IS THE LEGAL PERSPECTIVE STRUCTURE-BLIND? *

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1. Introduction

The author of this paper is working in the field of international studies, not in the field of international law - so this is an effort to look from the outside into the field of international law and report what it looks like. I am not sure whether the specialist in international law will recognize the picture drawn; in all likelihood he will recognize some features, not all, and disagree with the rest. As usual there may be misunderstandings and difficulties of communication involved in such cases - so let me state from the beginning that the present paper is equipped with a question mark not only in the title, but also - although it does not appear typographically - all through the paper.

2. Two cosmologies.

To introduce the issue let me make use of a distinction I have found useful between two ways of looking at human, social or for that matter international affairs: the actor-oriented and the structure-oriented perspectives.(1) They can be seen as two ways of reflecting social affairs, each of them catching something of importance, neither of them sufficient but - in the view of the present authors, each of them necessary. Together they make for a relatively rich perspective, alone they function like the eyes of a color-blind person, filtering out something that are impressions on the eyes of others, admitting something. The metaphor is not chosen at random because there are also colors involved here: one perspective is more blue (conservative), the other more red (radical) - one filters out what the other perspective permits into the eyes of the beholder so that it becomes a part of the image on which he would act. And the reader will then have guessed the general thesis: there is something in the legal paradigm closer to the actor-oriented perspective.

A choice has been made, for each perspective taken alone constitutes a language, so to speak, in which certain things can be formulated and others not, or only with great difficulty, stretching the language and the concepts and the whole underlying model in such a way that it no longer fits originally into the basic framework. Needless to say this is also an effort to say something about why lawyers tend to be conservative, why radical lawyers are so few - but in a way which does not draw on such obvious hypotheses as social origin in the recruitment into the profession, or the constraints put on the lawyer by the nature of his job and the vested interests of the employers.

The followin is in schematic form some of the basic properties on the two social cosmologies:

Dimension	ACTOR-ORIENTED PERSPECTIVE	STRUCTURE-ORIENTED PERSPECTIVE
Basic unit	Actors (individuals, states, others)	Structures (position, and relations between them)
Basic aspects	Intention (good vs. evil) Capability (weak vs. strong) Presence (passive vs. active)	Exploitation vs. equity Penetration vs. autonomy Fragmentation vs. solidarity Marginalization vs. participation
Problem of Evil	Actors that are evil, strong, active	Structures that are exploitative, penetrating, fragmenting, marginalizing
How to cope with it	Make actors good, or weak or passive	Make structures equitable, autonomous, solidary, participatory
Basic approach	Focus on evil actor, institution-building	Focus on wrong structure, revolutionary changes
Time cosmology	Focus on acts, i.e. on events	Focus on structures, i.e. on permanents -- and on processes
Forgotten factor	Structures, actor-invariant aspects	Actors, structure-invariant aspects

By and large the column to the left (politically to the right) is what anyone can read any day in the Western press.(2) The basic

idea is that the world is to be understood in terms of its actors, individuals, states and others. As there are very many of them, particularly of the former, some selection has to be made in the perception, and the selection is in favor of the active and the strong - the latter making the top of the social pyramids visible with the rest turning into an amorphous mass of the passive and weak. There is, however, a principle of Chinese boxes involved here. If the eyes that see are trained on the world as a whole, the superpowers and big powers in general and their heads of state and governments etc. will be discovered first, and thinking as well as action will be in terms of them. But the eyes can also be trained on sub-units and sub-sub-units, and that is how presidents of corporations and associations, the heads of families (meaning the husbands, in general) mayors and chairmen etc. enter the picture. The perspective is capable of dissolving the amorphous mass into actors, but will always overselect the strong and active.

Among the strong and active there will be an overselection of the "evil" ones, those who have already through their acts proven that they are evil as well as those who may be suspected of evil intentions. The causes of evil are seen to rest with them, expressed in their acts of threats, of inclination to engage in evil acts. One may speculate why there is so much less focus on the good actors and the good acts - and one possible explanation may be as follows: "let us protect ourselves against evil and then hope there will also be something good". It is, in a sense, the mentality of frightened people exposed to the hazards of nature - the opposite attitude would be "let us facilitate and promote the good and hope there will not be too much evil".(3)

The question then is, what to do with such actors, and the answer is in terms of converting them, weakening them by depriving them of capability, or making them more passive. To obtain this institutions have to be built, all the time hedging against the evil act, and particularly against the accumulation of collectively organized evil known as internal or external war. It should be noted that within this framework of thinking the evil act is an <u>event</u>, it is not a state of affairs, a <u>Zustand</u>, something that was, is and probably will continue to be. Nor is it

a slowly changing process. On the contrary, it is a discontinuous jump, something that is but was different a moment ago, and may well be different thereafter. Thus, I am walking in the street with my bag, then suddenly I lie in the gutter with no bag and the thief can be seen at a distance, bag firmly in hand, himself on one of those small, highly efficient motorbikes. Or: there was"peace", then suddenly there is "war". Of course, this opens for the possibility of a continuum between the process and the jump: the steep curve.(4)

If one should characterize this perspective, not politically which will be done later, but from a purely perceptual point of view, one might argue that the perspective is somewhat primitive, as taken out of an early stage of cognitive development. It focusses on concrete entities, individuals, and appoints them the key building blocs - using social stratification and simple threat-perception as filtering mechanisms for selecting individuals that merit particular attention. Further, it focusses on sudden changes in the state of affairs of these individuals, building on the contrast effect between what was and what is. It captures very well a change of property - something "mine" that suddenly becomes "yours", or a sudden death from a loose brick or a shot fired in anger - but does not capture well the slow transfer of wealth known as exploitation, nor the slow death known as starvation. Thus, there is something simplistic in the perspective, almost infantile but in this there is also strength: in its concreteness lies a protection against exessive concept-formation. True, there are also abstractions as when collective actors are introduced - eg., states, but again the perspective is best at capturing the concrete actors, or even at equipping it with concreteness by stipulating that a state should be a territorially contiguous unit with recognizable and recognized borders, with some kind of power-center (so that others would know which actors to have as addressee of letters or bullets).

This is not the place to engage in the exercise of suggesting fruitful usages of the four word-pairs mentioned above as basic in the language of structural discourse - that has been done elsewhere. Clearly, in this perspective such phenomena as exploitation (the first dimensions) and imperialism (all four combined) are all fassbar - to use that excellent

German word - because the language has been built that way. More important, however, is that this perspective catches types of evil (if one assumes that material or non-material empoverishment, even to the point of somatic or spiritual death are "evils") that do not presuppose evil actors. Thus, an imperialistic structure (5) can have disastrous consequences and yet there is no evil intention; what is defined as actors may not be particularly strong (because only a small part of a structure shows up in any particular actor); and those actors may not be particularly active. In fact, they may only be doing their "job" - it is millions of such acts that constitute "doing jobs" that add up to an imperialist structure. So, if a wrong is being done unto somebody, where is the evil actor on whom to focus? Where is that particular event that should trigger institutions into action? Answer - nowhere, at no time; nothing stands out.

Thus, things that cannot easily be captured in one perspective can be captured in the other; suggesting that they are complementary. Both of them are too one-sided. One sees evil in terms of sudden events and suggests as a remedy something permanent - an institution; the other sees evil in terms of somethings permanent - the wrong structure, and suggests as remedy a sudden event - a revolution. One perspective tends to be structure-blind, the other tends to be actor-blind in the sense of being insensitive to the peculiarities of actors and categorize them merely as "bourgeois", "proletariat" or as "center" vs. "periphery", etc. Thus, our contention is certainly not that one is wrong and the other right, but that each of them is incomplete without for that reason claiming that their combination would be "complete" - thus, they are both too weak on the dimension of time, and too undialectical.

3. <u>The legal perspective</u>.

What now comes will have the vices and virtues of the caricature to some, and important insight to others. No doubt it is exaggerated, and there is absolutely no doubt that it applies better to criminal law than to civil law; something will be said about that later.

We shall asume that the basic constituent of the legal perspective is the juridical person or entity as something to

which legal norms may apply. They are norm-objects in the sense of being capable of receiving norms - some of them may also be norm-subjects in the sense of being capable of sending norms. The juridical person may be an individual or collective actor; in the latter case some individuals within the collectivity have specific tasks to perform in a legal context - in the former case there are some limitations, not all individuals are juridical persons (not children, not the mentally ill, sometimes not other categories defined in terms of sex, race, class etc.)

Characteristic of juridical persons is that they are equipped with intentions and capabilities. Thus, structures cannot be juridical persons, they do not possess actor concreteness. They cannot be norm-objects whose acts can be evaluated by applying standards to classify behavior as right/indifferent/wrong - standards that come out of draft laws/treaties that have been ratified by appropriate bodies. If the conclusion is"wrong" then the application of standards should lead to adjudication, possibly verifying the conclusion, convicting the actor, imposing sanctions with a view to obtaining non-evil behavior in the future for the same actor or other actors to whom the same norms would apply (usually there is also the possibility of appeal, of some validation by an appropriate competence group).(6) If not in fact, at least in theory: a juridical person is something capable of playing the role as an object of all this.

Thus, the actor-oriented perspective shows up a number of places in this paradigm.

First, as already pointed out: the basic entity is an actor, and one equipped with at least the capacity for having intentions and capabilities, and being active - meaning enacting them, in an evil way, meaning thereby infracting norms properly arrived at.

Second, the legal perspective tries to use two of the three methods under "how to cope with it" in the preceding action:

> making actors <u>weak</u> by punishing them - depriving them of free time or free money (or more bodily forms of punishment);
>
> making actors <u>passive</u> by imprisoning them or deterring them from any evil-doing (individual and general prevention).

However, there is very little, if any at all, emphasis on making actors "good" by converting them - this is left to another actor-oriented institution: the church. The legal system is very poor in terms of positive approaches - but that is not a consequence of its actor-orientation, only one additional property of the system. Such religions as Christianity are much stronger in this regard by being more symmetric, showing both what is right and what is wrong; trying to instill a desire to the former and not the latter; encouraging the good-doer into activity through promisses of eternal rewards, discouraging the evil-doer into at least passivity through threats of eternal punishment. But both of them have concrete actors as their subjects, with the important difference that Christianity tends to focus on individual actors to the neglect of the collective ones - even being subservient to the top individual actors inside the collective actors.

Third; it is important if not absolutely essential that the evil act is intended. There is such a thing as negligence, but that concept also shows the importance, the weight attributed to the dimension of intention. Lack of intention, moreover, does not necessarily mean consciousnessness. It could also mean that there is an intention but in another direction, such as the soldier who kills not with the intention of harming anybody, but with the intention of defending himself, his country, freedom, socialism. In other words there has to be some kind of coincidence between subjective intention and objective harm for certificates of guilt to be distributed in the adjudication process.

Fourth: not only is the perspective actor-oriented, it is also what one might call negatively structure-oriented. Thus, if an actor commits an act that can be seen as "normal" in the precise sense that other actors in the same position commit the same acts in the same situation; in other words, <u>if the act is actor-invariant</u>, then it is not captured in this particular grid. One husband who beats his wife may be detected, reported, evaluated, convicted, punished; one billion husbands who exploit one billion or so wives in an institution called marriage are left undetected, unreported etc. One soldier who commits a My Lai massacre is punished; half a million who engage

directly or indirectly in less explicit massacres pass unpunished. The willingness to punish the unusual and not entirely actor-invariant can also be seen as a price necessary to pay by those who have vested interest in the structure. Needless to say, they will generally be the people on top of the structure, domestic or global, and prefer paradigms, images and conceptual frameworks in general that locates "evil" in the unusual and actor-specific, not in the normal and actor-invariant - in other words in that which is built into the structure.

What about the actor who commits evil acts regardless of structural context - in other word the evil that is structure-invariant? The bully, the perennial bully - what about him? The guess would be that this particular person is not declared guilty of evil acts, but sick, mentally insane as proven by the fact that he cannot function normally in any context. In other words, the condition for issuing a certificate of evilness is that the actor not only engages in unusual and harmful behavior in some context, but that this can be seen as the customs of a conscious choice, as something deliberate, as proven by the circumstance that in other contexts - or even better - in the same context but in earlier periods, such acts are/were not committed. Thus, the legal paradigm is in a sense setting up two borders: one against the structure-invariant evil factor, the other against the actor-invariant evil structure; neither of them falls within the paradigm.

At this point one might ask: why should they? Why should the legal paradigm be capable of catching everything? Would that not be an even greater danger, the all-pervasive thought-form capable of coming to grips with everything between heaven and earth - even above the heavens into paradise and below the earth, into the other place?

This is a valid point, it seems, and we are not in search of a general theory of evil, complete with all possible mechanisms for its eradiction. There have been efforts in human history and they tend to serve as a rationale to legitimise very powerful elites who in the name of the eradiction of evil commit evils at least commensurate with those they are supposed to eradicate - cfr. the Inquisition in Catholic Europe, the witch-burning in Protestant Europe.

But there is another argument in this connection. Thus, to the extent that law is compatible with one paradigm rather than another, and the paradigms or perspectives themselves are parts of a political reality favoring some rather than other views and groups and parties, law becomes politics. As an intellectual game it is innocuous, but as a forceful factor permeating much of the thinking on international and domestic relations it is far from innocuous. Thus, it is far from innocuous that it is much more easy within the legal paradigm to define military aggression than to define "economic aggression" - so much more easy that quotation marks have to be introduced for the latter. Why? Because military aggression satisfies all the characteristics built into the actor-oriented perspective: it is made by actors that have to be "evil" (from the point of view of the victim), no doubt are "strong" or at least believe so themselves (otherwise they probably would nothave engaged in such acts) and certainly are "active". In fact, their activity comes out as a concrete act, an act of aggression - e.g. a sudden invasion, a bombing of an open city. Compare this to economic aggression that just is: there is vertical division of labor, exploitation in other words; the periphery is dependent on the center, conditioned, caused by it; the total structure splits the periphery and unites the centers, and it draws a line between first and second class participants in the system - whether the system is a factory, a firm or an international economic system.

To take but one aspect of this: it is easy to see who should be punished if an act of military aggression is performed. The system may not be capable of inflicting any punishment sonit aims at the more modest idea of deterrence through balance of power policies in lieu of that -- but except for the empirical difficulty in finding the initial act in actio-reactio chains of provocations and counter-provocations disguised as defensive responses,there is, at least, logically speaking something somewhere that fits the model. Not so with economic aggression: the first step may be so imperceptible and in addition not easily classified as "evil": a country or a firm makes a small investment in the form of a governmental or non-governmental technical assistance project and with the best intentions -- and after some time the imperialist structure is there, in full bloom. Who is guilty? Can one arrest a structure and bring it before the court - or make it confess its

sins, atoning for them? Not so easy, for the simple reason that the structure is not a juridical person but something abstract, something one cannot easily draw a line around and say eccolo!

The latter, however, is no longer so true as it used to be, for with the advent of the transnational corporation (TNC) there is more of a coincidence than there used to be between structures and actors. In the transnational corporation the four structurally negative properties referred to above as characteristics of a wrong structure (others may have other dimensions and definitions) are built into the corporation which in turn is an actor - having a center of control with a "mind" capable of formulating goals and devising strategies to obtain them. Within the TNC the general imperialist structure is replicated, only that the "countries" become "companies", the center-periphery idea is expressed more softly in family terms, even female terms: mother vs. daughter (companies). The rest is the same, with the managers of the "daughter" companies being the center in the Periphery of the system, the conveyor belts of administrative decisions, production factors and products and research findings.

In a sense the transnational corporations, in incorporating themselves, are making themselves more accessible to the legal paradigm. The debate is over to what extent they are accountable and how they can shift everything around so that profits only show up (if at all) in places where there is a "friendly climate to business", and labor-intensive work is only carried out in places where the labor is cheap and unable to defend themselves and fight for their interests. This is an important debate, but even more important is the debate over how one can identify the non-incorporated structure. Thus, as soon as a code of conduct for TNCs is established, which will happen if for no other reason simply because it is feasible and the number of professionals capable of doing it is sifficiently high, the TNCs will be transformed so as to comply and leave the less palatable aspects to the non-incorporated parts of the total world economic structure. Again, the argument would be that law might be mystifying, providing a pretence that something is being done to a problem while in reality it is being brushed under the carpet - and the carpet is provided by the legal pattern forcing some parts of the structure into a form which is fassbar by the paradigm, concealing the total structure.

Again, this is not an argument against law or lawyers as such; only a critique of them insofar as they contribute to a mystification of social reality - in other words insofar as people start believing that they constitute a generally valid approach to all aspects of social life. That they do not is obvious to most: for instance, most people would know that laws are not too good at catching a process, they are better at coming to grips with a state of affairs, with a set of actors. By this we do not merely think of the obvious, that social life is ever-changing and the intuitions for changing laws grind out new laws slowly so that they tend to be lagging behind the social reality they are supposed not only to reflect (that is the task of social science), but to regulate. We are more thinking of the circumstance that laws somehow do not build dynamism and dialectics into their visions. They depict and regulate a state of affairs where certain acts are proscribed. The rest is left open, the focus on the evil acts leave a lot of free play for the good acts, the deeds - but there is nevertheless something frozen about the image given. It is difficult to conceive of it differently: A "dynamic" law indicating from the beginning that what is forbidden today may be permitted after 1 January next year not only invites the evil-doer into a pattern of postponed gratification; it also freezes the dynamism of a society, not only the social statics. On the other hand, however, this difficulty in imagining a dynamic legal system may also be a sign of how "brain-washed" one has become by the present paradigm, so poor in reasoning along the dimension of time.

What then, one might ask, would happen to this pattern of argumentation if one changes from the paradigm of criminal law to that of evil law - law less as an instrument that draws a line between proscribed and permitted and more as an instrument that seeks to develop, in fact, adequate structures? Is this not the instrument needed, a way of catching, in normative form, an image of a good social reality?

It is, and it is not. It can be to the extent that the image of the "good" social reality is informed by sufficient insight in structural aspects of society, and in social processes. But we have argued above that this insight is not facilitated by the legal paradigm simply because it so one-sided opts in favor of the actor-oriented perspective. And it is definitely not to the extent that it is based on contractual relations between

collective actors, (1) because the individuals signing or entering the contract will tend to be from the top of the collective actor and their relation to the rest may be tenuous, and (2) because parties at the top may have harmony of interest expressed in the contract that does not carry deeper down in the two social pyramids (for which "collective actor" is a euphemism) they represent. Thus it is that contracts or treaties may become "scrap of paper"; they are intra-elite contracts not reflecting the structures in which these elites are embedded. Signatures and elite agreement are too weak and too biased as instruments of social cohesion. A guerilla leader who enters into an agreement with the oppressor to get independence on certain conditions may be accused by the movement of having committed a sell-out - and what is the value of his signature if he is no longer a leader?(7) To what extent does such structural ties really enter into the consideration?

To take a more specific example: imagine one wants to establish a treaty about the nodules down on the ocean floor, on the seabed.(8) Their content is metallic: manganese, nickel, cobalt, copper. Governments conclude a treaty that gives technologically developed countries (i.e. mainly United States and the Soviet Union and those who can invest in their companies) the right to mine the ocean floor against payment of royalties to an international seabed authority and (the governments of) developing countries. A new inter-governmental organization has been born. Activity starts and the following scenario is activated: nodules are mined, the metallic content is extracted, it is processed and marketed and the proceeds are used to cover the costs, for reinvestment, for profit - and for royalties. The latter, however, being money, flow into the empty bank accounts of Third world governments and elites rather than into the empty stomachs of Third world masses; and in those bank accounts - governmental or non-governmental - they tend to be put to purposes that are either private, or public in a way that does not benefit the masses. One reason is very simple: money <u>can</u> be used, for the satisfaction of basic material needs, but it presupposes a number of conversion mechanisms, a network of financial institutions and - if there is much of it - a capital-intensive technology all of which is likely to generate very

vertical, center-periphery type structures and also to price the final product out of the reach of the masses.

But there is no need to go into the political economics of these processes. What is needed to see what happens is actually much simpler: the basic material needs are such as food, clothes, shelter, health, education - for all of them the metal content in terms of Mn, Ni, Co and Cu is very low, negligible. To believe that there is a simple conversion mechanism by means of money is naive; the detours via tractors etc. being few and often too capital-intensive. Moreover, there is also the distinct possibility that the metal will not only not be processed into "bads" (arms - the military industry has a demand structure that is highly compatible with the nodule supply structure) rather than goods, and even used to control those with empty stomachs, directly or by selling the arms to elites with vested interests in the status quo in the Third world countries. Seen in this perspective it is not so strange if a treaty is signed, well knowing that even that is a major accomplishment. The treaty might well be built over a relatively solid harmony of interests at the elite levels: the interests of the industrialized countries in raw materials (for the superpowers in addition to this the needs of their military industries to be ahead of all others and the need to structure institutions in such a way that their technological prowess can be converted into power - eg., by focussing on nodules and deep sea mining out of reach for most other countries), and the interests of non-industrialized elites in convertible currency.

Our point is that the legal paradigm too easily leads to that kind of outcome. Of course, there are remedial mechanisms, such as the idea of composing the national delegations in a more representative manner. More particularly, if they consisted mainly of hungry and angry people the results might be different - but such people would not be salonfähig, and incapable of drafting the instruments. It is also possible that with 50% of the delegates being women there might have been less fascination with metals and more with food - hence less of a focus on nodules and more on ocean-farming of various kinds. But the important point is that such safeguards do not follow automatically from the paradigm; they are not built into it. The treaties negotiated are between actors that are states and will reflect a balance of

state (or national) interests; not necessarily the "lower level" actors and their interests - human needs. The perspective is not only short on the structure between actors; it is also short on the structure within actors - preserving and promoting the billard ball image of national actors.

4. Conclusion

For that reason a justified scepticism: no war on legal thinking - there are those who have used it very well and for purposes serving the progress of mankind. But the basic paradigm is too one-sided, too biased. Time has come for a basic change, not only for clever intra-paradigmatic maneuvers. Such a task will not be carried out by international law commissions - so let us hope that some of the new forces emerging in the world can lay the ground for a new paradigm combining the actor- and structure-oriented perspectives and promoting an international law that would be human law and not stop at the gates of the state, but bridge the gap between collective and individual actors better than is done today.

N O T E S

* Contribution to the Liber Amicorum Discipulorumque Prof.Dr. B.V.A. Röling. It is a special pleasure for me to contribute to this Festschrift, to a man whose dedication to peace in general and peace research in particular has been of such a great significance in recent years. As a member of the Executive Committee of the International Peace Research Association in the years from its early start in 1964 till 1971, the years when Röling was Secretary General, I had occasion to admire how he was pursuing the goal of keeping the association, and thereby the whole idea of peace research as a trans-national and trans-disciplinary venture alive and growing through the first difficult years, before there was much in terms of research findings, new paradigms, contact with political actors etc. Today the field of research can no longer be uprooted - in those days it easily could, and many were willing to do so - none of them able. To a large extent due to Bert and his clear vision, always finding a road through four big conferences, at the same time making important contributions to the research - pursuing the lines so clearly seen in his work as member of the Tokyo tribunal, and in his famous books about (non-expanding) law in an expanding world.

(1) For more on this, see The True Worlds, A Transnational Perspective, New York 1977, chapter 2.1

(2) For an effort to explore this theme, relating it to news communication, see Johan Galtung and Mari Holmboe Ruge, "The Structure of Foreign News", Essays in Peace Research, Vol.IV, 4, Copenhagen, Ejlers, 1977.

(3) One reflection of this asymmetry is found in the rather strong asymmetry between the amount of money, manpower and institution-building devoted to punishment (fines, imprisonment etc) and devoted to rewards (medals, orders, citations).

(4) This theme is explored in chapter 9 of Methodology and Ideology, Copenhagen, Ejlers, 1977.

(5) In "A Structural Theory of Imperialism", Essays in Peace Research, Vol.IV, 13 - and particularly in the form it is given as 4.1-2 in the book mentioned in footnote (1) the four structural properties of exploitation, penetration/dependency, fragmentation and marginalization are combined into one: imperialism. In a sense this constitutes one possible precization of

the idea of "structural violence" first developed - inspired by my work on Gandhi in the 1950's together with Arne Næss, in "Violence, Peace and Peace Research", Essays in Peace Research, Vol.1, 4, Copenhagen, Ejlers, 1975.

(6) For a discussion of this more explicit version of the legal paradigm, see "Two Approaches to Disarmament", Essays in Peace Research, Vol.II, 3, particularly pp. 56-62.

(7) On the other hand, any one who bargains on behalf of others can make use of this to claim that his hands are tied.

(8) For more details see "Human Needs, National Interests and World Politics: The Law of the Sea Conference", Essays in Peace Research, Vol.V, 13, Copenhagen, Ejlers, 1978.