International Law in a Post-Modern Hall of Mirrors: International Legal Structures, by David Kennedy

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INTERNATIONAL LAW IN A
POST-MODERN HALL OF MIRRORS*


Reviewed by Edward M. Morgan**

Lolita, light of my life, fire of my loins. My sin, my soul. Lo-lee-ta: the tip of the tongue taking a trip of three steps down the palate to tap, at three, on the teeth. Lo. Lee. Ta.1

International law devotes a great deal of attention to its sources. Scholars have produced a large body of work about both the conditions under which treaties, custom or general principles of law bind actors and the hierarchy among the various doctrinal forms which might apply in a given instance.2

I. INTRODUCTION

The opening lines of Vladimir Nabokov’s most renowned novel tend to take readers by surprise. Having heard of and anticipated this famous story in which the term "nymphet" was

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coined, one might expect any number of approaches and themes: a quasi-pornographic appeal to the senses, or perhaps a psycho-drama of passion and guilt, or even a morality lesson in wrong and right. Indeed, the first short sentences of the book are, although sarcastically exaggerated in tone, seductive in just this way. The remainder of the paragraph, however, reveals the author's hand, exposing the novel as having little in common with what the reader had been led to expect. *Lolita* is about neither sex, nor psychology, nor morality. It is about the linguistic games we play in expressing our feelings, thoughts and judgments in words. It is about modes of expression rather than content; and in this it is the seminal post-modern work of literary art.

David Kennedy's *International Legal Structures* needs no such entrapment in its initial phrases. The very appearance of the book — its expansive survey of subject matters contained in the table of contents, its prolific and detailed footnote references, its rigorous adherence to doctrinal terminology in chapter headings, *et cetera* — accomplishes the task of a seductive first impression without the need for any more direct opening moves. Indeed, the introduction to the book goes so far as to warn the reader that although the work may appear to be "structured somewhat like a treatise on public international law," the narrative will "follow paths quite unfamiliar to those... who customarily follow doctrinal developments, interactions and applications."

As the first sentence in the book reveals, Kennedy's interest is in the modes of self-expression of international legal doctrine.

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3. From his jail cell early in the novel, the narrator Humbert is made, in mock sentiment, to express the attitude of the entire work. "Oh, my Lolita, I have only words to play with!" Nabokov, supra, note 1 at 34. See also Nabokov's characterization of himself as a writer, and his perspective on his own efforts to express the view of the world that his life has given him: My private tragedy, which cannot, and indeed should not, be anybody's concern, is that I had to abandon my natural idiom, my untrammeled, rich, and infinitely docile Russian tongue for a second-rate brand of English, devoid of any of those apparatuses - the baffling mirror, the black velvet backdrop, the implied associations and traditions - which the native illusionist, frac-tails flying, can magically use to transcend the heritage in his own way.


Modern international discourse typically casts states and statespersons in the roles of heroes and villains, victims and perpetrators, et cetera. For Kennedy, however, the only protagonist is doctrinal language itself, which is presented as devoting "a great deal of attention to its sources" where more traditional treatises would doubtless have one nation devoting attention to the aggressive or offensive actions of another. For Nabokov's Humbert, love-talk is love itself; and for David Kennedy's lawyers and state-affiliated practitioners, international norms take no form but that of their rhetorical structures.

It is thus a moment of admirable understatement when Kennedy asserts in his introduction that, "[t]he approach which I take to these familiar materials is somewhat unorthodox." Indeed, the book's opening ploy does not stop at the initial distancing of the doctrinal rhetoric from its content. As the second sentence reveals, a conscious attempt is made to distance the author himself, along with his work, from the scholars and writing with which international law has traditionally been populated and by which it is generally characterized.

International law as contemporary scholars know and study it, is, despite its ancient roots, essentially a modern phenomenon. Indeed, it may be said to have come into its own as a discipline with its maturation from the skeletal nineteenth-century pronouncements of the "law of nations" to the elaborate treaty and institutional structures of the post-World War I era and, finally, the doctrinal proliferations of the post-World War II era. As such, the legal writing with which those in the discipline have become familiar generally takes the form of a distinctly modernistic rendition of, or explanation for, the ways in which the law attempts to govern the world of international relations. Not only does this body of doctrine and scholarship exhibit a departure from the pre-modern formalism

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5 Ibid. at 7.

6 Ibid. at 7.

7 Kennedy has himself written elsewhere on the origins, and eventual twentieth-century maturation and institutionalization, of international law. See D. Kennedy, "Primitive Legal Scholarship" (1986) 27 Harv. Int'l L.J. 1; D. Kennedy, "The Move to Institutions" (1987) 8 Cardozo L. Rev. 841.
of rationalist or conceptualist method, but it reveals a pragmatically modern tendency to situate theory and intellectual reflection in actual practice — thought becoming a mode of action, and (states') action being constitutive of thought. Moreover, the themes of this writing are those of modernity generally, in that the doctrines and discourse of the past are submerged in favour of a purposive interpretation of precedents and future direction.

In pursuing their modern tasks, international lawyers have produced voluminous arguments and doctrines addressed to why and how state actors are legally bound in the absence of any visible overarching legal authority. With his interest in rhetorical structures, Kennedy's task, of course, is not to add to this body of international legal writing, but to stand one step removed from it, providing what can only be called a post-modern account of the modern legal phenomenon. Thus, the book does not explain the rules of the international game. It rather explains the explanations of the rules; modern doctrinal expressions are placed under such an intense level of scrutiny that it becomes clear that it is not the meaning of the law which is the subject matter of the book, but the "meaning" (if this word can be used here at all) of the meaning of law.

In a nutshell, International Legal Structures is itself structured by a division into what international lawyers generally consider to be three distinct doctrinal structures: sources, process, and substance. To use Kennedy's distanced phraseology, each of the three chapters respectively attempts to unwind modern doctrines and arguments about the sources of law in an international setting, the international legal processes of participation and adjudication; and issues of substantive legality and illegality among states. No attempt will be
made in this essay to cover in an exhaustive fashion every nook and cranny of doctrinal argument with which the reader is meticulously presented;\(^\text{11}\) rather, this essay will attempt to illuminate the reader as to the value of Kennedy's endeavour by mirroring not only the structure and most fundamental themes of the book, but the analytic approach itself. That is, Kennedy's basic aesthetic posture,\(^\text{12}\) his post-modern analysis of modern international legal expression, will be explained by reference to, and by a post-modern analysis of, modern literary expression.

Since Kennedy's approach bears marked similarity to a literary parsing of various doctrinal arguments, this review's otherwise unusual approach to a law book seems peculiarly appropriate. In keeping with the overall structure of the book, three examples of literary modernism have been chosen, each of which deals in some way with the respective subject matters or categories of sources, process, and substance. One early modern piece, Joseph Conrad's *Heart of Darkness,*\(^\text{13}\) will be utilized as an allegory for the modernist search for the "sources" of meaning and for the doctrinal search for the sources of international law. Following this, Virginia Woolf's modern masterpiece, *To The Lighthouse,*\(^\text{14}\) will be used as a medium through which to highlight the "process" themes of participation and self-realization in the modern world, and to understand more fully the doctrines of juridical personality, recognition, international jurisdiction, and standing. Finally, T.S. Eliot's *The Waste Land*\(^\text{15}\) will

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\(^{11}\) In this, the present essay reflects Kennedy's observation about his own book in relation to traditional treatises: "Although this book is structured somewhat like a treatise on public international law, the cases and doctrines I have chosen are no more than exemplary. I have made no effort to be complete or definitive in my compilation of cases and references." Kennedy, *supra,* note 2 at 7.

\(^{12}\) On Kennedy's self-conscious move away from a strictly logical analysis in favour of a more aesthetically-oriented approach, see D. Kennedy, "Theses About International Legal Discourse" (1980) 23 Germ. Y.B. Int'l L. 353 n.4.


be examined for its high-modernist statement of the "substantive" state we are in, and for its attendant reflection of modern doctrinal articulations of substantive rights and wrongs. In reviewing a book like *International Legal Structures*, it seems impossible to resist holding the hall of mirrors in which legal doctrine is scrutinized up to yet one more set of mirrors.

II. THE HEART OF DOCTRINE

The primary conceptual problem confronted by the system of legality obtaining between nations has been apparent at least since international law was identified by John Austin as being "law improperly so called." That is, international jousting and its accompanying set of rules takes place in an arena where all the players are sovereign, but none is the king. This scepticism born of Austinian positivism, in turn, tends to correspond with the lawyer's innate distrust of a system which purports to at once emphasize and abuse the crucial legal concept of sovereignty. The struggle of international law, and in particular doctrinal pronouncements with respect to the sources of international law, has been to accommodate the uncomfortably twinned propositions that the participants as well as their systematized game are insuperably sovereign.

In an imagistic style which suggests a similar thematic challenge, Conrad's portrait of Marlow's search for the notorious Mr. Kurtz is marked by the imaginative pairing of opposites. *Heart of Darkness* commences in a mist-shrouded Britain, where the whereabouts and activities of Kurtz are an enticing mystery, and where the narrator, Marlow, anticipates the inevitable clarification and understanding to come from his journey to the clear, untouched air of Africa. At the same time, the light of European civilization and the whiteness of European skin, like the lights of London and the English coast as seen from the ship, fade in Marlow's mind into the darkness of the unsettled African terrain and the uncivilized African population. The familiar Thames and the distant, uncharted Congo River flow in and out of Marlow's consciousness, establishing

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an early structural opposition which the reader assumes the tale will ultimately bridge.

As the journey of discovery progresses, however, these already antonymical images are then turned on their heads. Thus, the blackness and savagery initially associated with the African jungle and its people is eventually reversed with the progressive revelation of the unsavoury European lust after the white tusks of ivory. Marlow's vision of the enlightenment, health and rational self-control of English civilization exported to a dark, disease-ridden and barbarically passionate continent is transformed before the reader's eyes into a picture of foreign chaos, insanity and sickness invading the orderly and healthy lives of the Africans in their own world. The articulate Kurtz engages in "unspeakable rites," the legendary descriptions which accompanied his life being subtly transmuted into the cabin boy's simplistic final announcement that "Mistah Kurtz — he dead."17 Perhaps most important, the adventurous search into the heart of a remote continent unearths a message of darkness discernible in the heart of every person at home. As the imagery continually flips, and white merges with black just as darkness becomes light, one gets the feeling that for Marlow (and for Conrad) nothing is as its seems; true meaning is found in the opposite of where it would first appear to lie.

Having made one's way through Conrad's clever narrative imagism, employed in the ingenious attempt to reveal meaning beneath what otherwise appear to be vacuous adventures of modern life, one reads the doctrinal statements about the sources of international law with a remarkable sense of déja vu. It is, of course, the fundamentally problematic nature of international legality — the idea of a binding law among sovereigns — that makes for both the pitfalls and the genius of sources doctrine. For lawyers, the venture into the relations between states is truly a journey to a different part of the world; but is one which threatens to be ultimately unsatisfying in its inability to fill the normative void with interstate authority. The point of doctrines about sources is to overcome this appearance of an inevitably vacant system by locating binding legal authority where the reader was least expecting it, and

17 Conrad, supra, note 13 at 150.
where as a consequence the notion of systemic norms is least vulnerable to sceptical attack.

In good Conradian fashion, sources doctrine begins with a pairing of opposite images. As Kennedy notes, the thematic opposition central to international legal pronouncements about sources is that of "hard" and "soft" forms of argument.\(^{18}\) Thus, "hard" argument, immediately associated with treaty law, presents itself as grounding the source of binding obligation in the consent of the relevant sovereigns. Contrarily, "soft" forms of sources argument, associated in the first instance with customary norms, seek to give effective embodiment to some transcendent or extra-consensual notion of justice among states. In this way, the adventure into the heart of international doctrine truly takes on the quality of a journey, with the search for sources moving from the familiar starting point in sovereign authority towards the mysterious, yet promising notion of systemic (trans-sovereign) control; while at the same time the hope is held out that the soft vagueness of international authority over state actions can be crystallized into formal conformance with the hard specificity of sovereign commands.

Like a nineteenth-century African explorer’s, the lawyer's quest after a transcendent normative authority is at once premised on a perception of the absence of this type of meaning in the positivist world of domestic legality, and inspired by the potential for imbuing the mysteries of transnational law with the sense of clarity and obligation characteristic of the legal system at home. Yet, true to the complexities of a modernist understanding of meaning, sources doctrine allows for no such ready solution. Rather, as one delves into the detailed rhetorical wrinkles that inform treaty and custom doctrine, the positions of "hard" and "soft" begin to reverse. Thus, as Kennedy notes, positivists defending the authoritativeness of treaties have, in international legal debate, "raised the soft norm *pacta sunt servanda* to a new status,"\(^{19}\) even going so far as to

\(^{18}\) *Supra,* note 2 at 29. "Sources rhetoric provides two rhetorical or persuasive styles, which we might call 'hard' and 'soft'."

\(^{19}\) *Ibid.* at 34. The notion that agreements or obligations must be obeyed — *pacta sunt servanda* — is generally identified as underlying all treaty obligations as "an antecedent general principle of law": A. Fitzmaurice, "Some Problems Regarding the Formal Sources of
"[extend] the validity of treaty-based norms to those who had not explicitly consented on the grounds that treaty-following was just.\textsuperscript{20} Likewise, naturalists defending the inherent justice of legal principles have typically argued that customary law "most accurately represent[s] the way in which sovereigns want to be treated,"\textsuperscript{21} so that custom becomes law "when 'accepted' as law."\textsuperscript{22} The desired message, of course, is not that the law is meaningless, or that it has no authoritative source, but that things are not as simple as they seem; one has to look deep, and often in the opposite direction than that which was anticipated, in order to find a meaningful source.

When one scrutinizes both Conrad's and the international lawyer's sophisticated modernism under a post-modern lens, however, it becomes clear that the pairing of opposites as an explanatory device simply does not operate so as to expose a true source or meaning. That is, the erecting of a conceptual dichotomy, and the subsequent reversals of imagery and styles of argument, make for intriguing rhetorical and narrative structures, but in the end these structures are supported only by their own momentum. As explicative devices, they are self-referring even in their antonyms, and self-destructive of any possible grounding in a coherent understanding of their subject matter. The discursive structures of modernist argument are apparently built on a foundation — a source, as it were — of thin air.

For Conrad, the problem is quite simple to describe. In achieving his understanding of the complexities of the human heart and the darkness of modern life, Marlow's thinking has relied on too


\textsuperscript{20}Kennedy, \textit{ibid.} at 34.

\textsuperscript{21}\textit{Ibid.} at 35-36.

\textsuperscript{22}\textit{Ibid.} at 36. Typically, customary norms are said to go beyond sovereign consent in the source of their authority, while at the same time it is found that they "find [their] source in the will of States": R. Baxter, "Treaties and Custom" (1970) 129 Recueil des Cours 25, 31; see also A. D'Amato, \textit{The Concept of Custom in International Law} (Ithaca, N.Y.: Cornell University Press, 1971) at 75 (the "voluntaristic aspect" of customary international law "is precisely what makes it acceptable to nation-state decision makers").
many opposites. Rather than providing clarity and definition, the images and notions of light and darkness, order and chaos, sickness and health, savagery and civilization may be seen to have dangerously supplemented each other.\textsuperscript{23} Thus, in imagining his journey from civilization to savagery down the Congo as providing a modern parallel for the ancient Roman soldier sailing up the Thames into barbaric Britain, Marlow effectively undermines the coherence of either notion by making the meaning of each rely on its exact opposite. While it is impossible to understand civilization without reference to inherent human savagery—the very notion of civilization being that it engulfs and transcends savagery—the juxtaposition is conceptually dangerous. Civilization needs savagery for meaning, yet it is threatened by the notion of savagery; for, by definition, civilization excludes savagery. Civilization seems unable to live with savagery, and yet is incomprehensible without it. In the end, all that one can say for Conrad and his Marlow is not that meaning exists in unexpected places, but that the attempt at extracting meaning has resulted merely in a clever series of imagistic manipulations. The reader is presented with a world in which no point exists without its irreducible, but self-destructive counterpoint.

For the lawyers and statesmen of the international system, the problem of sources is even further compounded by the expectations that we bring to the inquiry. That is, like Conrad's modernist narrative, sources doctrine suffers from the dangerously destructive attempt to ground the meaning of "hard" in the notion of "soft", the meaning of principle in consent, state sovereignty in systemic superiority, \textit{et cetera}. Beyond this, statements of international law about sources embody, in Kennedy's words, an "abstract detachment from the content of the norms whose authority they delimit."\textsuperscript{24} The idea, as Kennedy explains it, is to utilize

\textsuperscript{23}The notion that the poles of a conceptual dichotomy may constitute a 'dangerous supplement' for each other has become a mainstay of post-modern interpretation and criticism. See J. Derrida, \textit{Of Grammatology}, trans. G.C. Spivak (Baltimore: John Hopkins University Press, 1976) at 141-65; and for the application of this notion to legal reasoning, see G. Frugg, "The Ideology of Bureaucracy in American Law" (1984) \textit{97} Harv. L. Rev. 1276 at 1286-89; and see also P. Macklem, "Deconstructing Bliss" (1986) [unpublished manuscript on file with the author].

\textsuperscript{24}Kennedy, supra, note 2 at 29.
abstract discussion about a normative order in such a way as to ensure that both "hard" and "soft" arguments about binding authority will remain attractive: sovereign autonomy guarantees the attractiveness of hard, consensual sources, while the separation of sovereigns (that is, the impermissibility of their mutual impingement) fortifies the notion that they must restrain their voluntary actions, such that hard sources ultimately become transcendent and soft. Thus, sources doctrine flourishes and, indeed, on its own resolves numerous international disputes, without ever having to discuss the very thing that attracted the lawyer's attention in the first place: the normative content of the interstate system.

Ultimately, therefore, sources discourse must be said to disguise rather than to expose the inner heart of doctrine. As Kennedy unearths for his readers repetitive reflections and permutations of the dichotomized "hard"/"soft" rhetoric, it becomes clear that sources doctrine is riddled with a form of argument which, to put it mildly, "continues the problematic which motivates it."

The result of Kennedy's intense scrutiny of these arguments is to demonstrate that their genius lies in having provided manifold doctrinal reflections of the underlying juxtaposition of a sovereign authority with systemic normativity, and in having done so in a way that allows the contradictory strands of thought to apparently coexist.

The problem is no more resolved than is Marlow's quest for a solitary, untwined meaning; yet the rhetoric in which the search for legal sources is conducted makes it appear that the puzzle of

\[25\text{Ibid. at 32.}\]

\[26\text{Not only do the twinning and surprising reversals of "hard" and "soft," consensual and systemic, serve to characterize the general nature of treaty and customary law, but even within each of these categories a similar rhetorical pattern is identified. Thus, for example, doctrines about treaty creation which emphasize consent (For example, signature, ratification, etc.) are tempered by exceptions to usual treaty norms based in an extrinsic sense of justice (For example, rebus sic stantibus – the doctrine of changed circumstances); similarly, doctrines about custom formation which emphasize a conception of the good (For example, the binding of non-participating or inactive states) are constantly tempered by doctrines providing for consensual opting out of customary obligation (For example, "persistent objector"). The totality of doctrinal manifestations of this basic schism seemingly constitutes an endless spiral. Ibid. at 32-54.}\]

\[27\text{Ibid.}\]
sovereignty — that is, sovereignty of states versus sovereignty of the law — has been solved. It seems that if black can coexist with white in the colour scheme of Marlow’s thoughts, or "if the 'hard' can lie down with the 'soft' in sources arguments," then people will be civilized in their extant savagery and "sovereigns will be able to remain autonomous within a binding normative order."²²

III. TO THE COURTHOUSE

The project of doctrines about international legal process is system-building. As traditionally presented, the legal pronouncements in this general category commence with rather minimalist assertions about the attributes of statehood, recognition and juridical stature in the international arena. They then move through various attempts to delineate the outer limits of domestic jurisdiction and to define the requirements of participation in an inter-sovereign system, and finally culminate with full-blown expressions of international process in the procedural mechanisms of international institutions and the World Court. The fundamental idea is to elaborate a systemic or participatory structure for independent states, which can support what is here still only hinted at: the enforcement of substantive international norms.

Virginia Woolf’s modernist classic, To The Lighthouse, expresses a parallel theme of participatory interaction in the movement toward, as opposed to the substantive definition of, truth. The deceptively simple plot depicts the family of characters simultaneously striving toward and deferring to a different day their ultimate goal, the connotation being that it is the process of considering and getting to a meaningful existence, rather than the shape of meaning itself, that is the subject with which the author is concerned. Woolf is nothing if not a master of narrative and structural technique, and the intricate interpersonal drama portrayed in the novel, all sculpted from the bare factual material of a conversation about the weather and a planned trip to a nearby lighthouse, evidences this craftsmanship. Each character to appear

²²Kennedy, ibid. at 32.
on the scene, from the naively excitible son, James, to the artistic and independent Lily Briscoe, the calculating and realist Mr. Ramsay, and the imaginative and impractical Mrs. Ramsay, embodies a distinct perspective on or version of truth, and each is portrayed with equal vigour and intimacy by a narrator that seems capable of observation from both within each individual consciousness and from its own omniscient point of view.

Not only does the narrative account weave in and out of each character's mind as the rudimentary plot unfolds, but the overall structure of the book is such as to reflect the competing personalities and versions of truth. In particular, the first chapter, "The Window", is paired with the second, "Time Passes", in a way that accentuates the conflict between the warm and passive female and the cold and active male figures of Mrs. and Mr. Ramsay. The reader is, quite literally, presented with a window on the sea, an initial insight into the paradoxical mental fluidity and physical inertia of the woman for whom the social logic of bearing children has replaced the urge for artistic creation. This, in turn, is followed by an account of the similarly paradoxical corrosive yet blind passage of time, or the predictable stability and methodological activity of the man for whom a career of logical inquiry has undermined the capacity for intuitive or imaginative vision. The fixed gender identities, much like politically self-interested states, are presented as both autonomous and mutually destructive in their unresolved, competitive situation.

The goal of To The Lighthouse is not so much to surmount or diminish the insurmountably opposite gender types, but to point to an androgynous forum in which the man can partake of the woman's vision, and the woman can participate in the man's energy. In the third and final chapter, "To The Lighthouse," Mrs. Ramsay has died and the artist, Lily Briscoe, paints for Mr. Ramsay an idealized version of his late wife, her creation from memory somehow defusing the destructive opposition of femininity and masculinity by negating the opposition, but not the characteristics, of either. One is reminded that throughout the first part of the book, as the narrative voice vacillated from one character's mind to another, the omniscient storyteller periodically repeated the line, "Someone had blundered," signalling that although many diverse perspectives exist, it is crucial that something replace the extant
opposition of forces. In the last part of the book, the same narrative voice describing the eventual boat ride to the lighthouse repeats at intervals the phrase, "We perished, each alone," the connotation again being that unbridled antagonism, or autonomy of self-conception, is inevitably destructive. Like the lighthouse in Chapter One, the painting in Chapter Three is never actually described for the reader. Yet as the characters move toward their goal, and as the artist fashions the idealized woman from imaginative memory, the various perspectives on the lighthouse are seen to have at least achieved a medium for expression, replacing their initially insulated and uncommunicative existence.

Much like the Ramsays, states are initially portrayed in process doctrine as being autonomous in their self-conceptions and antagonistic in their identities and world views. Indeed, the very attributes of their statehood — the characteristics which give them juridical personality — are for the most part said to rest on the types of unilateral assertions of stature which stand in destructive opposition to any equivalent assertion of personality with which they collide. Thus, for example, an entity must simply acquire a discernible population and territory, and maintain over these an effective coercive power, in order to be three-quarters of the way to being a full-fledged international person.29 As Kennedy notes, international law therefore sets itself the task of providing some systemic or participatory definition for its juridical persons and for the jurisdictions of these entities vis-à-vis each other, as well as a definition of the system itself vis-à-vis each of these international persons.30

29 See Montevideo Convention On Rights and Duties of States, 1933, 28 A.I.L. Supp. (1934) 75: "The State as a person of international law should possess the following qualifications: (a) a permanent population; (b) a defined territory; (c) government; and (d) capacity to enter into relations with other States."

30 Supra, note 2 at 117.

"Doctrines of 'participation' abstractly delimit the actors whose interests and nature will be constitutive of international law and whose substantive behaviour will be controlled by international law. Doctrines of what might loosely be called 'jurisdiction' abstractly delimit the avenues of legitimate interchange out of which authoritative norms grow and the spheres of activity which will be governed by substantive international law."[Footnotes omitted.]
The narrative techniques in which process norms are expressed are typically rather clever. That is, the logic of doctrines about participation and procedures in the interstate system is such that it provides a medium for communication and a forum for action between nations which has many substantive overtones, without having to explicitly delineate what kind of things states are prohibited from saying or doing. Thus, by way of illustration, the doctrine of recognition is said to provide for a systemic affirmation or veto on the otherwise auto-determined (that is, determined by the subject entity itself) question of who it is that counts as a sovereign participant and has an official voice in substantive international discourse,\textsuperscript{31} while it remains distinctly silent, or deferential, with respect to the content of such discourse. Yet, as Kennedy points out, "[r]ecognition seems to lead a double life."\textsuperscript{32} While remaining substantively deferential to sovereign autonomy, it provides the registry of whose voice (and, consequently, of what viewpoints) will be heard in international forums.

Much like Lily Briscoe, in bridging the communicative gap between the opposing personalities, the creative or system-building efforts of process doctrine point the way toward a substantive, idealized view of truth. The reader is, in a sense, duped, but it seems all for a good cause. After all, the initial positions of outright antagonism were viewed as destructive by all observers of the scene. In moving toward substance, and providing an androgynous space in which the qualities of female and male can participate in productive expression, Lily gives us a strong hint that the ultimate view of truth will certainly look more like Mrs. than Mr. Ramsay;\textsuperscript{33} likewise, in providing the framework for the expression of conflicting viewpoints, process doctrine moves towards substance, thus hinting at the ultimate form of the dispute's resolution. In structuring the

\textsuperscript{31}For a classic articulation of this notion, see the statement of Cardozo J. in Sokoloff v. National City Bank of New York 239 N.Y. 158 at 165 (1924); 145 N.E. 917 at 918 (1924): "Juridically, a government that is unrecognized may be viewed as no government at all...

\textsuperscript{32}Supra, note 2 at 132.

\textsuperscript{33}Some feminist critics, most notably Kate Millett, have identified the image of Mrs. Ramsay as representing Virginia Woolf's ideal of femininity. See K. Millett, Sexual Politics (London: Virago, 1977) at 139-140.
courthouse, the engineers can't help but provide a glimpse of the merits of the case.

There is, however, a crucial problem in both bodies of narrative. The dilemma of To The Lighthouse is presented by the fact that in overcoming the dangers of the binary gender oppositions, Lily Briscoe's solution can also self-deconstruct. That is, Lily perceives masculinity as an inherent supplement for femininity, and undermines the meaning of the opposition by identifying it as just one more construct in our social discourse, our narrative, which can be unmade just as it was "man"-made. What goes unsaid, however, is that Lily herself is equally a product of the narrative. Woolf's elusive narrator weaves its way in and out of Lily's consciousness just as it does for every character in the book, implying that the version of truth that is Lily is just one more artificial construct of a narrative which, despite its remaining unidentified, has a personality all its own. Woolf therefore seems ultimately to be caught in the cleverness of her technique. By spinning a narrative web through multiple viewpoints and forces, she undermines the truth of each autonomous one while creating a structure in which oppositions can be transcended in a movement toward a synthesized truth; but in the process she reveals her own movement or structure to be just one more artificial construct to be spun into yet some other web.

Just as Woolf cannot possibly identify truths as fundamentally contingent and surmountable in one breath and identify her own transcendent truth in the next, so international process doctrine can ultimately be seen to be too clever by half. In Kennedy's words, the gimmick of process doctrine is to maintain its posture as the "humble handmaiden to a substantive international legal regime," while simultaneously "assert[ing] itself as the dispositive international legal regime." It accomplishes this magic by articulating both a deference to sovereign authority and an assertion of its own systemic authority, the double implication being that the system is no more, but also

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34 For an identification of Virginia Woolf's method as early deconstructionist, and of Lily's role in To The Lighthouse being to "deconstruct the death-dealing binary oppositions of masculinity and femininity," see T. Moi, Sexual/Textual Politics: Feminist Literary Theory (London: Methuen, 1983) at 13.

35 Kennedy, supra, note 2 at 166-167.
much greater, than the sum of its parts.\textsuperscript{36} The famous \textit{Nottebohm} case,\textsuperscript{37} in which Guatemala's confiscation of an individual's property was analyzed by the International Court of Justice as a question of Liechtenstein's standing to bring a claim on the individual's behalf, is cited by Kennedy in illustration of just such an international process trick.\textsuperscript{38} In dismissing the claim against Guatemala on the basis of Liechtenstein's lack of legitimate association with the individual complainant, the court raised its own authority over that of the claiming state when considering Liechtenstein's participatory position; and at the same time it is submitted to the insular state authority of Guatemala in considering the substance of the action.

The result of this convoluted process discourse is to establish for the institutional embodiments of the international system the authority to act in facilitation, but not restriction, of state power. Despite the system's elaborate exercise in self-assertion, therefore, the approaches and techniques employed in international process doctrine serve to construct a system which is forced to constantly jockey for strategic position much like any one of its constituent state parts. The system's strength, it would seem, is based on its own tactical manoeuvres in avoiding direct confrontation with any equally strong sovereign. In Lily Briscoe fashion, the forum constructed for mediating the various opposing forces gets caught up

\textsuperscript{36}The following statement by the Permanent Court of International Justice is perhaps apt: 
... the independence of Austria ... is nothing else but the existence of Austria ... as a separate State and not subject to the authority of any other State or group of States. Independence as thus understood is really no more than the normal condition of States according to international law; it may also be described as sovereignty ... by which is meant that the State has over it no other authority than that of international law.

\textit{Austro-German Customs Union Case (Advisory Opinion),} [1931] P.C.I.J. Rep. Ser. A/B, No. 41. The suggestion seems to be that independent Austria is under the authority of no other state, but is under the authority of all other states.


\textsuperscript{38}\textit{Supra,} note 2 at 166-172.
in the narrative of which it is a part, becoming in the process just one more opposing force.39

IV. THE WRONGS-AND-RIGHTS LAND

If the problem of sources doctrine is, as suggested earlier, to overcome Austin's sceptical attack,40 the challenge of substance is to deal with international legality's "tender vulnerability to the worlds of politics and ideology."41 Having disposed of the assorted problems of positivism in the more preliminary sources and process stages of its system-building efforts, international law confronts in its substantive aspirations the seemingly dangerous obstacle of realism.42 The idea is to control political confrontation through substantive norms of war and peace, or doctrines which manage state force and mandate interstate cooperation, without succumbing to the pressures of realpolitik seen to be lurking beneath both the formulation and the enforcement of the rules. In short, international law must, in its final phase of defining substantive rights and wrongs, transcend the political contexts of which it is born.

In approaching this task, modern substance doctrine evokes from its audience a sense of promise as well as disappointment. The regime of substantive international law is fragmented and scattered across the subject matters and geography of the world. As Kennedy

39 Perhaps the most explicit illustration of this phenomenon in international process, or system-building doctrine, is found in the Reparations Case (Advisory Opinion), [1949] I.C.J. Rep. 174, where it was held that the United Nations, as an institutional embodiment of the international legal system, is itself a possessor of juridical personality and can therefore claim compensation when injured by a member-state. The court in effect asserted that the system, like any person, is alive: "The [U.N.] Charter has not been content to make the Organisation that created it merely a centre 'for harmonising the actions of nations in the attainment of these common ends' (Article 1, para. 4). It has equipped that centre with organs..." [emphasis added].

40 Supra, note 16 and accompanying text.

41 Kennedy, supra, note 2 at 196.

42 See, for example, H. Morgenthau, Politics Among Nations, 4th ed. (New York: Knopf, 1967) at 282: "Both attempt and success [at establishing substantive international law norms] depend upon political considerations and the actual distribution of power in a particular case."
notes, "while some areas (that is, some substantive fields or geographic regions) ... are rather elaborately regulated, others await normative treatment," the overall effect being one of a complex, and at times highly detailed, patchwork.\textsuperscript{43} The fractured quality of this regime, reflecting the apparent political and ideological sensitivities of the issues and the attendant difficulties in normative expression, in turn engenders some degree of hope for the future and frustration with the present and past. In Kennedy's words, "the fragmentation of substantive doctrine seems both to undercut and to substantiate its utopian relationship to expectations generated by process and sources...."\textsuperscript{44} The aspirational paradox of substantive international law, therefore, is that of modernist expression generally: the desire to break free from historical-political contexts and start afresh, and at the same time to inaugurate a new political history based on the substantive norms being pronounced.\textsuperscript{45}

Probably the most famous modernist text in English literature, and certainly the one which in the most head-on way addresses the question of history and the apparent contextualization of meaning, is T.S. Eliot's poem \textit{The Waste Land}. The renowned, if depressing, modern response to the question of whether understanding can be achieved within history — that is, absent an abstraction from historical contexts — is contained in the opening image of the work. Eliot proclaims that:

April is the cruellest month, breeding
Lilacs out of the dead land, mixing
Memory and desire.\textsuperscript{46}

\textsuperscript{43}Supra, note 2 at 193.

\textsuperscript{44}Ibid. at 196.

\textsuperscript{45}For the now classic identification of this paradoxical modernist impulse to both break free from and re-start history, see P. de Man, "Literary History and Literary Modernity" in P. de Man, \textit{supra}, note 9 at 142-165. For a critical appraisal of this paradox as expressed in modern literature, see W. Steiner, "Collage or Miracle: Historicism in a Deconstructed World" in S. Bercovitch, ed., \textit{Reconstructing American Literary History} (Cambridge: Harvard University Press, 1986) at 323-351.

\textsuperscript{46}Supra, note 15 at 61, lines 1-3.
Historicism, and the processes of history itself, certainly do not seem to hold the promise of meaning, the connotation of the poem's introductory phrase being that the memory of an understanding in context and the futile desire to achieve a trans-historical understanding from our present vantage point, are both cruel and painful endeavours. The spiritual death that is at the core of the wasteland stems, quite obviously, from the perceived impossibility of achieving knowledge unconditioned by a particular contextual or historical framework, and yet the continued acknowledgment that a specifically conditioned understanding cannot contain objective truth. Eliot bitterly asks,

That corpse you planted last year in your garden,
Has it begun to sprout?\(^47\)

thus signalling the failure of past meanings for present comprehension and the futility of present endeavours for future meanings.

It is Eliot's radical doubt of meaning in historical context, his realization of the subjectivity of such knowledge, which marks his work as the high-point for modernist thought and expression.\(^48\) History, somewhat like the fragmented yet oddly complete poem itself, becomes

A heap of broken images, where the sun beats
And the dead tree gives no shelter.\(^49\)

If knowledge and meaningful expression are to be achieved, history is something to be avoided; yet the view from the present is acknowledged as just one more subjective construct, which eventually will be shown to have been as mortal as the contexts of the past.

\(^{47}\)Ibid. at 63, lines 71-72.


\(^{49}\)Eliot, *supra*, note 15 at 61, line 22.
Accordingly, although contemporary understanding is seductive, inviting comfort in the present state of our knowledge ("(Come in under the shadow of this red rock),"50 beckons Eliot in parentheses), its revelations are of a frightening variety. "I will show you fear in a handful of dust,"51 we are told, as a reminder of the particularity and mortality of even our present grasp of truth.

It is this fundamental indeterminacy of knowledge, and the failed understandings of even the high-points of human history and culture, that leads to the fragmented allusions and imagery of the poem. In the final section of The Waste Land, the reader is taken through a brief survey of western civilization, and made to see

Falling towers
Jerusalem Athens Alexandria
Vienna London
Unreal52

All of the most notable attempts at cultural achievement within history are grandiosely reduced to "[c]racks and reforms and bursts in the violet air."53 The message which Eliot's modern critics have elucidated from the apparent destruction of his own myriad historical allusions, and the sheer number and jarring juxtaposition of obscure and unrelated references, is that the actual historical significance of the allusions is, in fact, minimal.54 The assumption is that either the allusions are purely formal structures, in which case one can comprehend their significance even if their source is a mystery, or they are essentially fictitious, in which case Eliot could have as easily been drawing from his imagination as from history

50 Ibid. at line 26.
51 Ibid. at line 30.
52 Ibid. at 73, lines 373-376.
53 Ibid. at line 372.
In either case, the implication is that the poem has championed a distinctly ahistorical brand of knowledge. Eliot is seen to be something of a literary structuralist, imagining true understanding to be isolated from history much as one can comprehend the fragmented poem without actual familiarity with all of the fragments; the creative energy and allusions of the poem seem themselves to prove that the "heap of broken images" of the past will not effect the productions of the present.

A thematically similar attempt to divorce the formulation of substantive international law from the historical-political contexts of which international relations are composed, is found in what is perhaps the high-point of modern substance doctrine: the law of the sea. As Kennedy notes, this is one of the most ancient and the most modern branches of all of international law, the seventeenth-century debate between Grotius and Selden having now given way to the impressively detailed and comprehensive regime of the 1982 Convention. Indeed, the struggle of legal modernism to lift its substantive pronouncements out of their material contexts can be appreciated precisely when compared to the approach taken by international lawyers of an earlier era. For this reason, Kennedy finds it fruitful to compare the debated versions of right and wrong posed by Selden and Grotius—the former having argued strenuously for the oceans to be divided into sovereign dominions like the land, and the latter having advocated a rule of freedom of the seas—with the approach of the state-of-the-art modern maritime regime.

Pre-modern discourse on the law of the sea is presented as having offered a choice of authoritative freedom or dominion.

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55 For a similar summary of this type of standard interpretive approach to Eliot, see Steiner, supra, note 45 at 333-334.

56 For an example of structuralist thought, see C. Levi-Strauss, Structural Anthropology, trans. C. Jacobsen & B. Schoepf (New York: Basic Books, 1963). Kinship systems, historical events, and political trends can all be understood in either historical or ahistorical terms.


58 Kennedy, ibid. at 203.
Although in one sense these positions seem to remind us of contemporary substantive argument which gravitates around the autonomy and cooperation of sovereigns, one has to agree with Kennedy that "their bold assertions seem naïve." And this naivety seems to trace directly to the very unflinching quality with which the historically particular visions of the Dutchman and the Englishman, each of whose discursive positions so conveniently and with unspoken perfection reflected the strategic positioning of his parent nation, were posited as trans-contextual rules for all time. Seventeenth-century sovereigns yielded a doctrine now notable for its naïve self-confidence.

By contrast, the sophisticated modernism of the 1982 Convention On the Law of the Sea reveals no such immature assertiveness. In the first place, as Kennedy points out, the text of the Convention exhibits a certain loss of confidence by the sovereign signatories and by their collective system. Rather than primitively unhesitant articulations of legal rights and punishable wrongs, the Convention presents a continuous deferral of its substantive rules to some later point and referral back to some earlier normative formulation. In Kennedy's words, reading the Convention is certainly a "puzzling experience," modern states having "created the international legal order by balancing procedural regimes." In the result, one is cognizant of the document's stature as the high-water mark of substantive international legality, yet one is at a loss to identify "the mechanism by which it establishes itself as a substantive legal regime."

59 Kennedy identifies this polarity as forming the thematic structure for much of substantive international law. Ibid. at 196.
60 Ibid. at 204.
61 Ibid.
62 Ibid. at 202.
63 Ibid. at 204.
64 Ibid. at 202.
The *Convention* moves from a statement of substantive purposes in the Preamble, to a series of architectural or jurisdictional issues, institutional rules, and dispute resolution procedures. That is to say, this comprehensive sea regime provides an illustrative microcosm of the fragmented world of substance doctrine generally, in that the aspirations of substance are coupled with a displacement back into the process and forward into state practice. This elaboration of a complex procedural and institutional environment, all of which stands in support of a substantive set of norms which is referred to but which never actually appears, embodies both the disappointment and the genius of modern substance doctrine. The intricacy of its structure and the complexity of its mechanisms for delaying and diverting the moment of substance has replaced the historically-bound rights and wrongs of Grotius' time with a seemingly detached, unbound understanding pertinent to all future time. Ironically, therefore, it is this apparently unsubstantive approach which allows substantive international law the appearance of having accomplished its twin modern goals: the detachment of itself from historical-political context and the initiation of a new history with a cooperative normative thrust.

Both the *Convention* and *The Waste Land* (according to the poem's modern interpreters) accomplish their tasks of unbound understanding by strenuously attempting to bracket their understandings from historical context altogether. In this respect both texts seem equally inspiring and equally absurd. One cannot help but admire the goal pursued and energy expended, yet for all of their complexity each product seems almost purposely to be unsatisfactory. The *Convention* strives to insulate substantive legality from international politics by removing any ascertainable substance from its numerous terms. Eliot, in similar fashion, seems to many modern readers to have revealed the subjective quality of historical understandings by means of an imagery which heavily utilizes and then destroys historical allusions, the suggestion being that the poem should be read and comprehend without knowledge of the history to which it alludes. What remains is a high-point of substance doctrine
void of substance, and a high modernist poem that is, in terms of modernist understanding, almost completely incomprehensible.\textsuperscript{65}

The notion that modern international law is complete when lacking in substance seems almost as bizarre as the idea that Eliot's incessantly historical poem can be appreciated without any awareness of history. An alternative form of understanding, however, is suggested by Eliot's own writing. In a well-known essay on the position of the individual artist in history, Eliot described present culture as "a living whole of the poetry that has ever been written,"\textsuperscript{66} the idea being that the history of culture is, in effect, the history of informed interpretations and creative re-expressions of all that has come before. Taking this cue, one can read in "The Waste Land" and its many historical allusions a distinctly post-modern, rather than modern, message; that is, the poem may be seen to contain an interpretative strategy for unravelling its own mysteries. In condensing western cultural history into a 431-line poem, Eliot causes the reader inevitably to inquire about its meaning, and in so inquiring the reader educates him- or herself and re-creates the history the reader has come to know.\textsuperscript{67} The message of the text seems to be to encourage the reader to overcome the failures of history by actively pursuing the knowledge required to understand the text. Only through a highly sensitized, historically aware reading can the reader transcend the chaotic maze and "heap of broken images" that are the poem and our cultural history.

The interpretive approach which transcends the detailed chaos of modern substance doctrine is suggested not so much by the Convention On the Law of the Sea or some other, doctrinal text, but by the post-modernism of Kennedy's analytic approach. In intensifying our scrutiny of the rhetorical modes in which doctrine

\textsuperscript{65}As one critic has noted, "It is perhaps unnecessary to point out how little of 'The Waste Land' is not allusive, that is, 'present and knowable in itself.'" Steiner, supra, note 45 at 334.


\textsuperscript{67}One post-modern reader of Eliot has noted that "the modern wasteland is redeemed only when people again read literature, value the tradition, and themselves create the syntheses that actively remake the past into a historical present." Steiner, supra, note 45 at 338.
presents itself, he not only reveals the self-effacing outcome of the attempt to de-contextualize substance doctrine, but sends the reader of modern international law texts on a search to reconstruct the meaning of doctrinal language. Thus, for example, in inquiring into modern sea law's odd deflection of attention back to process and forward to interpretation or practice, one also comes to perceive the historical positioning of legal substance between a moment of agreement (the Preamble) and a process of implementation (the Convention). By so situating the text historically between an instant of closure and a wide open process, the reader becomes aware of the momentum generated by international legal discourse; and it is from the dust of this movement that the sovereign states emerge as "parties" to the system and its rules.

In the process of deconstructing the logic with which international doctrine presents itself, Kennedy's readers therefore become aware of a thematic undercurrent which has been present in international law all along. Modern doctrinal pronouncements seem inevitably to be "relying upon an image of the determination of discourses past and the indeterminacy of discourses future," thus positioning themselves as the energy or momentum coming between stasis and motion. In this way, as Kennedy notes, "the rhetorical system is able both to claim to be becoming an international order and to be experienced as fulfilling that promise." The reward for the reader who probes this rhetorical mass whose doctrines straddle determinacy and indeterminacy is the discovery that the energy of this discursive see-saw is not only self-generating, but is its own point.

By the time one has finished with *International Legal Structures*, international law has come to be seen as a medium


69Ibid. at 205: "By situating the text historically, between a moment of intention (by the 'conscious' States Parties) and a moment of implementation (by the text and the order), the Preamble seems to transform individual states into parties."

70Ibid. at 294.

71Ibid.
"suited to a practice of interminable discourse." Accordingly, what seemed to be the fatal defect — the interminable movement toward, rather than the expected arrival at sources, process and substance — is revealed to be "the subtle secret of [international law's] success." The fact that international legal discourse can be kept up seemingly forever, its rhetorical repetitions and doctrinal transmutations rebounding through time, geography and subject matters as if in a hall of slightly warped mirrors, is what keeps the law alive as a subject of study. The reader comes to appreciate international law in much the same way as Nabokov would have his readers appreciate Humbert's chaotic infatuation for Lolita: the endless play with words providing for the continuous movement forward.

It is therefore the regenerative process of discourse itself, rather than any of the particular reflections or apparent stops along the way, which is the object of Kennedy's study and the subject which his readers come to know best. Likewise, it is this inherent momentum of international rhetoric that allows the doctrine to both root itself in and to transcend its historical-political contexts, and which inspires us as scholars of international law to transcend the particular doctrinal contexts which the legal texts on their face present to us. The post-modern scrutiny of legal language, and the understanding of doctrinal structures as rising and falling constructs able to propel themselves through a history of political contexts, allows us to finally appreciate the maze of international legality as possessing a rhetorical force which transcends its own fractured doctrines. With this understanding it seems possible to move with international law into the future, preventing its modern present and past pronouncements from being what Eliot would have called "withered stumps of time."