CHAPTER IX  KORHONEN, SITUATIONALITY AND “THE CAVE”

The ethical task is to encounter the problems of life as they come: open, indeterminate, uncontainable, irreducible. ‘Authenticity’ in this pragmatic world is about facing the problems in their full complexity, without simplification or abdication of responsibility to higher unverified authorities, ideals or standards, in a manner which builds a relation of significance between what we do, both in terms of our work and our personal actions, and what we are and what we want to be as people.¹

Facing the Post-Foundational

I noted in the previous chapter Carty’s comment that Kratochwil’s work, in some senses, “picked up where Koskenniemi left off” – and I argued that this was true only insofar as Kratochwil provides us with a basis for understanding how international norms can and do function in terms that escape the totalising impulse of Koskenniemi’s dichotomising technique. In ethics, it is at least arguable that he ultimately returned to a form – albeit a very sophisticated one – of foundationalism, based on an “elemental” transcendental element to his theory of communicative action in his discourse on grievances.² Therefore, although Kratochwil’s methodological approach based upon the Aristotelian conception of rhetoric does provide us with one interesting avenue for exploration in the attempt to take up the

² This, of course, as I noted in the previous chapter, is precisely the charge that Foucault and Rorty have levelled at the creator of the theory of communicative action, Jürgen Habermas. See e.g. Michel Foucault, “The Ethics of Concern for the Self as a Practice of Freedom”, in Paul Rabinow, ed., Michel Foucault: Essential Works of Foucault 1954-1984: Volume 1: Ethics (New York: Free Press, 1997) 281-301, at p. 298; Richard Rorty, Contingency, Irony, and Solidarity (New York: Cambridge University Press, 1989) pp. 61-68.
critical challenge – on which considerably more in the next section of the book – the manner in which argumentation should be guided and, ultimately, judged, remains locked in the paradigm of foundationalist philosophy through his attempt to ground universally valid norms.1

In this chapter, I want to deal in detail with the work of Outi Korhonen, a scholar who has picked up from Koskenniemi in a manner perhaps more in keeping with my overall project here: namely, to attempt to suggest what might be left if we take post-foundationalism as applicable “all the way down”, not just to the interpretation of laws but also to the ethical (and, indeed, meta-ethical) positions that must, ultimately guide and inform that practice. Korhonen’s main arguments in this regard are contained in a single article, “New International Law: Silence, Defence or Deliverance”;4 and, although many of the themes therein are reprised in subsequent works, most notably in her monograph International Law Situated;5 there is also a considerable degree of difference in the later pieces, particularly in terms of the ambition of her propositions – which appear considerably lessened in the latter. For that reason, my main focus in this chapter will be on the first article, although I will have cause to refer to her other works; particularly as, to my mind, the seeds of the later changes are already sown in her early conclusions, as I will seek to illustrate. Perhaps unsurprisingly, my own view is that, despite her avowedly post-foundational premises, she too ultimately returns to a type of foundationalist thinking, this time characterised by the problem of fetishism.

In many ways, Korhonen’s work is the closest of any of the theorists that I have analysed to the project of this book. No-one else has attempted to up the critical challenge so explicitly in its own terms, and to look to see what, if anything, lies beyond apology and utopia. As I have done here, she locates her own writings before the first chapter of standard doctrinal textbooks, seeking to avoid the application of “pre-set” criteria about what is and what is not legal that “remain out of sight”, their determining influence on what is presented as neutral exegesis never

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1 To the extent, at least, that he flirts with the ideal transcendental element of the theory of communicative action in terms of the “elemental normative requirements” of a discourse on grievances. See also, however, footnote 63 in the previous Chapter.

4 Outi Korhonen, “New International Law: Silence, Defence or Deliverance?”, 7 European Journal of International Law (1996) 1-28. She does refer to another work of hers, unfortunately, as far as I am aware, not available in English translation; I am thus unable to include an analysis of it here: Korhonen, Kansainvälisoikeudellinen tulkinta ja dialogisuus (Philosophical Inquiries at the University of Tampere) (1995).