

OF LAW AND THE WORLD

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WORLD

Critical Conversations on Power, History,
and Political Economy

DAVID KENNEDY AND
MARTTI KOSKENNIEMI

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Preface

The seven texts that follow are the edited transcripts of conversations we had between August 2021 and February 2022 while the COVID-19 pandemic kept us homebound. We had met long before—at a diplomatic cocktail party in Geneva in the mid-1980s, where we found ourselves in a corner talking about Adorno and the intellectual disappointments of our chosen field. In the years since, we remained close friends, followed similar career paths and intellectual trajectories: some time as practicing lawyers, some time in and around intergovernmental institutions, and a lot of time in the academy as teachers and scholars. We often collaborated at conferences and in mentoring and lecturing. We both had the sense that we were pursuing similar themes and political projects in our scholarship, if in different ways. We were often linked as European and American “critical” voices in international law.

The pandemic gave us the opportunity to talk about those common themes and experiences. We were as intrigued by the overlaps as by the differences. What is or was “international law,” how important or interesting does it seem today? What does it have to do with hegemony, with unequal patterns of ownership, authority, and status? We’ve both focused on the intellectual history and current practice of legal professionals in the North Atlantic. But what about everyone else? What happens when we bring all this to “political economy,” a more salient frame for critical reflection now than when we began? There is a theme running through all of the discussions: What do we mean by “critical” or “heterodox” when thinking about law, power, or history?

Our different professional, intellectual, and personal experiences inflected our engagement with these shared themes. Martti was a career diplomat in the Finnish foreign service before entering Finnish university life.

David has taught at Harvard University his entire career, with breaks in a variety of professional settings. Though we often read the same critical literatures, the intellectual and political worlds in which we did so were miles apart.

Talking things through, like teaching, does clarify one's thoughts. It also opens questions that don't find answers, reframes ideas, and raises themes in different ways as conversations unfold. As in any good conversation, we returned to issues and examples, reshuffling what we had to say about them. We drew on our prior work along the way; full citations are provided in the list of works at the end of this book. Much of Conversation 2 was first published by Routledge in *Leading Works in International Law*, edited by Donna Lyons.

We have both been blessed with wonderful mentors, colleagues, students, friends, and family throughout our careers. The more we talked together, the more often we felt their influence and support. We are particularly grateful to Tiina Astola, Arnulf Becker, Dan Danielsen, Janet Halley, Karen Knop, Päivi Leino-Sandberg, Ralf Michaels, Vasuki Nesiiah, Guy Priver, and Jonathan Zimmerman for their engagement with this project and comments on early drafts. Our thanks also to Ian Malcolm, our commissioning editor at Harvard University Press, who encouraged us to turn these conversations into a book. We would like to pay special tribute to Karen Knop who passed away suddenly and unexpectedly as we were finishing the manuscript. Karen was an altogether exceptional academic whose contributions had enriched our community for many years. Her comments on this manuscript were absolutely invaluable.

We make no overarching argument in these conversations. Rather, we share the thoughts that emerged as we talked with one another; we hope there will be something refreshing in the format. One conclusion that became clear is how tenuously we had scratched the surface of these issues in forty years of scholarly work. There remains so much to understand, and the objects for critical reflection are not standing still. We hope these conversations will stimulate your own critical thinking. We'd love to hear what you discover.

David and Martti, Cambridge and Helsinki, 2023

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CONVERSATION ONE

What Is Critique?

David: I'm looking forward to these conversations, although it's hard to know where to begin thinking about law's many roles in the world. We're both thought of as "critical" voices in "international law"—perhaps we should start by talking a bit about those two terms.

For me, "critique" is less a method or school of thought than a posture of skeptical suspicion toward some object—like international law. If you have that kind of animus, you harness what you can find in the traditions you have been exposed to and have at it. That can be thrilling in itself—the intellectual and social pleasures of mobilizing your resources to unravel what seems a worthy opponent. Quite conventional modes of analysis can be as useful as self-consciously critical ones; legal traditions as helpful as weird things you find in other disciplines. So, normal-science doctrinal or historical analytics, perhaps with a bit of psychoanalysis or postmodern literary theory or economic policy argument or Marxist social theory dragged in from here or there.

My sense is that for people who start with a critical orientation, a lot depends on whom they encounter, in writing and in person. In my experience, critique has been as much a collective as an individual project—I had mentors and students and partners in crime all along the way, you among them.

How do you see the critical impulse arising and finding expression?

Martti: It's always been more of a sentiment or a posture than technique. But it does resonate with well-known twentieth-century literatures—Marxism, psychoanalysis, critical social theory, structuralism, poststructuralism, and so on. Those readings have invited us to be suspicious of the

most common explanations or justifications for legal—or international legal—phenomena. Somehow these explanations miss the massive injustice of the world, or may even have been complicit. But what has prevented at least me from becoming a loyal adherent to any one of the critical literatures is that their critical power leads in different directions, they almost cancel each other out. While the older criticisms seek depth, and fundamental structures behind surface phenomena assumed to tell us what was *really* going on, newer ones rather focus on the surface, taking language and its phenomenological experience seriously. Or, if you wish, the older ones invite looking *behind* legal language and experience; the newer ones take that language or experience superseriously. I have both fallen into a *marxisant* interpretation of social forms as obstruction over “real relations”—but also celebrated a culture of formalism and taken legal language and cultural form very seriously.

I think the adoption of both an in-depth and a surface critique should be understood biographically, in view of what happened in social and legal thought in the 1970s and 1980s. The critical animus arose as a generational thing, a political thing, and an intellectual thing. My generational influences have to do with having come of age in northern Europe as a politically active person in those decades. Domestic politics appeared stale. But the world was burning—imperial wars, the East-West opposition, famine and revolution in Africa, cultural revolution in Europe—the 1960s generation began to penetrate public institutions. The prior generation’s experience with the war had become distant. Together with student friends we read all kinds of new social and political theory, organized meetings, and used student unions and party organizations to demand the expansion of democracy in education. One felt that everything was political—stale, but also just a tipping point away from some real transformation.

David: And somehow the political and the intellectual flowed together, no?

Martti: Yes. We wanted to become intellectuals by reading Popper, Kuhn, Habermas, and the Frankfurt school, trying to find new ways of political engagement. At the law school in Turku, my hometown, hermeneutics was big. That was, in retrospect, a good thing because it highlighted the absence of philosophical and political ambition in Anglo-American analytical jurisprudence. But to be an intellectual, hermeneutics was there to attack—structuralism was a first response, then Foucault and Derrida and

poststructuralism. These were analytically tougher than hermeneutics and did not endorse social-democratic politics. All this was good preparation for later engagement with international law, I now realize. Learning about the debates in critical legal studies in the United States gave these intuitions a powerful edge, and eventually led me from diplomacy to the university. The context of the US law school must have been radically different.

David: Formation is certainly key. Where one starts, who else is around. The literatures you mention were all in the air in American universities in the 1970s. I'd probably add those my high school teachers considered canonical—Weber, Freud, Sartre, French movies—well, and Bergman—and postwar theologians like Niebuhr, Tillich, Buber. My senior year, I somehow became fascinated by the structural linguistics of Benjamin Whorf and Edward Sapir. And by people like Marcuse, brought to our attention by the 1960s generation. So much had just happened in the late 1960s and early 1970s. By the time I got to college, it was easy to feel belated, needing to catch up. I don't think I was "critical" in any sense other than that of my milieu in college. But everyone I knew thought the war was a catastrophe—morally, politically, in every way—and showed the mendacity of the whole political class. And then there was Watergate—a gripping story that might just unravel the whole thing . . . but didn't.

It was only in graduate school—and particularly law school—that I encountered people—and ideas—that were *against* the established order in a more profound and interesting way. I had studied history and international relations in college, and I remember reading Kuhn's theory of "paradigm shifts" in scientific reason and the Left/progressive world systems and dependency ideas prevalent in international relations at the time. In law school came strands of European social theory making their way into American law in what was becoming "critical legal studies" as it reworked and extended heterogeneous legacies in American legal thought.

Like the high school material, these were all resources when I later tried to think differently myself—which I probably wouldn't have done, certainly not in so determined a way, had I not found mentors and playmates who were also trying to do that. Mentors really were crucial; it wasn't like the unfolding of ideas. The student paper that became my first international law article owed a great deal—certainly in tone and structure—to my first-year encounter with Roberto Unger.¹ *International Legal Structures*—like my critique of Henkin—was self-consciously modeled on Duncan

Kennedy's "Form and Substance in Private Law Adjudication," which Duncan gave me to read in the first weeks of law school.² I've ended up in a lifelong conversation with Duncan, whose ideas, provocations, and intellectual support are present in everything I've written.

Martti: You invoke heterogeneous literatures, to be sure, but joined by the message that things were more open-ended than people thought, there was room for experimentation. But to make use of the possibilities the political had to be closely aligned with the intellectual, as you said.

David: It didn't seem that way to me at first; critical ideas were fascinating, but their relationship with politics was elusive. Entering law school, I was a typical progressive student of my generation interested in international affairs. The world seemed terribly unjust. Becoming a lawyer promised a career doing something about it. And international law was the field with the right name, so I studied it. International law did purport to talk about—even adjudicate—big things I was interested in: Vietnam, nuclear weapons, the North's responsibilities for economic development in the South, American interventions in Latin America, the Iran hostage crisis, the energy crisis, and more.

The international law mavens I encountered wore their commitment to international law on their sleeves, each elaborating a theory about how it worked and why it was important. At the same time, they seemed to realize the legal materials were thin, contradictory, intellectually weak. They were good-hearted, cosmopolitan people; the field's weakness seemed to demand fealty that it might one day be strong.

Martti: I think much of international law in Europe is still like that, but go on.

David: They had a hard time ginning up persuasive arguments about the things they purported to consider. There were competent, but not particularly compelling, international legal arguments both for and against the legality of nuclear weapons or invading Vietnam or placing mines in Nicaraguan harbors or sharing wealth with the South or nationalizing natural resources or . . . the list went on. International lawyers seemed content with that—or lacked the cultural authority to insist that one or the other argument was the sounder one. They were ready to acknowledge that Iran raised

a good point about American interventions that should mitigate or justify the seizure of hostages, just as the United States raised a good point about the broader context of threat it felt was posed by the Sandinistas' authority in Managua. Each international legal professional had his own, often idiosyncratic position on such things—as on the bindingness of international law and a host of other questions. But why listen to any of them in particular?

More than that, talking about any of these things in legal terms seemed to miss the point: Should arguments about the “legality” of American bombing have any weight in one’s ethical assessment of the Vietnam War? And yet, people kept doing it. Leading international lawyers seemed more concerned with promoting the status of international legal argument itself than doing anything with it. It wasn’t just the people. The doctrinal and theoretical materials seemed more like arguments *for* international law than efforts to engage the world. Which gave the whole field a “doth protest too much” feel.

For all that, international law seemed a reasonable place to take on the sensibilities of the post-Vietnam culture of rulership. The glory days of postwar “best and the brightest” were over; the certainties and moral self-confidence that would saturate the elite after 1989 or the recommitment to formalism, managerialism, and empirical social scientific expertise that followed were all impossible to imagine. And critiquing a weak discipline had its advantages. The only difficult was explaining to anyone else why it was worth bothering about.

But, Martti, let me ask you more directly what you were *against*. The international law notables of the time became my target—Louis Henkin first, and then many others. Looking back, it was a strange choice. I found these men quite sympathetic—cosmopolitan gentlemen in an otherwise terribly parochial academy and profession. And, yet, disappointing. If I critiqued them, maybe I’d make them stronger—maybe they’d even thank me, bring me into their world.

Martti: What was I *against*? A surprisingly hard question. Like you, I had all the views that a progressive law student would have—and the right adversaries. But my encounter with international law was different from yours. I joined the foreign ministry in 1978, where many of my closest colleagues and superiors were left lawyers with an anticapitalist and development agenda. I was not against them; on the contrary, I admired their

activism: pushing environmental issues, women's rights, legal items related to the New International Economic Order. But I did come to suspect that the tools they, too, worked with—international law, human rights, United Nations (UN) diplomacy more generally—were not up to the job. I also learned eventually that they were not representative of the wider diplomatic and legal world. The international law establishment—people I met at UN conferences, professors whose books I had begun to read—had no critical awareness. Nothing would ever change if it were up to them. Their self-image as authorities on justice and equality was sometimes outright revolting. But I did not credit this to their malevolence; I got along with everyone pretty well. It was just that international law went nowhere near to meeting their official expectations. (I later learned that maybe they did not actually have such expectations, and I reflected on that predicament at the end of the 1990s in “Between Commitment and Cynicism.”)³

David: How such a weak field kept going—I struggled with that in a student paper that became “Theses about International Law Discourse.”⁴ I proposed that international law was failing as a practical project—becoming weaker as it became more complex and prevalent—because “it is not meaningful to speak of a particular solution to a legal problem as having been compelled by a line of reasoning. It is not true that some arguments, because of their content, are more convincing or persuasive than others.”⁵ What kept it going was a failure to see how contradictory and indeterminate it was. The 1970s had a kind of “last days of Pompeii” feel—the oil crisis, economic disarray—and I imagined international law would unravel as folks came to see its weaknesses. In my first historical article, “Primitive Legal Scholarship,”⁶ I proposed a parallel: after the Reformation split the field, an entire legal worldview fell apart as the indeterminacy of its modes of reasoning became apparent. Maybe this too shall pass.

I was of base on both counts. International law kept going precisely because it was so open-ended. Awareness of all those contradictions didn't make it fade away. I had probably been too influenced by Thomas Kuhn's argument that a scientific consensus could suddenly shatter as awareness of its limitations rose to prominence.⁷ And by Roberto Unger's apocalyptic invocation of the contradictions in ‘liberalism.’⁸ An early object lesson in the false starts that seem to go with intellectual work. There have been a lot of those!

Duncan Kennedy's structuralism pointed in a different direction—more Lévi-Strauss. Modes of cultural interpretation don't collapse around their contradictions but function by transforming contradictory alternatives—the “raw and the cooked”—into adjacent alternatives, which seemed to resolve the tension.⁹ Learning to be a competent legal reasoner meant knitting conclusions out of a field of gaps, conflicts, and ambiguities. Perhaps resolving contradictions by elision, transformation, denial, or deferral was, as I put it in *International Legal Structures*, the “subtle secret of its success.”¹⁰ That didn't make it a good thing, but it explained something of how it worked. And explaining how it worked in this sense seemed a critical thing to do—as if it worked by not noticing these recurring antinomies and elisions. My short initial piece on Henkin was like that, as I recall, describing how his text seemed to work, to sound plausible—how it knit contradictory impulses together, deferred or promised resolution of tensions it couldn't resolve, things like that.

That international law worked precisely because elites understood and managed its weakness also made sense of some early reactions to my work—as if patting me on the head and saying, “Yes, yes, dear boy, it's contradictory. I mean, what did you expect?” And if you said, “Yeah, but it's an exercise of power and isn't grounded the way it claims,” folks would say, “Well, are you surprised to find that law is an exercise of power? Perhaps it doesn't always work, but the goal to bring the world into the rule of law is a pretty noble project, don't you think? Join the team.”

Martti: Sorry to interrupt, but I wanted to say that I do recognize that reaction, though I interpret it a little more charitably. So not only “Yes, dear boy, it is contradictory” but also genuine gratitude for having been given an explanation for something that colleagues *knew* but for which they had no explanation. The indeterminacy critique may sound flattering because it suggests that legal work is really hard, the materials never suffice, there is always choice, and, as you would say, responsibility involved for those acting through law. Things really get more interesting once the analysis moves forward to those actual choices, demonstrating that if they are not logical entailments from the law but from something like patterns of normal behavior among the legal class or the structural bias of an institution, then hostility may sometimes step in, though not necessarily.

Nor is there always hypocrisy. I think practitioners have a really complex, though often not very clearly articulated, sense of what we have called

the “politics of international law.” But it is often hard in discussions to address the substance of that complexity; there is a powerful conservatism in the field, an unwillingness to deal with a problem that nevertheless is part of any professional experience. I suppose hypocrisy or cynicism may be a part of this, but I would rather look for some other frame of explanation.

David: On my side of the Atlantic, they weren’t grateful in that sense—they were confident they had always already known about the worm at the heart of being. They were more puzzled. What did I see that was new? I don’t think Henkin probably liked my saying, “You fudge a lot of contradictions,” but I don’t think others found it surprising or particularly telling. They were worried about real problems; here I was fiddling with words.

I thought a structuralist map of the field’s materials was like a secret decoder ring—everyone would want one. But no mainstream teacher seemed to. Their project was another one: adumbrating sophisticated arguments for their specific case-by-case good judgment. They weren’t turning over cards from a structuralist deck, they were meditating on the just outcome for a particular situation. Here critical inquiry may have strengthened my professional capabilities, but at some loss to my participation in the habitus of professional practice.

So I’m less sure about their sense of responsibility. They were proud to be acting in the world—if only by making international legal arguments. But conjuring with contradictory materials to generate the experience of their authority was also a way of eliding responsibility. “It wasn’t me, it was the law.”

Still, we can start to see the entanglement of the field’s internal structure and external impact. We’ve each sometimes pursued “internal” and “external” critique as separate paths—the materials are indeterminate, the world impact unfortunate—but the distinction confuses as much as it clarifies. We’ve also both argued that the internal structures of expert materials and practice have an impact, certainly on the authority of mandarin speakers which itself helps the haves come out ahead. More than that, a universalizing language that promises virtue while mud-wrestling contradictory objectives into reasoned analysis can have a legitimating, hegemonic effect.

I tried to figure out the embedded conservatism you describe by looking for blind spots and biases one regime at a time: human rights, European

law, international economic law, comparative law, law and economic development. Again, a lot of false starts and shifts in strategy—each field opened to critical inquiry in a different way. Nevertheless, whatever their specific deformations, each purported to be about equality and turned out to be about hierarchy. In each case, for all the contradictory plasticity of materials, some kinds of problems and some voices were of the table and out of sight. By promising to “take everything into account,” these elite practices consolidated their authority while keeping what they didn’t consider ofstage. Along the way, the reasoning and outcomes that emerged strengthened one ideological or material interest over others.

Marti: The external side of our critiques—as you call it—was always more tentative, more vulnerable, than the internal. Showing gaps and contradictions in the law, once you learned how to do it, became easy. So was the demonstration that, despite this, coherent patterns of decision arose everywhere in practice. Legal institutions operated in quite predictable ways. That was, after all, the very problem: the same people continued to win and lose over and over again. If that was not the outcome of legal reasoning (because it was contradictory and full of gaps), then it had to result from something else—a *structural bias*. But what did that consist of, and how did it work? This was a much harder nut to crack.

Showing that the system did not (internally) have a leg to stand on, was empty or self-contradicting, alone went nowhere to show that it is evil or that its consequences are unjust. External critique was needed. But we both hated it if critique offered itself as dogma, promising something like a true and righteous alternative to a false and evil mainstream. Things were more complex than that. Moreover, external critique rarely worked unless it could tap onto a corresponding suspicion or malaise in the interlocutor, a readiness to question existing biases. Even then, commitment to the system may override such initial suspicions, or be translated into mild reform rather than engagement with the frame.

Another thing I want to underline is the rhetorical and linguistic dimensions of our early criticisms. We were both influenced by the “linguistic turn.” I was quite stunned at how powerful structuralist analysis was in law and how utterly ignorant the field itself was of it. Here was now a demonstration of how it was possible to argue almost anything in a legally “correct” way. *From Apology to Utopia* even proposed a “grammar” of international legal language to show this.¹¹ That then raised questions about

why it was then *these* and not *those* outcomes that were preferred by the field. The field responded to such questions in bland platitudes about balancing and scope of discretion. Ad-hocracy and pragmatism. This was disappointing.

David: No kidding.

Martti: So, although both of us stayed away from conventional methodological debates, this did not mean that we weren't influenced by certain methodological writings. For me, the linguistic and rhetorical approaches were and remain indispensable. They totally destroyed the kind of midlevel play with concepts that one frequently encounters in the texts of official doctrine, as well as the naive realism that imagined *effectiveness* or *compliance* as the law's main problems. They opened the way for a younger generation to look beyond the habitual forms of abstraction in the field. But I suppose there are big variations between local legal cultures in this respect.

David: Absolutely. It felt great to find a grammar and structure to the scattered and contradictory materials and idiosyncratic analyses that constituted the field. If it was all organized around irresolvable antinomies, the ad-hocracy of the practice was no surprise. On the other hand, *not* finding a structure helped preserve the professional experience and cultural authority of "sound judgment." In that sense, the organizational key did have critical bite and you could feel the resistance. Mandarins don't want you to find the decoder ring.

I want to stress that in figuring this out, *cohort* was as crucial as intellectual heritage and mentoring. I was pushed, educated, and led by students and colleagues with lots of diverse critical projects. You and I didn't come up with this stuff—certainly not on our own. We were borrowing, being pushed, learning, experimenting. Remember how alive heterodox, critical, theoretical, leftist thinking was in those years across the humanities and social sciences?

Martti: That is true, I used to leave office at lunch hour to visit the Academic Bookstore at the center of Helsinki at a time when they still carried loads of new social science and humanities texts. But for law, I would have

continued reading European hermeneutics had I not—through you—encountered critical legal work from the United States.

David: I arrived at Harvard as the critical legal studies movement was underway. It was a fascinating, intoxicating mix of political and intellectual discussion, controversy and engagement, if overwhelmingly focused on American law. There was a lot of conflict and ferment in the American legal academy in those years—people were getting fired for pursuing critical inquiries. Writing a lot, even before I was quite sure what I wanted to say, was also a strategy to keep my job. Moving among fields, diving into high theory were others. The result was pretty scattered.

There were so many new influences in law schools then. I encountered David Trubek in graduate school and found a link between critical theory and development studies. When Guenter Frankenberg arrived in Cambridge from Habermas's institute to figure out what "critical legal studies" was all about he started a life-long conversation with German critical legal thought. Lots of us were trying to figure out what German critical theory and French "theory," as we called it—poststructuralism, postmodernism—could offer. Students who cut their teeth on that at college brought it to legal studies—Nathaniel Berman probably the best example in our field. He was constantly challenging me to be more "pomo"—I remember visiting him in Paris and being taken around to hear all the French heavyweights.

There was a lot of cross-disciplinary borrowing, also in law. Jerry Frug and I worked together closely in those years—he on the city, me on the international. In the American academy, literature and cultural studies were hotbeds of theory. Jerry and I went to their events and I tried my hand at cultural criticism in the then fashionable style. I remember critical race theorist Pat Williams and I spending a couple of summer weeks together in New Hampshire studying with literary theorists Marge Garber and Barbara Johnson—even Derrida showed up—while I was writing "Spring Break" and she was writing *The Alchemy of Race and Rights*.¹²

Martti: Though Foucault and Derrida were big names in Europe, they did not translate into the kind of legal activism they spurred in the United States. I was nevertheless fortunate to come to legal theory in Finland where the influence of the philosopher G. H. von Wright had spurred a very lively,

eclectic jurisprudential community. It may have been stalled politically by its unthinking commitment to Nordic social democracy and the welfare state, but in terms of intellectual analysis, it was, I think, the best Europe had to offer. I could not have produced my work without those readings from legal semiotics, systems theory, analytical hermeneutics, and versions of (Marxist and other) realism that were available at home. But only encountering US critical literature gave these readings a powerful edge.

David: At the same time, in the United States, feminist voices were bringing new critical tools to bear on the field, often starting by noting the absence of women in the worlds of diplomacy and international law, then asking how issues of concern to women were sidelined in the doctrinal materials and how insights from feminist theory—on the public/private split or the nature of patriarchal authority—could open lines of critical inquiry across the international law corpus. Feminist theory was as present as critical/French material—more urgent and conflicted, but very *present* in the academy, in the air. I remember Hilary Charlesworth, now a judge on the International Court of Justice, pressing me in class in the early 1980s. Clare Dalton and Mary Joe Frug were linking feminism with pomo theory—“postmodern legal feminism,” they called it.¹³ What Clare was doing with contracts I was trying with treaties. What Mary Joe was doing with legal doctrine I was trying to do with my experiences as a human rights advocate. In writing about the origins of the League of Nations, I foregrounded the role of women’s movements, doubtless under their influence.¹⁴ These were all parallel projects, which picked up steam with the next generation of students and colleagues—people like Karen Engle, Karen Knop, Kerry Rittich, Vasuki Nesiah, Ileana Porras, Annelise Riles, Helena Alviar, and many more.

I mention these people to stress the element of collaborative conversation in critique, at least as I’ve experienced it. In the 1990s, another generation of students brought an equally determined focus on the experiences of the third world with international law. Their target was less the North American international law canon than their own precursors—the earlier generations of third world intellectuals who became international legal scholars and institutional players.

For someone like Antony Anghie, the models and mentors—and opponents—were people like novelist V. S. Naipaul and the international lawyers Christopher Weeramantry, Muthucumaraswamy Sornarajah, or

B. S. Chimni, alongside T. O. Elias, Mohammed Bedjaoui, and the other leading legal figures of the decolonization generation. Tony insisted, like Hilary before him, that people like you and me come to terms with their critical priorities. There was also a conflicted and intensely personal as well as theoretical space—lots of disagreements and alternate pathways among people like James Gathii, Makau Mutua, Balakrishnan Rajagopal, all of whom were students at Harvard, organized conferences, reading groups, debates.

And it went on like that. This kind of activity has an enormous impact—I know I tried both to read what they were reading and contribute to their projects. I've stopped naming names before the time the Berlin Wall fell—even mentioning these folks reminds me how many others there have been—right up to the present. I've really been privileged to be challenged and engaged by so many amazing students and colleagues.

Martti: You received those influences firsthand; reading about them in Finland, we kept wondering what to do with them. My partner, Tiina Astola, taught me always to ask “the woman question” in politics and at work; feminist legal scholarship was lively at the university, and some colleagues at the foreign ministry, including the head of the international law division, Holger Rotkirch, were committed activists. But the Nordic context prevented that from developing into a radical, oppositional voice. For good and bad, I suppose. Later on, perhaps inspired with what went on across the Atlantic, the situation changed; there is much less complacency now with the inherited gender politics of the welfare state. The same with development. *Law and society* and *reflexive law* were big in the jurisprudence department in the 1970s and 1980s but quite integrated into the social-democratic mainstream. The later focus on identity and colonialism has distanced academic work from what goes on in government. But it is hard to make generalizations. Europe is a varied terrain—Finland is not Poland, and neither is Spain nor France nor the United Kingdom. The struggles may be the same, but the arrangement of forces varies.

David: Indeed. And I know my experience at Harvard was hardly typical—worth mentioning, I think, because thinking critically really does take a village, as they say. At least in my experience, the pressures and challenges from all sides in those years got the pot boiling. As I recall, both feminists and third-worlders in those years seemed to find external questions more

salient—it took some doing to interest them in the internal contradictions of North Atlantic legal thought. I think my engagement with them helped me figure out how the internal and external might be related. Kimberlé Crenshaw was at Harvard then as well, mentored by Derrick Bell and Duncan Kennedy as she helped build the network that became critical race theory. The early critical race work was also looking for links between the internal and external critiques of the dominant legal order.

This kind of challenge—and opportunity—continues. *Racial capitalism* has placed race at the center of international legal scholarship and revitalized a long tradition of Black and Pan-African thinking about international law. Feminist and third-worldist traditions have expanded and developed; they continue to press against the white male North Atlantic international law world. I’m also thinking of people bringing world systems analysis or contemporary Marxist modes of critique to bear—Susan Marks, Akbar Rasulov, and Tor Krever, among others in our field.

As the problems motivating critique shift to technocracy and the power of scientific and expert knowledge, Sheila Jasanof and her colleagues have drawn international law folks into the science and technology studies tradition, just as those animated by the inequalities visible after the 2008–2009 economic crisis brought various notions of “political economy” back to the field. So, there’s a lot going on, and it’s much broader than what you and I have been doing.

In the end, the critical project is a set of relationships: there’s an impulse, there’s an object that feels worthy of critical energy, and then there are mentors and intellectual legacies offering tools of engagement and colleagues, interlocutors, fellow travelers who speed one along.

Martti: No doubt the names you mention have formed an exceptionally inspiring community for critical work. There were others, too, such as Anne Orford from Melbourne or Gunter Frankenberg from Frankfurt. But no matter where you originally start—international or domestic law; international relations; some branch of history, politics, or social science—the group of people who began to think of themselves as new approaches and, with your help, organized under that label in the early 1990s has grown into the most important center for critical legal reflection on the global “situation.” Though, of course, differences and tensions remain. It is one thing if you are educated in the United States or if you come to the field as a Francophone student from, say, North Africa. Even though strong heterodoxies exist in

both places, they are hard to join together. Mohammed Bedjaoui or Georges Abi-Saab are well known as anticolonial critics but may not feel sympathy toward poststructuralist lawyers from Harvard or Helsinki. There is some good recent work—I am thinking of Anthea Roberts—on the many lives of international law: how it is one thing in Australia and another in France, both yet different from, say, Russia or China.¹⁵ If the mainstream in those places is wildly different, then so must heterodoxy be.

You reference the complex ways in which feminist and postcolonial agendas have become part of the core critical vocabulary—though in different ways in different places. In many locations, people doing classical public international law are barely beginning to adopt such vocabularies—even as they may possess long traditions of Marxist or otherwise leftist legal study. But conservatism appears in many forms and throws a long shadow over legal training in Europe. Critical strands that used to exist within early twentieth-century French or German public law, for instance, have left almost no mark in those countries' present-day internationalist mainstream.

I suppose that TWAIL—third world approaches to international law—has had most success penetrating the internationalist curriculum. Being in some ways *for* the decolonized camp has become an acceptable, even expected posture in many places. But materials produced under that label are very eclectic. Again, I suppose there is a generational issue. You and I were once reading Adorno and Horkheimer, but I am uncertain if today's TWAIL activists still do, especially if not educated in the West. The linguistic turn was a big thing in the 1970s and 1980s—but a neo-Marxist would hardly be impressed.

David: “Identity” has become a starting point for critique in a way it wasn't when we began. International law was itself *against identity*, where identity was national, but to critique international law was not at all to be *for* national identity. The idea was to get away from that choice, so empowering for both national and international elites. We now see “cosmopolitan” as an identity, but the “citizen of the world” self-conception was built as an escape from identity. The tragedies of the postcolonial state were so visible that it made the early generation of anticolonial international lawyers seem as much part of the problem as of the way forward. We could see why they had insisted on national sovereignty, but if it had been an emancipatory project, it came to seem an unfortunate step backward. At

best, a necessary “stage” in development—how confident we were in the direction of progress!

It turned out that identity had a lot more to offer—and the critique of identity required a lot more than relegating it to the past. But I still see a divide between critique rooted in the consolidation and representation of an identity and critique rooted precisely in the undoing of that kind of rigidity. There, I’m on the identity against identity side of things, if we can think in those terms. Perhaps that’s what folks bringing “queer” thinking to international law have in mind now.

Martti: I know. For any invocation of identity, one tends to look for the contrasting identity, trying to push the point that it can be both liberating and constraining.

David: Still, the initial critical impulse is usually rooted in identity, if by that we mean life experience. We’ve talked about our identities in that way. I have often met students from peripheral places or identity positions who became lawyers as an answer to their marginality, only to find their marginality confirmed rather than overcome. That can certainly ignite a critical impulse. Perhaps you’re from east or central Europe and think the European Union (EU) is the answer; you go to Brussels to work and, yikes, maybe not. Or you come from an elite stratum in a third world nation and think human rights or development will give you an establishment seat at the global table—until your early professional experiences suggest otherwise. To make sense of that experience, you start looking around for new intellectual resources.

Let me raise a different question: What about audience? Critical analysis is a performative thing, and audience is one way to ask about the effect one seeks. I did start by writing *up* to mentors—both those with critical projects and those in the international law field. But I was never going to convince the leading figures that they were part of the problem. That does happen, but the result is usually a more sophisticated version of what they were doing before. We can both think of fields that absorb critical energy like a sponge. The World Bank website is a good example: they have an army of internal researchers who domesticate critical reflections on the development experience. The human rights movement is another. My little list of possible “dark sides” has been taught all over the place to aspiring human rights advocates as issues for which they may someday need a response.

I think my work got stronger after I gave that up and wrote *out* instead, building an audience among younger people who had come to international affairs and law with their own critical energy and were interested to see how someone else raised questions or opened avenues for critical understanding. But also writing to figure things out for myself—perhaps with the fantasy that someday someone will look back and say, “Well, at least someone saw what was happening.” I was just dreaming, but one does when one writes.

And for you, Martti? There’s an aspect to your work—the comprehensive weightiness of the tomes, quite unlike my own—that is its own performance.

Martti: I think I oscillated between the sense that from now on nothing can go as usual—and that, oh well, this kind of academic work is unlikely to have much effect. Perhaps by bombarding the establishment with thick tomes . . . But I was—still am—really interested in giving a clear expression to the importance of law for the way the world has become and to the capacity of legal analysis to illuminate the working of social and political institutions. My reluctance to produce policy proposals or explain critical positions by naming large structural causalities arises from an interest to speak to people who recognize the fragments I bring them as part of the injustice of the world but lack faith in any clear existing remedy. Or perhaps, like me, they feel that available remedies are “part of the problem.” The audiences have always been students and colleagues with an already critical suspicion but nowhere to take it. It turns out there are lots of such people.

David: Surprisingly so.

Martti: As you know, I ended up writing *From Apology to Utopia* as a diplomat; no doubt I was thinking of my left colleagues as an audience. The idea was to try to show to them—and later also students—that having that suspicion was fine, that there was an explanation for why international law was so disappointing, and how it might be employed with less danger of bad faith. It did not have a ready-made set of solutions to world problems; on the contrary, it was often an aspect of them. But it could still be used for good purposes. I did not write against them; rather, more to impress them and invite them to think about it in a new way. In addition, I chose a rather ‘philosophical’ style for *From Apology to Utopia* because