

Critical International Law: Recent Trends in the Theory of International Law

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Introduction

'Critical' international legal studies constitute a so-called post-modern approach to international law. This is to assert that the discipline is governed by a particular, historically conditioned discourse which is, *in fact*, quite simply, the translation onto the international domain of some basic tenets of liberal political theory. It opposes itself to positivist international law, as representative of an actual consensus among states. The crucial question is simply whether a positive system of universal international law actually exists, or whether particular states and their representative legal scholars merely appeal to such positivist discourse so as to impose a particularist language upon others *as of if were a universally accepted legal discourse*. So post-modernism is concerned to unearth difference, heterogeneity and conflict *as reality* in place of *fictional* representations of universality and consensus.

A crucial 'battleground' will be the so-called sources of international law. So, for instance, a contested question will be whether general customary law does actually refer to an obligatory consensus among states, a consensus which they regard as productive of effectively constraining legal rules standing above states. The critical approach to international law questions such an understanding of the discipline, i.e. as consisting of an empirical search for actual state consent to effectively constraining norms. Instead the language of international law has to be understood historically as no more than a subsystem of the discourse of liberal political theory. The contradictions and incompleteness of international legal discourse can, therefore, be understood quite easily – post-modern theory does not aim to be obfuscating – if one refers to the dilemmas which are well known to the debate which surrounds liberal theory. Above all, liberal political theory is plagued by the dilemma how autonomous and independent actors can be brought together in support of or under the rubric of some notion of the common good, when authority for a definition of that good must remain with the same autonomous and independent actors.

A major part of this study will be 'deconstructionist' in the sense that it will explain what are believed to be path-breaking studies in the breaking down of consistent and persistent attempts by positivist international lawyers to avoid the dilemmas at the heart of their subject, through highly elaborate, apparently technical, recourse to the language of (state) consent as a representational language. There is a contradiction within international legal practice which consists in a virtually unending process of reification of the discourse of state consent into actually existing, constraining rules independent of states, which have only to be identified, for problems of authority in relations between states to be resolved. In practice this leads to sterile and acrimonious attempts to 'demonstrate' that 'the other side' has 'consented' to a viewpoint which one prefers, an elusive exercise, given that the starting point will usually be a conflict of interest which supposes that neither party is 'consenting' to what 'the other' wishes.

The critical approach, far from decrying the very existence of international law, allows a way out of this impasse precisely because it recognises the character of liberalism as a tradition. It does this by means of two devices. It recognises the absence of a central international legal order as an impartial point to which state actors can refer, i.e. the simple meaning to be given to the phrase, 'the disappearance of the referent'. At the same time it

favours a mature anarchy in international relations, the recognition of states as independent centres of legal culture and significance, which have to be understood, in relation to one another, as opposing to one another very fragile, because inevitably partial, understandings of order and community.

The role of the international lawyer in such an acutely relativised, self-reflective culture is now, more than ever, crucial. It is his function to resist phony, reified would be universalist legal discourse in favour of the recognition of the *inevitably* restrictive and exclusive nature of individual state discourses. Above all this calls for the development of a new critical standard which is concerned to penetrate through the cultural symbols of pseudo-universalisation thrown up by individual states to assert themselves against one another. It is not the ambition of the critical international lawyer to substitute another pseudo-impartial legal order, but to facilitate the development of the process of inter-state/ inter-cultural dialogue and understanding which *may* allow a coming together, however temporary and fragile. What is called for is scholarly work of legal translation, itself attempting to be impartial, to stand outside the circles of meaning projected by individual states.

A theory of legal translation must begin from the realisation of the very partial, multilayered and fragmented nature of international society. It must approach this reality from the basis of the newest insights obtained from legal and cultural anthropology. International society consists, above all, of opposing and self-differentiating national and regional/continental cultural traditions, criss-crossing with both religious and commercial systems, which are more transnational. A tradition is contingent. It depends upon historical and social circumstances for its existence, its shape and its limits. The difficulty for the post-modern international lawyer is that 'participation' in a tradition will probably be decisively shaped by a peculiarly Western concept of law which is naturally unsympathetic to such diversity. It is this concept of law which permeates liberal theory and gives it a peculiar universalising pretension. In his *Anthropologie Juridique* Rouland explains how far a monist western theory of law has worked against pluralism by virtue of its confidence in the idea of the unitary tradition as such.¹ This expresses itself, above all, in the compulsive search for and construction of universalist language. For instance such language resorts to the apparently neutral impartiality of impersonal and passive constructions of verbs. At the same time an apparently universal effect is obtained by resort to indefinite pronouns, indicatives, and, above all, to mythical models, such as, in the sphere of private law, 'le bon père de famille' which presupposes the existence of a consensus. The formal rigour of this legal language simply conceals a consciousness of the conflictual plurality of the real.²

The first stage in the way of the construction of a theory of legal translation has to be the deconstruction of this universalist compulsion, rooted in the Platonic belief that the human being tends to unity and to the Christian belief that every kingdom divided against itself must fall. In fact the cultural choices of each society are largely attributable to the peculiarities of its history, beliefs etc..³ The task of the legal translator is to search out the roots of the formation of a consensus on the quality of the law, the quality of juridicity within a society at a particular point in time. These limits will always be found precisely at that point which the society considers vital for its cohesion and reproduction. The supreme difficulty is simply that each society has its own manner of thinking and reflecting on the nature of this juridicity. There is here intense danger for international society, because each society will be aware of its identity as differentiated from other societies.⁴

1 Rouland, 77-78, 84, 94.

2 Rouland, 97-98.

3 Rouland, 396-398.

4 Rouland, 401-405.

If law is to take its coherence not from what is imposed from without but from the mutual attraction of elements within society, the key element of law is not submission but identification and differentiation.⁵ The crucial dimension of the pluralism represented by the transfer of a legal ethnology from traditional societies to modern international society is the recognition that there is no superior power capable of imposing its will to resolve the dangers implied by an immanentist theory of law. This is for Rouland a positive development. Post-modern law turns to the solutions of traditional law, where society affirms itself as made up of groups which cannot be reduced, the one to the others.⁶ At the same time the task is hazardous. A unitary compulsion in law drives to cover over difference and to insist upon the homogeneity of all experience, resulting in a contrived consensus. However the immanentist approach sets itself the more perilous task of confronting the fact that for societies existence depends not merely on awareness of social identity, but also on the exclusion of other societies as different.

Perhaps it is cultural anthropologists who are most aware of the dangers. Introducing his *Writing Cultures: The Poetics and Politics of Ethnography* Clifford warns that culture consists of seriously contested codes and representations. It is inevitable that the texts which they produce are constructed and artificial. What has to be *read* is a reaching beyond the texts of power, resistance, institutional constraint and innovation. As a study of collective arrangements, ethnography is inevitably actively situated *between* powerful systems of meaning.⁷ The systematic *will be* exclusive. Clifford defends the view that ‘...all constructed truths are made possible by powerful *lies* of exclusion and rhetoric ... Ethnographic truths are thus inherently *partial*-committed and incomplete’. While this may evoke a fear of the collapse of clear standards of verification ‘...a rigorous sense of partiality can be a source of representational tact...’.⁸

I would insist that each society should *have to* claim a right of cultural self-determination. Indeed it should be *imposed* on it, ironical and apparently inconsistent as this demand may sound. There should follow simultaneously both an immanent self-critique and a critique of the Other which can, usually, only exist as self-represented. I have called for what Clifford describes as fictions of dialogues:

...The potential task of legal doctrine is to reconstruct conflict situations in accordance with basic principles of understanding, a theory of knowledge based on the development of argument, rather than a search for objectivity or experience as such. At the very least, this method is appropriate for conflicts rooted in national cultural differences.⁹

Clifford explains how these fictional dialogues have the effect of transforming the ‘cultural’ text into a speaking subject, who sees as well as is seen.¹⁰ Despite the subjectivism which has underlain the tradition of legal idealism, Clifford perceives how dialogical modes do not lead to hyper self-consciousness or self-absorption. In my view it is the pretension of universalist liberalism to restrain polyvocality by giving to one voice a pervasive authorial function. Nonetheless the discovery of the fact of discursive partiality is progressive. It is to recognise that ‘...there is no longer any place of overview (mountaintop) from which to map human ways of life, no Archimedean point from which to present the world. Mountains are in constant

5 Rouland, 404-405.

6 Rouland, 418.

7 Clifford, 2.

8 Clifford, 7.

9 The Decay, 114-115.

10 Clifford, 14.

motion'¹¹ Clifford represents the same path to post-modernity in cultural anthropology as does Rouland in legal anthropology when he concludes: 'But is there not a liberation, too, in recognition that no one can write about others any longer as if they were discrete objects or texts...?'¹²

I. Recent Deconstructionist Contributions to the Theory of International Law and a Post-Modern International Law

I intend the major thrust of the paper to be an analytical presentation of the main themes of the work of four contemporary international law scholars. In the first instance I will outline the deconstructivist work of Kennedy, above all in his *International Legal Structures*. I think this very difficult work is path-breaking in exposing, by means of an immanent critique, how far positivist international legal language is, in its own terms, not viable. Kennedy pushes to the limit the insight that the orthodox legal language, far from being truly positivist, fails to refer to any concrete legal phenomena or experience. However I will criticize Kennedy as the last modernist, rather than the first postmodernist, of international law because he stops short of questioning the context of the discourse which he deconstructs. He does not treat it basically as an historical conditioned discipline. Nor does he question the uses to which it is put. Instead he at least appears to treat international legal discourse as an aesthetic achievement. Its very aimlessness is the mark of its perfection: international law for the sake of international law, a beautiful exercise in perpetual and 'successful' evasion.

In the second instance I will consider Koskenniemi's *From Apology to Utopia*. This follows very closely and indeed builds upon the work of Kennedy. Nonetheless he firmly locates the discourse which he also deconstructs within liberal political discourse. He explains very lucidly how the techniques of evasion which Kennedy has so painstakingly exposed, are an inevitable consequence of contradictions within the liberal political project. There is simply no way to resolve the question of authority within decentralised state structures. There is no archemidian point from which to judge impartially what is the common good of states. This is why the positivist techniques for the construction of inter-state consent turn out to be so spurious. However, in his own terms Koskenniemi's attempts to reconstruct an international legal order abandon altogether the problem of authority in the legal order in favour of a free-ranging communicative process which is as shapeless as a post-positivist, and therefore post-formalist, theory of law is bound to be.

In the third instance I consider works by Kratochwil and Fastenrath. The latter exposes how far international law lacks credible formal criteria for the identification of law in the sense of concrete 'legal' phenomena. Both attempt to outline how international legal discourse is, and should be, rooted in a practice or tradition of law. It is this practice, perhaps even custom, which has come to accord to the relevant participants in the 'system' the right to be there. More importantly, this practice should largely shape, and supposedly confine, the limits of the discourse used for the purpose of communication. Both Kratochwil and Fastenrath appear to move well beyond the apparent aimlessness of Kennedy and the formlessness or shapelessness of Koskenniemi. However relying upon the philosopher MacIntyre, I attempt to expose their work as reproducing another dilemma common to liberal political theory. Its principles, – particularly the freedom and equality of autonomous actors, – are too general to serve as criteria for the resolution of conflict.

If it is true, as both Fastenrath and Kratochwil believe, that normative principles can only receive definite meaning in the light of a social practice, nonetheless liberalism cannot simply

¹¹ Clifford, 22.

¹² Clifford, 25.

save itself from vacuity by turning itself into a tradition. The liberalism of the Enlightenment intended to break with, to dispense itself from, tradition in favour of a rational autonomy. The positivist legal scholar cannot *both* prioritise freedom against a constraining traditional, customary practice *and* engage in a rigorous searching of social, i.e. state practice to see whether it really affords evidence of consent to rules.

So indeed a closer examination of Kratochwil and Fastenrath reveals that they are both still committed to a transcendental dimension to their concept of the international legal order. A priori formal categories for the verification of consent are supposed to underlie or be necessary to the international legal order. Fastenrath, in particular, makes reference to the work of Verdross and Simma as a generally accepted exposition of this position. In my view this is to build contradictions between liberalism as a philosophical project and liberalism as a tradition into international law. They are not compatible. In my view this is precisely such as illusory project which is open to the relentless deconstruction which Kennedy continues to undertake.

By way of conclusion I propose to offer a post-modern approach to international law which purports to be embedded exclusively within a widely varied, indeed infinitely complex maze of conflicting traditions and social practices, all conditioned by particular historical perspectives and experiences. That is to say there is no pretence that a transcendental method has somehow produced a sustained social practice which overcomes its formalist vacuity. The only concession which I make is that I recognise that a key element in such a notion of tradition is that it is, in its own terms, authoritative and that the international law scholar is *engaged* by the conflicting pretensions of these traditions. The task of the international lawyer is, in the words of MacIntyre, to acquire the skills to engage in what can only be an endless, and not necessarily fruitful, endeavour to facilitate the harmonious interactions of these traditions, above all through the medium of translation. I will suggest where these traditions are above all located and where the international lawyer may possibly look for resources to pursue his task of undoing the work of Babel.

II. Kennedy's Deconstruction of International Legal Discourse:

A. The Absent Referent

Perhaps I might introduce Kennedy's work by considering his description of the old, tired natural law/positivist controversy. His theme is the exclusion of the referents of soft and hard rhetoric/doctrine. The former is concerned with arguments based on 'justice', 'equity' etc, while the latter founds obligation in consent. The difficulty is simply that no objective standards of justice are accepted in contemporary international society, and yet that same society is *in fact* (apart from any indulgence of theoretical interest) not satisfied with law based upon consent. Kennedy's argument is purely analytical and remains firmly within the legal texts acceptable to the discipline of international law as at present practiced. He sees hard and soft rhetoric as successors to positivism and naturalism in terms of their functions, but not in so far as the one purports to refer to actually demonstrable inter-state consent and the other appeals to objective normative standards of good and justice. To go so far as to touch upon such 'referents' outside the discourse would be 'extremism'.

So 'we would equate the struggle to blend hard and soft rhetorics with the dilemma confronting a theory of international law which is to be neither naturalist nor positivist'.¹³ To take one side of the equation, consensual rhetoric seems to reassure the sovereign while critiquing substantive order, while traditional positivist doctrine sought to contradict the realist with evidence of practice¹⁴ (which supposes a referent). The exercise is ideological in the sense that it 'is for a decisive discourse – *not a persuasive justification* (my emphasis) – which can continually distinguish binding from non-binding norms *while remaining open to expressions of sovereign will* (my emphasis)...The result is a discourse of evasion...endlessly evading and managing a set of ephemeral rhetorical differences'.¹⁵

For instance consider two arguments of the so-called customary law discourse. The first 'soft' doctrine is that universal consent is not necessary since this would prevent states developing their subjective intentions without being hindered by a recalcitrant or uninterested minority. The 'hard' position which stresses the consent of the specially affected can, in turn, be reimagined so as to enshrine the just notion that the specially affected are also the most likely to produce good norms.¹⁶ Even clearer is such language as that new states should consent to be bound by custom by virtue of their participation in the international system in which they have received the benefits of statehood.¹⁷

The difficulty is twofold. How can the majority bind the entire community – an issue which liberal theory prefers to play down with doctrines of presumed consent? And secondly, also much more seriously, what can self-imposed obligation mean? Surely the very idea of self-imposed obligation contradicts the implication of obligation that it is an imposition? So critical international law reintroduces the question whether international law is binding, not in the form that it is a question which must be asked, but rather in the form that it has always been there and constantly repressed and deferred. While one might take a 'constructive' view and say that the immensely flexible structure of international legal argument allows an open weighing of the merits of issues of justice and freedom,¹⁸ Kennedy prefers to stress that the

¹³ *International Legal Structures* ILS, 106.

¹⁴ ILS, 107.

¹⁵ ILS, 107.

¹⁶ ILS, 46.

¹⁷ ILS, 50.

¹⁸ E.g., *pacta sunt servanda* and *rebus sic stantibus* in treaty law, ILS, 1987, 50.

discipline is more interested in rhetorical strategies of closure,¹⁹ i.e. avoiding these choices by appearing to satisfy criteria of both positive international law and a naturalist perspective. So Kennedy sees the discipline as recognising that for states individual declarations of legal/state will are not enough. They exist nowhere. 'Intent alone cannot support the idea of obligation/...If any system of good faith is to endure states cannot remain free to change their minds once having given their word'.²⁰ A purely hard position (the instance is the French declaration in the *Nuclear Tests Case* (1).) 'could as easily devour the binding nature of undertakings,' i.e. by France's auto-interpretation of its obligation,²¹ the fact of which is also a fundamental feature of the international legal order. Deferral and exclusion are necessary to skirt continuously away from the perimeters of this system. The precise function of closure is to hide the fact that a consensual (contractarian) theory of legal obligation cannot resolve a clear absence of consent between equal sovereign states.

So the alternative is to appear to bring the opposing camps together without resorting to a non-existing objective order of justice in which the 'place' for each must be somehow already allocated. This can only be done through an intellectual sleight of hand. There is no objective foundation to which to appeal. There is only the series of independent states subject to no superior authority. Kennedy illustrates this thesis with the *Continental Shelf Case* (2). The Court could have accepted the argument that a natural prolongation argument had to be accompanied by actual usage, a hard, consensual approach. It rejected this in favour of the principled nature of prolongation – a soft doctrine.²² However it rejects the equidistant principles as insufficiently grounded in German consent, i.e. it is not a part of the principle of natural prolongation.²³ So by rejecting two proposed interpretations of the natural prolongation argument, the Court creates a sense of movement. It 'preserves the soft integrity of the principle – without creating a preference for either interpretation'.²⁴ It seems that Kennedy wants to stress that without this 'movement' the Court would have to admit that it is occupying a high ground from which it could afford some 'objectivist' interpretation. The difficulty is that this leads the Court into repeated recourse to what Kennedy calls a 'purely consensual rhetoric', without the firm empirical evidence to support it. At the same time, as Kennedy points out, the discussion is unmoored from systemic considerations. It is a fundamental weakness of liberal political theory that sovereign autonomy and consent, *as principles* are unable to generate any particular rule.²⁵ 'The result was the anti-climactic conclusion that the parties must 'agree' to an apportionment which must be in accord with equitable principles' etc'.²⁶ It then outlines a whole series of 'relevant considerations'.²⁷

B. Modernity, Post-Modernity and International Law

The most distinctive feature of the crisis of *modern*, legal philosophy is the conflation of subject and object, the knower and the known, and, with it, any assured legal method or technique. For instance the deconstruction of legal texts through some undefined, 'spontaneous' exercise in immanent critique, assumes, even if it does not express the fact

19 ILS, 53.

20 ILS, 60/61.

21 ILS, 62.

22 ILS, 91.

23 ILS, 93.

24 ILS, 93.

25 ILS, 94.

26 ILS, 97.

27 ILS, 98.

clearly, that there is no more than the knower to consider. The 'known' is simply what he produces or participates in. In the context of international legal discourse this means simply a language which mirrors the ontological anxieties of its subjects. States, just as much as individuals, start from attachment to their autonomy, but feel compelled to search for external validation '(perhaps by implication from 'objective' facts)'.²⁸ Kennedy is addressing patterns of illusion. 'The possibility of an external normative order grounding their equality and mutual respect suggests the appeal of soft sources... In order to fulfill the desire for an autonomous system of normative sources, argument...includes strands associated both with normative autonomy and normative authority...' The system works, but in an apparently self-deceptive way. 'Sources argument...pursues a rhetorical strategy of inclusion because it manages the relations between these two rhetorical strands so as to 'solve' the problem of sources doctrine as a whole.'²⁹

Kennedy considers resort to one or other type of rhetoric as capricious in terms of the supposed rigour of existing sources doctrine, unable to avoid internal contradiction. So positivists who prefer treaties, raise the soft norm, *pacta sunt servanda* to a new status, extending the validity of treaty based norms to those who have not explicitly consented on the grounds that treaty following is just. Naturalists corrupt the softness of custom and general principles by arguing that these most accurately represent the way in which sovereigns want to be treated, and that treaties can be reinterpreted as an expression of community judgement about the justice of norms. For instance one might consider the special status accorded to the Kellogg-Briand Pact or the UN Charter.³⁰ Kennedy perceives how the discussion is not, in the practice of the discipline, pushed to the point that sources discourse actually touches upon the modernist/positivist evidences of consent or the naturalist's objective values of justice. In this sense sources discourse appears to take on the quality of a disembodied essence engaged in an endless movement between two objects or referents which it does not dare or even intend to reach.³¹

Kennedy's main insight is to understand rhetoric as Echo. He distinguishes between soft and hard rhetoric. Soft rhetoric refers to any argument which relies upon some extraconsensual notion of the good or the just.³² Under the existing regime of legal argument it is considered always possible for the 'other' state to respond that among equal sovereigns 'justice' must be negotiated. The defender of a soft norm can be forced to

20 defend it in hard terms, i.e. by demonstrating consent. Kennedy concludes that 'because neither set of arguments can be convincing by itself and neither can trump the other, argument within this structure could go on endlessly without resolution.'³³ In my view the strength of this argument, although it is not itself stated explicitly, is to expose the lack of an ontological basis to international legal argument. Its underlying nihilism will appear when soft and hard rhetorical arguments are pushed to their limits. For this reason Kennedy engages in the virtually psycho-analytical insinuation that 'argument is not so much a matter of logic as it is a practice of continued movement between these two rhetorics which creates an image or feeling of resolution... (D)octrines must include them both by limiting each so as to render them compatible. Without this careful limitation of extreme visions of hard and soft, doctrines are in constant danger of dissolution'.³⁴

28 ILS, 31.

29 ILS, 32.

30 ILS, 34-36.

31 ILS, 37.

32 ILS, 29.

33 ILS, 31.

34 ILS, 32-33.

C. The Deconstructionist as ‘the last Modernist’

Surely the support for this understanding of the function of rhetoric remains modernist in its allure because it purports to treat legal argument as self-regulating, separate from the study of social, historical or psychological factors. All arguments are treated in a formal way, as merely parts of an argumentative structure.³⁵ The question might be put whether deconstructive critical scholars are offering the allure of an exceptional tortuous and rigorous entry into an esoteric legal world, beyond mundane appearances. Exceptional intellectual discipline will yield extraordinary, if incommunicable, insights. The proponents of this school do not present a postmodern international law as a waste land. For instance to speak with enthusiasm, as does Kennedy, of tracing the references which one doctrine makes to another, the repetitions therein and the self-sufficiency of the rhetoric, might appear reassuring to the profession if Kennedy is only to conclude that ‘the result of this effort is a new appreciation for the complexity, strength and self-sufficiency of the international legal order.’³⁶

Kennedy does appear to consider international law language, as he describes it, as, in some sense, acceptable. By avoiding ‘extremes’ the authority of sources discourse is preserved, by both binding states against their interest and not presuming away a diversity of interest.³⁷ So he clearly distinguishes this exercise from pure rhetoric, i.e. a persuasive technique. The ‘game’ (my emphasis) is maintained through a hesitancy about extremes. A crucial post-modern concept now appears. The ‘abyss’ (my emphasis) is avoided because both hard and soft rhetoric have their referents excluded by sources doctrine, thereby preserving the autonomy, and therefore authority, of sources discourse (abstract/formalist/modernist), but also referring the international lawyer away from sources discourse itself (presumably not thereby inviting too rigorous a probing of its contradictions) in order to (and here Kennedy appears simply to accept the enterprise as ongoing) establish ‘a substantive legal fabric which remains *comfortable* (my emphasis) with sovereign authority’.

Kennedy considers sources discourse supplemental in the sense that it is ‘neither itself authoritative nor descriptive of an authority located elsewhere’.³⁸ So he equates the *supplement* with ideology when he writes ‘doctrines about sources seem derivative of a systematic vision (note the choice of word) articulated first in doctrines of process or substance – where for example the ‘sovereign’ whose consent will ground a source will be defined’.³⁹ There is no implication that this *supplement* is to turn upon the dominant and operative structure and, of itself, undermine it. Instead, as a magical tinsel it validates and supplants(?) a constellation (choice of word) of sovereign authorities. So Kennedy’s argument is that there is no direct or even systemic link between doctrines of sources, personality (which he calls process) and substantive law, e.g. the law of the sea. He begins his discussion of ‘process’ by setting up ‘Participation’ doctrine as an open-ended response to state authority (which is already there). Jurisdiction doctrine is to be regulatory, structuring international life by defining the boundaries of various authorities, which are also already in place.⁴⁰ Both are in place in the sense that Kennedy has already decided without explanation that he is not concerned with the context in which arguments are made, nor with what he calls their political and interpretative milieu.⁴¹ This amounts to a serious internal contradiction for Kennedy’s thought, because he does not articulate the assumptions behind *his own* crucial exclusion or

35 A/U, XXIV.

36 ILS, 7-8.

37 ILS, 103-104.

38 ILS, 104.

39 ILS, 105.

40 ILS, 117.

41 ILS, 7.

effective denial of the existence of the referent (in effect, the *actual* state) upon which his entire system depends. The ‘game goes on’.

So Participation doctrine WILL show how statehood both depends upon a series of criteria such as territory or recognition and upon a set of systematically registered assertions of sovereign authority such as recognition or capacity to enter into foreign relations.⁴² Quite apart from the repetition which this statement presents, which I do not think matters, the statement merrily assumes that closures are going to be achieved with the appropriate rhetoric. He will not say for whom and with what effect. As with sources doctrine, there is an acute awareness that discourse must not appear to reach a ‘logical’ conclusion, because such extremism will reveal the absence of the referents which might appear to be supposed by the language of the texts. Yet the statement ‘all is text’ does not mean that Kennedy is going to introduce us to a historical tradition.

His notion of time is both static and cyclical. It is a matter of ‘elaboration of the rules of the game in a way which permits new substantive results but does not reflect merely the pattern of existing sovereign interest’.⁴³ This entails a dichotomy between the objective and the subjective. These two rhetorical tendencies reflect self-definition and action in the system, and are associated with sovereign authority and equality,⁴⁴ already given factors for Kennedy. The associative scheme is fluid in that it *reflects* (his emphasis) sovereign equality (the objective) and ratifies it (the subjective).⁴⁵ That which is the object of this exercise is already there and yet is somehow the focal or referent point for two directions in a process (the objective and the subjective) which must not be allowed to reach a logical conclusion (which is extremism) because the process itself does not have referents.

In my view what is at issue here is not unclear. For instance with respect to recognition doctrine, one speaks of the constitutive and declaratory approaches. There is supposed to be a repeated difference between the two.⁴⁶ This should reflect the fact that neither self-definition nor community definition are accepted as conclusively authoritative. Both views are repeated inconsistently. He reanimates a lively academic debate out of texts and treatises, while underlying the exercise is the realisation that the so-called repetitive dialectic simply reflects the absence of a means of resolving the difference. The equivocal relationship between the two rhetorical devices is effective because it appears to meet the demands of simultaneous openness and closure and draws back from these in a significant measure. There follows, in my view, a key declaration ‘...Thus, for example, although the attempt to make participation or jurisdiction depend upon the ‘real’ configurations of power places process in some tension with formal assertions of sovereign will, it does so in a way which which protects the discourse from having to assert its own normative theory’.⁴⁷

A question is whether it is Kennedy who is avoiding the possibility that the discourse which he analyses has itself a referent, an historical tradition of international legal scholarship. Is this not all it means to say that the subjective and objective exist in relation, as contradictory opposites.⁴⁸ The difficulty of bringing together the ideas of sovereign authority and social interaction is surely compounded by Kennedy’s prior refusal to accept that either could have a

42 ILS, 118.

43 ILS, 121.

44 ILS, 121-122.

45 ILS, 122.

46 ILS, 123.

47 ILS, 125-126.

48 ILS, 125.

referent, confining himself quite simply to the contemporary literature.⁴⁹ To say that 'these two approaches need to overrule one another in order to allocate between themselves the twin project of process discourse'⁵⁰ is in a trivial sense true simply in that the legal scribblers must 'keep going'. However it is also true in the sense which Kennedy has already explained with respect to sources doctrine, that while the project of subjectivity/ objectivity can be defined – it is to protect determinacy and to maintain openness – there is in fact no way of achieving the project, since the necessary referents are absent.

So one is left with the ultra-fragile fact of whatever life is left to the antagonism between the two desires, for autonomy and for objective support. Kennedy is quite correct to say these desires pull back from making difficult choices.⁵¹ The choice is simple enough to state: whose sovereignty will be upheld, an exercise which requires an externally supplied substantive theory independent of the will of the two contestants, about when recognition is permissible and what effects it may have.⁵² Nonetheless it seems to me much simpler to accept literally that the answer does not at present exist and that the soft/hard rhetoric described by Kennedy does not in fact bring us to it. Indeed, as he points out, that is not the intention. Instead Kennedy appears to enjoy going towards and away from this destination by engaging in a rhetoric of constant deferral.⁵³

I would not go as far as to say that the 'word spells' are of Kennedy's creation. His own work has a referent, the writings of our colleagues. So for instance with respect to recognition it is the basic conundrum of political liberalism which is stated. Recognition of another state can seem the fulfilment of sovereign authority as much as of sovereign equality. There is anxiety introduced by the question whether international law does or does not equalize absolute authority. Authority and equality seem to require each other, seem to be associable, and yet the tension continues without resolution.⁵⁴ In my view this is a profound insight into the character of contemporary international legal argument. However it assumes that we are caught in the logjam of political liberalism. I prefer a stronger statement of the same thesis, that the distinction between doctrine and practice cannot be held up, that international lawyers become international law. A critical theory of knowledge holds that it is the international lawyer's categories of knowledge which define his 'reality'. This is why the enterprise can only be continued within its own terms through further reflection of an introspective nature..⁵⁵ Otherwise it is a *cul de sac*.

III. The Debt of International Law to Liberal Political Theory

Kennedy is followed very closely by Koskeniemi in his study *The Structure of International Legal Argument: From Apology to Utopia*.(A/U) He stresses how far the evasive rhetoric of the contemporary practice of the discipline serves to continue a guarantee of the professional autonomy which comes from the modernist/formalist approach to law. He is conscious of the desire of the lawyers to continue their professional identities as something other than moral and social theorists.⁵⁶ One clear assumption, which allows debate to remain within doctrine, is that

49 ILS, 127.

50 ILS, 128.

51 ILS, 133.

52 ILS, 137.

53 ILS, 137.

54 ILS, 145.

55 Decay of International Law, Decay, 129-131.

56 A/U, XIII.

meaning is relational, so that knowing a language is to be capable of operating these differentiations. International legal language sees each discursive topic (e.g. sovereignty) to be constituted by a conceptual opposition. Indeed the opposition is what the topic is about. Disagreement persists because it is impossible to prioritize one term over the other. These terms turn out to depend upon one another.⁵⁷ In this case argument consists of a process of differentiation, that justification of a position or rule consists of establishing a system of differentiations. There follows a very strong statement, which is surely brings to mind the Irish playwright Samuel Beckett: 'We cannot make a preference between alternative arguments because they are not alternatives at all; they rely on the correctness of each other.'⁵⁸

I think this theory of international legal grammar can be demonstrated by reference to, for instance, the structure of Simma's study 'International Crimes: Injuries and Countermeasures' (Simma). It rests precisely upon a process of potentially indefinite, conceptual differentiation. There is at once a juxtaposing of bilateralism, that obligation is a matter of relations between pairs of individual states, and a community-interest paradigm in which respect for certain fundamental values is not left to the free disposition of states individually but is a matter of concern to all states.⁵⁹ The question is how to define or delineate an international obligation so essential for the protection of fundamental interests of the international community that its breach is recognised as a crime by the community as a whole.⁶⁰ Simma discusses the push and pull to and from bilateralism, resisting both ends of the pole.⁶¹ Indeed at the risk of appearing frivolous, I am tempted to argue that the difference between Simma and Koskenniemi at this point is one of attitude to, rather than appreciation of, the nature of the phenomenon. Simma concludes his presentation of the *problematique* with the words: 'What is needed, therefore in the current codification effort is a *reconciliation* of what the present author would call the 'natural bilateralism' in international law with those requirements of 'community interest' which modern international experience has shown to be necessary'.

The discussion follows exactly the lines suggested by Kennedy and Koskenniemi. For instance the very idea of obligations on the part of third states in the case of an international violation is seen as remarkable;⁶² individual countermeasures go too far; international adjudication/ or UN Chapter VI/VII handling of the question of justifying action is utopian (Koskenniemi) and amounts to indefinite deferral (Kennedy);⁶³ yet some further differentiation (Simma's word) is essential if one is to move beyond the unitary regime of 'all-State' reactions to 'international crimes'.⁶⁴ Simma states the problem in terms of a dilemma: how to overcome bilateralism without departing from the horizontal system of correlative rights and duties, i.e. a matter of 'the inherent limits of such a theory'.⁶⁵ Yet Simma set himself the positive task of balancing the two factors.⁶⁶ He recommends, as the form of differentiation of which he speaks, in terms of hypothetical imperatives of lawyers's tasks, separate regimes of legal consequences, complete with adequate dispute settlement

57 A/U, XX-XXI.

58 A/U, XXI.

59 Simma, 283, 285.

60 Simma, 291.

61 Simma, 393-4.

62 Simma, 305.

63 Simma, 306-8.

64 Simma, 109.

65 Simma, 310.

66 Simma, 311.

procedures, for every international crime.⁶⁷ This is a matter of 'extreme bilateralism' being 'tempered at least in theory, by the manifestation of community interest'.⁶⁸ It might simply be objected that the international lawyer has a choice between an arbitrary preference for one horn of the dilemma – which he can be sure his colleagues will reject –, or a deferral of the issue to another forum, i.e. in this case that more thorough investigation of the precise requirements of each individual crime to be stated 'with utmost precision'.⁶⁹

In my view Koskenniemi locates the dilemmas which Kennedy teases much more explicitly in liberal political theory. Indeed international law simply reproduces them without adding anything. On the one hand we seem incapable of conceptualizing the State or whatever liberties it has without reflecting on the social relations which surround it. The sphere of liberty of a member of society must, by definition, be limited by those of others, which means we cannot simply rely upon the self-definition of the members of their liberties. Yet we cannot derive the State completely from its social relations and its liberty from an external normative perspective without losing the State's individuality as a nation and the justification for its claim to independence and self determination.⁷⁰ The issues of recognition, jurisdiction and territory considered by Kennedy⁷¹ all fall within this ambit, which is itself nothing more than the contractarian dilemma first constituted by Hobbes, as so clearly presented by Koskenniemi.

The dynamic of ascending/descending movement has from the start served as the sleight of hand which hides the fact that contractarian foundations for political liberalism rest, in effect, neither upon empirically demonstrable consent, nor upon a consensually grounded legal order which is capable of being sufficiently determinate to overcome the subjectivism of the liberal theory of values. The liberal/modern paradigm supposes that a belief in a natural, pre-existing normative code leaves free and equal individuals with ends that differ and conflict.⁷² In the liberal interpretation, social order can only be justified with reference to individual ends, but not each individual's can be respected. So one has to suppose that 'real' ends of individuals coalesce with the existence of a constraining social order. This is supposedly an ascending, therefore consensual order. At the same time this order is seen to make possible, against individual dissenters, a theory of objective interests. This is a descending order.⁷³ It is, of course, something which is 'convincing' only if kept moving, between the bottom where it would have to be shown that all have consented, and the top, where it would have to be clear that one was confronted with utterly unambiguous, objective standards. As neither is possible, the illusion is maintained by movement. It is this very precise function which Kennedy has consigned to the word 'rhetoric'.

There is an additional and elusive feature to this process which is essential to the formalism and abstraction of law, to the ambition to create an order beyond political interest. Knowledge, and therefore legal knowledge, does not relate to ideas and facts themselves, but, a (representational) meaning which might be discovered in their name. Knowledge is a social product. So knowledge can only be established through a knowledge-producing process in a meaning-generative (name-giving) consensus in the State.⁷⁴ In this context law, as an ideal, is that which has been consensually produced, through the state, but which consists of complete

67 Simma, 314.

68 Simma, 315.

69 Simma, 315.

70 A/U, 193.

71 And also by Koskenniemi, A/U, 192-263.

72 A/U, 58, 60.

73 A/U, 62.

74 A/U, 55.

and logically organised wholes, beyond the subjectivity of morality and politics.⁷⁵ This is the ideal which legal method sets out to attain. It is fundamentally flawed because full consent is never there and so there is simply no sense in the attempt to attain objectivity. It could only be a harmonized version of the totality of individual ends.

Koskenniemi does suggest an alternative to 'objective' knowledge of legal obligation. He proposes a 'foundationless', hermeneutic, sometimes called perspectivism. It affords a context in which to put the question whether the transition demanded is too great a break with the professional practice of modernist formalism. Is it the case that the 'post-modern' international lawyer can be more than eclectic in the sense that he puts together a capricious, subjective collage by way of supposedly persuasive argument. Koskenniemi recognises that we appear trapped between the subject's construction of objects (knowledge or obligation based upon consent) and the subject's dependence upon a pre-existing framework of ideas and facts (definition of the subject by the legal order etc). He is aware that now a new wave of 'anti-foundationalist' philosophers are wanting to do away with the object/subject distinction or have reformulated objectivity so as to relate to the ways whereby agreement is reached or the frame of mind of persons engaged in knowledge-production.⁷⁶ If the subject/object/legal action trichotomy disappears then along with it goes the need for a formal concept of state/international legal order/legal action. If sources discourse is taken to mean the legal action which maintains the relation of the state to the international legal order (object/objectivity) it has been seen how the state appears to create the objectivity which finds it and to be limited and directed by that objectivity. The whole 'cult' of formalism and abstraction is capricious since there is no way to choose between the opposing categories. Yet once they are abandoned there is no need to define the state in terms of the doctrine of jurisdiction, itself a formal device to delimit the state from other 'states' and from the 'international legal order' (viz. the objective).

If what is needed is a social theory which avoids reductionism we need a perspective on international legal personality which allows us to 'explore the embeddedness of facts and ideas in each other'.⁷⁷ The question remains what to take as a starting point. If it is accepted that language is not representational but interpretative, so that the world is constructed through language,⁷⁸ the question still remains: with what language will international lawyers begin. A linguistic thesis would be that the sense of expressions is determined from within language itself, from the relations into which the expressions of language have organised themselves.⁷⁹ The difficulty, especially clear in Kennedy's analysis, is that, in so far as this is to be based upon the present language of the discipline of international law, the exercise will be sterile. Instead Koskenniemi suggests, to my mind, that the crucial question is not 'with what language' but 'with whom'. Given the indeterminacy of international legal language, we have no means to compel or to convince our opponent '...unless we are both ready to enter into an open-minded discussion about the justice of adopting particular interpretations' (*in which case, of course, there is no certainty that we shall agree in the end*)(my emphasis).⁸⁰ What will appear intolerable to the lawyer is to embark upon a course/method(?) which does not guarantee an authoritative resolution. Yet the key to a hermeneutic has to be the subject/person of the exercise, as indeed the key to its shadow/ deconstruction, has to be the denial of the

75 A/U, 67.

76 A/U, 462.

77 A/U, 462-3.

78 A/U, 469.

79 A/U, 474.

80 A/U, 474.

subject/person. Of course the irony of this exercise, as we will see much later, may be whether this is to reintroduce the subject/object dichotomy in another form.

There is a certain difficulty with Koskenniemi's hermeneutic, in so far as the subject/person as such is not so clearly defined as the process. He stresses the notion of embeddedness of norms in institutions and practice. A critical theory can engage in a two dimensional dialectic, in which one 'renounces the presumption of the existence of an external rationality in which all possible conflicts would have been solved...with a unique (legal) technique.' Normative problem-solving is a practice of attempting to reach the most acceptable solution in the particular circumstances of the case, a conversation about what to do.⁸¹ Yes, but with and between whom? He does state as his goal 'decreasing domination and increasing the sense of an authentic community between disagreeing social agents'.⁸² Yet who and where are these social agents? He does stress that statehood is merely an expression to silence voices crying out for the realisation of economic and spiritual values, while individuals do relate to one another in communal ties that go beyond individual atomism. Yet is there not an ethereal lightness of touch in asserting that the reality of these communal ties is grounded in their attaching such importance to them? ⁸³ Who are They? As a 'postmodern', 'anti-foundationalist' Koskenniemi is sure that there is no 'deep-structural' logic or meta-narrative (for instance replacing the state with supposedly more natural forms of human organisation such as national or ethnic groups). Yet to speak of having to face mutually incommensurable goods as if this were a form of classical tragedy, and to call for respect for the existence of conflicting ideals of social organization 'by seeking to secure the revisability of each agreed arrangement' is, as Koskenniemi says, 'an argument which will remain indeterminate'.⁸⁴ Is this more helpful than Kennedy's fascination with a legal discourse which disperses itself into an unending play of conceptual oppositions?

Instead I see no difficulty in simply recognising the institutional, cultural (national) and ideological dimensions of the state.. The question is to understand the role of each in achieving a 'mature anarchy' in international relations.⁸⁵ In my view there is no difficulty, in terms of the most rudimentary social theory, in jettisoning formalist approaches to legal subjectivity/personality. As a state's population can exist without it, so the state is more a metaphysical entity, in the sense of an idea held in common by a group of people. While it is possible that the idea be so weak that the state becomes a mere institution in which the elite commands the machinery of government, it is the community's idea of itself, e.g. its republicanism, its ethnic nationalism, which defines its notion of its national security, the foundation of its relations with others. The sliding scale between the idea and the institution can be assessed if not measured.⁸⁶

It is true that such a perspective is multi-dimensional and fragments international relations. For instance economic and bureaucratic elites may stress the importance of science, technology and the predictability of international transactions. Cultural nationalists and ideologists will stress the relativity, the perpetually approximate, and the dialectic of repression and liberation, within and between groups. There is no single principle from which to measure the weight of the variables; nor is there a first foundation principle which might

81 A/U, 482/6.

82 A/U, 489.

83 A/U, 499.

84 A/U, 500.

85 Decay, 113.

86 Decay, 7.

allow one to return to a 'final point' which grounds the validity of each factor being considered.⁸⁷ It has simply to be

38 appreciated that formalism in such a context will be exclusionary. Resort to fundamentalist norms, such as 'the consent of states' is arbitrary. For instance it is known that the concept of general custom has encrusted upon it an aesthetic perspective on national culture which is traditional (in the anthropological sense), not voluntarist. It should, seen positively, invite attempts at a hermeneutic of cultural interpretation. Whether these can resolve conflict is part of the great drama of hermeneutics.⁸⁸

IV. (Re)Constructions of a Liberal Tradition of International Law

The anti-foundationalist legal theories which have just been described would attempt to overcome the now acknowledged indeterminacy of legal norms while accepting the absence of an authoritative umpire in most international conflicts. However, for some liberal theorists, who do acknowledge the problem of the indeterminacy of legal norms, their desire for a resolution of this uncertainty leads them back again to logical hypotheses about the necessity of a 'world' sovereign/ state and from this to reifications of supposedly existing, positive international legal structures. Liberal theorists are unable to engage directly in the concrete anti-foundationalist hermeneutic which Koskenniemi has suggested and which I intend to elaborate further in my conclusion. They draw back from their own exposure of the indeterminacy of the basic structures of the liberal international legal order by asserting that this indeterminacy is relieved through the practice of the community which gives material substance to these structures, which structures are themselves also supposedly grounded in the same practice. The outcome is that various otherwise very advanced critiques of the orthodox view of the international legal order fail to penetrate beyond what is rightly perceived as the reification of liberal political theory into supposedly actual legal structures. They draw back from what they fear to be the nihilism of their own analysis and claim that the self-same legal structures constitute the core of the practice of states. They have to add that there is not a direct line of compelling logical deduction from such general structures to their application, but still claim that somehow the practice is justified as a rational/practical interpretation of the general structures by those who have to be engaged in making them 'work'.

This is simply the outcome of a dilemma which is at the centre of any attempt to turn a rationalist theory into a tradition. Liberalism is anti-traditional. It does not claim an authority which rests upon social practice. Therefore one cannot overcome the indeterminacy of liberalism by turning it into a practice. If this is attempted the outcome will merely be an inevitable, compulsive tendency on the part of the theorist to assert that the basic structures of liberalism are already a social practice. The energy of the 'liberal traditionalist' will be devoted to demonstrating this, and yet, at the same time, he will be left with a social practice which is itself indeterminate.

A. The Dilemma of Liberalism as a Tradition

How should it be that it is only social practice, the value consensus of socially established entities, which ensures that the basic structures of liberal legality can be assured of a definite content? I am following, as does Koskenniemi, the historical criticism of liberalism made by MacIntyre in *After Virtue* (A/V). The crisis of liberal thought (I would prefer the word Decay) comes with the realisation, now very widespread and represented in this section by Fastenrath

⁸⁷ Decay, 113.

⁸⁸ Decay, 114.

and Kratochwil, that 'those forms of human behaviour which presuppose notions of some ground to entitlement, such as the notion of a right, always have a highly specific and socially local character...'.⁸⁹ On its own this proposition might appear unproblematic. Yet this is to forget the whole purpose of the liberal, modern project of the Enlightenment. As MacIntyre indicates, the newly autonomous agent was supposed to be able to find rational justifications for his moral allegiances without resort to the external authority of traditional morality. Yet the price for this liberation has been the loss of any authoritative content for the would-be moral utterances of the newly autonomous agent.⁹⁰

It is MacIntyre who states simply what it has been the ambition of Kennedy and Koskenniemi to demonstrate for the discipline of international law. The function of practical reasoning in liberal philosophy is to provide a semblance of rationality to a modern political process in which, in practice, appeals to rights and principles of utility are completely incommensurable. 'The mock rationality of the debate conceals the arbitrariness of the will and power at work in its resolution'.⁹¹ In MacIntyre's view it is in this very limited and unpromising sense that liberalism has become a tradition. In *Whose Justice? Which Rationality?* he continues this argument. Liberal argument cannot appeal to a material standard of the common good. So focus turns to the manner in which arguments are presented and the process by which they are weighed. This second level 'presupposes that the procedures and rules which govern such tallying and weighing are themselves the outcome of rational debate of quite another kind, that at which the principles of shared rationality have been identified by philosophical enquiry'. The liberal tradition consists precisely, in MacIntyre's view, in the social embodiment of this exercise as a continuous debate which is 'perpetually inconclusive but nonetheless socially effective in suggesting that if the relevant set of principles has not yet been finally discovered, nonetheless their discovery remains a central goal of the social order'.⁹²

Since Kant, liberalism has been concerned to elaborate a form of transcendental reason, a series of analytical propositions which define the conditions for rational moral choice which must bind moral actors if they are to be and to remain moral actors. This argument does not assert that there are any such actors, nor that people may not choose to be other than moral actors. However the idea of a moral/normative order is said to require these conditions. In my view this transcendental project suffers from an inherent contradiction concerning its ontological status, i.e. in what sense can it be said to exist. The modern positivist/ formalist international legal order is acutely affected by the drive to assert the minimum conditions for a liberal international legal order and to assert, at the same time, that these conditions are met. The argument advanced here is that the root cause of this contradictory drive is the awareness of the indeterminate content and lack of authoritative content of the project and the hope that concrete practice will resolve, or has resolved, these difficulties.

Before considering at length the work of Fastenrath and Kratochwil I will offer to illustrate the operation of this dilemma in one theoretical explanation of the foundations of international law. Verdross and Simma demonstrate amply how far this language has been taken over into international law. The UN Charter is to be seen as a positivising of the Kantian ideal, that states recognise their security rests not on their own power or independent legal existence, but upon a great league which is a united power (Macht) and upon the decision set by a law which expresses a united will (und von der Entscheidung nach Gesetzen des vereinigten Willens).

89 A/V, 67.

90 A/V, 68.

91 A/V, 71.

92 W/J/W/R, 343-344.

This is positivised in the sense that it is not a mere idea but is actually recognised by states.⁹³ Yet it is precisely this distinction between idea and positive law which remains elusive in such analysis and which it is a major part of the task of theorists of the 'liberal tradition' to explore.

Verdross and Simma explain that the characteristic of modern law – since 1648 and the definitive removal of the Papacy and the Empire – is that law rests upon a coordinated consensus. Yet they also insist that relations between states are only possible when they recognise certain basic principles as satisfying their needs.⁹⁴ The difficulty is the ontological status of such a proposition. It appears to me that Verdross and Simma are saying that it is an idea which is analytically integral to the idea of international law, while at the same time they wish to claim that it is something states actually accept. So they say that no state submits to a power above itself, but only accepts subordination to the international law based upon interstate consensus. This is the meaning of sovereignty in international law.⁹⁵ The purpose of this argument is to overcome the liberal objection to one state subordinating itself to another.⁹⁶ For instance, coming to the distinction between *ius dispositivum* and *ius cogens*, Verdross and Simma say that while most of the law is made up of the former, no community could exist unless principles in the later category are recognised.⁹⁷ The question I present is whether these arguments are not in fact analytical and transcendental in the Kantian sense.

Verdross and Simma stress that international law is not based upon a formal treaty or general custom, but upon a formless consensus (formlosen Konsenses), again based upon reciprocity, whereby states have subordinated themselves to definite norms which make up the constitution of the non-organised community of states. In my view we have here a Kantian statement of an analytical/transcendental character. They are referring to the norms which are assumed by the process of consensus itself '...da diese Normen die Voraussetzungen der weiteren Erzeugung des VR bilden'.⁹⁸ They deny firmly that they are dealing with doctrinal ideas, and yet proceed to affirm that it is here a matter of '...ein Gefüge originärer Normen, deren Geltung von den Staaten selbst als Grundlage des von ihnen einvernehmlich erzeugten VR vorausgesetzt'.⁹⁹

In my view the status of this argument is even clearer when they refutes the thesis of Arangio-Ruiz that the existence of the state is a mere fact. This overlooks, in the view of Verdross and Simma, that a mere inter-individual law between private persons is impossible. Rights and law always presuppose that a legal order is standing over the individual and binding him. One has to distinguish a consensus between states from the norm standing above them which declares that the agreement reached by consensus is binding.¹⁰⁰

At present the liberal tradition is committed to elaborating the problematic outlined by Verdross and Simma. It may seem rather strong to follow the argument of MacIntyre that the very object of the exercise is to engage in a pretence of rationality so as to conceal the 'real' forces at work in international society. However there would be some substance in his complaints if two assertions were accepted. The first is that there are evident contradictions in the liberal project. The second is that these contradictions are well known, and yet there seems to be no loss of enthusiasm to continue with the enterprise. The contradictions have to do with

93 *Universelles Völkerrecht: Theorie u. Praxis*, U/V, 17.

94 U/V 20.

95 U/V, 29.

96 U/V, 33.

97 U/U, 40-41.

98 U/V, 59.

99 U/V, 59-60.

100 U/V, 60.

the impossibility of founding an international order exclusively on consent alone, and, at the same time, the impossibility of completing the inadequacy of consent with any metaphysical foundation which itself is not grounded in consent. That would be incompatible with the liberal project. Hence 'liberal tradition' tries to complete consent by having resort to analytical/transcendental enquiries into the presuppositions of a legal order based upon consent. It is this avenue which becomes purely formal and abstract, without determinate content. It serves as a tradition only in the sense that it serves to censor and exclude any other tradition which does not accept its agenda for discussion, a point which I wish to take further in my conclusion.

B. Liberal International Law as a 'Social' Practice: A Communicative Action with an 'unavoidable' Impartial Superior

In *Rules, Norms and Decisions* Kratochwil offers a theory of communicative action, following upon Habermas, which perhaps takes up where Koskeniemi concludes. He appears to wish to be able to dispense with the need for a constraining sovereign, arguing that the sovereign itself depends for its existence upon a contract, i.e. precisely the common acceptance of a practice etc.¹⁰¹ I would characterise this enterprise as foundationless in the sense that the existence of independent and equal individuals/actors is the sole assumption upon which rests a theory of law/social normativity. The latter is to be constructed through a procedure which involves the consent of all concerned, but in the sense that they participate actively in a rational, in the sense of reasoned, justification of the norms which they adopt. The individuals/actors are, therefore, not 'grounded' in a tradition, embedded in social structures, or materially constituted by a common nature.

Kratochwil states that it is through analyzing the reasons which are specific to rule-types that the inter-subjective validity of norms can be decided. What is required is investigation of the circumstances under which certain types of reasons serve as sufficient justification for following a rule: itself a more encompassing theory of communicative action.¹⁰² Yet at once he seems to be ambivalent about whether a hermeneutic is alone sufficient. He appears to consider that since the Hobbsean sovereign will not be disinterested and impartial, the quest for such a sovereign is futile.¹⁰³ Nonetheless, paradoxically, the sense of the presence of a Hobbsean sovereign serves as latent for a trust in a general system of expectations guaranteed by the inter-subjectivity of the rules (114). However, fundamental for Hobbes was the exclusion of unilateral resolution of differences as to interpretation of rules. This difficulty must be faced in any hypothetical construction of a legal order.

At times it is not clear whether Kratochwil is recommending a renewed legal phenomenology or whether he maintains consistently the perspectivism essential to a foundationless legal hermeneutic. So he writes of the closeness to the ground which general customary law is supposed to fulfil in Habermas's interpretation of Durkheim:...'Without having regard to the imperatives of self-preservation or self-interest he commits himself with all the other believers to a communion'.¹⁰⁴ The question arises, given that a traditional view of morality is not being offered, what and where is the reasoned process by which one is to reach communion? International lawyers may appear to be invited to embark upon scrupulous empirical searches for evidence that one has/the society of states has/ reached 'communion'. This would invite a renewed search, for instance, for the '*opinio juris*' of states as a generalised psychological condition. However it is clear that this is precisely the kind of search he wants to

101 Kratochwil, 96.

102 Kratochwil, 97.

103 *ibid.*, 117.

104 Kratochwil, 124.

enable us to abandon as a sterile search for an authoritative, impartial authority standing above states.

As he develops his argument that there is no need for an impartial observer/third party/world state/international legal order/ God etc, Kratochwil insists that he is speaking for law and morality alike. Indeed this helps him to stress that there is no question that the former has to support an analytical theory of coercion or sanction; there has been a common misunderstanding:

...that the obligatory force of a norm or rule derives from the issuance of a 'command' by God or the sovereign. This command theory seems to be acceptable only as an explanation of the experience of the sacred. Justifications in terms of intersubjective reasons, on the other hand, are 'claims to validity' that can be decided only discursively... Deliberation and persuasion are similarly characteristic of legal decision-making, as the metaphor of 'finding the law' and the need for reasons offered in a judicial pronouncement indicate.

The subject/object, formalist legal method consists of a monologic theory of justification, giving primacy to logical criteria and consistency. This has been shown to be unable to resolve the conflicts which arise between free and equal legal subjects. However Kratochwil argues that the enterprise should not be abandoned too readily. Apparently indeterminate norms, such as 'cruel and unusual punishment' are decidable not once and for all, but depend upon shared practices and historical contexts.¹⁰⁵ My question to this argument is whether it drives an anti-foundationalist legal hermeneutics back once again into reliance upon a hypothesised impartial third party, in practice purely imaginary, or at least very secondary, in contemporary international relations.

Kratochwil has set himself the task of establishing that rights become operative only in a discursive community,¹⁰⁶ that intuitive or cognitive grounds for rights suppose an outmoded ontology (ibid., 168 – an argument about which he is as dogmatic as Koskenniemi). He sets out a framework for a hermeneutic of the perspectives of concretely established social entities. He recommends resort to dialectical reasoning, which ideally suits an anti-foundationalist hermeneutic. He follows a distinction first established by Aristotle: 'Reasoning is demonstrative when it proceeds from premises which are true and primary...Reasoning is dialectical when it reasons from generally accepted opinions.'¹⁰⁷ So one has to address the context in which key 'social entities' formulate their opinions. It is not a question of a phenomenological or cognitive search for 'legal facts' such as the supposed existence of an *opinio juris* of states with respect to the *existence* of a binding general custom. As Kratochwil puts it, 'what acquires the status of an 'objective' fact is not the thing described but rather the intersubjective *validity* of a characterization upon which reasonable persons can agree' (each time, his emphasis).

It appears to me that Kratochwil does not maintain this position. 'The imperfections of reality, i.e. the actual unavailability of consensus' are to be overcome by restricting the type of participants one admits to the discourse.¹⁰⁸ He understands here a form of exclusion which he has elaborated in terms of material standards of conduct. For instance he writes that 'we have no defences against either the morally indifferent or the fanatic'. A 'sincere Nazi' would accept going to a death camp if he was Jewish. His response is very strong. 'But such a position borders on madness'. The consistency principle will invite incentives to invent spurious classes

¹⁰⁵ Kratochwil, 138.

¹⁰⁶ ibid., 172.

¹⁰⁷ Kratochwil, 215, quoting Aristotle.

¹⁰⁸ Kratochwil, 229.

of people to demonstrate (my choice of word, to indicate the moral realist nature of the argument) that the 'others' are not part of the 'society' to which the rules apply.¹⁰⁹ So Kratochwil again quotes Aristotle, that '...You should, therefore, not readily join issue with casual persons (where) those who are practicing cannot forbear from disputing contentiously'.¹¹⁰

His hermeneutical/perspectivist approach hopes to overcome the indeterminacy of political liberalism by appealing to the rootedness of claims to protection for particular interests in the value-consensus of society. For instance the norm that 'one is obliged to retribute the damage done to another' supposes that one is able to progress through a set of argumentative steps.¹¹¹ In his opinion a 'tradition' of values is already *legally* informed, differing from pure ethics or simple commonsense considerations.¹¹² It is only because he believes there is a context for communicative structures that it is, in his view, possible 'to rally support (assent) to practical judgements on the basis of commonly accepted value-positions'. Only in this way can one avoid the dilemmas entailed in the equally naive rationalist mode of 'subsumption' as a basis of understanding legal reasoning.¹¹³ This is how he might have overcome the legal nihilism exposed by Koskeniemi and Kennedy. Yet it is a path which drives him back into what is predominantly once again legal phenomenology – the search for the legal conviction of states which expresses the general legal consensus that is the ground and framework for the elaboration of specific solutions on the basis of a dialectic of opinions held. It is only at the last, rather subordinate point that a legal hermeneutic is introduced.

For instance how is it that Kratochwil can be categorical about the issue of state rights when proponents of individual rights insist that only people, not states, exist? 'States have rights in so far as they are members of a practical association called the international community (legal order) which is based on the acceptance of common practices and the recognition of mutual rights'. For instance the rights of ambassadors and treaty making are rights only as 'part of the interaction of public legal bodies'.¹¹⁴ There are not many orthodox international lawyers who would disagree with him. Yet this seems rather a disappointingly orthodox 'proof' that consent, induced by reasoned discourse, is and can be the 'foundation' for a viable international society.

Kratochwil remains open about the extent to which a concrete international legal order exists in the sense in which he here defines such an order. The world political process remains sporadic, despite the increased intensity of communications. It is often characterized by bargaining and coercive moves rather than by persuasion and by appeals to common standards, shared values and accepted solutions. Therefore many relevant legal rules and principles remain unclear in the absence of authoritative determination. There is a role for advisory opinions and scholarly expositions, but their weight rests upon their persuasive power rather than their institutional authority.¹¹⁵

C. A Social Practice of Communicative Action without an Impartial Superior

In *Lücken im Völkerrecht*, Fastenrath offers a critique of international law which is very close to Koskeniemi's. At the same time it helps to make the break with existing international legal

109 Kratochwil, 133.

110 *ibid.*, 230.

111 Kratochwil, 238.

112 *ibid.*, 242.

113 Kratochwil, 247.

114 Kratochwil, 161.

115 Kratochwil, 254-5.

structures. Through this work one can see more clearly how the distinction between formal sources of law and material law can be abandoned and then precisely how much is involved in a commitment to a social practice of communicative action. I say deliberately that it is possible to take these guidelines from his work because, at the same time, Fastenrath makes numerous overcautious qualifications to his analysis which appear to indicate that he draws back from his own conclusions.

The first question is whether there are criteria for the identification of positive legal norms in international law. The crucial issue should be the testing of the existence of an *opinio juris* or legal conviction of states. Yet the concept of general custom does not rest on a consensus. At least three theories of law are engaged: psychological, sociological and a formal will theory. There is no point in trying to measure the relative correctness of these theories, although Fastenrath concludes, gratuitously, that each has a kernel of truth in it.¹¹⁶ An examination of treaties and general principles of law reveals equal difficulties. The latter contain an unresolved commitment to both positivist and natural law theory, as well as uncertainty about the extent of weight to be attached to municipal law experience.¹¹⁷ The former suffer from a general weakness of international standards. They contain little precision and all is to depend upon concrete application in the absence of an authoritative interpreter.¹¹⁸ That is, the ambiguity of treaty standards is part of the general uncertainty, at the global level, as to the meaning of such cultural values as peace and justice, and the absence of an authoritative language which might make them more precise.¹¹⁹ The issue of the plurality of cultural values is rendered all the more acute in contemporary international law because of the apparent wholesale incorporation of such vague values into the formal structure of international law. For instance the principle of equity has been treated as a legal principle in law of the sea cases.¹²⁰

In my view Fastenrath helps in understanding how to make the break with two key concepts of liberalism, the idea that a state is free to do what is not forbidden by a rule to which it has given its assent, and the belief that a law based on consent must function as a practice-based experience of the parties directly affected. He recognises the notion of the priority of freedom as a Kantian principle which is, as such, not necessarily anchored in international practice. Instead he stresses that the problem in international relations is how to balance conflicting claims, something the principle itself cannot do. If the function of law is to arrange the most just possible order and to fix reliable boundaries between opposing jurisdictions, the priority of a principle of freedom could not be more dysfunctional.¹²¹ This brings one back to Fastenrath's more general argument that principles and norms of international law are too vague to allow decisive deductive reasoning from them. Put in more theoretical terms, his view is that no legal or natural language can give an exact meaning to a concept; there can only be an *ad hoc* interpretation by those directly involved in a specific context.¹²²

However, Fastenrath draws back from the view that international law never receives a definite, undisputed interpretation.¹²³ He insists that international law is not destroyed as a

116 Fastenrath, 37-38.

117 *ibid.*, 39.

118 *ibid.*, 35 and 20.

119 *ibid.*, 11-12.

120 *ibid.*, 51-52 et seq..

121 *ibid.*, 105-108.

122 *ibid.*, 79-80.

123 *ibid.*, 13.

system by questions of disagreement about content.¹²⁴ Nonetheless he does not see the solution to disagreements in what I would regard as illusory searches for a single authoritative international instance – which could be either ‘conclusive’ proof of the existence of a customary rule or the fact that a compulsory adjudicatory or legislative forum has been found. Fastenrath definitely abandons this temptation.

At the same time it is the formalism of the liberal theory of law that has given it its constraining, binding character. If it is true that consent may be obtained through any form or procedure, it is equally true that, given a very low level of formalism in reaching consent, there need be very little change to undo consent.¹²⁵ He is not committing himself to a theory of sources of law in what is really a taxonomy of differing views. He does accept that the absence of the possibility of making convincing deductions from general principles appears to throw the judiciary, for instance, into decisionism.¹²⁶ However Fastenrath avoids the issue of obligation, (and thereby the hard rhetoric/soft rhetoric dilemma posed by Kennedy and Koskenniemi, as well as the more formal liberal, in the sense of Kantian, structures of Verdross and Simma, and, in the final analysis also, of Kratochwil.) by adopting an anti-foundationalist approach in a functionalist guise.

Instead Fastenrath maintains that the notion that consensus could always be renounced at any time is simply not functional.¹²⁷ Nor it is likely that any international society could function where all of its rules were so vague that participants in the society had to thrash out every detail at each move.¹²⁸ The question is simply how to resolve uncertainty where it does actually arise. Fastenrath does not directly face or resolve the issue raised at the philosophical level by MacIntyre, and considered by Verdross and Simma, that state consensus on the constitution of the international community is linked to a rationalist consensus theory. The point is simply respectfully mentioned.¹²⁹ However the clear emphasis of Fastenrath’s work is to recommend how disagreement about meaning and value is to be resolved in an anti-foundationalist spirit.

So it is simply the starting point rather than the conclusion of the debate to assert, triumphantly, that participants in international society disagree with one another. That is to state the obvious. At the same time, however, the participants in international society inevitably seek to push their meaning through, to reach a universal, not a partial meaning.¹³⁰ Arguing against what he calls Kennedy’s postmodernism, Fastenrath objects to the view of international society as consisting of closed self-referring systems, in favour of the perspective of conversational participants, not simply in the sense that they exchange ideas, but also in that they bring themselves into the process. What they know beforehand, what they bring into the process, alters in the development of the discussion, so that transferred contents don’t simply remain closed entities, but are incorporated into trains of meaning. So understanding is a process of self-understanding, whereby reflection is not simply onto an external object but must also include the subject.¹³¹

Fastenrath follows the general thesis that ideas have no prior existence in nature. They respond to the needs of normal life. With language people empower themselves and create

124 *ibid.*, 67.

125 Fastenrath, 44.

126 *ibid.*, 94.

127 Fastenrath, 114.

128 *ibid.*, 111.

129 Fastenrath, 42.

130 Fastenrath, 99-100.

131 Fastenrath, 27.

their world. Communication depends upon a consensus of meaning in a context and with a background. This applies equally to all texts, such as treaties. This is the transcendental dimension to Fastenrath's thought, however much it may appear in a functionalist guise. Once again Fastenrath stresses that such ideas and texts etc are not closed, independent entities, but constitute new information to be added to the fore-knowledge and fore-understanding already present. The task of hermeneutics is to describe this information flow as an inter-subjective communication. There is certainly difficulty in the interaction of old and new information. Full agreement on the part of interpreters is never present. Yet it is simply a matter of striving and certainly, Fastenrath concludes, once again on a slightly non-committal note, some measure of agreement is necessary for a rule to be said to exist.¹³² So it is still a matter of stating the terms most suitable for ensuring this agreement, which is what I mean by the transcendental framework for the most perfect possible inter-subjective communication. These terms will, in a functionalist perspective, become clear from the observation of actual practice.

IV. Towards an 'ethnography' of International Legal Hermeneutics

I have suggested that the so-called primary source of international law, general customary law, has encrusted upon it an aesthetic perspective on national culture¹³³ which should invite attempts at a hermeneutic of cultural interpretation. While it is not possible in a review of other contributions to contemporary theory of international law to give an exhaustive account of my own approach at this stage, I would like to suggest certain markers towards my own theory. It is a simple supposition to argue that for a sense of obligation to exist there must be a sense of identity. As I ask in *The Decay* 'In what sense is it possible to speak of States having an identity which allows one to suppose that, as centres of subjectivity, they have acquired a sense of obligation with respect to a particular matter?'. A notion of corporate personality could answer the question only if an international legal system had designated certain legally competent organs which could specify a legal commitment. This I have rejected for the same reasons as the others give. There is no international legal order such as positivist legal language has tried to represent. To use the international relations language of Hollis and Smith (1990, pp.7-8), in terms of 'levels of analysis', I definitely opt for the view that the individual nation-state is prior to any international system. If there were systemic forces strong enough to propel nation-states through their orbits, one might account for that system's working without enquiring into the internal organisation of the state units.'

My central objection to the German theory of legal nationalism, the so-called *Volksgeist*, was that it precluded a precise analysis of decision-making processes which might have allowed an awareness of psychological perceptions.¹³⁴ At the same time I rejected 'realist' interpretations the 'behaviour' of states, as 'dictated by their interests' in favour of a view of the state as a system of shared perceptions, practices and institutions within which communities of persons establish and advance their ends.¹³⁵ I would like to develop this perspective by claiming that the interpretation of the evolution of international standards, in an international society which is secondary to the states which compose it, is a function of the reconciling of competing community paradigms. I take the concept of paradigm from the work of Hollis and Smith who adapt certain recent developments in the philosophy of science to international relations.

132 Fastenrath, 71-74, and 99-100.

133 *The Decay*, .114.

134 *The Decay*, 30-36.

135 *The Decay*, 111-113.

Popper, Quine and Kuhn converge in their understanding of so-called scientific objectivity, that it always a matter of a priori judgement whether a particular 'fact' or 'experience' is admitted as 'valid'. It is a function of how far it corresponds to the interpretation which the paradigm puts on the new material. If there are numerous new materials which do not fit comfortably into the paradigm it may eventually become overloaded and disintegrate. Hollis and Smith uses these deliberations to subject supposedly 'realist' paradigms of national state interest to 'scientific' criticism in their own terms. These are found wanting as being unverifiably vague.¹³⁶ Such a conclusion may, and in my view should, push us easily towards a theory of interpretation of the social world rather than exclusive 'objective' concentration on behaviour. A question which Hollis and Smith ask is whether the existence of deeply different forms or patterns of life constitutes a barrier to universal norms for international behaviour.¹³⁷ If it is a matter of self-warranting systems, in the sense that each declares what is real and rationally believed through its own internal practices, then there is no neutral external criterion for reality or rationality.¹³⁸

My own post-modern approach to the sources of international standards of behaviour does not merely leave open the possibility that there is no overarching system whose signification could be unravelled by a sufficiently subtle and tactful hermeneutic. It insists that such is the primary problematic with which international lawyers have to work. The LAW is a tapestry of *lacunae* with occasional densities of normativity. If the question is how to recognise and, *perhaps* overcome the *lacunae*, it is by recognising the key factors which go to provide most states with varying degrees of internal cohesion, and from which they then view international society. I try to reconstruct a notion of nationalism in the sense that every political community must have its own distinct constellation of political values rooted in a specific political culture which defines what it regards as obligatory. This is the starting point for any work of legal hermeneutic or translation.

Once it is seen that a state is nothing more or less than a metaphysical entity, an idea held in common by a group of people,¹³⁹ the institutional apparatus with which a people organises itself upon a specific territory, the primary question becomes: from where can the international lawyer draw standards to determine what a people is, how it understands itself and how it judges others. The appropriate task for the lawyer is to understand (engage in a hermeneutic of) the claims, allegations and actions of the states parties to a dispute, incident etc, in terms of their 'cultural' pre-suppositions. Indeed the clash of such pre-suppositions constitutes his problem. There is no elusive slight of hand, in terms of a positivist international legal order, which will resolve it for him. At the same time there may well be, in a particular case, already a density of normativity which reflects the fact that the two 'fields of force' represented by the states are already intimately integrated.

The difficulty with the hermeneutical approach is that it appears to require the lawyer to accept the intentions and meanings of parties at their face value. However in respect of a matter so basic as how individuals and groups come to identify themselves as peoples, and then proceed to make claims upon space and even to authority over other peoples, some critical apparatus is still necessary to assess these intentions. Some understanding of the problem can be found in recent theoretical work on nationalism. For instance in The *Ethnic Origin of Nations* Smith's researches may serve to alert lawyers to the types of arguments which have their roots in ethnicity. Ethnicity is a vague word. Smith

136 Hollis and Smith, 50-66.

137 Hollis and Smith, 82-4.

138 Hollis and Smith, 87.

139 *The Decay*, 7.

interprets it simply¹⁴⁰to mean the sense of a number of people living together and acting together, though not necessarily belonging to the same clan or tribe. The modern nation is the continuous successor of the historical *ethne*¹⁴¹ which has the vital consequence that historical memory is the central feature of nationalism. As such it is being constantly restated.

This is precisely where the lawyer comes in. He is always faced with a ready-made complex of consciously constructed arguments justifying claims of peoples to territories, to independence, to freedom from unwarranted menace from others, and, in more positive terms, to histories of collaborative ventures with certain neighbours or confederates. There are no limits to the variety of arguments with which effectively nationalist intellectuals will confront the international lawyer. None of these arguments need be taken to have any *fundamental* validity. They have simply emerged in the course of modern history. To borrow the language of Kratochwil, they face the lawyer with the task of a dialectician. However, without embracing a foundationalist view of nationalism, I would claim that the richness of historical experience outlined by a work such as Smith's – essentially an exposition of the arguments elaborated by nationalist intellectuals in an immense variety of historical contexts – the lawyer has a framework sufficiently dense to allow the play of a dialectical hermeneutic to take a definite form.

I might conclude this over-brief introduction by drawing upon Smith to illustrate the rich texture of argument with which the lawyer could well have to contend, should he so choose. The approach dove-tails perfectly with the notion of cultural anthropology with which I began this paper. By cultural difference is meant a specific sense of historical community. It is derived less from objective indicators such as fertility, literacy or urbanization rates, as from 'meanings conferred by a number of men and women over some generations on certain cultural, spatial and temporal properties of their interaction and shared experience'.¹⁴²

A common identification in struggle makes up the collective memory of the people in a spatial context which they are then anxious to preserve. So, for instance, this is why the French perceived the German acquisition of Alsace-Lorraine after the Franco-Prussian war of 1870 as *unjustified*. The rancour caused by this experience was one of the occasions of the First World War. In terms of linguistic culture the population was very largely German. However the institutional territorial memory of the people was very distinct from the German people as a whole, and, above all, bound up with the revolutionary nationalism of France between 1789 and 1815.¹⁴³ Such a case shows the extreme importance of a very close familiarity with the facts of the particular situation. This is the only way there is a real prospect of assessing the relative weight of, for instance, institutional memory and ethnicity in the narrower cultural sense. There are forms of social *bonding* which are associated with a common language, above all, interpretations of the spiritual life of a people, which could have bound the provinces of Alsace-Lorraine to the German Empire. However in this particular case such forms of *bonding* were not enough to overcome the particular circumstances of the transfer, i.e. the Prussian/German defeat of the second version of the French Napoleonic dream, a curious mixture of imperial nationalism and democratic liberalism. The Treaties of Peace of Frankfurt (1871) and Versailles (1919) are merely registers of events in the terms outlined here.

1. *The Nuclear Tests Case* ICJ Rep.(1986) 253.
2. *The Continental Shelf Cases* ICJ Rep.(1969) 1.

140 Smith, 1986, 21-22.

141 Smith, p.216.

142 Smith, 21-2.

143 Smith, 129, 149, 202.

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