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# WHAT PLACE FOR DOCTRINE IN A TIME OF FRAGMENTATION?

## A Definition of Doctrine and its Present Problematic in Public International Law

I intend to begin simply by referring to two recent French works, the *Dictionnaire encyclopédique de théorie et de sociologie du droit* and a colloquium organized by the legal history department of the University of Picardie (Amiens), *La Doctrine juridique*. The first provides us with an authoritative and vital distinction between legal doctrine and legal dogmatics, while the second explains the problematic of keeping the former alive.

The French dictionary distinguishes doctrine from 'dogmatique juridique' (legal dogmatics). The former is defined as 'opinion, theory or thesis,' while the latter means the domain of the science of law concerned with the interpretation and systematization of juridical norms.[1] An essential element of doctrine is that it is supposed to have authority. The theory, opinion, etc. must be capable of exercising influence. Coming from the tradition of Roman law and canon law, particularly in French and German legal communities, doctrine has authority not as a source of law as such, but as freely and spontaneously held opinion, which is likely to become accepted. Since the seventeenth century the nature of this authority has become contested. It is seen as rooted in theories of *natural right* which were increasingly regarded as the ideological apparatus of a dominant bourgeois class.

Legal dogmatics works within the assumptions of legal positivism, particularly with respect to the sources of law. It is concerned with the interpretation of statutes and jurisprudence. There may be, within this framework, theories of interpretation and methods for the systematization of written and customary law. However, this supplementary role for the legal writer, whether an academic or practitioner, is not challenged one way or the other by the controversies surrounding doctrine. Theories of interpretation and systematization do

not have to operate only with logic, but any explicit reference to values will be confined to those which it can be argued are immanent to the system of legal norms actually accepted as legally binding in a society. This type of legal activity is an inevitable and integral part of any positive legal order, however narrowly understood.

The crisis facing doctrine, on the contrary, appears to be fatal. It is attributable above all to the collapse of the natural law or law of nature background to both continental civil law and international law which can be taken to have been completed in the West, especially Europe, by the 1950s, notwithstanding a brief renaissance of natural law after the Second World War. This tradition had allowed the jurist, since the glossators and canonists of the medieval period, to resort freely to notions of natural justice, equity, personal responsibility, public order, and harmony, etc., to develop freely otherwise fragmentary pieces of local custom, regional law, judicial precedents, and even general legislation.

In a sense the tradition was pre-democratic and pre-liberal, in that it is always assumed that somehow there will be present a group of erudite and morally serious people who are able to wrap up legally significant human actions in the texture or framework of reasonableness. It is also assumed that standards are universal and everywhere the same, not only in space but also in time. This favors an old-fashioned form of interdisciplinarity, which now appears as mere eclecticism. The doctrinal writer will look to history, philosophy, and even literature to support what appears to him just and reasonable in the circumstances.

It is, in the view of the Picardy study on *La Doctrine*, above all Kelsen with his Pure Theory of Law, who is easily recognizable as taking away the foundation for the working method of *doctrine*.[2] According to the Pure Theory of Law, theories of natural law or equity merely conceal the personal preferences of the authors and are subjective. Insofar as the structure of a legal order contains gaps and ambiguities, these can only be filled through political decision, in which the individual jurist has no special part to play. Liberal, voluntarist democracy means that, to find law, one has to return to the primary means which the legal order has agreed for the creation of new norms. In the Pure Theory of law these primary means do not have to be democratic, although Kelsen himself was a democrat. Given an increasingly regulatory function for law, in Kelsen's view, the details of social life to be so regulated would have to be dealt with by the appropriate public legal authority, whose success would be more or

less a matter of effectiveness. Deficiencies could be best remedied by giving authority to the judiciary, an extension of the state, or, as Kelsen preferred, the legal order, to take the necessary additional decisions. Allied to the Pure Theory of Law, as an enemy of the natural law schools, comes Scandinavian realism, which also serves to bury the traditional role of doctrine. Not only does this school attack natural law, etc. on epistemological grounds, but it uses the same weapons to attack the basic concepts of positive law which it sees as a legacy of the natural law tradition. These include the concepts of subjective or individual right, the will of the state or of the legislator. The Scandinavian realists would replace such activity with a form of legal sociology which entailed identifying law as a psychological datum, evidence of a sense of obligation in a society, that people felt themselves to be bound by rules which they regarded as law. Instead of the concept of validity, the lawyer should work with a theory of verification which allowed him to identify that there was a social belief that rules existed that were binding upon the people who held the belief.[3]

Given the present structure of international law, which is still primarily customary, this gives a full place to writers, but only within a framework of legal dogmatics.

## The Classical Place of Doctrine in International Law

The aim of this introduction of the figure of Paulus Vladimiri will be to illustrate how, during the classical medieval period, the distinction between doctrine and dogmatics was clearly understood precisely in the sense outlined in the *Dictionnaire* discussed in the first section. It is only with the coming of the modern period that the former comes to be swallowed up by the latter.

### Vladimiri and the 'higher' medieval period

Vladimiri was anxious to carve out a proper space for judicial practice against the hegemonic claims of doctrine in medieval legal disputations. At the same time his doctrinal method, that is the types of material upon which he relied to develop his argument, shows clearly how this method rested upon certain epistemological assumptions which have not been regarded as valid since the classical period. It mattered enormously to Vladimiri, involved in a dispute with the German (Teutonic) Order on behalf of the Polish king, to argue that the proper resolution of the conflict had to be through a judicial

process and not merely a reliance upon doctrine. To demonstrate this he made a clear distinction between the two, which remains valid in a legal culture where it is the claims of judicial practice which are hegemonic. To leave disputations about heresy or the rights of infidels against Christians in the hands of doctrinalists is very dangerous because the nature of doctrine or of science is that it excludes all doubt, and therefore does not accept proof to the contrary, since it is from propositions, which are known by themselves.[4] Whether a war against a heretic or infidel is just and can therefore be undertaken involves questions of evidence as well as of doctrine. Whether in a particular case there is a legitimate cause of attacking, and hence an illegitimacy in resisting, are questions which cannot be answered 'except by way of justice, namely by proof brought in law or by sentence and in consequence by a legitimate declaration . . .'[5]

Vladimiri's method receives a very lucid analysis from Stanislaus Belch. Here I wish to highlight the place which is nonetheless left to doctrine as against judicial practice. For instance, confusion about what may be done by Christians to infidels arises from a factually incorrect assumption that all infidels commit blasphemy, persecute Christians, and seize their territories. Factually inaccurate assumptions lead to pseudo-doctrinal justifications of what can be done to infidels. Where none of this has been proved, the question arises, which doctrine can appropriately answer, what can be done to infidels as such? The answer comes from natural law: they are entitled to be left in peace. It is the nature of the Christian faith that it is grounded in love. Therefore, nothing coercive can be done in its name.[6]

The correct question for doctrinal debate was whether 'the infidel nations have the same human rights as the Christians.' To answer this question meant the establishment of the truth of certain principles which alone could serve in any argument as a major premise.[7] This involved Vladimiri in sifting through the opinions of the great doctors of the Church, some of whom did not share this doctrine on the rights of infidel nations. He applied a quite simple style of reasoning to reach his goal. For instance, there was scriptural support (c.3, D 45) concerning directly the prohibition of force in the conversion of the Jews. There, the essence of this canon is that it applies equally to the conversion of all infidels. Again, to take another example, Vladimiri's opponent Vrebach takes Paul's admonition that Christians should not fight infidels to mean not those who recognize the dominion of the Church and the empire. Vladimiri objects that in law we do not usually make distinctions, and so we should not here.[8]

**The renaissance universality of resemblances**

The justification for this rather extensive treatment of a medieval figure is that it is now widely accepted in the scholarship that modern figures which might compete for the 'fatherhood' of international law, above all Vitoria and Grotius, belong firmly within this medieval world. Haggenmacher emphasizes the pre-modernity of Grotius. That is, Grotius's work, which is mainly about the doctrine of just war, is the culmination of a medieval scholastic tradition, which depended upon a medieval and classical Greek concept of natural law. The main feature of this doctrine is that *Man* is embedded in a universal society and in the *Cosmos*.[9] Equally, Vitoria, who was concerned with the same question as Vladimiri, approached it against the backdrop of a presumed universal order. As Bartelson puts it, 'The question was not how to solve a conflict between competing sovereigns over the foundation of a legal order, but how to relate concentric circles of *resemblant* laws, ranging from divine law down to natural and positive law. In his effort to work out a coherent relationship between them, Vitoria relies on a lexicon of legal exempla, in which a wide variety of textual authorities are invoked.'[10]

The transition from the medieval to what Bartelson calls the classical period, from the seventeenth century at the latest, already disturbed the place of doctrine, if not among international lawyers, then certainly among serious students of international society. Bartelson provides a very illuminating account of the epistemological foundations of the transformation. The essence of this perspective is, of course, a retrospective reflexivity. (thanks to a neo-platonic revival). Renaissance knowledge became a knowledge of resemblances between entities whose unity had been shattered. Bartelson sums up what is, in effect, the method of Grotius in the following phrases: 'Through the resemblance of events and episodes it becomes possible to describe and discuss present affairs by drawing on the almost infinite corpus of political learning recovered from antiquity, without distinguishing between legend and document';[11] it becomes possible to describe the deeds of a Moses or a King Utopus in the same terms as one describes 'the recent behaviour of Cesare Borgia or Henry VIII, because it is assumed that they share the same reality, and occupy the same space of possible political experience.'[12] It is inevitable that such a conception of legal order will be, in the modern sense, monist. Neither Vitoria nor Grotius will countenance any opposition between the kind of law that applies

between states and within states, since this would imply an absence of law.[13]

## THE SOVEREIGN: OR THE OBJECTIVITY OF SUBJECTIVE INTEREST

The epistemological break with the medieval–Renaissance picture supposes a combination of political and philosophical events. The so-called modern state arising out of the wars of religion of the sixteenth and seventeenth centuries is taken as traumatized by its bloody foundation and hence silent about its origins. It becomes the subject of Descartes' distinction between the immaterial subject and the material reality which it observes, classifies, and analyses. Knowledge presupposes a subject, and this subject, for international relations, is the Hobbesean sovereign who is not named, but names, not observed, but observes, a mystery for whom everything must be transparent. The problem of knowledge is that of security, which is attained through rational control and analysis. Self-understanding is limited to an analysis of the extent of power of the sovereign, measured geopolitically. Other sovereigns are not unknown 'others' in the modern anthropological sense, but simply 'enemies,' opponents, with conflicting interests, whose behavior can and should be calculated.

The purpose of knowledge, once again, is not to re-establish resemblances in a fragmenting medieval Christian world, but to furnish dependable information with which to buttress the sovereign state, whose security rests precisely upon the success with which it has banished disorder from within its boundaries onto the international plane. Mutual recognition by sovereigns does not imply acceptance of a common international order, but merely a limited measure of mutual construction of identity resting upon an awareness of sameness, an analytical recognition of factual, territorial separation, combined with a mutual accord of reputation, which, so long as it lasts, serves to guarantee some measure of security.

However, the primary definition of state interest is not a search for resemblances, affinities of religion, or dynastic family. Instead, it is a matter of knowing how to conduct one's own affairs, while hindering those of others. Interest is a concept resting upon detachment and separation. 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.[14]

## The Role for Doctrine in the Classical Theory of Sovereignty

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 one of law. One may not inquire into its composition or nature. Law is whatever the sovereigns choose to define as such through their will, in treaties or customs as implied treaties. 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. International law is binding but not enforceable. Adjudication exists, but its impact is sporadic. Fundamentally, the problem can be encapsulated in a sentence. There is what all the parties are willing to identify as law, but there is auto-interpretation of the extent of obligation.

Given the preponderance of the state, the role for doctrine has become marginalized and confined to the question whether international law is law at all. Perhaps the majority view among the profession is that the question is unnecessary. Emer de Vattel made the point that international law is a law precisely suited to the nature of the state, as a form of independent corporation. Institutional defects in the character of international law, viz. the absence of legislature, judicature, etc., do not affect the basic need for and suitability of inter-state law for law among states. So Jouannet sees no difficulty in the Vattelian sovereign being integrated into an international legal order. The lack of difficulty is hardly surprising because this new legal order is made by states specifically for their relations with one another. The crucial feature of her argument is that the character of the sovereign is corporate. Because sovereign nations deal only directly with one another, they can only see one another as societies of men of whom all the interests are held in common. It is not a law of nations derived from human nature which rules them, but a law derived from the particular character of the state.[15]

The difficulty remains, accepted by Bartelson and Jouannet, that there is no superior juridical order immediately binding upon states. They agree that sovereignty includes the right to decide the extent of an obligation. Again, both may quote Vattel 'each has the right to decide in its conscience what it must do to fulfil its duties; the effect of this is to produce before the world at least, a perfect equality of rights among Nations . . .'[16]

Jouannet describes Vattel as introducing the logic of Hobbesean and Lockean individualism into international law, liberty, and

sovereignty which are not unlimited but not subject to any higher order. Bartelson would rather describe this order as the objectivity of subjective interest.

This dilemma is what is meant by the question whether international law is binding. It troubled doctrine in international law as long as a natural law or Law of Nature tradition continued to have any life in it, thereby posing the question whether norms or values could have objective character. It was a main preoccupation of international law doctrine in the nineteenth and early twentieth centuries, encapsulated in debates about whether (a) international law was binding, (b) whether treaties were legal instruments which had to be kept, and (c) whether the sovereignty of states could be legally limited or restricted.

When the traditions of natural law, even of a Vattelian character, evaporated after 1945, there seemed to be nothing left but a legal pragmatism, until the so-called critical legal debate resurrected the issues. The critical legal debate, particularly associated with Kennedy and Koskenniemi, appears to resurrect the role for doctrine at least in the narrow and marginal sense described here. They agonize about the paradox of the need for an international order if equally sovereign states are to have any peace with one another. At the same time they recognize that an objective international order, one that is binding upon its subjects albeit not created by them, is incompatible with the structure of state sovereignty, taken from Vattel, which they do not dispute.[17] This debate now takes upon itself a post-epistemological turn insofar as the parties debate through rhetorical devices which are neo-positivist and neo-naturalist, in that they do not willingly espouse the foundations of either school, even if they continue to contrast the language of the two schools.

In my view, the critical legal approach is useful as a heuristic device for exposing the failure of practitioners to ground appeals to rules of law in *actual*, rather than supposed, evidence of state consent, or in *actual*, rather than concealed or disguised, reference to objective values. However, its 'postmodernism' (its opposition to the idea of any fundamental or absolute values) does not allow it to resurrect any creative role for doctrine, even less so Vladimiri's. Their own sharing of liberal value skepticism leaves critical legal studies with no more than repetitive demonstrations that international law decisions (whether of courts or of states) are precisely that – decisions – so that international lawyers must accept responsibility for the political character of their decisions, in the sense that they are free, undetermined by prior legal

rules. Indeed, debate with critical theorists has revealed that there is a partiality for the authority of the state that precludes any return to naturalism or any possible contemporary equivalent. For instance, this may be seen in a discussion between Allott and Koskenniemi on this point.[18] I will juxtapose their positions from quotations of their work. According to Allott, international law does not recognize the total social process by which reality is formed, but only that of the interacting of the governments of state societies, as if they constituted a self-contained and self-caused social process. This is precisely the sense of epistemological positivism which Bartelson has focused on in Descartes and Hobbes. Koskenniemi objects that statehood functions precisely as that decision-making process which, by its very formality, operates as a safeguard that different (theological) ideals are not transformed into a globally enforced tyranny.[19] It is obvious that Koskenniemi imposes upon existing state structures the liberal idea of a political order as arbitrator. However, he nowhere demonstrates that states function internationally in this way, even those that suppose themselves to be liberal. Indeed, Tasioulas points out how Koskenniemi's further response to this encounter leads to the odd conclusion that there is a 'tendency of some of these recent trends to yield conclusions surprisingly congruent with Weil's positivist stance . . . '[20] So, the problem posed by the classical doctrine of sovereignty remains, only now it seems that international lawyers, in a 'postmodern' epoch, are bereft of any tools with which to complement or, alternatively, deconstruct the state. This is the sense in which I pose the question whether there is any future for doctrine in a world beyond positivism, namely beyond the exclusive role of states as law-definers?

## And Meanwhile, in England?

I have argued that: 'the theory of international law was deliberately 'killed off' by the 'greats' of the discipline in the 1920s and 1930s, in particular by Oppenheim, McNair, Brierly, and even Lauterpacht. It was they who laid the intellectual foundations for the so-called practitioners' approach to the discipline, and then sent their successors off into the courtrooms'.[21]This statement risks a number of ambiguities, the first of which has to do with the word 'theory.' This has come to mean the rather abstruse application of French poststructuralism to legal formalism, leaving much of the profession baffled, even intimidated, but hardly convinced that a connection had been made with their concerns.[22] Obviously, the argument that theory has died out in

England, as everywhere else, needs to be restated in several essential elements.

First, the expression theory should be understood to mean the symbolic, or cultural, ethical significance of the body or system of international law in ordering the relations among states. This disappeared in Britain with the shock of the First World War and the rush to institutions to defend humanity against the sovereignty of states. No more eloquent statement of this view has been made than by Thomas Baty:

> The difference between the 19th century and the present becomes vividly apparent if one peruses such a book as Sir R. Phillimore's *Commentaries on International Law*, written in the 1850s. Grandiloquent, discursive, ill-balanced, inconclusive as it often is, one feels as one reads its pages the pervasive presence of a conclusive standard of right and wrong. No such moral standard permeates the works of today.[23]

Whether one esteems such figures as Phillimore as thinkers or intellectuals (and clearly Baty did not), they considered themselves as international lawyers as having a responsibility to address statesmen about how the rule of law should prevail in international society. This had nothing to do with being university teachers, because their primary audience was not the university student. Nor does it help to describe them as 'practitioners' without defining what they practiced. The word is as slippery as 'theory.' For instance, Crawford describes Phillimore as an English-educated civilian. His three-volume international law text 'was written by a civilian practitioner and later judge of the Admiralty Court.'[24]

Phillimore's concept of law rested upon an appeal to the spirit of a God-given moral law governing the universe.[25] So, 'Obedience to the law is as necessary for the liberty of States as it is for the liberty of individuals.' Moral truth demonstrates that independent communities are free moral agents, and historical fact demonstrates that they are mutually recognized in the universal community of which they are members. Law is not to be equated with the notion of physical sanction. Instead, one has to judge critically the impact of historical events upon states as free moral persons. So Phillimore's view, writing in 1879, was that European history since the Danish War of 1864 had been very critical. In 1864 there was a violent change of territory and states did not come to assist as they ought to have done. There followed further injuries which states did not assist others to prevent. So in the 1870s we find that Europe is subject to the prevailing notion that 'a state must seek territorial aggrandizement as a condition of her

welfare and security.' There may have been little 'theory' underlying these remarks, but clearly he was addressing them to his political leaders, at least one of whom, his friend William Gladstone, might have been expected to have some sympathy. While it is mentioned that he was a judge of Admiralty, he was also a member of the House of Commons in the 1850s when he wrote the first edition of his textbook. An essay by Gladstone may illustrate how a leading Victorian politician understood law and morality in relations among states. 'England's Mission' gave a central place to the equality of independent states. To Gladstone, an immoral policy is a 'vigorous' policy, which excites the public mind, apathetic with the humdrum detail of legislation, thereby covering up domestic shortcomings; it disguises partisan interests as national and enlists jingoist support. The self-love and pride, which all condemn in individuals, damage states as well, destroying their sobriety in the estimation of human affairs, as they vacillate from arrogance to womanish fears:

> The doctrines of national self-restraint, of the equal obligations of States to public law, and of their equal rights to fair construction as to words and deeds, have (however) been left to unofficial persons . . . [T]o overlook the proportion between our resources and our obligations, and above all to claim anything more than equality of rights in the moral and political intercourse of the world, is not the way to make England great, but to make it both morally and materially little.[26]

Phillimore's association with Gladstone was hardly exceptional. In his survey of the English tradition of international law Johnson quotes F. E. Smith (later the Earl of Birkenhead) referring to it as an English tradition that 'Professors of International Law shall also be men of affairs.'[27]

There is no mistaking McNair's unease with this intellectual atmosphere. He remarks how the nineteenth-century textbook was a descriptive rather than an analytical work, a history of international relations.[28] Now the output of judicial decisions makes international law 'comparable in technique and educational value to the common law or equity.' The topics one can now consider in teaching international law are much more often dealt with in the national courts, the conclusion being permitted that such law is part of a barrister's training. These topics are: recognition of belligerency, effects of insurgency and civil war, immunities of foreign states and public ships, diplomatic and sovereign immunities, territorial waters and jurisdiction on the high seas, nationality, treatment of aliens, effects of war, etc.

Jennings began his tenure of the Whewell Chair in Cambridge with a ringing endorsement of McNair's sentiments. He emphasizes the importance of judicial, primarily municipal, decisions which are found in the *International Law Reports:*'It is impossible to exaggerate the importance of this publication which has transformed international law into a case law subject, thus making it not only a better teaching material, but also a very much stronger and more useful law.'[29]

When McNair and Lauterpacht were presenting the first volume of what was then called the *Annual Digest of International Law Cases* in 1929 their expectation was that: 'The feature of the twentieth century, particularly after the year 1919, is likely to be an abundant growth of judicial activity in international relations, and there is little reason to doubt that, before half that century has elapsed, international law will be developed almost out of recognition.'[30] Concerning the authority of such material, the authors clearly have reference to the fruitfulness of the judicial style of reasoning, that is the concern with the resolution of a specific problem. So the authors continue 'in any field of human activity it is impossible for one mind faced with the task of solving a problem not to give weight to the solution of a similar problem which has commended itself to another mind elsewhere. That is not a principle of law but of common human experience.'[31]

This is not necessarily 'ignoring state practice in favor of judicial decisions, or the analysis of ideas in favor of textual exegesis,' [32] but it is to create the expectation that the best synthesis of this practice, and indeed the most authoritative interpretation of this practice, will be provided by the judiciary, whether national or international.

Elsewhere I have recently argued that it is a focus on the prospect of adjudication that heightens the concern of the positivist international lawyer, with the bilateral or reciprocal aspects of legal relationships at the expense of the wider aspects for international order which concerned Phillimore or Birkenhead. The problems of state power and sovereignty, and the exigencies attaching to the nature of an international legal system and its legal structure, are unlikely to be central to the concerns of a consensus-based judiciary, which still resembles permanent arbitration. The tendency will be to rely upon areas of state practice that are fairly well settled and have implications for the individual, for example, for the purposes of extradition law, which state may be taken to have effective jurisdiction. A casuistry of the equity of the particular case is combined with the necessity of having regard to the seesaw of recognition and acquiescence with

respect to the two most engaged parties, for example with respect to title to territory, in what will usually become a concrete context of arbitration.[33]

What is lost thereby is the confidence to address directly the behavior of states in terms of some independent international standard. This had disappeared with the Victorian and Edwardian confidence in the capacity of international lawyers as opinion-makers to sway the conscience of nations. When exactly this happened is disputed and may vary from country to country,[34] but the gradual process of technical transformation of the discipline of international law has taken place everywhere, and in Britain that form has accentuated the place of the judiciary. In the nineteenth century, the confidence of English international lawyers to influence state behavior rested on a utilitarian sense of the power of international opinion to sway state behavior to a social sense of what was in the interest of the majority. It supposedly reproduced the role of opinion in shaping legislation in England itself. Here key figures were the professors of international law in universities such as Oxford (T. E. Holland) and Cambridge (John Westlake).[35]

The alternative, post-1918 view in England was instead institutional, one in which the international lawyer had no distinctive role as an opinion-shaper. Brierly represented it well in his study of the foundations of international law. As with Oppenheim,[36] Brierly saw the state as a complex institutional labyrinth. He took a view which effectively excluded any place for an evolving international public opinion, or even an evolving customary practice of states. He had the following perspective on the relation of opinion to law creation:

> 'the public' which is supposed to direct political events in a democratic state is a 'phantom'; there is no overmastering social purpose in it, but a vast complex of individual purposes . . . Somehow or other we know that out of these chaotic materials there are precipitated the public policies . . . which the organs of government proceed to carry into effect in legislation or administration, but the process by which this takes place is far too intricate either to be traced in detail or to be summarized in a single formula.[37]

The sequel to this development appears to be very unfortunate in the case of England. Commenting on the English scene in the early 1960s in his inaugural lecture at the London School of Economics, Johnson provides a remarkable panorama of the richness of the classical English international law tradition. It cannot be reduced to the role of nineteenth-century utilitarianism and the manipulation or

legitimate shaping of public opinion. It goes back to a rich medieval and Renaissance civilian, Roman law, and natural law tradition, alongside the important prize law field, protected by the ancient universities and having so prominent a place even into the nineteenth century.[38] However, at the time of writing Johnson noticed the serious gulf in England, wider than elsewhere, between the study of international law and the study of ethics. Johnson blames this not on John Austin, who did not oppose international law as form of international morality, but on the international lawyers themselves, who wished to make their subject appeal to their fellow law school colleagues. This led English international lawyers, wishing to impress their colleagues with the positive character of international law,

> to go too far in severing the links which connected international law with the principles of morality and natural law. International law may by this presentation have been made respectable to practicing lawyers, although, as we have seen, even that result was only very partially achieved. The price paid was that international law came to have, and still has, very little meaning to that substantial portion of English public opinion which tends to view world events in moral terms. What relevance has international law today to those people, and especially young people, who feel passionately about such questions as the hydrogen bomb and race relations? Unfortunately very little.[39]

## FOUNDATIONS FOR A NEW ROLE FOR DOCTRINE

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 a particular country and its favored international associations, viz. special relationships.[40] Any indepth exploration can only show that, however lucid individual politicians and lawyers may think they are, structural anthropology is correct that their 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. Yet the internal dynamic of the argument within Britain today – with the continuing Iraq crisis – shows that the dialectic of intersubjective confrontation does at least keep controversy moving, although only

within the national boundaries. This is occurring because of internal divisions within the governing elites of the country, which breaks down the wall of silence of the otherwise secret state. Still the disaffected within the governing groups believe they can appeal to a wider interested public through the media.[41] External criticism remains irrelevant and unnoticed. This internal debate does, as Ricoeur would expect, take on a personalist language of individual accountability and responsibility, in which doctrine, viz. 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.

Exactly what role an academic might play in this context can perhaps be illustrated by the response of one academic international lawyer to the behavior of the Attorney General. Professor Colin Warbrick of Durham University is reported as making an intervention in *The Guardian* (March 25, 2005) upon publication of Elisabeth Wilmhurst's letter of resignation from the Foreign Office. This letter showed that the Attorney General changed his mind between giving his legal advice of March 7, 2003 and his brief statement to Parliament ten days later. Warbrick calls for his resignation as Attorney General for failing in his constitutional duty to give his own legal opinion about the proposed war. By this Warbrick means the Legal Officer allowed himself to be led by others. However, more disturbing is Warbrick's observation that Blair and his colleagues are likely to remain immune from prosecution for the crime of aggression before the International Criminal Court because the parties which have signed up to the Court are still trying to work out a definition of the crime.

It is the inevitably inchoate institutional background of international law which assures the continued role for doctrine in international law. Behind the inchoate nature of international legal order lies the perpetual threat of unilateralist action by states. It is merely the counterpart of a relative lack of international institutional authority. The only certain legal response to this deficiency, however weak, remains doctrine. Yet doctrine is itself weaker than ever in its foundations. It rests on little more than the intersubjective 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. Once again, it has to be said that doctrine cannot become

authoritative judgment in the sense of the distinction made by Vladimiri. 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 physical 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. Nonetheless there are also very positive features of the present intellectual climate that favor the development of doctrine. There has been a sea-change of an epistemological nature in the understanding of the state that the burden of the classical period still appears to impose upon doctrine. In the classical epoch law, as also any other significant political meaning/symbol, was defined by the detached, mysterious sovereign (of Descartes and Hobbes) in an exclusive, authoritative fashion. Now it is recognized, following Bartelson's stress on the early nineteenth-century revolution of language, that the exercise of naming – of which legal naming, the acceptance of obligation, is merely a part – is directly related to language and the history of the nation. It is no longer a matter that mysterious sovereigns, remote 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. Instead, man himself emerges as the sovereign creator of his representations and his concepts. Words are not there, as with Descartes, to represent passively, as if mirroring, something external to the subject. It is the activity of the subject itself which creates its own world of experience and gives words to it. Language reflects the experience of an individual, but also of the tradition of a collective political being. Therefore, language becomes subject to interpretation. Language in its dense reality is able to tell us the history of the institutions signified by the words. The world of institutions is made by men and therefore can be reached as a mode of self-knowledge.[42] The agenda of this escape of meaning from the sovereign state at the international level is something of which international lawyers have been conscious for a long time, even if they cannot give the change a clear theoretical focus.

So I will elaborate once again the implications of Bartelson's distinction between the language of state security and the situation, which followed the early nineteenth-century revolution in language, *after which we all become responsible ourselves for the meaning of the language we use*. What is being argued for here is not an absolute sweeping away of the very limited place which exists for arguments that suppose a quasi-federal international system in which an

increasing range of hierarchically ordered tribunals may have the opportunity to test the jurisdictional competences of states, as entities incorporated under an international legal structure. This limited field may exist, if rules in the area of environment, economic transactions and even the use of force were to become relatively settled and the practice of their adjudication relatively regular and enforceable.

Nonetheless the urgent importance of a more penetrating concept of international society, as a responsible network of individuals interacting in a web of international interpersonal relations, may be illustrated by the current crisis of the British state, in the period since the beginning of the Iraq War in 2003, precisely in the hallowed traditional area of state security. Here the corporate character of the state, and hence the scope that exists for juridical analysis, should have been able to rest upon the absolute secrecy of its internal operations. The jurist would have to deal only with 'authorized' or 'validated' acts or pronouncements of the state. And yet in early twenty-first-century globalized, democratic, but above all media-dominated international society, the internal workings of the British state and its relations with its American ally allow easily and call for phenomenological ethnography of its individual participants. Indeed, to borrow some 'progressive' classical international law language,[43] the individual has, with a vengeance, become the only real subject of international law, which provides enough material activity to give doctrine scope to reach all the essential parameters of the field. This is not simply because the corporate character of the state dissolves into a natural person in a state of nature as it confronts other states across an international state of nature.[44] It is also because, in a radically democratized and educated European and American society, the notion of the individual as absolutely subject to a sovereign ruler dissolves into a willingness to serve and to cooperate, which is equally absolutely conditional upon the reasonable behavior of one's masters.

So the way is open for us to return to the morality of princes and personal rulers familiar to the pre-Vattelian epoch of international law doctrine, in which there was full scope for the medieval and classical Roman concept of law as a standard of right reason, of behavior judged appropriate in the circumstances *as applied to natural persons*. What is suggested here can only be, in this preliminary, introductory outline, the bare bones of an ethnographic phenomenology of human conduct, whereby the place of language as an all-determining structure is accepted up to the point that out of minute instances of surface consciousness, general social perspectives can be

read. The Ricoeur-based phenomenology espoused in the later stages of this book is ultimately personalist and assumes that the individual can become aware of and freed from the structures of consciousness that language imposes upon him.[45] The individual can then be held accountable. This is not to conflate the distinction between doctrine and authoritative judgment that Vladimiri thought so important. Doctrine cannot finally judge human behavior. It can merely explain it and offer to challenge its contradictions, calling upon participants engaged in contested actions, to explain themselves.

I have already suggested that the lawyer needs to equip himself with the tools of ethnography and cultural anthropology if he is to understand the issues which arise in the context of contemporary international controversies.[46] This is because we are all embedded in national, linguistic, historical communities. From these we scarcely ever emerge, especially if we are English-speaking. Since conflicts usually occur across national boundaries, our task is to try to unravel differences of which we are hardly even aware, precisely because they are so profound.

The methodology of the Écoles des Annales, in particular their history of Mentalities, could be useful for sharpening an understanding of how a particular historical community approaches the question of legal obligation.[47] Taking a case study of the biographical evolution of Hans Kelsen and Carl Schmitt in Germany and Austria in the 1920s and the 1930s, a phenomenology of individual, as well as group, human consciousnesses is the most personal and humane way of understanding people's sense of obligation and outrage in the matter of conflict. This historical approach to mentalities is an integral part of an approach to international law, which claims that the idea of the state in international law should be understood simply as the institutional or procedural framework which cultural, historical communities give themselves for the conduct of their public affairs.[48]

## THE STRUCTURE OF THIS BOOK

What follows in the next three chapters, on the sources of international law, international legal personality, and the law relating to the use of force, may well appear to show some familiarity with the usual topics of a general course on international law. However, their aim is to introduce the problems of fragmentation of statist language for the very heart of the daily labor of the international lawyer. In this

way a case will be made for *philosophizing international law*. This should mean, recognizing the inherence of an anthropology in the legal discourse of international lawyers, which needs to be brought fully to life *and made to run*. One needs to explore how the language of sources as used by an as august a body as the International Court of Justice, fails to express the reality of the forms of legal consciousness in contemporary international society. The chapter on sources does not offer a theory of justiciability, nor does it attempt a sociological critique of the professional limitations of the judges, although both are implicit in the critique of the Court's reasoning. Instead, the aim is merely to show that the statist language with which the Court works is unable to grasp the processes of international life. It will be implicit in the critique that the reason lies in the Court's continued adherence to the security-oriented language of the classical state sovereign of early modernity. Hobbes is in the shadows. The chapter concludes by setting out possible minimum conditions for an effective observation of the practice of states as institutions and the place of lawyers within them, by invoking the idea of a public space, within and outside the state in which legal argument can take place. As an appendix, a history is outlined of a concrete study of the debates about legality within a state, about an issue of intervention, and how this actually played out to the wider public space.

The next chapter addresses this question more directly by exploring international legal discourse, again largely judicial, on legal personality, particularly the dialectic between territorial sovereignty and the right of peoples to self-determination. These clashes reproduce the very basic conflict between the classical and the romantic concepts of meaning outlined by Bartelson. Indeed, the phenomenology of subjective, individual meaning, which is opened up by the language of self-determination, albeit itself historically restricted to the claims of nationalism, begins to provide a way into a phenomenology of international relations. At the same time, it is recognized that the language of the state, as the mechanism for identifying legally significant customary law practice, still produces a circular reaffirmation of territorial integrity and precludes change. Indeed, the concern of the positive, international legal system with order means, historically, that it has no legal theory of personality, but merely addresses tasks to entities which precede it. There follows a doctrinal study of the implications of the classical and romantic interpretations of personality for the state and nation as competing subjects of international law, to show the impasse between the two

paradigms of personality, which have still to be superseded. In the later chapters, especially the last, an attempt will be offered to surmount the dichotomy.

Next, the chapter on the use of force leads into the philosophical argument that the struggle for humans to find meaning has to take priority over the struggle to build institutions. It will offer to make most explicit the raw spirit of Hobbes that underlies the whole attempt to construct an international legal order on the basis of the early modern classical state sovereignty. A close analysis will be given of the most penetrating and systematic critique of the problem that the classical state posed for international law, which Kelsen offered after the First World War. The main lesson here is that this most rigorous thinker did not consider the positive law put in place by the UN Charter met his standards for overcoming the dilemmas posed by the classical state. The chapter concludes by drawing upon the work of Richard Tuck to show that the radical individualism associated with Hobbes, whom Tuck brings together with Grotius, Vattel, and Kant, is integral to a predatory imperialism towards the non-European world. The chapter has an appendix, which is intended to offer a clear illustration of the role which doctrines of pre-emption and radically defined concerns of the security state now play out in relations with the so-called non-Western world.

The following three chapters take up directly the philosophical issues, which have been permeating through the familiar enough international legal discourse up to now. Inevitably the argument will increasingly subordinate the supposedly legal materials – the remnants of a fragmented statist discourse – in relation to the various tools of history, poststructuralist cultural theory, geopolitical theory, etc., in order to reach an analytically rigorous understanding of present contemporary international society, that is not any society, but the society which is dominated by the US in the final throws of its imperialist dominance.

The chapter on the implosion of the legal subject, the US, illustrates what the implications might be for international law, of a poststructuralist interpretation of the end of the subject, a favorite theme of postmodernism. The primary aim, in the spirit of a pluralism of methods, is to see what this approach can yield as an understanding of the context in which some American international legal argument is constructed. The chapter does not have the aim to address in legal terms the quality of those legal arguments; quite the contrary, it aims to insist on the necessity of entering the unfamiliar ground of cultural

history and social psychology (albeit through a specific postmodern lens), of which the legal discourse is derivative.

The following chapter treats the same subject, the US, again at the present time, through the lens of a geopolitical neo-Marxist critique, that is, maybe ironically, diametrically opposed to a poststructuralist critique. Effectively, it takes up again the themes of the chapter on the law on the use of force, by stressing that the predatory imperialism of the US, as now a latest representative of 'the West,' has its roots in the dynamic of the classical state as a capitalist enterprise. Harvey's theory of accumulation through dispossession is an updating of the plundering of 'the native world' legitimized by Grotius and Vattel. The chapter does have a larger ambition than the previous one by relating the US to the entire international system in both its economic and political-military aspects, also within an historical perspective.

Without rejecting either poststructuralism or neo-Marxist geopolitical analysis, the book concludes with two chapters that are a rather confident and maybe over-optimistic appeal to a humanist phenomenology that affords plenty of hope for a world society of individuals who can accept personal responsibility for their own actions and approach others with a tactful respect, measuring always the distance which any autonomy necessitates. I believe the two approaches outlined in chapters 5 and 6 serve to unravel the underlying structures, the collective unconscious of international society, helping radically to increase our awareness of the crises, which confront us. However, they do not preclude a rational unraveling of the ideology of what I call liberal democratic hegemony.

The penultimate chapter offers an analysis of where we are now with Hobbesean man, the warrior marketer, with his battle songs of democracy, human rights, and the rule of law. It considers the rootedness of some already existing American philosophies of international law, in the languages of spreading democracy and the rule of law. The chapter traces the connections between rights and legal sanctions in the theories of validity of the analytical approaches to law, dominant in the Anglo-American legal tradition. Again accepting the intimate connection between economic, political, and military questions, the chapter enters the constitutionalist debate about what would be the minimal conditions for an international law of humanitarian intervention to enforce human rights. It situates this in the same predatory individualism, which Tuck has located between Grotius and Kant. The chapter concludes with a critical legal theory

response to liberal legal discourse. The primary function of politics, i.e. democracy and its junior partner, the rule of law, has to be as an alternative to civil war, whether national or transnational. This supposes the search for a constitution absent at present. Hence, the weakness of formal institutions makes all the more pressing the need for material standards of conduct, for ways of thinking them through and helping them to evolve.

The final chapter is an optimistic review of possible philosophical overcomings of the Western liberal tradition, through Paul Ricoeur's phenomenological, humanist response to Hobbes and Hegel, *from an order of fear to one of respect*. Phenomenological analysis takes one through the cultural imperialism that Steiner can trace by means of his theories of translation. These techniques of minute analysis can be applied through the theory of 'the Other' developed in the *Orientalism* debate, onto a deconstruction of all fundamentalist discourses through a phenomenological philosophy of tact and distance, a true pluralism that can ground a genuinely liberal world society. All of this can and has to be applied to conflicts characterized as easily discernible phenomena of broken, immature relationships. For Ricoeur the final foundation for any legal order rests in the maturity of *persons and communities in relation*.

**Notes**

1 *Dictionnaire*, 2nd edition, gen. ed. A. J. Arnaud (1993), entries by Sylvie Cimamonti and Aulis Aarnio, respectively.
2 See, in the Picardy Colloquium, Annick Perrot, *La Doctrine et l'hypothèse du declin du droit* (1993) 180, the entire article, but esp. 198, etc.
3 *Dictionnaire*, entry on Realism, Scandinavian, by Enrico Pattaro. Ross produced a *Textbook of International Law* in 1945.
4 Ludwig Ehrlich (ed.), *Works of Paulus Vladimiri (A Selection)* (1968) Vol. II, from 1st Tractatus (1417), 203.
5 Ibid., Vol. I, Controversy with Frebach, Quoniam Bror (1417) 308.
6 Stanislaus F. Belch, *Paulus Vladimiri and his Doctrine Concerning International Law and Politics* (1965), Vol. 1, 213–14.
7 Ibid., 233.
8 Ibid., 233–6.
9 P. Haggenmacher, *Grotius et la doctrine de la guerre juste* (1983).
10 Jens Bartelson, *A Genealogy of Sovereignty* (1995) 128.
11 Ibid., 108.
12 Ibid., 110.

13 Ibid., 130–1. Bartelson applies these remarks to Vitoria.
14 Ibid., summary of the whole of chapter 5, '*How Policy Became Foreign*,' 137–85, Bartelson.
15 E. Jouannet, 'L'Emergence doctrinale du droit international classique. Emer de Vattel et l'école du droit de la nature et des gens,' PhD thesis, Paris, 1993, 447–8, 458–9.
16 Ibid., 472–5; Bartelson, 'How Policy Became Foreign,' 194–5.
17 The literature on this subject is now legion. I offer a survey of the main characters in Anthony Carty, 'Critical International Law: Recent Trends in the Theory of International Law,' in *The European Journal of International Law* V. 2 (1991) 66–95. The continued dynamic of this debate is illustrated by the opening and closing paragraphs of John Tasioulas, 'In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case,' *Ox. JLS* 16 (1996) 85–128. He draws a distinction between the positivist statist concept of international society and a natural law orientation which gives a communitarian concept of the society.
18 See the 'Conclusion', British Institute of International Law (ed.) *Theory and International Law, An Introduction* (1991) 119–21.
19 Referring to M. Koskenniemi, 'The Future of Statehood,' 32 *Harvard ILJ* (1991) 397 at 407.
20 Tasioulas, 'In Defence of Relative Normativity,' 128.
21 A. Carty, 'Why Theory? – The Implications for International Law Teaching,' in *Theory and International Law, An Introduction*, 75, 77.
22 J. Crawford, 'Public International Law in Twentieth-century England,' in J. Beatson and R. Zimmermann (eds), *Jurists Uprooted, German-speaking Émigré Lawyers in Twentieth-century Britain* (2004) 681 at 699. 'Self-conscious exercises in "grand theory" in international law are a more recent phenomenon', referring to the work of David (not Duncan) Kennedy, M. Koskenniemi, P. Allott, and S. Marks. These are the theorists mentioned in the last section.
23 T. Baty, *International Law in Twilight* (1954) 10.
24 Crawford, 'Public International Law in Twentieth-century England,' 686 and 689.
25 What follows comes from Carty, 'Why Theory?,' 88, with citations omitted.
26 In *The Liberal Tradition, From Fox to Keynes*, ed. Bullock and Shock (1967) 165–7.
27 D. H. N. Johnson, 'The English Tradition in International Law,' *International and Comparative Law Quarterly* 11 (1962) 416, at 425, with a quotation from the first edition of his *International Law* (1900). Smith held numerous offices of state, but, for Johnson, the most significant example of the practice was Sir William Harcourt, who was both

Whewell Professor of International Law in Cambridge and a leading Liberal statesman through the Gladstone ascendancy.

28 What follows is taken from 'Why Theory – Implications for International Law Teaching,' 78.

29 R. Y. Jennings, 'The State of International Law Today,' *Journal of the Society of the Public Teachers of Law* (1957–58) 95 at 96.

30 Preface to the *Annual Digest of International Law Cases, Years 1925 and 1926* (1929) x.

31 Ibid.

32 Crawford, 'Public International Law in Twentieth-century England,' 700.

33 See further A. Carty, 'Visions of the Past of International Society, Law, History or Politics,' in the *Modern Law Review* 69(4) (Spring 2006), 644–60.

34 Martti Koskenniemi places the change in continental Europe in the 1950s, in *The Gentle Civiliser of Nations* (2002), 3, while David Kennedy is closer to the view expressed here that the shock of the Great War led international lawyers to hope, in his view somewhat magically or mysteriously, for peace through institutions, or even the language of institutions, see David Kennedy, 'The Move to Institutions,' *Cardozo Law Review* 8 (1987), 841, esp. to 849.

35 See Casper Sylvest, 'International Law in 19th Century Britain,' *British Yearbook of International Law*, LXXV (2004) 9–70; and John Anthony Carty '19th Century Textbooks on International Law,' unpublished thesis, Cambridge University, 1973, esp. Part VII, 'International Law in England, The Textbooks,' 277–379.

36 Carty, 'Why Theory? – The Implications for International Law Teaching,' 79–82 describing the state as an institution, a perspective most amenable to the superimposition of international institution, although obviously not causing them, merely catching the mood of the times, as a representative thinker.

37 J. Brierly, *The Basis of Obligation in International Law, and Other Papers*, ed. H. Lauterpacht (1958) 41–2.

38 Johnson, 'The English Tradition in International Law,' 432 ff.

39 Ibid., esp. 432.

40 Correlli Barnett, *The Verdict of Peace* (2001) 51–2, from the chapter, 'The Principal Partner of America in World Affairs,' tracing the symbiotic, if still unilateral, dependence of Britain on the US back to the Korean War.

41 The basic material for critique is provided by a leaked report of a meeting in July 2002 between Tony Blair, Jack Straw, Lord Goldsmith, and a Service Chief, which had such a character that it must have outraged a very senior government official who knew of it. The report indicated a political decision to manipulate public opinion against Saddam

Hussein to prepare the country for war: reported and reproduced in *The Sunday Times* May 1, 2005, available on *www.timesonline.co.uk* (the secret Downing Street memorandum).

42 Bartelson, *A Genealogy of Sovereignty*, 188–201.

43 I am referring to the work of figures such as, above all, George Scelle, but also James Leslie Brierly and Hans Kelsen. See further a systematic treatment of these authors for a questioning of state sovereignty in Jane E. Nijman, *International Legal Personality* (2004) 85–243.

44 See Anthony Carty, 'Convergences and Divergences in European International Law Traditions,' *European Journal of International Law* 11 (2000) 713, esp. 726–8, considering the French tradition of the state in international law. I will come to these themes again in the chapter 3 below.

45 See, for instance, Paul Ricoeur, *The Conflict of Interpretations* (English translation Northwestern Press 1974) ed. Don Ihde (2004) especially the chapter, 'Structure and Hermeneutics,' translated by Kathleen McLaughlin, 27–60, where Ricoeur confronts primarily the structuralist anthropology of Lévi-Strauss with his phenomenological doctrine of intentionality; also Anthony Carty, 'Scandinavian Realism and Phenomenological Approaches to Statehood and General Custom in International Law,' *European Journal of International Law* 14 (2003) 817, esp. 836–40, on the importance of becoming aware of the constraints of culture heritage and personal history, above all through the dialectic of intersubjectivity.

46 Carty, 'Critical International Law,' 67–70.

47 A. Carty, 'Interwar German Theories of International Law: The Psychoanalytical and Phenomenological Perspectives of Hans Kelsen and Carl Schmitt,' *Cardozo Law Review* 16 (1995) 1235–92.

48 Carty, 'Why Theory – Implications for International Law Teaching,' 73, 97–9.