PART 1

Introductory Observations

CHAPTER 1

Introduction: "What's Wrong with International Law?"

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Throughout his academic career, Professor Soons has always had a keen interest in the role of international law as a mechanism to create world public order, for instance in his capacity as Director of Studies of the International Law Association. The ordering role of international law is hardly self-evident. Realists have lambasted international law for being utopian,[1] and suggested that opting for international law as an instrument of global governance should be a rational choice of self-interested states.[2] Even where the ordering role of international law has been acknowledged, the existing state-centered order has been criticized for being self-serving, biased in favor of Western values,[3] failing to sufficiently factor in justice considerations,[4] being blind to policy,[5] and overemphasizing the role of the state.[6] Despite these attacks on international law, legal formalists or positivists, of which we dare say Professor Soons was one, have continued to defend the consent-based structure of international law and the social validity of rules adopted through agreed formal

1 E.g. H. Morgenthau, *Politics among Nations*: *The Struggle for Power and Peace* (Knopf, New York: 1948).

2 E.g. J. Goldsmith and E. Posner, *The Limits of International Law* (Oxford University Press, Oxford: 2005).

3 E.g. A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press, Cambridge: 2005).

4 E.g. S. Marks (ed), *International Law on the Left: Re-examining Marxist Legacies* (Cambridge University Press, Cambridge: 2008). Note that in political philosophy, a large body of literature on "global justice" is thickening, which allots global responsibilities to States regardless of the responsibilities they may have under current international law. See e.g. S. Caney, *Justice beyond Borders* (Oxford University Press, Oxford: 2005).

5 See for the policy-oriented school of international law in particular M. McDougal, "International Law, Power and Policy: A Contemporary Perspective" (1953) 82 *RCDI* 133–259; R. Higgins, "Policy Considerations and the International Judicial Process" (1968) 17 *International and Comparative Law Quarterly* 58–84.

6 E.g. G. Handl, J. Zekoll and P. Zumbansen (eds), *Beyond Territoriality: Transnational Legal Authority in an Age of Globalization* (Nijhoff, Leiden: 2012) (drawing attention to the regulatory role of transnational private actors and hybrid networks).

processes.[7] A middle position, which has become rather influential over the years, has been adopted by Martti Koskenniemi, who has usefully defined international law as a "process of articulating political preferences into legal claims that cannot be detached from the conditions of political contestation in which they are made."[8] This position, which invokes the inner morality of law, seemingly does justice to realist, formalist, and natural law-based approaches to international law.

Each approach nonetheless continues to jockey for pre-eminence, considering itself to be right and the other to be the wrong. In the case of *Jurisdictional Immunities* (Germany v Italy, International Court of Justice 2012), for instance, Judge Cançado Trindade did not mince his words when denouncing the Court's "positivist exercises" that lead "to the fossilization of international law" and that disclose "its persistent underdevelopment, rather than its progressive development," and finally sighing "Words, words, words… Where are the values?"[9] The judgment of the Court in *Questions relating to the Obligation to Prosecute or Extradite* (Belgium v Senegal, International Court of Justice 2012) has similarly been denounced as being too formalist and failing to acknowledge the context and a possibly more compelling moral and social discourse regarding the design of trials for human rights violations.[10]

This perception of international law's "wrongness," as it is widely perceived by both its practitioners and external observers, is the subject of this book. At his retirement from Utrecht University, Professor Soons himself provocatively posed the question to his colleagues from all over the world: "What's wrong with international law?" In doing so, he provided them an opportunity to set out what they thought *is* in fact wrong in international law: in specific rules, judgments, or the system as a whole. However, he intentionally posed the question in such a way that one could also read the question as "So, what's *wrong* with international

7 E.g. J. d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press, Oxford: 2011).

8 M. Koskenniemi, "International Law and Hegemony: A Reconfiguration" (2004) 17 *Cambridge Review of International Affairs* 197, 198. See also M. Koskenniemi, "International Law: Constitutionalism, Managerialism and the Ethos of Legal Education" (2007) 1 *European Journal of Legal Studies* 14–15 (defining law as a "mindset with which the law-applier approaches the task of judgement within the narrow space between fixed textual understandings (positivism) on the one hand, and predetermined functional objectives (naturalism) on the other").

9 ICJ, *Jurisdictional Immunities of the State* (Germany v Italy; Greece intervening) (2012), Cançado Trindade, diss. op., para. 294.

10 J. Almqvist, "Searching for Common Ground on Universal Jurisdiction: The Clash between Formalism and Soft Law" (2013) 15 *International Community Law Review* 437, 457.

law as a whole?" and answer it with a resounding "nothing!" The duality of the question perhaps summarises Professor Soons's own attitude to the field: sharply analytical and therefore not shying away from indicating where in specific rules or cases things are in fact wrong, but always strongly committed to the discipline as a whole.

This *Liber Amicorum* presents some of the answers that Professor Soons's colleagues have given in response to his provocative questions. They either (1) identify regulatory gaps or "wrong norms" in specific fields of international law, or (2) address the more fundamental question of what is wrong with the regulatory function of international law as a system.

With regard to the former, more concrete question, authors have addressed regulatory questions in a number of areas that are close to Professor Soons's heart: the law of the sea, international dispute-settlement, international environmental law, and the law of treaties. With regard to the latter, more abstract question, authors have discussed transnationalism, the explanation of international law to various audiences, the challenge of globalization, the territorial premises of international law, the public character of international institutional law, and the role played by international lawyers.

It is of note, however, that even the authors who reflected on the place of international law in global governance ultimately focus on specific points of contention; they do not problematize, or defend international law as a normative system. Ultimately, all authors share, explicitly or implicitly, Fred Soons's strong commitment to an international rule of law that civilizes the politics of international relations,[11] an awareness of its shortcomings, and an optimism that such shortcomings can be overcome through conceptual rethinking and reinterpretation. In that sense, this book is a veritable liber *amicorum*.

As editors, we have acted primarily as coordinator of *amici*, only giving the occasional suggestion – we have not sought to force on the authors a unity in argument, approach or style. The result is a diverse range of views, beautifully reflecting the diversity among Fred's friends, and in that, reflective of Fred's openness to the opinions of others.

The contributions reflect developments until 30 September 2014.

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11 We are taking our cue from M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870–1960* (Cambridge University Press, Cambridge: 2002).