

# The Function of Public International Law

Jan Anne Vos

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# Foreword

Since the late 1980's international legal scholarship has been shaken up by incisive anti-foundational critiques as voiced by *inter alia* David Kennedy and Martti Koskenniemi. Following the tradition of critical legal scholarship, these critiques demonstrated the indeterminacy of foundational legal concepts in international law and the openness and reversibility of international legal arguments. The insights from critical legal scholarship provoked strong and contradictory responses. Some embraced them as tools for emancipation, that could be used to disclose the political agendas pursued in the name of an objective and neutral international legal order. International law, in this view, should be re-politicized. Others, however, regarded critical scholarship as undermining the international rule of law; as a project that may be well-developed in terms of analysis and deconstruction, but also as a project that threatens international law's independence from politics as well as its ability to civilize conduct in international affairs.

Jan Anne Vos' *The Function of Public International Law* is an ambitious attempt to transcend the terms of the debate between critical legal scholars and 'mainstream' international lawyers about the relation between law and politics. Vos basically accepts the validity of the critique voiced by critical scholarship. In terms not dissimilar to Koskenniemi's basic concepts in *From Apology to Utopia*, Vos argues that international legal argument oscillates between two mutually exclusive positions or frameworks. The first is the framework of obligation, which holds that rules of international law restrict a pre-given freedom of states. The other is the framework of authorization, which holds that international law confers upon states the normative power to act. According to Vos both frameworks suffer from the same problem: they cannot be upheld consistently. As a result, international legal argumentation has a tendency to constantly shift from one position to the other, even though both positions cannot be valid at the same time. Vos illustrates the workings of both frameworks in general theories of law, international theory, the sources of international law, the law of international organizations and concepts such as *ius cogens* and *erga omnes*.

For Vos, however, the radical indeterminacy that follows from his analysis does not mean that international law is irrelevant or overtaken by politics. On the

contrary: Vos regards the dilemma situation that results from the mutually exclusive and internally contradictory frameworks as a precondition for the proper working of international law. International law, in his view, is not a system of rules laying down standards for conduct, but rather a system which forces states (and other actors) to continually constitute and reconstitute international society through practical reasoning. Within this reformulated framework, Vos regards international law and international politics as mutually constitutive; as part and parcel of the never-ending constitution of international society. For him this is, to use the title's wording, the function of public international law.

As I stated above, the approach taken by Vos is ambitious. Vos is not afraid to turn established readings of international law and legal theory on their head nor to come up with independent and original interpretations of some classics in international law and legal theory. Moreover, he does not shy away from developing his own framework of international law and from giving examples how this framework could be (or could have been) applied in practice. The unconventional nature of Vos' approach will most likely spur debate and controversy. In a way, however, this is exactly what the book seeks to achieve. After all, the book itself is part and parcel of what it analyzes, the ongoing debate on the constitution and reconstitution of international society through practical reasoning; through argumentation, critique and counter-argumentation.

January 2013

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