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CONTINUING UNCERTAINTY IN THE MAINSTREAM

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There is no consensus among International lawyers on a workable or operable concept of general customary law, supposed to be the fundamental source of an international law binding upon states. It is thought to represent an analytical framework within which one can assess whether states recognize a rule, principle, or practice as binding upon them as law. Jurists are to examine the same 'raw material' of international relations as diplomats, statesmen, historians, and political scientists. Yet according to the most orthodox view, expressed in the jurisprudence of the ICJ the jurists are to find that states have, in some sense, a legal conscience or sense of conviction. In the *North Sea Continental Shelf* cases the ICJ said that the 'practice of states' relevant to the assertion that a rule of customary international law exists must:

> be such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (*opinio juris sive necessitatis*) . . . The states concerned must therefore feel that they are conforming to what amounts to a legal obligation . . .[1]

The basic problems with this formulation have been put squarely by Sorensen and D'Amato. Sorensen points out how the very nature of relations among states makes ascertainment of an evolving customary law virtually impossible. Diplomatic negotiations remain so closed and secret that not even the representatives of one state will know what are the underlying motives of their opposite numbers. Yet such motivation is essential to the psychological element of custom.[2] D'Amato has been equally direct in questioning any possible legal method of observing customary law evolving out of the consciousness of a modern bureaucratic state.[3]

It appears impossible to speak of states having an identity that allows one to suppose that, as centers of subjectivity, they have

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acquired a sense of obligation with respect to a particular matter. If the state is viewed as a corporate entity, the legal order that supports it should define the organs of the state competent for the purpose of creating general custom, and, furthermore, specify when in fact the organs are acting to this end. Yet the international legal order does not do this. Jurists are left fumbling with the idea that the state is itself, as a totality, in some undefined way, capable of having a 'legal sense' that it is bound by a general custom, which may even be supposed to be already existing. The reaction of some jurists has been to try to dispense with the psychological element of general custom altogether, yet without abandoning the concept of general custom itself.[4]

Pierre-Marie Dupuy provides an exhaustive and authoritative account of the formal problems for the international legal profession. In his *Hague Academy Lectures* he draws attention to the fact that the profession must face a deficiency: 'that, precisely, of the existence of *procedures,* duly formalised by the law itself, for the creation of customary norms . . . '[5] Dupuy remarks how there are very detailed rules for the conclusion of treaties, 'but, there are not, to the contrary, to borrow the terminology of Hart, secondary rules governing the conditions of formation of custom . . . One contents oneself to affirm unilaterally that the rules of custom exist or one awaits a judge to say so himself, in place of the states . . . '[6] Until there is some form of 'revelatory proof of its existence, generally judicial, a rule of custom remains a virtual rule. The paradox is that, trapped in its theoretical premises, the most classical positivist doctrine, says Dupuy, nonetheless persists in seeing in custom, despite this absence of forms, a formal source of law with respect to the conditions of its creation, and not merely with respect to its content. [7]

There is a clear residual confidence among international lawyers that the international judiciary can 'reveal,' to use Dupuy's language, the presence of custom, and turn it from virtual to real law. Yet, it is almost a commonplace of legal doctrine that the ICJ has reached decisions in such cases as the *Fisheries Jurisdiction* (1974) or the *Advisory Opinion on Namibia* (1971), in the face of so much conflicting state interest and interplay of power, as to leave one at a loss as to how general custom is supposed to arise out of state practice.[8]

A number of recent landmark cases in the jurisprudence of the ICJ indicate that its use of the concept of general custom has not become less problematic. In the 1986 case *Certain Military Activities Concerning Nicaragua* the ICJ affirmed a formal principle with respect to sources of law. The mere fact that states declare their

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recognition of certain rules does not make these rules customary law, without the essential role, required by Article 38 of its Statute, played by general practice.[9] This means there should be a practice to confirm a legal discourse. There must be conduct of states consistent with rules, or at least inconsistent behavior should generally be treated as breaches of the rule.[10]

The difficulty facing the Court was fundamental. There appeared to be a general rule, recognized in numerous declarations, that intervention in the internal affairs of states is illegal. However, interventions are frequent, especially by the US; in this case, in Nicaragua. The Court decided first, that the rule existed, and then asked whether exceptions had been recognized.[11] Then it changed the object of analysis away from actual practice, in the sense of externally observed conduct, to the delicate subjective element, declarations of opinion concerning conduct. The principle of intentionality is introduced as decisive, although the starting point of the Court's analysis was that it could not be given separate analysis.

So the US authorities clearly state grounds for intervening in a foreign state for reasons

> connected with, for example, the domestic policies of that country, its ideology, the level of its armaments, or the direction of its foreign policy. But these were statements of international policy, and not an assertion of rules of existing international law . . .[12] [In this case] . . . the US has not claimed its intervention, which it justified in this way on the political level, was also justified on the legal level . . . [where it] has justified its intervention expressly and solely by reference to the 'classic' rule involved, namely collective self-defense against armed attack . . .[13]

Here the Court is speculating about state intentions that are not completely transparent. The Court can freely classify as political/insignificant, or legal/significant, what it likes about the intentions of states, which the Court, is, in any case, projecting onto the states. States are unwilling to give formal, principled declarations in favor of their actions. The US is in fact giving substantial material support and training to armed bands which are attacking a foreign state. The US was claiming the right to come to the aid of an opposition group (the Contras) in a country led by a one-party communist regime (the Sandinistas), which had undertaken to hold free elections at a meeting of OAS Foreign Ministers. It had not done so. The Court, as it were, declassified this undertaking as itself political/insignificant, a pledge made not only to the OAS, but also to the people of Nicaragua.

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However, 'the Court cannot find an instrument with legal force, whether unilateral or synallagmatic, whereby Nicaragua has committed itself in respect of the principle or methods of holding elections . . . '[14] Only legal force, as characterized by the Court, is significant.

How far can the Court take its investigation into the *real intentions of states, or other collective entities*? The Court puts its position modestly: 'nor has it authority to ascribe to states legal views which they do not themselves advance . . . '[15] This limitation is particularly important when the Court is in fact equating the state of Nicaragua with the national *junta* of reconstruction (the Sandinistas). A US Congressional finding was that the Nicaraguan government has taken significant steps towards establishing a totalitarian communist dictatorship. The Court responded that:

> adherence by a state to any particular doctrine does not constitute a violation of customary international law; to hold otherwise would make nonsense of the fundamental principle of state sovereignty, on which the whole of international law rests. Consequently, Nicaragua's domestic policy options, even assuming that they correspond to the description given of them by the Congress finding, cannot justify on the legal plane the various actions of the respondent complained of . . . [16]

Normally, legal intention (i.e. seriousness) can be inferred from action in an area or field, which is itself taken to be serious. Where the US gives military support to opposition parties to overthrow a communist regime in a Latin American state, it can only be supposed that it is extremely serious about what it is doing. It is difficult to see what is gained by the Court treating some state intentions (whether of the US or of Nicaragua) as political and others as legal. This appears to be a 'head in the sand' approach, which denies the international law profession the analytical framework to grasp fully the *intentionalities* of the parties engaged in a conflict, thereby penetrating beyond the corporate veil of the state to find the subjective elements within it.

The ICJ was faced with an issue of high politics. This should provoke reflection upon the question whether the traditional analytical tool of general customary law is suitable for the elements of idealism and realism, altruism and state egotism that are at play in the legal phenomena of international relations. The US determines that its interest or national security cannot tolerate the close proximity of a new neighbor (Sandinista Nicaragua) dedicated, in its view, to an irreconcilably hostile ideology. It is very problematic for the legal positivist to ask himself categorically, in each atomistic instance,

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whether the state has or has not acted on the basis of a legal conviction. Yet it is inevitable that a state will form some ideal view of what it needs to undertake for its own security. Is there no analytical framework within which one can assess critically how the state attempts to do this?

Legal positivism has, since the French Revolution, given expression to the idea that the will of the state is, in fact, the democratically expressed will of the people, constituted as a nation.[17] There is very little official state disagreement about this rather confused hotchpotch of political-legal ideas, which has come out of European culture since the French Revolution. This view of democracy combines with a vaguely benign view of a romantic nationalism, which supposes that peoples as group actors constituted in states are sufficiently motivated by idealist ideologies for their international relations to signify more than a mere interplay of Machiavellian calculations of state interest.

This is not to say that legal imagination must be defeated by the complexities of international life, only that it must rethink the options that the language of general customary law offers. One may illustrate the possibilities by contrasting two Frenchmen reflecting, also in the 1980s, on the general legal significance of the third United Nations Conference on the Law of the Sea.

A former head of the French Foreign Office legal department formulated a relevant thesis while still a judge of the ICJ. De Lacharrière argues that a state has inevitably conflictual relations with other states and will, as far as possible, formulate and interpret a rule of posited law to its own advantage and equally to the disadvantage of its neighbor. The international lawyer, as a legal scientist, must observe, in a detached manner, the particular convergence of circumstances which persuades a state that it has no choice, if it is to have another state agree to something which it does not want, but to agree to a measure of what it does not want. Throughout his text de Lacharrière develops a lucid account of the most extensive possible negation of Kant's categorical imperative – do as little as possible to base your conduct on a general principle applicable to everyone, but subject to your being aware that the determination of others to do precisely the same will mean that you will end up somewhere in the middle.[18]

Particularly important are de Lacharrière's reflections on the drafting and conclusion of treaties as evidence of the evolution of general customary law – a principle given great attention by the ICJ in both the *North Sea Continental Shelf Case* and the C*ertain Militaries Activities (Nicaragua) Case*. The Law of the Sea Convention (1982)

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is a treaty. Concerning its value in international law, de Lacharrière insists that treaties are used by states merely as a convenient technique to predetermine conduct in international relations. Insistence upon their application will depend very much on whether states intend their own behavior to correspond to the treaty. Furthermore, the process of drafting a treaty is that of a diplomatic conference and it is therefore unscientific to attempt to transform this essentially pragmatic environment into the academic straitjacket of the search for an *opinio juris* of states with respect to the formation of customary law. This is simply another way of saying that the diplomatic representative is authorized to achieve what advantage he can through negotiation. The act of ratification by government and parliament is quite separate. Finally, there is nothing remarkable about states taking up positions that are analytically or doctrinally inconsistent or incoherent. The doctrine of estoppel is a judicial invention which does not correspond to how a state formulates its view of its own interests. The basic principle of state conduct is that each state insists naturally on its own specificity. At the same time each state sees itself as a unique representative of universal values, but precisely in the sense that these are understood to give specific significance to its own practice in terms of the development of general customary law.[19]

None of this is to say that international law does not exist. It is simply that scientific study of its functioning has to focus on the techniques that states employ to manipulate legal phenomena. There is not a single international law. There are the external legal policies of as many states as are active with respect to an issue.

De Lacharrière supposes that any other conception of the subject rests on suppositions of legal transcendence or idealism. If a law is felt by a state to be a constraint imposed from above, this means only that other states have effectively imposed something on it. He denies vigorously that there is an international legal order (or community) which grants any competences to states with respect to a matter not yet regulated by them. It is pure reification to say that states are acting within a legally limited discretion in terms of powers delegated to them. States retain control of the interpretation of international law, so there is merely an application of multiple conflicting state policies.[20]

Alternatively, René Dupuy argues that there is an open dialectic between the spirit of co-operation and of conflict in international relations. The dialectic is not a monopoly of any particular state, but represents a permanent antagonism among states which are independent yet interdependent. This is not a Marxist dialectic, which supposes an

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inevitably positive synthesis. The dialectic expresses the fact that relations among states are constantly disintegrating and then being reconstituted towards some semblance of harmony. Every progress contains a contemporaneous regression within it. A pattern of contradiction is universal and does not simply reproduce in a superstructure of international law the material antagonisms of the infrastructure of international society. Dupuy means to state that at present the weaker members of this society oppose a different concept of the structure of the law itself to those of the stronger. They oppose an institutional view of law to the traditional relational one, or more simply a vertical to a horizontal one. Neither approach enjoys preeminence, and indeed particular states may change roles within this spectrum.[21]

The institutional approach reflects what Dupuy calls an old French tradition as to the nature of general customary law – that it is a spontaneous growth, which has its origin in a common conscience of the members of society without anyone having formulated it precisely. This is not a naïve formulation of the value of state practice. On the one hand, there is always a firm refusal of states to accept any principle that transcends them – the relational approach. Each is self-sufficient for himself. On the other hand, there is the push to create rules and means of applying them which are above states. The former approach joins necessarily the notions of power and law in the same subject, whereas the latter approach, the institutional concept of international law, distinguishes firmly between the state and the law, reducing the former to be a subject of the latter. However desirable this may appear as a means of controlling power, the nature of international society is such that it makes no sense to try to deprive nation-states of their specific identities, to encourage an excessive institutionalization, which freezes their specificity.[22]

Dupuy recognizes that there is no denying the fragility of communitarian 'strivings' to go beyond the selfhood of the individual state. He argues that the concept of community, like other basic legal concepts, such as contract, treaty, etc. is a myth, in the Sorelian sense. It mobilizes forces. It is not designed to put an end to ideological conflict, but reflects a concrete democratic egalitarianism that is constantly in a state of struggle. It is accompanied by the disappearance of the characteristic of generality in law in favor of differentiation. The latter marks the refusal to accept the quasi-mystical notion of Rousseau that law should be general and abstract. Struggle is to make law, as far as possible, concrete and situational. In a sense, what one

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is experiencing is a return to the pre-Revolutionary concept of law as directed to the needs of a variety of distinct legal subjects, rather than accommodating one universal and abstract legal type.[23]

The mythical force of legal concepts has a destabilizing effect on rules of law. The roots of this force are to be found not in the state itself, but in the rights of peoples, who are the real sovereigns. The notion of community is a link concept, which takes issues out of the purely relational context and pushes them towards institutionalization. Notions such as *res communis*, under the 1982 Law of the Sea Convention, even without the agreed authority to manage it, operate to impose on independent states a duty to act with a discretion, which requires the rational management of humanity's resources for its benefit. No state can be compelled to be a part of an international organization against its wishes. Yet, however much it may try to resist, no state can behave as if it existed in a purely relational system of law, free to do whatever it had not committed itself not to do.[24]

Whatever the absolute merits of the theories of de Lacharrière and Dupuy, they point to the need for a framework of analysis of state practice which allows one some means to question: elements of naïve positivism (that law is simply there to be described); superficial idealism (that rhetoric about community and development has prevailed in reality); and democratic, nationalist prejudice (that whatever any Western democracy's state authorities have approved has become law).

2

A later landmark case, *Legality of the Threat or Use of Nuclear Weapons* (1996), shows, to an acute degree, the intensity of contradiction between realism and idealism in analysis of what is, above all, the state practice of liberal, democratic Western states. The difficulty with this case was how to square the commitment of states to principles of humanitarian law and, at the same time, their reliance upon nuclear deterrence as a central part of their strategic defense policy. The aim of the latter is the elimination of large centers of enemy population, indeed the elimination of entire enemy societies, while the basic principle of humanitarian law is that there is a distinction between combatants and non-combatants, that war must remain limited to military defeat of the enemy.

The dissenting opinions of Judges Higgins and Schwebel contrast with the majority opinion of the Court to evidence distinct coyness

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about positivists grappling with 'the realities' of the 'practice' of contemporary states. From the beginning, the Court was aware that the question existed, whether the present international law system had relevant rules on the issue of threat or use of nuclear weapons. It responded that its function was not to legislate, but to state the existing law. Somehow it could also say, 'An entirely different question is whether the Court, under the constraints placed upon it as a judicial organ, will be able to give a complete answer to the question asked of it. However, that is a different matter from a refusal to answer at all . . .' (para. 18). What the Court might mean by such a promise of self-restraint became clear in its consideration of the exercise of the right of self-defense. Quoting itself in the *Certain Military Activities in and against Nicaragua Case,* it said that self-defense 'would warrant only measures which are proportional to the armed attack and necessary to respond to it, a rule well established in customary international law . . .'(para. 41). Certain states argued that the very nature of nuclear weapons and the high probability of escalation of nuclear exchanges mean there is an extremely strong risk of devastation. Then the Court went on to make a remarkable statement about the sharing of responsibilities between a reviewing Court and sovereign states, in the post-Vattelian subjectivist international legal order:

> The risk factor is said to negate the possibility of the condition of proportionality being complied with. The Court does not find it necessary to embark upon the quantification of such risks; nor does it need to enquire into the question whether tactical nuclear weapons exist which are sufficiently precise to limit those risks: it suffices for the Court to note that the very nature of all nuclear weapons and the profound risks associated therewith are further considerations to be borne in mind by states believing they can exercise a nuclear response in self-defense in accordance with the requirements of proportionality . . . (para. 43)

This is all the Court has to say about the compatibility of the strategy of nuclear deterrence with the principles of the UN Charter, that is, whether as a means of self-defense the threat or use of such weapons 'would necessarily violate the principles of necessity and proportionality . . .' (para. 48).

The Court is on stronger ground when it says that the illegality of the use of certain weapons as such does not result from an absence of authorization, but, on the contrary, is formulated in terms of prohibition (para. 52). In the past two decades a great many negotiations have been conducted regarding nuclear weapons, but they have not

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resulted in a treaty of general prohibition of the same kind as for bacteriological and chemical weapons (para. 58). A key issue is the legal significance of the Treaty on the Non-Proliferation of Nuclear Weapons. Those states supporting the legality of the use of the weapons say the very logic of the treaty is on their side. The treaty evidences the acceptance of the possession of nuclear weapons by the five nuclear weapon states. '[T]o accept the fact that those states possess nuclear weapons is tantamount to recognising that such weapons can be used in certain circumstances . . . ' (para. 61). The Court concludes that such treaties 'could therefore be seen as foreshadowing a future general prohibition of the use of such weapons, but they do not constitute such a prohibition by themselves . . .' (para. 62).

Surprisingly, the Court distinguishes this interpretation of treaty practice from customary law, which it gives the usual definition of actual practice and *opinio juris* of states (para. 64). Some states refer to a consistent practice of non-utilization of nuclear weapons since 1945 as an *opinio juris* that such non-use evidences a conviction that use would be illegal (para. 64). Other states invoke the doctrine and practice of deterrence as showing that states have 'always reserved the right to use those weapons in the exercise of the right to self-defense against an armed attack threatening their vital security interests . . .' So, non-use merely means the circumstances that might justify their use have not arisen (para. 66). There follows an absolutely extraordinary and, in my view scandalous, pronouncement of the Court, which shows the utter bankruptcy of the doctrine of positivist customary law:

> The Court does not intend to pronounce here upon the practice known as the 'policy of deterrence'. It notes that it is a fact that a number of states adhered to that practice during the greater part of the Cold War and continue to adhere to it. Furthermore, the members of the international community are profoundly divided on the matter of whether non-recourse to nuclear weapons over the past fifty years constitutes the expression of an *opinio juris*. Under these circumstances the Court does not consider itself able to find that there is such an *opinio juris*. (para. 67)

Having closed off argument on the *ius ad bellum* and nuclear weapons, the Court puts the whole weight of argument on the compatibility of nuclear weapons with the principles of humanitarian law. The Court says it has not found a conventional rule of general scope or a customary rule specifically proscribing the threat or use of

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nuclear weapons (para. 74). However, the fact that humanitarian law pre-dates the advent of nuclear weapons, and that its development through conventions did not explicitly take the weapons into account, does not preclude the application of the law to the weapons. Any other conclusion, says the Court, 'would be incompatible with the intrinsically humanitarian character of the legal principles in question which permeates the entire law of armed conflict and applies to all forms of warfare and to all kinds of weapons . . . In this respect it seems significant that the thesis that the rules of humanitarian law do not apply to the new weaponry, because of the newness of the later, has not been argued in the present proceedings . . .' (para. 86).

When the Court came to consider how the principles would be applied, it observed that none of the states advocating legality in certain circumstances has indicated what would be the precise circumstances justifying such use; nor whether such limited use would not tend to escalate into all-out use of high-yield nuclear weapons. Once again the Court restrains itself: 'This being so, the Court does not consider that it has a sufficient basis for a determination on the validity of this view' (para. 94). Conversely, the Court would not make a determination that use of nuclear weapons would be illegal in any circumstances due to their inherent and total incompatibility with the law applicable to armed conflict. The weapons would scarcely seem to be reconcilable with the law. Nevertheless, 'the Court considers that it does not have sufficient elements to enable it to conclude with certainty that the use of nuclear weapons would necessarily be at variance with the principles and rules applicable in armed conflict in any circumstances . . .' (para. 95).

In fact, it is the subjectivity of liberal, post-Vattelian international law that is determining the Court's conclusion. The Court cannot lose sight of the fundamental right of every state to survival, and thus its right to resort to self-defense, in accordance with Article 51 of the Charter, when its survival is at stake. Nor can the Court 'ignore the practice referred to as "policy of deterrence", to which an appreciable section of the international community adhered for many years . . .' (para. 96). This leads the Court to say, effectively, that because it cannot penetrate the meaning or significance of state practice, it cannot say whether the use of nuclear weapons would be illegal where states are actually going to invoke the right:

> Accordingly, in view of the present state of international law viewed as a whole, as examined above by the Court, *and of the elements of fact at its*

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> *disposal, the Court is led to observe that it cannot reach a definitive conclusion as to the legality or illegality of the use of nuclear weapons by a state in an extreme circumstance of self-defence, in which its very survival would be at stake* . . . (para. 97; author's italics)

It is hardly surprising that Judge Higgins comments that at no point does the Court engage in a systematic application of the relevant law to the use or threat of nuclear weapons. 'It reaches its conclusion without the benefit of detailed analysis. An essential step in the judicial process – that of legal reasoning – has been omitted . . .' (para. 9). Yet Higgins is equally operating within the Vattelian principles of subjectivity. She objects to the idea that the Court is implying that states could justifiably use nuclear weapons to ensure their survival, even if that involved a violation of humanitarian law. This goes beyond what nuclear weapons states were claiming, namely they always accepted that they would have to comply with humanitarian law (para. 29). What she means is a reference to the same pure subjective belief of sovereign states that prevents the Court itself from penetrating state practice. So Higgins argues, 'If a substantial number of states in the international community *believe* [author's italics] that the use of nuclear weapons might *in extremis* be compatible with their duties under the Charter (whether as nuclear powers or as beneficiaries of 'the umbrella' or security assurances) they presumably *also believe* [author's italics] that they would not be violating their duties under humanitarian law . . .' (para. 33).

It is the role of the judge to resolve in context and on grounds that should be articulated why the application of one norm (e.g. humanitarian law) rather than another (e.g. the right of self-defense with nuclear weapons) is to be preferred (para. 40). So Higgins reaches a conclusion identical to that of the Court for exactly the same reason, the systemic character of international law as a liberal (i.e. Hobbesean) order of raging subjectivities, none of which can trust one another. It is hardly surprising that a collection of judges can do nothing in the face of such moral chaos:

> In the present case, it is the physical survival of peoples that we must constantly have in view. We live in a decentralised world order, in which some states are known to possess nuclear weapons but choose to remain outside of the non-proliferation treaty system; while other such non-parties have declared their intention to obtain nuclear weapons; and yet other states are believed clandestinely to possess, or to be working shortly to possess nuclear weapons (some of whom indeed may be party to the NPT). *It is not clear to me that either a pronouncement of illegality in all*

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> *circumstances of the use of nuclear weapons or the answers formulated by the Court in paragraph 2E best serve to protect mankind against that unimaginable suffering that we all fear* . . . (para. 41; author's italics)

Judge Schwebel adds to Higgins' critique illustrations of what it could mean to give substance to a serious analysis of state practice as an avenue for exploring the evolution of customary international law. Schwebel argues, pointedly but in general terms, that state practice demonstrates that nuclear weapons have been manufactured and deployed by states for fifty years. In that deployment inheres a threat of possible use. Nuclear powers have affirmed they are legally entitled to use nuclear weapons in certain circumstances and to threaten use:

> They have threatened their use by the hard facts and inexorable implications of the possession and deployment of nuclear weapons; by a posture of readiness to launch nuclear weapons 365 days a year, 24 hours of every day; by the military plans, strategic and tactical, developed and sometimes publicly revealed by them; and, in a very few international crises, by threatening the use of nuclear weapons. In the very doctrine and practice of deterrence, the threat of the possible use of nuclear weapons inheres . . . This is the practice of five of the world's major Powers . . . significantly supported for almost 50 years by their allies and other states sheltering under their nuclear umbrellas . . . It is obvious that the alliance structures that have been predicated upon the deployment of nuclear weapons accept the legality of their use in certain circumstances . . . (pp. 1 and 2)

Schwebel goes on to discuss at length (pp. 9–12) one instance of an implied threat of the use of nuclear weapons which he considers had a positive effect in ensuring international public order in terms of international law. In the case of *Desert Storm*, the 1991 war against Iraq, the US feared that Iraq might deploy chemical and biological weapons against its opponents. The US Secretary of State reports, after the event: 'I purposely left the impression that the use of chemical or biological agents by Iraq could invite tactical nuclear retaliation . . .' (p. 10). Schwebel relies on a further *Washington Post* article for evidence that the Iraqi authorities translated the various ambiguous, but grievous and devastating US threats to mean it would respond to Iraq's use of chemical and biological weapons with nuclear arms (p. 11). Schwebel concludes that this affords an example of how the UN Charter was sustained rather than transgressed by a nuclear threat. The threat may have made a critical contribution to the UN triumph. This is not a case of the end justifying the means, 'It rather demonstrates that, in some circumstances, the

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threat of the use of nuclear weapons – as long as they remain weapons unproscribed by international law – may be both lawful and rational' (p. 12).

The issue of the legality of nuclear deterrence may be different from that of superpower, ideologically-driven interventions. The existence of nuclear weapons for more than half a century, and the apparent fact that their development cannot be reversed, point in the direction of structures which present generations have simply inherited. How can liberal democratic Western states embark upon security strategies which include a willingness to obliterate entire societies, as a way of ensuring one's own security? The answers lie in historical processes. The foundations for total war waged with nuclear weapons, bringing with them the complete destruction of one's enemy, were firmly laid by 1945. They amount to nothing more or less than the continuation of strategies used during the last war, resting upon an ideology of total war. Doctrines associated with nuclear deterrence come later and have not modified the essential strategic assumptions or what the armed forces are actually organized to do. Questions of the credibility of the deterrence, the morality of a conditional threat to carry out an act in itself admitted to be immoral, etc., are raised when there is already a commitment to a type of warfare in which the absolute destruction of one's opponent is regarded as normal. Certain strategic practices have become institutionalized. One has still to trace out historically and recognize exactly where responsibility for this institutionalization rests.[25]

It is inherently difficult for a judiciary to consider anything other than individual, or collective, responsibility of contemporary actors. Yet the law has to find some way of facing issues of historical responsibility. It is not enough to start from where we are now. Nuclear strategies are embedded in wider, institutionalized military-economic strategies. It is simplistic to say that one has to balance considerations of humanitarian law with legitimate claims to use certain instruments of self-defense, when it has been decided long ago that the most economical way to wage war has been to bring it to the enemy civilian population. No piecemeal reversal of policies is conceivable. We are faced not so much with individual, present moral dilemmas as with the baleful consequences of wrong actions. The extent of the crisis is expressed by the American sociologist Robert Nisbet. He concludes his study of what he calls the lure of military society thus: 'that only events presently unforeseeable in nature and scope . . . could possibly arrest the present drive of militarism in the Western world . . .'[26]

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The complexity of the issues includes the following two elements. First, there has been a remarkable lack of concern in the West about the scale of casualties that nuclear deterrence could cause, suggesting a general public denial psychosis which a judicial process could hardly be a suitable forum to penetrate. Second, one needs to understand the responsibility that German and Japanese aggression bears for a dehumanization process in which the Allies, in turn, implicated themselves when they undertook total war. Garrison captures this dimension in the provocative remark that the conflagration with Germany was the outcome of psychic conditions that were universal 'only while the Germans threatened a single people with genocide, the nuclear arms race threatens the entire human race with extinction . . .'[27]

Higgins and Schwebel come closer than the Court to facing the implications of nuclear deterrence in state practice. Yet their own approaches lack the historical perspective that reveals how moral choices are already frozen in practice. The balance of humanitarian law and the law of self-defense has long ago been decided in favor of the latter. A legal analysis, which is to challenge or even understand this, requires a dimension of *opinio juris* in state practice that recognizes the contextual and structural dimension of states as historical communities.

3

Two more cases of the International Court of Justice concern an apparently more focused and manageable issue: the protection of the sovereignty of the state. First, the issue was whether the Foreign Minister of a state is entitled to sovereign immunity from prosecution by another state; the second was whether the construction of a wall beyond the recognized territory of a state is necessary for its national security. There is an extensive international relations literature highly critical of the alleged crudeness of a 'vital interests' or 'national security'-obsessed perspective on international relations.[28] At the same time, there is a lack of interest among international lawyers in questions such as whether states may put their subjectively conceived vital interests above international law. This is the question whether international law is observed – sometimes yes, sometimes no, but more often than not, and, anyway, the issue that such conduct raises is meta-juridical.

Yet the question has come up in the International Law Commission's discussion of the draft articles on state responsibility, in connection

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with the concept of state necessity. According to this a state may commit an act which injures the rights of other states where there is a grave and immanent threat to the vital interest of a state, which was not provoked by it and which cannot be overcome in any other way. It is recognized that such a concept is vague and yet it is impossible, even if desirable, to arrange compulsory adjudication of the use of the concept by states. In the mid-1980s the view of the Special Rapporteur to the ILC was that the concept was so deeply rooted in the general theory of law that silence on the issue would not serve to exclude its continued application. Yet the ILC declares a lack of interest in the theoretical foundation of the right. It does not matter whether it is a question of violating a subjective right of another state, or whether there happens to be somehow two conflicting abstract norms, which, fortuitously, cannot be applied simultaneously at a particular point in time.[29] It is not recognized by the judiciary that balancing of principles (humanitarian law/self-defense; sovereign immunity/prosecution of universal crimes) is never going to take place as long as judicial tribunals and the ILC choose not to elaborate a theoretical analysis which takes as its starting point the actual conduct of states rather than formal arguments based on the logical structure of the idea of law as such.

3.A

In the *Case Concerning the Arrest Warrant of 11 April 2000* (Democratic Republic of Congo v. Belgium)[30] the Court easily reached the conclusion that an arrest warrant issued by a Belgian judge against the incumbent Foreign Minister of a state violated the law of sovereign immunity. The alleged crime was that the hate speech of the Minister provoked racial killings of Congolese in the Congo, some of whom invoked a Belgian law promising universal jurisdiction. At the time the warrant was issued the Minister was not in Belgium. The issue is so controversial, because it has been squarely posed that state officials commit certain types of crimes as state officials and that the very idea of granting them immunity because they are state officials impedes the development of criminal law. However, both parties agreed to narrow the case at issue to one of whether, *if Belgium could be assumed to have jurisdiction over the alleged crime,* it had exercised it unlawfully because the object of the warrant was an incumbent Foreign Minister. The Court observed that there was no directly applicable treaty and that customary law had to answer

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the question. In the space of a few paragraphs it decided in favor of immunity. The Foreign Minister, responsible for the conduct of a state's relations with all other states, occupies a position such that, like the Head of State or the Head of government, he or she is recognized under international law as representative of the state solely by virtue of his or her office (para. 54). The Court accordingly concludes that the functions of a Minister for Foreign Affairs are such that throughout the duration of his or her office, he or she when abroad enjoys full immunity from criminal jurisdiction and inviolability . . . (para. 54). Even the mere risk of legal proceedings could deter a Foreign Minister from traveling internationally when required to do so to perform his functions' (para. 55).

Belgium argued that the Court still had to accept that immunity did not apply to the commission of war crimes or crimes against humanity. It relied on the logic of dicta in the *Pinochet Case*[31] that law can hardly establish a crime having the character of *ius cogens* and at the same time provide an immunity which is coextensive with the obligation it seeks to impose (para. 56). The Court responded, in one short paragraph (para. 58) that it had carefully examined state practice 'and had been unable to deduce from this practice that there exists under customary international law any form of exception to the rule according immunity from criminal jurisdiction and inviolability to incumbent Ministers for Foreign Affairs where they are suspected of having committed war crimes or crimes against humanity . . .' As for the rules of international tribunals (such as Nuremberg, Tokyo, the International Criminal Court, etc.) concerning issues of immunity for persons having an official capacity, the Court 'finds that these rules likewise do not enable it to conclude that any such an exception exists in customary international law in regard to national courts . . .' (para. 58). Finally, none of the international criminal court decisions (e.g. of Nuremberg and Tokyo) 'deal[s] with the question of the immunities of incumbent Ministers for Foreign Affairs before national courts where they are accused of having committed war crimes or crimes against humanity . . .' (para. 58).

A joint separate opinion of Judges Higgins, Kooijmans, and Buergenthal attempted to challenge the technique of the Court, particularly in not addressing directly the question whether Belgium could claim universal jurisdiction over war crimes, etc. This should have set up a framework in which the Court would undertake the explicit task of balancing claims of universal jurisdiction against claims of sovereign immunity of Foreign Ministers.

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The joint opinion affirmed that there was no established practice in which states exercise universal jurisdiction, as virtually all national legislation envisages links of some sort to the forum state; and no case law exists in which pure universal jurisdiction has formed the basis of jurisdiction (*Pinochet* was treaty-based). Yet national legislation is not conclusive, as states are not bound to claim full jurisdiction. Equally the case law does not evidence *opinio juris* on illegality. State practice is neutral (para. 45). Also universal criminal jurisdiction exists for certain international crimes, where the principle *aut dedere aut prosequi* opens the door to a jurisdiction based on the heinous nature of the crime rather than on links of territoriality or nationality (whether as perpetrator or victim). The 1949 Geneva Conventions lend support to this possibility and are widely regarded as today reflecting customary international law (para. 46). The dictum of the PCIJ in the *Lotus Case* also supports Belgium, as it would be necessary for an opponent to 'prove the existence of a principle of international law restricting the discretion of states as regards criminal jurisdiction' (para. 49; also PCIJ, Series A, No. 10, 18–19).

The joint opinion rejected the view of the Court that the battle against impunity of war crimes and crimes against humanity is 'made over' to international treaties and tribunals, with national courts having no competence in such matters. None of the treaties (hostages, terrorism, criminal tribunals) excludes additional grounds of jurisdiction on a voluntary basis (para. 51). The only prohibitive rule is that criminal jurisdiction should not be exercised within the territory of another state. A possible arrest in Belgium or in a third state, at its discretion, in the words of the joint opinion, 'would in principle seem to violate no existing prohibiting rule of international law . . .' (para. 54). So, a state may choose to exercise a universal criminal jurisdiction *in absentia*. At this point the joint opinion introduces the element of balancing. '[T]he desired equilibrium between the battle against impunity and the promotion of good inter-state relations will only be maintained if there are some special circumstances that do require the exercise of an international criminal jurisdiction . . . e.g. persons related to the victims of the case will have requested the commencement of legal proceedings . . .' (para. 59). The permissibility of jurisdiction can be deduced from the nature of the crime. As with piracy, war crimes and crimes against humanity 'are no less harmful to the interests of all because they do not usually occur on the high seas . . .' (para. 61).

However, the joint opinion still came to say that the increasingly recognized importance of pursuing international crimes has given rise

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to the tendency 'to grant procedural immunity from jurisdiction only for as long as the suspected state official is in office . . .' (para. 74). These trends reflect a balancing of interests, that states should also allow officials to act freely on the inter-state level 'without unwarranted interference' (para. 75). National prosecution is the only credible alternative as a means of pursuit 'after the suspected person ceases to hold the office of Foreign Minister' (para. 78).

On the question of immunity as such of a Foreign Minister, the joint opinion recognizes that evidence of state practice is very scarce. The immunity is generally considered in the literature as merely functional. The judges refer to the Institute of International Law and the ILC, which did not extend to Foreign Ministers the immunities of a head of state (paras 80–2). Then, remarkably, the joint opinion continues:

> We agree, therefore, with the Court that the purpose of the immunities attaching to Ministers for Foreign Affairs under customary international law is to ensure the free performance of their functions on behalf of their respective states. During their term of office, they must therefore be able to travel freely whenever the need to do so arises. There is broad agreement in the literature that a Minister for Foreign Affairs is entitled to full immunity during official visits in the exercise of his function. This was also recognized by the Belgian investigating judge in the arrest warrant of 11 April 2000. The Foreign Minister must also be immune whenever and whereever engaged in the functions required by his office and when in transit therefor . . . (para. 83)

The point where the joint opinion differed from the Court was that once the accused ceased to be Minister for Foreign Affairs the illegal consequences attaching to the warrant also ceased, even though it continues to identify him as the minister (para. 89).

The joint opinion goes into much more detail about the grounds and extent of possible Belgian universal jurisdiction. It recognizes it as legal and as a necessary part of the development of international law in the pursuit of international criminals. It also recognizes the need for a balancing of interests between international criminal jurisdiction and sovereign immunity for Foreign Ministers. What the joint opinion very obviously does not do is enter into what I have called the actual conduct of states rather than formal arguments based upon the logical structures of legal propositions. For instance, where the Foreign Minister is engaged or is reasonably believed to be engaged in inciting genocide through public race hate speeches in his capacity as a leading state official, what possible international community interest can exist in facilitating his travel to other states? The possible response is that

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the claims are spurious, manipulative, propaganda–based, etc. If the latter is not the case, other states should be engaged in taking concrete steps, including forcible, UN-authorized intervention, to overthrow the government of which he is a part. At the very least, the officials of his state should be banned from international travel. There are very many instances of such scenarios (e.g. Israel and Zimbabwe at the moment) which could have been considered by the joint opinion. It fails, as much as the majority opinion, to enter into a phenomenological, concrete analysis of the real tensions inherent in any genuine effort at balancing interests.

The dissenting opinion of the Belgian *ad hoc* Judge van den Wyngaert discerned how the pseudo-application of custom as a reflection of state practice could erase the very idea of balance of conflicting principles. The Court has, in effect, decided that there is evidence of a rule protecting the immunity of Foreign Ministers *and no evidence of departing from this in the case of war crimes or crimes against humanity* (para. 10; author's italics). The Court's approach, in fact, subordinates the interest in the latter to the interest in the former, when one would have imagined the idea of core crimes had a *ius cogens* character (para. 28). Instead, all the relevant international criminal law conventions affirm Principle 3 of the Nuremberg principles: 'The fact that a person who committed an act which constitutes a crime under international law acted as head of state or responsible Government official does not relieve him from responsibility under international law' (para. 29).

The complete absence of evidence of immunity of Foreign Ministers should have meant that the Court could not apply its standard test for customary law, and the *Lotus* principle should have applied. Absence of prosecution of such ministers did not preclude Belgium from exercising the option (para. 13). Diplomats reside in the territory of the host state, while Foreign Ministers reside in the state where they exercise their functions (para. 15). Finally, in his 1989 ILC report, the Special Rapporteur on Jurisdictional Immunities of States said the privileges and immunities of Foreign Ministers were granted on a basis of comity and not law (para. 17). Indeed *male fide* governments could simply appoint suspects to senior cabinet positions to shield them from prosecution in third states (para. 21). The judges in the *Pinochet* case could see where this reasoning leads. Some crimes under international law (e.g. genocide, aggression), can only be committed with the means and mechanisms of a state. They cannot be other than official. Hitler's 'Final Solution' must be regarded as an

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official act, deriving from the exercise of his functions as head of state (para. 36).

The *monstrous cacophony* argument, used by the Congo, is that if a state would prosecute members of foreign governments, etc. and without any point of linkage to domestic legal orders, there is a danger of political tensions (para. 87). However, in the present dispute, there was no allegation of abuse of process on the part of Belgium. The warrant was issued after two years of investigation and there were no allegations that the investigating judge who issued it acted on false factual evidence (para. 87). All cabinet ministers represent their countries in foreign meetings. The effect of the Court's decision is to increase hugely the number of persons who enjoy international jurisdictional immunity (ibid.).

3.B

In the final case, an advisory opinion concerning the *Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory,* the Court was faced with the following argument from Israel. It was necessary to inquire into the nature and scope of the security threat to which the wall is intended to respond and the effectiveness of that response (para. 55). The Court responded that the UN Secretary General had prepared a dossier and Israel's concerns about security were published and in the public domain (para. 57). The Court determined that under customary international law, territory is considered occupied when it is actually placed under the authority of a hostile army. Israel has the status of an occupying power (para. 78).

The Court was able to determine, on the basis of the Secretary General's dossier, that when the wall was completed it would take up 16.6 per cent of the West Bank, home to 237,000 Palestinians, and almost completely encircle another 160,000 Palestinians. Nearly 320,000 Israeli settlers would be living in the area between the Green Line and the wall (para. 84). The territory between the Green Line and the wall has been declared a Closed Area and Palestinians may only remain there with a permit, while Israelis can move freely without one (para. 85).

The Court noted that the route of the wall as fixed by the Israeli government includes within its Closed Area some 80 per cent of the settlers living in the Occupied Palestinian Territory. The wall's sinuous route has been traced so as to include within that area the

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great majority of the Israeli settlements (para. 119). As regards those settlements, the Court notes that Article 49/6 of the 4th Geneva Convention provides: 'The occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.' That is, the settlements are illegal (para. 120). The construction of the wall and its associated regime create a *fait accompli* on the ground that could well become permanent, in which case, and notwithstanding the formal characterization of the wall by Israel, it would be tantamount to *de facto* annexation (para. 121).

The Court notes that Article 53 of the 4th Geneva Convention provides that any destruction of real or personal property, by whomsoever owned, is prohibited, except where such destruction is rendered absolutely necessary by military operations (para. 126). Article 49 allows total or partial evacuation of a given area if the security of the population or imperative military reasons so demand (ibid.). The Court relied upon a UN Special Committee Report that an estimated 10,000 hectares of excellent agricultural land, and large amounts of private property, were destroyed. Fifty-one per cent of the West Bank's water resources have been annexed and communications necessary for schooling, economic life and health have been so disrupted as to make further Palestinian population movements inevitable (para. 133). The Court noted finally that the provisos of Articles 49 and 53 were not applicable. On the material before it, the Court is not convinced that the destructions carried out 'were rendered absolutely necessary by military operations . . .' (art. 53, para. 135). The Court also took the view that the measures taken were not justified as proportionate responses to the security situation in terms of abrogation of human rights under the UN Human Rights Covenants, although Israel does not accept that the Covenants are applicable at all (para. 136). So, to sum up, the Court says:

> from the material available to it, [it] is not convinced that the specific course Israel has chosen for the wall was necessary to attain its security objectives. The wall, the route chosen, and its associated regime gravely infringe a number of rights of Palestinians residing in the territory occupied by Israel, and the infringements resulting from that route cannot be justified by military exigencies or by the requirements of national security or public order . . . (para. 137)

The Court also considered whether Israel could claim to exercise a right of self-defense under Article 51 of the UN Charter. It cites the article and comments that it recognizes the existence of an inherent

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right of self-defense in the case of an armed attack by one state against another state.

> However, Israel does not claim that the attacks against it are imputable to a foreign state. The Court also notes that Israel exercises control in the occupied Palestinian territory and that, as Israel itself states, the threat which it regards as justifying the construction of the wall originates within, and not outside, that territory . . . (para. 138)

Finally, the Court considered whether Israel could, under customary law, invoke a state of necessity. This can be only on an exceptional basis, strictly defined, the state concerned not being the sole judge. The formula used is taken from Article 25 of the ILC draft articles on state responsibility, being 'the only way for the state to safeguard an essential interest against a grave and imminent peril.' Again, the Court said that in the light of the material before it, it was not convinced that the construction of the wall along the route chosen was the only means to safeguard the interests of Israel against the peril, which it has invoked as justification for that construction (para. 140). Israel has to respond to numerous indiscriminate and deadly acts of violence against its civilian population, but only in conformity with international law (para. 141).

The American Judge Buergenthal dissented from the opinion of the Court. His primary reason for doing so was that the Court should have answered its own dictum in the *Western Sahara Case*: whether 'it had sufficient information and evidence to enable it to arrive at a judicial conclusion upon any disputed questions of fact the determination of which is necessary for it to give an opinion in conditions compatible with its judicial character . . .' (para. 1). He objected that the 'nature of these cross-Green Line attacks and their impact on Israel and its population are never really seriously examined by the Court, and the dossier provided the Court by the United Nations on which the Court to a large extent bases its findings barely touches on that subject . . .' (para. 3).

As for the possible Israeli right of self-defense, Buergenthal objected that Article 51 merely requires that there has been an armed attack and not that it has to come from a state. This has been recognized by the Security Council in the wake of September 11, 2001 (Res. 1368, 1373). Also, insofar as the Court regards the Green Line as dividing Israel proper from the Occupied Territories, the territory from which the attacks originate is not Israel. The question is then whether there is necessity and proportionality in the exercise of the

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right of self-defense. 'the Court's formalistic approach to the right of self-defense enables it to avoid addressing the very issues that are at the heart of this case . . .' (para. 6).

The central part of Buergenthal's argument is that the Court fails to address any facts or evidence specifically rebutting Israel's claim of military exigencies of national security. The Court says it 'is not convinced', but it fails to demonstrate why it is not convinced (para. 7). However, Buergenthal goes some way towards the Court's position. Private property may never be confiscated under Article 46 of the Hague Rules, but Israel offers compensation, and this is not considered (para. 8). Article 49/6 of the 4th Geneva Convention also allows no exception for military exigencies. The Israeli settlements are illegal. It follows that segments of the wall built to protect them are *ipso facto* in violation of humanitarian law. Moreover, the demonstrably great hardship which the wall causes the Palestinian population makes it seriously doubtful whether the standard of proportionality in self-defense has been satisfied (para. 9). Nonetheless, he remains of the view that the court lacked the relevant facts bearing on Israel's construction of the wall (para. 10). Therefore, the Court did not even begin to balance the two sides of the argument.

4

What is needed is a framework of analysis of state activity that allows a court to engage in effective analysis of the conduct of states as actors in international society. This entails actually lifting the corporate veil of the state in order to understand both facts and intentions. For some purposes this might not be strictly necessary, for example if the matter under observation is purely one of legal/state responsibility. Positions taken by governments would, then, be of more importance than understanding actions in contexts. However, investigation of customary practice is a matter of deciphering the normative significance of the behavior of collective entities and of evaluating, comparatively, clashing collective actions. As has been seen in the first part, doctrine has virtually talked its way into the position that somehow the very idea that states have intentions, minds, etc. is regarded as absurd. Instead, the notion of legal obligation of states is to be inferred from the results of their behavior, externally observed as a sort of material fact. As Akehurst put it some time ago: 'We cannot know what states believe. First of all states being abstractions or institutions do not have minds of their own; and in any case since much of the decision-making

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within governments takes place in secret, we cannot know what states (or those who speak for them really think), but only what they say they think.'[32] It is possible to imagine what a purely materialist approach to conduct can mean. Philosophical sociology has grappled with the problem. Wittgenstein has called 'mentalism' the belief that subjective mental states cause actions. In other words, it is no less problematic to ask what are the intentions, the internal subjective state of an individual person, than it is to explore the activities of a collective entity. Instead, we merely ascribe motives in terms of public criteria which make behavior intelligible. Therefore, it is better for social scientists to eschew intentions as causes of actions and focus on the structures of shared knowledge which give them content.[33] Wittgensteinians say that, in the hypothetical court case, the jury can only judge the guilt of the defendant – having no direct access to his mind – by means of social rules of thumb to infer his motives from the situation (a history of conflict with the victim, something linking him to the crime scene, etc.). They go further and argue that the defendant's motives cannot be known apart from these rules of thumb and so there is no reason to treat the former as springs of action in the first place.[34]

However, it is possible to argue – and will be done so here – that no matter how much the meaning of an individual's thought is socially constructed, all that matters for explaining his behavior is how things seem to him. In any case, what is the mechanism by which culture moves a person's body, if not through the mind or the self: 'A purely constitutive analysis of intentionality is inherently static, giving us no sense of how agents and structures interact through time.'[35] Individuals have minds by virtue of independent brains and exist partially by virtue of their own thoughts. These give the self an 'auto-genetic' quality, and are the basis for what Mead calls the 'I,' an agent's sense of itself as a distinct locus of thought, choice, and activity: 'Without this self-constituting substrate, culture would have no raw material to exert its constitutive effects upon, nor could agents resist those effects.'[36]

When the present form of the subjective element of customary law came to be established in international law doctrine, international lawyers do not appear to have had a legal understanding of the state primarily as a corporate entity. It is the Swiss jurist Alphonse Rivier who is given the honor of being the first to employ the modern concept of *opinio juris* as an essential psychological element in his definition of general customary law.[37] This was at the end of the nineteenth century, in 1896. Rivier's own manual is based on a more

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extensive review of sources and methods of law which he undertook with von Holtzendorff (first published in Berlin in 1884 and translated into French in 1887).[38] Both Rivier and von Holtzendorff fit firmly within the tradition of the historical school of law. The life of peoples is more powerful than written laws or legal doctrine, and the supreme goal of law is to return to custom, which provides a foundation beyond the disputations of treaties and doctrine.[39] In themselves treaties are usually diplomatic means to resolve particular uncertainties. They can be instructive as precedents, but they do no more than reflect on historical development and as such they are a poor reflection of the historical consciousness of peoples.[40]

In the next chapter there will be a more metaphysical exploration of the normative implications of the notion of historical consciousness for the constitution of states as legal subjects. Here the concern is more directly with the problems and possibilities of analysis of state practice, which the concept of general custom provokes. Rivier was one of the founders of the Institute of International Law in 1873 and he succeeded Rolin-Jaequemyns as its second Secretary General. His *Principes du droit des gens* was not, in his view, a digest of material but a guide to politicians and diplomats which aimed to draw out of the multiplicity of facts certain general and dependable principles and rules of law universally and habitually respected 'de façon á faire ressortir ce qu'il appelle 'la consience juridique des nations.'.[41] In the preface to the Serbian edition of his work, Rivier defined the task of the international jurist in terms that Jürgen Habermas has described as the classical liberal public space.[42] The juridical conscience of nations was precisely a liberal space of political rationality which independent academic lawyers could influence and help to direct. The task of jurists was:

> . . . de controller les actes des politiques et de les juger, non d'après un code arbitraire, mais du point de vue le plus élevé du juste et de l'injuste; il proclame que c'est abaisser le droit des gens envisagé comme science que de lui assigner le role passif d'un simple enregistrement et classification des faits internationaux; il affirme qu'il doit constamment s'inspirer des principles supéreurs de la morale, de la justice et de la fraternité.[43]

The founders of the Institute said that without the support of public opinion even the unanimity of men of science would be ineffective. That is not to say that they relied upon public opinion alone. There was a law of progress and there were the imperfections of human nature.[44] This means jurists have to state the juridical opinion of the

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civilized world as clearly as possible, so that it can be accepted by states as regulating their relations.[45]

So, for the founders of the Institute the notion of general custom itself had to be understood in the wider context of liberal legality, which it was the function of jurists to uphold by their power of reasoning in public debate. In spite of the vicissitudes of politics, the society of fact existing between nations is becoming a society of law, because it is difficult for an individual or a state to confine its activities to its own territories. In these circumstances the rules of law are not merely a moral and scientific necessity, but also a political necessity of the first order.[46] Rivier says that states are independent, but that, in their autonomy, they adopt certain rules and submit to certain principles, whose necessity they recognize, this voluntary consent expressing itself in custom and treaties.[47] However voluntary it may be, the positive law is not merely changeable and relative. It is not arbitrary: 'Ses principes découlent des relations effectives des peuples, de l'ordre universel, tel que Dieu l'a créé et continue a le créer.'[48] In other words, peoples, nations, or whatever, are the center of international legal activity. Rivier is preoccupied with a law of peoples, a *droit des gens*, who exist in a morally significant global order created by God.

The international system is not a world federation. Nations retain their autonomy but must submit to the laws of justice. The Institute was set up by academic lawyers 'to serve as an organ for the legal opinion of the civilised world on the subject of international law.'[49] The ambition was to avoid the national bias which was possible with the continued independence of states, and to give expression to the elevated sentiment of law and to the conscience of humankind, which is not simply a product of the conduct of diplomats. The latter must respect first the instructions of their sovereigns. Thus they will not necessarily be able to direct themselves to an absolute rule of law beyond the particular interest of the nations they defend.[50] It is a liberal internationalism which assigns to the academic international lawyers the task of exploring the ethical sense of mankind. They must discover and make precise the rules of justice, morality, and fraternity which they recognize as having to be the basis of the relations that peoples have with one another.[51]

It might be wondered, even at this ascendant point of liberal internationalism, how international lawyers thought they could hope to direct or regulate the activities of powerful, centralized states. Even in the most democratic of states the Foreign Offices and Diplomatic Services continued to be staffed from a minute section of society.

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Parliament and public opinion were not important, although they exercised influence at certain intervals. Foreign affairs were still the prerogative of a largely pre-bourgeois aristocratic class. They were reputedly still honorable men who really experienced a conflict of loyalties between the defense of their country and the claims of a common heritage and unity in the civilization of Europe.[52] What is incongruous about the growth of a bourgeois or liberal middle-class perspective on international law at this time is that the most distinctive feature of a continuing *ancien regime* was the secrecy with which international affairs were conducted.[53]

Nonetheless the picture is clear. Habermas explains that classical liberal political space was not the sole prerogative of state power, but belonged as well to civil society, which was the public interest as an 'affair' to which it might contribute with a public use of its reasoning powers.[54] This capacity for reasoned public debate was seen as rooted in the untrammeled subjectivity of the individual, protected by his economic independence and by the emotional privacy of his family.[55] For this notion of debate each participant is taken as a simple person without hierarchy or status, equality is assumed, and the laws of the market are suspended, to achieve a detachment beyond mere competitiveness.[56] Ideas of public reasoning were intimately related to the notion of conversation or dialogue. The independence of the individual conscience was decisive.[57] The very idea of 'humanity' in this liberal sense rested on free will, the intimacy of the family (i.e. free of compelling social constraints), and an independent intellectual culture.[58]

Such a notion of liberal political rationality is tied to a substantive view of legality. The constitutional state has to guarantee the connection between law and public opinion. The rule of law signifies the representation of the people. However, law is not simply an expression of the will of a particular group of people, but also a guarantee of a *ratio* which puts aside a dimension of domination, precisely because it is the outcome of a continuing spirit of public debate. Insofar as law is an expression of agreement based upon rational public discussion, the inevitable arbitrariness of actual laws has to be submitted to the constant pressure of public debate, so that a positive legal order cannot be seen as a static phenomenon. There must be a constant pressure to turn *voluntas* into *ratio*.[59] Clearly, there is presupposed the possibility that each person can attain the independence of property and culture which will permit a detached concern for the general public welfare. Once this public transforms itself into a

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dominant class, reason will become dogma and opinion will become command. Nevertheless the bourgeois idea of legality remains that truth, not authority, makes law, and that liberal political rationality is able to untie the dominant force of group interest.[60]

Thus a critical spirit of Enlightenment does depend upon an intellectual class. They must be independent *vis-à-vis* the state and elaborate critical principles for their own sake. In Habermas's view it is to philosophy that one must look and not to law as such, in a narrower sense, or theology and medicine, all of which rest upon authority, erudition, and a certain supervision by the state.[61] There is by definition no hierarchy of rational authority; nor are professional demarcations clear. The general principles of bourgeois legality in question have to serve to remove, or at least to assuage, the element of command and domination in public life. This means a conflation of law and morality.[62] The task of public instruction then falls to what Kant calls, in his *Critique of the Faculties*, 'Professeurs de Droit libres,' which really presupposes an underlying pre-statist natural law.[63]

Where international lawyers style themselves on the intellectual class of the time of the founding of the Institute (1873) it is possible to imagine them engaging with issues such as foreign military invention (Nicaragua), nuclear deterrence, and the other cases in a more penetrating and creative way. States are in fact nations or peoples, with representatives who are bound by human laws of justice and fairness, the meaning and implications of which could be elaborated in concrete terms. The procrustean bed of the state need not appear and the international lawyer has no connection with the state. This allows the international lawyer as critical intellectual to ask about the history of US relations with the Samoza and then Sandinista regimes in Nicaragua. One might explore concretely the nature of the Contras who fought the Sandinistas. Again, who are the elements within the US political system that want to see a change in Nicaragua? What are the pretexts that the Sandinistas give for not holding elections? Principles of democracy, political independence, equality of peoples, human rights, freedom from arbitrary violence, the right to life of non-combatants, etc. – all these elements could be discursively developed by a critical, reflective intellectual class, which, by definition, remains open and non-hierarchical. The same could be said of the dilemmas of nuclear defense, of the moral confusion of an international political class steeped in political violence, and of the desperate conflict between the Palestinians and Israelis. These controversies can be made concrete, conceptualized, and, most of all, be attributable to

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particular individuals and groups, through a history of their motives, intentions, and actions.

Instead one appears to be faced with a paralysis of reflective intellect and moral sense. The Court is an inter-state institution, only states and UN bodies can appear before it, and its judges are state-nominated. Of such elements Habermas suggests a not very promising political sociology. These are very hard words, but it is high time to stop being surprised at the hopelessness of the deliberations of the ICJ and look in other directions. The symbiotic relationship of the 'state' lawyer to inter-state law is well up summed by Habermas in his assertion that the loss of independence of the intellectual is rooted in both the loss of a private, interior life and in the exclusion from active, in the sense of spontaneous, participation in public life.[64] A process of 'disinteriorization' is the converse of the social absorption by an all-embracing state regulatory apparatus.[65] An independent critical standard becomes inconceivable as a matter of the sociology of knowledge. Habermas draws a sharp contrast between the private culture of the traditional bourgeois, who engages in independent integration of material, and the 'ready-made' debate furnished by the mass media, in which the vast majority can participate only at a voyeuristic level that cannot possibly unpack the rigid social structures of modern society. Such public debate becomes one more form of production and consumption, which will inevitably obey its own laws of the social market, without necessarily having any impact on the rest of the system.[66] Public discussion takes the form of fabricating an acclamatory consensus as a passive social response and is a far cry from the Enlightenment ideal of civil society as the foundation for independently directed criticism of public power. Such a picture cannot survive the totally integrative function of the production-consumption cycle of the social market.[67]

Power is now transferred to groupings, whether public or private, whose interests are reflected in attitudes, and which use publicity, the mediation of pre-digested views, as part of a bargaining process, where 'consensus' reflects what a traditional liberal rationalist would regard as a stalemate or a standoff. If there is a 'real' debate, it is secretive and takes place within these groupings.[68] The public sphere is refeudalized by formalistic acts of self-representation by these groupings, struggling for prestige and reputation.[69] It is precisely these groups, e.g. Israeli state security interests, nuclear deterrence states, communist regimes in Central America, which produce, in the public domain, standoffs in terms of struggling self-representations, that the

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state officials who are judges, or advocates of states, can merely reproduce, select arbitrarily, or allow to cancel out against one another.

A way out of the impasse, which Habermas considers, is to create further institutions, which might undertake the task of publicizing and popularizing the opinions of an elite, qualified by a special level of intelligence and information. This is openly to sacrifice universality in order to retain rationality,[70] a form of government by expert opinion or 'doctrine.' Such institutions could embrace governmental commissions, the secretariats of unions, the 'quality' press. The difficulty is that they do not amount to public debate in the classical liberal sense because there is no relationship of reciprocity between them and the general, unorganized mass of the population. They owe their profile to a prior conferring of privilege by institutions.[71] The only fragmentary public debate which is still possible is between persons who are 'private' intellectuals in the classical liberal sense and the members of those social groups or institutions which are willing to permit their internal structures to function on a basis of democratic discussion.[72]

Translated into the terms of international law and doctrinal or judicial reflection, this program means one will have to confront and attempt to enter into dialogue with a variety of quasi-official, ready-made discourses, rather than imagine that there is a single 'state' discourse which is authoritative and which can influence or even merely absorb and reproduce. The orthodox criteria for the identification of law – general custom and treaty practice – cannot yield the type of objective, critical legal standard set by the founders of the Institute. There is no single authoritative monologue to which the legal profession can listen, any more than that there is a possibility of universalized rational public discourse. All that remains of the classical paradigm of the Institute is the illusion that the methodology of international law can refer to a single, global, thinking public, with a conscience to which appeal can be made in the form of rational debate and, through a scientific distilling of the essentials of the debate, one can recover single, authoritative legal answers still somehow addressed by everyone to everyone.

The issue of sources is acutely interrelated to that of the subject of law, primarily the so-called statehood in international law. This will become the theme of the next chapter. However, here an outline, by way of conclusion, is necessary to demonstrate where the international lawyer actually finds himself. The classical analytical-empirical definition of the state as a territory, with an population and a government

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in control, which is seen as a corporate entity capable of engaging responsibility, has its uses, as already indicated. However, it needs to be completed with an historical understanding of how concrete, namely particular, states have been constructed and also, vitally, there is a need for a dimension of self-awareness and self-understanding of such collective entities, however limited. This means abandoning abstractions of statehood for a political sociology of democratic, historical nations – at least for the West and much of Asia – which function as collective systems of epistemological reference. They have inherited traditions, prejudices, strivings, etc. which all contribute to the style and content of their behavior. There can be no search for a unitary state-will, but rather an at least heuristic acceptance of a psychosocial collectivity as a framework in which to pursue concrete individual behavior in both reflective and unreflective forms. At most the 'state' may be regarded as an institutional framework for the numerous subordinate institutions within which individuals, including international law officials, work with – and against – others to achieve certain aims with more or less conscious intentions.[73] The conclusion, in terms of Habermas's theory of institutional rationality, is that the most that exists for international law and lawyers is the international law departments of states, their interaction with the academic community and with the judiciary, both national and international. They are limited forms of government by expert opinion that sacrifice universality (vital to democracy) for a limited expression of rationality. While they will suffer all the constraints already identified, they do provide material for analysis and reflection.

It is worthwhile to ask, in a particular case, whether a state's actions are motivated by legal considerations among others. Whether this is the case is simply a matter of assessing whether significant state officials acted in terms that were understood subjectively to be formulated legally.[74] That is to say, the officials considered they were acting as they were legally entitled or bound to do. This is matter of evidence and the evidence is in the archives, the internal history of various state institutions. If states have, as collective entities, an idea of obligation, it can only come from an ethnological background, a common historical, by its nature almost entirely unreflective, consciousness. Much more will have to be said about this in chapters 3, 5, 7 and 8 of this book.[75] The actual practice of inter-state international law is bound up, ethnologically, with a closeness to particular national institutions, which determine the meaning of obligations, which need interpretation. It is too simple to say that states, as

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sovereigns, give words meanings that suit state interests. However, a political sociology, following Habermas, does not deny any dimension of institutional intentionality or any measure of normative behavior at any levels within the state. The latter is seen here as a framework for numerous subordinate sub-institutions providing textual or interpretative communities within which international law officials work with others towards certain aims.

It may be that in a particular case the lawyers are the determining voice, so that to understand the outcome as human action it is only necessary to trace the intentions of the lawyers and how they came to be adopted. However, more usually the work of the international lawyer officials will be entwined in a complex of attitudes and expectations also held by those who are not lawyers. It is the sheer complexity of the relationships which exist that make it so difficult to be categorical that the language of legal duty is the most appropriate way to describe action eventually agreed upon. In ethnographic terms, the assumption is being made that law really exists within a web of tacit understandings and agreements among and within a number of states whose meaning cannot be unraveled without regard to the interaction of the intentions and expectations of diplomats, politicians, and lawyers. The international law practice of a state, so far as any of the state's institutional practice has a rational, consciously thought-out dimension, will exist alongside other standards, ethical, political, or whatever, which together make up the ethos which permeates the context in which all of the state officials, including elected politicians, work. This much can be studied with the tools of diplomatic history relying primarily on archives and with the tools of contemporary history and investigative journalism, which are also capable of extensive penetration of the corporate veil of the state.

With these qualifications, it is possible to give intellectual credibility to the empirical study of state practice to see whether and how far it has been motivated by the desire to observe or to create law. The historical school's approach to law becomes an ethnography of, for the most part, sub-institutions of the state. This leaves intact theoretically Habermas's critique that the state, taken as a collective entity, cannot be studied simply in terms of the normative significance of its actions on the assumption that they have a unitary source. An international law, rooted in practice, must have a much more comprehensive picture of the nature of the state as an expression of brute force, unconsciously exercised tradition and prejudice, as well as blind, fragmented confusion. The boundary line between the reflective/rational – in which law

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may play a part – and the rest is always problematic and should be the object of the idealist international lawyer to contest.

Appendix: Archival Analysis of the Practice of States in Relation to the 1957 Oman and Muscat Incident, and the Place of Legal Advisors in Shaping the Presentation of Issues

Introduction

The international lawyer, as much as the diplomatic historian, needs to understand state conduct and this means having reliable access to state intentions. These remain, in principle, state secrets except insofar as the state itself chooses to disclose them, or when recalcitrant officials leak them, or journalists otherwise come improperly or irregularly on state intentions. There is a second, equally important problem, especially concerning the analysis of contemporary events, and that is to know whether one can be sure of the factual circumstances which are supposed to justify the invocation of a norm. Based on archival records in the UK Foreign Office (FO), which are here revealed for the first time, this appendix focuses on the active FO discussions in July and August 1957 about the best way to present the UK's relations with Oman and Muscat internationally, when an Arab bloc of states, led by Egypt, tried to place (what it called) UK armed aggression against Oman on the agenda of the Security Council. The legal advice of Francis Vallat and Sir Gerald Fitzmaurice played a considerable part in these discussions which reveal a vision of governmental structures for dealing with international relations which appear very much a hangover from the period of the High Renaissance. Secrecy is prized as the most reasonable option when it comes to providing public explanations of state conduct. Without consistent and comprehensive access to the governmental policymaking process in which government international lawyers may also have a significant input, it is impossible to assess the process of decision-making in such a way as to determine exactly how international law is being interpreted, applied, followed, or ignored.

State practice

It is very difficult to discuss contemporaneous events for a number of reasons. The main one is the fact that those involved are usually still alive and may continue to be engaged in the very same events that are

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ongoing. Perspectives and opinions about the best course of action will remain openly contested. Furthermore, there will not usually be agreed objective and detached sources from which one can draw to determine the nature of the events. There will be much fresh, first-hand testimony, but it will be conflicting. Where official events are concerned, and state practice falls under this rubric, there will not be direct access to primary source material, and indeed it may be wondered whether the very idea of primary source material itself is becoming archaic in the postmodern age of political spin. Contemporary events will be important to those still engaged and passions will run high in attempting to discuss them. At the same time the objective, detached, perhaps officially agreed records for the description of the events will not be available and there will be no final authority to adjudicate contesting versions of the events.

All of this impinges directly on the practice of the international lawyer in at least two respects. The international lawyer, as much as the diplomatic historian, needs to understand state conduct and this means having reliable access to state intentions. These remain, in principle, state secrets except insofar as the state itself chooses to disclose them, or when recalcitrant officials leak them, or journalists otherwise come improperly or irregularly on state intentions. Such well-known problems pose for the theory of state practice the temptation to avoid the psychological or intentional element of state practice when collecting and analyzing it. I suggest that it is a remedy a lot worse than the disease.

There is a second, equally important problem with the analysis of contemporary events in which states participate, and that is to know whether one can be sure of the factual circumstances which are supposed to justify the invocation of a norm. Perhaps the most usual example is where a state alleges that it has intelligence information (which it cannot disclose for fear of endangering sources, etc.) that another country constitutes an imminent threat, justifying pre-emptive actions.

International Law is supposedly based upon the practice of states. Whether this is simply a matter of assessing the development of a new rule of general customary law or more specifically a matter of assessing the attitude of a particular state to the application of the evolving law to itself, orthodox doctrine still supposes that the practice will have two elements: the material practice of the state and a psychological element which evidences the intention of the state and the way in which it makes clear whether it is following a rule, or somehow

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creating a rule as a matter of legal obligation. Therefore, in principle, the international legal practitioner should expect to become embroiled in all the problems of contemporary history writing.[76]

An authoritative recent representation of the debates about the two elements which make up customary law, material practice, and the subjective element, is Mendelson's 'The Subjective Element in Customary International Law.'[77] He raises the important question of whether, in order to assess the subjective element of custom, it is necessary to know the inner workings of a state bureaucracy. States do not have minds of their own,

> and in any case, since much of the decision making within government bureaucracies takes place in secret, we cannot know what states (or those who direct or speak for them) really think, but only what they say they think. There may be something of an exaggeration here. In some instances we can discover their views because the opinions of their legal advisers or governments are published. [Footnote: Though admittedly this is done only on a partial and selective basis and often only long after the event; and though it must also be conceded that the opinion of a government legal adviser does not invariably become that of the government . . .]

After these important deliberations, Mendelson writes that it is better to speak of the subjective rather than the psychological element of custom:

> for it is more a question of the positions taken by the organs of states about international law, in their internal processes [Footnote: Including the communications of governments to national legislatures and courts, and the express or implicit *prise de position* about rules of international law by national courts and legislatures in the exercise of their functions] and in their interaction with other states, than of their beliefs.[78]

The *United Kingdom Materials on International Law* (until recently, edited by the late Geoffrey Marston) have been available in the *British Yearbook* annually since 1978. Marston has followed what is called the Model Plan for the Classification of Documents concerning State Practice in the Field of Public International Law, adopted by the Committee of Ministers of the Council of Europe in its Resolution (68)17 of June 28, 1968. This was amended by Recommendation (97)11 of June 12, 1997, following General Assembly Resolution 2099(XX) on technical assistance to promote the teaching, study, dissemination, etc. of international law. The changes are not significant, and the essence of Marston's approach is

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that he sets out, as Mendelson has put it, 'positions taken by organs of states about international law, in their internal processes and in their interaction with other states . . .'[79]

What will be attempted here is an analysis of the implications of these activities with respect to a single significant issue, the use of force by Britain in international relations, with respect to one incident as offering a pivotal precedent, the Oman and Muscat Incident of 1957, and the rule of international law with respect to intervention in a country at the request of its government. However, before considering the case study in some detail, some general remarks can be made about the significance of penetrating the bowels of the state. In strict legal terms, the issue can arise in distinct ways. It may be a matter of determining whether Britain is observing or violating a rule of law. Alternatively, this may be a matter of assessing what contribution Britain is making to the development or clarification of the law, where it is taken to be uncertain. In either case, it is not enough simply to know what verbal positions British state organs take up. It is necessary to know what Britain has actually done. The discrepancy will arise where the British positions are either not true or not the whole truth. But it need not even be so black and white morally. It may simply be that without the full picture, the actions of a state, such as the UK, may be unintelligible.

The practical requirement of secrecy

In an article published in 1986, a Foreign and Commonwealth Office (FCO) Legal Advisor drew attention to the fact that 'informal agreements' played a large part in British foreign relations.[80] The basic principle is that a state is free to deny itself the advantages of concluding a legally binding treaty in order to benefit from the advantages of concluding informal instruments. Security and defense issues are not the only issues covered, but it is clear that the advantage here is the flexibility which comes from secrecy. This background will usually be relevant to cases involving the use of force, as there will be agreements between the UK and its allies that are not public knowledge, or there may be relevant agreements even if the UK is not itself formally a party to them. This was the case with Oman and Muscat in 1957.

To present the issue in a wider context, one might take a well-known and still uncertain case, the US bombing of Libya in 1986 from bases within the UK. The terms under which the US enjoys the

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use of military bases within the UK are known to be the subject of informal agreements or even understandings. With the US bombing of Libya from British territory, one question was whether the UK had the full legal power to permit the US action. The UK did not try to claim that the US had acted independently of it, but supported US action, again relying upon undisclosable intelligence information that there were very specific Libyan targets engaged in terrorist activity. The information could not be disclosed for fear of jeopardizing sources. The Prime Minister, Margaret Thatcher, in an emergency debate in the House of Commons on April 16, 1986, affirmed that her legal advice was that the bombing targets chosen were permitted by Article 51 of the UN Charter, as a matter of an inherent right of self-defense against armed attack.[81]

It was argued, however, in the House of Commons debate, that Thatcher should be obliged to demonstrate, with relevant evidence before the Security Council, that Article 51 had been observed. This would mean producing concrete evidence that, at the least, without an air strike there would be planned raids from specific camps, putting British citizens at risk. The Foreign Secretary, Sir Geoffrey Howe, himself a QC, argued in reply that the right of self-defense includes the right to destroy or weaken one's assailants, to reduce his resources, and to weaken his will so as to discourage and prevent further violence.

Howe's argument was, to repeat the point, presented in a context where the information which was supposed to ground the threat or risk and the justification for military action could not be disclosed because it would jeopardize sources of intelligence information. There was effectively a claim to determine unilaterally the scope of international obligations with respect to restraint on the use of force, not only with respect to the extent of the norm but also the factual context of its application.

Such resort to arguments about the necessity of state secrets leaves the UK open to the types of charges levied against it in works such as Curtis's *The Ambiguities of Power* and the successor volume, *The Great Deception: Anglo-American Power and World Order*.[82] Curtis's view is that Britain has a clear foreign policy aim, which it follows in concert with the United States. This aim is to preserve as much as it can of the economic, political, and military advantages, which it possessed at the time of the Empire. In his analysis, Britain continues to be largely successful in the pursuit of this policy in the Middle East, especially in the Gulf, and in Southeast Asia. Military

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interventions, whether covert or open, and support for friendly regimes, particularly military and other security training, will be attuned to the need to preserve these interests. Obviously, the language of international law is a potentially useful propaganda weapon in the hands of opponents, and so no useful purpose is served by an explicit and provocative disregard of it.

Therefore the British rhetoric is one of continued commitment to the principles of the UN Charter, above all, non-intervention in the internal affairs of other countries, respect for human rights and democracy, and priority to the peaceful settlement of disputes. Positions in accordance with these principles will be declared in international fora and even in public debates within national fora. The actual practice is difficult to put together because it remains largely secret and one obtains only sporadic glimpses of it.

Implications for the development of customary law on the use of force: the example of Oman and Muscat (1957)

What are the implications of these polemics for attempts to assess what contribution Britain is making to the development of international customary law on the law relating to the use of force and the right of intervention at the behest of a friendly government? For instance, the 1986 *United Kingdom Materials on International Law* contain a document produced by the Planning Staff of the FCO in July 1984, entitled 'Is Intervention Ever Justified?'[83] The question is how, or even whether, such a document is to be read critically, that is how to assess the relationship of the document to an inevitably largely hidden practice. For instance, in paragraph II.6, intervention under a treaty with, or at the invitation of, another state is mentioned. If one state requests assistance from another, then clearly that intervention cannot be dictatorial and is therefore not unlawful. In 1976, the Security Council recalled that it is the inherent right of every state, in the exercise of its sovereignty, to request assistance from any other state or group of states. An example of such lawful intervention at the request of states might be the British aid to Muscat and Oman.

Curtis comments on this incident as follows. Oman requested British military aid to quell a revolt in the north of the territory in the summer of 1957. In fact, in Curtis's view, Oman was a *de facto* client state controlled by Britain as much as any former colony. Its armed forces were commanded by British officers under the overall control of a British general. The Ministries of Finance and Petroleum

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respectively and the Director of the Intelligence Service were British. Banking and the oil company management were controlled by the British. The country was desperately poor, with infant mortality at 75 per cent. The Royal Air Force and the Special Air Service together struggled until 1959 to put down a revolt against these conditions. Oman continued after its suppression to serve British financial and other interests very well. Extensive bombing of villages was an integral part of this campaign. At one point, the British Political Resident recommended that the villages should be warned that unless they surrendered the ring leaders, they would be destroyed one by one, etc.[84]

The FCO paper fully recognizes the complexity and controversy surrounding this area of law. It continues, on mentioning Oman in 1957, to say in paragraph II.7 that international law does prohibit interference (except maybe humanitarian) when a civil war is taking place and control of the state's territory is divided between warring parties. At the same time, the paper claims that it is widely accepted that outside interference in favor of one party to the struggle permits counter-intervention on behalf of the other, as happened recently in Angola.

Before considering what a closer examination of the archives might reveal about the Oman Incident, it might be interesting to consider some reactions in the academic community to Curtis's work. The reception of *The Great Deception* in a review in *International Affairs* is pointed. It begins: 'This book does not explain, so much as to seek to condemn . . .' Curtis supposedly implores his readers to extricate themselves from the view of establishment scholarship which includes the vast majority of academics. One might imagine Curtis scouring the archives looking for evidence to incriminate British and American policymakers. He often refers to his earlier book, *The Ambiguities of Power*, where the sources are often personal recollections or references to secondary works. If his sources are so accessible, why then have only a tiny minority of scholars been able to see the story this way. The reviewer concludes by exhorting Curtis to 'be more measured in his judgments, show more sensitivity to complexities and moral dilemmas that confront policy-makers, and offer some more viable alternatives to the policies he so roundly condemns . . .'[85]

There was a very full discussion within the Foreign Office in July and August 1957 about the best way to present the UK's relations with Oman and Muscat internationally, when an Arab bloc of states, led by Egypt, tried to have what it called UK armed aggression against Oman placed on the agenda of the Security Council. Legal advice by

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Sir Gerald Fitzmaurice and Francis Vallat played a considerable part. The Foreign Office was reacting to arguments put forward in a particular context, a UN forum. Arab states, backed by the Soviet Union, wanted to have British military action in the Sultanate characterized in UN Charter language as constituting aggression against the independent state of Oman, coming from British forces in Muscat.

Fitzmaurice's and Vallat's legal advice

The advice from Vallat for the benefit of the Secretary of State was that intervention, at the request of the Sultan of Muscat, to put down an insurrection by tribes in Oman was legal. Intervention is wrongful, but that only refers to dictatorial interference, not assistance or co-operation. Oppenheim gives numerous examples of military assistance to maintain internal order, including Portugal in 1826, Austria in 1849, Cuba in 1917, and Nicaragua in 1926–27.[86]

Fitzmaurice is more explicit about the importance of the status of Muscat and Oman. Oman is not an independent state. In the international legal sense, it is not a state at all, but merely part of Muscat and Oman. The Imam of Oman exercised no territorial sovereignty. There are no frontiers between Oman and any other state or between Oman and Muscat. An agreement, known as the Sib Agreement, was reached in 1920. During the negotiations in 1920, a request for independence was completely rejected. The Sib Agreement worked well until 1954. The Sultan's sovereignty was recognized by the Imam, in that external affairs remained in the hands of the Sultan, i.e. concerning individuals and their lawsuits with foreign administrations. The Imam's adherents relied upon passports issued by the Sultanate. Judgments of the Muscat Appellate Court were accepted in the interior. An attempt to assert independence in 1954 failed. No state had regarded 'Oman' as a sovereign state independent of Muscat until the Saudi and Egyptian intrigues, which followed a Saudi incursion into neighboring Buraimi in 1952.[87]

This presentation of the situation was successful when the UK argued it before the Security Council. Sir Pierson Dixon mirrored the legal advice closely. There could be no aggression against the independent state of Oman because none existed. The sovereignty of the Sultan of Muscat and Oman over both had been recognized since the nineteenth century. Egypt and other countries claim that the independence of Oman was reaffirmed in the 1920 Treaty of Sib. This Treaty granted the tribes of the interior a certain autonomy but did

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not recognize Oman as an independent state. This request was refused by the Sultan. Also, the agreement was not a treaty, but merely an agreement between the Sultan and his subjects. Sir Pierson Dixon followed Fitzmaurice's line very closely about the later marks of sovereignty. He concluded by saying the UK's action in supporting the legitimate government of Muscat and Oman had been in the interests of stability of this area. If the subversion there had not been checked, the consequences might have been felt beyond the Sultanate and would not have been to the advantage of any of the countries in the region that signed the letter to place this issue on the agenda of the Security Council.[88]

The vote against putting the matter on the agenda was five to four, with two abstentions.[89] Only the Philippines denied the legality of an intervention at a request of a government. The Soviet Union confined itself to generalities about the oppression of the national liberation movement of the Oman people. There was little stress on the argument about outside intervention in Oman, except from France, which led the vote against adopting the Arab item on the Security Council agenda. The UK itself played it down because it did not want to worsen its relations with Saudi Arabia.[90] An item to this effect was circulated to all the British embassies in the Middle East. Although the UK knew of the Saudi involvement, a higher priority had to be given to drawing Saudi Arabia out of the Soviet and Egyptian sphere of political influence.[91] This goal would have been lost if one had entered into specific detail about Saudi subversive activities. Instead, the legality of a response to an invitation for assistance was stressed.

At the same time Ehili Lauterpacht gave a full account of the events in the *International and Comparative Law Quarterly*.[92] The account reproduced a statement by the Foreign Secretary in the House of Commons in July 1957. It followed the same lines as Sir Pierson Dixon's UN presentation, stressing the invitation from the Sultan. He emphasized the importance for Britain's reputation in the region, that it responded to its implicit obligation to protect the rulers of sheikdoms under British protection from attack. There was a direct British interest and the House did not need to have stressed the importance of the Persian Gulf. The fact that dissidents had received assistance from outside the territories of the Sultan was briefly mentioned. The Joint Under-Secretary of State at the Foreign Office also made a statement concerning the right to send arms to support a ruler upon invitation. The UN had not been informed directly because it

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was an internal matter. Finally, a note was sent to the Soviet government. The latter alleged Britain had recognized the independence of Oman in an agreement and had now invaded the territory of Oman and evaded responsibility for this aggression by blocking discussion at the UN. The British response was that the district of Oman had been an integral part of the dominions of the Sultan of Muscat and Oman since the middle of the eighteenth century and had been recognized as such in a number of treaties between the Sultan and foreign powers. The UK's action was a response to a direct request on the occasion of an internal uprising stimulated from outside the country. There was no question of UK aggression against Oman and, of course, it had never recognized the independence of the Oman area in any treaty.

Lauterpacht himself offered an extensive note on the law on intervention, suggesting a limit to the right to intervene by invitation where a revolt had reached the point of intensity that recognition of belligerency would be permissible. He commented briefly from the answers in the House of Commons that the insurgents did not represent any substantial dissentient proportion of the inhabitants of the area subject to the rule of the Sultan and that, in any event, they were stimulated and supported in their rebellion by foreign elements. Lauterpacht finally reiterated the international treaty practice evidencing the Sultanate's independence. However, he did add two points. In an agreement in 1891, the Sultan pledged not to alienate his dominions save to the British government, thereby giving the latter a direct interest in anything affecting the territorial integrity of the Sultanate. Lauterpacht concluded, further, that its independence was in no way compromised by the undertaking of the Sultan, given in 1923, that he would not grant permission for the exploitation of petroleum in his territory 'without consulting the Political Agent at Muscat and without the approval of the High Government of India.' In a footnote, Lauterpacht remarked that the rights under this agreement cannot properly be said to have lapsed with India's independence. Nor can it be said that India succeeded to these rights. The term 'Government of India' was a mere administrative convenience.

Pressure for public disclosure: Sir Ronald Wingate's Counsel

However, further pressure was exerted on the Foreign Office from a quite different source: the domestic media, in particular an article in the *Guardian* of August 7, 1957. Pressure grew within the UK, in the

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media, and through questions in Parliament, to uncover what the exact relationship between the government and the Sultan of Muscat and Oman was. Here, the picture which emerged in Foreign Office discussions was quite different from the public face at the UN. A focus for discussion was whether to publish the Sib Agreement which appeared to define the relations within the Sultanate. This was thought inadvisable, as the more the history and operation of the agreement were explored, the clearer it would become that the only coherence and stability that the Sultanate enjoyed came from British support at every level. The British Political Agent, now Sir Ronald Wingate, who had effectively written both sides of that Agreement, was still alive in 1957.

In September 1957, Sir Ronald came to see officials in the Foreign Office. He explained to them, in particular a Mr Walmsley, that the Western concept of sovereignty was meaningless in the region. The Walis, whom the Sultan maintained in Oman, did nothing and could not be said to constitute a token of government. The entire Sultanate of Muscat and Oman was, for all practical purposes, not administered. The situation there in 1954, as in 1920, could be compared to the Scottish Highlands before 1745. The Sultan was completely dependent on Britain and powerless outside a few coastal towns. Wingate commented upon a copy of Dixon's speech to the Security Council. He said that he could see nothing wrong with it, except that he would have expressed himself more frankly. The immediate comment of Walmsley was that while one might speak reasonably to reasonable people, it was impossible to concede any point unnecessarily in the UN.[93]

Wingate made a further detailed comment on the Agreement of Sib and Sir Pierson Dixon's speech. Treaties concluded by the Sultan did not mean he had any effective sovereignty over an undefined area. His power had always extended only to a few coastal towns and it would be impossible to hold that the Sultan exercised any sovereignty over the interior between 1913 and 1955. Indeed the interior tribesmen, who hated the Sultan, could have driven him into the sea had it not been for a strong battalion of imperial troops. This policy cost the UK a lot and served no purpose. It had been there in the nineteenth century to keep the French out and to stop the slave trade. Both reasons were long defunct. In 1920, Wingate, as Political Agent, undertook to reorganize the Sultanate, putting Egyptian personnel in charge of administration. Wingate, and not the Sultan, refused to acknowledge the independence of Oman. He refused

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to recognize the Imam of Oman as Imam because of the religious significance of such an act. It would have given the Imam authority over the whole Sultanate. However, the Imam remained as head of the tribal confederation. The agreement recognized the facts of the situation in a way that permitted Muscat and the coastal Oman on the one side, and the tribes of the interior Oman on the other, to exist as separate self-governing units. No question of allegiance to the Sultan arose. What the Sultan did in 1955 was not to reassert his authority but to take over the interior by armed force. This could be justified as necessary for the security of the coastal regions. However, one also had to be careful about how to deal with the extraordinary rise in the Sultan's revenues, derived, presumably, from oil exploration rights which he had granted in the interior tribal areas, and which necessitated the provision of security for the drilling parties in the tribal territories.[94]

Wingate's comments were relevant to the advisability of publishing the Sib Agreement as a way of silencing British media controversy about the status of the Sultan, in particular the article in the *Guardian* of August 7, 1957. It was thought that, on balance, publication would merely show how uncertain the situation in Muscat and Oman was, although selected journalists were shown the agreement on a confidential basis. A further detailed internal FO reading of the Sib Agreement revealed that it was difficult to use. The difficulty was that it made no mention of sovereignty for either side, so officials reasoned that they would have to elaborate a thesis that the Sultan's authority was implicitly assumed and that the burden of proof would be on Omanites to show they had any corresponding sovereignty. The whole question was that much more prickly because of a British Administration Report which appeared on an FO Confidential Print on the Buraimi: 'The Agreement of Sib virtually establishes two states, the coast under the Sultan, and the interior, that is Oman proper, under the rule of the Imam . . . The tribes and tribal leaders having attained in their own eyes complete independence . . .'.[95] The best one could make of this would be to stress the words 'virtually' and 'in their own eyes.' The Sultan's interpretation of this agreement was equally valid. There was a consensus that this was also the direction of Wingate's commentary.[96]

A further difficulty is that while Wingate's report as Political Agent states categorically that the demand for the independence of Oman was refused, it also makes a number of uncomfortable points, if one had to rely upon it by publishing it. He denigrated the unparalleled

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degree of ineptitude of the Sultan and even worse, his despatch made the following 'acid remarks' on British policy:

> Our influence has been entirely self-interested, has paid no regard to the peculiar political and social conditions of the country and its rulers and by bribing effete Sultans to enforce unpalatable measures which benefited none but ourselves, and permitting them to rule without protest, has done more to alienate the interior and to prevent the Sultans from re-establishing their authority than all the rest put together . . .[97]

One might try to say that the Agreement had been violated and ceased to exist by virtue of the subversion coming from Oman, and so it was quite pointless to produce it. However, if one attempts to argue that the balance of the Agreement has been destroyed by the aggression of the Imam Ghalib and treats the Agreement as no longer valid, to do this 'we should have to explain how completely he was in the pocket of the Saudis, and this would conflict with the Secretary of State's decision that at present we must avoid attacking the Saudi Government over Oman . . .'[98]

Therefore, it can be argued that in 1957 the senior FO officials did not think that there was any realistic way in which they could present publicly what they understood to be happening in the Sultanate of Muscat and Oman, other than in the Charter language of friendly states and supporting internal order within them. In fact, there was no state other than what Britain undertook to maintain, but the alternative would be for Saudi Arabia, Egypt, and eventually the Soviet Union to occupy a space if Britain were to vacate it. Dorril explains at length that further insurgency against the Sultan in the late 1960s convinced the Wilson government of the need for change, and the Conservative government gave the go-ahead at the end of June 1970. It was agreed to replace the Sultan with his English-educated and more competent son. It still took until 1975 to defeat Chinese- and Soviet-backed insurgency.[99]

It is ironical that the assessments of Curtis and Dorril, that the Sultanate was so misgoverned in the years before the 1970 *coup*, are part of the implicitly official UK view of that period from the hindsight of post-*coup* developments. The two authors rely upon much secondary evidence, as the Chatham House reviewer complains, but the secondary evidence is a book titled *Oman: The Making of a Modern state*, by John Townsend and published in 1977.[100] Townsend was economic advisor to the Oman government from 1972 to 1975. Curtis quotes him as arguing that, after the regime

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change, the Sultan's response to the rebels in the 1960s was not an alternative program with proposals for reform or economic assistance, but simply the use of even greater force.[101] By 1970, that policy promised to lose the Sultanate to communist-backed forces. This was not acceptable. Furthermore, with the Shell-owned Petroleum Development (Oman) oil company producing oil in commercial quantities by 1967, there was plenty of domestic revenue to allow scope for a more pragmatic social policy.

The international lawyers perplexity

For the perplexed international lawyer, the question that is most pressing is whether and how the Charter paradigm and language for the analysis and understanding of international society can retain not merely formal validity but also a significant impact upon the forces at work in that society. Perhaps the least that one can say as an international lawyer is that positions taken up by the UK, or for that matter any other government, cannot be taken at face value, or even be treated with anything other than complete skepticism. Without consistent and comprehensive access to the governmental policymaking process in which government international lawyers may also have a significant input, it is impossible to assess the process of decision-making in such a way as to determine exactly how international law is being interpreted, applied, followed, or ignored.

The difficulty has already been seen to lie in part with the continuing and presumably inevitable secrecy of diplomacy where strategic interests are engaged. This is, in effect, to acquiesce to the vision that governmental structures for dealing with international relations remain a hangover from the period of the High Renaissance. A typology of this world is provided by Jens Bartelson in *A Genealogy of Sovereignty*.[102] The so-called modern state arising out of the wars of religion of the sixteenth and seventeenth centuries is 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 supposes a subject and this subject, for international relations, is the Hobbesian sovereign who is not named, but names, is not observed, but observes, a mystery for whom everything must be transparent. The problem of knowledge is the problem of security, which is attained through rational control and analysis. Self-understanding is limited to an analysis of the extent of the power of the sovereign,

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measured geopolitically. Other sovereigns are not unknown 'others' in the anthropological sense, but simply 'enemies,' opponents with conflicting interests whose behaviour can and should be calculated.

So, 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. The primary definition of state interest is not a search for resemblances or affinities, but a matter of knowing how to conduct one's own affairs, while hindering those of others. Interest is a concept 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.

However, a more precise paradigm suitable for a situation which may be peculiar to North–South relations is suggested by Robert Cooper's *The Breaking of Nations*.

Concluding remarks: towards a more precise paradigm

Cooper denies the universality of international society and divides it into three parts: the premodern, the modern, and the postmodern. The United Nations is an expression of the modern, while failed states come largely within the ambit of the pre-modern. This means, on a practical level, that the language of the modern UN does not apply to pre-modern states. This is not to say the Charter is violated in that context; it is simply conceptually inapplicable.[103]

The pre-modern refers to the post-imperial chaos of Somalia, Afghanistan, and Liberia. The state no longer fulfills Weber's criterion of having a legitimate monopoly on the use of force. Cooper elaborates upon this with respect to Sierra Leone.[104] This country's collapse teaches three lessons. First, chaos spreads (in this case, to Liberia, as the chaos in Rwanda spread to the Congo). Second, crime takes over when the state collapses. As the law loses force, privatized violence enters the picture. It then spreads to the West, where the profits are to be made. The third lesson is that chaos as such will spread, so that it cannot go unwatched in critical parts of the world. An aspect of this crisis is that the state structures themselves, which are the basis of the UN language of law, are a last imperial imposition of the process of decolonization.

The modernity of the UN is that it rests upon state sovereignty and that in turn rests upon the separation of domestic and foreign

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affairs.[105] Cooper's words are that this is still a world in which the ultimate guarantor of security is force. This is as true for realist conceptions of international society as governed by clashes of interest as it is for idealist theories that the anarchy of states can be replaced by the hegemony of a world government or a collective security system: 'The UN Charter emphasizes state sovereignty on the one hand and aims to maintain order by force.'[106]

It is because the world is divided into three parts that three different security policies will be followed.[107] Europe is a zone of security beyond which there are zones of chaos which it cannot ignore. While the imperial urge may be dead, some form of defensive imperialism is inevitable. All that the UN is made to do is to throw its overwhelming power on the side of a state that is the victim of aggression.[108] Cooper generally counsels against foreign forays. European humanitarian intervention abroad is to intervene in another continent with another history and to invite a greater risk of humanitarian catastrophe.[109] However, the lessons of recent state collapse in Sierra Leone and other places cannot be ignored. Empire does not work in the post-imperial age, that is the acquisition of territory and population. Voluntary imperialism, a UN trusteeship, may give the people of a failed state a breathing space and it is the only legitimate form possible, but the coherence and persistence of purpose to achieve this will usually be absent. There is also no clear way of resolving the humanitarian aim of intervening to save lives and the imperial aim of establishing the control necessary to do this.[110] While Cooper concludes by saying that goals should be expressed in relatives rather than absolutes, his argument is really that the pre-modern and the modern give us incommensurate orders of international society.

This brings us back to the conversation between Walmsley and Wingate at the Foreign Office in 1957. After reading Dixon's address to the Security Council, Wingate said he would have expressed himself more frankly. Walmsley replied that one could speak reasonably to reasonable people, but that at the UN it is better not to make unnecessary admissions. I think that is where Britain still remains, except that the world in which Britain operates today has become infinitely more dangerous. Is it not time to rethink the nature of reasonableness?

Notes

1 *ICJ Reports* (1969), 3 at 77.
2 M. Sorensen, *Les sources du droit international* (1946) esp 109.

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3 A. D'Amato, *The Concept of Custom in International Law* (1971) 82–4.
4 Ibid., 52; Sorensen, *Les Sources du droit international*, 52.
5 *L'Unité de l'ordre juridique international, Cours général de droit international public* (2003) 160; the author's translation.
6 Ibid., 160–1.
7 Ibid., and the literature cited therein: a comprehensive survey of doctrine, especially 'continental.'
8 For instance, N. K. Hevener on the 1971 *South West Africa* opinion, 'A New International Legal Philosophy,' 24 *ICLQ* (1975) 790, at 793–4; and R. Churchill on the *Fisheries Jurisdiction Cases*, 'The Contribution of the ICJ to the Debate on Coastal Fisheries Rights,' 24 *ICLQ* (1975) 82.
9 *ICJ Reports* (1986)1, para. 184 of judgment.
10 Ibid., para. 186.
11 Ibid., para. 206.
12 Ibid., para. 207.
13 Ibid., para. 208.
14 Ibid., para. 261.
15 Ibid., para. 207.
16 Ibid., para. 263.
17 So the true founders of modern legal positivism are Robespierre and Saint Just.
18 G. de Lacharrière, *La Politique juridique éxterieure* (1983).
19 Ibid.
20 Ibid.
21 R. J. Dupuy, *La Communauté internationale entre le mythe et l'histoire* (1986).
22 Ibid.
23 Ibid.
24 Ibid.
25 T. Carty, 'The Origins of the Doctrine of Deterrence and the Legal Status of Nuclear Weapons,' in H. Davis, (ed.) *Ethics and Defence* (1986) 132.
26 R. Nisbet, *Twilight of Authority,* at 191, quoted in T. Carty, 'Legality and Nuclear Weapons: Doctrines of Nuclear Warfighting,' Davis, Ethics and Defence, 152.
27 J. Garrison, *The Darkness of God: Theology after Hiroshima*, (1982) 29–33 quoted by the author, in Davis, *Ethics and Defence* at 153.
28 Carty, *The Decay of International Law,* 111–13.
29 C. Guttierrez Espada, *El Estado de necessidad y el uso de la fuera en derecho internacional* (1987), a comprehensive review of the treatment of the issue by the ILC at 47–59, and especially at 36, 59–61.
30 ICJ (2002) 1.

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31 *Regina v. Bartle and the Commissioner of Police for the Metropolis ex parte Pinochet*, March 24, 1999, www.publications.parliament.uk/pa/ld/ldjudgmt.htm.
32 M. Akehurst, 'The Concept of Custom in International Law,' *BYIL* 47 (1974–5) 195.
33 A. Wendt, *Social Theory of International Politics* (1999) 179.
34 Ibid.
35 Ibid., 181–2.
36 Ibid.
37 A. Rivier, *Principes du droit des gens* (1896) 35, C. Rousseau, *Droit international public*, vol. 1, (1970) 324, and P. Guggenheim, 'Contribution à l'histoire des sources du droit des gens,' 94 *Hague Received* (1958) 53.
38 F. von Holtzendorff and A. Rivier, *Introduction au droit des gens*. The reliance of the textbook on this work is quite explicit, e.g. 27, 31, and 37.
39 Ibid., 140–1.
40 Ibid., 142–3, 145.
41 Obituary of A. Rivier by M. E. Lehr, *Annuaire de l'Institut de Droit International* XVII (1898) 415, 429.
42 J. Habermas, *L'Espace public* (1986). This part of the argument draws upon what the author has already written in his 'Changing Models of the International System,' in W. E. Butler (ed.), *Perestroika and International Law* (1990) 13–30.
43 Cited in E. Nys, 'Alphonse Rivier, sa vie et ses oeuvres,' *Revue de droit international* XXXI (1899) 342, 344.
44 Speech of M. Mancini, in G. Rolin-Jaequemyns, *De la necessité d'organiser une institution scientifique permanente pour favoriser l' étude et les progrés du droit international*, *Revue de droit international* V (1873) 463 at 706.
45 Ibid., 705.
46 Ibid., 463.
47 *Principes du droit des gens* I, 27.
48 Ibid., 29.
49 R. P. Dhokalia, *The Codification of International Law less* (1970).
50 Note 43 at 704.
51 Ibid., Mancini, in Rolin – Jaequemyns, *De la necessité d'organiser une institution scientifique,* 704.
52 R. Albrecht-Carrie, *A Diplomatic History of Europe* (1967) 152–3.
53 A. J. Mayer, *The Persistence of the Old Regime* (1981) 79–127.
54 Note 41, at 34, 38.
55 Ibid., 39.
56 Ibid., 47.
57 Ibid., 53.

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58 Ibid., 56–7.
59 Ibid., 91–3.
60 Ibid., 96–8.
61 Ibid., 114–15.
62 Ibid., 118.
63 Ibid., 125–6.
64 Habermas, *L'Espace public*, 165.
65 Ibid., 167.
66 Ibid., 170–2.
67 Ibid., 203.
68 Ibid., 208.
69 Ibid., 209.
70 Ibid., 248.
71 Ibid., 257.
72 Ibid., 259–60.
73 See further, A. Carty, 'Scandinavian Realism and Phenomenological Approaches to State and General Customary Law,' *EJIL* 14 (2003) 817–41.
74 A. Carty and R. Smith, *Sir Gerald Fitzmaurice and the World Crisis, a Legal Adviser in the Foreign Office 1932–1945* (2000) 25 ff.
75 See the use of ethnographic theories of Clifford and Rouland in A. Carty, 'Critical International Law: Recent Trends in the Theory of International Law,' EJIL 2 (1991) 66–96.
76 A. Carty and R. Smith (eds), *Sir Gerald Fitzmaurice and the World Crisis: A Legal Adviser in the Foreign Office (1932–1945)* (2000) 23–7.
77 M. Mendelson, 'The Subjective Element in Customary International Law,' *BYIL* 66 (1995) 177.
78 Ibid., at 195–6.
79 Ibid., See further G. Marston, 'The Evidences of British State Practice in the Field of International Law,' in A. Carty and G. Danilenko (eds), *Perestroika and International Law, Current Anglo-Soviet Approaches to International Law* (1990) 35, says that parliamentary sources predominate in the *UK Materials on International Law*, i.e. positions taken by Ministers before Parliament. He points out that only rarely is material made available here which has not already been released to the public.
80 A. Aust, 'The Theory and Practice of Informal International Instruments,' 35 *ICLQ* (1986) 787.
81 See A. Carty, 'The UK, the Compulsory Jurisdiction of the ICJ and the Peaceful Settlement of Disputes,' in Carty and G. Danilenko (eds) *Perestroika and International Law*, 131–3. Aust's 1986 *International and Comparative Law Quarterly* article is discussed here.
82 M. Curtis, *The Ambiguities of Power: British Foreign Policy since 1945* (1995); Curtis, *The Great Deception: Anglo-American Power and World Order* (1998).

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83 G. Marston (ed.), 'United Kingdom Materials on International Law,' *BYIL* (1986) 57. 614–20.
84 Curtis, *The Ambiguities of Power: British Foreign Policy since 1945,* 98–9.
85 Dobson, 'The Great Deception (Book Review),' 74 *International Affairs* (1998) 923–4.
86 UK, Foreign Office, FO/371/126877/EA1015/89.
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91 See also Nolte, *Eingreifen auf Einladung* (1999) 86–9.
92 E. Lauterpacht, 'Contemporary Practice of the United Kingdom,' *ICLQ* 7 (1958) 99–109.
93 UK, Foreign Office, FO/371/126887/EA1015/371.
94 UK, Foreign Office, FO/371/126829: FO Confidential Note on the Agreement of Sib, and Sir Pierson Dixon's Speech in the Security Council of 20/8/1957, prepared by Sir Ronald Wingate.
95 UK, Foreign Office, FO Confidential Print on the Buraimi at 157.
96 UK, Foreign Office, FO/371/26882/EA1015/235.
97 UK, Foreign Office, FO/371/26882/EA1015/235(A).
98 Ibid.
99 Dorril, *MI6: Fifty Years of Special Operations* (2000) 729–35.
100 Townsend, *Oman: The Making of a Modern state* (1977).
101 M. Curtis, *Web of Deceit: Britain's Real Role in the World* (2003) 279.
102 J. Bartelson, *A Genealogy of Sovereignty* (1995), especially chapter 5.
103 R. Cooper, *The Breaking of Nations: Order and Chaos in the Twenty-First Century* (2003) especially 16–37.
104 Ibid., 66–9.
105 Ibid., 22–6.
106 Ibid., 23.
107 Unfortunately, time does not permit further discussion of postmodern Europe.
108 Ibid., 58.
109 Ibid., 61.
110 Ibid., 65–75.

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