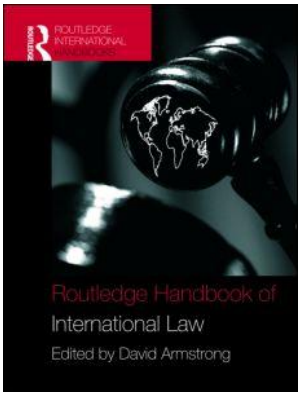

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The Practice of International Law

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The practice of international law

Anthony Carty

This chapter designates the analytical framework within which one can assess whether states, through their practice, recognize a rule, principle or practice as binding on them as law. Academic international lawyers do not usually go further in defining the practice of states than to look at the jurisprudence of the International Court of Justice on the issue of definition of customary international law, and, additionally, compiling official state communiqués in semi-official national yearbooks. We offer, instead, an explanation of how the archival tools of diplomatic history can reveal how far it is possible to construct an historical narrative that determines precisely whether law has formed part of the motivational structure of a state, when the question is whether it is observing or creating international law. At the same time, it is necessary, in expositions of state practice, to be aware, at the systematic, theoretical level, of the impact which the nature of international society will have on the willingness of states to give a place to international law alongside their anxieties about national interests and security. It is also valuable to consider not only the extent to which diplomatic history can make transparent the role of international law in state practice, but also the extent to which this practice does or does not confirm or deny the skepticism of realist theory about the place of international law in international society.

Introduction: the state of the academic discussion

It is possible to give the concept "practice" several meanings. Perhaps the most obvious is to trace the practical activities of lawyers as international lawyers. In *The International lawyer as Practitioner* Wickremasinghe identifies 10 different roles for the international lawyer. As a U.K. Foreign Office legal adviser he has numerous functions: advising on the place of international law in making foreign policy; negotiating treaties; codification of the law; advising at the U.K. Permanent Mission at the United Nations or the European Union. The international lawyer also has a role as an advocate at a domestic or international court level. He serves as international judge or as arbitrator and he also advises both non-governmental and international organizations (Wickremasinghe 2000).

Another meaning, the one preferred here, is to designate an analytical framework within which one can assess whether states, *through their practice*, recognize a rule, principle or practice, as binding on them as law. In other words, we mean to address quite simply the practice of international law by states.

The first problem to consider is that orthodox international lawyers do not

usually go further in defining the practice of states than to look at the jurisprudence of the international court of justice and then, sometimes, in addition, to compile official communiqués with respect to a country's state practice in semi-official national yearbooks of international law. There are huge problems with respect to both these undertakings. The first approach generally does not even directly address the means to gather state practice but instead confines itself to considering the judgments of the I.C.J. (and its predecessor the Permanent Court of International Justice) on the meaning of state practice, in particular the concept of general customary law.[1] So, no student of international law will be invited actually to explore the practice of states, if he/she follows the guidance of the standard textbooks. Instead they will be invited to comment on the more or less pragmatic deliberations of the International Court.

According to the view of the I.C.J., one is to find that states have, in some sense, a legal conscience or sense of conviction. In the *North Sea Continental Shelf* cases, which are most usually cited, the Court said that the "practice of states" relevant to the assertion that a rule of customary international law exists must:

> [B]e such, or be carried out in such a way, as to be evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it (*opinio juris sive necessitatis*) . . . The States concerned must therefore feel that they are conforming to what amounts to a legal obligation.
>
> (I.C.J. Reports 1969: 77)

The basic problems with this formulation have been put squarely by both Sorensen and D'Amato. Sorensen (1946: esp.109) points out how the very nature of relations among states makes ascertainment of an evolving customary law virtually impossible. Diplomatic negotiations remain so closed and secret that not even the representatives of one state will know what are the underlying motives of their opposite numbers. Yet such motivation is essential to the psychological element of custom. D'Amato (1971: 82–4) has been equally direct in questioning any possible legal method of observing customary law evolving out of the consciousness of a modern bureaucratic State.

It appears impossible to speak of states having an identity that allows one to suppose that, as centers of subjectivity, they have acquired a sense of obligation with respect to a particular matter. If the state is viewed as a corporate entity, the legal order that supports it should define the organs of the state competent for the purpose of creating general custom, and, furthermore, specify when in fact the organs are acting to this end. Yet the international legal order does not do this. Jurists are left fumbling with the idea that the state is itself, as a totality, in some undefined way, capable of having a "legal sense" that it is bound by a general custom that may even be supposed to be already existing. The reaction of some jurists has been to try to dispense with the psychological element of general custom altogether, yet without abandoning the concept of general custom itself (D'Amato 1971: 52; Sorensen 1946: 52).

Pierre-Marie Dupuy (2003a: 160, my translation) provides a most recent exhaustive and authoritative account of the formal problems for the mainstream. Dupuy draws attention to the fact that the profession must face a deficiency: "[T]hat, precisely, of the existence of *procedures*, duly formalized by the law itself, for the creation of customary norms." Dupuy (2003a: 160–61) remarks how there are very detailed rules for the conclusion of treaties, "but, there are not, to the contrary, to borrow the terminology of Hart, secondary rules governing the conditions of formation of custom . . . One contents oneself to affirm unilaterally that the rules of custom exist or one awaits a judge to say so himself, in place of the States." Until there is some form of "revelatory proof of its existence, generally judicial, a rule of custom remains a virtual rule. The paradox is that, trapped in its theoretical premises, the most classical positivist

doctrine, says Dupuy, nonetheless persists in seeing in custom, despite this absence of forms, a formal source of law with respect to the conditions of its creation, and not merely with respect to its content.[2]

There is a clear residual confidence among international lawyers that the international judiciary can "reveal," to use Dupuy's language, the presence of custom, and turn it from virtual to real law. Yet, it is almost a commonplace of legal doctrine that the I.C.J. has reached decisions in such cases as the *Fisheries Jurisdiction* (1974) or the *Advisory Opinion on Namibia* (1971) in the face of so much conflicting state interest and interplay of power, as to leave one at a loss as to how general custom is supposed to arise out of state practice (see, e.g. Churchill 1975; Hevener 1978: 793–4).

Some doctrinal consideration of what would be involved in actual, direct analysis of state practice does directly address the difficulties of assembling practice and then presenting it systematically. An authoritative recent representation of the debates about the two elements that make up customary law, material practice and the subjective element, is Mendelson's (1995) article, in which he raises the important question of whether, in order to assess the subjective element of custom, it is necessary to know the inner workings of a state bureaucracy. States do not have minds of their own:

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

After these important deliberations, Mendelson (1995: 195–6) writes that it is better to speak of the subjective rather than the psychological element of custom:

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

The United Kingdom *Materials on International Law* (until recently, edited by the late Geoffrey Marston) have been available in the British Yearbook annually since 1978. Marston has followed what is called the model plan for the classification of documents concerning state practice in the field of public international law, adopted by the Committee of Ministers of the Council of Europe in its Resolution (68)17 of June 28, 1968. This was amended by Recommendation (97)11 of June 12, 1997, following General Assembly Resolution 2099(XX) on technical assistance to promote the teaching, study, dissemination, etc. of international law. The changes are not significant, and the essence of Marston's approach is that he sets out, as Mendelson (1995) has put it "positions taken by organs of States about international law, in their internal processes and in their interaction with other States."[3]

Towards a phenomenology of the actual problem

In philosophical discourse the word *phenomenology* is used to describe the attempt to reach directly to the object one wishes to understand, through some scheme of full perception and digestion of the object. In this case, some general remarks have to be made about the significance of penetrating the

bowels of the state to find out whether and how it is observing or contributing to the creation of international law. In strict legal terms, the issue can arise in distinct ways. It may be a matter of determining whether a country is observing or violating a rule of law. Alternatively this may be a matter of assessing what contribution the country is making to the development or clarification of the law, where it is taken to be uncertain. In either case, it is not enough simply to know what verbal positions state organs take up. It is necessary to know what the country has actually done. The discrepancy will arise where the official positions are either not true or not the whole truth. But it need not even be so black and white morally. It may simply be that without the full picture, the actions of a state, such as the U.K., may be unintelligible.

In an article published in 1986, a Foreign and Commonwealth Office (F.C.O.) legal adviser drew attention to the fact that "informal agreements" played a large part in British foreign relations (Aust 1986: 787). The basic principle is that a state is free to deny itself the advantages of concluding a legally binding treaty in order to benefit from the advantages of concluding informal instruments. Security and defence issues are not the only issues covered, but it is clear that the advantage here is the flexibility which comes from secrecy. This background will usually be relevant to cases involving the use of force, as there will be agreements between the U.K. and its allies that are not public knowledge, or there may be relevant agreements even if the U.K. is not itself formally a party to them.

To present the issue in a wider context, one might take a well-known and still uncertain case, the U.S. bombing of Libya in 1986 from bases within the U.K. The terms under which the U.S. enjoys the use of military bases within the U.K. are known only to be the subject of informal agreements or even understandings. With the U.S. bombing of Libya from British territory, one question was whether the U.K. had the full legal power to permit the U.S. action. The U.K. did not try to claim that the U.S. had acted independently of it, but supported U.S. action, again relying on intelligence information – which could not be disclosed for security reasons – that there were very specific Libyan targets engaged in terrorist activity. The information could not be disclosed for fear of jeopardizing sources. Prime Minister Thatcher, in the House of Commons on 16 April 1986, affirmed that her legal advice was that the bombing targets chosen were permitted by Article 51 of the U.N. Charter, as a matter of an inherent right of self-defence against armed attack (see Carty 1990: 131–33).[4]

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

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

Yet, from a practical point of view it can be very difficult to penetrate significantly "into the bowels of the state." It is very difficult to discuss contemporaneous events for a number of reasons. Those involved are usually still alive and may continue to be engaged in the

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

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

What is needed is a framework of analysis of state activity that allows a legal analyst to engage in effective analysis of the conduct of states as actors in international society. This entails actually penetrating the corporate veil of the state in order to understand both facts and intentions. For some purposes this might not be strictly necessary, e.g. if the matter under observation is purely one of legal/state responsibility. Positions taken by governments would then be of more importance than understanding actions in contexts. However, investigation of customary practice is a matter of deciphering the normative significance of the behavior of collective entities, and of evaluating, comparatively, clashing collective actions. As we have seen, doctrine has virtually talked its way into the position that somehow the very idea that states have intentions, minds etc. is regarded as absurd. Instead, the notion of legal obligation of states is to be inferred from the results of their behavior, externally observed as a sort of material fact. As Akehurst (1974–5: 195) put it some time ago: "We cannot know what States believe. First of all States being abstractions or institutions do not have minds of their own; and in any case since much of the decision-making within governments takes place in secret, we cannot know what States (or those who speak for them) really think, but only what they say they think."

It is necessary to realize that there are degrees to which the internal workings of the state can be made transparent and part of the rigor which may accompany the work of the legal analyst is to realize the extent to which one is approximating total transparency. For instance purely historical work, in the sense that archives are fully open, allows one to construct an historical narrative that determines precisely whether law has formed part of the motivational structure of the action of a state.[5] This will constitute an absolute standard against which to judge whatever other explorations of state practice one may undertake. In this respect, the work of the legal analyst most closely approximates that of the diplomatic historian.

At the same time a theory of the practice of international law has also to consider the inherent possibilities of the impact of legal advising in the state structures which make up international society. This brings the legal analyst much closer to the theorist of international relations, as well as to the science of the history of political ideas. There is a

widely held realist view of the nature of international society, which dictates that a state will place its subjectively considered view of its national security needs above any international legal or moral standard. There is unending controversy about the extent to which this in fact must happen. However, the legal analyst needs to be conscious of both the pressures the "in-house lawyer" will suffer within national state bureaucracies and indeed the extent to which the whole ethos and intellectual tradition of international law, as part of the European history of political ideas, is itself permeated by the language of raison d'état.[6] Nonetheless, empirical investigation of the practice of international law within state structures should throw enormous light on the "real" force of "realist" perspectives on the importance of international law. Obviously, there are many other international relations perspectives, but space does not permit consideration of them and for this reason, the "realist" theory is chosen as the one most likely to discount any place for international law in the decision-making process of a state. The discussion will not focus on elaborating on variations of "realist" theory but merely try to expose, through a study of international law practice, the actual place of international law in international society in particular cases. Through study of numerous such instances of practice, it may be eventually possible to generate new international relations theory.

Exploration of state practice with the tools of diplomatic history

In the words of the 1920s' U.K. Foreign Office Legal Adviser, Sir Cecil Hurst: "What makes international law is the practice of governments, and to know in any particular case not merely what the Government did but why it did it, i.e. the particular circumstances in the case on which its view is based, is what makes the precedent valuable as a guide for the future."[7] In other words the legal advice only becomes the position of the government when the government actually follows it. At the same time where the government has heard legal suggestions but not followed them, that fact can indicate a great deal about the political character of the state decision, even when it cannot be said that the state has acted illegally. The manner in which the legal advice is introduced can affect its character. For instance, it is not uncommon for the lawyers to have no case stated to them, but simply to be sent all the relevant dispatches. This will have the effect that the lawyers are expected to enter into all the practical considerations on which the government has to decide. However, a more usual practice is for papers submitted to the legal advisers to be minuted so as to show as clearly as possible the points on which the legal advisers' view is required. Any use of that advice must be clearly approved by the legal adviser. According to a former legal adviser, this gives the lawyer not merely a function of finding and explaining the law but also "an important control over the way in which the law is applied in particular cases" (Berman 1994: 85).

The usually understood form of international legal analysis can be actually quite alien to the way in which international law is practiced, not simply in the sense of how international lawyers understand it, but also in the sense of how it becomes the international legal practice of states. Lawyers have distinguished what they call a purely legal method of exposition of the legal advice given to governments and an historical–diplomatic approach. Clive Parry, Lord Arnold McNair and H. A. Smith have expressed themselves on this matter. Part of the difficulty is seen to be feasibility to present all relevant contextual documentation, but also lawyers doubt whether they have the competence, in McNair's words, "to pursue each incident to its conclusion and find out what happened. That would be diplomatic history, a field in which I have no experience and into which I would not dare to enter" (McNair 1956: xx).

McNair and Parry both consider that legal advice is in itself very valuable, as being impartial advice given with respect to a concrete situation. One can wonder how they feel so assured as to the impartiality of advice if they remain unaware of the context in which it is given. However, much more importantly, the lawyers here appear to be making a fetish out of the legal advice by forgetting that the only point at which international law can come into existence, or have any real existence, is through the actual practice of states, and yet they are saying that they do not have the competence as diplomatic historians to assess exactly what is the precise historical significance of state practice. Hence, there is no one who can make the distinction, crucial for the evolution of new customary international law, between state practice which is legally or not legally significant, because it is or is not attributable to a legal conviction (*opinion juris*) on the part of states. How such a determination would work out in practice can be illustrated from a contribution to this debate by Smith, with respect to the U.K. recognition of the Spanish American Republics. We use this example because we intend to illustrate the historical diplomatic method later, with respect to the U.K. government's recognition of the new Communist Chinese government in 1949. Smith (1932) says:

> Legal opinions and pronouncements have but little value except in relation to the facts which provoke them . . . Without a fairly generous selection from the political documents it would be impossible, for example, to understand the reasons which finally impelled Great Britain, after many years of hesitation, to decide upon the policy of recognizing the Spanish American Republics.

It is argued here that it is worthwhile to ask whether a state's actions in a particular instance are motivated by legal considerations among others. Whether this is the case is simply a matter of assessing whether significant state officials acted in terms that were understood subjectively to be formulated legally. That is to say, the officials considered they were acting as they were legally entitled or bound to do. This is a matter of evidence and the evidence is in the archives. House of Commons statements or other official communiqués can bind the state, in the sense of an estoppel, but they do not amount to reliable evidence of what the state's actions *mean*. For this one needs access to intentions, as much in the practice of legal interpretation as in the practice of states.

That many specialists in the field of international law should say there is no coherent legal method to directly access customary international law and so one has to await pronouncements of the World Court as to that practice is an internally contradictory view of the nature of international law. This is because it is already recognized by the foundational article 38 of the Statute of the I.C.J., that judicial opinions are merely evidence of the law and not its direct source. If no "normal" international lawyer can explain how he can unearth a state practice which constitutes customary law, the mere authority of the judiciary cannot fill the gap. At the same time international relations scholars recognize that the importance of anthropological theory for the foundations of international law rests in the fact that the meaning of legal concepts is limited by the relativity of different state or other collective community grasp of any sense of obligation outwards, whether legal or otherwise.[8] Some mechanism to explore a dialectic of disparate legal meanings has to be elaborated. The perspective on the analysis of state practice, which is offered here, has the ambition to explore in very much more detail the suspicion that concrete international legal practice, despite its ideological tones and pretence of universality, is actually very bound to national institutions that effectively determine the meaning of legal obligations. However, it is too simple to say that states, as sovereigns, give words meanings that suit state interests. This begs the question: What

is the state? Instead, it should be recognized that the state as an institutional framework for numerous subordinate institutions is a textual or interpretative community within which international law officials work with others to achieve certain aims.

It may be that in a particular case the lawyers are the determining factor in a decision-making process and in this case to understand the outcome as a human action, it is only necessary to trace the intentions of the lawyers and how it is that these intentions came to be adopted. However, more usually the work of the international lawyer will be entwined in a complex of attitudes and expectations also held by those who are not lawyers. The question is not whether the international lawyer nobly upholds legal principle as against a grimy national interest, as there will be a dialectic among several governments attempting to apply general principles or rules, in accordance with their own subjective interpretations. Even more significantly, within national state institutions as well as within smaller groupings or networks of states, it will be seen that the law really exists within webs of tacit understandings and arguments, whose meaning cannot be unraveled without regard to the interaction of the intentions and expectations of diplomats, politicians and lawyers. The international law practice of a country and its other standards, ethical, political or whatever, *together make up the ethos which permeates the context within which all the officials (legal and political) work*. Another U.K. Foreign Office Legal Adviser has given expression to very much these sentiments. Sir Ian Sinclair (1982: 134) has written:

> In the international legal field, there is no clear dichotomy between law and policy, particularly where, as is often the case, textbook solutions are not available. The role which the FCO Legal Advisers perform in relation to their clients is accordingly rather more creative than first appearances might suggest; it will not be confined to the rendering of abstract advice, but will rather be designed wherever possible to afford practical guidance as to what course of action to follow in the particular circumstances, having regard to governing legal principles and to developing legal trends.

It is proposed to illustrate this theory with a concrete example from British diplomatic and legal practice, where it could be said that the lawyers had clearly a very determining role in the outcome of a very significant area of policy making where the politicians and diplomats certainly preferred to regard their options as completely open, until they were otherwise directed by the international lawyers.

The case concerns the *de jure* recognition of the Chinese Communist government following its seizure of Beijing in October 1949. There are two broad strands of documents. The first is the *Documents on British Policy Overseas: Britain and China 1945–1950* (henceforth, *Documents*) which are drawn entirely from government archival sources, which ends with the recognition of the Chinese government.[9] They provide some picture of the wider chronology of the diplomacy leading to recognition, but also mention the place of legal advice, quite unusual in such types of publications. The second strand of documents consists of unpublished archive materials, mainly from the Foreign Office. Resort is had to this for the purpose of obtaining the fullest picture of how the legal advice is developed and used. These archival material show that the legal advice was directly taken on board by the political officials and became, virtually verbatim, the position represented by the Foreign Secretary, Ernest Bevin. The archival material also indicates that the Foreign Office legal adviser also considered that the issue of recognition of governments and representation at the U.N. were related, so that the decision as to the former could be guided by how one expected to deal with the latter.

Recognition by the U.K. of the Communist government of China

The issue of recognition of a Communist regime was first broached in February 1949 when the Chinese were already in control of a large area of China and refusing to recognize foreign consuls operating within their territories on the grounds that diplomatic relations had not been established.[10] However, it did not become a pressing and clear case for a call for legal advice until August and September 1949. The first thing which clearly emerges from the archival record, but not so easily from the *Documents*, is that the Foreign Secretary and senior political officials within the Foreign Office were of a mind to make recognition of the new Chinese government dependent on various conditions, and that the contrary legal advice, particularly of Sir Eric Beckett, was, most probably, very influential in leading the government not to set conditions to its *de jure* recognition of the new Chinese government.

The story reaches its crucial stage on September 27, 1949 when officials (P. D. Coates) brought to the attention of the legal adviser, a public speech by the Secretary of State in the U.N.G.A., reported in the *Times*, that China, having entered into certain international obligations, must honor them. The *Times* correspondent added that this phrase has aroused much speculation. Reference is made to a legal adviser memorandum, saying that it is not customary to make conditions of this nature preliminary to recognition of a new government, but that the legal minute cannot be traced.[11] An extensive two-page minute from Sir Eric Beckett follows on October 4, 1949.

> The predominant and I think the right legal view is that the recognition of a government . . . is one which can be appreciated solely on whether the regime applying for recognition fulfils the qualifications for recognition laid down by international law. The political appreciation which necessarily comes in should really be limited to forming an opinion on whether the legal qualifications are fulfilled or not . . . In the recent past the conduct of a good many states and of some reputable states . . . has hardly been in accord with what I have indicated above as being the proper legal view . . . I would rather gather from these papers that the Secretary of State has decided, and is even committed to, that there shall be no recognition of the Communist Government in China as the *de jure* Government in China until it says that it will accept Chinese international obligations (query in general or with specified particular I do not know).
>
> Now the position of China and the Security Council eloquently, I think, testifies to the difficulties which are likely to occur if recognition is granted or refused on other than some legal principle. I think that . . . in an ideal world, the other members of the Security Council . . . impartially assess the practical elements of the situation and see who is legally most entitled legally to represent China.

In the course of the preparation of a draft cabinet paper for October 24, 1949 legal advice was taken solely on the question whether there could be any legal objection to the recognition of the Chinese government, and, citing Hersch Lauterpacht's views on recognition, the legal advice was that there could be no objection "having regard to the proportion of Chinese territory controlled by the Communist Government, the firmness of its control there, on the one hand and the tenuous nature of Nationalist control, where it exists, on the other hand."[12] This opinion was reproduced verbatim in the Cabinet Paper, the *Memorandum of Mr Bevin on Recognition of the Chinese Communist Government*, of October 24, 1949.[13]

However, this memorandum did not deal with the question of assurances from the Communist Chinese that they should respect China's international obligations. *Documents* point to further discussion of the issue in diplomatic exchanges and in cabinet. The Australian Minister for External Affairs,

Dr. Evatt, claimed that the U.K., the U.S., and Australia were in complete accord on this need to respect international obligations, and also that recognition would not be forthcoming unless China gave specific assurances respecting the territorial integrity of neighboring countries. Bevin replied that no such assurances had been required from the "satellite" governments in eastern Europe and added that "in the light of our bitter memories of the fate of non-aggression pacts at the hands of totalitarian states" it was "inconceivable" that the U.K. would request guarantees for the territorial integrity of China's neighbors.[14]

When it came to the preparation of a further cabinet paper in December 1949, the legal adviser was approached by Mr. Scarlett, who said the time for according *de jure* recognition is fast approaching. He notes to Beckett:

> You have minuted . . . that the granting of *de jure* recognition is in fact merely an acknowledgment of facts and in consequence that this should not be conditioned in any way. On the other hand, I have no doubt that it would be politically of some advantage to phrase our communication to the Chinese in such a way that the expressed wishes of e.g. the United States Government and the Government of Australia might be held to have been met. Both these Governments have repeatedly expressed the view that recognition should only be accorded in return for some prior undertaking of good behavior from the new regime in China.
>
> As I see it there are three possibilities.
>
> (1) Our Note to the Chinese could simply state that H.M.G. were now ready to accord *de jure* recognition . . .
> (2) We might follow our Yugoslav note which began by stating H.M.G.'s readiness etc. . . . and went on to state H.M.G.'s assumption that the new Government would respect the international obligations of its predecessor.
> (3) The Chinese say they are willing to establish diplomatic relations with any Government willing to observe the principles of equality, mutual interest and mutual respect for territorial sovereignty . . . We could echo this phrase and argue thereafter that it implied some general assurance of decent behavior.

Scarlett concluded by asking Beckett: "Do you think that forms of words along the lines of (2) or (3) would be likely to strengthen our hand in law *vis a vis* the Chinese if need arose?"[15]

Beckett replied on the same day that he considered it unnecessary and undesirable to try to make a bargain under which recognition *de jure* is given for an assurance that previous international obligations will be observed. This would certainly apply to (2), but even to the vaguer (3). Even that invites an awkward answer and you gain nothing by it. This is for reasons given in an earlier minute on the same day. Beckett suggested instead that a separate statement might be made to some else to which the Chinese government is not required to respond.[16] Such an approach recognizes the fact, insists Beckett, that:

> [N]o change in the international obligations of a state are brought about by a change of regime, and therefore it is not necessary, as the United States appear to be doing, to insist on an explicit acceptance of this principle by the new regime. Indeed, to insist on such an explicit statement has its disadvantages because it opens the way to the argument that the new regime is only bound by the previous obligations of the country if it expressly says that it will be.[17]

These legal conclusions are substantially reproduced verbatim in the final *Memorandum by Mr Bevan on Recognition of the Chinese Communist Government*, to Cabinet (December 12, 1949).[18] Given especially the fact that the legal adviser did not claim his view of the law was even frequently applied, one must suppose that

the Foreign Secretary simply considered the legal advice sound in itself. The memorandum observes, on the effects of recognition, that "recognition does not itself make the Communist authorities the rulers of China. They are that already. Recognition is no more than an acceptance of a fact, which its withholding would not alter."[19] To refuse recognition when no other effective authority exists in China is to imply a boycott, which would be negative for long term relations. Politically, recognition means willingness to enter into diplomatic relations and does not signify approval of ideology. "The political advantages of recognition are calculated on the assumption that we cannot afford to ignore, however much we may disapprove its political orientation, a government which has effective authority over a vast territory and population. Similarly, it is assumed that without relations with this Government, we shall be in no position to exert influence on its future development."[20] It was recognized that such a position clearly did not guarantee treaty rights of the U.K. The final cabinet memorandum mentions that the Chinese offer of relations of equality etc. was only part of the picture. The Chinese press announced that all Kuomintang treaties were liable to re-examination and revision. The judgment was that in any case a unilateral statement by the U.K. would make no difference, will not lead to the obligations being regarded as binding and delay in recognition will not help as the treaties are valueless without diplomatic relations. Therefore recognition, followed by laborious and unpromising negotiations is what lies ahead, particularly with respect to the Sino-British Treaty of 1943.[21] More precisely, it is stated that while "the new regime is not at present so corrupt as its predecessor, its authority may well prove even more arbitrary and vexatious in its regulations."[22]

The cabinet adopted the recommendation to recognize the new Chinese government on December 15, 1949.[23] Two days later the ambassador in Washington reported the results of a meeting with the U.S. Secretary of State, Dean Acheson. Sir O. Franks reported that "They [the U.S.] now thought there was likely to be early expansion (of the Chinese) south and east beyond the borders of China. This expansion would be especially dangerous, if it took place, where there were considerable Chinese settlements." The Ambassador asked what evidence there was for this and said "The only reply I got was that the Communists would, by aggrandizement in the south, direct the gaze of the Chinese people from Manchuria."[24]

On January 6, 1950, The U.K. accorded recognition of the Chinese government, as in effective control of by far the greater part of the territory of China, as the *de jure* government and they were ready to establish diplomatic relations on the basis offered by the Chinese themselves, i.e. equality, mutual benefit and respect for territorial integrity and sovereignty.[25]

In June 1950 the Foreign Secretary produced an extensive circular on *Recognition of States and Governments* which was to remain authoritative for at least 20 years.[26] The Foreign Office was continuing to refer to it in the face of the blizzards of military coups in Africa and other parts of the "Third World" in the 1960s and 1970s. The document outlines two approaches, which it calls "doctrines" regarding the matter. It is so comprehensively and closely argued that its reproduction is advisable. Its content will only be outlined here to show the connection with how it applied in the case of the recognition of the Communist government of China, after October 1949. The document itself includes an annex of a letter of Hersch Lauterpacht to the *London Times* on January 6, 1949, "prompted by His Majesty's Government's recognition of the Chinese Communist government." The letter "refers only to the recognition of governments, but the principles applying to the recognition of states are virtually the same."

The first approach was that recognition was a matter of mixed law and fact, but mixed only in the sense that: "The law determines the

conditions which entitle a state or a government to *de jure* or *de facto* recognition . . . Policy determines whether these conditions are or are not fulfilled, and there is often a margin for a political appreciation . . . But if the conditions for recognition are fulfilled, there is a legal duty to grant it." The crucial part of this argument, which was decisive to the Chinese case, comes at the end. "Recognition does not necessarily imply any approval of or any friendly disposition towards the regime recognized."

The second approach was that "recognition is a pure matter of policy and involves no question of law whatever . . . states recognizing or refusing to recognize are merely using political weapons in a political game." Again, the punchline is at the end. "Under this doctrine recognition implies a moral or political approval of the regime recognized."

It would not be fair to say that policy advantage alone led to the choice of the first approach without any constraining legal force. However, this policy was specifically evolved in the Chinese context where it was always recognized that Britain's main protagonist, the United States, took the second approach while Britain was preparing to take the first one. In this memo, the arguments are expressed more abstractly and even academically rather than diplomatically.

In the document, the argument is that the first doctrine "is broadly based on the general practice of states and, taken over a long period, though there are admittedly exceptions, the balance of authority is strongly in its favor." In contrast, the second doctrine is anarchic:

> It makes almost nonsense of a great part of international law and if generally followed may render almost impossible the working of any international organization. When the greater part of international law is directed to defining the rights of States, it is not on a very sound foundation if State A can in effect avoid the greater part of its obligations to State B by deciding as a pure matter of policy not to recognize it, or not to recognize what is obviously its Government. Similarly, no international organization can work if, following the purely anarchic doctrine of recognition, States are infinitely various as regards the regimes they recognize, as they are likely to be, whereas the scope of difference is reduced to narrow proportions if the first doctrine is strictly followed.

The document recognizes that it is the U.S. which virtually adopts this second doctrine although not precisely in the language presented here, viz., that recognition is purely a matter of policy. The U.S. itself will present its strategy on recognition "as an instrument of policy in support of law and legal order." For instance, a regime should not be recognized if it is unconstitutional, e.g. the U.S. approach to certain Latin American regimes. Neither should there be recognition if a state or regime is constituted as a result of aggression, as with the Stimson doctrine, characterized by this document "as completely unsuccessful." Again, recognition may be refused to a government, unless it appears the state or regime will recognize international obligations, particularly those of its predecessors. The document notes such a practice of bargaining for recognition is not infrequent, but it is incoherent because new governments are anyway bound by such obligations, "and to bargain about this as a condition to recognition tends to throw doubt on the legal principle."

The document is especially determined to root out evaluative elements in recognition, however high sounding. The second doctrine remains just as anarchic as in its bald formulation:

> It would be possible to justify almost any non-recognition on the ground that the non-recognizing State was not satisfied that the new regime was prepared to fulfill all its international obligations, for instance recognition of *all* Communist regimes could be refused on the ground that they did not recognize human rights.

In fact, these two doctrines are being formulated as a matter of direct British opposition to U.S. policy and tactics with respect to the cold war, with Communist China as the focal point. The document itself mentions Israel and China. Israel was recognized as soon as the establishment of the new state was no longer in doubt, but "as soon as it was clear that it was sufficiently firmly established, they [H.M.G.] recognized it." More central to our present story:

> The recognition of the Chinese People's Government was a straightforward case of the application of the first doctrine . . . because the Chinese People's Government was firmly established, with control over practically all Chinese territory, they [H.M.G.] recognized it *de jure*, although the character of that Government was not one which commanded their approval and it was far from certain that it would recognize obligations under international law, as His Majesty's Government understand it.

It is important to conclude this section of the story with a remarkable passage, which shows the very careful deliberation, which is going into the choice of the word "doctrine." Bevin is arguing in his circular to U.K. representatives abroad, that H.M.G. is choosing the first doctrine as the right doctrine, which it thinks is in the interest of the development of a peaceful and stable world order. He continues:

> In view of the attitude of the United States Government, it is clear that any public discussion of this subject must be very carefully handled. Nevertheless it is the intention of His Majesty's Government to spread as widely as possible the knowledge that the doctrine set out by Professor Lauterpacht is in their opinion correct and to propagate that doctrine by all suitable means, in the hope that the contrary doctrine may thus become generally discredited and be eventually abandoned.

This very carefully constructed picture is the outcome of what the Foreign Office took to be the experience it had had in negotiating its policy of recognition of the Chinese People's government with the United States.

International relations theory and the practice of international law

The present case study focuses on the active U.K. Foreign Office discussions in July and August 1957 about the best way to present the U.K.'s relations with Oman and Muscat internationally, when an Arab bloc of states, led by Egypt, tried to place (what it called) U.K. armed aggression against Oman on the agenda of the Security Council. The legal advice of Francis Vallat and Sir Gerald Fitzmaurice played a considerable part in these discussions, which reveal a vision of governmental structures for dealing with international relations which appear very much a hangover from the period of the high renaissance. Secrecy is prized as the most reasonable option when it comes to providing public explanations of state conduct. What the case study will show is not the failure to apply international law, but rather a more constructivist, and at the same time, fragmented picture of an international society where legal discourse plays a significant part but does not grasp fully the complexities of the situations which it indeed may contribute to concealing. International law is both constrained by raison d'état and also becomes interwoven in the secrecy of the diplomacy that that requires.

The case study takes as a starting point the types of charge levied against the U.K. in works such as Mark Curtis's *The Ambiguities of Power* (1995) and the successor volume, *The Great Deception, Anglo-American Power and World Order* (1998). Curtis's view is that Britain has a clear foreign policy aim, which it follows in concert with the United States. This aim is to preserve as much as it can the economic, political and military advantages, which it possessed at the time of the Empire. In his analysis, Britain continues to be largely

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

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

What are the implications of these polemics for attempts to assess what contribution Britain is making to the development of international customary law on the law relating to the use of force and the right of intervention at the behest of a friendly government? For instance, the 1986 United Kingdom materials on international law contain a document produced by the planning staff of the F.C.O. in July 1984, entitled "Is intervention ever justified?" (Marston 1986: 614–20). The question is how, or even whether, such a document is to be read critically, i.e. how to assess the relationship of the document to an inevitably largely hidden practice. For instance, in paragraph II.6, intervention under a treaty with, or at the invitation of, another state is mentioned. If one state requests assistance from another, then clearly that intervention cannot be dictatorial and is therefore not unlawful. In 1976, the Security Council recalled that it is the inherent right of every state, in the exercise of its sovereignty, to request assistance from any other state or group of states. An example of such lawful intervention at the request of states might be the British aid to Muscat and Oman.

Curtis comments on this incident as follows. Oman requested British military aid to quell a revolt in the north of the territory in the summer of 1957. In fact, in Curtis' view, Oman was a de facto client state controlled by Britain as much as any former colony. Its armed forces were commanded by British officers under the overall control of a British general. The Ministries of Finance and Petroleum respectively and the director of the intelligence service were British. Banking and the oil company management were controlled by the British. The country was desperately poor, with infant mortality at 75%. The Royal Air Force and the Special Air Service together struggled until 1959 to put down a revolt against these conditions. Oman continued after its suppression to serve British financial and other interests very well. Extensive bombing of villages was an integral part of this campaign. At one point, the British political agent recommended that the villages should be warned that unless they surrendered ringleaders, they would be destroyed one by one, etc. (Curtis 1995: 98–9).

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

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

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

Fitzmaurice's and Vallat's legal advice

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

Fitzmaurice is more explicit about the importance of the status of Muscat and Oman. Oman is not an independent state. In the international legal sense, it is not a state at all, but merely part of Muscat and Oman. The imam of Oman exercised no territorial sovereignty. There are no frontiers between Oman and any other state or between Oman and Muscat. An agreement, known as the Sib Agreement, was reached in 1920. During the negotiations in 1920, a request for independence was completely rejected. The Agreement worked well until 1954. The Sultan's sovereignty was recognized by the imam, in that external affairs remained in the hands of the Sultan, i.e. concerning individuals and their lawsuits with foreign administrations. The imam's adherents relied upon passports issued by the sultanate. Judgments of the Muscat Appellate Court were accepted in the interior. An attempt to assert independence in 1954 failed. No state had regarded "Oman" as a sovereign state independent of Muscat until the Saudi and Egyptian intrigues which followed a Saudi incursion into neighboring Buraimi in 1952.[28]

This presentation of the situation was successful when the U.K. argued it before the Security Council. Sir Pierson Dixon mirrored the legal advice closely. There could be no aggression against the independent state of Oman because none existed. The Sultan of Muscat and Oman had his sovereignty over both recognized since the nineteenth century. Egypt and other countries claim that the independence of Oman was reaffirmed in the 1920 Treaty of Sib. This treaty granted the tribes of the interior a certain autonomy but did not recognize Oman as an independent state. This request was refused by the Sultan. Also the agreement was not a treaty, but merely an agreement between the Sultan and his subjects. Sir Pierson Dixon followed Fitzmaurice's line very closely about the later marks of sovereignty. He concluded by saying the U.K.'s action in supporting the legitimate government of Muscat and Oman had been in the interests of stability of this area. If the subversion there had not been checked, the consequences might have been felt beyond the sultanate and would not have been to the advantage of any of the countries in the region that signed the letter to place this issue on the agenda of the Security Council.[29]

The vote against putting the matter on the agenda was five to four, with two abstentions.[30] Only the Philippines denied the legality of an intervention at a request of a government. The Soviet Union confined itself to generalities about the oppression of the national liberation movement of the Oman people. There was little stress on the argument about outside intervention in Oman, except from France, which led the vote against adopting the Arab item on the Security Council agenda. The U.K. itself played it down because it did not want to exacerbate its relations with Saudi Arabia.[31] An item

to this effect was circulated to all the British embassies in the Middle East. Although the U.K. knew of the Saudi involvement, a higher priority had to be given to drawing Saudi Arabia out of the Soviet and Egyptian sphere of political influence (see also Nolte 1999: 86–9). This goal would have been lost if one had entered into specific detail about Saudi subversive activities. Instead, the legality of a response to an invitation for assistance was stressed.

Pressure for public disclosure: Sir Ronald Wingate's counsel

However, further pressure came on the Foreign Office from quite a different source: The domestic media, in particular an article in the *Guardian* of August 7, 1957. Pressure grew within the U.K., in the media and through questions in parliament, to uncover what the exact relationship between H.M.G. and the Sultan of Muscat and Oman was. Here, the picture which emerged in Foreign Office discussions was quite different from the public face at the U.N. A focus for discussion was whether to publish the Sib Agreement which appeared to define the relations within the sultanate. This was thought not advisable, as the more the history and operation of the agreement was explored, the clearer it would become that the only coherence and stability that the sultanate enjoyed came from British support at every level. The British political agent, now Sir Ronald Wingate, who had effectively written both sides of that agreement, was still alive in 1957.

In September 1957, Sir Ronald came to see officials in the Foreign Office. He explained to Foreign Office officials, in particular a Mr. Walmsley, that the western concept of sovereignty was meaningless in the region. The Walis, whom the Sultan maintained in Oman, did nothing and could not be said to constitute a token of government. The entire sultanate of Muscat and Oman was, for all practical purposes, not administered. The situation there in 1954, as in 1920, could be compared to the Scottish highlands before 1745. The Sultan was completely dependent on Britain and powerless outside a few coastal towns. Wingate commented on a copy of Dixon's speech to the Security Council. He said that he could see nothing wrong with it, except that he would have expressed himself more frankly. The immediate comment of Walmsley was that while one might speak reasonably to reasonable people, it was impossible to concede any point unnecessarily in the U.N.[32]

Wingate made a further detailed comment on the Agreement of Sib and Sir Pierson Dixon's speech. Treaties concluded by the Sultan did not mean he had any effective sovereignty over an undefined area. His power had always extended only to a few coastal towns and it would be impossible to hold that the Sultan exercised any sovereignty over the interior between 1913 and 1955. Indeed, the interior tribesmen, who hated the Sultan, could have driven him into the sea had it not been for a strong battalion of imperial troops. This policy cost the U.K. a lot and served no purpose. It had been there in the nineteenth century to keep the French out and to combat the slave trade. Both reasons were long defunct. In 1920, Wingate, as political agent, undertook to reorganize the sultanate, putting Egyptian personnel in charge of administration. He, Wingate, and not the Sultan, refused to acknowledge the independence of Oman. He refused to recognize the imam of Oman as imam because of the religious significance of such an act. It would have given the imam authority over the whole sultanate. However, the imam remained as head of the tribal confederation. The agreement recognized the facts of the situation in a way that permitted Muscat and the coastal Oman, on the one side, and the tribes of the interior Oman, on the other, to exist as separate self-governing units. No question of allegiance to the Sultan arose. What the Sultan did in 1955 was not to reassert his authority but to take over the interior by armed force. This could be justified as necessary for

the security of the coastal regions. However, one also had to be careful about how to deal with the extraordinary rise in the Sultan's revenues, derived presumably from oil exploration rights which he had granted in the interior tribal areas, and which necessitated the provision of security for the drilling parties in the tribal territories.[33]

Wingate's comments were relevant to the advisability of publishing the Sib Agreement as a way of silencing British media controversy about the status of the Sultan, in particular the article in the *Guardian* of 7 August 1957. It was thought that, on balance, publication would merely show how uncertain the situation in Muscat and Oman was, although selected journalists were shown the agreement on a confidential basis. A further detailed internal F.O. reading of the Agreement of Sib revealed that it was difficult to use. The difficulty of the agreement was that it made no mention of sovereignty for either side, so officials reasoned that they would have to elaborate a thesis that the Sultan's authority was implicitly assumed and that the burden of proof would be on Omanites to show they had any corresponding sovereignty. The whole question was that much more prickly because of a British administration report which appeared on a F.O. confidential print on the Buraimi: "The Agreement of Sib virtually establishes two states, the coast under the Sultan, and the interior, that is Oman proper, under the rule of the Imam . . . The tribes and tribal leaders having attained in their own eyes complete independence."[34] The best one could make of this would be to stress the words "virtually" and "in their own eyes." The Sultan's interpretation of this agreement was equally valid. There was a consensus that this was also the direction of Wingate's commentary.[35]

One further difficulty is that while Wingate's report as political agent states categorically that the demand for the independence of Oman was refused, it also makes a number of uncomfortable points, if one had to rely on it by publishing it. He denigrated the unparalleled degree of ineptitude of the Sultan and even worse, his despatch made the following "acid remarks" on British policy: "Our influence has been entirely self-interested, has paid no regard to the peculiar political and social conditions of the country and its rulers and by bribing effete Sultans to enforce unpalatable measures which benefited none but ourselves, and permitting them to rule without protest, has done more to alienate the interior and to prevent the Sultans from re-establishing their authority than all the rest put together."[36]

One might try to say that the agreement had been violated, and ceased to exist by virtue of the subversion coming from Oman and so it was quite pointless to produce it. However, if one attempts to argue that the balance of the agreement has been destroyed by the aggression of Imam Ghalib and treats the agreement as no longer valid, to do this: "[We] should have to explain how completely he was in the pocket of the Saudis, and this would conflict with the Secretary of State's decision that at present we must avoid attacking the Saudi Government over Oman."[37]

Therefore, it can be argued that in 1957, the senior Foreign Office officials did not think that there was any realistic way in which they could present publicly what they understood to be happening in the sultanate of Muscat and Oman, other than in the Charter language of friendly states and supporting internal order within them. In fact, there was no state other than what Britain undertook to maintain, but the alternative would be for Saudi Arabia, Egypt and eventually the Soviet Union to occupy a space if Britain were to vacate it. Dorril explains at length that further insurgency against the Sultan in the late 1960s convinced the Wilson government of the need for change, and the Conservative government gave the go-ahead at the end of June 1970. It was agreed to replace the Sultan with his English-educated and more competent son. It still took until 1975 to defeat Chinese and Soviet-backed insurgency (Dorril 2000: 729–35).

It is ironical that assessments of Curtis and Dorril, that the sultanate was so misgoverned in the years before the 1970 coup, are part of the implicitly official U.K. view of that period from the hindsight of post-coup developments. The two authors rely on much secondary evidence, but the secondary evidence is a book called *Oman: The Making of a Modern State* (Townsend 1977). Townsend was economic adviser to the Oman government from 1972 to 1975. Curtis (2003: 279) quotes him as arguing that, after the regime change, the Sultan's response to the rebels in the 1960s was not an alternative program with proposals for reform or economic assistance, but simply the use of even greater force. By 1970, that policy promised to lose the sultanate to communist-backed forces. This was not acceptable. Furthermore, with the Shell-owned Petroleum Development (Oman) oil company producing oil in commercial quantities by 1967, there was plenty of domestic revenue to allow scope for a more pragmatic social policy.

Conclusion: the international lawyers' perplexity

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

The difficulty has already been seen to lie in part with the continuing and presumably inevitable secrecy of diplomacy where strategic interests are engaged. This is, in effect, to acquiesce to the vision that governmental structures for dealing with international relations remain a hangover from the period of the high renaissance. A typology of this world is provided by Jens Bartelson in *A Genealogy of Sovereignty* (1995: esp. chapter 5). The so-called modern state arising out of the wars of religion of the sixteenth and seventeenth centuries is silent about its origins and primarily obsessed about its own security needs. It can usefully be understood as the subject of Descartes' distinction between the immaterial subject and the material reality, which it observes, classifies and analyses. Knowledge supposes a subject and this subject, for international relations, is the Hobbesian sovereign who is not named, but names, not observed, but observes, a mystery for whom everything must be transparent. The problem of knowledge is the problem of security, which is attained through rational control and analysis. Self-understanding is limited to an analysis of the extent of the power of the sovereign, measured geopolitically. Other sovereigns are not unknown "others" in the anthropological sense, but simply "enemies," opponents with conflicting interests whose behavior can and should be calculated.

So, mutual recognition by sovereigns does not imply acceptance of a common international order, but merely a limited measure of mutual construction of identity resting on an awareness of sameness, an analytical recognition of factual, territorial separation. The primary definition of state interest is not a search for resemblances or affinities, but a matter of knowing how to conduct one's own affairs, while hindering those of others. Interest is a concept of a collection of primary, unknowable, self-defining subjects, whose powers of detached, analytical empirical

observation take absolute precedence over any place for knowledge based on passion or empathy.

Within this framework of analysis international law is perceived subjectively by each state in the light of the perspective it has of its own interests. It reflects on other states an image of international law which is part of its image of itself in relation to its "others." These images clash and may occasionally break through to one another. However, the level of existing research into the practice of international law does not permit one even to imagine how this might happen. There is no credible primary source based research into the interacting practices of international lawyers simultaneously within and across state bureaucracies.

Notes

1 See, for instance, the standard chapter on "The sources of international law", by Hugh Thirlway, *International Law*, edited by Malcolm Evans, 2003, 117–44. This is devoted to commenting on article 38 of the Statute of the International Court of Justice, setting out the sources of law to which the Court will refer. Similarly the other standard textbook by Malcolm Shaw, *International Law*, 5th edition, Cambridge University Press, 2003, 68–87, also considers almost exclusively the case law of the international courts, with, in addition to what Thirlway/Evans consider, a very superficial review of some secondary literature on customary law.

2 Ibid., and the literature cited therein: a comprehensive survey of doctrine, especially "continental."

3 See further, Marston (1990: 35), saying that parliamentary sources predominate in the U.K. materials on international law, i.e. positions taken by ministers before parliament. He points out that only rarely is material made available here which has not already been released to the public.

4 Aust's 1986 *International and Comparative Law Quarterly* article is discussed here.

5 What follows draws on Anthony Carty and Richard A. Smith (2000: chapter 1, 1–40).

6 This part of the argument will draw more particularly on Anthony Carty (2007a: chapter 2, 26–78) and particularly also an article reproduced there and published in *The Singapore Year Book of International Law* (Carty 2005).

7 FO/370/203, folios 210–11 (Foreign Office File 4704), quoted by Geoffrey Marston (1990: 40, 46).

8 The present author's latest reiteration of this point is to be found in the *European Journal of Legal Studies*, vol. 1, 2007, "The yearning for unity and the eternal return of the Tower of Babel", 1–28.

9 Series I, Vol. VIII, edited S. R. Ashton, Whitehall History Publishing, Frank Cass, 2002.

10 *Documents*, Doc.58, 17.2.1949, 204–207.

11 U.K., Foreign Office, FO 371/75815, F14109.

12 U.K., Foreign Office, FO 371/75818, F6028, October 20 and 22, 1949.

13 *Documents*, No.105, 397–402, CP (49) 214, (CAB 129/37).

14 *Documents*, No.105, 402.

15 U.K., Foreign Office, FO 371/75826, F18535: 49, December 5, 1949.

16 U.K., Foreign Office, FO 371/75826, F18535: 50.

17 U.K., Foreign Office, FO 371/75826, F 18695/1023/10, December 5, 1949.

18 *Documents*, No.110, 417: 420, paragraph 12, CP (49) 248 (CAB 129/37).

19 *Documents*, No.110, 417: 421, paragraph 15, CP (49) 248 (CAB 129/37).

20 *Documents*, No.110, 417: 421, paragraph 16, CP (49) 248 (CAB 129/37).

21 *Documents*, No.110, 417: 422, paragraph 15, CP (49) 248 (CAB 129/37).

22 *Documents*, No.110, 417: 422, paragraph 21, CP (49) 248 (CAB 129/37). *Documents* provides edited notes that: "It was China's entry into the war (Korean) in October 1950 that put paid to any prospect of negotiations with the Communists to protect British firms . . . They were forced into such debt by taxes and regulations that they had to close, leave China voluntarily and hand over what remained of their assets to the Chinese Government. Their withdrawal was announced in May 1952 and subsequent U.K. losses were estimated between £200 million and £250 million," ibid., 442–3.

23 *Documents*, No. 110, 417: 426, CP (49) 248 (CAB 129/37).

24 *Documents*, No. 116, 435–6. *Sir O. Franks to Mr Bevin, telegram no. 5855*, U.K., Foreign Office, FO 800/462, December 17, 1949 .

25 *Documents*, No.121, *Mr Bevin to HM Representatives Overseas*, 448–9.

26 Original reference, L 280/1 Circular No.059, found at FCO 25/046. The author has benefited from an AHRC research grant to undertake archival research, and this document was unearthed in the course of the project by Dr. Orna Almog.
27 U.K., Foreign Office, FO/371/126877/EA1015/89.
28 ——, FO/371/126887/EA1015/365.
29 ——, FO/371/126884/EA1015/282(A), August 20, 1957.
30 ——, FO/371/126884/EA1015/283, August 20, 1957.
31 ——, FO/371/126878/EA1015.
32 ——, FO/371/126887/EA1015/371.
33 ——, FO/371/126829: FO Confidential Note on the Agreement of Sib, and Sir Pierson Dixon's Speech in the Security Council of 20/8/1957, prepared by Sir Ronald Wingate.
34 ——, FO confidential print on the Buraimi at 157.
35 ——, FO/371/26882/EA1015/235.
36 ——, FO/371/26882/EA1015/235(A).
37 ——, FO/371/26882/EA1015/235(A).