

The Yearning for Unity and the Eternal Return of the Tower of Babel

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I. Introduction

International lawyers frequently aspire to affirm the existence of international community and the presence of authority to speak on its behalf. However by forcing a hierarchical representation of legal values upon nations, which have not accepted them, international lawyers, and the politicians whom they advise, risk unleashing a whirlwind of violence. The myth or the Biblical story of the *Tower of Babel*, is a millenniums old warning of the presumption which can lie behind an apparently reasonable desire for global unity and harmony. I take as a welcome task assigned to me by the coordinator of this issue of the journal,¹ to demonstrate that those who support the idea of international community fail to address the horizontal inter-state fragmentation of international society.

I am going to approach this task, which I have been labouring for approximating twenty years since the publication of *The Decay of International Law*,² not by elaborating what I see as all the stages necessary to set the scene for a non-foundational dialectic in international legal argument,³ but merely by focussing on what I think is just one of the many stumbling blocks in the way of placing any dialectical arguments at all on the agenda of mainstream formalist international lawyers.⁴ The stumbling block is the formalist definition of the state as the primary subject of international law. This entity, which is, of course, an invention of the lively imagination of the formalist international lawyers, can hardly be any more capable of dialectical argument than its creators.

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¹ A letter from Karine Caunes, 08.11.06

² A. CARTY, *The Decay of International Law? A Reappraisal of the Limits of Legal Imagination in International Affairs*, Manchester University Press, 1986, to whose arguments Ms Caunes kindly refers in her letter.

³ I prefer the expression non-foundational to anti-foundationalist, as the latter expresses an aggressive conclusiveness about the concrete circumstances of individual persons and nations, which would, in my judgment, need to be individually demonstrated. Anti-foundationalists tend not to feel they need to take the trouble to do this.

⁴ This will still involve some repetition of arguments already published, but since they have not evoked a positive response, as far as I am aware, they probably need more succinct expression.

Non-foundational dialectical legal argument takes as its starting point, the contingency and, therefore, relativity of legal arguments presented by states. These arguments may appear to the states themselves as objective representations of legal truths, *i.e.* in terms of analytical or normative legal theory, correct approximations to already valid legal norms. This will usually have the corollary that, where disagreement arises, one or more states are taken to misrepresent legal truth and are therefore delinquent, and must be punished. Legal formalists, who are all foundationalists, tend to be rather violent people, always running to the Security Council, or around it, to enforce their legal representations on others. The non-foundationalist, who is as sceptical of himself as he is of others, must endeavour, in the present climate of international violence,⁵ to try to reassert the egalitarian priority of the inter-subjective as itself the only formal category with which to work. All legal argument will in fact be perspective driven, contingent to time and place, and, above all, relational, reactive, *i.e.*, whether the parties are aware of it or not, dialectical. The non-foundational argument is anti-objectivist in the sense that it resists the search for a point of validity to resolve an argument, which is outside the parties themselves.

The difficulty with all of this for the formalist international lawyer is, quite simply, he does not see what it can mean to say that states could argue. Political scientists such as Raymond Aron may call states “cold monsters”, prone to quite glacial argument, but, for lawyers these entities have no personality at all in an anthropomorphic sense. This is why the first difficulty for both legal formalists generally, as well as for those who want to see a legal form to an international community, is how there can be any language of understanding, misunderstanding, recognition or mis-recognition in relations among states. How can one reach so far as a dialectic of clashing cultures among entities conceived by formalist lawyers as corporatist in character, and conceived by international constitutionalists as stepping-stones on the way to a world corporate entity? The corporatist way of thinking excludes any direct contact with the human elements, which make up the community behind the state.

The corporatist way of thinking about the state resolves the problem of political legitimacy through a theory of representation, which has its roots in various forms of contractarianism. All of these theories suppose that legitimacy arises through the consent of the individual and this can be supposed - here enters the mythical character of

⁵ So graphically and accurately described by the Russian President, Putin, at the Security Conference in Munich on the weekend of the 10-11 February 2007.

contractarianism – to be given because of an original contract whereby he can be taken to have consented to the institutional framework whereby he is politically represented. Political legitimacy will be the equivalent of legal validity. If decisions are taken by corporatively authorized representatives then they will be legally valid and binding. The formalist lawyer's self-appointed task will be to assess whether decisions taken by supposed authorized representatives have been so taken. I say self-appointed task, because the most dominant theory of contractarianism applied by international lawyers is the Hobbsean variety, whereby the representor and represented are subsumed into one person, so that issues of invalid state actions, at least at the international level, are difficult to imagine. Of course, state representatives accuse one another readily, of having committed invalid and illegal acts, but as there is not yet a world state, a world corporate entity which could resolve the validity of these allegations, it is precisely this type of mutual abuse that states find so frustrating and leads them to behave violently towards one another. So, whatever limited function the international lawyer may have as an external relations lawyer, a branch of constitutional law, at the international level he has really almost nothing to do. Nonetheless his conceptual framework for approaching international legal personality bars him from more productive avenues, such as the development of international legal dialectic.

It is proposed here to reiterate this argument by means of a close reading of contemporary French doctrine on international law, also as French is the second language into which this article will be translated. While by no means every country follows French doctrine, it is sufficiently sophisticated, in terms of awareness of the background of political theory underlying international law, to be taken as a genuine challenge for my project. The French state as a corporate entity in the formalist legal imagination is incapable of recognising any internationally significant dialectic, because it is, at the internal, domestic level, unitary and uni-dimensional. This primary international law understanding of corporatism is Hobbsean. It requires a unity of the represented and the representative in the latter. The essence of the state as a subject is a single will, which projects itself externally. There is quite simply no place for inter-subjectivity within the state and inter-state meeting is confined to a formal convergence of wills which represents a thoroughly statically conceived fettering of otherwise sovereign state discretion. This Hobbsean approach recognises that at the international level, there is no world corporate entity.

II. Corporatism and contractarian theory

It is the actual corporate character of the state that counts. A state as a structure is inconceivable⁶ if it does not have a constitution, which treats a group of persons as organs of the state. As Combacau says, the apparition of the state is inconceivable if the collectivity does not give itself the organs by means of which the actions of fact of the social body which it, presumably the collectivity, (les agissements du fait du corps social) constitutes already, can be imputed to the legal corporative body (corps de droit) which it claims to become.⁷ The co-author Sur says of the relation state/nation, the coincidence of the two is a delicate matter. The national composition of a state is a social reality and not a juridical matter. International law attaches to the idea of sovereignty and sees in the state a stable element and foundation. Sovereignty itself signifies a power to command. As Combacau says⁸ sovereignty signifies the power to break the resistance as much of one's own subjects as of one's rivals in power. It has to subordinate both. The beginnings of the institutions of the state are a matter of fact because, by definition, the state does not pre-exist them- that is, the institutions have not come into being by a constitutional procedure. They may claim legitimacy from a struggle which the collectivity has against a state which it judges oppressive, but international law is indifferent to the internal organisation of collectivities. Nothing requires that organs be representative, but merely that they have power "[...] de quelques moyens qu'ils aient usé pour le prendre et qu'ils usent pour l'exercer".⁹

This obliteration of the social body or community as against the corporate character of the state itself is reproduced across the whole spectrum of French international law textbooks, regardless of their ideological tone. In *Droit International Public* by Nguyen Quoc Dinh, Patrick Daillier and Alain Pellet, the authors say that for the definition of the elements of a state, among the terms population, nation and people, only the first is accepted. Disagreement is total on the meaning of the term "nation". The spirit of this analysis is the same as with Combacau and Sur. The effect of a right of secession, vindicating a right of self-determination of peoples, would be unlimited territorial claims. So any recognition of the material substance

⁶ J. COMBACAU and S. SUR, *Droit International Public*, 1st ed., Paris, Domat Montchrestien, 1993, p. 268.

⁷ *Ibid.*

⁸ *Ibid.*, p. 226.

⁹ *Ibid.*, p. 269.

of the social body is seen by Daillier and Pellet as an immediate recipe for international social chaos. Once a state is created it confiscates the rights of peoples.¹⁰

In the collective volume directed by Denis Alland, *Droit International Public* provides a very lucid third chapter on the state as a subject of international law, which makes rather explicit the philosophical and ideological foundations of French formalism. Using virtually identical metaphors to Daillier and Pellet he speaks of the right of self-determination of peoples as a matter which may be exercised at a particular historical instance, *after which the people effaces itself once again behind the state*.¹¹ He draws a distinction between the sociological and juridical definition of the state, and he prefers the former, which reflects the factual, historical origin of the state, that its coming into existence is not governed by international law.¹²

It is only in the work of Dupuy, arguably the most purely technical, in the international law sense, that the inherent confusion of the whole French approach is brought to light. In his *Droit International Public*, Pierre-Marie Dupuy gives extensive attention to the relationship between the classical definition of the state and *the right of self-determination of peoples*, saying that *the problem is difficult because the latter is accepted as legal and as applying in all situations, if one follows the letter and the logic of the international legal texts* (my italics).¹³ He looks to international recognition as a solution, with the qualification that there are not clearly objective criteria to identify what constitutes a people. While international law is no longer indifferent to issues of legitimacy and human rights, it will still be a question whether the traditional elements of the state, which express effectiveness, are reunited in a particular case.¹⁴ This position more accurately recognises the confusion that international law does experience, between corporatist and ethnic or other social concepts of the personality of the main subject of international law.

Once constituted, the state appears to exist in an immaterial world. It is said that the state as a corporate body is detached from the elements that compose it. This reasoning allows Combacau to say that the moral personality of the state, in the sense of corporate identity, removes the significance of the identity of the persons and the groups which make it up materially. This has the consequence that the greater or lesser modification of the spatial

¹⁰ NGUYEN QUOC DINHP, D. AILLER and A. PELLET, *Droit International Public*, 6th ed., Paris, Librairie Générale de Droit et de Jurisprudence, 1999, pp. 407-408.

¹¹ D. ALLAND, *Droit International Public*, 1st ed., Paris, PUF, 2000, in the Chapter by H. ASCENSIO, "Etat", pp. 99-ff, § 91.

¹² *Ibid.*, §§ 73-75.

¹³ P.M. DUPUY, *Droit International Public*, 4th ed., Paris, Dalloz, § 133.

¹⁴ *Ibid.*, §§ 30-34 and 130-132.

basis or the population of this territorial collective which is the state do no more than draw in another manner the contours of the object with respect to which the international competences of the state are recognised.¹⁵

The historical significance of the corporatist approach (effectively Hobbsean in the French case) for the impossibility of a hermeneutic of inter-state traditions is made clear in the work of Jens Bartelson who describes the rupture with the past more contextually. The late medieval tradition, which included Vitoria and especially Grotius, started from the premise that Man is still embedded in a universal society and in the Cosmos. As Bartelson puts it "...the question was not how to solve a conflict between conflicting sovereigns over the foundation of a legal order, but how to relate concentric circles of *resembling* laws, ranging from the divine law down to a natural and positive law".¹⁶ Whether Vitoria or Grotius, they would look to the resemblance of episodes and events by drawing upon an almost infinite corpus of political learning recovered from antiquity, whether legendary or documented, "...because it is assumed that they (modern rulers) share the same reality, and occupy the same space of possible political experience."¹⁷ Neither Grotius nor Vitoria would countenance any opposition between the kind of law that applies between States and within States, since this would imply an absence of law.¹⁸

The break with the Medieval-Renaissance picture comes with the modern state arising out of the wars of religion of the 16th and 17th centuries. The conception of this state broke with any attempt to ground its existence in a transcendent order. The new state had to self-ground itself in the absolute, unquestionable value of its own security, as defined and understood by itself. The science of this state was Hobbsean, concerning the sovereign who obliges, but is not obliged, to whom everyone is bound, but which is itself not bound. Territorial integrity is an aspect of the security, which rests in the already established territorial control. This control of territory comes to be what the so-called law of territory has to authenticate and validate. The extent of the territory of one sovereign is marked by the boundary of the territory of other sovereigns. The actual population of each sovereign territory is limited to the extent of power of the sovereign, measured geopolitically. *The*

¹⁵ J. COMBACAU and S. SUR, *Droit International Public*, 1st ed., Paris, Domat Montchrestien, 1993, pp. 219-220.

¹⁶ J. BARTELSON, *A Geneology of Sovereignty*, Cambridge, Cambridge University Press, 1995, p. 128.

¹⁷ *Ibid.*, p. 110.

¹⁸ *Ibid.*, pp. 130-131; Bartelson applies these remarks to Vitoria.

*populations of other sovereigns are not unknown "others" in the modern anthropological sense, but simply people beyond the geo-political boundary of the state (my italics).*¹⁹

The purpose of law is no longer to re-establish resemblances in a fragmenting medieval Christian world, but to furnish dependable information about the limits, as boundaries, of the sovereign state, whose security rests precisely upon the success with which it has guaranteed territorial order within its boundaries, regardless of whatever is happening beyond these boundaries. Mutual recognition by sovereigns does not imply acceptance of a common international order, but merely an analytical recognition of factual, territorial separation, which, so long as it lasts, serves to guarantee some measure of security. However, as Bartelson puts it, *the primary definition of State interest is not a search for resemblances, affinities of religion or dynastic family. Instead interest is a concept resting upon detachment and separation (my emphasis).* The rhetoric of mutual empathy or sympathy between peoples is, in a logical or categorical sense, inconceivable. International society is composed of a collection of primary, unknowable, self-defining subjects, whose powers of detached analytical, empirical observation take absolute precedence over any place for knowledge based on passion or empathy, whether oriented towards sameness or difference.²⁰

This structure of sovereign relations remains the basic problematic, which international lawyers face today. The origin of the State is a question of fact rather than law. One may not inquire into its composition or nature. Law is whatever the sovereigns choose to define as such through their will. The instability of this supposed legal order is patent. The status of mutual recognition as a means of assuring security is unstable. There is no agreement about the legal significance of recognition. Fundamentally the problem is that while there is plenty of what all the State parties are willing to identify as law, there is auto-interpretation of the extent of legal obligation.

So, law has come to be defined unilaterally by the Sovereign (of Descartes and Hobbes). The meaning of legal obligation has no communal sense. It merely attaches spacially to a geo-politically limited population. Sovereigns, detached and separate from society, can determine meanings by legal fiat, by using words to reflect their exclusive monopoly of physical power and the capacity to coerce. It has always been my wish to argue,

¹⁹ *Ibid.*, a summary of the whole of Bartelson's chapter 5, 'How Policy Became Foreign', pp. 137-185.

²⁰ *Ibid.*

since *The Decay of International Law* (1986), that international legal concepts have been embedded in political theory, *i.e.* probably long forgotten projects to give meaning to public life. The corporatist project rests upon a contractarian myth, expressing the belief that all political legitimacy, *and with it legal validity*, must rest upon being able to draw a contractual chain, however implicit or supposed, between the consent of the individual and the act of the state. Thereby the state act has a legally and politically representative character. If the chain is clearly broken at any point, both the lawyer and political theorist will say that legal validity and political legitimacy have vanished. That is all either of these two would-be professionals have to do or indeed can do. They do not have to recognise or understand anyone, or indeed engage in any material argument, dialectical or otherwise with anyone. Formalism is a matter of chasing after the imaginary contractual chain.

The most penetrating criticism of contractarian theory known to me comes from political theology, which has the perspective sufficiently broad to appreciate the mythical character of the theory and how it blocks the way to a legal politics of cultural identity. Oliver O'Donovan points out how any community identity rests upon historical provenance.²¹ He objects, contrary to the Hobbsean and other contractarian myths, that contractarian theory as a way to political authority cannot actually constitute a people.²² A state structure, the outcome of a successful argument for political authority, serves for the defence of something other than itself. O'Donovan makes the vital claim that contractarianism, as a mythical foundation for political authority, offers no theory of identity that could support the moral unity of a people.²³ He affords a brilliant insight into the extraordinary violence of self-styled Western democracies; when he goes on to argue that this huge deficiency in contractarian theory leads its proponents into a compensatory compulsion to impregnate the shell of their societies with an ideological self-consciousness from the very start. For instance, Rawls' language distinguishing liberal from so-called decent peoples is abstract political invention, not rooted in ordinary life. The narrative myth of constitution has to perform the task of political analysis.

O'Donovan has also understood the inevitable path which contractarian theory will follow at the global level and makes the point that the theory will be self-driven to think

²¹ O. O'DONOVAN, *The Ways of Judgement*, Cambridge, Eerdmans, 2005, p. 140.

²² *Ibid.*, p. 150.

²³ *Ibid.*, pp. 155-156.

globally of a single world government, reigning over a non-existent world people, since the theory has no place for identity. The theory makes impossible any material, mutual dialectic of identities, because contractarianism ignores any moment or place for recognition, conceiving the representative relation as achieved by a once and for all act of the human will²⁴ *i.e.* in the founding Hobbsean contractarian myth, which combines the representative and the represented in one entity. As there are no possibilities of mutual recognition – given the once and for all expression of a single unified will – whether of Hobbes or Rawls – the newly constructed entity, whether national or global, cannot be self-reflective or exist in relationship. A government of a people without internal relations of mutual recognition can have no identity (p.214). So, at the global level, contractarianism can only jump to a theory of world government, once again striving forcefully to reproduce globally a single world people, just as the single state produces ideologically its own people.²⁵

Again, a crucial insight into contractarianism that O'Donovan provides is that the single global people reproduced by a global constitution ignores the idea of a people as a subject in a world of reciprocating others. This is why it inevitably happens that schemes of world government cannot be distinguished from the realities of imperial- colonial enterprise, given that they work with an abstract idea of a government of a people with no internal relations of mutual recognition.²⁶ In whatever their claims to universality, all empires need strong boundaries – empires are driven, metaphysically to recreate the I-Thou relationship, for instance as Rome did through Byzantium.

The brutality of contractarian universalism can be seen so clearly in the solipsist argument of Robert Kagan's *Paradise and Power*, where, as O'Donovan would lead us to expect, an ideologised concept of American democracy, as an objective value, is projected onto the global scene, whose violence is above all a failure of cognition, rooted in a two-fold failure of both internal and external self-recognition and mutual recognition. As O'Donovan has pointed out²⁷ a people must have internal relations of mutual recognition to have a capacity for identity and hence external relations of recognition. The ideological aspiration of a single state to be a global government - anyway only ideologically implicated – ignores the idea of a people as a subject in a world of reciprocating others. It may not be fashionable in

²⁴ *Ibid.*, p. 163.

²⁵ *Ibid.*, pp. 219-220.

²⁶ *Ibid.*, p. 214.

²⁷ *Ibid.*, p. 214.

academic scholarship to pinpoint a particular country and a particular personality, but the issue of imposition of a constitutional order, outside American policy, is purely academic. I agree with Kagan, “that EU foreign policy is probably the most anaemic of all the products of European integration”.²⁸

The challenge of global liberal constitutionalism, effectively, comes only from this American source. Of course, the irony is that it is not conceived in terms of multilateral institutionalism, but, as O’Donovan warns, it depends upon a confusion of the self with the global. It is best to quote Kagan, as paraphrasing of Kagan’s delirious script will risk the accusation of anti-American bias in anaemic European academic circles:

“The United States *is* a behemoth with a conscience... Americans do not argue, even to themselves, that their actions may be justified by *raison d’etat*. They do not claim the right of the stronger or insist to the rest of the world that “the strong rule where they can and the weak suffer what they must. The United States is a liberal, progressive society through and through, and to the extent that Americans believe in power, they believe it must be a means of advancing the principles of a liberal civilization and a liberal world order”.²⁹

“Americans have always been internationalists, but their internationalism has always been a by-product of their nationalism. When Americans sought legitimacy for their actions abroad, they sought it not from supranational institutions but from their own principles. That is why it was always so easy for so many Americans to believe that by advancing their own interests they advance the interests of humanity”.³⁰

This perspective will not change, in Kagan’s view, and it has long been the American position. Both the Clinton and Bush administrations rested on the assumption of America as the indispensable nation.³¹ Kagan continues: “Americans seek to defend and advance a liberal international order. But the only stable and successful international order Americans can imagine is one that has the United States at its centre”.³² This is not described as an expansion of international law, because supranational governance means for Kagan, working with other

²⁸ R. KAGAN, *Paradise and Power*, London, Atlantic Books, 2003, p. 65.

²⁹ *Ibid.*, p. 41.

³⁰ *Ibid.*, p. 88.

³¹ *Ibid.*, p. 94.

³² *Ibid.*

nations.³³ Instead Kagan means actual government of the whole world by the United States. So he says:

“Just as the Japanese attack on Pearl Harbour led to an enduring American role in East Asia and in Europe, so September 11, which future historians will no doubt depict as the inevitable consequence of American involvement in the Muslim world, will likely produce a lasting American military presence in the Persian Gulf and Central Asia, and perhaps a long term occupation of one of the Arab world’s largest countries. Americans may be surprised to find themselves in such a position...But viewed from the perspective of the grand sweep of American history, a history marked by the nation’s steady expansion and a seemingly ineluctable rise from perilous weakness to the present global hegemony, this latest expansion of America’s strategic role may be less than shocking”.³⁴

III. International law formalism: The eternal quest for the will of the State and sociological critique thereof.

At the level of legal formalism in Europe the difficulties with contractarian positivism are less pressing, because whatever schemes of world domination may be afloat in academic circles of legal and political cosmopolitanism, they are not going to be realised politically. Instead, the problem is more sclerosis in academic work. The only form legal communication among states can take is a Triepel-like meeting of state wills as they go beyond their institutional state boundaries to conclude international legal agreements. These could lead to the foundation of international institutions having the pretension to be constitutions of world society. Some German doctrinal study does choose to interpret the UN Charter in these terms. Critical Legal Studies has enjoyed mounting a campaign to demonstrate that the search for the “original intention” of the inter-state legislators cannot be found. The common intention of the somehow originally unified individual state wills is taken to be an ideological illusion.

In other words Critical Legal Studies does not itself afford any way out of this impasse. It will be sceptical that there is a coherent, or dense, culture behind the institution of the state that will allow any recourse to a rebirth of international studies by focussing on the interplay between different national legal traditions and understandings. That would be to “essentialize” collective social beings. Critical Legal Studies shares with contractarianism the absence of any social theory beyond legal institutions. Just as it will question whether there is

³³ *Ibid.*, p. 95.

³⁴ *Ibid.*, p. 96.

any “intention of the legislator” beyond the projection of the legal interpreter, so it will treat the idea of cultural community as a construction of the intellectual. The exercise that I am now proposing will appear to Critical Legal Studies as a form of regressive positivism, social and historical realism. With respect to actual states in the world, whether France, China or Uruguay, one should search for a concrete understanding of how particular states have been constructed and open a way to include the dimension of self-awareness of nation states as frameworks of epistemological self-awareness. This points the way to collective, inherited traditions and prejudices etc., which contribute to the style and content of collective behaviour.

The Swedish philosopher Axel Haegerstrom deconstructs, as a natural law myth, the argument that one can speak of the will of the state as an organised authority within society. That is to say, he begins the sociological task of trying to unearth the whereabouts of the structures, which are the figments of the legal and political formalist imagination. Empirically no organised authority in a society can be so centralised that it is confined to a single person. Any system of law is merely maintained by a majority of the population for an infinite variety of motives, so long as they have no sufficiently focussed motives for breaking with that system of law. The idea that a society governing itself implies a unitary willing, in turn implying a unitary subject is perhaps habitual. However, it can only mean that certain rules relating to a group are supposed to be applied by specifically appointed persons, somehow “through forces operative within the group”. In the end it is a judge who declares a legal principle in litigation.³⁵

If law understood as an imperative is called the will of the state, one will still not be able to look to an identifiable group maintaining the system of rules within the group. The reason is that all sorts of factors make up the social forces that maintain the impact of the rules. This medley of factors includes the habits of people to obey decrees, popular feelings of justice, class interests, the lack of organisation among the discontented, the positive acquiescence of the military. Even if each person wishes to conform to the law that does not imply a unitary will in all those individuals participating, that they have a common end as a unifying focus. The force of a law never depends merely upon the fact that a certain section of persons within a group desire it to be obeyed. The concept of a unitary will as a measuring

³⁵ **A. HAEGERSTROEM**, *Inquiries into the Nature of Law and Morals*, edited by **K. OLIVECRONA**, translated by **C.D. BROAD**, Almqvist and Wiksell, Stockholm, 1953, pp. 36-38.

rod for judging the claims of other original sources of law *e.g.* custom, equity, by resort to the supposed real will of the state authority, is in fact a continuing spectre of natural law.³⁶

The idea that there must be a supreme rule of law, which is a principle of validity of all legal systems translates into the idea that every group is a corporate entity with a supreme holder of power whose ordinances must be followed. This proposition is supposed to be a necessity of thought but rules are applied in practice, as applications of law, in consequence of the already mentioned medley of general extra-legal factors. There is no factual continuity or coherence in legal rules other than what is stated by the judges. Authority is not in fact clearly attributed to individuals in a corporate hierarchy if one is to look to rules, and practices actually followed. Such as way of thinking is in fact all a part of the already mentioned naturalist myth of contractarianism, supposedly legitimising politically and validating legally every decision taken in a way that can be traced back, purely hypothetically, to individual consent. So the belief of positivist international lawyers that there is an identifiable state “complete with will” is a natural law (contractarian) fantasy. There is now absent the classical natural law association with a supposed objective justice, but the obsession with legal validity has simply replaced that idea of justice with a concept of legitimacy based on a fictional individual consent. Haegerstrom’s basic point is that this approach to law fails to regard legal systems as actual social-psychological phenomena. Indeed he appears to go so far as to argue that any theory of the sources of law will presuppose naturalist fantasies of unitary harmony, when in fact the very idea of the existence of laws supposes a continued application of them, which is as difficult to unravel sociologically, in terms of actual driving forces, as the idea that one can unravel the intentions behind any original declaration of the laws.³⁷

As a heuristic device Haegerstrom’s so-called sociological realism is immensely helpful in deconstructing the intellectual apparatus with which the formal and particularly French tradition of international law works. Traditionally a legal question is usually a variant of the theme: whether the sovereignty of the state is limited by some international rule, willed explicitly or implicitly by itself alone or in conjunction with others or by the international community as a whole, which has, equally, expressed its will if only implicitly. The

³⁶ *Ibid.*, pp. 39-42.

³⁷ *Ibid.*, pp. 43-45 and 48-51. Of course Haegerstroem applies his views only to the contractarian theory of the state. I endeavour to elaborate their international law consequences.

international or national judge is set in search of valid rules. Thereby national sovereign space is either limited or extended as a result of the judgement reached as to the whereabouts of the international legal rule. To accomplish all of this, international lawyers at present think with the formalist triangle of sovereignty, international law and community, without any regard for the concrete factors, which are peculiar to the evolution of nations and their relations with one another. Formal logic does not express the reality of actual social movement and so the society of nations, the so-called international community, has a form as unitary as the so-called sovereign state (the organised nation), hiding as much profound difference as exists within states. The UN Charter, in this “objectivist logic”, rediscovers its conclusions at its point of departure. For instance, the international conditions the national, modifying it or abrogating it *ipso facto*. Indeed the two cannot logically conflict, because the trio state, international society and legal order are uni-dimensional elements of a formal equation. For instance municipal law cannot overrule or be invoked against international law. Equally, the principle *rebus sic stantibus* cannot, in promissory commitments, override the principle *pacta sunt servanda* etc., effectively the same as the principles either of the priority of the international community or of the inevitable harmony of the international and national communities.³⁸

Critical Legal Studies is correct that the illusory search for any of these national or international “legal wills” is merely a projection of the interpreting judge, who never undertakes what Haegerstrom, or any sociologist, might remotely recognize as a realistic, empirical search for the actual intentions of real people. However, the difficulty with the critical school, is that it leaves matters there. It recognises, in very vague and general terms, the contingency of the social reality, or at least what it might call, “that which lies beyond the purely projected legal forms”, but it does not attempt to reach out beyond these forms. And indeed, it cannot, for it accepts Haegerstroem’s radical critique of the subjective premises of the contemporary dreamy legal formalism. So, Haegerstrom rejects the Kantian idea that human reason can introduce an “ought” into human behaviour, because subjective attitudes in terms of feelings are reduced to, or explained in terms of, the outcomes of social upbringing and tradition. A clash of subjective attitudes has no moral significance and cannot be resolved. The idea of normative judgement tries to retain the element that something is true

³⁸ This style of critique of particularly French international law formalism is set out by **C. APOSTOLIDIS**, *Histoire du droit international: Doctrines juridiques et droit international; Critique de la connaissance*, Paris 1991.

because it springs from our will as intelligence and so from our proper self. However, this merely refers to feelings with which, in Humean terms, the person assumes a certain attitude to what is given. If the person lacks the appropriate attitude of feeling and volition, the feeling of attachment to obligation vanishes. Any search for external authority is illusory, which means that any search for “objective standards for normative judgement” will be authoritarian and produce fanaticism.³⁹ Hence the critical legal scholar will treat any essential search for “objective normative foundations” as fanatical, hegemonial or whatever. Instead he will preach to the judicial interpreter, the virtues of modesty and conversationalism, while still supposing, quite inexplicably, that somehow the international legal enterprise, and particularly its judiciary, should continue to function.⁴⁰

IV. From sociological critique to cultural, phenomenological interpretation.

However, the next step on the way to a more constructive inter-cultural dialectic, and with it, exercises in international legal translation, is to recognise, as does Raymond Aron, that psycho-social collectivities are a primary fact of international society. Individual life rests, dually on heredity *and reflection*, (my emphasis) which is not so much racial or territorial as cultural. *With a collection or assembly of beliefs and conduct*, nations find some internal or domestic harmony in relations of culture, in the narrower sense, politics, history and reason, which ground their language and also law as distinctive styles of existence.⁴¹ These are a mixture of prejudice and reflection, whereby the nation becomes an epistemological framework of perception, expressing divergences of experiences in time and place, quite simply human limitations of horizon. The essential element of this perspective, over a purely observatory, behavioural, sociological approach, is that one recognises how cultural patterns of behaviour are shot through with human imaginings and intentions, however prejudiced and confused. As Aron says, as long as human groups have languages and beliefs, which are different, they will “mis-recognize” one another and conflicts will arise out of different hierarchies of values. Interests and strategic considerations are all to be given a special, distinctive interpretation by differing groups.⁴² Aron lays stress upon the rivalry of

³⁹ See **J. BJARUP**, “Reality and Ought: Haegerstroem’s Inaugural Lecture Re-examined”, *Scandinavian Studies in Law*, 2000, pp. 57-68.

⁴⁰ This is the very vague conclusion of **M. KOSKENNIEMI**, *From Apology to Utopia*, Finnish Lawyers Publishers, Helsinki, 1988.

⁴¹ **R. ARON**, *Paix et Guerre*, Flammarion, Paris, 1962, pp. 735-736.

⁴² *Ibid.*, p. 741.

cultures, the permanent tendency which pushes each to claim that it is superior, where the will to be a nation becomes a collective arrogance.⁴³

Indeed collective psychological investigation can lead us to even more alarming insights. Negative forces can be at work in collective identities, which need never work themselves through constructively. Depression and paranoia work sharply in the definition of difference that will equally be accompanied by a struggle for superiority.⁴⁴ Since Hegel first formulated his phenomenology of the Master-Slave relationship it has been clear that at the root of modern phenomenologies of self-determination there is a vigorous if not violent struggle for self-expression. It is rooted in a logic of identity that is conflictual and anti-social in the sense that it represents a perhaps-obsessive struggle against the “outside threat” of objectification. While it may work towards the goal of inter-subjective recognition – which must suppose frontiers – the struggle is apparently inherently unstable. The Hegelian paradigm was popularized for international relations by Alexandre Kojève’s lectures on Hegel’s *Phenomenology of the Spirit*.⁴⁵ The Hegelian influence on Sartre, and its implications for international relations theory, have been followed up by James Der Derian.⁴⁶ Its influence on feminist phenomenologies of struggle is developed by Jessica Benjamin.⁴⁷

Yet it is precisely this dark social reality of explosive prejudice that an existential phenomenology of international law has the task to challenge and overcome, and not the dreamy worlds of formal validity that an equally formalist Critical Legal Studies denounces as vacuous. It is possible, phenomenologically, to become aware of one’s embeddedness in a “sea” of prejudice, to grasp a meaning from a different standpoint, engage in acts of imaginative projection, premised, certainly, on existential uncertainty – the consciousness of an absence of foundations – but also upon the existence of constituted, intentional worlds. These worlds allow of interpenetration and we are not compelled to remain imprisoned in solipsist monologues. Nations are intentional worlds, but it is possible, for the international lawyer, to achieve transcendence, also of himself, through a dialectical process of moving from one intentional world to the other.

⁴³ *Ibid.*, pp. 297-298.

⁴⁴ *Ibid.*; C. OLIEVENSTEIN, *L’Homme Parano*, Paris, Livre de Poche, 1993, pp. 103-108.

⁴⁵ A. KOJEVE, *Introduction a la lecture de Hegel*, Paris, Gallimard, Paris, 1947.

⁴⁶ J.D. DERIAN *On Diplomacy*, Oxford, Blackwell, 1987, pp. 152-160.

⁴⁷ J. BENJAMIN, *The Bonds of Love*, New York, Verago, 1990, pp. 51-84.

The fragments of legal institutions can be understood, as intentional acts, if placed in this wider context of relations among nations, as the cultural complexes which Aron understands and describes. “Wars” against terrorism etc. and Islamic militants, struggles over proliferation of weapons of mass destruction, quarrels over the relationship of environmental to commercial concerns (GM foods), migratory movements and asylum appeals, issues of humanitarian assistance and limits to humanitarian interventions, disputes over minority and secessionist movements – all of these issues and many others, are, in practice, embedded in concrete relations among particular groups. The essential part of a non-essentialist argument is that the parties should appreciate that their perspectives cannot have, as far as their powers of self-reflection go, any measure of objectivity. They are completely situation determined and in this sense, lack any final foundation. The following are some examples:

For instance the arguments about Iran acquiring nuclear weapons are in a context of the Palestine Israel conflict and the covert assistance of Israel by the Western powers to acquire such weapons in the 1960s and 1970s. Iran accepts, voluntarily, a legal duty not to acquire the weapons. The difficulty is the notoriously ambiguous legal duty not to enrich uranium *for the purpose of developing nuclear weapons* – a subjective standard. Yet the nuclear powers have also a duty to work towards their own disarmament. More especially the Non- Proliferation Treaty is itself consensual and can be denounced. Arguments about proliferation have something to do with treaty obligations, but much more to do with attitudes that communities have towards one another, themselves rooted in fairly long histories of antagonistic association. The question of equality of treatment is glaring. Arguments that “weapons cannot be allowed to fall into the hands of certain types of states” are prevalent here, and yet involve cultural, political and moral evaluations inseparable from interpretation of treaty terms. Interpretation of any scattered and random treaty obligations (why should not Israel be a party to the NPT?) will be, it can safely be said, entirely a matter of judgement by particular historical cultural communities, of other such communities.

Secondly, the security issue, war against terrorism and humanitarian atrocities generally, has become polarised between most of Europe and the United States. Ulrich Beck has offered a picture, Orwellian in character, of what the recent American impact on international law has come to, while at the same time he regards the European response as a form of stone-walling, producing global stale-mate. In particular he takes up Orwell’s ideas as to how words are given opposite meaning, *e.g. Fascism is Democracy*, and he applies this to

particular “developments” in international law, such as the doctrine of humanitarian intervention. So Beck comes back precisely to the idea of the just war. He finds it paradoxical that the most successful institutionalizations of cosmopolitan culture – the so-called societies of the language of individual and democratic freedom – lead the call for a re-legitimation and legalisation of war, (*Krieg ist Frieden, Über den postnationalen Krieg*), in particular what he graphically calls Human Rights Wars and Wars against Terrorism. The boundaries that have preserved the world against total war since the 17th century, dualities such as war/peace, civil/military society, military/police action disappear. Beck speaks of a culture of world turbulence, which is a mixture of poverty, religious intolerance, racial hatred and anti-Americanism. He does not prefer the European to the American model, for just as one seeks revolutionary solutions through unilateral action, the other seeks a negotiation without force from the standpoint of the status quo. For one thing, the threats now facing Europeans and Americans, also among other threats, include a diffuse ideological terrorism (so-called militant Islam) and international criminality, a privatisation of violence, which neither European nor American models of international order accommodate.⁴⁸

Thirdly, Beck so impressively recognises with respect to the interface between environmental and commercial questions, that we are here on the border between reason and belief, if not madness. The nature of objectivity is what is at stake, both whether it exists and whether we can reach it. Dangers, whether of terrorism or more European anxieties, such as global warming and genetic food manipulation (Frankenstein foods) are real because they are real in the eyes of the beholders. The reality and the perception of dangers are difficult to separate. Indeed Beck appears to claim there is no objectivity of a danger apart from the perception of it from a cultural (meaning relative, particular) perception and evaluation. The objectivity of a danger, he says, exists and has its origin essentially in the belief in its existence. Here Beck turns his own discourse into an Orwellian paradox. That one person’s mortal danger is another’s infantile hysteria means that the struggle or striving for objectivity throws us completely into the realm of belief, that is, quite simply faith, that from which the conscience of the Enlightenment is supposed to have escaped. Those who believe in the dangers of atomic terrorism live in a totally different world from those who believe in the dangers of fall-out from the use of atomic energy. What shakes the NATO and the EU to the

⁴⁸ U. BECK, *Der kosmopolitische Blick oder: Krieg ist Frieden*, Frankfurt am Main, Suhrkamp, 2004, especially Chapter 5: “Krieg ist Frieden: Ueber den postnationalen Krieg”, pp. 197-244.

foundations is existential threat to one person and pathological hysteria to the other. How to come out of this impasse?⁴⁹

Shweder's work on cultures makes the connection between culture and phenomenology, the philosophical framework for a non-foundational dialectic. Phenomenology, as a philosophy of the "Obvious", is a matter of becoming aware of the Self, aware of one's embeddedness, of prejudice, in the sense of the framework within which one pre-judges matters. Shweder argues that it is possible to assume that one particular culture will grasp a meaning from a standpoint different from any other but at the same time representing a striving for objective meaning which can, and should and will have an impact on others. Shweder opposes what he calls Nietzsche's ontological atheism, his reductionist reification of thought as radical subjectivist imagining, without contact with an external, objective world. Instead Shweder believes that existential seizures of meaning represent "irrepressible acts of imaginative projection across the inherent gap between appearance and reality".⁵⁰ That is, one can come out of inherited prejudice.

Cultural psychology for Shweder is premised on human existential uncertainty (the search for meaning) and on an "intentional" conception of "constituted worlds". The principle of intentional (or constituted) worlds asserts that subjects and objects, practitioners and practices, interpenetrate each other's identities and cannot be analyzed into independent and dependent variables. A socio-cultural environment is an intentional world, in so far as a community of persons direct their purposes and emotions towards it.⁵¹ It is not possible to achieve transcendence and self-transformation except through a dialectical process of moving from one intentional world into the next.⁵² It is precisely this dialectic, which saves us from the stagnant bigotry of nationalism, which legal formalists and critical legal scholars equally distrust.

⁴⁹ *Ibid.*

⁵⁰ **R. SHWEDER**, *Thinking Through Cultures*, Cambridge, (Mass.), Harvard University Press, 1991 p. 68.

⁵¹ *Ibid.*, p. 74.

⁵² *Ibid.*, p. 99.

V. Phenomenological pathways to inter-subjective normativity in international law

From a phenomenological perspective, international society does not have to be seen as a normative vacuum, even in the absence of the acceptance of corporatist language of global states or inter-governmentalism. A sense of obligation can arise for both the individual and society from a consciousness of a sense of identity with oneself and a memory of relationships with others. The unity of the self *may possibly not have any absolute foundation* because, as far as self-reflection takes us, the unity of the self is of a gradually acquired and eventually consistent pattern of acted on intentions. Obligation arises from awareness of the need for unity through consistency and through comprehension of the similar needs in the other. This position may or may not be ultimately foundational. Anyway, phenomenology itself does accept the ultimately *solid* nature of the individual person. Equally, while it is fashionable to say that nations are social-historical constructions, it stretches the fashion to say that, for instance China is the construction of some dissatisfied, over westernised “Chinese” intellectuals, if this is taken to mean there is no continuity from present Chinese identity, back into the 19th century and beyond. Nonetheless, for the sake of the construction of dialectical argument, the working assumption here as to the pariah spectacle of objective national essences is that they will never be grasped, as increasing self-awareness increases doubt as to the compelling nature of one’s own perspective.

So, Edmund Husserl does explain that the starting point has to be the supposition of an “I” from which conscious experience originates. The “I” is not an empty ideal point. It becomes originally the one who has decided and creates a history, which persists for it habitually as the same “I”. The direction towards the personal is towards how persons define themselves in relationships, friendships, marriages and unions, above all how they form mental meanings in a useful way. It is the self-objectification of the monad as psyche that makes the self aware of the self as self among others. This happens not in cognition but in action, in *praxis*. Husserl abandons the impersonal subject of Descartes, Kant etc., orienting towards the inter-subjective network. This inter-monadic relation includes a structure resistant to our arbitrary actions. It is starting from the “own” self that the alien is understood, but this

contact is a matter of suffering and doing whereby the ego or man becomes a person in community. The outcome is an objective order in the sense of an inter-subjective order.⁵³

Something more needs to be said about the constraints of inter-subjectivity compared to the apparently transcendental search for objective validity. Inter-subjectivity is the kernel point for Husserl, replacing Descartes' search for a final foundation point, such as divine veracity.⁵⁴ In other words the lawyers' search for a final, "nodal" point of validity is replaced by the search for the point where mutual comprehension of intentionalities can be reached. Intentionality refers to the intending of a sense and not to some sort of contact with an absolute external world. At the same time the life of the Cogito is not an anarchic outburst but is guided by permanences of signification.⁵⁵ In other words, contrary to the "anti-essentialists" who believe that all would-be substances are purely social constructions, it is maintained that the ego does constitute the substratum of its permanent properties. The crucial point is that the ego gives itself coherence by its manner of "retaining" and of "maintaining its position-takings". This includes "my world around me", including my experience of "the other", a radical triumph of interiority over exteriority.⁵⁶ The ego has to imagine itself in order to break away from itself as brute fact. Yet this imaginative self-distancing is anything but a self-construction. It bridges the disparity between positing of the self and the positing of "the other" in a subjectivity in general. There is a capacity to bring the presence of "the other" back to the presence of the self, because of the power of consciousness to go beyond the latter into its implicit horizons.⁵⁷

The crucial next step is to realise that the histories of nations, in Aron's sense, places them in the grip of inter-subjective constraints similar to those that affect individuals, and these nations the myth of the Tower of Babel would have us believe, have always existed in one form or another.⁵⁸ It is the inter-subjective constraint that exists at this level, which is crucial for international law. These debates themselves only make sense in the context of a material definition of the personality of the state as an historical cultural community, the descriptive analysis of which has also to be evaluative. The most helpful categorisations here

⁵³ P. RICOEUR, *Husserl: An Analysis of His Phenomenology*, translated by E.G. BALLARD, Evanston, Northwestern University, 1967, pp. 137-141 and 168.

⁵⁴ *Ibid.*, p. 84.

⁵⁵ *Ibid.*, p. 94.

⁵⁶ *Ibid.*, pp. 106-107.

⁵⁷ *Ibid.*, pp. 108-113.

⁵⁸ Also the view of A.D. SMITH, *The Ethnic Origin of Nations*, Oxford, Blackwell, 1986.

are from Barry Buzan, in terms of mature and immature political societies, also embedded in institutionalised structures. The definition and application of international legal rules can be understood, across the board in terms of a phenomenology, to a greater or lesser extent, of maturity and immaturity, *i.e.* in the anthropomorphic sense of being self-assured, balanced, internally stable, in contrast to being fragmented, disturbed, or otherwise prone to attack others.⁵⁹ At the same time his definition of (im-)maturity extends to relations among states, for instance India and Pakistan, or the United States and the Soviet Union during the Cold War. Clusters of relationships cover a mixture of (im-)mature relations. How far two states define themselves against one another depends on the circumstances. The state practice needs to be illustrated more fully with respect to clusters of recognisable international legal rules.

One may take an example of how international law needs to be seen in the context of its embeddedness in inter-communal relations by looking at the law on the use of force and particularly the idea of self-defence against the threat of danger from another country. Buzan identifies precisely the problem of defining ideas of “threat” and “security” in a manner, which is decisive for international law. The formalist international law concept of threat of force or use of force is purely directed against the physical territory and “physical” institutions of the state, in particular its government officials. This is to ignore the vital element of the character of the state, itself dependent upon distinctions between the idea of the state, the institutions of the state and its physical base.⁶⁰ Whether a state such as the US feels “threatened”, *e.g.* by the Soviet Union, in the time of the Cold War (1982) will depend crucially upon the part played by anti-communism in the construction of the idea of the United States. This type of inherent instability continues to be built into many of the world’s “trouble spots”, particular Israel/Palestine and India/Pakistan. It is difficult to see how “threats” to security can be eliminated in these areas without a fundamental change in the idea, and, at the same time, the institutions and physical base of these states. The viability of legal rules based on reciprocity, such as mutual recognition, of equality and non-intervention is put into question in these cases.

Equally decisive are internal weaknesses in the idea of the state as such. When the population have no common interests, purposes and ideas, the society or population of the state will be liable to internal divisions which will automatically lead other states to treat the

⁵⁹ B. BUZAN, *People, States and Fear*, Brighton, Wheatsheaf Books Ltd, 1982.

⁶⁰ *Ibid.*, especially Chapters 2 and 4.

physical base of that state as a legal vacuum, making it prey to various levels of intervention. A mature anarchy in the relations of states supposes that the states are themselves mature as distinct from immature. By mature Buzan means “well ordered and stable within themselves”.⁶¹ Only mature states can support strong common norms for the system as a whole. The idea of international law expresses this mature anarchy, mutual recognition of sovereign equality, the right of national self-determination, the sanctity of territorial boundaries, the resolution to settle disputes without recourse to force and, most importantly, refraining from interfering in the domestic affairs of other equal states. Any state, which does not reach the necessary level of maturity automatically, falls out of this net of reciprocity and the vacuum of physical space that it represents is not filled by international law. So the international lawyer has to make his way through a web of ideas, expressing political culture, more or less unevenly within and between states, and it is these alone that can possibly support a law based upon reciprocity. If the unity is not there, the law cannot create it, because normativity -as inter-subjective constraint- can only develop and function if there is a minimum of stability and coherence in the intentions of the partners. In this sense the legal order remains non-foundational.

It would be useful, by way of a concrete example, to show how the deformation of relations among several states can work to disadvantage and indeed harm in relations with third states. It is no part of the phenomenological approach outlined here, that somehow a cast iron method has been devised to uphold the existing fabric of international law. Quite the contrary – if the personality of the individual or the state fragments, then any hope of legal order will fragment with it. It is only by understanding, or becoming aware of the facts of, and dynamics of this fragmentation that any hope of recovering maturity exists. *This does not have to happen. Somehow it rests upon the free choice of persons and communities, who can as easily be the cause of the destruction of others as of themselves.* The task of the academic, independent, international lawyer or whomever, remains, at most, as a mediator, to translate the confusion of fragmented relations into a lucidity that might pave the way to an *international calm*. Whether he can rise to the occasion is anyone’s guess. The non-foundational world is not one full of predictable methods and foolproof techniques.

The example chosen is the UK participation in the US aggression against Iraq in 2003. There may be many valid explanations of the motives of the Blair Government,

⁶¹ *Ibid.*, pp. 96-98.

but the one suggested here, is to see its decision for war as enmeshed in the dependency of the so-called special relationship between the two countries. This may be seen, briefly, without cataloguing the whole episode once again, in placing in context an important meeting in the summer of 2002, alongside the faraway participation of the UK in the Korean War in 1950. The UK intention to go to war is clearly demonstrated to have dated at least from the time of a meeting in 10 Downing Street London on 23 July 2002.⁶² *The key features of this meeting are that the US has decided to take military action and the UK is going to support that.* The problem, so to speak, given that Britain is a democracy, is to how to manage public opinion within Britain, not *whether the UK should follow the US. The latter choice is impossible to make, given the present level of consciousness of British elites.*

In the words of the Foreign Secretary, Jack Straw, while Bush had made up his mind to take military action, “[...] the case was thin. Saddam was not threatening his neighbours, and his WMD capability was less than that of Libya, North Korea or Iran. *We should work up a plan for an ultimatum to Saddam to allow back the UN weapons inspectors. This would help with the legal justification for the use of force....*” (*my italics*).⁶³ Clearly the Foreign Secretary was concerned with problems of public presentation, with what he himself thought to be a weak case, this approach was also endorsed by the Prime Minister; he said *“it would make a big difference politically and legally if Saddam refused to allow in the UN inspectors... There were different strategies for dealing with Libya and Iran. If the political context were right, people would support regime change. The two key issues were whether the military plan worked and whether we had the political strategy to give the military plan the space to work”* (*my italics*).

The Attorney General, Lord Goldsmith, said that the desire for regime change was not a legal base for military action, nor was either self-defence or humanitarian intervention grounds that could be used in the circumstances at present, and use of a prior UNSCR 1205 would be difficult.

⁶² Reported and reproduced in the *Sunday Times*, 1 May 2005, available on www.timesonline.co.uk - the Secret Downing Street Memo.

⁶³ *Ibid.*

The issues to do with oscillations in the legal advice of the Attorney General, Lord Goldsmith to his government on the question of war, are well known. I wish here only to highlight one part, the influence of the US international lawyers upon him. What I consider significant is the view that what moved Goldsmith from the position that UNSCR 1441 used unclear language allowing arguments on both sides, to the standpoint that a reasonable case could be made for it reviving UNSCR 678, was a visit to the US. This aspect of the history is extensively reported in *The Observer* May 1, 2005. Goldsmith was sent to Washington by the Foreign Secretary, Jack Straw, to “pit some steel in his spine”, as one official said. On February 11, 2003 he met William Taft IV, Powell’s chief legal adviser, and after a “gruelling 90 minute meeting in Taft’s conference room 6419, he met many other key lawyers, including John Bellinger, legal adviser to Condoleezza Rice, National Security Adviser. Bellinger is reported to have said: “We had trouble with your Attorney, we got there eventually”. Taft commented to *The Observer*, that all the American legal advisers told Goldsmith their views in the same way and he did not at the time indicate what his own conclusion would be. *The Observer* reports of Taft: “Laughing he added: ‘I will say that, when we heard his statement in Parliament, which was the next thing we heard about, what he said sounded very familiar’”.

The real challenge for anyone wishing to reflect upon these apparent streams of consciousness, whether of the politicians or the lawyer, Goldsmith, is to fathom the intensity of the Anglo-American relationship. All is predetermined by the felt necessity to follow whatever the Americans are going to do. This is a permanent feature of British foreign policy at least since the Korean War. It is not a party difference in Britain, except for the minority Liberal Democrats. The Conservatives are still saying that, even without evidence of Weapons of Mass Destruction and even with the legal mess, they support the decision to go to war against Iraq. It is impossible in the space here to exhaustively describe the phenomenon of “the need to be with the Americans”, but one can illustrate it from the decisions of the British Cabinet in January 1951 to embrace the American demand for whole-scale rearmament, despite the internal advice that it would be disastrous for the rejuvenation of the British post-war economy. While Anaurin Bevan, the Minister of Health could not believe the American argument that the Soviet Union posed an urgent threat of a full-scale attack on the West (and resigned from the Cabinet), Hugh Gaitskell, as Chancellor, “[...] in relation to the Cold War acted within

the Cabinet as the influential voice of subservience to America, as a British quisling [...]. Since Gaitskell thus wholeheartedly embraced America's anti-Communist crusade and the Western rearmament driven by it, he was resolved that expenditure on defence must be preserved at the cost of the health service [...]"'. In their resignation speeches Bevan and the future Prime Minister Harold Wilson explained the rearmament programme "was more than the economy could bear without crippling damage".⁶⁴

This is one of innumerable further examples, which Barnett gives, from the British National Archive, of a policy of subordinating British state interests to those of the United States, which Barnett thinks can only be explained, if at all, in terms of some extraordinary, and in his view, mistaken trust that Britain feels towards the United States. Whether the relationship is always so consistently intense, in the case of the Iraq war the sheer ferocity of this relationship effectively undermined any prospect that Britain could observe the rules of the UN Charter. This perception cannot be reached by international lawyers adopting a quasi administrative law search for breaches of legal competence through exploring such corporatist formalities as British House of Commons and Cabinet votes, but go instead to the heart of what Haegerstroem calls "the forces operative within the group", the sofa politics of Prime Minister Blair's inner circle and the closed circles of military and civil servants who see themselves as dependent on this sofa politics.⁶⁵ This is where one has to go to understand why what happened did happen and it is also the target to be deconstructed if it is not to happen again.

⁶⁴ C. BARNETT, *The Verdict of Peace*, London, Macmillan, 2001, pp. 51-52, from the Chapter, "The Principal Partner of America in World Affairs".

⁶⁵ The reference to sofa politics is taken from the so-called **Lord Butler**, *Inquiry into war: Review of Intelligence of Weapons of Mass Destruction*, **HC898**, July 2004.

VI. Conclusion

What is demonstrated by this final example is that any in-depth exploration of serious conflict about the place of international law in inter-state relations has to show that however lucid individual politicians and lawyers may think they are, structural anthropology is correct that their very language and thought patterns will be embedded so deeply in their ethnic-cultural context that arguments about truth/falsity, honesty/deception will be impossible to unravel. One is, as an accidentally external, cultural legal critical voice, up against such a density and stubbornness of opinions and convictions that it appears impossible to move forward with rational argument. Debate can only take on a personal language of individual accountability and responsibility, in which doctrine *i.e.*, the struggle of individual, relatively independent academic international lawyers, has a part to play. They try to call both political leaders and government lawyers to account by appeal to international standards.

The difficulty for the very idea of international legal order remains its seriously inchoate institutional character and that international law ideas held nationally are embedded or even encrusted in prejudices and emotions tied up with the national history and identity of the country and its favoured international associations, *i.e.*, special relationships. Behind the inchoate international nature of international legal order lies the perpetual threat of unilateralist, in the sense of solipsistic activity by states. It is also the counterpart of a relative lack of international institutional authority. The only response to this deficiency, however weak, remains international legal doctrine. Doctrine is itself weaker than ever in its foundations. It rests on nothing more than the non-foundational, inter-subjective dialectic which can challenge the prejudices of individuals who claim an individual sovereignty for the meaning of the language they use, however comically they may be enmeshed in prejudices which only a most elaborate anthropological and phenomenological analysis can unravel. As for a positive outcome it can only come, if at all, from live and personal dialectical engagement. Learned writing has to be accompanied by social confrontation before there is any prospect of psychological movement. It is conceivable that the individual scholar can reconstruct the entire process from within himself, but this is most unlikely.

It is the corporatist myth of the state, grounded in the political theory of contractarianism, which leads the international lawyer astray from the real ground of inter-subjective dialectic in legal relations among states, into the sterile world of inconclusive arguments about legal competences of states, of the legal validity of their behaviour. Legally transcendent standards and transcendent legal authorities to interpret and enforce these standards are logically conceivable to the imaginations of legal formalists, but their implementation within the next centuries will only mean the coercion of some nations by others. In the meantime let us try to understand why we quarrel so much.