
The war against cliché: dispatches from the international legal front

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‘To idealize’, writes Martin Amis, ‘all writing is a campaign against cliché. Not just clichés of the pen, but clichés of the mind and clichés of the heart.’ He goes on: ‘When I dispraise, I am usually quoting clichés. When I praise, I am usually quoting the opposed qualities of freshness, energy, and reverberation of voice.’¹ Amis is a justly respected leader in the war against cliché. But if we, the authors of this chapter, hope to consider ourselves partisans of that campaign, in our case the spur to enlist came from another source.

It was at the time when we were both doctoral students working under the supervision of James Crawford. One of us was busy finding the devil in the detail. The other was wondering whether at the end of the day everything really was so cut and dried. Well, suffice it to say (for clichés are surely hard to avoid altogether), we changed our tune (ditto) when there began to appear in the margins of our drafts that shaming rebuke, that call to arms: ‘cliché’.

We wish to use the present occasion to explore a little further what happened then. What exactly was it that James was signalling to us as aspiring scholars of international law when he cautioned us against cliché? Are the clichés of international legal field clichés of the pen, or also clichés of the mind and even clichés of the heart? Why are they to be deprecated? And if, once deprecated, they still remain (as we have already suggested) hard to avoid, why is that so? Does cliché always stand opposed to freshness, energy and reverberation of voice, or might it be that, behind the over-familiarity, there is potential for vitality and insight yet?

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¹ Martin Amis, *The War against Cliché* (London: Vintage, 2002), xv.

It is a cliché of writing about cliché that, while we think we know a cliché when we're confronted with one, that is not always the case. Perhaps because of this, much work on the subject takes the form of inventories or 'dictionaries' of clichés.² We do not offer here a list of international legal clichés (assuming such could exist). The issue for us is, rather, cliché – the phenomenon of cliché – as a problem of international law. What does it mean, we ask, and what does it not mean, to wage the war against cliché on the international legal front?

I

We begin with the concept of cliché itself. In the introduction to a dictionary of clichés that is now in its fifth edition, Eric Partridge writes that a cliché is 'an outworn commonplace; a phrase or short sentence that has become so hackneyed that careful speakers and scrupulous writers shrink from it because they feel that its use is an insult to the intelligence of their audience or public.'³ This definition highlights a number of features. In the first place, there is the *hackneyed* character of the cliché. Clichés are banal, trite, ho-hum. Secondly, the concept of cliché brings with it the idea of loss or degeneration.⁴ A cliché is an *outworn* commonplace, in the sense that it originally had a point but repetition has now blunted that point and effaced the meaning and intensity which the cliché once had. And thirdly, cliché is a pejorative term. To apply the label is to condemn that to which it is applied as boring, predictable, inane, jejune and/or specious – an *insult* to the collective intelligence.

Partridge's concern is the verbal cliché – the phrase or short sentence – but, at any rate today, the concept of cliché plainly extends much further than that. Thus, for instance, we speak of musical clichés, architectural clichés, theatrical clichés and culinary clichés. We take cliché to apply not only to language, but also to the aural, visual and other sensory domains, as well as to the realm of gestures and actions. Underlying all this is an idea of cliché as a particular mode of thought – a markedly unreflective mode of thought, indeed a mode of non-thought, a kind of automatism. For Walter Redfern, the central characteristic of cliché is 'dependence'

² See e.g. Eric Partridge, *A Dictionary of Clichés*, 5th edn (London: Routledge, 1978); James Rogers, *The Dictionary of Clichés* (New York: Ballantine, 1991); and Lucy Fisher, *Clichés: A Dictionary of Received Ideas* (Kindle, 2012).

³ Partridge, *A Dictionary of Clichés*, 2.

⁴ On this, see Elizabeth Barry, *Beckett and Authority: The Uses of Cliché* (Basingstoke: Palgrave Macmillan, 2006), 3.

in this sense.⁵ When you use a cliché, you short-circuit cognition. You renounce your independent-mindedness and obviate the inconvenience and effort of thinking for yourself. There is felt to be a laziness about the use of cliché. There is also felt to be an undertone of self-legitimation, inasmuch as clichés tie us to normality, to respectability, to authority. In her study of the trial of Adolf Eichmann, Hannah Arendt remarks on Eichmann's tendency to repeat 'word for word the same stock phrases and self-invented clichés', observing that 'when he did succeed in constructing a sentence of his own, he repeated it until it became a cliché'.⁶

At the same time, Gillian Beer poses a fair question when she asks: '[H]ow would we live or communicate without clichés?'⁷ Clichés frequently belong to the category of phatic communication, meeting the need for general sociability, rather than putting across any specific proposition. As Beer explains, 'cliché assures us that we all belong together . . . It wards off extreme intimacy of encounter', while signalling comfortable 'communality'.⁸ Redfern recalls that the French word 'répétition' has the double sense of reiteration and rehearsal.⁹ The repetition of familiar tropes facilitates the performance of social interaction. The darker side of that is, of course, that cliché is also exclusionary. Outworn, it is by no means washed-up; there is a potency in its very banality. Thus, clichés function as *shibboleths* that distinguish those in the know from those who fail to understand the clichéd expression or to appreciate its character as a cliché. At the same time, clichés serve as carriers of *ideology* that uphold the status quo by making the received version of right-thinking common sense too banal to question. Arendt's attention to Eichmann's patterns of speech has been read in this light: 'To identify the cliché is to try to open up the possibility of dissent in the domain of the obvious.'¹⁰ Finally, clichés give expression to *stereotypes* that reinforce prejudices and perpetuate the marginalisation of low-status groups.

The concept of the stereotype takes us directly to the origin of the word 'cliché'. Borrowed from French, the term comes from the world of printing. It refers to a moulded metal plate – a stereotype – cast for printing

⁵ Walter Redfern, *Clichés and Coinages* (Oxford: Basil Blackwell, 1989), 16.

⁶ Hannah Arendt, *Eichmann in Jerusalem* (London: Penguin, 1994 [1963]), 49. See further Jakob Norberg, 'The Political Theory of Cliché: Hannah Arendt Reading Adolf Eichmann', *Cultural Critique*, 76 (2010), 74.

⁷ Gillian Beer, 'The Making of a Cliché: "No Man is an Island"', *European Journal of English Studies*, 1 (1997), 33.

⁸ *Ibid.* ⁹ Redfern, *Clichés and Coinages*, 8.

¹⁰ Norberg, 'The Political Theory of Cliché', 81.

blocks of text. Whereas at first individual letters had always to be set one by one, in the early nineteenth century a process developed whereby phrases that were likely to appear frequently could be prefabricated as single units – ‘clichés’. The word is believed to be onomatopoeic: *clicher* is a variant of the more common *cliquer* (to click), and is understood to evoke the ‘click-clack’ sound made by the moulding matrix when it struck the surface of the molten metal to produce the plate. By extension, cliché came also to refer to plates for the printing of images, and later to other printing technologies, including photographic negatives. The figurative usage of cliché as a ‘prefabricated’ or stereotyped mode of expression had apparently gained currency in France by the 1860s. That figurative usage (though not, it seems, the literal usage) was then imported into English.¹¹ The *Oxford English Dictionary* dates the first occurrence in English to 1892.

The cliché, then, is a phenomenon of the nineteenth century that is bound up with processes of mechanisation, industrialisation and rationalisation, and with the emergence of a print culture enabling the mass circulation of texts. In tracing its history, Elizabeth Barry highlights the shift from the positively or neutrally coded ‘commonplace’ to the negatively coded ‘cliché’.¹² In classical antiquity commonplaces formed part of the study of rhetoric, and referred to particular starting points or the-matics to be used in formal argument (*topoi*). Early modern European thought likewise embraced the idea of the commonplace, though not so much as an aspect of rhetoric, which fell widely out of favour insofar as it came to be associated with manipulative and insincere speech. Instead, the activity of ‘commonplacing’ and the ‘commonplace book’ became private pursuits, the collection of material in personal scrapbooks. According to Barry, what set the scene for the concept of cliché was the emergence of a mass market for the consumption of texts. Anxiety about vulgarisation, banalisation and inauthenticity arose as a concomitant of the increasingly wide and fast dissemination of words and ideas that was made possible by the new technologies of mechanical reproduction. Barry reports that an analogy became prevalent in Romantic literary aesthetics between ‘a mechanical use of language and the technical equipment of printing’.¹³

The first work thematising the concept of the cliché is often said to be Gustave Flaubert’s satirical novel *Bouvard and Pécuchet*, written in 1880,

¹¹ The *Oxford English Dictionary* refers to cliché in its literal sense as the French name for what in English is simply called a cast or, in a more technical idiom, a ‘dab’.

¹² Barry, *Beckett and Authority*, 11 *et seq.* ¹³ *Ibid.*, 16.

in which two copy-clerks embark on a search for knowledge that brings only errors, failures and disasters.¹⁴ The clerks’ putative commonplace book – published separately under the title of *Dictionary of Received Ideas* – catalogues clichés in such entries as ‘Rhyme: Never in accord with reason’; ‘Thicket: Always “dark and impenetrable”’; and ‘Unleash: Applied to dogs and evil passions’.¹⁵ By the middle of the next century, the denunciation of cliché had become considerably less subtle – a trend perhaps nowhere better exemplified than in George Orwell’s famously intemperate essay on politics and the English language.¹⁶

For Orwell, ‘the English language is in a bad way’, and a key aspect of the pathology is the prevalence of clichés.¹⁷ All too often, and especially in the discourse of politics and government, recourse is had to ‘ready-made phrases’ and ‘worn-out metaphors which have lost all evocative power and are merely used because they save people the trouble of inventing phrases for themselves’.¹⁸ Echoing the association mentioned above of ‘mechanical’ language with printing technology, Orwell writes that a ‘speaker who uses that kind of phraseology has gone some distance towards turning himself into a machine. The appropriate noises are coming out of his larynx, but his brain is not involved as it would be if he were choosing his words for himself’.¹⁹ The essay culminates in a series of rules for overcoming this state of affairs, of which rule 1 is ‘Never use a metaphor, simile or other figure of speech which you are used to seeing in print.’²⁰

II

Let us now begin to connect this discussion to international law.²¹ In doing so, we should note one further feature of cliché on which we have not yet touched. This is that cliché is, as Ruth Amossy and Elisheva Rosen observe, an inescapably relative phenomenon.²² There is no such thing as a ‘cliché in itself’.²³ Rather, clichés are specific to particular times.

¹⁴ Gustave Flaubert, *Bouvard and Pécuchet*, with *Dictionary of Received Ideas*, tr. A. Krailsheimer (London: Penguin, 1976).

¹⁵ *Ibid.*, 324, 328.

¹⁶ George Orwell, ‘Politics and the English Language’, reprinted in *Why I Write* (London: Penguin, 2004), 102.

¹⁷ *Ibid.* ¹⁸ *Ibid.*, 112, 106. ¹⁹ *Ibid.*, 114. ²⁰ *Ibid.*, 119.

²¹ We join here a wider literature on law as rhetoric and the roles of imagery in law, including international law. What distinguishes clichés is that they involve failed metaphors, whereas the legal literature tends to focus on successful imagery.

²² Ruth Amossy and Elisheva Rosen, *Le Discours du cliché* (Paris: Société d’édition d’enseignement supérieur, 1982), 9.

²³ *Ibid.*

We mentioned earlier Partridge's dictionary of clichés. It runs to some 250 pages, and puts asterisks next to clichés that are 'particularly hackneyed or objectionable'.²⁴ Yet who today speaks of 'heaping coals of fire on a person's head', or of 'Lares and Penates', 'the clerk of the weather', 'in one's palmy days' or 'hewers of wood and drawers of water' – all of them asterisked as especially egregious clichés in Partridge's most recent edition of 1978?

Clichés are also specific to particular places. To stay with verbal clichés, 'Monday morning quarterback', 'fall off the turnip truck', 'blow this pop stand' and 'talk turkey' might be – or once have been – used and understood by some people in the United Kingdom, but if so, these phrases would not be likely to be – or have been – heard as particularly clichéd. That said, the global circulation of language, or at any rate English, and perhaps especially American English, is a widely remarked phenomenon of our time, and it may be accelerating. As Hephzibah Anderson remarks, 'Twitter, digital memes and the 24-hour news cycle can coin a cliché overnight, it seems.'²⁵

Finally, clichés are specific to particular contexts and communities. Hence Redfern's remark near the beginning of his book on cliché that there is 'no way of knowing whether my clichés are yours'.²⁶ Amossy and Rosen explain that clichés depend on conditions of reception that permit them to be recognised as such.²⁷ Along with the other aspects of relativity, this is, of course, a feature shared by the related phenomenon of idiom. But whereas idioms are unmarked lexical items, we have seen that it belongs with the distinctiveness of the cliché that it gives off an aura of loss or degeneration.²⁸ In order for that to occur, there must exist a situation in which, and an audience by whom, it is apprehended as exhausted, stale and devitalised, something that once fired the imagination, but does so no longer.

Learning to sort a field's clichés from its idioms is an important competence that may serve as a badge of proficiency for those who have it and a handicap and barrier to entry for those who don't. It is a competence that is often acquired through relationships of training or apprenticeship. We have already mentioned the training which we both received from James Crawford. Of course, that training was not limited to specialised international legal language. The clichés of international law are the clichés of

everyday communication – and they are the clichés of policy debate, legal practice, institutional organisation and academic life as well. On the other hand, those wider terrains are not all-encompassing. As with Orwell's domain of politics, there also exist clichés that are rooted in the distinctive history, literature, institutions and traditions of international law itself.

Thinking about cliché as a problem of international law, we might start by recalling the usage in international legal communication of banal and specious phrases in general currency. 'The reality on the ground', 'all the stakeholders', 'going forward' and 'drill down' are a few contemporary examples. We can then notice the emergence of clichés peculiar to international law. These mostly arise from the overuse of language borrowed from academic literature or from the pronouncements of courts and tribunals. 'The invisible college',²⁹ 'compliance pull',³⁰ 'a legal black hole'³¹ and 'the dark sides'³² are some phrases that may be thought to exemplify this turn of events whereby resonant expressions become, in some sense, victims of their own success. To these figurative noun-phrases, one might add sentence-length propositions. It is now trite to say – as the cliché of legal discourse would have it – that 'almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time'.³³ So too, repetition has dimmed the rhetorical power of Judge Dillard's chiasmus: 'It is for the people to determine the destiny of the territory and not the territory the destiny of the people.'³⁴

But the clichés of international law are not, of course, only verbal. Perhaps the most notorious international legal clichés lie, in fact, in the visual domain – the domain of book covers, website homepages, institute logos and the like. Robert Musil once wrote that '[t]here is nothing in this world as invisible as a monument',³⁵ and certainly the iconography of international law is replete with 'monuments' that have become more

²⁴ Partridge, *A Dictionary of Clichés*, 9.

²⁵ Hephzibah Anderson, 'In Praise of the Cliché', *Prospect*, 14 November 2012.

²⁶ Redfern, *Clichés and Coinages*, 3. ²⁷ Amossy and Rosen, *Le Discours du cliché*, 9.

²⁸ On the distinction between cliché and idiom, see further Barry, *Beckett and Authority*, 4.

²⁹ Oscar Schachter, 'The Invisible College of International Lawyers', *Northwestern University Law Review*, 72 (1977–8), 217.

³⁰ Thomas Franck, *The Power of Legitimacy among Nations* (New York: Oxford University Press, 1990), 16.

³¹ *R (Abassi) v. Secretary of State for Foreign and Commonwealth Affairs* [2002] EWCA Civ 1598, para. 64; Johan Steyn, 'Guantanamo Bay: The Legal Black Hole', *International and Comparative Law Quarterly*, 53 (2004), 1.

³² David Kennedy, *The Dark Sides of Virtue: Reassessing International Humanitarianism* (Princeton University Press, 2004).

³³ Louis Henkin, *How Nations Behave: Law and Foreign Policy*, 2nd edn (New York: Council on Foreign Relations, 1979), 47 (emphasis omitted).

³⁴ *Western Sahara*, Advisory Opinion, 16 October 1975, ICJ Reports (1975), 12, 116.

³⁵ Robert Musil, 'Monuments' in *Posthumous Papers of a Living Author*, tr. Peter Wortsman (London: Penguin, 1993), 61.

or less invisible. Maps are one example. Their overuse on the dust jackets of international legal books has largely drained them of the capacity to engage us imaginatively. We register them, of course, as images of the global scale of international law or of its preoccupation with boundaries, spaces and territories, but they do not detain us for long. They do not hold our attention or invite our scrutiny. Their evocative spark has gone faint. Yellowing antique maps, favoured in recent times to emphasise international law's Eurocentric viewpoint (whether to place it comfortably in the past or disturbingly in the present), scarcely escape this fate.

Images of justice – the blindfolded goddess Justitia or the set of scales she holds – together with the Earth as a globe are another example. A staple of logos of programmes, journals and professional associations in the international legal field, these once-inspiring representations now project reassuring normality, safe respectability and a rather bland, humdrum authority. As a final example, we might take the scenes of important people doing momentous things in settings of international law-making and adjudication that adorn international legal publications and promotional materials for international legal activities – statesmen shaking hands, diplomats negotiating around a table, Heads of State signing documents, representatives voting at the United Nations, international judges on the bench and other similar images. Are we to focus on who is present at these occasions or on who is absent from them? The images are so familiar that it becomes hard to remember even to ask such questions.

Alongside verbal and visual clichés, any discussion of cliché as a problem of international law must reckon with a further category of clichés that come rather less neatly packaged for inspection. We shall call this the category of 'conceptual clichés'. Inasmuch as they are expressed through language, conceptual clichés might, of course, be assimilated to verbal clichés. But the focus here is less on the manner of speaking than on the manner of conceptualising things. Conceptual clichés are outworn ways of framing, analysing, thematising or otherwise thinking about the issues under investigation. In expressing conceptual clichés, we can usefully take our cue from Flaubert's copy-clerks. Thus, some international legal examples might be 'State sovereignty: Either eroding or persisting'; 'The individual: Always emerging as a subject of international law'; 'International legal system: Young, embryonic, primitive'; and 'Balancing: Applied to freedom and security, state sovereignty and human rights, military necessity and humanitarian protection, etc.' Stamped machine-like on the texts of international law, these *topoi* operate as stereotypes, shibboleths and performances of comfortable 'communality'.

III

On the basis of what we have said so far, it seems that international law is as problematic when it comes to cliché as Orwell took politics to be. Rule 1 may well be more honoured in the breach than the observance. And, of course, there we go breaching it yet again. Orwell concedes that he breaches it too. 'The debased language I have been discussing is in some ways very convenient', he writes. 'Look back through this essay, and for certain you will find that I have again and again committed the very faults I am protesting against.'³⁶ Does that make Orwell a hypocrite? For Christopher Ricks, the 'only way to speak of a cliché is with a cliché', with the result that 'even the best writers against clichés are awkwardly placed'.³⁷ The problem, as he sees it, is that some of them do not always 'winc[e] enough'.³⁸ But Ricks also shows that the issue is not only about wincing enough. Orwell is surely one of the best writers against clichés, and Ricks has something very interesting to say about the passage with which Orwell's essay 'Politics and the English Language' ends.

The passage goes like this:

One cannot change this all in a moment, but one can at least change one's own habits, and from time to time one can even, if one jeers loudly enough, send some worn-out and useless phrase – some *jackboot*, *Achilles' heel*, *hotbed*, *melting pot*, *acid test*, *veritable inferno* or other lump of verbal refuse – into the dustbin where it belongs.³⁹

Ricks comments that 'Orwell's darkest urgings' have, in these words, a 'weirdly bright undertow'.⁴⁰ How so? Because 'what is most alive in that sentence is not the sequence where Orwell consciously put his polemical energy' – the 'argumentative train of serviceable clichés' that takes him from 'worn-out and useless', through 'lump of verbal refuse', to 'into the dustbin where it belongs' – but rather the sequence that lists the spurned clichés themselves:

The *jackboot* has, hard on its heels, *Achilles' heel*; then the *hotbed* at once melts in the heat, into *melting pot*, and then again (a different melting) into *acid test* – with perhaps some memory of Achilles, held by the heel when he was dipped into the Styx; and then finally the *veritable inferno*, which

³⁶ Orwell, 'Politics and the English Language', 116.

³⁷ Christopher Ricks, 'Clichés' in Leonard Michaels and Christopher Ricks (eds.), *The State of the Language* (Berkeley: University of California Press, 1980), 54.

³⁸ *Ibid.*, 55. ³⁹ Orwell, 'Politics and the English Language', 120.

⁴⁰ Ricks, 'Clichés', 55.

not only consumes *hotbed* and *melting pot* but also, because of *veritable*, confronts the truth-testing *acid test*.⁴¹

Ricks concludes that 'Orwell may have set his face against those clichés, but his mind . . . was another matter.'⁴² For even as Orwell disdains and dismisses this language as a useless heap of verbal rubbish, even as he sets schoolmasterish rules designed to ban it, he uses it to 'create a bizarre vitality of poetry'.⁴³ The key word in that last sentence is actually 'uses'. Ricks explains: '[u]sing is the nub'; the point is to use clichés, not be 'used by them'.⁴⁴ Orwell proposes that clichés 'anaesthetize a portion of one's brain',⁴⁵ but on the evidence of Orwell's own writing, Ricks demonstrates that the great essayist is wrong. 'Clichés invite you not to think', Ricks writes, 'but you may always decline the invitation'.⁴⁶ In a similar vein, Redfern remarks that 'clichés are first thoughts', but 'we have the capacity for second thoughts'.⁴⁷

Ricks and Redfern belong to a critical tradition that urges contemplation of the imaginative possibilities of clichés. Rather than simply banning clichés, for these critics the more productive approach is often to *do something with them*. In any case, experience teaches us that a ban will not work. It will only serve to make everyone feel bad. As Redfern rightly avers, 'we are all vulgarians'.⁴⁸ We can't and won't avoid using metaphors, similes and other figures of speech which we are used to seeing in print, even if it were a good idea for us to try. That means we also need to be careful as critics. For if clichés can serve as shibboleths – door-openers that also shut out those not in the know – so too the criticism of cliché can risk spilling over into self-delusion and snobbery. Besides, if clichés were really so worthless, why would they have such tenacity?

We have mentioned more than once that it is a characteristic feature of clichés that they are taken to be outworn and degraded, the trace of something once potent that has been dissipated through overuse. In the case of verbal clichés, what has been dissipated often seems to be their figurative charge. When we speak of an 'acid test', the acid is no longer vivid in our mind's eye (or ear or nose). Because of this, clichés are sometimes thought of as 'dead metaphors' – that is to say, metaphors that we no longer recognise as figurative, metaphors in respect of which the comparison made in the metaphor is no longer imaginatively registered.

⁴¹ *Ibid.*, 55–6. ⁴² *Ibid.*, 56. ⁴³ *Ibid.*, 55. ⁴⁴ *Ibid.*, 57.

⁴⁵ Orwell, 'Politics and the English Language', 117. ⁴⁶ Ricks, 'Clichés', 58.

⁴⁷ Redfern, *Clichés and Coinages*, 7. ⁴⁸ *Ibid.*, 5.

The classic examples are expressions like 'the foot of a mountain', 'the leg of a table', 'to run in the family'. Some analysts of language dispute this concept, arguing that even in expressions of that kind there is some 'bare spark of life'.⁴⁹ But certainly, when it comes to clichés, those who highlight the possibility of their creative deployment insist that 'dead metaphor' is not, in fact, the right way to think of them. Of course, no one disputes that it is a defining feature of cliché that it has lost vigour, but rather than taking clichés for dead, these scholars encourage us to see them as merely 'sleeping'.⁵⁰

The implications of seeing metaphors as sleeping are explored by Chaim Perelman and Lucie Olbrechts-Tyteca in their celebrated treatise on the 'new rhetoric'.⁵¹ (The term actually used in the English edition of their book is 'dormant'.) To characterise a metaphor as dormant, they propose, is to intimate that it is inactive, but that 'this state of inactivity may only be transitory', so that 'the metaphor can be awakened and become active again'.⁵² We can be led again to see, hear and smell the fizz of the unverified substance as it hits the acid, and through that, we can be led to reflect on the imagery of the 'acid test' and on how it directs, channels and frames our thinking about the nature of truth and of truth-testing. Perelman and Olbrechts-Tyteca describe a number of ways in which dormant metaphors may be awakened. They may be awakened by being placed in a context that is different from their usual one (recontextualisation).⁵³ They may be awakened by being set alongside another cliché or other clichés (juxtaposition). They may be awakened by being developed or extended in a new way (development or extension). And they may be awakened by being taken literally (literalisation).

The awakening of dormant metaphors is the stuff of much everyday playfulness and humour.⁵⁴ It can make us laugh, but in doing so, it can also make us think. In a book about cliché published in 1970, Marshall McLuhan reports a funny story that illustrates the first of Perelman and

⁴⁹ George Lakoff and Mark Johnson, *Metaphors We Live By* (University of Chicago Press, 1980), 55.

⁵⁰ See esp. Barry, *Beckett and Authority*, 3. On the idea that metaphors may be 'not dead but sleeping', see William Empson, *Seven Types of Ambiguity* (London: Hogarth Press, 1991), 25.

⁵¹ Chaim Perelman and Lucie Olbrechts-Tyteca, *The New Rhetoric: A Treatise on Argumentation*, tr. John Wilkinson and Purcell Weaver (London: Notre Dame Press, 1969), 405 *et seq.*

⁵² *Ibid.*, 405. ⁵³ The bracketed terms are our own.

⁵⁴ As Ricks, among others, observes. See Ricks, 'Clichés', 58.

Olbrechts-Tyteca's methods of metaphor-awakening – recontextualisation:

A teacher asked her class to use a familiar word in a new way. One boy read: 'The boy returned home with a cliché on his face.' Asked to explain his phrase, he said, 'the dictionary defines *cliché* as a "worn-out expression"'.⁵⁵

The boy in this story has placed the cliché of clichés as 'worn-out expressions' in a context that is different from its usual one, and in so doing, he has jolted it awake. To be sure, the awakening took a bit of explanation. But once it happened, the imagery of exhaustion and expression would have become, for his teacher and classmates, at once strikingly vivid and newly, comically strange.

Many of the authors to whom we have referred in this section, McLuhan included, highlight the prominence of metaphor-awakening in the work of modernist writers like James Joyce, T. S. Eliot, Eugene Ionesco and Samuel Beckett. Here is one example from Beckett's *Happy Days*:

Winnie: Oh well what does it matter, that is what I always say, it will come back, that is what I find so wonderful, all comes back . . . Floats up, one fine day, out of the blue . . . The comb is here. The brush is here. Perhaps I put them back after use. But normally I do not put things back after use, no, I leave them lying about and put them back all together, at the end of the day. To speak in the old style. The sweet old style . . . That is what I find so wonderful, that not a day goes by – to speak in the old style – without some blessing in disguise.⁵⁶

Beckett uses here the second of Perelman and Olbrechts-Tyteca's methods – juxtaposition. The clichés tumble out, one on top of the other, in a way that draws attention to their clichéness: the 'old style' of speaking. What is that old style? Is it really 'old' – or also new? Sweet – or also bitter? A style – or also a regime of knowledge and power? H. Porter Abbott observes that, in passages such as this, Beckett exposes 'a still-active power in clichés, a power that works on us in our slumber'. For, Abbott suggests, 'it is not really the metaphors that sleep but we who use them'.⁵⁷

⁵⁵ Marshall McLuhan with Wilfred Watson, *From Cliché to Archetype* (New York: Viking Press, 1970), 54 (quoted by Ricks, 'Clichés', 59).

⁵⁶ Samuel Beckett, *The Complete Dramatic Works* (London: Faber and Faber, 1986), 135, 144, 146–7.

⁵⁷ H. Porter Abbott, 'The Art of Making it New, Revisited: Beckett and Cliché', *Poetics Today*, 29 (2008), 596.

IV

To recognise international law as a domain of cliché is also to grasp international law as a domain in which *things can be – and have been – done with cliché*. In this final section, we want to illustrate the potential for rousing (or, as the case may be, not rousing, even further enervating) international legal clichés by returning to some of the verbal, visual and conceptual clichés to which we referred earlier. In particular, we want to return to 'the invisible college', the erosion or persistence of sovereignty, 'a legal black hole' and images of maps and important people. Beginning, then, with the first of these, it is part of the cliché of the invisible college to recall that this phrase was coined by Oscar Schachter in an article published in 1977.⁵⁸ Schachter wrote that 'the professional community of international lawyers . . . , though dispersed throughout the world and engaged in diverse occupations, constitutes a kind of invisible college dedicated to a common intellectual enterprise'.⁵⁹ He referred to this community's role in giving 'meaning and effect' to the conception of '*la conscience juridique*',⁶⁰ but said that, in order to fulfil that role, it had to become more visible to State officials. There was also a need for wider 'participation embracing persons from various parts of the world and from diverse political and cultural groupings'.⁶¹

In 2001 the American Society of International Law chose as the theme of its annual meeting 'The Visible College of International Law'. The organisers explained that they found:

Professor Oscar Schachter's famous observation, made nearly a quarter century ago in 1977 . . . to be an intriguing characterization, one that demanded a kind of reflection particularly suitable for observance of the (true) millennium and the extraordinary changes that had occurred in the nature of international law – and its practice – over the past quarter century.⁶²

They said that their theme was designed to focus attention on the 'historical evolution, our current status, and our future prospects as a college, we submit, an increasingly visible college, of international legal scholars, practitioners, policy makers, and social scientists'.⁶³ To speak of the

⁵⁸ Schachter, 'The Invisible College of International Lawyers', 217.

⁵⁹ *Ibid.* ⁶⁰ *Ibid.*, 226. ⁶¹ *Ibid.*, 222.

⁶² David Bederman and Lucy Reed, 'The Visible College of International Law: An Introduction', *American Society of International Law Proceedings*, 95 (2001), ix.

⁶³ *Ibid.*

'visible' college of international law is to *develop* the cliché by replacing 'invisible' with 'visible'. In Beckett's *Waiting for Godot* Estragon similarly replaces the usual terms of a cliché with different ones when he says: 'On the other hand it might be better to strike the iron before it freezes.'⁶⁴

What makes Beckett's formulation arresting is that he plays against the cliché about striking while the iron is hot (and also perhaps adds into the mix another cliché about hell freezing over). Suddenly we see again the blacksmith sweating over his forge – the image that had become displaced by the idea of acting while conditions are right. In contrast, the American Society of International Law plays *into* the clichéd call for transparency and diversity in the discipline of international law, leaving that call largely undisturbed. The same may be said of a blog that *recontextualises* the cliché of the invisible college by taking it as its name. The 'Invisible College' blog is linked to the Netherlands School of Human Rights Research.⁶⁵ Again evoking 'Schachter's famous article of 1977', its stated aim is to provide interesting commentary on international law and also to serve as a community resource for the contemporary invisible college, publicising courses, job opportunities, web materials etc.

More promising, perhaps, is the title given by Hilary Charlesworth to an article on 'feminist futures for the United Nations': 'Transforming the United Men's Club'.⁶⁶ In substituting the openly exclusive concept of the club, and combining it with both 'United Nations' and '(gentle)men's club', Charlesworth *literalises* the invisible college of international lawyers. That is to say, she makes it not simply a metaphor for relative opacity and homogeneity, but an actual body or institution, like the College of Cardinals or the Garrick Club. Schachter has said that he chose the metaphor of a college because the 'group that formed the international law community in the past . . . used to be a fairly small community made up almost entirely of upper-class, European, French-speaking, male lawyers who knew or were related to one another'.⁶⁷ Charlesworth restores the whiff of cigars, bringing it into the present and implicitly reminding us

⁶⁴ Samuel Beckett, *Waiting for Godot*, 2nd edn (London: Faber and Faber, 1965), 18. See Barry, *Beckett and Authority*, 206. For an account of this passage as an illustration of the strategy of *literalisation*, see Abbott, 'The Art of Making it New, Revisited', 596–7.

⁶⁵ <http://invisiblecollege weblog.leidenuniv.nl>.

⁶⁶ Hilary Charlesworth, 'Transforming the United Men's Club: Feminist Futures for the United Nations', *Transnational Law and Contemporary Problems*, 4 (1994), 421.

⁶⁷ Mieke Clincy, 'An Interview with Oscar Schachter', *American Society of International Law Proceedings*, 95 (2001), 18.

that colleges, like clubs, permit only so much democratisation. In her hands, the 'college' becomes less a project to be advanced than a reality to be transformed.

Passing now to sovereignty, Louis Henkin once declared his belief that this word should be dropped from the vocabulary of international law.⁶⁸ '[I]t is time', he wrote, 'to bring "sovereignty" down to earth, cut it down to size, discard its overblown rhetoric . . . ; to repackage it, even rename it, and slowly ease the term out of polite language in international relations, surely in law.'⁶⁹ Henkin's approach to the clichés that cluster around the concept of sovereignty highlights a point on which we have not yet had occasion to touch, though it may have been implicit in our discussion so far. This is that if, as we have seen, clichés are apprehended as exhausted, stale and devitalised, they are indeed apprehended as *so* exhausted, stale and devitalised that they are not only unworthy of use; they are unworthy even of critical interrogation. They are simply to be avoided, banished, abjured. This explains why, to a much greater extent than other kinds of self-evident truth or taken-for-granted representation, clichés fly under the critical radar, escaping all forms of consideration other than censure.

In contrast, David Kennedy has the cliché firmly in his sights when he characterises sovereignty as 'a rhetorical toolkit, a glimmering and shifting style of presentation and address, at once fashionable and passé, fighting words and cliché'.⁷⁰ He goes on: 'We could call it [sovereignty] a shrewd balance, a recurring contradiction, an enduring problem at the core of the discipline, updated in each era.'⁷¹ And again: 'A thousand calls for [sovereignty's] elimination over the last hundred years, its death announced a thousand times in speeches and articles about the "new" interdependence, still it continues to structure our legal positions, our political alliances, our discipline's imagination.'⁷² Finally: '[H]owever much we love to hate sovereignty, it reappears in our dreams as desire.'⁷³ As in *Happy Days*, the clichés come tumbling out here, producing – as Ricks discerns also in Orwell's writing – a bizarre vitality of poetry. The 'shrewd balance' corrects the 'recurring contradiction', which results

⁶⁸ Louis Henkin, 'The Mythology of Sovereignty', *Canadian Council on International Law Proceedings*, 21 (1992), 16. See also Louis Henkin, 'That "S" Word: Sovereignty, and Globalization, and Human Rights, Et Cetera', *Fordham Law Review*, 68 (1999), 1.

⁶⁹ *Ibid.*, 16.

⁷⁰ David Kennedy, 'Some Reflections on "The Role of Sovereignty in the New International Order"', *Canadian Council on International Law Proceedings*, 21 (1992), 245.

⁷¹ *Ibid.*, 244. ⁷² *Ibid.*, 238. ⁷³ *Ibid.*, 239.

from the 'enduring problem at the core'. 'Reports of my death are greatly exaggerated' by the 'thousand calls'. The 'face that launched a thousand ships' is someone we 'love to hate', but would marry 'in our dreams'. Far from censuring the clichéd 'issues' of State sovereignty, Kennedy embeds them in a series of *juxtapositions* that invite attention to, and interest in, the sovereignty tropes as *clichés*.

Our next cliché – that of Guantánamo Bay as a legal black hole – exemplifies the speed with which clichés may arise. First coined in the context of a judgment rendered by the English Court of Appeal in 2002,⁷⁴ and used again a year later by the English judge Johan Steyn as part of the title of a lecture on the detentions at Guantánamo Bay,⁷⁵ the image of the legal black hole became timeworn very quickly. Along the way, it attracted more than the usual amount of critical attention. In one of the most insightful critiques, Fleur Johns argued that the metaphor was flawed and misleading, insofar as it implied that Guantánamo Bay was a lawless zone or a place empty of law.⁷⁶ In fact, as she reminded us, the United States's island prison was not at all lawless or legally empty; it was 'filled to the brim'⁷⁷ with law, whether as a result of the processes of international, constitutional, administrative, military, regulatory, immigration or some other kind of law. It followed that the problems of arbitrary detention, unfair trials and abusive treatment could not simply be solved by the application of law.

Although it was not part of Johns's purpose to propose that people should stop using the phrase 'legal black hole' to describe Guantánamo Bay and similar spaces, her analysis pointed in that direction. But what if the metaphor had layers of meaning that were not specious in this context? And what if, with regard to those layers, it was simply dormant, and could be awakened? The US National Aeronautics and Space Administration (NASA) explains black holes in the following terms:

Don't let the name fool you: a black hole is anything but empty space. Rather, it is a great amount of matter packed into a very small area – think of a star ten times more massive than the Sun squeezed into a sphere

⁷⁴ *R (Abassi) v. Secretary of State for Foreign and Commonwealth Affairs*, para. 64.

⁷⁵ Steyn, 'Guantanamo Bay', 1.

⁷⁶ Fleur Johns, 'Guantánamo Bay and the Annihilation of the Exception', *European Journal of International Law*, 16 (2005), 613. See also Fleur Johns, *Non-Legality in International Law* (Cambridge University Press, 2012), ch. 3.

⁷⁷ *Ibid.*, 618.

approximately the diameter of New York City. The result is a gravitational field so strong that nothing, not even light, can escape.⁷⁸

NASA also explains that:

[s]cientists can't directly observe black holes with telescopes that detect x-rays, light, or other forms of electromagnetic radiation. We can, however, infer the presence of black holes and study them by detecting their effect on other matter nearby.⁷⁹

In a recent book on the Black Hole of Calcutta, Partha Chatterjee shows that, in that very different context, the phrase 'black hole' has somewhat analogous connotations.⁸⁰ On the one hand, the Black Hole of Calcutta was a cell in which 123 British soldiers taken prisoner by the Nawab of Bengal allegedly died by suffocation in 1756. (By extension, 'the black hole of Calcutta' later became synonymous with any confined and suffocating space.) On the other hand, very little is directly known about the Black Hole of Calcutta. Inasmuch as there are conflicting accounts of where exactly it was located, and what happened inside it, it remains obscure.

All this points to the possibility that the 'legal black hole' might be made actually to align with Johns's critique. Instead of jettisoning the metaphor, we might *extend* it so as to recover and reawaken a twofold sense of being stuffed full and not easily comprehended.⁸¹ As in Johns's analysis, Guantánamo Bay could then seem a highly legalised space, not one empty of law. And as in her analysis too, the challenge it throws up could be less to secure the application of law than to understand the law's complicities and limitations. But, of course, the 'legal black hole' does not only express the condition of the law. It also expresses the condition of the people held. In a never-ending war on terror, these detainees cannot be released, any more than light can escape from a black hole. Moreover, like the prisoners of the Nawab in the story of the Black Hole of Calcutta, they have been cruelly treated. Is the scandal of the 'legal black hole' that the administration of the United States is being likened to an 'uncivilised' eighteenth-century Bengali ruler? Or does the parallel

⁷⁸ <http://science1.nasa.gov/astrophysics/focus-areas/black-holes/>. ⁷⁹ *Ibid.*

⁸⁰ Partha Chatterjee, *The Black Hole of Empire* (Princeton University Press, 2012), xi, 1.

⁸¹ For a play on the clichéd meaning, see David Dyzenhaus, 'Schmitt v. Dicey: Are States of Emergency Inside or Outside the Legal Order', *Cardozo Law Review*, 27 (2006), 2018 ('grey holes').

work the other way, chiming with criticism that the most high-profile detainees at Guantánamo Bay have been citizens of Western countries whose governments have intervened on their behalf or whose cases have been aired in the Western media?

To complete this brief illustrative review, let us turn finally to visual clichés. We referred earlier to the overuse in connection with international legal publications of maps and of scenes of important people in international law-related settings. Consider the following cover image. A man is sitting at his desk in a high-backed leather chair. He is white, in late middle age, and is wearing a three-piece mid-grey suit with wide 1950s-style lapels. His arms are folded, and his face is expressionless. His gaze is directed off to one side. He leans back in his chair. On the wall behind the man is a map. It takes up the entirety of the space behind him. The North Atlantic Ocean is to his right, the Indian Ocean to his left. The scale of the picture is such that his head is about the same size as West-Central Africa. Indeed, his head largely blocks those regions from view, along with the rest of the sub-Saharan continent. In front of the man, on the desk, is a large blurry shape that appears to be an open hard-sided attaché case. We see an extended diagonal hinge, again out of focus, ending at about Washington DC. This is the image on the cover of Sundhya Pahuja's *Decolonising International Law*. It's a black and white photograph, and a note on the back of the book informs us that the man is Eugene R. Black, president of the World Bank from 1949 to 1963.⁸²

Pahuja's cover reawakens the visual clichés of international legal publishing by *literalising* them and inviting attention to the material realities behind them. One of the characteristics of cliché, as we have seen, is evanescence; clichés fade into the background, unable to hold our attention or induce us to examine their detail. In the photograph on the cover of Pahuja's book, the map is *literally* in the background. Furthermore, the map itself is not a representation of a map; it is a *literal* map hanging on the wall of Black's office. As Black sits with his back to it, he *literally* claims a place in the order of international development before, or in front of, Africa. The fact that he obscures most of the continent also makes *literal* the old cliché of the 'dark continent'. The hinge of the attaché case connects Black's chair with the approximate location on the map of Washington DC, similarly *literalising* the seat of the World Bank. We get

⁸² Sundhya Pahuja, *Decolonising International Law* (Cambridge University Press, 2011).

a good view of Black's face, but the rest of his body is partly obscured by the attaché case and desk. He is *literally* a Head. What then of the organisation of which he is head – is the World Bank *literally* a world bank? The picture's blurry foreground suggests that, on certain questions raised by an enquiry into the decolonisation of international law, we currently have no clear answers.

Conclusion

Faced with the phenomenon of cliché, we have contrasted two approaches which we have found in the literature on this subject. One approach is to say '*Away with cliché!*'. This is epitomised by George Orwell in his essay 'Politics and the English Language', with its injunction never to use phrases which you are accustomed to seeing in print. The other approach is to say '*Do something with cliché!*'. Samuel Beckett was a master of this, but Christopher Ricks encapsulates the point of it when he speaks of using clichés, rather than allowing oneself to be used by them. The first of these two approaches is – to us, at least – the more familiar; the second, the more challenging. Together, they express what Elizabeth Barry has termed 'the impasse of attraction and resistance to cliché'.⁸³

International law designates a field of cliché. That field overlaps with, or is partly encompassed by, other fields of cliché, both specialised and everyday. But it is also partly distinct. Clichés specific to international law often originate as quotations from academic literature, from the pronouncements of courts and tribunals, or from the language of international institutions. Quotation – repetition – is key to the emergence of clichés. Of course, repetition also has a wider significance in law, including international law. The click-clack of cliché is integral to all jurisgenerative processes. As a problem of international law, however, cliché is fundamentally about international legal thought – its independence, vitality and creativity.

A 'war against cliché' has been declared, and is going on around us. What is, or should be, the situation on the international legal front? As we approach now the end of our discussion, we confine ourselves to one further observation. This is that it is among the *clichés* of clichés that they need to be 'attacked' and defeated militarily.⁸⁴ That is to say, the 'war against cliché' is itself a cliché. To engage in it is to be undermined in one's

⁸³ Barry, *Beckett and Authority*, 5.

⁸⁴ See Ricks, 'Clichés', 58.

efforts to pursue it by that very gesture. And if, somehow, the war could be won, what would victory look like? Would it not serve only, as Ricks puts it, to replace 'tyranny-by-clichés' with 'tyranny-over-clichés'?⁸⁵ Here is Redfern's friendly advice: 'Clichés will not go away, nor should we even desire them to. Use them. Know them. Use them knowingly.'⁸⁶

⁸⁵ *Ibid.* ⁸⁶ Redfern, *Clichés and Coinages*, 256.

International law and the responsibility to protect

MICHAEL BYERS

Introduction

'[W]e surely have a responsibility to act when a nation's people are subjected to a regime such as Saddam's.'¹ During its short life, the 'responsibility to protect' (R2P) has experienced gains and setbacks, with the greatest setback coming in March 2004 when Tony Blair invoked the concept in an attempt to justify the previous year's invasion of Iraq.

R2P is of interest to international lawyers and international relations scholars alike. It is a result of 'norm entrepreneurship'.² It achieved prominence quickly, with only four years separating its birth in 2001 from its inclusion in the United Nations World Summit Outcome Document in 2005. But with success came controversy and compromise. On the key issue of the use of military force, R2P has – by widespread agreement – been confined to the context of UN Security Council decision-making, where it remains non-binding.

This chapter examines the interaction between R2P, the prohibition on the use of force set out in the UN Charter, and the discretionary power of the Security Council to determine the existence of a 'threat to the peace' and authorise military action.³ It asks: to what degree, if any, has R2P

¹ Tony Blair, 'The Global Threat of Terrorism', speech, Sedgefield, 5 March 2004, BBC News, full text available at <http://news.bbc.co.uk/2/hi/3536131.stm>.

² On norm entrepreneurs, see Martha Finnemore and Kathryn Sikkink, 'International Norm Dynamics and Political Change', *International Organization*, 52 (1998), 887; Margaret Keck and Kathryn Sikkink, *Activists Beyond Borders: Advocacy Networks in International Politics* (Ithaca: Cornell University Press, 1998); Ian Johnstone, 'The Secretary-General as Norm Entrepreneur' in Simon Chesterman (ed.), *Secretary or General?: The UN Secretary-General in World Politics* (Cambridge University Press, 2007), 123.

³ The broader aspects of R2P are well-documented elsewhere. See e.g. Gareth Evans, *The Responsibility to Protect: Ending Mass Atrocity Crimes Once and For All* (Washington, DC: Brookings Institution, 2008); Ramesh Thakur, *The Responsibility to Protect: Norms, Laws, and the Use of Force in International Politics* (London: Routledge, 2011).

SOVEREIGNTY, STATEHOOD
AND STATE RESPONSIBILITY

Essays in Honour of James Crawford

Edited by
CHRISTINE CHINKIN
and
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