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ARTICLES

The Destiny of International Law

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Abstract

In much international legal scholarship, Iraq stands for what lies beyond the UN Charter – a world in which international institutions have proved unable to challenge the pragmatists of the new American empire, or one in which international institutions must be remade to suit the interests of the only state capable of acting as the sovereign enforcer of the law. Yet this sense of a crisis of legal authority is not novel for international law – rather, it pervades the discipline. Seen in this light, the inability of the United Nations either to prevent the use of force against Iraq, or to develop an effective multilateral response to terrorism, is simply another manifestation of that crisis, another moment in which international law is called upon to renew itself and reassert its relevance. International law is thus a useful site to explore modern responses to the pervasive uneasiness about legal authority and its legitimacy. Attention to anxious representations about what lies 'beyond' the law allows an exploration of the nature of the crises of legal authority that haunt modernity, and have returned again so traumatically in this time of terror. International law is also a continuing source of extremely productive responses to that crisis of authority. These responses include conventional attempts to find a new sovereign ground for the law, whether that be in the form of international organizations or of powerful national sovereigns who stand outside the law and guarantee its operation. But international law is also a source of much more surprising and radical responses to the sense of anxiety produced by that crisis. This article develops these arguments through engaging with readings by Jacques Derrida and Shoshana Felman of Sigmund Freud's *Beyond the Pleasure Principle*. *Beyond* was written at a time of some crisis for the new discipline of psychoanalysis and for Freud, its sovereign. At stake was the relevance of the discipline, its lack of mastery over its own knowledge, and questions of its proper heirs. All of these issues are at stake for the discipline of international law today.

Key words

anxiety; crisis; inheritance; repetition; sovereignty

At the UN Millennium Summit, held in September 2000, the General Assembly adopted a 'Millennium Declaration' reaffirming 'faith in the Organization and its

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Charter' and invoking a 'collective responsibility to uphold the principles of human dignity, equality and equity'.[1] For the drafters of the declaration, the United Nations, as 'the most universal and most representative organization in the world' and the 'indispensable common house of the entire human family', has a central role to play in creating 'a shared future, based upon our common humanity in all its diversity'.[2] In this appeal to the promise of a future community which will 'realize our universal aspirations of peace, co-operation and development', the declaration embodies the messianic spirit of twentieth-century international law.[3]

Three years later, on 2 September 2003, the UN Secretary-General Kofi Annan published his report on implementation of the Millennium Declaration.[4] The period between the publication of the declaration and the report is marked by the traumas of the violent attacks on the United States of 11 September 2001, and the use of force against the territory and people of Afghanistan and Iraq carried out in response. Only a few weeks before the publication of the Secretary-General's report, the United Nations had suffered the attack on its headquarters in Iraq and the resulting death of 22 people, including the UN High Commissioner for Human Rights, Sergio Vieira de Mello. The resulting report is striking in its inability to represent a straightforward progress narrative, and in its mournful, hesitant tone. The Secretary-General measures 'the distance travelled by humanity as a whole towards – or away from – the objectives set for it by the world leaders who met in New York in September 2000'.[5] 'Even before the tragedy', he wrote, 'I felt that a simple progress report could hardly do justice to what we had lived through in the past 12 months'.[6] Peace and security, development, human rights – all are at risk in the new world of terrorist attacks and the responses to them. It is necessary 'to evaluate not only the progress made, or not made, but also the obstacles encountered, and to re-examine some of the underlying assumptions of the Declaration'.[7] Progress is halted, the time is out of joint.[8]

In the Secretary-General's report, as in much international legal scholarship, Iraq stands for what lies 'beyond' the UN Charter, that future into which humankind is being blown. For some, this is a world in which the pragmatists of the new American empire espouse a flexible approach to the rules governing the use of force, and in which international institutions have proved unable to disturb 'the self-centred course of a callous superpower'.[9] For others, this world is one in which we 'can no longer take it for granted that our multilateral institutions are strong enough to cope with all of the challenges facing them',[10] and in which international institutions

1. The UN Millennium Declaration, UN Doc. A/RES/55/2 (2000), paras. 1, 3.
2. *Ibid.*, paras. 5, 32.
3. See M. Koskenniemi, 'Legal Cosmopolitanism: Tom Franck's Messianic World', (2003) 35 *New York University Journal of International Law and Politics* 471, 486.
4. Implementation of the United Nations Millennium Declaration, Report of the Secretary-General, UN Doc. A/58/323 (2003).
5. *Ibid.*, para. 2.
6. *Ibid.*, para. 3.
7. *Ibid.*, para. 4.
8. For a meditation on the phrase 'the time is out of joint', and its meaning for what he terms *mondialisation*, see J. Derrida, *Specters of Marx: The State of the Debt, the Work of Mourning, and the New International* (1994), 77–94.
9. G. Borradori, *Philosophy in a Time of Terror: Dialogues with Jürgen Habermas and Jacques Derrida* (2003), 27.
10. Report of the Secretary-General, *supra* note 4, para. 4.

must be remade to suit the interests of the only state capable of acting as the sovereign enforcer of the law. Yet, as Hilary Charlesworth has argued, this sense of 'crisis' is not novel for international law; indeed, it pervades the discipline.[11] International law understands itself as responding to crises, but is itself also perpetually in crisis. Seen in this light, the inability of the United Nations either to prevent the use of force against Iraq or to develop an effective multilateral response to terrorism is simply another manifestation of that crisis, another moment in which international law is called upon to renew itself and reassert its relevance. The question then posed by this compulsion repeatedly to invoke a sense of crisis becomes 'what this compulsion signifies, translates, or betrays'.[12]

In this article I want to make two arguments about the meaning of this repetition compulsion in international law. First, attention to this compulsion allows an exploration of the nature of the crises of authority that haunt law in modernity and have returned with such traumatic effects in this time of terror. The inability to find a single authority to ground or guarantee the wholeness of the law is a condition of late modernity. Most modern law works by burying the knowledge of this lack at its foundation. For international lawyers, however, knowledge of this lack of ground for the law is inescapable. It is relatively easy to get a sense of this – almost any debate in international law has at some point to deal with anxiety about a lack of sovereign authority.[13] There is no clear and uncontested authority in international law, no law-maker in the model of the 'sovereign' of say Austin or Hobbes. As a result, international law is an extremely productive site for the exploration of modern responses to this pervasive uneasiness about authority and its legitimacy. Second, international law is also a continuing source of extremely productive responses to that crisis of authority. These responses include conventional attempts to find a new sovereign ground for the law, whether that be in the form of international organizations or of powerful national sovereigns who stand outside the law and guarantee its operation. But I want to suggest that international law is also a source of more radical responses to the sense of anxiety produced by that crisis.

I seek to develop these two arguments by exploring what is played out 'beyond' the UN Charter in anxious representations around the war on terror. To do so, I draw on readings by Jacques Derrida and Shoshana Felman of Sigmund Freud's *Beyond the Pleasure Principle*.[14] *Beyond* was written at a time of some crisis for the new discipline of psychoanalysis and for Freud, its sovereign. At stake was the

11. H. Charlesworth, 'International Law: A Discipline of Crisis', (2002) 65 *Modern Law Review* 377.
12. Borradori, *supra* note 9, 87.
13. English international lawyers, for instance, have long been haunted by the ghost of legal philosopher John Austin, who argued that international law is not law 'properly so called': J. Austin, *The Province of Jurisprudence Determined* (1954 [1832]), 139. The essence of the well-worn Austinian argument is that law is the command of a sovereign in the character of a political superior, backed up by force and habitually obeyed. Austin was quite specific in his assertion that international law was not law. Despite the fact that international law emanated from sovereign states, those sovereigns could not bind each other. International society lacked an overarching sovereign and, thus, 'an imperative law set by a sovereign to a sovereign is not set by its author in the character of political superior'.
14. S. Freud, 'Beyond the Pleasure Principle', in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, ed. James Strachey, vol. XVIII (1961) (hereafter *Beyond*), 7; J. Derrida, *The Post Card: From Socrates to Freud and Beyond*, trans. A. Bass (1987), 257–409; S. Felman, *Jacques Lacan and the Adventure of Insight* (1987), 98–159.

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relevance of the discipline, its lack of mastery over its own knowledge, and questions of its proper heirs. All these issues are at stake for the discipline of international law today. I shall suggest that in the set of disciplinary obsessions and strategies played out around the debate on Iraq and the war on terror we can find what Felman has called '*the structure of a question*'.[15] A question, and a silence about its answer, is transferred through the constitution and inheritance of the discipline of international law.

Section 1 explores one of the traditional strategies by which international lawyers respond to this pervading crisis of authority, through an attempt to reassert control or mastery. This is the attempt by international lawyers to envisage a world organization capable of representing an international community and of operating as the agent of a unified and coherent system of international law. I explore this approach through a close reading of an exemplary text in this tradition – the second edition of *The Charter of the United Nations: A Commentary*, edited by Bruno Simma (*Commentary*).[16] This text produces the image of a busy and benevolent sovereign authority, managing the use of force, dealing with economic and social problems, and creating a complete system of law. This response to the inevitable crisis of authority in international law is formalist and inclusive, with the caveat that the notion of a world community is founded on the acceptance of the need to rescue or protect those others (such as failed states or territories under administration) who are not yet ready to govern themselves. Yet even this model performance of the constitution of a sovereign world community is haunted by an anxious sovereignty, an inability to stabilize the meaning of the UN Charter in a world of nation-states.

Section 2 explores a second strategy for managing the crisis of authority in international law – the attempt to exempt one hegemonic power from the operation of the law and thus to constitute that power as law's sovereign guarantor. I trace this approach through the responses of US lawyers and administrators to the war on terror. These commentators attempt to constitute the United States as the sovereign who transcends the law and thus assures its meaning and its enforcement. This response to the sense of a crisis of authority is pragmatic and exclusive, based on protecting the nation-state against its enemies and attempting to ground the law on the effective exercise of power. Yet this strategy also fails to find a stable ground for the authority of the law, or to control the anxiety this absence produces. The symptoms of this failure will be analyzed through a series of texts concerned with the military activities conducted by the United States and its allies in Iraq.

In *The Gentle Civilizer of Nations*, Martti Koskenniemi traces these two responses of formalism and pragmatism throughout the history of modern international law.[17] In the epilogue to that text, Koskenniemi offers a parable in which these legal

15. For the argument that Freud discovered in the Oedipus myth 'not an answer but *the structure of a question*', see Felman, *supra* note 14, 103.
16. B. Simma (ed.), *The Charter of the United Nations: A Commentary* (2002) (hereafter *Commentary*), 73.
17. M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (2001).

responses to questions about sovereignty, law, authority, and internationalism are written as a story about a dearly loved father and his two sons, one good, one a rebel.[18] Here the father (the international law of late-nineteenth-century Europe) responds to the challenges of modernity with charity, benevolence, and a liberal internationalist sensibility. The good son, a character we might see played today by the continental formalists of the *Commentary* genre or the 'old Europe' that opposed the US use of force against Iraq, follows in the father's footsteps, while the rebellious son, perhaps the American pragmatists of the 1960s and beyond, departs from the path of righteousness to seek power and success. Both sons act in the name of the father, both inherit that which he transmits. Koskenniemi's epilogue thus explicitly raises the question of the proper heirs of international law and of what the discipline bequeaths those heirs.[19] In section 3 I develop this insight to explore the possibility that the discipline of international law transfers a secret about authority between men, across generations. I explore a series of responses to this open question of authority which are not premised on attempts to reassert sovereignty or mastery. I conclude by drawing together international legal texts with readings of *Beyond*, to make available a sense of the alternative responses embedded within international law to this secret history of modern authority.

1. Constituting the world community[20]

The *Commentary* embodies a tradition in international law that works to create an international organization in the image of the sovereign. In this sense it provides a response to questions about the relations between authority, law, and power in the international realm. The law of the UN Charter is treated as a complete system which takes priority over other treaties. The fundamental principle of the maintenance of international peace and security is its unifying norm. In this vision the UN Charter represents 'the fulfilment of the modernist wish to find a single, comprehensive, and consistent point of view on the political organization of humankind'.[21] The preface to the second edition of the *Commentary* makes it clear that for its 74 authors the *Commentary* is envisaged as a call to remain faithful to the cause of establishing a 'genuine world community' through 'the only truly universal world organization that we have'.[22] The principal editor, Bruno Simma, introduces the *Commentary* with the words

> [T]he present work is not just meant to be a renewed expression of the strong interest of German-speaking practitioners and academics alike in the United Nations remaining

18. *Ibid.*, at 510–11.
19. See also *ibid.*, at 361, for the reference to the 'Oedipal urge' involved in Koskenniemi's recounting of the work of Hersch Lauterpacht.
20. This section develops the ideas published in A. Orford, 'The Gift of Formalism', (2004) 15 EJIL 179.
21. M. Koskenniemi, 'Review of Bruno Simma, *The Charter of the United Nations: A Commentary*', (1996) 17 *Australian Year Book of International Law* 227.
22. *Commentary, supra* note 16, vii.

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> alive and well. It is also intended as a plea to handle the only truly universal world organization that we have with greater care.[23]

These words of course take on an added import in the context of the 2003 war against Iraq and the split between the United States and 'old Europe' over the role to be played by the UN Security Council in the move to war.[24] If for many international lawyers Iraq stands for what lies 'beyond' the UN Charter, the *Commentary* represents that which is familiar and known, with its call for fidelity to the text of the Charter and commitment to dialogue in the conduct of international relations. Examples of this sense of the United Nations as a world organization, and of the Charter as its constitution, are spread throughout the *Commentary*.[25] For instance, the section by Ress on 'Interpretation' introduces the Charter as the 'constitution for the world community',[26] a notion echoed by Fassbender and Bleckmann on Article 2(1) ('the UN Charter is the constitution of the entire international community').[27] Simma, Brunner, and Kaul on Article 27 argue that the 'UN Charter, as a treaty, constitutes a self-contained system which even claims priority over other agreements'.[28] The importance of its organs is emphasized by Magiera, writing on Article 9, who describes the General Assembly as 'the world's most important political discussion forum',[29] and by Frowein and Krisch in their introduction to Chapter VII, where they follow Dupuy and Morgenthau in claiming that Chapter VII gives the Security Council the role of an 'executive of the international community' or of an 'international government'.[30] Any tensions between the objective of constituting a world community and the preservation of state sovereignty are resolved in the direction of an inevitable movement towards the world community. Ress, in the section on 'Interpretation', explains that it is difficult ever to sustain a claim that the authority of the organization has been exceeded,[31] or that there are limitations on the sovereignty of the member states that are not legitimate.[32] The section by Nolte on Article 2(7) is equally clear that, in terms of the limitation on UN intervention in matters essentially within the domestic jurisdiction of a state, 'intervention' will always be read sufficiently broadly, and 'domestic jurisdiction' sufficiently narrowly, that the article offers little to states seeking to maintain exclusive control over areas of domestic activity.[33] We are left with a sense of the inevitability of this process of

23. *Ibid.*
24. In response to a question on 22 January 2003 about European opposition to the use of force in Iraq, US Defense Secretary Donald Rumsfeld replied: 'You're thinking of Europe as Germany and France. I don't. I think that's old Europe. If you look at the entire NATO Europe today, the centre of gravity is shifting to the east and there are a lot of new members': J. Hooper and I. Black, 'Anger at Rumsfeld attack on "old Europe"', *Guardian*, 24 Jan. 2003, available at http://www.guardian.co.uk, accessed July 14 2003.
25. For an analysis of a similar image of the Covenant of the League of Nations as the charter of international society, and of international law as a complete system or autonomous legal order, as it appears in the work of Hersch Lauterpacht, see Koskenniemi, *supra* note 21, 361–88.
26. *Commentary*, *supra* note 16, 16.
27. *Ibid.*, at 84
28. *Ibid.*, at 495.
29. *Ibid.*, at 248.
30. *Ibid.*, at 702.
31. *Ibid.*, at 17.
32. *Ibid.*, at 15.
33. *Ibid.*, esp. at 156–8.

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internationalization – 'the area of domestic jurisdiction is constantly being reduced since more and more areas which used to be internal are now being regulated by international law'.[34]

In order to get a sense of the ways in which internationalization is understood in this tradition, it is useful to focus on those parts of the *Commentary* addressing two issues of UN activity: the regulation of the use of force and the management of economic and social functions. In its treatment of the use of force the *Commentary* consistently supports the authority of the Security Council over that of member states. For example, in his discussion of Article 2(4) Randelzhofer consistently prefers those interpretations that read the prohibition on military force as broadly as possible, while reading down possible exceptions (such as humanitarian intervention or rescue operations of a state's nationals).[35] Similarly, the section on Article 51 by Randelzhofer demonstrates the tendency to resolve any interpretative ambiguities that arise in this area in favour of restricting 'as far as possible the use of force by the individual state'.[36] Randelzhofer supports the view widely criticized by US commentators that 'any State affected by another State's unlawful use of force not reaching the threshold of an "armed attack" is bound, if not exactly to endure the violation, then at least to respond only by means falling short of the use or threat of force .... Until an armed attack occurs, States are expected to renounce forcible self-defence'.[37] The only option is to call on the Security Council to define the use of force as a breach of the peace and decide on measures under Articles 41 or 42. Randelzhofer also argues that anticipatory self-defence is not permissible.[38] He admits that this is not a satisfactory reading, since it provides 'very little protection against States violating the prohibition of the use of force', but calls for 'due regard' for the distinction in the 'clear wording' of Article 2(4) (prohibiting the use of force) and Article 51 (allowing self-defence in the face of armed attack).[39] This is a long way from the flexible reading advocated by commentators such as Thomas Franck.[40]

The authors are also critical of trends towards unilateralism or regionalism that threaten to undermine Security Council authority in the area of peace and security. In particular, the discussion of whether there exists authorization to act unilaterally to enforce Security Council resolutions differs radically from the position urged

34. *Ibid.*, at 157.
35. On the absence of any international law rule allowing for humanitarian intervention or the rescue of a state's own nationals, see *ibid.*, 130–3.
36. *Ibid.*, at 792.
37. *Ibid.*
38. *Ibid.*, at 803–4.
39. *Ibid.*, at 791.
40. See further T. M. Franck, *Recourse to Force: State Action against Threats and Armed Attacks* (2002). Franck advocates a reading of the UN Charter based on the statement of St Paul in II *Corinthians*: 'The letter killeth, but the spirit giveth life' (174). For Franck, while the 'literal' text of the UN Charter does not allow for anticipatory self-defence or humanitarian intervention, the Charter is not a 'static formula' but a 'constitutive instrument' that can be adapted by the practice of the UN's principal organs and by members through state practice (6). Franck argues that the Charter has been adapted to allow for a much broader reading of the right of self-defence to encompass anticipatory self-defence or the rescue of a state's nationals abroad, and for an approach to humanitarian intervention that would treat it as excusable if illegal.

by the US administration in the interpretation of Resolution 1441.[41] Frowein and Krisch treat the NATO action in Kosovo and the air strikes on Iraq during the late 1990s as illegal,[42] and are critical of the imprecise and broad authorization of the use of force as in Security Council Resolution 678, quoting the Secretary-General on 'the danger that the states concerned may claim international legitimacy and approval for forceful actions that were not in fact envisaged by the SC when it gave its authorization to them'.[43] In turn, the section by Bothe on 'Peace-keeping' is critical of the unwillingness on the part of powerful states 'to leave the direction of substantial military operations to the United Nations'.[44] He thus argues that we have not yet seen a peace enforcement action as envisaged under Chapter VII – instead, what we have seen is 'unilateral action undertaken by a group of States without the specific authorization of the Security Council'.[45]

Despite the manifest desire of the authors of the *Commentary* to transcend the narrow politics of individual states and achieve the goal of a world community, the *Commentary* appears 'obsessed with the struggle somehow to reinvent at an international level the sovereign authority it was determined to transcend'.[46] This is so particularly in the sections dealing with the economic and social functions of the United Nations. These sections, portraying the United Nations as the manager of problems in the developing world, appear to lead 'beyond' the UN Charter in the manner envisaged by Michael Hardt and Antonio Negri, towards the constitution of Empire as 'a new global form of sovereignty'.[47] The sense of a unified and complete system that emerges in this text produces something like Hardt and Negri's image of a global sovereign subject. The *Commentary* uses the language of 'machinery' and 'integrated management processes',[48] 'programme-planning cycles' and 'outputs',[49] and collection and dissemination of 'information' and 'technical assistance',[50] to deal with issues formulated as 'population problems',[51] 'social development',[52] 'stimulating investment', and solving 'Third-World debt'.[53] The section by Wolfrum on Article 55(a) and (b) stresses the 'coherence of the principles and goals of the UN' – 'maintaining international peace and security not only requires banning the use of force in international relations but also requires actively working for economic stability within and among States'.[54] We might then say that this 'machinery necessary for dealing with economic and social matters' works for justice, peace, and progress or, to translate this into less benign terms, we might think of this process in terms of normalization, biopolitical management, and surveillance.

41. *Commentary*, *supra* note 16, 713–14.
42. *Ibid.*, at 754.
43. *Ibid.*, at 759, quoting 'Supplement to an Agenda for Peace', UN Doc. A/50/60-S1995/1, 3 Jan. 1995, para. 80.
44. *Commentary*, *supra* note 16, at 664.
45. *Ibid.*, at 663.
46. D. Kennedy, 'The International Style in Postwar Law and Policy', (1994) *Utah Law Review* 7, 14.
47. M. Hardt and A. Negri, *Empire* (2000).
48. *Commentary*, *supra* note 16, 898, 337.
49. *Ibid.*, at 337.
50. *Ibid.*, at 914, 905.
51. *Ibid.*, at 915.
52. *Ibid.*, at 914.
53. *Ibid.*, at 911.
54. *Ibid.*, at 898.

This more sinister view can be better illustrated through a concrete example. In the section on Article 55(a) and (b), Wolfrum discusses the creation of 'new institutions' to 'ensure the adequate performance of the UN's functions under Article 55'.[55] These institutions would enable assistance for activities such as economic development, solving population problems, control of the environment, and emergency relief. Many of these agencies are now *in situ* in Iraq. While the Security Council was unable to prevent the use of force by the United States, the briefest glance at the homepage of the United Nations will convince you that there is an authority hard at work redeeming that situation.[56] Clicking on the heading 'The situation in Iraq', one moves through to a page providing a sense of frenzied organizational activity. There are links to no fewer than ten UN specialized agencies, all listed by acronym (UNDP, OHCHR, UNEP, UNESCO, UNICEF, and so on) and all advertised as 'mounting a concerted effort to assist the Iraqi people'. Security Council Resolution 1441 is available in the six official languages of the Security Council (although we all know that we cannot translate it from the American). Countless fact sheets, reports, video links, summaries, multimedia resources, and maps attest to the existence and the relevance of the organization. While the prewar concerns of the international economic organizations and the arms inspectors concerning Iraq were the lack of information and the failure of surveillance, in postwar Iraq international management is in full flow. One effect is to perform the constitution of a sovereign authority from the text of the UN Charter, here evidenced in the production of documents and activity by and on the part of UN organs and agencies in the aftermath of the war against Iraq. All seems designed to prove the point made by Costas Douzinas that

> In international law, the frenetic legislative activity indicates this desire [for a father or law-maker] at its strongest. Excessive law-making is a substitute for the obvious lack of a unitary legislator and credible implementation, a rather transparent attempt to claim that an author exists because otherwise so many texts would not have come into existence and so much progeny would not have been orphaned.[57]

An equally strong effect is the sense that all this activity is essentially humanitarian. The tone of the Charter shifts to the language of assistance, protection, co-operation, progress, development, and solutions to problems, and this is reflected in the *Commentary*. We are left again with a vision of international institutions and international law as the bearers of progressive values. Yet the scene in Iraq described above would seem already to be the performance of that model of the future for the United Nations imagined by Anne-Marie Slaughter – one in which the human rights machinery of the organization is harnessed to the security priorities of the United States and its allies.[58] We might read this as a model example of the United Nations working for the greater good of the poor, suffering people of Iraq, or we might want to think critically about the ways in which these different aspects of

55. *Ibid.*, at 905.
56. www.un.org.
57. C. Douzinas, *The End of Human Rights* (2000), 329.
58. A.-M. Slaughter, 'A Chance to Reshape the UN', *Washington Post*, 13 April 2003, B7. See further the discussion of Slaughter's position in section 2 below.

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the 'machine' work together to enable and legitimize the reconstruction of cultures the world over as capitalist, liberal democracies committed to privatization, foreign investment, limited regulation, and law and order.

Similarly, the suggestion by Frowein and Krisch, writing on Article 41, that the practice of administrators in territories such as Kosovo and East Timor is really trusteeship by another name is compelling, as is the suggestion that these administrations are conducted under Article 41 rather than Articles 82 and 83 so as to allow 'the Security Council greater liberty in the design of the administrations and [make] them less vulnerable to later objections'.[59] Their preference is for the formalization of this rule, with the suggestion that international administration over such territories should be guided by the standards set out in Chapter XII on the conduct of trusteeships. Yet, as the sections in the *Commentary* dealing with the trusteeship powers and obligations serve to remind us, these articles worked to create a 'system' in which trust territories were to be subject to protection, development, tutelage, and surveillance,[60] and in which their 'advancement' was to be the main objective.[61] In short, they provided a blueprint for the forms of neo-colonialism or re-colonization which have been the subject of much recent critical analysis in international law and elsewhere.[62]

The vision of a new imperial law operating through the administration of daily life and the harmonization of systems of control and coercion to create a new global subject is the trajectory mapped in Michael Hardt and Antonio Negri's *Empire*.[63] They there present a genealogy of 'juridical forms that led to, and now leads beyond, the supranational role of the United Nations and its varied affiliated institutions'.[64] The repetition of a sense of crisis in the old international order leads beyond these institutions towards the constitution of Empire as 'a new global form of sovereignty'.[65] Moral intervention prepares the stage for military intervention, and vice versa:[66]

> All conflicts, all crises, and all dissensions effectively push forward the process of integration and by the same measure call for more central authority. Peace, equilibrium and the cessation of conflict are the values toward which everything is directed.[67]

The discussion by Nolte of the debates within the United Nations about Article 2(7) post-Kosovo gives a similar sense of the relationship between moral and military intervention through an account of the expanding scope of authority for the United Nations and an inability of states to fall back on sovereignty as a basis for

59. *Commentary*, *supra* note 16, 744.
60. E.g. the section by Rauschning on Art. 75 links the principle of rule over a foreign population expressly for its benefit 'by fully developed States acting as trustees' underpinning this system directly (if uncritically) with the writings of de Vitoria and the speeches of Edmund Burke on India (*ibid.*, 1099).
61. *Ibid.*, at 1107.
62. See particularly A. Anghie, 'Time Present and Time Past: Globalization, International Financial Institutions, and the Third World' (2000) 32 *New York University Journal of International Law and Politics* 243.
63. Hardt and Negri, *supra* note 47.
64. *Ibid.*, at 4.
65. *Ibid.*, at xii, 4.
66. *Ibid.*, at 37.
67. *Ibid.*, at 14.

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resisting intervention. Nolte notes that even those states described as 'sovereignty-minded' were interested in preventing 'more massive forms of intervention'.[68] As a result,

> Since most States have expressed their support of a 'culture of prevention', it appears that the Kosovo crisis has ultimately resulted in widespread agreement that the powers of the UN organs, in particular that of the Security Council, to initiate and undertake measures of conflict prevention outside Chapter VII without violating Article 2(7) are rather broad.[69]

Despite these criticisms, the formalist tradition as embodied in the *Commentary* is of great value in the current context of debates about the need for radical reform of the United Nations and its Charter. Simma opened the preface to the first edition of the *Commentary* by describing it as a 'birthday present of the German-speaking international legal profession to the United Nations at the occasion of its 50th anniversary in 1995', and a gift it still is, a gift of faith, of careful and loving attention to an organization and the ideals it embodies. Yet the *Commentary* 'overflows the (given) presence of the present, the given of the gift'.[70] Where Simma presents us with a gift of fidelity, what overflows or accompanies that gift is uncertainty. If we read the marginalia of the text as framing the main business of fidelity and careful attention to detail, we 'gain access to that which is played out here beyond the "given", to that which is rejected, withheld, taken back, beyond . . . '.[71] What, then, lies beyond the *Commentary*? And what might this tell us about what lies beyond the UN Charter?

Anxiety about the grounds of authority seeps out around the edges of this text. This anxiety is suggested by the invocation in the preface of a language community of German-speaking scholars, itself a response to the threat of an alien reading. The preface offers the *Commentary* as an 'expression of the strong interest of German-speaking practitioners and academics alike in the United Nations remaining alive and well', thus drawing the authors of the book into a family. As Derrida notes, the response to a threat to mastery or authority may well be 'to regroup one's forces and to find oneself once more amongst one's own, one's derivatives, offspring, representatives, couriers, postmen, ambassadors and lieutenants'.[72] Yet this attempt to create a proper family fails immediately in the opening section on the history of the UN Charter, where Grewe and Khan seem compelled to search for a father who cannot be found. In one passage the authors report that while 'some individual authors, among them scholars and politicians, did develop and publish ideas which flowed into the general discussion . . . nowhere can their influence on the final shape of the Charter be authenticated'.[73] Later, they comment apologetically that 'As in the case of the experts, it is difficult to single out an individual statesman as

68. *Commentary, supra* note 16, 165.
69. *Ibid.*, at 166.
70. Derrida, *supra* note 14, 283.
71. *Ibid.*, at 284.
72. *Ibid.*, at 345.
73. *Commentary, supra* note 16, 3.

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the intellectual father of the Charter or of one of the UN institutions',[74] and again in the discussion of the Dumbarton Oaks Conference repeat that 'Once again the question of who the authors of these proposals were can only be answered in a very vague manner.'[75]

A lack of grounding authority, or of an original meaning, is also faced when international lawyers try to deal with the question of the authentic languages of the Charter. According to Article 111 of the Charter, the Chinese, French, Russian, English, and Spanish texts are equally authentic and thus 'all accorded equal authority'.[76] Of course, 'differences between the various versions cannot be avoided', but 'No version may be overlooked with regard to a question of interpretation'.[77] A range of strategies for managing the 'inevitable problems of interpretation' are explored,[78] including deeming the terms of the treaty to have the same meaning in each authentic text, having recourse to the 'original text' which formed the basis of negotiations, giving priority to the 'clearer texts' (although of course 'the asserted clearness is the object of the interpretation'), or adopting the version that best fits with the 'organizational purpose and the interests of the actual members'.[79] Yet the *Commentary* does not settle on one of these approaches, as if it is distracted by the failure of any to achieve the goal of 'maintaining a uniform object for interpretation'.[80]

Indeed, in the preface to the first edition to the *Commentary*, Simma specifically equates the problem of translation in international law with the lack of a unitary sovereign authority to ground the meaning of the text:

> A different plea for the indulgence of the user is in place, however: not a single author is a native speaker of English. Nevertheless, every contributor had to submit her or his own English text ... the reader is faced with sixty varieties of more or less subtle 'German English'. I have to confess that for me this aspect was a constant source of apprehension until I decided to regard it with some sense of humour. After all, like my editorial task of coordinating the moves of dozens of sovereigns, that is, German professors and high-ranking practitioners, does not the language problem that we faced mirror the situation in the United Nations itself?[81]

Here in the preface Simma abandons, 'with some sense of humour', the task he and his colleagues imagine for the United Nations throughout the *Commentary*, that of 'coordinating the moves of dozens of sovereigns'. I want to return later to explore the possibilities that this gesture offers more generally for international law.

74. *Ibid.*, at 6.
75. *Ibid.*, at 8. Delbrück on Art. 25 is much more confident about the existence of such 'founding fathers' and persistently refers to them in fixing the meaning of controversial texts, for example at 448 ('in the eyes of the authors'), 447 ('according to the will of the authors'), 445 ('the intentions of the authors').
76. *Ibid.*, at 1379.
77. *Ibid.*, at 1379–80.
78. *Ibid.*, at 1377.
79. *Ibid.*, at 21–3.
80. *Ibid.*, at 21.
81. B. Simma (ed.), *The Charter of the United Nations: A Commentary* (1995), vii.

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2. The hegemon as sovereign

A second tradition in international law responds to concerns about a lack of sovereign authority by seeking to exempt one state or power from the operation of the law. The refusal to subject a hegemonic power to international law is an attempt to constitute that power as an authoritative person or law-maker. From this perspective, 'If international law is to be seen as universal and international politics as ethical, one power must be exempted from its operations and, through its forceful intervention and sovereign interpretation of the law, give it its desired seamlessness'.[82]

2.1. The will of the sovereign

Such a response has been apparent in the statements made by US lawyers and the US administration about the war on terror. The United States is portrayed as justified in taking up sovereign control or mastery of an anarchic situation in which there is no other sovereign capable of enforcing its will. This logic is evident in the writing of a number of prominent American international lawyers arguing that it was simply irrelevant and inconsequential whether the resort to force by the United States against Afghanistan and then Iraq was illegal and in breach of the UN Charter. The argument here was not simply that the United States should enforce the will of the international community, but that a purely instrumental approach to the law should be adopted. Any international law that could not meet the objectives set by US policy-makers was to be ignored. So, for instance, Michael J. Glennon argues that the UN Charter provisions governing the use of force 'cannot guide responsible US policy-makers in the US war against terrorism or elsewhere'.[83] As it is not possible to gain consensus within the international community that the US approach to the use of force to combat terrorism is appropriate, the United States should judge for itself what measures should best be adopted for its self-defence, without reference to the UN Charter norms.

Similarly, Anne-Marie Slaughter, the president of the American Society of International Law, wrote an opinion piece published in the *New York Times* on the bleak morning following Bush's declaration that military action would commence unless Saddam Hussein and his sons left Iraq within 48 hours.[84] There she defended the decision of the United States to abandon its efforts to get UN approval for the prospective invasion of Iraq. Slaughter suggested that

> By giving up on the Security Council, the Bush administration has started on a course that could be called 'illegal but legitimate' ... even for international lawyers, insisting on formal legality in this case may be counterproductive .... The United Nations imposes constraints on both the global decision-making process and the outcomes of that process, constraints that all countries recognize to be in their long-term interest and the interest of the world. But it cannot be a straitjacket, preventing nations from pursuing what they perceive to be their vital national security interests.[85]

82. Douzinas, *supra* note 57, 329.
83. M. J. Glennon, 'The Fog of Law: Self-Defense, Inherence, and Incoherence in Article 51 of the United Nations Charter', (2001–2) 25 *Harvard Journal of Law and Public Policy* 539, 541.
84. A.-M. Slaughter, 'Good Reasons for Going Around the UN', *New York Times*, 18 March 2003, A33.
85. *Ibid.*

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In such a vision, as Martti Koskenniemi argues, the role of international law is merely to enforce the will or morality of the United States as the hegemonic power.[86] The arguments made by Glennon and Slaughter are the end result of the development that Koskenniemi traces in one branch of American international law since the 1960s, in which any 'notion of international law as a framework for formal inter-sovereign relationships' is replaced 'by a new, flexible, policy-dependent instrument for US decision-makers'.[87] The value of international law is measured by its 'relevance', where relevance is defined as 'instrumental usefulness' and law is of use only where it works as 'an instrument for the values (or better, "decisions") of the powerful'.[88] Law provides American policy-makers with 'the technical avenues through which they can reach their objectives'.[89]

Any concern with the political ends or objectives that such an instrumental law might serve is addressed through the 'turn to ethics'.[90] 'Ethics' here means a deformalized yet universal system of norms (justice, democracy, liberalism, human rights) which operate as 'an effective and legitimate constraint over otherwise deformalized decision-making as well as an objective (and legal) guide for foreign policy'.[91] Much has been written about this trend and its effects, particularly in the context of the renewed enthusiasm during the 1990s for 'humanitarian intervention'.[92] This resort to human rights as a basis for justifying pre-ordained security goals can be seen in the follow-up opinion piece by Slaughter written in the wake of the use of force against Iraq. Slaughter argued that 'By turning back to the United Nations now, in the moment of victory in Iraq, President Bush can seize a historic opportunity to pioneer a tough-minded and enduring form of multilateralism'.[93] While it is clear to Slaughter that 'the institutions of the post-World War II era aren't yet adapted to address the threats of the post-Cold War era', the answer 'is not to destroy those institutions but rather to reform them'. In particular, it is necessary to 'reform' the Security Council by 'redrawing the lines of how the Security Council defines which threats to international security are sufficient to require the use of force'.[94] For Slaughter, this should involve 'finally linking the human rights side of the United Nations with the security side', so that 'a government's business may more readily become the Security Council's business'.

This turn to ethics is an attempt to provide another secure and generalizable foundation for the law. As Costas Douzinas argues, in order for the law to gain its coherent or closed character, we need to be able to attribute regulations or norms or rules 'back to an authoritative person or text'.[95] This source of authority attests to the

86. Koskenniemi, *supra* note 17, 483.
87. *Ibid.*, at 481.
88. *Ibid.*, at 483–4.
89. *Ibid.*, at 484.
90. M. Koskenniemi, '"The Lady Doth Protest Too Much": Kosovo and the Turn to Ethics in International Law', (2002) 65 *Modern Law Review* 159.
91. Koskenniemi, *supra* note 17, 489.
92. See, e.g., Charlesworth, *supra* note 14, 377; A. Orford, *Reading Humanitarian Intervention: Human Rights and the Use of Force in International Law* (2003).
93. A.-M. Slaughter, 'A Chance to Reshape the UN', *Washington Post*, 13 April 2003, B7.
94. *Ibid.*
95. Douzinas, *supra* note 57, 328.

'desire for a Father or law-maker who is outside the operation of law and infuses it with its majesty or justice'.[96] As I have been arguing, the absence of such a sovereign law-maker is inescapable in international law, but this is perhaps merely an extreme case of the unavailability of this source of authority in modernity. Douzinas suggests that 'the paternal function is coming under attack in late modernity and cannot fulfil its role any longer'.[97] One response to the retreat of 'the fatherly figures' is to find another authority to 'occupy the impossible ... position of the guarantor of the completeness of the law'.[98] The ethics which Koskenniemi describes is one such 'heir to the Father', promising to 'make the law whole or just'.[99]

Yet the attempt to regain a sense of the law as coherent or closed through constituting the United States as the majestic 'Father or law-maker' does not succeed. The inability successfully to constitute the United States as the sovereign guarantor of international law is illustrated by debates about the legality of the US resort to force in the war on terror.[100] The attempt to resolve the interpretative debates about the legality of US action against Iraq turned on the sufficiency of information supporting two claims made by the United States – that Iraq was in breach of Resolution 1441 giving it 'a final opportunity to comply with its disarmament obligations under relevant resolutions', or that the United States was facing an 'armed attack' giving rise to the inherent and sovereign right of self-defence. Central to the 'case' for resort to force made by the United States was the question of the sufficiency of information put before the Security Council, whether to persuade its members of the existence of a terrorist link with Iraq (justifying either the determination of a threat to peace or a resort to the use of force in self-defence) or of programmes to create weapons of mass destruction (to establish a breach of Security Council resolutions). This information as to the threat posed by Saddam Hussein and his regime was the principal means by which the United States and the United Kingdom sought to establish the legitimacy of the resort to force.

International law has increasingly resorted to 'evidence' or information to provide the solid foundation for resolving questions about the legitimacy of responses to state-sponsored terrorism.[101] For Thomas Franck, the evolution of the international legal norms governing the use of force in self-defence against terrorist safe havens

96. *Ibid.*
97. *Ibid.*, at 330.
98. *Ibid.*
99. *Ibid.*, at 332.
100. The visibility of a crisis of authority in modern law is one of the effects of terrorism more generally. The fiction of a stable relationship between violence, territory, and authority is disrupted by acts of violence which are not controlled by the sovereign. The sense of a solid ground for the law, whether national or international, is undone by the inability successfully to ground a definition of terrorism in any regime of facts, truth, or morality. Ed Morgan has suggested that part of the horror felt as a result of witnessing a terrorist attack is the 'transfer of violence' to the viewer's 'own vulnerable and unstable state of mind'. The viewer who experiences a sense of disintegration does so not only because he or she is faced with scenes of death and destruction, but because of the reminder that there is no stable or coherent authority grounding the law or its subjects. See further E. Morgan, 'International Law's Literature of Terror', (2002) XV *Canadian Journal of Law and Jurisprudence* 317.
101. For the argument that 'evidence in law makes up for the violence found at the non-legal origin of criminal procedure', see P. Rush, 'Deathbound Doctrine: Scenes of Murder and Its Inheritance', (1997) 16 *Studies in Law, Politics and Society* 71, 77.

depends on international bodies assessing evidence relating to claims made by the parties concerned:

> In each recent instance, UN organs seem to have eschewed narrowly dogmatic insistence on a traditional armed attack by a national army as the sole justification for an armed response in self-defense. Instead, they have focused on relevant evidence, weighing the seriousness of each claim of necessity and the proportionality of each aggrieved party's countermeasures.[102]

As this formulation makes clear, the ambiguities generated when 'dogmatic insistence' on traditional categories is abandoned are resolved through a focus on 'evidence' – 'Here, as elsewhere in the discussion of controversial legal doctrines, much appears to depend on evidence of the facts and their context.'[103] For instance, Security Council Resolution 1368, passed on 12 September 2001 (the day after the terrorist attacks on the United States), has been interpreted as expanding the definition of what constitutes an 'armed attack' and an 'attacker' against whom the use of force in self-defence can be exercised.[104] Having referred to both 'threats to international peace and security' and 'the inherent right of individual or collective self-defence' in the preamble, the Security Council there '*stresses* that those responsible for aiding, supporting or harbouring the perpetrators, organizers and sponsors of these acts will be held accountable'.[105] Franck shows that 'facts' and 'information' are central to the ways in which the legality of the use of force in such cases is determined. While he argues that 'It is becoming clear that a victim-state may invoke Article 51 to take armed countermeasures in accordance with international law and UN practice against any territory harboring, supporting or tolerating activities that culminate in, or are likely to give rise to, insurgent infiltrations or terrorist attack', the question remains, 'who applies that law?'[106] The answer involves a movement between state and international organization, mediated through and by information.

> But who applies that law? Not alone, surely, the state from which insurgents and terrorists launch their attacks, nor any state claiming to be the victim of such an attack. Rather, the international system has a 'quasi-jury', consisting of the United Nations' principal political organs – the Security Council and General Assembly – and its judicial organ (the ICJ). These, of course, in their appreciation of the facts, are influenced by the global information network through which public opinion is informed and manifested.[107]

The prior questions to Franck's 'who applies that law' must be 'who determines the facts?' and 'who determines which facts are relevant?' Facts cannot simply be found.[108] In domestic legal systems, the removal of ambiguity through the

102. Franck, *supra* note 40, 67.
103. *Ibid.*, at 65.
104. S/RES/1368 (2001) of 12 Sept. 2001; T. M. Franck, 'Terrorism and the Right of Self-Defense', (2001) 95 AJIL 839, 842.
105. S/RES/1383 (2001) of 12 Sept. 2001, para. 3.
106. Franck, *supra* note 40, 67.
107. *Ibid.*, at 67–8. For Franck, this 'evidentiary requirement' arises '*after*, not *before*, the right of self-defense is exercised'. Thus a state may in its 'sole judgment' determine 'whether an attack has occurred and where it originated'. Only after the resort to force in self-defence must a state demonstrate 'that it is acting against the party guilty of the attack' and not against an 'innocent party': Franck, *supra* note 104, 842.
108. Charlesworth, *supra* note 11, 382–4.

writing of facts and determination of relevance is part of the practice of judgement.[109] Franck suggests that it is the Security Council, the General Assembly, and the International Court of Justice (ICJ), influenced by the global information network, which make this determination. In its performance during the Iraq war the United States appeared to accept this view. It formally played its part as a subject of international law by demonstrating its willingness to provide information to the Security Council concerning matters of war. Yet if we pay attention to that which the United States performs in the provision of this information, we see a refusal ever to give up the sovereign authority to determine which facts are relevant.[110]

On 5 February 2003 the US Secretary of State Colin Powell appeared before the Security Council to 'provide you with information, to share with you what the United States knows about Iraq's weapons of mass destruction, as well as Iraq's involvement in terrorism . . . . I cannot tell you all that we know, but what I can share with you, when combined with what all of us have learned over the years, is deeply troubling.'[111] Powell continued his address by stating:

> Given Saddam Hussein's history of aggression, given what we know of his grandiose plans, given what we know of his terrorist associations, and given his determination to exact revenge on those who oppose him, should we take the risk that he will not someday use these weapons at a time and a place and in a manner of his choosing, at a time when the world is in a much weaker position to respond? The United States will not and cannot run that risk for the American people. Leaving Saddam Hussein in possession of weapons of mass destruction for a few more months or years is not an option, not in a post-September-11th world.[112]

The form in which the United States provided this 'information' to the Security Council functioned much more as a sovereign declaration of war than as a submission of facts before a juridical tribunal. The United States retained the right to determine which facts would be made available to the Security Council ('I cannot tell you all that we know'), just as it retained the right to decide whether and when to use force against Iraq. The United States did not play the part of a witness providing facts, the relevance of which as evidence would be determined as part of the legal narrative of a higher sovereign power.

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109. N. Philadelphoff-Puren and P. Rush, 'Fatal (F)laws: Law, Literature and Writing', (2003) 14 *Law and Critique* 191, 201: 'the practice of judgement is not reducible to the task of finding the facts, as if the statement of the case is a correct reflection and reproduction of the state of affairs in the world – as if it were possible to find facts and not write them'. To the extent that law is unable to see itself as writing, 'law understands itself as reflecting a state of affairs, rather than producing it, and . . . it believes it can control the contexts in which its texts emerge and take on meaning' (202).

110. Even if the United States had been willing to submit to the authority of the United Nations, terrorism makes visible the absence of a stable and legitimate authority capable of allowing us to agree on the 'facts' about terrorism. International law has long been unable to reach a common definition of terrorism, or to agree on measures to enable a collective response to terrorism under the auspices of an international organization. As James Der Derian comments, 'outside the state, with no sovereign authority (in both the juristic and linguistic senses) to rule on legitimacy, we cannot establish facts which will bring an end to terrorism': J. Der Derian, *Antidiplomacy: Spies, Terror, Speed, and War* (1992), 82.

111. Secretary of State Colin L. Powell, Remarks to the United Nations Security Council, 5 Feb. 2003, available at http://www.state.gov/secretary/rm/2003/17300pf.htm, accessed 8 July 2003.

112. *Ibid.*

In the days leading up to the war, the United States continued to constitute itself as the sovereign guarantor of right at the international level. This is well illustrated in the remarks made by the US president in his address to the nation on 17 March 2003.[113] In that address, announcing that Saddam Hussein and his sons had to leave Iraq within 48 hours or military action would be taken, George W. Bush declared that the United States 'has the sovereign authority to use force in assuring its own national security'. He explained why the United States as sovereign was called on to enforce the demands of the Security Council:

> One reason the UN was founded after the Second World War was to confront aggressive dictators, actively and early, before they can attack the innocent and destroy the peace.
>
> In the case of Iraq, the Security Council did act, in the early 1990s. Under Resolutions 678 and 687 – both still in effect – the United States and our allies are authorized to use force in ridding Iraq of weapons of mass destruction. This is not a question of authority, it is a question of will .... The United Nations Security Council has not lived up to its responsibilities, so we will rise to ours.[114]

2.2. Veiling *Guernica*

The inability of the United States to succeed in this attempt to constitute itself as the law's sovereign guarantor is revealed well in an incident which accompanied Powell's appearance before the Security Council on 5 February 2003. As Maureen Dowd reported in the *New York Times*, in anticipation of the post-presentation press conference the United Nations threw a blue cover over the tapestry reproduction of Picasso's *Guernica* on display at the entrance to the Security Council, and then placed the flags of the Security Council in front of that cover.[115] This double veiling served to hide Picasso's famous anti-war image from the television cameras and thus from the global audience which would also judge the adequacy of Powell's information.[116] Why did it become untenable at that moment for the representative of the United States to stand before that backdrop and explain the reasons for bombing the territory and people of Iraq? Perhaps it was simply because, as Maureen Dowd commented, 'Mr Powell can't very well seduce the world into bombing Iraq surrounded on camera by shrieking and mutilated women, men, children, bulls and horses.'[117] But perhaps it was also because *Guernica* makes visible the excessive nature of the violence that founds authority. Both terrorism and the violent responses to it return the law to the scene that was here veiled.

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113. Remarks by the President in Address to the Nation, The Cross Hall, 17 March 2003, available at http://www.whitehouse.gov/news/releases/2003/03 (accessed 12 May 2003).
114. *Ibid.* The assertion of an authorization to use force in response to Iraq's 'material breaches of its disarmament obligations under relevant Security Council resolutions' was later relied on in Letter Dated 20 March 2003 from the Permanent Representative of the United States of America to the United Nations addressed to the President of the Security Council, 21 March 2003, S/2003/351.
115. M. Dowd, 'Powell without Picasso', *New York Times*, 5 Feb. 2003, A27.
116. On the 'double veils of cloth and flags', see M. Hansen, 'Statement on Critical Inquiry in the 21st Century', *Critical Inquiry* Editorial Board Meeting, Public Symposium, 11 April 2003, available at http://www.uchicago.edu/research/jnl_crit-inq/typewriter.html, accessed 12 June 2003.
117. Dowd, *supra* note 115.

This sense that the 'problem of justice' for the law relates to the violence of law's foundation is developed in the work of Jacques Derrida.[118] At the moment of constitution of a legal order, that founding violence is neither legal nor illegal. The legitimacy of the law and of authority is established only once that violence has succeeded in creating a new order, and even then only provisionally. Thus while the legitimacy of the law is in a sense guaranteed by the state, this is always subject to the possibility of being unsettled. This is perhaps evidenced most clearly in cases of revolution.

> A 'successful' revolution, the 'successful foundation of a State' ... will produce *après coup* what it was destined in advance to produce, namely, proper interpretive models to read in return, to give sense, necessity and above all legitimacy to the violence that has produced, among others, the interpretive model in question, that is, the discourse of its self-legitimation.[119]

If a rebellion against the existing government succeeds, the violence of the rebels takes on the legitimacy of the state it founded – if the rebellion fails in founding a new form of the state, the use of force will not receive official legitimation. It is precisely such a potential 'founding or revolutionary moment', a moment 'before the law',[120] that *Guernica* portrays. The ambivalence about the meaning of such revolutionary violence for Spain was central to the reception of *Guernica* at its first public display in the Spanish pavilion of the Paris World's Fair of 1937. The 'terror bombing' of the town of Guernica earlier that year, from which the painting took its name, was itself part of the ongoing Spanish Civil War. In that sense, the bombing of Guernica was an event the meaning of which was still open at the time of the World's Fair.[121] It could only be given a settled meaning as legal or illegal once the revolutionary violence had ended. *Guernica* is thus troubling, in part because it freezes time at that moment when the violence that may yet found a new law is not yet 'buried, dissimulated, repressed'.[122] While *Guernica* circulates as a symbol of democracy and a critique of fascist violence, and while Picasso came down firmly on the side of the Republican government in the Civil War, the painting also retains a sense of the ambiguity inherent in the use of force.[123] As John Berger comments, '[t]here are no enemies to accuse' in the painting.[124] For Berger, the protest 'is in what has happened to the bodies'. Thus *Guernica* stands as a reminder of this 'silence walled up in the violent structure of the founding act'.[125]

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118. J. Derrida, 'Force of Law: The "Mystical Foundation of Authority"', (1990) 11 *Cardozo Law Review* 921, 963.
119. *Ibid.*, at 993.
120. *Ibid.*, at 991, 993.
121. The phrase 'terror bombing' is taken from H. B. Chipp, *Picasso's Guernica: History, Transformations, Meanings* (1988), 156.
122. Derrida, *supra* note 118, at 963.
123. Picasso's painting had been commissioned by the Spanish Republican government, and from that point on worked as a critique of the legitimacy of the fascist rebels and later of the government they established. Picasso instructed his friends and his lawyer that the painting was not to return to Spain until a democratic regime and individual liberties were established. As a result, the painting remained a 'refugee' from Spain until its 'homecoming' in 1981. See further P. Picasso and R. Dumas, 'The Future of Guernica', Press Release issued on 15 April 1977 by Picasso's lawyer Roland Dumas, reprinted in E. C. Oppler (ed.), *Picasso's Guernica* (1988), 153–5; Chipp, *supra* note 121, 170–91.
124. John Berger, 'Success and Failure of Picasso', in Oppler, *supra* note 123, at 267, 271.
125. Derrida, *supra* note 118, at 943.

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In addition, *Guernica* memorializes an event in the history of warfare which may mark the limit of modern law's capacity to authorize force and to bury the dead. The bombing of the Basque town of Guernica by German aircraft and pilots flying for General Franco was the first time that aerial bombardment had been carried out against civilians in Europe.[126] A sense of the horrors of the new form of warfare is clear in the news reports of the event.[127] *Guernica* gives form to the idea of the apocalypse unleashed by such violence, through the haunting series of its suffering victims.[128] In so doing, it makes visible the possibility that the capacity of law or the state to secrete this violence in its foundation may be exceeded by the new capacity to cause unprecedented levels of destruction. Indeed, the theme of the 1937 Paris World's Fair – the 'exposition internationale des arts et techniques dans la vie moderne' – invokes Walter Benjamin's contemporary essay, 'The Work of Art in the Age of Mechanical Reproduction'.[129] Benjamin argued that imperialist warfare is necessary for fascism because it makes possible the utilization of the enormous productive capacity of modern technology without upsetting the property system.[130] Both *Guernica* and *The Charnel House*, Picasso's 1945 epilogue to *Guernica*, are a response to the destructive capabilities of this modern technology unleashed by bureaucratic states. Roland Penrose wrote of *The Charnel House* that it 'shows us nothing but the stark reality of our murderous, suicidal age … a pietà without grief, an entombment without mourners, a requiem without pomp'.[131]

Finally, *Guernica* points to that which exceeds the law, to that which even the law guaranteed by the sovereign cannot contain. For many contemporary viewers of the painting, it was a reminder of mortality. The surrealist poet Michel Leiris saw in the painting a death notice and a farewell:

> In the black-and-white rectangle of ancient tragedy, Picasso sends us our death notice: everything we love is going to die, and that is why right now it is important that everything we love be summed up into something unforgettably beautiful, like the shedding of so many tears of farewell.[132]

Like terrorism, *Guernica* is an anxious reminder that at the foundation of modern law is the memory of a violence that cannot be authorized – as the poet José Bergamín wrote of his response to the painting in Picasso's studio: 'This shockingly naked thing haunts us with the disturbing question of its anxiety'.[133]

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126. As the historian of bombing Sven Lindqvist has shown, European powers realized much earlier that bombing allowed them to exercise 'control without occupation' to pacify 'restless natives' – for instance in the French and Spanish bombing of their respective parts of Morocco in 1912, and in Britain's bombing of India's northwest in 1915, Egypt in 1916, Afghanistan and Somalia in 1919, Trans-Jordan in 1920, and Iraq in 1920. See S. Lindqvist, *A History of Bombing* (2001), 100–2.
127. See particularly G. L. Steer, 'The Tragedy of Guernica: Town Destroyed in Air Attack', *The Times*, 28 April 1937, reprinted in Oppler, *supra* note 126, at 160, 161. ('In the form of its execution and the scale of the destruction wrought, no less than in the selection of its objective, the raid on Guernica is unparalleled in military history.')
128. On the figure of the fallen warrior as a reference to the eleventh-century manuscript of the *Apocalypse of Saint-Sever*, see E. C. Oppler, 'Introductory Essay' in Oppler, *supra* note 123, at 45, 92.
129. W. Benjamin, 'The Work of Art in the Age of Mechanical Reproduction', in *Illuminations*, trans. H. Zorn (1970), at 211. On '*Guernica* in Paris: July–Oct. 1937', see Chipp, *supra* note 121, at 137–55.
130. Benjamin, *ibid*, at 234–5.
131. R. Penrose, *Picasso: His Life and Work* (1958), 318.
132. M. Leiris, 'Faire-part', *Cahiers d'Art*, no. 4–5, 128, trans. E. C. Oppler, in Oppler, *supra* note 123, at 210.
133. J. Bergamín, 'Naked Poetic Truth', in Oppler, *supra* note 123, at 201, 202.

Each of these themes resonates with the war on terror, and made it impossible for the reproduction of *Guernica* to be displayed on 5 February 2003. The United States, through its Secretary of State, was attempting to perform as a legitimate sovereign before both the Security Council and the mass audience of the subsequent televised news conference. This performance of sovereignty was designed to guarantee the United States not only as sovereign over the territory called the United States of America, but also as the sovereign that guarantees the international law it sought to bring into being at that performance. This was a version of the law in its own image, an international law that could authorize the violence that the United States was soon to bring to bear on the territory and people of Iraq. The tapestry of *Guernica* was a reminder of the excessive force that comes before the law.[134] Such a reminder is only tolerable 'once the law has been invoked in its place',[135] and so *Guernica* disappeared behind its veils.

2.3. Occupying Iraq

Debates about the legitimacy of US authority also became evident in discussions of the administration of Iraq in the wake of the use of force by the United States and its allies. Some of the effects of this instability can be seen in arguments about the legitimacy of competing sources of authority in Iraq. One justification for recourse to force made by the United States was the need to guarantee self-determination to the people of Iraq and protect suffering Iraqis from human rights abuses committed at the hands of Saddam Hussein's regime. For example, in his address to the UN General Assembly on 12 September 2002, President Bush stated:

> Liberty for the Iraqi people is a great moral cause, and a great strategic goal. The people deserve it; the security of all nations requires it .... If we fail to act in the face of danger, the people of Iraq will continue to live in brutal submission .... If we meet our responsibilities, if we overcome this danger, we can arrive at a very different future. The people of Iraq can shake off their captivity.[136]

Equally, the desirability of 'regime change' in Iraq was explained in terms of creating a democratic Iraq.[137] To this end, the US administration repeatedly said that its aim was to 'liberate Iraq, not to occupy Iraq', while the Deputy Secretary of Defence Paul Wolfowitz made the case for 'replacing the current Iraqi regime with one that embraces democratic norms'.[138]

Yet the legitimacy of the post-conflict governance of Iraq was questioned even before the war began. The US administration told US senators in February 2003

134. S. McVeigh, P. Rush, and A. Young, 'A Judgment Dwelling in Law: Violence and the Relations of Legal Thought', in A. Sarat (ed.), *Law, Violence, and the Possibility of Justice* (2001), 101, 107.
135. *Ibid.*
136. President's Remarks at the United Nations General Assembly, New York, 12 Sept. 2002, available at http://www.whitehouse.gov/news/releases/2002/09/print/20020912-1.html (accessed 12 May 2003).
137. US Committed to Working Toward Democratic Iraqi Government, White House Statement on Salahudeen meeting, 1 March 2003, available at http://www.usembassy.it/file2003_02/alia/a3022801.htm (accessed 11 March 2003).
138. Deputy Secretary of Defense Paul Wolfowitz, Remarks at Town Hall Meeting with Iraqi-American Community, Michigan, 23 Feb. 2003, available at http://www.defenselink.mil/speeches/2003 (accessed 26 May 2003).

that it would be likely to take at least two years before the military could fully transfer control to an Iraqi government.[139] The administration also announced that it would award construction contracts worth hundreds of millions of dollars for the rebuilding of Iraqi infrastructure, most of which have since been awarded to US companies.[140] When asked by the US Senate Foreign Relations Committee how it planned to install a democratic government under these conditions, State Department official Marc Grossman said,

> How this transition will take place is perhaps opaque at the moment. Hopefully there will be people who will come up and want to be part of the government.[141]

The sites of ambiguity about the status of those in control or authority over Iraq only multiplied in the aftermath of the war. The US appeal to the principle of self-determination and its commitment to postwar 'liberation' rather than occupation have meant that the legitimacy of the postwar governance of Iraq was in part judged by the level of Iraqi participation. Debates also continued about the extent of US and UK control in the territory and the obligations that flowed from that control. For example, were the United States and the United Kingdom occupying powers? And if they were occupying powers, were they limited in their capacity to undertake legal, judicial, and political reform?[142] Were they responsible for acts of looting conducted while they were in occupation?[143] Did the status of occupier constrain the uses to which the United States and its allies could put the proceeds from the sale of Iraqi oil?[144] Were they under an obligation to respect human rights and, if so, was the source of that obligation the human rights commitments of the United States and the United Kingdom, or those of the former Iraqi government, or those that would bind the United Nations if it were administering the territory?[145] Did the United States and its allies have to respect the diplomatic immunity of those accredited by the previous regime?[146]

It is the inability to resolve such questions and anxieties about the proper grounds of authority in Iraq that led to some of the more striking cultural interpretations of

139. J. Wright, 'US Plans for Two-Year Occupation of Iraq', Reuters News, 11 Feb. 2003.
140. Amnesty International, *Iraq: On Whose behalf? Human Rights and the Economic Reconstruction Process in Iraq*, available at http://web.amnesty.org/library/print/ENGDME141282003 (accessed 7 July 2003).
141. *Ibid.*
142. This might appear to be decided by Security Council Resolution 1483, which in its preamble refers to the United States and the United Kingdom as the 'occupying powers under unified command' and in para. 4 '*Calls upon* the Authority, consistent with Charter of the United Nations and other relevant international law, to promote the welfare of the Iraqi people through the effective administration of the territory'. Yet, as Thomas Grant has commented, the status of occupying power would seem to conflict with some of the obligations for legal, judicial, and political reform required of the Authority in the same resolution. See further T. D. Grant, 'Iraq: How to Reconcile Conflicting Obligations of Occupation and Reform', *ASIL Insight*, June 2003, available at http://www.asil.org/insights/insigh107a1.htm (accessed 9 July 2003).
143. J. J. Paust, 'The US as Occupying Power over Portions of Iraq and Relevant Responsibilities Under the Laws of War', *ASIL Insights*, April 2003, http://www.asil.org/insights/insigh102.htm (accessed 5 June 2003).
144. R. Dobie Langenkamp and R. J. Zedalis, 'What Happens to the Iraqi Oil?: Thoughts on Some Significant, Unexamined Questions Regarding Occupation of Oil Fields' (2003) 14 EJIL 417.
145. Amnesty International, *supra* note 140.
146. According to US State Department spokesperson Richard Boucher, foreign diplomats in Iraq have no status because 'They're accredited to a regime that is no longer existent.' There are now no diplomatic privileges in Iraq 'because there's no government in Iraq'. F. L. Kirgis, 'Diplomatic Immunities in Iraq', *ASIL Insight*, June 2003, available at http://www.asil.org/insights/insigh109.htm (accessed 7 July 2003).

the US occupation. I want to conclude this section by turning briefly to two such texts syndicated in Australian newspapers during April 2003, towards the final stages of the formal phase of the war. The first appeared on 12 April among a collection of articles about the conduct of the war, the consequences for international and domestic Australian politics, and the nature of reconstruction in Iraq. The article, entitled 'A Tour of the Palace', was syndicated from the United Kingdom's *Guardian* newspaper, and explored the responses of US military men and their leaders to the palaces of Saddam Hussein and his sons.[147] The piece mocks the tawdry glamour of these palaces, seeking to explore in a complicated double movement why the Husseins were illegitimate occupants of these ostentatiously grand palaces (and thus illegitimate rulers of Iraq), and whether the palaces might provide suitable headquarters for the then US civilian administrator General Jay Garner. So the reader is told that while the bombed palaces are beautiful, 'lavishly appointed', with 'miles of marble corridors', 'mirror and gilt ceilings', and 'huge chandeliers'; the US soldiers interviewed found 'a kind of cheap feel' and dismissed the fittings as 'cheesy'. Said one American sergeant: 'This is Saddam Hussein's palace? . . . He might have been rich, but he had poor taste'. Commenting on the corpses he passes on his way to the palace, the journalist remarks that the landscape of rotting bodies 'could hardly have been more removed from the scenes that would have unfolded at the palace during the days of Saddam and his sons. Then it was not about death but sex'. According to rumour, or so the author tells us, the inhabitants kidnapped young women off the streets to rape them inside these walls. The excessive sexuality of Iraq's former rulers is evidenced by the signs of 'splendour and decadence' still evident among the wreckage – a painting of a man with his hand on the breast of a woman, curtained beds, fountains (?), and locked doors, all indicating the nature of the goings-on inside the palace.

In a related article published the following weekend and entitled 'What Does this Painting Tell Us?', the links between aesthetics and authority are made even clearer.[148] There the journalist Jonathan Jones comments:

> The paintings of naked blonde maidens menaced by dragons and trolls, warriors wrestling serpents and a wet dream of missiles that have been found in Saddam Hussein's palaces and love shack feel like proof of something . . . . That is certainly how the photographs make it seem. In lieu of American soldiers posed next to chemical warheads, we have an American soldier contemplating a mural of massed rockets framed in an arched recess between purple marble columns in one of Saddam's Baghdad palaces. We may not yet have found weapons of mass destruction – but just look at this proof of the dictator's execrable sensibility . . . . And if this is the authentic taste of Saddam, it is that of a man who seems on this evidence to have lived according to a code of aestheticised, eroticised violence for which no one has yet to come up with a better word than fascism.

This representation is precisely a means of responding to anxieties about the proper sovereign subjects of international law, for the reader is told that these

147. S. Goldenberg, 'A Tour of the Palace', *The Age*, 12 April 2003, 3.
148. J. Jones, 'Saddam's Art: What Does this Painting Tell Us?', *The Age*, 18–19 April 2003, Insight 9.

'pleasure domes' are being toured by the 'newly designated, temporary military ruler of Iraq', the retired American general Jay Garner, 'who is in search of a headquarters for the new regime'.[149] Questions about the legitimacy of the new American occupiers of these splendid palaces are countered in these texts with 'proof' of the despotic nature of the former inhabitants. Sexual excess works as the marker of the impropriety of the regime of Saddam Hussein and his sons. We might think of Queen Elizabeth's Homily on Obedience, which reassured the inhabitants of early modern England that 'God hath created everything in its proper place' but then describes the volatile underside of that natural God-given order in erotic terms. 'For where there is no right order, there reigneth all abuse, carnal libertie, enormitie, synne, and Babilonical confusyon.'[150] This is the world that the US military – exemplary representatives of 'ryght order' – found in the palaces of Saddam Hussein – a world of 'carnal libertie, enormitie, synne', ... and bad art. As with the Homily, the picture of Iraq is one that 'imagines chaos and disorder largely in terms of erotic indulgence riotously out of control'.[151] And the juxtaposition of uncontrolled erotic indulgence with the dead bodies of other Iraqis (albeit those who died during the American bombing) reminds us that there are worthy and authentic Iraqis out there – those victims who need our help. Indeed, according to an economist speaking on Australian radio during the war, one good thing that will hopefully result from the conflict is that we shall come to see this region as needing our help, our aid. That is why 'we' are the proper masters of Iraq.

3. The secret history of international law

3.1. Transference and the question of international law

I want now to return to the parable with which Martti Koskenniemi concludes his history of European international law. Koskenniemi writes the epilogue to this history as a story about a father and his two sons – one the good son who follows in his father's formalist footsteps, one the rebellious son who seeks power and success. This story foregrounds the homosocial relations between those whom Koskenniemi names as the founders of international law and explores what is at stake for the discipline as the question of what is transmitted between men, across generations.[152] This section develops this insight, to suggest that the nature of the disciplinary, homosocial inheritance is precisely what is at stake in the serial crises of international law and order. In order to speculate about this inheritance, I draw on three readings of the way in which a tradition keeps 'within itself the secret of whatever it encrypts, the secret of its secret'.[153]

149. *Ibid.*
150. 'The Homily on Obedience' (1559), reprinted in A. M. Kinney (ed.), *Elizabethan Backgrounds: Historical Documents in the Age of Elizabeth 1* (1975), 61.
151. M. Breitenberg, *Anxious Masculinity in Early Modern England* (1996), 1.
152. I leave to a later date the complicated questions of what a daughter might inherit, and what a mother might represent, within such a tradition, but starting points for exploring these questions are J. Butler, *Antigone's Claim: Kinship Between Life and Death* (2000); J. Copjec, *Imagine There's no Woman: Ethics and Sublimation* (2002); L. Irigaray, *Speculum of the Other Woman*, trans G. C. Gill (1985), 13–129.
153. J. Derrida, *The Gift of Death*, trans. D. Wills (1995), 21.

The first such secret history is Eric Santner's rereading of the memoirs of Daniel Paul Schreber. In 1893, soon after Schreber was named *Senatspräsident* or presiding judge of the Saxony Supreme Court, a key centre of legal authority in Wilhelmine Germany, he suffered a psychotic breakdown.[154] After spending the next ten years in a series of mental institutions Schreber published his *Memoirs of My Nervous Illness* in 1903. His account was to form the basis of Sigmund Freud's famous case study of paranoia.[155] Santner rereads the Schreber case as offering insights into what happens when there is a crisis in 'those symbolic resources that human societies depend upon to assure their members that they are "legitimate"'.[156] Of particular value for the questions I am asking here are the ways in which Santner understands the meaning for modernity of that particular crisis of investiture experienced by Schreber.

Schreber's crisis was triggered when he underwent his 'symbolic investiture' as *Senatspräsident*.[157] This was a point at which a new legal order was emerging in Germany. Work on a new civil code began in 1874 and was completed in 1896. During that process public criticism of the draft code meant that it was not possible to suppress the extent to which liberal law served to defend the interests of particular groups within society. Debates about legal codification were thus 'one of the key sites where German society confronted the radical social changes associated with modernization and state formation as well as the shifting meanings of national identity in a period of cultural turbulence and contestation'.[158] International legal debates concerning the use of force, human rights, terrorism, and development are similar sites for confronting radical social changes in the age of globalization. And, as is the case with international law, the project of creating a 'unified law of the Reich' involved 'coming to terms not only with strong differences and conflicts between the heterogeneous legal codes and interests of the various German states and regions, but also with the needs and interests of new social constituencies whose contours were taking shape in the waves of industrialization and urbanization that dominated the last decades of the nineteenth century'.[159] In Santner's reading, Schreber's breakdowns were thus in part caused by his 'relation to the exemplary domain of symbolic authority to which his life was intimately bound, namely the law', at a moment of significant crisis for that institution.[160] This is a 'chronic state of emergency that, in effect, haunts all institutions insofar as they are dependent on the reality effects of performative utterances'.[161] For Schreber, the return of this suppressed knowledge involved the failure of 'the transmission of those symbolic resources with which he might have reassured himself that he was, in a deep and

154. E. L. Santner, *My Own Private Germany: Daniel Paul Schreber's Secret History of Modernity* (1996), xiii.
155. S. Freud, 'Psycho-Analytic Notes on an Autobiographical Account of a Case of Paranoia (Dementia Paranoides)' in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, ed. James Strachey, vol. XII (1961), 9.
156. Santner, *supra* note 154, at 144.
157. *Ibid.*, at xiii.
158. *Ibid.*, at 15.
159. *Ibid.*
160. *Ibid.*, at 26, 32.
161. *Ibid.*, at 43.

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dependable sense, legitimate'.[162] As I have suggested so far, just such a 'chronic state of emergency' haunts international legal scholarship.

The political point made by Santner is that the series of crises experienced by Schreber 'were largely the same crises of modernity for which the Nazis would elaborate their own series of radical and ostensibly "final" solutions'.[163] Yet while Schreber was experiencing the same crises as Nazism, his response was quite different. Schreber's delusional system was founded on compassionate identifications with those who were cursed with occupying the place of abjection in German culture at that time, and thus he 'managed to avoid … the totalitarian temptation' of a final solution designed to recreate a sense of a unified nation or a coherent community.[164] Santner reads Schreber's memoirs as offering 'the prospect of new strategies of sapping the force of social fantasies that might otherwise lend support to the totalitarian temptation':[165]

> Schreberian compassion … is a way of refusing to refuse the knowledge of the impasses and dilemmas of symbolic power and authority. At some level, Schreber was saying, indeed screaming, to those figures who were … cursed with the role of embodying these impasses: 'That is me'! … Of course, Schreber's fate as a psychotic suggests that one should not, as they say, try this at home; it is, in other words, genuinely maddening to find oneself occupying the place of abjection in the absence of some minimal form of human solidarity. What ultimately saved Schreber from psychological death, at least for a short while, was no doubt his residual need and capacity to *communicate and transfer* his 'discoveries', to inaugurate a new *tradition* constructed out of and upon the inconsistencies and impasses of the one he had known and which he had been called upon to represent.[166]

International law provides a practice of profound and sustained engagement with what Santner describes as the 'modern experience'. Whereas the success of other forms of law depends on acting as if the law had a solid ground or foundation, for international law this is impossible. There is no nation-state or ultimate sovereign that can act as 'guarantor of a right'[167] and thus do away with the uneasiness or anxiety caused by an inability to ground international law. International lawyers are thus always 'before the law' in the sense that Derrida describes – in the 'situation both ordinary and terrible of the man who cannot manage to see or above all to touch, to catch up to the law'.[168] This is the situation, 'both ordinary and terrible', that also confronted Schreber as he became fully aware that he was 'suspended in the void or above the abyss, suspended by a pure performative act that would not have to answer to or before anyone'.[169] The modern tradition of international law is itself 'constructed out of and upon' the sorts of 'inconsistencies and impasses', or the crises of authority, that Schreber was to make visible. The secret of that ongoing

162. *Ibid.*, at 61.
163. *Ibid.*, at xi.
164. *Ibid.*, at xi.
165. *Ibid.*, at 144.
166. *Ibid.*, at 144 (emphasis in original).
167. Derrida, *supra* note 118, at 943.
168. *Ibid.*, at 993.
169. *Ibid.*

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crisis remains inscribed within the discipline of international law, such that we continue to find ourselves again at a 'moment of danger'.[170] Perhaps this is one of the functions of international law as a discipline. As Santner suggests above, it was 'the need and capacity to *communicate and transfer* his "discoveries", to inaugurate a new *tradition*', that made the difference for Schreber.[171]

In his reading of that part of *Beyond* concerning the repetition compulsion, Jacques Derrida suggests that a tradition (psychoanalysis, international law) can be inaugurated in response to such dangers. Derrida draws attention to Freud's distinction between the experience of the child and of the adult with respect to repetition.[172] For the child, repetition gives pleasure, particularly the form of pleasure linked to mastery. 'For the adult, on the contrary, novelty is the condition for pleasure, says Freud.'[173] So, 'Faced with repetition, with the relation of the related of the scene, the child indefatigably asks for more, erasing the variant, while the adult flees it – at least as an adult – becomes bored, and seeks division'.[174] When an adult 'compulsively reproduces the repetitive demand (for example in analysis, and in the transference), he goes beyond the [pleasure principle], and acts like a child'.[175] This repetition compulsion is 'one of the first conditions of analysis', but if it remains it becomes a barrier to the success of analysis. Importantly for my reading, Derrida argues that this condition of possibility can be related to the creation and constitution of a discipline through transference forward and back across generations.

> Since this possibility is inscribed in the transferential structure, i.e. that the condition of its possibility can become the condition of its impossibility, what we said above about the scene of inheritance can help us to understand it better: an undissolved transference, like an unpaid debt, can be transmitted beyond one generation. It can construct a tradition with this possibility in its entrails. One can even begin a tradition for this purpose, giving it the forms necessary for this effect, and using all possible means to make the encysted threat endure, sleeping. When Freud speaks of the demonic as concerns the therapeutic obstacle, or even the fear of psychoanalysis (the dread of awakening something better left asleep), one can also relate (and overlap) this to (with) the relation that a tradition, for example the tradition of the psychoanalytic 'movement' or 'cause', maintains with itself, with the archive of its own demon.[176]

To speculate: what, then, if the 'undissolved transference' of international law is transmitted beyond one generation, so that the repetition compulsion is the condition of possibility of international law? David Kennedy's article, 'When Renewal Repeats', captures just such a sense of international legal discourse.[177] As he notes in his introductory paragraphs, this essay was written in response to an invitation by the student editors of the *New York University Journal of International Law and Politics*, seeking 'new thinking' for the journal's millennium issue and asking, 'what

170. Benjamin, *supra* note 129, at 247.
171. Santner, *supra* note 154, at 144.
172. Derrida, *supra* note 14.
173. *Ibid.*, at 352.
174. *Ibid.*, at 352–3.
175. *Ibid.*, at 353.
176. *Ibid.*
177. D. Kennedy, 'When Renewal Repeats: Thinking Against the Box', (2000) 32 *New York University Journal of International Law and Politics* 335.

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international legal issues will consume your legal career and shape the parameters of international law in the new millennium'?[178] Kennedy's response is overtly located, as is much of his recent work, within a pedagogical relation, and reflects on 'the role of novelty and innovation in the field'.[179] There, Kennedy works through the compulsion to repeat the project of renewal in international law, linking it to the constitution of a discipline and the affiliations involved in such a constitution. It is, in a sense, an attempt to come to terms with, to name or accept, the compulsions at the heart of international law.

Kennedy suggests that while successive generations of international lawyers seem committed to understanding their professional role as one of engaging in renewal, reform, or 'new thinking', in fact 'international lawyers return repeatedly to two basic axes of philosophical disputation, each with its own well-developed vocabulary: the relationship law should seek to strike between an international community and sovereign autonomy and the most effective balance between a more or less formal law'.[180] For Kennedy, it is as if international lawyers can continue to play this game without exhausting our capacity for taking pleasure in it. We don't get bored, we don't need novelty, except to the extent that we believe ourselves to be creating novel forms when we call for renewal. The sense of a lack of movement or disciplinary progress is summed up nicely in an image used by Kennedy in his discussion of these argumentative patterns that organize international law:

> [A]fter mapping the discipline's vocabulary, the temptation is strong to think that 'something else is going on' besides good faith pragmatism to animate changes in the discipline's preoccupations and arguments. It seems almost inconceivable that international lawyers should return again and again to the same set of ambivalent commitments as they struggled to respond to all the world's various practical challenges … Perhaps … beneath all this professional rhetoric, international lawyers are caught in a sort of disciplinary hamster wheel.[181]

I find Kennedy's image striking, both for its suggestion that any sense of progress is illusory and for the idea of the law encircling something. Perhaps international law has inscribed within it a secret? Do we transfer this secret across generations because there is something 'better left asleep' here – perhaps that which calls up the legal responses justifying the wars on terror as defensive self-preservation? Is this at the heart of the relation that the tradition of international law 'maintains with itself, with the archive of its own demon'?

3.2. Beyond the sovereign

> There is no destination, my sweet destiny …[182]

Having already described the ways in which international law seems to recognize and then contain this crisis of authority, I want now to suggest that there is another

178. *Ibid.*, at 335.
179. *Ibid.*
180. *Ibid.*, at 363.
181. *Ibid.*, at 407.
182. Derrida, *supra* note 14, at 29.

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sensibility in international law that avoids reasserting sovereignty. Recent critical histories of international law make available some sense of the alternatives embedded within international law as ways of responding to this open question of authority. I am thinking particularly of work focusing on international legal texts of the late nineteenth and early twentieth centuries. Here I want to focus again on Koskenniemi's *The Gentle Civilizer of Nations*.[183] As part of what is transmitted within this tradition, Koskenniemi finds in his critical history a current of European international legal writing that represents an 'openness to the possibility of community between different-thinking particularities' which resists 'the closed world of fixed identities' that founds the international law of our post–Cold-War era.[184] Rather than construct the world in terms of the moral certainty of those who are with us or against us, this tradition of international law 'represents the possibility of the universal … but it does this by remaining "empty"'.[185] So for Koskenniemi the question that structures this international law is 'what is it that we lack'?[186] International law then maintains 'the possibility of an open area of politics' that reaches towards a non-imperialist universality as a 'horizon of possibility'.[187] It is here, if anywhere, that international law seems to offer a narrative that is not organized around the desire for a unitary authority, the possibility that international law could encourage an anxious sovereignty rather than contain it. In the words of Koskenniemi, 'the inner anxiety of the Prince is less a problem to resolve than an objective to achieve'.[188]

Yet, as Koskenniemi recognizes, the history he writes of a modern international law capable of critiquing or moving beyond sovereignty is marked by the enthusiasm of these same European international lawyers for the maintenance of a strong sovereign state in their colonial territories.[189] This mirrors the argument made by Gayatri Spivak in her response to Michel Foucault's famous recognition of the move from sovereign or juridical mechanisms of power to biopolitical forms of power in the states of Europe during the seventeenth and eighteenth centuries.[190] While Foucault points to the emergence of a new mechanism of power in Europe that was 'absolutely incompatible with the relations of sovereignty' and far more 'dependent upon bodies and what they do than the Earth and its products', Spivak insists that the move to a liberal European polity 'is secured *by means of* territorial imperialism – the Earth and its products – "elsewhere"'.[191] This imperialism worked not only as a

183. For other critical histories exploring the resources offered by this period of international law and its modernist passions and fantasies, see O. Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance Towards Culture, History and Community* (2000); N. Berman, 'Legalizing Jerusalem or, of Law, Fantasy, and Faith', (1996) 45 *Catholic University Law Review* 823; N. Berman, 'Between "Alliance" and "Localization": Nationalism and the New Oscillationism', (1994) 26 *New York University Journal of International Law and Policy* 449.
184. Koskenniemi, *supra* note 17, at 504.
185. *Ibid.*
186. *Ibid.*, at 506.
187. *Ibid.*
188. Koskenniemi, *supra* note 90, at 175.
189. Koskenniemi, *supra* note 17, at 5, 143–78.
190. M. Foucault, 'Two Lectures', in *idem, Power/Knowledge: Selected Interviews and Other Writings*, ed. C. Gordon, trans. C. Gordon, L. Marshall, J. Mepham, and K. Soper (1980), 104.
191. G. C. Spivak, *A Critique of Postcolonial Reason Toward a History of the Vanishing Present* (1999), 279 (emphasis in original).

means of exploiting the resources and labour of the people who inhabit this space outside Europe but also in the ways in which Europeans imagined the inhabitants of such territories as doubles whose suffering existence supported the subject of the Christian West.[192] Jennifer Beard has traced this constitution of a valuable self for the West through centuries of the performance of Christian narratives of salvation over the bodies of those marked as other.[193]

Just such a 'Christian poetics of the journey of the soul' founds the humanitarian sensibility of those men of the Institut de droit international whom Koskenniemi names as the '"founders" of the modern international law profession' and the later 'representatives of international law's heroic period'.[194] These 'founders of the Institut were active Protestants whose activism also constituted a demonstration – to oneself at least as much as to others – that the internal qualities needed for salvation were indeed present'.[195] This demonstration to one's fraternity and oneself of the possession of the qualities needed for salvation involved a faith in European society as the end point of civilization, a desire to extend 'the mores of an *esprit d'internationalité* within and beyond Europe' and an appreciation of the utility of rationalism as a means of creating 'a distance between their societies and what colonial administrators encountered as they penetrated deeper into "uncivilized" territory'.[196]

The capacity to imagine that a colonial territory was the 'possession' of a European state was at the heart of the ability of these men of empire to maintain their sense of themselves as free and autonomous European subjects – 'just as ownership was a projection of the owner's person in the material world, colonial possession was an aspect of the healthy State's identity and self-respect'.[197] The 'blind spot' among these international lawyers was the atrocities that went on in '"normal" or "legitimate" French or German colonies in Africa'.[198] The role of international law in the age of formal imperialism was to regulate the relations between 'sovereigns', understood exclusively as European. For example, Koskenniemi's reading of the 1885 Berlin Act points to its exclusion of 'any pretensions to sovereignty that indigenous communities might have entertained. Articles 34 and 35 treated "sovereignty" as a quality that could only attach to a European possession.'[199] Similarly, Westlake wrote in 1894 that international law 'regulates, for the mutual benefit of the civilized states, the claims which they make to sovereignty over the region and leaves the treatment of the natives to the conscience of the state to which sovereignty is awarded'.[200] This,

192. J. Lacan, *The Seminar of Jacques Lacan, Book VII: The Ethics of Psychoanalysis 1959–1960*, ed. J.-A. Miller, trans. D. Porter (1992), 261.
193. J. Beard, *The Political Economy of Desire: Law, Development and the Nation-State* (forthcoming, 2004).
194. Koskenniemi, *supra* note 20, at 92, 511. My sense of this 'Christian poetics of the journey of the soul' is drawn from the work of Judith Grbich, particularly 'Ned Kelly as Fetish: Filming Law's Colonial Imaginary', paper presented as part of the Postcolonial Legal Scholarship seminar series, Institute of Postcolonial Studies, Melbourne, 29 May 2003; and 'Semiotics and Law Down-Under – Aesthetics in Christian Juridico-Theological Tracts: The Wanderings of Faith and Nomos', (2000) 12 *International Journal for the Semiotics of Law* 351.
195. Koskenniemi, *supra* note 17, 54.
196. *Ibid.*, at 92–3.
197. *Ibid.*, at 109.
198. *Ibid.*, at 165–6.
199. *Ibid.*, at 126.
200. *Ibid.*, at 127.

of course, was also the basis for the doctrine of *terra nullius*, according to which the notion that the land belonged to 'no one' referred exclusively to European sovereigns. Later, as the *Commentary* reminds us, the UN trusteeship system was itself designed to ensure that the interests of foreign states other than the trust power were not ignored in a territory, through principles such as the 'open door' policy and the inclusion of a 'national treatment' provision in Article 76(d). European administering powers in neighbouring territories were willing to sign treaties between themselves relating to the joint use of resources in their trust territories, without including as signatories the inhabitants of the territories themselves.[201] The prevailing view was that 'the population of a trust territory is not organized to exercise authority', and thus 'is not a subject of international law'.[202] This history suggests that the support of nineteenth-century European internationalists for the maintenance of a disciplining sovereignty 'elsewhere' was not just a historical accident but the condition that enabled them to tolerate the recognition of the emptiness that founded their own relationship with authority and law. Its legacy has played out in the intervening period through the colonial imaginary underpinning narratives of international economic law and of humanitarian intervention, among others.[203]

Is a less violent response to the lack that founds modern law possible outside these imperial relations? In order to explore this question, I want now to draw on the reading by Shoshana Felman of *Beyond the Pleasure Principle*.[204] As Freud was to counsel in *Beyond*, the compulsion to repeat can be a performance of the death drive – in international law, the repetition involved in controlling the anxiety produced by our inability to master our field of knowledge is too readily played out in the manner bequeathed to us by our legal forefathers of the classical imperial era.[205] Yet Felman finds in the work of Freud, particularly as rewritten by Jacques Lacan, quite a different use for this compulsion to repeat. Felman takes us back to the plays of Sophocles, the source of the guiding myth of Oedipus that was to shape so much of psychoanalytic practice. For Felman, drawing on Lacan, the essential moment in the myth of Oedipus occurs not in the play *Oedipus Rex*, but in its tragic sequel, *Oedipus at Colonus*. At the end of *Oedipus Rex* the king recognizes the words of the oracle as the meaning of his history – he has killed his father, married his mother, and brought tragedy upon his house. His destiny is that which the oracle foretold. Yet at the end of that play, while Oedipus names 'his desire and his history', he 'does not truly assume them . . . Oedipus accepts his destiny, but does not accept (forgive) himself'.[206] Rather, in a final act of attempted self-appropriation, of mastery or control, Oedipus performs 'consciousness' last gesture of denial: the self-blinding'.[207] The turning-point of the Oedipal myth for the meaning of psychoanalysis occurs in scene 2 of *Oedipus at*

201. *Commentary*, *supra* note 16, 1103.
202. *Ibid.*, at 1103.
203. Orford, *supra* note 92; Beard, *supra* note 193.
204. Felman, *supra* note 14. For an exploration of the resources offered by human rights discourse as a basis for responding to the recognition of the lack that founds modern law, see Orford, *supra* note 92, at 186–219.
205. See the discussion in Orford, *supra* note 92, at 179–80, 183–5.
206. Felman, *supra* note 14, 131.
207. *Ibid.*, at 138.

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Colonus. The exiled and blinded Oedipus is told by his daughter Ismene that the oracles now prophesy that the people of Thebes will desire Oedipus for their safety after his death and even while he lives. In response Oedipus asks, 'Am I made man in the hour when I cease to be?' For Lacan, it this moment, this speech, that gives 'its whole meaning' to the history of Oedipus.[208] Felman explains the significance of this moment for the relationship of psychoanalysis to the Oedipal myth:

> What is it, then, that makes for Oedipus' humanity and strength at the very moment when he is 'finished', at the moment when, reduced to nothing, he embodies his forthcoming death? What is it that Oedipus, beyond the recognition of his destiny, here assumes . . . ? He *assumes the Other* – in himself, he assumes his own *relation* to the discourse of the Other . . . ; he assumes, in other words, his radical decentring for his own ego, his own self-image (Oedipus the King) and his own consciousness. And it is this radical acceptance and assumption of his own self-expropriation that embodies, for Lacan, the ultimate meaning of Oedipus' analysis, as well as the profound Oedipal significance of analysis as such.[209]

At the end of *Oedipus at Colonus* Oedipus abandons himself to his destiny, and in so doing, accepts his lack of mastery over himself. As Felman shows, it is this same gesture that is performed by Freud in *Beyond*, and this performance which has made *Beyond* such a controversial and productive text for the discipline of psychoanalysis and more broadly. *Beyond* is thus to *The Interpretation of Dreams* as *Oedipus at Colonus* is to *Oedipus Rex*. In *Beyond* Freud goes beyond the meaning of the Oedipal myth with its lesson of wish-fulfilment or the pleasure principle. He offers instead a new myth, that of the compulsion to repeat or the death drive, which fractures the foundations of his discipline's claim to mastery. So in offering this retelling, Freud accepts his own, or his discipline's, lack of mastery over speech, over its field of knowledge. Felman argues that psychoanalysis, in this acceptance of the 'beyond', enables a productive use of the compulsion to repeat. For Felman, psychoanalysis enables 'a *life usage of the death instinct* – a practical, productive use of the compulsion to repeat, through a replaying of the symbolic meaning of the death that the subject has repeatedly experienced'.[210]

If we turn again to the drama of Oedipus we can see that at the heart of this 'replaying of the symbolic meaning of the death that the subject has already experienced' is the capacity to transmute that death into language and, in particular for Oedipus, 'into the symbolic language of the myth'.[211] As Felman argues, the final lesson dramatized in *Oedipus at Colonus* is the '*blessing* Oedipus imparts by the mystery in which his death is destined to be wrapped. Now a blessing is not the gift of a solution . . . but nonetheless a gift – of speech':[212]

> OEDIPUS: I come to give you something, and the gift
> Is my own beaten self: no feast for the eyes;

208. J. Lacan, *Le Séminaire, livre II: Le Moi dans la théorie de Freud et dans la technique psychanalytique* (1978), 250, translated and quoted by Felman, *supra* note 14, at 132.
209. Felman, *supra* note 14, at 133 (emphasis in original).
210. *Ibid.*, at 139 (emphasis in original).
211. *Ibid.*, at 136.
212. *Ibid.*, at 142 (emphasis in original).

> Yet in me is a more lasting grace than beauty.
> THESEUS: What grace is this you say you bring to us?
> OEDIPUS: In time you'll learn, but not immediately.
> THESEUS: How long, then, must we wait to be enlightened?
> OEDIPUS: Until I am dead, and you have buried me.[213]

Here, the gift of speech is, as always, the gift of an enigma or another riddle. The myth that will be founded after the death of Oedipus will act not because of its claims to truth or accuracy 'but by virtue of its resonance'.[214] As Freud recognized in *Beyond*, it is not possible to found a kingdom or a possession on such a myth – 'the narrative movement of the myth is precisely that which always takes us – if we dare go with it – *beyond itself*'.[215] This assumption of its own history is not something that a subject, or a discipline, can perform once and for all, not something that can be owned. Rather, the insight into one's destiny

> is not a cognitive possession, it is an event: the singular event of a discovery, the unique advent of a moment of illumination that, because it cannot by its very nature become a heritage, an acquisition, has to be repeated, re-enacted, practised each time for the first time.[216]

In her later work Felman argues that the disciplines of law and of literature 'embody, in effect, two different ways of addressing' the abyss produced by this recognition that there is no firm ground on which to build a self, or a kingdom.[217] Law, she says, seeks more or less successfully to close over this abyss:

> In its pragmatic role as guardian of society against irregularity, derangement, disorganization, unpredictability, or any form of irrational or uncontrollable disorder, the law, indeed, has no choice but to guard against equivocations, ambiguities, obscurities, confusions, and loose ends. All these the abyss embodies, in the image of a danger the law fears above all: that of a failure of accountability (or of a breakdown in foundation and foundational stability); that of a *loss*, of a *collapse* (absence) *of grounds*.[218]

In order to try to reduce or deny the threat posed by that which 'cannot be totalized' or enclosed, the law tries 'to *make sense of the abyss*', to name it or bring it within the logic of the law.[219] This, Felman argues, involves 'pretending, or ... misguidedly assuming, the abyss is something else, something that can be assimilated to known rules or precedents, something that can be enclosed, contained within the recognizability of known (stereotypical) legal agendas'.[220] Felman opposes this legal approach to the abyss to that of literature. She suggests that 'the purpose of the literary text is, on the contrary, to show or to expose again the severance and the schism, to

213. Sophocles, *Oedipus at Colonus*, trans D. Grene, in D. Grene and R. Lattimore (eds.), *Complete Greek Tragedies* (1954), scene 3, 105–6, quoted in *ibid.*, at 142.
214. Felman, *supra* note 17, at 152.
215. *Ibid.*, at 158 (emphasis in original).
216. *Ibid.*, at 12.
217. Felman, *The Juridical Unconscious: Trials and Traumas in the Twentieth Century* (2002), 94–6.
218. *Ibid.*, at 95 (emphasis in original).
219. *Ibid.* (emphasis in original).
220. *Ibid.*

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reveal once more the opening, the hollowness of the abyss, *to wrench apart what was precisely covered over, closed or covered up by the* [*law*].'[221]

International law departs from the forms of law Felman describes in its inability ever to secure its grounds or to perform the role of sovereign guarantor of meaning. Its approach to the abyss is closer to that which Felman ascribes to literature than it is to the role she attributes to 'law'. Yet, to paraphrase Derrida, the fact that international law cannot secure its grounds is not necessarily bad news.[222] In order to explore this further I shall return to Kennedy's essay on renewal and international law. In the third and final part of the essay, Kennedy moves to describe his own disciplinary affiliations and the desires that structure them, assuming his own part in the practices of the discipline. Kennedy here narrates the tale of the affiliation of which he is one of the founding fathers, the New Approaches to International Law (NAIL) project. For Kennedy this 'group was filled with projects of intellectual affiliation and disaffiliation, as well as dominance and submission'.[223] It regularly seemed to be 'in danger of collapsing' when groups with quite different national or political or intellectual traditions 'suddenly found it inconceivable to be part of the same endeavour'.[224] Yet there were also moments in which the participants found it possible to move beyond disciplinary, identity, or national boundaries. This was a product of an attempt to attend to the interests of a broader audience made up of people who shared perhaps only a certain starting point or sensibility, a commitment to imagining 'that one might write for this weird and diverse group of people rather than for those within one's pre-existing speciality or affinity group'.[225] And the resultant energy and excitement evidenced Kennedy's recognition that 'Something terrific can happen when people who share this sense find ways of telling one another, of touching, itching, expressing the animus within'.[226]

In his narration of this tale, Kennedy performs that '*life usage of the death instinct*' which Felman has described.[227] His essay places the compulsion to repeat at the centre of international law, but, perhaps more importantly, locates his own institutional performance as driven by the acceptance of this same compulsion for new thinking and change. However, rather than direct this knowledge towards another act of compulsive renewal, Kennedy here narrates the death of the NAIL project, transforming it from a possession into a myth.

> I don't think about 'new thinking' as a set of methods, ideas, or propositions. For me, new thinking is a performance .... It happened, and people who came, who danced, who choreographed, and who played, had an experience which would otherwise not have been available to them .... There was a sensibility, there were moments of intellectual engagement when people felt the presence of innovation, when the bonds of conventional wisdom relaxed, when the discipline suddenly looked altogether different. Some people wrote things up, and taught things, and did things in the world

221. *Ibid.* (emphasis in original).
222. Derrida, *supra* note 118, at 943.
223. Kennedy, *supra* note 177, at 494.
224. *Ibid.*, at 494–5.
225. *Ibid.*, at 495.
226. *Ibid.*, at 499.
227. Felman, *supra* note 14, at 139 (emphasis in original).

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> afterwards, but to my mind these are largely dead things. At the 'Fin de NAIL' celebration, many participants knelt down to hammer a finishing nail into a charred and fur-bedecked chunk of wood that Gunter Frankenberg had brought along. It was a disturbing ritual, and the relic remains an arresting mark of our endeavour together. As one participant, I found in the NAIL a place where the spirit of new thinking lived for a while for some people.[228]

Here Kennedy's narrating of the 'fin de NAIL' and incorporating its death into language is done in order for its spirit to survive. At this point, in this passage that speaks of the love, friendship, passion, energy, and illumination created through a project which he helped to inaugurate, Kennedy describes an approach to knowledge and insight which assumes that illumination cannot become a possession and radically decentres his own sovereign position. He reminds us that those texts and relics (articles, chunks of wood) that we create out of such experiences are redolent with death – international law, like Oedipus, like Freud, like all of us, 'lives a life which is made of death'.[229] As I have suggested in this article, it is one thing for international lawyers to live with the recognition that we are always beyond what is known, but it is another to assume that destiny fully and to accept its meaning (death, separation, loss) without trying to allay the anxiety it produces. To assume the death of the subject as a coherent self, to accept the loss that this entails, is the 'symbolic means of the subject's coming to terms not with death but, paradoxically, with life'.[230] Such a project can never be completed, as Kennedy recognizes in a wonderful closing paragraph which fully assumes this loss and makes of it a gift.

> I do not think we got to the end of the effort to figure out what the discipline should do. I can say that on our best nights, we performed what the discipline can be. There will be other performances, projects, parties. Perhaps some new NAIL will emerge. If I hear of anything, I will be sure to let you know and hope to see you there. If you find yourself with an exciting project of criticism and innovation or if you see the light on far off down some road and think something great might be going on, call me. I've got my dancing shoes polished, and I'd love to come along.[231]

Or in the words of Oedipus:

> I come to give you something, and the gift
> Is my own beaten self: no feast for the eyes;
> Yet in me is a more lasting grace than beauty.

4. Conclusion

I have suggested in this article that the texts of international law 'provide opportunities for their writers to act out or, ideally, work through, some of the very issues animating the subject matter of the text'.[232] This 'we might call the passions of [international law], namely, the deeper motives and motivations animating its

228. Kennedy, *supra* note 177, at 498.
229. Lacan, *supra* note 208, cited in Felman, *supra* note 14, at 136.
230. Felman, *supra* note 14, at 139.
231. Kennedy, *supra* note 177, at 500.
232. Santner, *supra* note 154, at 19.

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choices of subjects'.[233] While often international law responds to the sense of a lack of mastery over its subject matter by acting out, attempting to reassert sovereign control, or imagining itself on a journey towards the creation of a powerful world community, there are those within the discipline who write in ways that do not serve to appropriate the anxiety this crisis engenders. Beyond the certainty of a sovereign law-maker is the unknown. This is the condition of possibility and the source of the productivity of international law.

My reading has suggested that, at those moments when international law manages to live with this unresolved – and unresolvable – crisis of authority, it may be best able to avoid the temptation to secure the grounds of law through a final solution in which those who are believed to threaten the health, security, emotional wellbeing, or morality of the international community are violently sacrificed for the good of the whole. Both the terrorist attacks of 11 September 2001 and the US military responses to those attacks have been experienced by international law as a reminder of that which cannot be enclosed, of that which escapes the law. My hope is that the anxious subjects of international law might react to this insight into the 'necessary failure' to close over the abyss with the good humour evidenced by Simma in his preface to the *Commentary*, or with the grace displayed by Kennedy in his farewell to NAIL. International law can, and at times has, involved the performance of another way of living with, of accepting, uncertainty, anxiety, instability. It may be that this sense of always occupying the place beyond what is known is the destiny, if not the destination, of international law.

233. *Ibid.*

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