting (A Brief History)" TheCollector.com, February 13, 2022, https://www.thecollector.com/european-witch-hunting/. Retrieved 2023-11-16.

24 Jan Garnert (1993) Anden i lampan: Etnologiska perspektiv på ljus och mörker, p. 64ff.

25 This text of mine is, admittedly, not only reprehensibly eurocentric but also gravely anthropocentric. My apologies.

26 Dei Delitti e delle pene – Om brott och straff (1977), p. 201.

27 https://www.britannica.com/biography/James-Watt. Retrieved 2023-11-21.

of the industrial revolution: the Watt engine.[28] The influence of Beccaria's "Dei delitti e delle pene" on the abolition of corporal punishment, the abolition of the death penalty, the development of the concept of the rule of law in criminal law and criminal procedure (often referred to as the principle of legality), and the elaboration of the principles of criminalisation is beyond measure.

Beccaria took stand against the tyrannic ways in which the monopoly on violence had been used by autocracies for centuries. In "*Dei delitti e delle pene*" Beccaria also paved the intellectual way for the development of the scholarly treatment of criminal law that took place during the long 19th century by figures like Anselm von Feuerbach. While the criminal law as a legislative area always remained tied to the project of the modern state, its philosophy, jurisprudence and legal conceptualisations quickly became truly international during this period.[29] Criminal law as we know it today in democracies all over the world, the classical liberal conceptualization of the prerequisites for and limits of punishment in a Rechtsstaat, was born from Beccarias ground-breaking work and refined by legal scholars in the century that followed.

The unparalleled social impact of the industrial revolution – *life in the age of the steam engine* – together with the ideals of enlightenment philosophy and an emerging conceptualisation of criminal legal doctrine and *dogmatik* at law faculties across Europe, is the environment, the backdrop, background and indispensable soil from which modern criminal law grew and developed.

28 https://www.britannica.com/biography/James-Watt/Later-years. Retrieved 2023-11-16.

29 Christian Häthén (2004), *Stat och Straff*, p.183.

3
MAIN PLOT (I): FACTS AND FIGURES. EXT. OUDE WAALSDORPERWEG 10, THE HAGUE

It is somewhat unfortunate that a member of the public who does a search on the Internet using the term "ICC", looking for information on the International Criminal Court, will find that the abbreviation "ICC" is also used by the International Cricket Council, the International Code Council[30], Illinois Central College, and of course the International Chamber of Commerce. However, finally arriving at the official website of the International Criminal Court, the following facts, figures and slogan can be found under the heading "About the court"[31]:

Facts and figures

Today the Court has: Over 900 staff members; 2023 budget: €169,649,200; There have thus far been 31 cases before the Court, with some cases having more than one suspect.

Before moving on to more serious matters, let's take quick look at the facts and figures. The ICC has 900 employees. The yearly budget is €169 million ($180 million; SEK 1,9 billion). The budget for the entire Swedish court system for the fiscal year 2022 was SEK 6,6 billion, just about 3,4 times larger than the budget of the ICC. However, in that year alone, *456'061 cases* were decided by Swedish courts.[32] Since its inception 21 years ago, the ICC has decided in *31 cases*[33] (some even with more than one suspect!). Now, there are three kinds of people in the world: those who can do maths and those who can't. I suggest that either the instances of suspected international crimes[34] the last two decades have been rather surprisingly few, or that efficiency is not really the hallmark of the work of the ICC.

But are not the crimes within ICC's jurisdiction very hard to investigate, prosecute and decide on? Do they not require a multitude of investigative efforts and methods that takes time? Do they not entail the difficult task to document and trail actions and decisions from a multitude of actors on the ground? Do they not require many witnesses to be interrogated and countless numbers of documents to be traced? Do they not implicate delicate legal judgements concerning power-structures and the de-facto roles of individual human persons in a very complex event? Yes, of course they do. But the same is true with – inter alia – tax fraud, international smuggling and sale of narcotic drugs, murder within and by transnational or-

30 "The International Code Council is the leading global source of model codes and standards and building safety solutions that include product evaluation, accreditation, technology, training, and certification. The Code Council's codes, standards, and solutions are used to ensure safe, affordable, and sustainable communities and buildings worldwide", https://www.iccsafe.org/about/who-we-are/. Retrieved 2023-11-21.

31 https://www.icc-cpi.int/about/the-court. Retrieved 2023-11-21.

32 Sveriges domstolar. Årsredovisning 2022, p.15.

33 The International Criminal Courts's 25th anniversary and World International Justice Day. EPRS European Parliamentary Research Service, PE 751.406, July 2023.

34 Crimes listed in articles 6–8 in the Rome Statute of the International Criminal Court.

ganized crime, corruption, the causal and technical complexities of environmental crime, breaches of competition law, and the financial and organizational labyrinths characteristic of other forms of white-collar crime in "domestic" criminal law.

Thirty-one cases. In twenty years. Approximately €2–3 billions spent in total. That amounts to between €65–€100 millions spent by the ICC per case. If the Swedish court system had a budget like that even for just half of its cases, the budget would amount to between €14'000'000'000 (SEK 140 billion) – €22,5'000'000'000 (SEK 225 billion). Every year. An annual budget 34 times larger than today.

In an article from 2002, the year the International Criminal Court was constituted, Martti Koskenniemi expressed concerns that international criminal law was prone to produce "show trials".[35] Twenty years on we can note that, as a player in the crime and punishment show business, the ICC has a very meagre output. In comparison, the district court of Malmö, Sweden, produced 117 shows in the crime and punishment genre in just one week in November (17th–24th) 2023![36]

While crunching numbers, it might also be worth reflecting on racial issues and the output from criminal law. In the USA, where the problem of racial bias in the criminal law system has been discussed for a long time, black people make up 38% of the prison

35 Martti Koskenniemi "Between Impunity and Show Trials", Max Planck Yearbook of United Nations Law, Vol.6, p. 35.

36 https://www.domstol.se/globalassets/filer/domstol/malmo_tingsratt/veckans_forhandlingar/forhandlingar-vecka-47.pdf. Retrieved 2023-11-23. (List of scheduled trials at Malmö district court November 17th–24th, 2023).

population (while representing only 12% of the US population).[37] People with Black, American Indian or Latin ethnicity have a combined imprisonment rate of 2098 per 100'000 US residents. The imprisonment rate of people of White ethnicity though, is only 181 per 100'000 US residents.[38] Now, out of the 51 defendants in the 31 cases the ICC have decided on, 82% (42 out of 51) are of Black ethnicity. And as sure as the sun will rise tomorrow, these statistics have invited quite a large bulk of criticism from postcolonial and other critical perspectives.[39]

4
MAIN PLOT (II): "THE FIGHT AGAINST IMPUNITY". TOUCH OF EVIL.

Anyway, let's move on. The slogan, or 'tagline', of the ICC is this:

37 https://www.science.org/content/article/pandemic-may-have-been-setback-racial-makeup-u-s-prisons. Retrieved 2023-11-25.

38 https://www.sentencingproject.org/reports/one-in-five-ending-racial-inequity-in-incarceration/. Retrieved 2023-11-25.

39 For more on this, see Frédérick Mégret (2014), "International Criminal Justice. A Critical Research Agenda", in Schwöbel, Christine (ed.) "Critical Approaches to International Criminal Law. An Introduction", p.34–41; Lena Ina Schneider (2020), "The International Criminal Court (ICC) – A Postcolonial Tool for Western States to Control Africa?", Journal of International Criminal Law [Vol. 1], p.90–109; Ann Sagan (2010), "African Criminals/African Victims: The Institutionalised Production of Cultural Narratives in International Criminal Law", Millennium: Journal of International Studies 39(1) 3–21.

The fight against impunity continues

By supporting the Court, the countries that have joined the Rome Statute system have taken a stand against those who, in the past, would have had no one to answer to after committing widespread, systematic international crimes. The ICC calls on all countries to join the fight against impunity, so that perpetrators of such crimes are punished, and to help prevent future occurrences of these crimes.

This, of course, is an echo of the wording of the preamble to the Rome Statute of the International Criminal Court (in which we hear Virtue – rigid and pompous – making long speeches[40]), where the state parties declare their determination to "put an end to impunity for the perpetrators of these crimes and thus to contribute to the prevention of such crimes".

So, here we have a criminal court declaring that it is part of a "fight against impunity". Now, I am just a mere senior lecturer with a doctoral degree in "domestic" (Swedish) criminal law, so my reaction to this slogan is probably an expression of misunderstanding, misconception as well as ignorance. However, I contend that such a slogan is inappropriate for any court, and that it ought to be unthinkable for any court that claims authority to decide on criminal cases. Even if it had been the slogan of the operative investigation unit of a police authority, it would have been unfitting, eerie, sinister and unsettling.

A criminal court should not partake in a fight against anything (except miscarriage of justice). A criminal court should restrict itself

40 Jfr Fröding, Gustaf (1884), *Anita*

to decide whether or not the prosecution has successfully proved that the accused person has committed the crime specified in the indictment. And if it finds that the prosecution has reached the threshold of proof, declare the accused person guilty and make a principled decision on sentencing.

As a matter of fact, by using that slogan, the International Criminal Court is at risk of positioning itself outside of Law. Impunity, understood legally, is nothing more, and nothing less, than the upholding of the presumption of innocence, as it is set down in the Universal Declaration of Human Rights, art. 11.1:

> Everyone charged with a penal offence has the right to be presumed innocent until proved guilty according to law in a public trial at which he has had all the guarantees necessary for his defence.

From the viewpoint of any system of criminal law based on the presumption of innocence, no individual human being can be seen as wrongfully exploiting "impunity". In fact, from the presumption of innocence we can deduce every person's right *not* to participate or facilitate the investigation of one's own alleged criminal behaviour. In effect, the presumption of innocence gives each and every one of us the right to make it as difficult as possible for any authority to accuse us or convict us for a crime. From a legal standpoint, then, "impunity" is a fundamental human right. Fighting impunity therefore implies the breakdown or complete disregard of the presumption of innocence.

For a criminal lawyer working or doing research in any modern democratic society, this comes as no surprise. "Impunity" simply

means that a corporate manager committing tax fraud on behalf of the corporation, a bank robber, a killer, a sexual predator or a thief runs off into the woods and hides, or that he (it is most often a man) gets rid of evidence, covers up his tracks, uses a disguise or uses any other available means to make a police investigation as difficult as possible. And of course, as far as he is successful in these undertakings, there will be a situation of "impunity" for the crimes committed. However, this state of "impunity" is not a consequence of the corporate manager or thief exploiting the situation. The situation of "impunity", instead, is a consequence of the State's claim to have a right to punish in the first place.

The main objection to the analysis above would be that the slogan "The fight against impunity continues" is not intended to be understood in such a formal, legalistic way. How is it to be understood then? It seems to me that the idea of "impunity" entails at least nine[41] different meanings, aspirations or crimino-legal dimensions that ought to be separated from each other:

1. Impunity as a dissatisfaction and indignation with the existence of perceived *evil* in the world.
2. Impunity as a consequence of the fact that there is no power (sovereign, state) with a monopoly on violence from which the claim to the right to punish can be derived.
3. Impunity as a failure to anchor robustly the claim to the right to punish in penal theory (theories of punishment).

41 These nine crimino-legal dimensions are an elaboration of Jareborg's three levels of punishments. See Jareborg (2002), *Scraps of Penal Theory*, pp. 90–105.

4. Impunity as a *demand for criminalization* of actions that, as yet, are not criminalized (principles of criminalization).
5. Impunity as a consequence of *practical, factual, methodological or forensical difficulties when investigating* whether or not a crime has been committed. No perpetrator(s) can be identified or the perpetrator(s) cannot be localized and arrested; the events cannot be reconstructed (investigative failure).
6. Impunity as a *consequence of the burden of proof*. The prosecutor has not been successful in proving beyond a reasonable doubt that either 1) the accused is the perpetrator, or 2) that the perpetrator's behaviour constitutes a crime.
7. Impunity as a failure to execute or enforce a sentence. The perpetrator has escaped, fallen ill or passed away during or after the trial.
8. Impunity as a failure of a system of criminal law and punishment to deter future criminal behaviour in a population (no general deterrent effect).
9. Impunity as a failure of a penitentiary system to deter an individual person convicted of a crime from future delinquency (recidivism).

A review of some of the literature on international criminal law reveals a certain inability to separate these nine crimino-legal dimensions from each other. In fact, sometimes they are conflated in such a way that there is a risk of leading to something of an intel-

lectual disarray.[42] The reason for this seems to be an unfamiliarity with the basics of criminal law and criminology. Sometimes this unfamiliarity is even expressed as a distinct unwillingness to take criminal law, criminology and its theory seriously. This is the case when international criminal law is declared to be "sui generis"[43], and when it is described as dealing with "extreme cases" and "unusual contexts", often invoking a rhetoric of "evil", "atrocities", "mass atrocities" or "egregious crimes". And this kind of rhetoric is rather successful – the use of the word "atrocitites" makes *the fight against impunity* unassailable, it ends the discussion. The moral indignation and the righteousness of this rhetoric, portrays further questioning as indecent.[44] Especially if the questioning comes from something as trivial as "domestic" criminal law! To me, the claim that international criminal law is different, special, something more and above criminal law as it has hitherto been known by scholars of the field, appears presumptuous, pretentious and gives quite a homemade impression.[45]

In the worst case, the unwillingness to take traditional theories on punishment seriously might originate in a deeply unfortunate misunderstanding:

The time-honoured, diverse and, admittedly, often contradictory crimino-legal theories of punishment, its justification and consequences, are not at all tied to the legal system of any one specific nation state with "familiar Westphalian features"[46], they are not

42 See for example Darryl Robinson, (2020) *Justice in Extreme Cases: Criminal Law Theory Meets International Criminal Law*. Cambridge: Cambridge University Press. In chapter 5, "*Criminal Law Theory* in Extremis", Robinson fails fundamentally to make clear whether his text is about 1) the justification of punishment for certain behaviours, or 2) the redundancy of the nation state (because time and space are perceived differently in the vicinity of a black hole in the universe!), or 3) that the terms "governance" and punishment are equated (or not). Then the term "cosmopolitanism" is introduced to inexplicably motivate the replacement of the nation state with "overlapping networks" as the origin and justification of punishment.

43 Se the following for examples of this characterization: Sarah Nouwen (2016), "International Criminal Law: Theory All Over the Place", in Anne Orford and Florian Hoffmann (eds.), *The Oxford Handbook of the Theory of International Law*, pp. 752–753; Julia Geneuss and Florian Jeßberger (2020) Introduction: The Need for a Robust and Consistent Theory of International Punishment, in Jeßberger, F., & Geneuss, J. (Eds.). (2020). Why Punish Perpetrators of Mass Atrocities?: Purposes of Punishment in International Criminal Law (ASIL Studies in International Legal Theory), Cambridge: Cambridge University Press., pp 1–11.; Immi Tallgren (2002), "The Sensibility and Sense of International Criminal Law", European Journal of International Law 13, no. 3, p. 575; Robert Cryer (2011), *The Philosophy of International Criminal Law*, in Alexander Orakhelashvili (ed.), *Research Handbook on The Theory and History of International Law, Elgar Publishing,* p. 263.

44 Or as Sergey Vasiliev puts it, "whenever the question 'why punish?' is posed, the tables are quickly turned on those daring ask it: Why not punish? What else – let them go free? Yet, this answer does not truly engage with the question, and the tone of unassailable certainty hardly extinguishes it.", Sergey Vasiliev (2020), *Punishment Rationales in International Criminal Jurisprudence. Two Readings of a Non-question,* in Florian Jeßberger and Julia Geneuss (eds.), *Why Punish Perpetrators of Mass Atrocities? Purposes of Punishment in International Criminal Law.*, p. 46.

45 Without doubt, such "sui generis" characterizations of international criminal law are more likely to generate research funding, though.

46 The depiction of a nation state as a place with "familiar Westphalian features" expresses a rather condescending and demeaning view on the societal and legal systems in which billions of actual individual human beings live out their days. For an example of this rather cynical approach, see Darryl Robinson, (2020), *Justice in Extreme Cases: Criminal Law Theory Meets International Criminal Law*. Cambridge: Cambridge University Press, p. 120.

"domestic" in any way. They are inherently international. We must therefore distinguish between criminal law (the monopoly on violence) on the one hand, and the scholarly treatment of the problem of punishment on the other. The latter is, and has always been, international by nature and needs not to be reinvented for the purpose of international criminal law.

The failure to acknowledge the universal character of classical works and thought on criminal law, together with an unreflected use of buzz-words such as "atrocities", "extreme" and "peace" in works on international criminal law, explains the saddening unanalytical, and unfruitful use of the "impunity" terminology as a slogan for the International Criminal Court.

5
CONCLUSION. MODERN TIMES.

May the judge disappear,
and the philosopher continue
the peaceful exploration of the sea!

JULES VERNE (1870)
Twenty Thousand Leagues Under the Sea

Imagine a subculture in which *life in the age of the steam engine* serves as the model. It's a subculture that plays with the idea that technological development has stopped and is still based on steam power, gears, shafts and mechanics. Without widely available electricity and no electronics or computer chips. A subculture that imagines rural and city life, fashion, literature, visual art and music in a way that reflects the cultural and societal conditions that reigned during what is often called the *Victorian era*. As Jenny Sundén explains, it is a subculture which includes

> *[..] retro-futuristic dreams of what might have happened if the steam-powered, mechanical technologies of the 19th century had been given a different scope. Its retrofuturism is an anachronism in the form of conscious chronological mistakes, an inconsistent temporality that misplaces people, events, objects [...] an imaginative re-creation of the past with the help of today's technological sensibility and knowledge.*[47]

A subculture with festivals where you can buy imaginary tickets for hot air balloon rides to distant lands and where Jules Verne and Charles Dickens are still publishing new books describing both the social misery of the time and its fantastic dreams of what the future will be like. A world of circuses and freak shows, outcasts, corsets, thieves, judges in wigs, and polite elegance in a top hat. It is a re-creation of the past in the form of an alternative, invented present that, among many, many other things, still trembles in the wake of James Watt's invention and Beccaria's book.

47 Jenny Sundén (2012), *Ångpunkens politik.*,in Erling Bjurström, Martin Fredriksson, Ulf O Isson och Ann Werner [eds.], *Senmoderna reflexioner: Festskrift till Johan Fornäs*, Linköping: Linköping University Electronic Press, s. 91–99. (My translation from Swedish).

Roughly outlined, *steampunk* is that subculture.[48]

In order to participate successfully and satisfactorily in a subculture, one must familiarise oneself with its basic premises and beliefs. This is true even if one's participation is more light-hearted, temporary and playful. To engage in criminal justice research is to accept the premises of steampunk: Like people who participate in any of the many expressions of steampunk, those who wish to engage with criminal law must first familiarise themselves with its world, its basic material conditions, ideologies, fantasies and practices. One must follow its journey through the 19th century, its many and contradictory functions in a Europe marked by social unrest, industrialisation and urbanisation, the continuous struggle of its theorists to explain, justify and understand it in the light of their time, its relationship with broadside ballads and the evolving evening tabloid press. One must eventually take off the top hat, follow its new role in a post-war world of material abundance, its criminological disappointments, its cultural function in the film noir of the 1940s, the problematization of it in the Western movies of the 1960's and 1970's, its absence in the films of Ingmar Bergman, it's still much unexplored function in the global digitalised media landscape of the 21st century. One must, not unlike a follower of steampunk, accept and understand that its trajectory from the 19th century to today is a deeply serious and indispensable anachronism that cuts through the heart of our current culture.

48 Jeff VanderMeer with S.J Chambers (2011), *The Steampunk Bible,* New York: Abrams; Patrick Jagoda (2010), *Clacking Control Societies: Steampunk, History, and the Difference Engine of Escape*, Neo-Victorian Studies, Vol. 3 No. 1: Special Issue: Steampunk, Science, and (Neo)Victorian Technologies, pp. 46–71.

Criminal law, then, is so much more than just a peculiar feature of "domestic" law of the "Westphalian" nation state that gets in the way in the "fight against impunity".

If you want to meddle with criminal law, learn some steampunk first!

Murbräcka

Ulrika Andersson

MELODIE:
Du hast von Rammstein

Gregor
Gregor hat
Gregor hat mich

Gregor
Gregor hat
Gregor hat mich

Gregor
Gregor hat
Gregor hat mich

Gregor
Gregor hat
Gregor hat mich

Gregor
Gregor hat
Gregor hat mich
Gregor hat mich
Gregor hat mich gefragt
Gregor hat mich gefragt

Gregor hat mich gefragt
(nach seinem Umzug nach Göteborg)
Und
Ich hab' *Nein* gesagt

Willst du Lund bis (dass) der Tod euch scheidet?
Treu sein für alle Tage?
(Ja) Nein
(Ja) Nein

Willst du Göteborg bis (dass) der Tod euch scheidet?
Treu sein für alle Tage?
(Ja) Nein
(Ja) Nein

Gregor
Gregor hat
Gregor hat mich

Gregor
Gregor hat
Gregor hat mich

Gregor
Gregor hat
Gregor hat mich
Gregor hat mich
Gregor hat mich gefragt
Gregor hat mich gefragt

Gregor hat mich gefragt
(nach seinem Umzug nach Göteborg)
Und
Ich hab' *Nein* gesagt

Willst du Lund bis (dass) der Tod euch scheidet?
Lund lieben auch in schlechten Tagen?

Vielleicht
Vielleicht

Willst du Göteborg bis (dass) der Tod euch scheidet?
Treu sein für alle Tage?

Vielleicht
Vielleicht

The Significance of Gregor Noll

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GRAPHIC DESIGN

Ateljé Grotesk

PRINT

Livonia Print, 2024

ISBN

978-91-527-9404-3

THANK YOU

Emil Heijnes stiftelse för rättsvetenskaplig forskning
for your generous support.

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