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A Constant Craving for Fresh Brains and A Taste for Decaffeinated Neighbors

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Abstract

This paper is a radical rethinking of Public International Law through the use of Lacanian psychoanalysis. Its central thesis is that while contemporary scholarship addresses what Lacan calls the Symbolic and Imaginary registers including law, politics, and ideology, it continues to ignore and repress the dimension of the Real. The paper illustrates this with a clinical example examined by Kris and discussed by Lacan. Imagining Public International Law as an indefatigable neurotic in search of ‘fresh brains’, the paper shows why meeting her in the domains of law and politics is not enough to satiate her appetite. What continues to resist is the ‘extimate’, the inhuman element within the human that the subject hides so well from herself that it is *excluded in the interior*. A major instance of the extimate is the ‘caffeinated neighbor’, that is, the neighbor who is not in our image because her disturbing core has not been subtracted. The paper argues that unless International Law comes to terms with this inevitably ugly and obscene core, in oneself as well as in the neighbor, it cannot hope to achieve any meaningful changes. That the need to recognize the

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extimate is the ethical demand facing International Law now; unless we address it, our symptoms will continue to grow and we will continue to crave fresh brains.

1. Identity Crisis? That Is So Last Century

For insufficiently young academics like myself, the sudden embrace, adulation and self-congratulation amongst and for public international lawyers comes not only as a surprise, but calls to be treated with a grain of suspicion or at least the proverbial salt. To rewind: studying and teaching international law in the last century, not so long ago as that was, always came, as some of us recall, with a large dose of apologetics, restorative rhetoric and self-abnegating excuses: this law, lets call it provisionally our teachers pleaded, may or may not be law, it may or may not work, it may or may not achieve justice, or order, or even certainty. Please bear with this vast and often tedious array of treaty instruments, declarations and resolutions, they impliedly implored, learn them, interpret them, compare and fight with them, even if, in the final analysis, lets admit, they may be devoid of any material effect, indeed, lets face it, they may be meaningless.

Less than two decades later, International law, we are told, is experiencing a rebirth. From international criminal trials of former dictators at the Hague to a hive of resolutions at the United Nations and Human Rights tribunals, the discourse of International Law is indeed hard to escape. 'From an exotic specialization on the fringes of the law school' James Crawford and Martti Koskenniemi begin their magisterial *Companion to International Law*, 'International law has turned into a ubiquitous presence in global policy-making as well as in academic and journalistic

commentary'². Even supermodels have been robbed under its spell, signaling its ultimate triumph and acceptance in a celebrity-driven culture. Yet before we rush to congratulate this perennially insecure subject with coming of age after centuries' of diffidence and self-questioning, this article will take a step back and address what International Law, in all its contemporary glory, continues to resist and repress.

Given this paper contests the notion of identity, of the human subject as well as of a discipline, including that of International Law, the only way to proceed is by addressing its subject *awryly*, that is, from an angle, lets say the oblique angle from which an analyst (avoids) looking at her patient on the couch. Public International Law will lie on the Lacanian couch with the help of a clinical case called the 'fresh brains case' from which all of us, and in particular academics, have a lot to learn. The case was examined by Ernst Kris in 1950s New York and discussed repeatedly by Lacan who waged a long vendetta against the teachings and practices of ego psychology generally and against its prophets, Ernst Kris, in particular.³ Kris's patient

²J. Crawford and M. Koskenniemi (eds) *The Cambridge Companion to International Law* (2012).

³Kris was one of the troika of ego psychology who left Vienna during the war and took their version of Freud (a bad version of Freud as far as Lacan was concerned) to the United States. The other members of this triumvirate included Lacan's own analyst, Rudolf Lowenstein and Heinz Hartmann who had been in analysis with Freud. For a discussion of the history see J. Malcolm, *Psychoanalysis: The Impossible Profession* (1982) and B. Fink, *Lacan To The Letter: Reading Ecrits Closely* (2004), at 38-62. Lacan is intrigued by this case and keeps returning to it time and again from Seminar 1 in 1953-54 to Seminar XV in 1965. Having spotted what he believed to be a major flaw in Kris's treatment, Lacan will not let the matter rest, dragging Kris's patient up for further analysis and the analyst Kris for ever-increasing ridicule. In Seminar 1 Lacan gives Kris unqualified praise: Kris' interpretation, he suggests, is 'indisputably valid': the patient's report that following the session he goes in search of 'fresh brains' is seen as 'a response elicited by an accurate interpretation: J. Lacan, *The Seminar of Jacques Lacan, Book I: Freud's Papers on Technique 1953-1954*, J-A. Miller ed., trans. J. Forrester (1991). This

may remind us not only of all of us academics forever in search of new ‘knowledges’ but of Public International Law itself. The symptom these patients share, I suggest, is an assumption that someone somewhere out there is perfect, has all the answers, is, in short, full of ‘fresh brains’, and that someone is not oneself. In the case of Kris’s patient, as we will see, the constant craving for fresh brains was not just metaphorical but literal.

Kris’s patient, like our subject Public International Law, was too conscientious, always examining his own worth and credentials and ridden by doubts whether he came up to the standards expected and ordained by some invisible and perfect Big Other. Indeed he was plagued by not just normal, healthy insecurity that his work may not be good enough, but further an inhibition against publishing his work for fear that it was plagiarized from the work of other people. As we can all appreciate, an inhibition against publishing is not conducive to a successful academic career. So the patient resorted to analysis in part to overcome his inhibition.

My paper depicts Public International Law as the neurotic patient hankering after ‘fresh brains’ that she believes she will find in other disciplines, be they religion,

unqualified praise, however, does not last long. From Seminar III (1955-56) onwards Lacan insists on showing how Kris missed the point and misdirected his patient’s treatment. Kris’s interpretation is no longer ‘indisputably valid’, but ‘Kris has pressed the right button. It is not enough to press the right button. The patient quite simply acts out’: J. Lacan, *The Psychoses: The Seminar of Jacques Lacan Book III 1955-56* ed. J-A. Miller, trans. R. Grigg, at 78-81. Lacan’s criticism gets progressively more cutting until he ends suggesting that if anyone needs fresh brains, it is not the patient but the analyst Kris. It goes without saying that, as far as Lacan is concerned, he is the only ‘Master’ capable of serving patients, and all of us, fresh brains.

economics, history, politics, literature or, now, psychoanalysis⁴. Like Kris, I analyse this patient's symptoms, but unlike Kris, and following Lacan, I point out how Kris's diagnosis goes wrong, leading not to a cure but to repetitive acting out. A constant craving for fresh brains, I will argue, can lead to a diet that can be as beneficial as it can be noxious and dangerous: in other words, if we are what we eat, and we do not want to revolt, or throw up what we take in, we must be cautious about sampling the flavors of the month which can leave the underlying body, or law's ego we could say, just as sick if not sicker than before our meal.

In contrast to Kris who, as we will see, tries to cure his patient, the message from the (nasty) Lacanian analyst is not to cure the patient's ego and return it to her well adjusted to reality, in other words, not to strengthen and perpetuate International Law's self-delusions but to lead it, kicking and screaming no doubt, to finding out the bloody histories that constituted it as a subject and enable it, in short, to 'get over itself'. In lacanese this is achieved when the patient traverses the fundamental fantasy that sustained it as a subject. It requires the annihilation of the fantasies and misrecognitions that the patient used to rely on, and the constitution of a new, perhaps less confident and arrogant, but also, as I will argue, a truer and more ethical subject. In the last section of my paper I call this the 'atheist' position: the subject, difficult as this step is, has to dethrone the Big Other from his paper throne, stop

⁴ In this vein, see M. Koskenniemi's *International Law: The Gentler Civiliser of Nations* (2001) where he chronicles the history of International Law from its pretensions to be the world's conscience to attempts to portray itself as philosophy (Germany 1871-1933) and sociology (French 'solidarism', 1871-1950) and A.Carty 'Visions of the Past of International Society: Law, History, Or Politics?' *Modern Law Review* 69(4) pp644-660 (2006). For Carty's important rethinking of the philosophical foundations of International Law beyond doctrines and practices see *Philosophy of International Law* (2007).

addressing her complaints and demands to him, in short, stop recognizing him as well as letting go of her desire to be recognized by him. That ethical position can only be attained, quite simply, when the subject has come to terms with the fact that the Big Other (sometimes known as God) doesn't exist.

2. The Split Subject and the Split Other

An important step towards attaining this ethical position is for the subject to take responsibility for her own desires, and stop looking for other people or disciplines to tell her what to do, what to want, and how to be. Public International Law, I suggest, has been especially neurotic, indeed hysterical, in its constant appeals to other disciplines to help define its identity. To give a short diagnosis of this symptom, International Law, like any subject, like all of us, and like Kris's patient, is marked by a lack at its center. Indeed the constitution of International Law, like the identity of any subject or discipline, is achieved by a cut; what psychoanalysts call castration. Once that cut has been inflicted the subject goes on endlessly looking to recover the missing bit, deluding herself that if only they had that bit they would be 'whole'. The problem with this quest is that the people or disciplines we look for to complete us, are just as lacking as we are⁵.

Moreover, it is not just the subject that is irretrievably cut and castrated but, more importantly, the symbolic order. The message of psychoanalysis is not only that the subject is irretrievably lacking (that is hard enough to digest and come to terms

⁵ I discuss the pitfalls of looking to other disciplines as a means of 'completing' ourselves in 'The Trouble With The Double: Expressions of Disquiet In and Around Law and Literature' *Law Text Culture* 2007, Volume 11, pp 183-208

with) but that the Big Other she addresses her demands and pleas to is also pathetic and impotent. So when we hear, for instance, that, International Criminal Law aimed to ‘complete’ Human Rights law and render it ‘whole’⁶, we must recall that International Law, like all subjects, like all of us, will always be lacking: something will always be missing because losing something, is a precondition for our constitution as subjects⁷. It is futile, therefore, to look for the missing bit in other people or in other disciplines. Moreover, such searches prevent us from admitting to and doing something about our own deficiencies: as Lacan puts it, ‘in persuading the other that he has that which may complement us, we assure ourselves of being able to continue to misunderstand precisely what we lack’⁸. In particular it conveniently allows us to ignore and repress what is ugliest and most shameful about ourselves, that is, the extimate.

As I argue later, God was ideal for filling the gap in the subject, as well as in the Other of the symbolic order. Unfortunately, since God’s so-called death, modern man and woman have struggled in vain to fill the empty place with anything remotely as ‘fulfilling’. A major thread of my paper and indeed of my current work as a whole is a plea towards what I call an ‘atheist jurisprudence’: that is, an acknowledgement and coming to terms with the fact, as difficult as that is, that, ‘there is no Other of the

⁶ Gerry Simpson critiques this idealistic hope in *Law, War, Crime*, (2007). For a similarly critical account of human rights in the context of humanitarian intervention see D. Kennedy *The Dark Side of Virtue: Reassessing International Humanitarianism* (2004) and *Of War and Law* (2006).

⁷ *Supra*, note 5.

⁸J. Lacan *The Four Fundamental Concepts of Psychoanalysis* Ed J-A Miller Trans A Sheridan (1979) at 133.

Other'. That, since there no ultimate guarantor for our acts or our laws, we need to learn to live without guarantees, in our personal lives just as in our disciplines⁹.

A pre-emptive response to a paradox in this paper: why look at psychoanalysis if the argument is to stop looking for others, subjects or disciplines, who will complete us? The short answer is that the lacanian couch, unlike most couches, and in particular unlike the ego psychology couch, from which I take the fresh brains example, far from boosting the patient's ego, solidifying it and returning it to the patient 'whole' (which in practice means in the analyst's own image), it delivers the patient in pieces: the goal of the analysis in effect is to devastate, de-subjectify and shutter the subject.

And what is it that devastates and shuts the subject? In brief the analysis is over when the patient comes face to face with her own 'extimate' desires. That is the hardest thing to do and we spend our whole life avoiding it. After all the extimate is something that we are so thoroughly ashamed of, that we have made sure we hid it where no one, not even ourselves, would dare look: we have hidden and excluded it not outside but *in the interior*. A lacanian analyst is one who leads the patient, to commit murder against himself and also, soon after, against the analyst: once the analysis is over the analyst can be killed, with impunity. And well might the patient murder him, as the analyst has just witnessed the patient's unspeakable truth.

3. Where There's Two, There's Always a Third

⁹ For the beginnings of this position see my 'Where God Was Law Will Be? Kant Avec Houellebecq' *Australian Feminist Law Journal* June 2011, Vol.34 pp3-21 and 'Democracy Or Your Life: Knowledge, Ignorance, and The Politics of Atheism in Jose Saramago's *Blindness* and *Seeing*' *Law Culture and Humanities* February 2013, Vol.9

How do we approach this truth? In a recent inspired and passionate Conference at Melbourne's pioneering Centre for International Law and the Humanities, the organizers' call for papers suggested, incisively and accurately, that Public International Law dwells 'in at least two registers': on the one hand a technocratic or solemn tone speaks of the realm of authority and law, on the other, the realm of passions, affect and emotions¹⁰. We could depict these realms as the public versus the private, the male versus the female, even law versus literature. The hint, however, that there are 'at least' two registers, prompts me to look for the inevitable third, to examine the way the three registers are knit together and what is hidden, repressed or protected in the process. The third register, which continues to resist and insist, is what Lacan calls the Real, the contingent, unrepresentable and unassimilable. My paper uses the fresh brains case to illustrate why we must address all three and not just two registers. Imagining Public International Law as an indefatigable neurotic in search of new ideas, I discuss why meeting this patient in the domain of law, and in the domain of passions, will not be enough to satiate her appetite. Instead, like Kris's patient, her symptoms will reappear, and grow, after every meal, like weeds.

Everyone knows that at the intersection between the Imaginary, Symbolic and Real registers we can find Lacan's famous little object a, that obscure object of desire that constitutes the subject *as* subject and which was cut off from the subject for it to emerge into the symbolic order¹¹. Another unruly inhabitant of planet Real in addition to the well known 'little object a' is the extimate: the alien, or inhuman element

¹⁰ <http://www.law.unimelb.edu.au/melbourne-law-school/news-and-events/news-and-events-details/diaryid/6334>. The Conference proved a veritable feast of wild, weird and wonderful passions from horror to boredom, pity to laughter, shame, despair, courage, oblivion and empathy.

¹¹ See 'The Trouble With the Double' *supra* n.5.

within the human that the subject hides so well from herself that it is *excluded in the interior*. The extimate is the monster within us that cannot be represented and therefore cannot be assimilated in our psychic space.

The extimate is a term coined by Lacan who, as he protested all his life, was not Lacanian but orthodox Freudian. Can we find the term or an intimation of it in Freud? International lawyers like us would be delighted to find that, when Freud gestures towards this term in one of the metaphors that he was so adept at, the metaphor he chooses is from the domain of Public International Law: ‘Pathological phenomena’, he suggests, ‘are, one might say, a State within a State, an inaccessible party, with which co-operation is impossible, but which may succeed in overcoming what is known as the normal party and forcing it into its service’¹².

Gerry Simpson has rightly and aptly described law as displaced politics while Martii Koskenniemi has written of the flight to legality as a flight against and away from politics¹³. Both are right. Both, however, ignore the third dimension, that of the Real and in particular of the extimate. The flight from politics, unfortunately, is not the only problem: if only. Politics, as Freud knew, long before Slavoj Zizek, is also always a politics of fantasy: like religion, ‘the assumptions that determine our political regulations [are] illusions’¹⁴. So politics also and always dwell in the realm of fantasy, of the imaginary. The greater task is coming to terms with the fact that the politics we fly away from (into the supposedly safe haven of rules and regulations)

¹² S. Freud, *Moses and Monotheism (III)*, in *The Standard Edition of the Complete Psychological Works of Sigmund Freud*, ed. L. Strachey, Vol. XXIII, (1939) at 76.

¹³ Simpson, *supra* note 6. Koskenniemi, ‘The Politics of International Law’ 1 *EJIL* (1990) 4-32.

¹⁴ Freud, *The Future of An Illusion*, (1927) in *The Standard Edition*, Vol. XXI, at 34, *supra* note 12.

are also imaginary fantasies and mis-recognitions; and that we indulge in those fantasies in order to avoid the Real: the unassimilable extimate core.

In the case of Public International Law, just as in the case of domestic law, the retreat into law is a retreat into reality to avoid the Real; yes, most of us agree that law is a defense against politics but more fundamentally law is a defense against the unassimilable core, the extimate. Politics and law, therefore, are just two sides of a three-pronged problematic: law is on the side of the symbolic, politics on the side of the imaginary. But neither law nor politics can eliminate or protect us from the Real. In the final analysis, the flight from politics to law is a flight from the Real, and in particular and obviously the real of death: that which cannot be legislated away yet persists and insists with more force than any rule of law or imaginary politics. In this paper I will not talk about the manifold intimations of the Real but one instance of it: the extimate and in particular the extimate as the Neighbor. Since the subject hides the extimate so well from herself, one instance when it appears is in the neighbor: not because the neighbor manifests the extimate core better, but precisely because the reason we turn away in horror at the neighbor is because we recognize that alien core in ourselves.

A further reason why we have to examine the third register: we know politics and the rhetorics surrounding it are fake, but what we also must come to terms with is that our deeply held affects and emotions, our *passions*, as the Melbourne Conference put it, are also fake; borrowed, second hand, cheap imitations of the desires of other people. As Fernando Pessoa puts it in a timeless metaphor, we are all ‘shadows of gestures performed by someone else’¹⁵ and it is ‘other people’s rubbish [that] pile up

¹⁵ F. Pessoa, *The Book of Disquiet*, (2002), trans. R. Zenith, §149.

in the rain in the inner courtyard that is [our] life'¹⁶. Or, as Rimbaud put it much earlier, in a phrase that Lacan never stopped repeating, 'I is another'¹⁷. Unfortunately we can fool our ego into thinking we are forgiving, or we are loving or we are reconciled. But the only affect that is truly ours and is not borrowed or copied from the other is, sadly, anxiety.

Which leads me to the issue of how to get close to the extimate? In *Law, War and Crime*, Gerry Simpson charts the similarities between 'show trials' which are supposedly political and 'war crime trials' which are supposedly legal and in accordance with the rule of law. Simpson's title for the chapter, 'Law's Anxieties', intimates something that Freud knew; that anxiety is the only sure way to finding what Lacan later termed the extimate¹⁸. Anxiety, as Charles Shepherdson puts it, is 'the Ariadne's thread' leading us to the Real¹⁹. The all-too familiar panic that accompanies anxiety serves to warn us that we are approaching something precious, indeed unbearably precious: we are in other words, coming close to jouissance and, in the terms I focus on in this paper, to the extimate.

Anxiety therefore warns us of proximity to our unspeakable truth because, as Lacan knew, anxiety is the only affect that does not lie²⁰. When we encounter law's

¹⁶F. Pessoa, *The Book of Disquiet* (1991), trans. M. J. Costa, at 42.

¹⁷ A. Rimbaud, *Oeuvres Complètes* (1954), at 268.

¹⁸ 'The problem of anxiety is the nodal point at which the most various and important questions converge, a riddle whose solution would be bound to throw a flood of light on our whole mental existence': Freud, *Introductory Lectures in Psychoanalysis*, in *The Standard Edition*, *supra* note 12, Vol.XX (1920), at 393.

¹⁹ Shepherdson, 'Foreword' in R. Harari *Lacan's Seminar on Anxiety: An Introduction*, (2001), at xxi.

²⁰ 'Anxiety is that which does not deceive... In experience it is necessary to canalize it and, if I may say so, to take it in small doses, so that one is not overcome by it. This is a difficulty similar to that of

anxiety we can be sure that we are getting close to law's extimacy: something that is so close to law's desire that law has hidden even from itself. In the example explored by Simpson, one could go further and say that war crime trials and show trials are uncanny doubles: when the fragile border we try to draw between law and politics, between show trials and war crime trials, is perilously close to collapsing and coming undone, we can be sure that we are close to looking through law's own looking glass: that we are close to witnessing what we have been at pains not to see by hiding from ourselves, that is, the primary repression, the bit that had to be cut off from us at our inception in order to constitute us as subjects. Something primary, violent, bloody and, needless to say political, had to be cut off from war crime trials to constitute themselves as trials rather than show trials. But as Simpson shows, the seams show through, hence the onset of 'anxiety'.

4. In Search of Fresh Brains, Again

Lets check what is happening with Kris's patient, the academic hampered in his desire and need to publish by a fear that what he has to say is a plagiarism of existing work by other colleagues. During the course of the analysis he apparently manages to write a paper that he is almost happy with, only to find shortly afterwards a thesis in the library which, he claims, makes the same findings as his own paper and which, he claims, he must have plagiarized as the thesis in the library had been published some years ago and he himself had read the thesis in the past. In a paper discussing the case, Kris relates his patient's 'satisfaction and excitement' at having

bringing the subject into contact with the real': J. Lacan, *Four Fundamental Concepts of Psychoanalysis*, *supra* n.8, at 41.

proved himself once more a plagiarist. Such behavior on the part of his patient led Kris to ‘inquire in very great detail about the text he was afraid to plagiarize. In a process of extended scrutiny it turned out that the old publication contained useful support of his thesis but no hint of the thesis itself.’²¹

How are we to interpret Kris’s intervention here? It appears that, in the good old tradition of ego psychology, Kris, tried to ‘cure’ his patient’s ego. To do that he entered his patient’s imaginary universe in more or less the following terms: ‘Very well’, we can imagine Kris saying, ‘you think you plagiarized, let us check, oh yes, I checked and you didn’t plagiarize.’ Having done that, Kris, equally ‘satisfied and excited’ to have found his patient is *not* a plagiarist, communicates his findings to the patient. The important point here is that the analyst has joined the patient on the dimension of the imaginary: Kris discussed with him (or perhaps even went to the library to check) the contents of the two papers in order to ascertain whether the patient’s work was indeed a plagiarism of a previous paper. Although it is not clear from Kris’s account or from Lacan’s retelling of it, whether Kris actually went to the library to check and compare the two theses, either way, Kris’s attempt to make a value judgment on the issue of plagiarism, does not impress Lacan.

Having done his patient’s homework on the scientific project his patient was working on, Kris proceeds to do his own homework as an analyst and offers his patient an interpretation of what has been happening: Kris’s theory is that his patient wanted to be a plagiarist because that would have proved to him that there were ideas worth stealing from someone greater. That someone greater than you, Kris suggests to his patient, was your grandfather, or more accurately the *grand* father, that is a father

²¹ Kris, ‘Ego-psychology And Interpretation In Psychoanalytic Therapy’ *Psychoanalytic Quarterly* vol.20: 15-30 (1951).

who is so *grand* that his ideas were worth copying. In other words, Kris suggests to his patient that he is so convinced his grand father is ‘grand’, that he cannot possibly come up with anything, grand or petit, of his own. This leads Kris to conclude that the patient’s protest that he was a plagiarist was actually a defense against having to compete with his ‘grand’ father, that is, a father who is ‘great’. To cut a long story short, Kris here offered his patient a (not so) imaginative interpretation straight out of the good old story of Oedipal rivalry between father and son.

Unfortunately for Kris, when he offers this interpretation to his patient, the patient responds with his own *coup de grace*: in common with many patients who reveal the most important information as they are about to leave a session, as he is about to leave Kris’s smart New York apartment, the patient turns to his analyst and casually informs him: ‘Every noon, when I leave here, before luncheon, and before returning to my office, I walk through X street [a street well known for its small and attractive restaurants] and I look at the menus in the windows. In one of the restaurants I usually find my preferred dish – fresh brains.’²²

What went wrong? Why did Kris’s interpretation backfire so spectacularly? The guy who thinks he is a plagiarist and does not have any ideas, any ‘fresh brains’ of his own, on being told by his analyst that he is not a plagiarist, that he does possess fresh brains of his own, leaves analysis and goes in search for fresh brains: in the flesh. Lacan has an answer and it is in line with the thesis I pose in this paper: if we imagine Public International Law as the patient in search of fresh brains that she imagines can be found in other disciplines, be they literature, politics, international relations, the last thing we should do is meet them in the register that Kris seems to be

²² ‘Response to Jean Hyppolite’s Commentary on Freud’s ‘Verneinung’ in J. Lacan *Ecrits* trans B. Fink, (2006), at 331.

so adept at entering: that is, in the domain of their own ego or what Lacan calls the imaginary.

What is wrong with meeting them at that level? From his paper on the mirror stage onwards Lacan never stopped reminding us that a patient's own image of him or herself is fundamentally distorted: a mis-recognition²³. Our precious identity is basically constructed from false identifications and copies of other people²⁴. So if Public International Law is protesting that it is about justice or equity or reconciliation or revenge or forgiveness or catharsis or politics or the rule of law, the last thing the analyst should do is take Public International Law at her own word. To do that would mean the analyst would be reinforcing the patient's mis-recognition of herself. If she does that then the patient, like Kris's patient, will continue to act out and in years to come our children and grandchildren will still be analyzing and treating International Law, that is, if our patient has not, by then, committed suicide.

More dangerously, by entering the dimension of the patient's imaginary in order to 'cure' the patient's ego means in effect to normalize it while ignoring the dimension of desire: the dimension that is not normal or universalisable but is unique to each subject. It is to ignore the real question, that is, *why* the patient thinks he is a plagiarist. The dimension of what Lacan terms the Real, in other words, continues to remain unaddressed. What Lacan is worried about is that analysts address the patient's ego in order to reshape their patients in accordance with the analyst's

²³ 'The Mirror Stage as Formative of the *I* Function as Revealed in Psychoanalytic Experience', in *Ecrits, ibid*, at 75-81.

²⁴ I discuss the perils of imaginary identifications in 'Three Close-Ups in Search of Truth: Law, Cinema, Psychoanalysis' in M Wan (ed), *The Legal Case: Interdisciplinary Perspectives* (2012)

world²⁵. Meanwhile the specificity and idiosyncrasy of the patient's desire remains unaddressed; no wonder Lacan concludes by suggesting that, if anyone needs fresh brains, it is not Kris's patient but the analyst Kris.

So what should the analyst have done? As far as the symbolic register is concerned for Lacan the answer is simple: there is no such thing as intellectual property. The symbolic belongs to everyone and therefore plagiarism doesn't exist. Which enables Lacan to pose the *real* question: 'if the symbolic belongs to everybody, why have things in the symbolic order taken on this emphasis, this weight, for the subject?'²⁶ To address *that* question, it is not enough to tell the patient, 'Don't worry, you are not stealing'. You have to address *why* they are under the impression that they are stealing. To do that the analyst must penetrate to the Real, and in particular that bit of the Real that the patient is so ashamed of and embarrassed about that he has hidden even from himself. As I have related, Lacan coined a term for this: *the extimate*. To have a chance of penetrating to the extimate, the analyst should have preserved the patient's hunger for eating fresh brains: had he done that, then the analyst might have found out why the patient was so hungry in the first place.

²⁵Lacan sees this as a wider plot by ego psychologists along the lines of Roosevelt's New Deal in America: Kris, the intellectual leader of the 'New Deal of ego psychology', he mocks, decisively intervenes by appealing to the subject's ego. The deal of the "new deal", Lacan claims, has its goal to normalize the subject in order to better adapt to so-called reality. So 'Kris' ideas about intellectual productivity thus seem to me to receive the Good Housekeeping Seal of Approval for America.' In the US, Lacan feared, psychoanalysis was enlisted in the service of the New Deal, exhorting the analysand to adopt to her social environment and to so-called reality. 'Response to Jean Hyppolite' in *Ecrits*, *supra* note 22, at 318-333.

²⁶ *Ibid*, at 329.

5. From the Imaginary to the Real

A bad analyst, as we have just seen, would behave like Kris: if her patient were Public International Law, she would go and check if the work produced and performed by Public International Law is up to scratch; in doing that she would be entering the patient's, no doubt distorted and self-reflecting imaginary. Such an excursion, according to Lacan, will do no good to anyone, least of all the patient. In entering the patient's imaginary, the analyst would be assuming and implying that there is a standard against which Public International Law should compete and that standard, if not the analyst's own, is one laid down by the Big Other of Law in general. So in addition to 'normalizing' the patient, another major flaw of the ego-psychology treatment is its assumption that there is such a Big Other who is whole and complete, ignoring that the Big Other of the symbolic order is also irretrievably cut, castrated and lacking.

So how do we resist the temptation of meeting our patient at the level of her own imaginary (and no doubt imaginative) narratives (that it is about justice, reconciliation, politics, pragmatism, amongst other claims) and meet them at the level of the Real where an intervention will actually make a difference? The Lacanian insight which again is first and foremost Freudian, is that the analyst must listen to what the patient says about herself; in this instance the analyst must *preserve* the patient's desire for fresh brains; by doing that the analyst will give the patient the opportunity to find out *why she is so hungry in the first place*. As I discuss shortly, my wager is that International Law is ravenous because it tries to fill a place that is unfillable, that is, the empty place left by the death of God.

So how does the analyst listen in such a way as to allow their patient to articulate their desire, uncontaminated by the analyst's own desires and prejudices? The problem, as analysts find out daily when listening to their patients' endless and monotonous ramblings, is that most of our speech about ourselves is idle chit chat; what Lacan called 'empty speech'. Lacan goes further to insist that, for the analyst to respond to the subject's 'empty' speech (that it is about justice, or reconciliation or forgiveness, or revenge), is to perpetuate the subject's false identifications and misrecognitions. What the analyst must do is lead the subject to recognize the *imaginary* nature of those identifications. The Lacanian analyst will listen to International Law's protests about itself, nod wisely and silently, and ignore them. The last thing she will do is take its monotonous and bombastic monologue about itself to be the truth. She will bear in mind that the demands International Law makes, its constant protests, may well be false demands, hiding its real desires. For it cannot be denied that at times International Law with its protests at its own idealism despite its poverty and weakness, takes the position of the beautiful soul who enjoys complaining about being sinned against and forgives and forgets her own sinning. And as Hegel pointed out qua this beautiful soul, the true evil resides in the very gaze that sees evil all around itself²⁷.

Rather than taking the patient at their word, the analyst will look *beyond* the patient's empty speech to try hear their 'full speech'. And what is full speech? In contrast to empty speech which maintains the distance between the *I* as speaker and *I* as subject of the message (the subject of the enunciation and the subject of the enunciated as linguists put it), full speech implicates the subject's desire. And it will

²⁷ Hegel's discussion of the beautiful soul under 'Spirit Certain of Itself: Morality' in *Phenomenology of Spirit* (1977), at 383.

come as no surprise that for Lacan that place is not far from the place where the subject's enjoyment resides: truth, he says, is 'the sister of that forbidden jouissance'²⁸. So full speech emerges when the subject comes to articulate their secret, shameful, and indeed hitherto only unconscious knowledge: that is, the extimate. This truth, hidden and excluded in the interior, we disavow in ourselves but, as we will see, are all too ready to find it in the other, in the neighbor.

5. The Big Other: God

A true analysis therefore will try to penetrate beyond the patient's monotonous retellings of her own history and pierce through to her real yet inevitably repressed desires. It is at this, doubtless painful but real level, that we can hope to encounter Public International Law's secret and disavowed kernel. This kernel, I suggest, is a passion to act as the limit that was once occupied by God.

Kris' patient's insecurity and defenses against emulating someone 'great' take us back to the heart of psychoanalysis, the Oedipal struggle: Lacan had no issue with that aspect of Kris's interpretation. Freud, as we know, revisits the Oedipal motif in his tangential analysis of the origins of law in *Totem and Taboo*. Supposedly based on his impressions of aboriginal Australians, *Totem and Taboo* reiterates the motif of the Oedipal struggle, insisting that we can learn from primitive societies, like from neurotics and children, what we repressed in our own psychic lives.

One of the lessons we learn is that the son's initial rivalry with his father and the son's wish for the removal of the father becomes a desire for identification: the

²⁸ J. Lacan, *The Other Side of Psychoanalysis, Book XVII*, ed. J-A. Miller, trans. R. Grigg, (2007), at 61.

son who wanted to replace the father now wants to be like the father. As Freud knew, however, there is nothing benign or flattering about identification: identification implies idealization but also competition with and annihilation of the other: ‘Identification’ he writes, ‘is ambivalent from the very first; it can turn into an expression of tenderness as easily as into a wish for someone’s removal. It behaves like a derivative of the first, oral phase of the organization of the libido, in which the object that we long for and prize is assimilated by eating and is in that way annihilated as such.’²⁹

For Freud’s primal horde, the brothers’ love for the father becomes identification with the father followed by his annihilation, that is, his murder. Freud’s lesson however, as in *Dostoevsky and Parricide*, is that in the rivalry between father and son the son always loses: once you kill the father he becomes more powerful than before³⁰. The sons inherit the guilt for their crime and the father becomes undead. As the Portuguese poet Jose Saramago puts it, ‘dead gods are gods forever’³¹.

This helps us answer the question Gilles Deleuze posed in an early essay on Nietzsche: quite simply and disarmingly Deleuze asks, ‘Did we kill God when we put man in his place and kept the most important thing, which is the place?’³² And the answer is the place is still very much present, indeed all the more glaringly and loudly present, for having been left spectacularly empty. Our modernist parents, we could say, wrecked the place by trying to kill God and we inherited their destruction: as I

²⁹ Freud, ‘Identification’ in *Group Psychology and the Analysis of the Ego* (1921) in *The Standard Edition*, *supra* note 12, Volume XVIII, at 105.

³⁰ *Dostoevsky and Parricide* in *The Standard Edition*, Vol. XXI (1928), *supra* note 12.

³¹ J. Saramago, *All The Names* (2000), trans. M. J. Costa, at 15.

³² G. Deleuze *Pure Immanence, Essays on a Life* (2001), at 71

have discussed before, the morning after the death of god is a nasty hangover. Our parents had the party and we are left with cleaning up the mess of their enjoyment³³.

Psychoanalysis, furthermore, reminds us that it is not just the modernist house we inherited from our parents but every building that is cracked, the building housing each subject just as the building housing each system. The concept of God addressed, redressed and even repressed our desires for protection, for reassurance, and for belonging. For International Law whose founding fathers based its origins on divine law, God performed the functions of total legislation, total knowledge, total ownership (of territory) and of course total enjoyment. What is significant, moreover, is not how, or how well, God performed these functions, but the fact that the desires for someone who could perform these functions were there *ab initio*. And these desires were there *ab initio* precisely because every subject, and every system, is plagued by a lack at its center. The death of God may have revealed the emptiness at the heart of the symbolic order and at the heart of each subject more glaringly than ever before, but the death of God did not create the emptiness: the emptiness, to repeat the point, was there *ab initio*. Religion was one of the chief remedies, or placebos, imagined and created in response to this pre-existing emptiness.

As Lacan illustrated using Cantor's set theory, the notion of a complete set, the set of all sets, does not exist as it is not possible to include the systematizing number within the system; if we exclude it, however, the system is inevitably incomplete³⁴. The malady of incompleteness haunts not just set theory but everyone.

³³ *supra* note 9..

³⁴ See Giorgio Agamben's summary of this paradox, one that, as he says, nowadays occupies conversations at cocktail parties but when articulated by Bertrand Russell in a letter to Gottlieb Frege in 1902, it threatened the 'paradise' that Cantor's set theory had created for mathematicians: 'When we

It is not just Lacan who insists on the impossibility of a set of all sets, the set that closes off the system. Hans Kelsen puts it more prosaically when he places Public International Law as the lynchpin of the *grundnorm* that crowns the pyramid of law-making norms³⁵. The *grundnorm*, as we know, is a transcendental presupposition which does not exist but must be hypothesized for the rest of the system to work: just like every circle has a periphery, every system has a limit and this requirement does not escape International Law. The function of the limit is to give the illusion of completion, including the crucial ideological function of a ‘final’ limit: in the case of International Law we could say we postulate a limit, a *grundnorm* or Big Other to make up for the fact that everything underneath is not as cohesive and uniform as we would like it to be: to efface the fact, in other words, that there is no such thing as ‘an international society’.

Simpson in *Law, War and Crime* points out the undecideability of law’s ‘place’, hovering uncertainly between domestic and international and leading Simpson to suggest that law’s ‘place’ is a ‘hybrid’³⁶. I would go further and suggest that this place is not undecideable but *empty*. The barely disguised messianic messages and iconicity of the International Criminal Court, as Edwin Bikundo shows, betray the desperate attempt to fill the empty place with, if not God, at least

say that certain objects all have a certain property, we suppose that this property is a definite object, that it can be distinct from the objects that belong to it; we further suppose that the objects that have the property in question form a class, and that this class is, in some way, a new entity distinct from each of its elements. Precisely these unstated, obvious presuppositions were brought into question by the paradox of the “class of all the classes that are not members of themselves”’: *The Coming Community* (1993), trans M. Hardt at 71.

³⁵ H. Kelsen, *Pure Theory of Law* (1967), trans. M. Knight.

³⁶ *Supra* note 6.

something ‘God-like’. International criminal trials in particular are suffused with liturgical rhetoric, apocalyptic warnings and promises of salvation; international criminal law therefore remains incurably ‘faith-based’.³⁷ This is not surprising since modern theories of the state as Carl Schmitt knew, are so many secularized theological concepts³⁸. Since belief is pivotal, we can understand the rush in International Criminal Law for the establishment of rituals and symbols more than doctrines. The use of secular law *as if* it were religious, and the role of sacrifice, as Bikundo has shown, are pivotal: in this case the sacrifice of the African whose peers form the preponderance of defendants in the International Criminal Court. While Simpson and Bikundo suggest that religious tropes are deployed to bridge the gap between theory and practice, my thesis goes slightly further: the gap, I maintain, is unfillable.

The limit as well as arrogance of modernity, however, is its refusal to acknowledge a limit. Moreover, the presumed absence of a limit makes the subject less rather than more free, more vulnerable, less confident. As Lacan responds to Dostoevsky, ‘Fat chance [the death of the father liberates us from the law]. The good news [that God is dead] does not liberate us from the law, far from it. If God is dead, nothing at all is permitted.’³⁹ The alleged death of God, we could say, is responsible for Public International Law’s neurosis and its constant craving for fresh brains. If the rules and prohibitions making up Public International Law could be grounded in divine law, as in the doctrines of its founding fathers, then our patient might

³⁷ Bikundo, ‘The International Criminal Court and Africa: Exemplary Justice’ *Law and Critique*, Volume 20(1), 2009.

³⁸ C. Schmitt, *The Concept of the Political* (1996) and *Political Theology: Four Chapters On The Concept of Sovereignty* (2006).

³⁹ *The Other Side of Psychoanalysis*, *supra* note 28, at 119-20.

occasionally be satiated. Instead, with modernity, our patient is at pains to ground fundamental and universal rules without the guarantee of an agreed limit.

In the following section I examine some presumed limits modernity tried to insert in the wake of the ‘death of God’ and in particular Kant’s exaltation of man as a legislative being whose will utters the categorical imperative. As will be obvious, psychoanalysts are far from convinced that Kant’s proposals for law in general or International Law in particular in his famous essay *Towards Perpetual Peace* succeed in establishing an impermeable limit; in the terms of this paper, what continues to ‘leak through’, I argue, is the extimate.

6. Can Law in General, and Public International Law in Particular, Act as a Limit?

A. Freud and the Categorical Imperative: a Perverse Modern Taboo?

Modern man tried to imitate God’s injunction against proximity to the raw Real by inserting formal law in the empty place; in Kant’s case, this has taken the form of the categorical imperative. For Freud, however, the workings of the categorical imperative, in particular its compulsive nature, render it indistinguishable from the workings of taboos in pre-modern societies. For Freud the categorical imperative is a remnant of the primitive within modernity: ‘taboos still exist among us. Though expressed in a negative form and directed toward another subject-matter, they do not differ in their psychological nature from Kant’s “categorical imperative”, which operates in a compulsive fashion and rejects any conscious motives.’⁴⁰

⁴⁰ Freud *Totem and Taboo* in *The Standard Edition*, *supra* note 12, Volume XIII (1913) at xiv.

For Freud law's origins are not unknowable, but unconscious; that is, our unconscious knows them, but our conscious selves strive to keep that knowledge well and truly repressed. And no wonder we choose to repress them, as those origins inevitably include an originary crime which has left us with the memory of guilt though not of the crime itself. Our guilt therefore, as Joan Copjec has put it, is all we know of the law and its origins⁴¹. In contrast to Kant, therefore, for Freud the only reason we have rules is not because we are rational but because we are guilty: and why are we guilty? Because we have already performed, or desired to perform that prohibited action, *in our unconscious*. 'The basis of taboo', as Freud puts it, disarmingly simply, 'is a prohibited action, for performing which a strong inclination exists in the unconscious.'⁴²

Which leads us to articulate Freud's obvious, yet neglected insight on the relationship between law and desire: 'where there is a prohibition there must be an underlying desire' he insists⁴³. And it is because these desires are so strong that 'the most severe measures of defense' against them are needed⁴⁴. Taboos, categorical imperatives, moral and conventional prohibitions, all share the same origin and that is none other than desire. The origin of law, we can say clearly, is desire. For psychoanalysis the proscriptions of International Law, like of all law, are precisely based on desire. Public International Law, like all law, prohibits what is most desired: if there were no desire then there would be no need for prohibition.

⁴¹ Copjec, 'Evil in the Time of the Finite World' in J. Copjec (ed), *Radical Evil*, (1996) at xiv.

⁴² *Totem and Taboo*, *supra* note 40, at 32.

⁴³ *Ibid*, at 70.

⁴⁴ *Ibid*, at 17.

Since the origin of law is desire, the function of Law, as Lacan insisted, is not to prevent access to our desires but to act as a defense against unlimited desire and thereby unbearable enjoyment. Access to unbridled enjoyment would be unbearable for the subject so law acts as a limit, not to our freedom, but to limitless, and therefore unbearable, enjoyment. Law's limit on enjoyment is reassuring because it makes it look like what we cannot attain due to our inherent lack is instead prohibited. So in the case of International Law, small or weak states can usefully claim 'we don't attack or invade other states, not because we can't, but because it is prohibited'.

B. Self-Legislation as a Limit?

Can self-legislation perform the function of the limit? For Kant what is right and what is wrong, what ought I to do, can be decided by reason only. At the same time, Kant appreciated that 'pure reason' left a 'vacant place' in its account of the world and set out to fill it with his account of 'practical' or 'moral' reason⁴⁵. What does practical reason demand? For Kant pure practical reason enjoins the subject to act in such a way as she would will for her action to be a universal law. The resulting moral duty, therefore, is not imposed on the subject but autonomously assumed by the subject herself: the individual acting in accordance with the moral law identifies her will with the principle behind the law so the moral law is not dictated but self-positing.

For Kant, therefore, self-legislation is expected to function as the indispensable limit of the system. Yet is self-legislation, whether in domestic or international law, possible or even desirable? For Kant law is paramount because he sees man as a legislative being; International Law seems especially appealing and in line with

⁴⁵ 'This vacant place is filled by pure practical reason with a definite law of causality in an intelligible world, namely the moral law'; I. Kant *Critique of Practical Reason* (2005), trans T.K. Abbott, at 195.

Kant's principles because it is based on the ideal of self-legislation and consent. While in domestic law, the concept of self-governance has become a long-lost ideal and distant memory, with self-governance meaning, at best, governance by the majority or the representatives who may or may not represent the 'self', in Public International Law this ideal is supposedly still alive: Public International Law's main sources being the customary practice of states and the obligations they voluntarily entered into through treaties, suggest that the state's will is still paramount.

In the case of the individual, self-rule is not necessarily universally welcome, nor is everyone convinced by Kant's celebration of the 'dignity' of the free will. France's Michel Houellebecq doesn't take long to dismiss Kant's pretensions: 'According to Immanuel Kant', he muses 'human dignity consists in not accepting to be subject to laws except inasmuch as one can simultaneously consider oneself a legislator. Never had such a bizarre fantasy entered my mind. I was quite happy to delegate whatever powers I had'⁴⁶. The inverse of us creating our own duties is the injunction to, not only perform that duty, but to choose what duty we have to perform and take responsibility for its consequences. Such a duty, the duty to choose one's duty, and to further choose the correct duty, far from liberating the modern subject, weighs on her with the tyranny of responsibility; what if I make the wrong choice? No wonder we are often left hoping that someone or something would please choose for us. Exercising free will and choosing one's duty, a duty that one would will, at the same time, to be a universal law, and then acting in accordance with that duty is no easy task. No wonder we often watch states reacting or colluding in other states' desires. In psychoanalytic terms, like hysterical patients, states, rather than choosing or determining their own will, often copy or imitate the will of other states: in

⁴⁶M. Houellebecq, *Platform* (2003), at 329-330.

particular of a powerful state. How often do we witness countries like the United Kingdom for example appear to let the United States choose their desire for them?⁴⁷

Like Freud, Kant agrees that in the absence of international institutions, states live in a state of nature, that is, in a state of war with each other: ‘nations engaged in a war’ he writes, ‘are like two drunkards bludgeoning each other in a china shop’⁴⁸. Yet his hope that reason could be the foundation for the moral law extended to international law in his famous *Perpetual Peace*. The attempt again is to ground peace between nations not on the existence of God but on reason and the rule of law. In modernist international law as conceived by Kant the principle of sovereignty and sovereign equality means that states are only bound by norms they have themselves agreed on. If the ideals of the rule of law and self-legislation work in domestic law, then, Kant insists, they will do so ‘even in a race of devils’. Self-legislation, then, is the transcendental norm with the sovereign state taking the place of Kant’s self-legislating individual in the international legal order.

Kant’s set of ‘preliminary articles’ for reducing the likelihood of war include the prohibition of annexation of one state by another, the abolition of standing armies, and a ban on interference by one state in the internal affairs of another⁴⁹. In addition his ‘definitive articles’ include the insistence that every state shall have a republican

⁴⁷ I discuss hysterical desire in the subject of law in ‘Does the Letter of the Law Always Arrive at its Destination? A Study in Feminine Psychology’ *Law and Literature* Fall 2010, Volume 22 Issue 3, pp394-417

⁴⁸ Quoted by H. Arendt, *Lectures on Kant’s Political Philosophy* (1992), at 53. Arendt notes that ‘the quote is actually from Hume’.

⁴⁹ P. Kleingeld (ed) *Immanuel Kant: Toward Perpetual Peace and Other Writings on Politics, Peace and History*, (2006), §8:343–47.

civil constitution so it is the people decide who whether there will be a war⁵⁰. Rulers who wage war without their people's consent are using their subjects as property, as a means rather than an end in themselves: 'Citizens must give their free assent, through their representatives, not only to waging war in general but to each particular declaration of war'⁵¹.

Kant, while conscious of the fact that individuals as well as states are not angels but a race of devils looking out for their own self-interest, still insists that that minor inconvenience can be catered for 'if only they are intelligent'. A big if as it turns out. For Kant what underlines it all is not altruism but self-interest: When states are ruled in accordance with the wishes of the people, their *self-interest* will provide a consistent basis for pacific relations:

The problem of organizing a state however hard it may seem, can be solved *even for a race of devils*, if only they are intelligent. The problem is: "Given a multitude of rational beings requiring universal laws for their preservation, but each of whom is secretly inclined to exempt himself from them, to establish a constitution in such a way that, although their private intentions conflict, they check each other, with the result that their public conduct is the same as if they had no such intentions."⁵²

The bad man, the 'devil' for Kant, as Hannah Arendt emphasized in her *Lectures on Kant's Political Philosophy*, is someone who is inclined to *secretly* exempt himself from the rule. The point here is 'secretly' because for Kant, 'In politics, as

⁵⁰ *Ibid*, § 8:348

⁵¹ *Ibid*, § 6:345-6.

⁵² *Ibid*.

distinguished from morals, everything depends on *public* conduct.’⁵³ Publicity therefore is key to Kant’s political thinking and, we trust, to *Public* International Law. The trust is that evil deeds can only be done in secret. As Hannah Arendt summarizes, ‘Publicness’ is a criterion in his moral philosophy.. Morality is the coincidence between the public and the private. To be evil is to withdraw from the public realm. Morality means being fit to be *seen*’ and ‘Publicness is the transcendental principle that should rule all action.’⁵⁴

Lest we think that Kant’s ideal of a rule of law ruling the nations was always naïve and certainly by now outdated, we only need to look at contemporary debates to find for instance Jean L. Cohen’s renewed ‘plea for a re-articulation of Public International Law along the lines of the rule of law’⁵⁵. Cohen sets out to update international law by asking for a renewed ‘strengthening of supranational institutions, formal legal reform, and the creation of a global rule of law that protects both the sovereign equality of states based on a revised conception of sovereignty and human rights’. She acknowledges, of course, that ‘international law can also be instrumentalized by the powerful. But the principle of sovereign equality and its correlate, nonintervention, provides a powerful normative presumption against unwarranted aggression. Abandoning it’, she concludes, ‘would be a mistake’⁵⁶. Once again we see a focus on administration and impersonal rules to eliminate the political; can such rules and administration however, eliminate the estimate?

⁵³ Arendt, *supra* note 48, at 18.

⁵⁴ *Ibid*, at 49, and 60.

⁵⁵ Cohen, ‘Whose Sovereignty? Empire Versus International Law’ *Ethics & International Affairs* 18, no. 3 (2004).

⁵⁶ *Ibid*.

A few serious problems immediately present themselves however: first, despite Kant's optimism, not all people are necessarily intelligent, even when it comes to their own self-interest. Second, unfortunately people are willing to commit evil deeds publicly. Thirdly, if self-legislation is a distant memory in the domestic sphere where private individuals hardly get to choose the laws they are governed by, does it have any meaning in the international arena? In the case of Public International Law, and self-legislation by states, what does the freedom to create one's own laws actually entail in the twenty-first century? Are states free to choose any and all types of laws? Not surprisingly, we find that it is only 'some' systems and 'some' states that enjoy this freedom to choose. It is obviously forbidden not to be a democrat: indeed it is taboo to question the desirability or self-evident goodness of democracy.

As Slavoj Žižek and Alain Badiou have been pointing out, the only choice we are told we have today is between liberal democracy and fundamentalism⁵⁷. Political freedom in the twentieth first century, rather than the grand ideal of self-legislation dreamed of by the Enlightenment is reduced to the freedom to choose a particular lifestyle, indeed only one lifestyle: global capitalism. Yet it is obvious that democracy is not open at the fundamental level of the economy: as Žižek points out simply, International Monetary Fund chiefs are not elected by the billions of people whose decisions they affect. Global capitalism in effect excludes democracy at a structural

⁵⁷ I discuss this theme in 'Democracy Or Your Life' *supra* note 9. For a recent collection of essays addressing the pitfalls and limits of the democratic ideal see G. Agamben et al *Democracy: In What State?* (2011). Badiou's thesis was developed earlier in 'A Speculative Disquisition on the Concept of Democracy' in *Metapolitics* (2005).

level, and therefore appeals to neo-Kantianism risk appearing as a form of state philosophy: as propaganda, in other words, for neo-liberalism⁵⁸.

C. Lacan On Kant: The Perverse Core of Kant

As if such an attack on Kant's dignity of the free will was not severe enough, Freud's blow to Kantian ethics continues by suggesting that what Kant calls the moral law, the inner voice of conscience which utters the categorical imperative, is nothing other than the superego. Rather than issuing guidance and benign rebukes to the subject, Lacan's superego is a sadistic agency whose origins hark back to the perverse God who commands Abraham to kill his own son. This superego not only enjoins the subject to obey the moral law but also enjoys the subject's failures to come up to its exacting standards.

Lacan takes this cue from Freud and pushes the point further: the core of Kantian ethics, he suggests, as a demand for the impossible ('You can because you must') has a perverse undercurrent, just as Sade's perverse discourse can be construed to have an ethical undercurrent: using the other as an instrument for my enjoyment implies, indeed demands, a correlative right in the other to use me as an instrument for his or her enjoyment. So for Lacan the Marquis de Sade's 'will-to-jouissance' conformed perfectly to Kant's imperative of the universalization of the will: Sade's will to use others as instruments for his enjoyment recognized at the same time the right of others to use him as an instrument for their enjoyment. In short, a subject can derive enjoyment from enunciating and imposing categorical imperatives, commands which may be well universalisable as Kant insisted, but are not necessarily for *good* ends.

⁵⁸ S. Žižek, *Less Than Nothing: Hegel and the Shadow of Dialectical Materialism*, (2012).

The ‘emptiness’ of the moral law, the fact that it doesn’t enunciate any notion of the Good other than doing one’s duty, can lead the subject to do something not only for the sake of duty but *only* for the sake of duty. That is, one can conform to the formal structure of the categorical imperative irrespective of the substantive content of that imperative, in other words, while pursuing diabolically evil ends. A famous abuse of Kantian ethics was of course Eichmann’s appeal to Kant during his trial in Jerusalem: Eichmann’s perversion, as Hannah Arendt and others have described, involved putting himself in the position of an instrument of the Big Other’s — here the Furher’s — will. By making himself the instrument of the Big Other’s will, a subject like Eichmann can use the notion of duty as an excuse to absolve himself from exercising free will and for refusing to acknowledge that he did, indeed have a choice. As Alenka Župancic puts it, ‘what is most dangerous is not an insignificant bureaucrat who thinks he is God but, rather, the God who pretends to be an insignificant bureaucrat. One could even say that, for the subject, the most difficult thing is to accept that, in a certain sense, she is “God”, that she has a choice’⁵⁹. The horror Eichmann’s case revealed, as Žizek notes, is that in modernity evil is not just pure egotistical evil, that is, for simple selfish reasons, but *radical* evil: ‘Evil masked (appearing) as universality’.⁶⁰

Public International Law’s retreat, therefore, behind rules, procedure, diplomacy and bureaucracy will not save us from having to make an ethical choice. The reason why rules and self-legislation are not adequate for protecting us from radical evil is the same in the case of individuals as it is for a group of individuals called states: Public International Law, no more than any law, can not escape the

⁵⁹ A. Župancik, *Ethics of The Real* (2000), at 97.

⁶⁰ Žizek *supra* note 58, at 12.

pathological. The symbolic, to put it in lacanese, is not a sufficient barrier against the Real.

Kant was aware of this, showing not only the limits of pure reason and supplementing it with practical or moral reason, but also revealing the *excess* in humanity; he appreciated, in his words, the ‘scandal of reason’, that ‘reason contradicts itself’⁶¹. The capacity for the infinite of practical reason is also a capacity for the *inhuman*, for radical evil. As we see later, this inhuman element, the undead as Žizek calls it, is the excessive dimension of the human. While with the creation of the modern state this irrational excess is supposed to have been left out, like a state within a state, to return to Freud’s metaphor, like the repressed, it is always bound to return and shatter the patient’s equanimity.

8. Humanity or a Race of Devils?

If formal law cannot be guaranteed to protect us from the pathological, what about the cult of humanity, otherwise known as Human Rights? If divine law prompted and promoted faith in a tradition of natural law, following the death of God the cult of humanity provided a tradition of natural rights as human rights. Kant frequently cites Leviticus’ injunction to love one’s neighbor as yourself as an instance of the categorical imperative and continues the logic of universalization and marriage between religion and reason.

Psychoanalysts, however, are not convinced. For Freud in his pessimistic late work *Civilization and Its Discontents*, the injunction to love one’s neighbour is Christianity’s ultimate delusion: ‘not merely is this stranger not worthy of my love’,

⁶¹ Letter to Christian Garve, September 21, 1798, quoted in Arendt, *supra* note 48, at 9.

he protests. 'I must honestly confess that he has more claim to my hostility and even my hatred'⁶². Freud appreciated that solidarity within the community is only ever achieved at the expense of those outside the group; in that sense, Jews, he presciently claimed, rendered 'most useful services' by being the target of hatred and thus promoting community spirit among Christians⁶³. The rise of nationalism and fundamentalism in the last two decades suggests that tolerance and multiculturalism have not worked. And that closer co-existence can breed, not more respect and cooperation but more intolerance and hostility.

The message of the second half of the twentieth century, a time when human rights were enacted and sought to be enforced is, unfortunately, not as salient as we would like: the neighbor, it appears, is only tolerated, respected and celebrated when she is kept at a proper distance.⁶⁴ When she comes too close, as the plight of refugees and illegal immigrants betrays only too well, the rhetoric of toleration shows its limits. Freud and Lacan shared this pessimistic analysis of the limits of human generosity and neighborly love: altruism, as Lacan pointed out, does not cost much, and indeed it protects, rather than detracts from our egoism, since we only help those who are in our own image. It seems that the other whom we do not recognize as being in our own image, is left to the wiles not of our humanity, but of a God that we profess to have killed.

For psychoanalysis the function of law is not to bring us close to the neighbor, but to keep him at a proper distance: that is, the underlying focus of the law is not to

⁶² 'Civilization and Its Discontents' in *The Standard Edition*, *supra* note 12, Vol. XXI (1929), at 110.

⁶³ *Ibid*, at 110-11. For further discussion of this point see Reinhard 'Freud, My Neighbour' *American Imago* vol.54:2 1997 pp 165-195 and again in S. Žižek, E. L.Santner, K. Reinhard, *The Neighbour: Three Enquiries in Political Theology* (2005).

⁶⁴ See for example Žižek's 'Love My Neighbour? No Thanks!' in S. Žižek's *Violence* (2008).

enjoin us to ‘care’ for our neighbor but to regulate the relationship between us so that the neighbor doesn’t get too close to us. For Freud in *Group Psychology and the Analysis of the Ego* distributive justice only works because we deny ourselves things so that others may be deprived of them as well⁶⁵. We could go further and say, like Žizek, that the charade of political correctness and celebration of multi-culturalism arise not from love of one’s neighbor but from fear of encountering real others; the fear of the inevitable violence such encounters entail. Which leads to my conclusion:

9. The Extimate Is The Neighbor

If the extimate is the bit in ourselves that we don’t dare approach, the unassimilable core, or, as Lacan often described it, the Thing, the un-decaffeinated neighbor exemplifies this radical core. ‘Freud’, Lacan understands, ‘recoils in horror at the commandment to love one’s neighbor because of the evil that dwells in the neighbor and therefore also in oneself. And what is it that we don’t dare go near to? Our jouissance – that which prevents us from crossing a frontier at the limit of the Thing’.⁶⁶ The alien, traumatic kernel, the unbearable Thing we don’t dare approach, except from the safe distance of decaffeinated tolerance and multiculturalism, is the neighbor. The neighbor who has not had the caffeine subtracted from her is the neighbor we don’t dare approach and find it harder to love.

⁶⁵ *Group Psychology and the Analysis of the Ego*, in *The Standard Edition*, *supra* note 12, Vol XVIII (1921) at 686.

⁶⁶ J. Lacan, *Seminar VII: The Ethics of Psychoanalysis*, ed. J-A. Miller, trans. D. Porter, (1997), at 186-21.

As Jacques Alain Miller discusses, the concept of the neighbor in Christianity seeks to abolish extimacy: as if such a project were ever possible. ‘The Christian injunction’ Jacques Alain Miller says is ‘nullify extimacy’⁶⁷. Lawyers and human rights lawyers in particular are used to addressing the symbolic register, the register where one subject can superficially look like another. However, what law and the symbolic order generally cannot get rid of is the extimate. Human rights discourse may try to reduce the disturbing and unassimilable core of the other to what is common, to the universal, to what conforms to the norm. As Miller puts it, ‘On the level of the signifier, on the level of form, there is equality, substitutability, peace’. But what makes the other *other*, their alterity, their difference, their particularity, is not on the level of the signifier, of the symbolic, but on the level of the Real, of the extimate. At that level, the other is irreducibly different: at that level, as Miller says, ‘there is war.’⁶⁸

Miller suggests why none of the generous and universal discourses on the theme of ‘we are all fellow-beings’ have been effective. Because racism, he continues,

calls into play a hatred which goes precisely toward what grounds the Other’s alterity, in other words its *jouissance*. If no decision, no will, no amount of reasoning is sufficient to wipe out racism, it is because racism is founded on the point of extimacy of the Other. Racism is founded on what one imagines about the Other’s *jouissance*; it is hatred of the particular way, of the Other’s own way of experiencing *jouissance*. We may well think that racism exists because our Islamic neighbor is too noisy when he has parties; nevertheless it is a fact that what is really at stake is that he takes his *jouissance* in a way

⁶⁷<http://www.lacan.com/symptom/?p=36> Miller, ‘Extimacy’ *The Symptom* Vol. 9 (June 2008).

⁶⁸ *Ibid.*

different from ours. The Other's proximity exacerbates racism: as soon as there is closeness, there is a confrontation of incompatible modes of *jouissance*. For it is simple to love one's neighbor when he is distant, but it is a different matter in proximity. Racist stories are always about the way in which the Other obtains a *plus-de-jouir*: either he does not work enough or he works too much, or he is useless or a little too useful, but whatever the case may be, he is always endowed with a part of *jouissance* that he does not deserve.

Intolerance, in short, is intolerance of the other's enjoyment. We can now make sense of Kierkegaard's dramatic claim, often repeated by Žižek, that the only good neighbor is a dead neighbor⁶⁹. If the extimate is the neighbor's disturbing *jouissance* then Kierkegaard is right that the only good neighbor is a dead neighbor: because a dead body can no longer enjoy.

10. Towards An Atheist Public International Law

To sum, Public International Law, I have suggested, is an inadequate, or porous limit because, like all law, it does not take account of the extimate: it can neither guard against the extimate in the other nor acknowledge the extimate in ourselves. Can we learn anything from Kris's failure in the fresh brains case to address this deadlock? As we recall, Kris wanted to show his patient that he was plagued by a desire to consume fresh brains because he believed in the existence of someone who already possessed fresh brains: that is, someone who is Great, someone who knows everything. As I discussed, this belief in someone who knows it all harks

⁶⁹ S. Kierkegaard, *Works of Love*, trans. H. Hong (1974), at 75.

back not only to the ‘grand-father’ of the patient but to the grand-father par excellence, the omniscient divinity. Public International Law suffers from a similar symptom; that there is someone out there greater than it, that it compares itself to and finds itself wanting.

As I have discussed, the entity which the subject directs her demands to, imagining that they have the capacity to answer and fulfill them is not a subject but a *place*: the place where full knowledge and full enjoyment is not only possible but attainable. In other words, the place once occupied by God. Learning from Kris’s mistake, the task for the analyst I suggest is not to tell the patient, ‘listen, don’t worry, you are also great’ but instead lead them to come to terms with the fact that the person they have been trying to please, impress, and imitate is also not great. That the place she has been addressing her demands and beliefs to is an *empty* place.

I call this realization, the traversing of the fundamental fantasy of someone great the atheist position: fully assuming the non-existence of a Big Other who knows it all means learning to know how not to know and continuing without guarantees. Like the man in search of fresh brains, like International Law, like all of us, we must acknowledge not only that we don’t know but that the Other doesn’t know either. That the answers are not to be found in other disciplines, or in other people’s brains, but in our own disavowed, repressed, and hidden extimate recesses.

This, of course, is no easy task: it means facing up to our own ugliness without the help of consoling fantasies including the fantasy of a God, or a Big Other, or ideologies including Human Rights or Democracy. It means confronting our own excess *jouissance*, an enjoyment that we find so threatening when we encounter it in the neighbor precisely because it is the unacknowledged evil that also resides in ourselves. Moreover, we must confront this ‘radical evil’, to borrow Kant’s

expression, without the placebos and palliative softeners provided by fantasies of a benign humanity or a benevolent Big Other. Like Kris's patient, we need to recognize there is no *grand* pere who knows it all, that when we come face to face with the extimate we are alone; and that no law, international or domestic, can protect us. This is the foremost ethical demand facing International Law today and the challenge we must rise to: until we are ready to confront our own extimate core, no individual or social transformation can take place

Freud's response to Kant's *Perpetual Peace* can be found I suggest in his pessimistic late work, *Civilization and Its Discontents*. Anticipating Lacan, who was, after all, Freudian first and foremost, Freud suggests here that what eros and civilization can ultimately never eradicate, however hard they try, is the death drive or, in our terms, the extimate:

The inclination to aggression is an original, self-instinctual disposition in man, and it constitutes the greatest impediment to civilization... man's natural aggressive instinct, the hostility of each against all and of all against each, opposes this program of civilization. The aggressive instinct is the derivative and the main representative of the death instinct which we have found alongside of Eros and which shares world-dominion with it.⁷⁰

For Freud the death drive, whether it exists or not, it nevertheless persists and insists. Like the undead, it is defiant, intransigent, obstinate, unassimilable, unriddable. and **above all**, unlegislateable. Following Zizek's term, we can call it the 'indivisible remainder' that persists beyond and oblivious to symbolic and imaginary appeals, rules, and interventions⁷¹.

⁷⁰ Freud, *Civilization and Its Discontents*, *supra* note 62, at 122.

⁷¹ Slavoj Zizek, *The Indivisible Remainder: On Schelling and Related Matters* (1996).

Public International Law, like all of us, continue to refuse to acknowledge the extimate: that there are things we cannot represent, not by law and not by literature either. The extimate, nevertheless, what is closest to us than ourselves, continues to persist and insist. It is no wonder therefore that Schopenhauer's verdict on Kant was that, despite protesting to be exploring and critiquing the nature of reason, he was, all along, courting religion: as Schopenhauer memorably suggested, Kant was like the man at a masked ball trying to seduce a woman only to find when she removed her mask that the masked lady was his wife all along. Kant, in other words, was at pains to seduce reason but behind the mask of reason was always religion⁷².

To return to my beginning: to get to the extimate we must experience anxiety. Unlike other affects that we can fool ourselves into thinking we feel, anxiety doesn't lie: it is the alarm bell that announces to us that we are approaching the extimate. When we experience anxiety we know we are touching the untouchable, unassimilable core. When and how does this happen? In the terms I have been using in this paper, and which Lacan insisted on when demolishing Kris's attempt at treatment, this happens when the extimate is not safely hidden by law (the symbolic), or by politics (the imaginary), or by affects or passions (that can be faked) but erupts in all its obscene and violent underside. I will close with two examples of such recent explosions of the extimate, both causing anxiety and forcing us to confront the extimate, the first in the neighbor, the second in ourselves.

First, France's recent legislation banning the burka or niqab in public; when the other's difference, her extimacy, is all too apparent, the rhetoric of toleration, allowance and acceptance come abruptly to an end. As Slavoj Zizek elaborates this

⁷² As Zizek concludes, this implies that Kant's 'radical critique [is] really just a new attempt to support religion, his transgression a false one': *Less Than Nothing*, *supra* note 58, at 11

example, when the face which subjectivizes the neighbor and makes her look a little like us is hidden from view, we are confronted with the horror of the neighbor as unbearable thing and the 'tolerant' west from France and beyond can no longer pretend to tolerate it⁷³. The French legislators, we could say, prefer their neighbor 'decaffeinated'.

My second example is an instance when the extimate is shown not in the other, in the neighbor, but in ourselves: the abuses at Abu Ghraib which as we know are not isolated instances of lone rangers or 'bad apples' but all-too endemic in the conduct of wars and indeed in the exercise of power generally. As Zizek elaborates again, Abu Ghraib illustrates 'the disavowed beliefs, suppositions, and obscene practices that we pretend not to know about even though they form the background of our public values.'⁷⁴

In international just as in domestic law and institutions, the abuse of power forms the obscene and hidden underside of all exercise of power. I have called this hidden and obscene core the extimate, the gap in the subject as well as in the Other that God was so good at concealing. In the morning after the death of God, fully assuming this gap at the center of our subjectivity as well as of our neighbor, in all its ugliness, and without decaffeinating it, is the highest and hardest ethical demand

⁷³ Zizek, 'The Neighbour in Burka' Spring 2010, Vol.11, *The Symptom* 69.

⁷⁴ Zizek, 'What Donald Rumsfeld Doesn't Know That He Knows About Abu Ghraib' <http://www.lacan.com/zizekrumsfeld.htm> posted May 2004 and discussed further in *Violence* (2008). Abu Ghraib abuses accompany, as we know, every war and indeed every exercise of power. Examples are too numerous to list though it is worth adding two more examples appearing in the British press as I write: 'Five Royal Marines Charged With Murder Over Afghanistan Death' *The Observer*, 14 October 2012; 'British Troops Face Fresh Charges of Iraq War Torture and Killings: Allegations to be unveiled in High Court of Systemic Policy of Abuse from 2003-2008' *The Observer*, 19 January 2013.

International Law, and all of us, face. Until we do that, no amount of ‘fresh brains’ will be sufficient to satiate our patient.