

THE IMPLOSION OF THE LEGAL SUBJECT AND THE UNRAVELING OF THE LAW ON THE USE OF FORCE: AMERICAN IDENTITY AND NEW AMERICAN DOCTRINES OF COLLECTIVE SECURITY.

Anthony Carty*

I. INTRODUCTION. II. CAPTAIN AMERICA AND THE CRUSADE AGAINST EVIL: RELIGIOUS FOUNDATIONS OF CONTEMPORARY AMERICAN FOREIGN POLICY. III. JOHN LEWIS GADDIS AND THE AMERICAN FOREIGN POLICY TRADITION. IV. CULTURAL INTERPRETATIONS OF CERTAIN AMERICAN INTERNATIONAL LAW DISCOURSE CHALLENGING COLLECTIVE SECURITY.

I. INTRODUCTION

I wish to present a perspective from American culture and history, which may help to explain dominant American tendencies to resort to the unilateral use of force to resolve what they take to be demands of their national security. This is very far from wishing to deny the importance of international law either as an intellectual construct or as an ideological weapon. Indeed the wider cultural, historical analysis is intended to demonstrate the contrary. International law language is the final battleground in the struggle for legitimacy, which always accompanies the use of force. Nonetheless, international law is plagued by the problem of auto-determination of its normative system, by the absence of a framework of compulsory adjudication of disputes. This fact ought to lead international law theorists to attach exemplary importance to the character of international legal personality. If indeed it is a feature of the legal personality of states that they have sovereignty, why is it that international lawyers treat this fact as purely formal. Does state independence from authoritative external criticism not have itself a substantive aspect, a cultural, symbolic dimension that the history of the discipline can more fully elucidate?

As has been seen, international law theory does not directly broach the issue of ILP, except formally to delimit their legal powers through an international legal order. This is surprising because it is obvious that where the interpretation of norms depends entirely upon the independent exercise of judgment by the subjects of a legal order, then the material character of these subjects must be decisive as to how that judgment is exercised and international legal norms are eventually interpreted. However, postmodern international relations theory has a full-blown theory of the *construction of*

* Professor of Public Law, University of Aberdeen, School of Law

the collective subject represented by the state (or nation-state) as part of a system of states, i.e. *with a focus on the need to explain how such identity or subject is constructed in relation*. This explanation is material, concerned with the domestic content of statehood, precisely while insisting that the domestic and the foreign are mutually constitutive. Indeed these theoretical developments have been worked out most fully by scholars working on the place of the present US in the international system. The implications of the construction of the *domestic-foreign construction* are to destabilize international or systemic normativity at the same time as constituting it.

The key postmodern international relations text is David Campbell's *Writing Security, United States Foreign Policy and the Politics of Identity*.¹ There are several key features of collective identity that he elaborates. One is to explain it as a vacuum that has to be filled through a negative construction of the "other" which returns to give it material content. This process is a deeper level of the process of secularization represented by Westphalia. Modern secularization, the core of which is self-assertion or self-determination, in rejecting medieval or universal Christendom, presented the problem of securing identity "in terms of how to handle contingency and difference in a world without God."² Absent the metaphysical guarantee of the world by God, man is faced with danger, ambiguity and uncertainty, all in a world now unfinished. Relating the argument directly to Westphalia, Campbell explains how the transfer of sovereignty from God to the state meant also "...the transfer of the category of the unconditional friend/enemy relation onto conflicts between the national states that were in the process of integrating themselves".³

The so-called legal sovereignty of states and the rule of law limiting force in international society suffers the colossal symbolic burden in the post-Westphalia era, that, in Campbell's words, synthesizing contemporary postmodern scholarship, discourses of danger are always central to discourses of the state and of "man", where the demands for external guarantees inside a culture that has erased the ontological conditions for certainty, means that in place of spiritual certainty, the state has to find discourses of danger. These replace the Christian language of finitude, contempt of the world and eternal salvation, with that of a state project of security. The state engages in an evangelism of fear to ward off internal and external threats.⁴ Campbell concludes this part of his argument:

"...we can consider foreign policy as an integral part of the discourses of danger that serve to discipline the state. The state and the identity of "man" located in the state, can therefore be regarded as the effects of discourses of danger that more often than not apply strategies of otherness. Foreign policy thus needs to be understood as giving rise to a boundary rather than acting as a bridge."⁵

A second part of Campbell's argument, intimately related to the first part, is that ambiguity - read danger, uncertainty - is not disciplined by reference to a pre-given foundation. Campbell says: "that "foundation" is constituted through the same process

¹ Revised edition (1998) Univ. Minnesota Press

² *ibid*, 46

³ *ibid*, 47, quoting from Hans Blumenberg, *The Legitimacy of the Modern Age* Cambridge (1983), p.xxiv

⁴ *ibid*, 48-50

⁵ *ibid*, 51

in which its name is invoked to discipline ambiguity.”⁶ Just as the sources of the danger are not fixed, so the contours of the identity are constantly being rewritten, and it is only this process of repetitive inscribing which gives the permanence to what is by nature contingent and subject to flux.⁷ The social totality is never really present, always containing traces of the outside within and is never more than an effect of the practices by which total dangers are inscribed.⁸ At the same time, sovereignty signifies “ a center of decision presiding over a self that is to be valued and demarcated from an external domain that cannot or will not be assimilated to the identity of the sovereign domain.”⁹

The two themes developed by Campbell, the construction of the self through the exclusion of the other, and the repetitive character of the techniques used to construct the self will appear to be determining, compulsively, causally, or however, in American interpretation of use of force norms. However, before this stage of the argument is reached (i.e. before I offer interpretations of US international law arguments) I wish to draw upon two further studies to illustrate exactly how US identity is constructed *in relation to use of force norms* and then how that identity is known, even to mainstream political historians, to be repetitively reconstructed at least in every generation.

The way to present this argument will be to consider briefly two studies taken to be representative of American thinking, Robert Jewett, John Shelton Lawrence, *Captain America and the Crusade against Evil*,¹⁰ and John Lewis Gaddis, *Surprise, Security and the American Experience*¹¹ Both of these studies consider international law important and both claim that fundamental cultural forces shaping American identity are equally shaping dominant approaches to international law. A greater part of Campbell’s study also takes up the detail of American history to illustrate the same points with respect to America from the colonial period till the early 1990s.¹² However, his story stops here and the advantage of the following studies is that they focus directly on the detail of the Bush Administration since 2001, while also providing a historical sweep.

The argument seeks to give more concrete shape to the distortions of the post-Westphalia order. If international law is taken to be either an objective order standing above states, according each their place, or a median reference point that states use to balance their relations with one another, in either case the compulsion to define the self against the other will express itself, also, through *the inclusion of international law within the identity of the self, so that it merely serves as a boundary for the self and as a weapon against the other.*

II. CAPTAIN AMERICA AND THE CRUSADE AGAINST EVIL: RELIGIOUS FOUNDATIONS OF CONTEMPORARY AMERICAN FOREIGN POLICY

⁶ *ibid*, 65

⁷ 31

⁸ *ibid*, 62

⁹ *ibid*, 65

¹⁰ *The Dilemma of Zealous Nationalism* (2003) Eerdmans,

¹¹ (2004) Harvard University Press

¹² especially chapters 5 and 6.

The special value of Jewett and Lawrence is that as a theologian and a philosopher they appeal directly to the specific intellectual context of the Bush Presidency, its character as a so-called “faith Presidency”. The difficult part of their argument for a lawyer to follow is that they think, given the importance of the Protestant religious to dominant strands of American identity, the correction of mistaken theology is essential to the restoration of the place of international law in American cultural identity. However, it is no part of their argument that a “true” international law has to find once again religious roots.

It is one of the strongest commonplaces of Western international law that since Grotius and the Peace of Westphalia, international law is a secular branch of knowledge separate from the Christian churches and able to unite peoples regardless of religious background. Jewett and Lawrence do not directly contest this. They are concerned to show how particularly Protestant misinterpretations of the Old Testament of the Christian Bible lead to a short-circuiting of the idea of legal process and hence, and this is the center of their argument, of America’s adherence to the international legal process. The authors still conceive international law in secular terms - above all as a framework for the impartial adjudication of right, especially with respect to their factual foundations, on a basis of equality. However, the authors draw upon Daniel Moynihan’s *On the Law of Nations*¹³ - for detail of the erosion of the American commitment to international law, as a result of the stalemate of the Cold War (CACAE, 319). In other words they consider the crisis of American adherence to international law goes much further back than the crisis of 9/11. They go to press in October 2002 and offer a grim history of American foreign policy.

Before exploring the detail of the authors’ explanation of what they call the Deuteronomic subversion of international law, I propose to offer a justification of the focus on theology by pointing to a key study of Bush’s religious beliefs that appeared just before the 2004 Presidential elections. In the New York Times Magazine, an extensive article by Ron Suskind, *Without a Doubt*¹⁴ is taken as demonstrating plainly the central role of religion in Bush’s entourage. The question is what kind of religion. Suskind describes the “faith-based presidency” as “a with-us-or-against-us model”. Suskind records a meeting for the introduction of Jim Towey as head of the President’s faith based and community initiative on Feb.1, 2002. Bush saw Jim Wallis, editor of the *Sojourners* and came over to speak to him. Wallis commented on Bush’s January 2002 State of the Union address (that included the *axis of evil* argument), where Bush had said that unless we devote all of our energy etc. on the war against terror we are going to lose. Wallis added that if we don’t devote our energy to the war on poverty we will lose both the war on poverty and the war on terrorism. Bush, who had just been given Wallis’s book *Faith Works* by his message therapist, said that was why America needed the leadership of its clergy. Wallis responded “No, We need your leadership on this question...Unless we drain the swamp of injustice in which the mosquitoes of terrorism breed, we’ll never defeat the threat of terrorism”. Wallis recalls that Bush looked at him quizzically and they never spoke again after that.¹⁵

¹³ Harvard University Press, 1990

¹⁴ New York Times, October 17, 2004). I am grateful to my Westminster and American law colleague Andrea Jarman for bringing this article to my attention.

¹⁵ Jewett and Lawrence explain Wallis’ own theological views about responses to 9/11 at CACAE, 3

Suskind has highlighted the, “there is no need of facts” element to Bush presidency decision-making as absolutely crucial. Many congressmen and cabinet ministers have found that when they press for explanations of the President’s policies, which seemed to collide with accepted facts, the President would say “that he relied on his *gut* or his *instinct* to guide the ship of state, and then he *prayed over it*”. Suskind explains more precisely what this means. He was once called in by White House aide to hear critical feedback about an article he had written in *Esquire* about a former White House communications director, Karen Hughes. The following in Suskind’s view gets to the heart of the Bush presidency.

“The aide said that guys like me were “in what we call the reality-based community” which he defined as people who “believe that solutions emerge from your judicious study of discernible reality”. I nodded and murmured something about enlightenment principles and empiricism. He cut me off. ”That’s not the way the world really works anymore”, he continued. ”We’re an empire now, and when we act, we create our own reality. And while you’re studying that reality - judiciously, as you will - we’ll act again, creating other new realities, which you can study too, and that’s how things will sort out. We’re history’s actors and you, all of you, will be left to just study what we do...”

Suskind ends by calling again upon Wallis. Faith can cut in so many ways. If you are penitent and not triumphal it can move us to penitence and accountability. But when it is designated to certify our righteousness, it is dangerous, pushing self-criticism aside. There is no reflection.

Jewett and Lawrence do still argue within a religious tradition, calling for a correction of it, to achieve a restoration of the rule of law in international society. So it may be helpful to afford an, as it were, outsider’s introduction to the contextual significance of their argument. They will claim that the “faith-based” Presidency, with the full connivance of the wider American public, absorbs the Judeo-Christian tradition into American identity in a blasphemous manner, rooted in what the authors call the Deuteronomic principle, arrogating to themselves the righteous identity of an infinite God, rather than appreciating that a transcendent and accusing God independently challenges their own utterly finite, and repeatedly erroneous moral choices. The essence of those choices is idolization of self, banishing fear and danger onto a demonized other. Simple regard to and perception of independent fact, the transcendence of the world beyond the self, are the first conditions of due process and the rule of law. They are eclipsed by what Jewett and Lawrence call a pop fascism that absorbs all the elements of law into American identity.

The central mistake concerns what the authors call the Deuteronomic dogma. Jewett and Lawrence ask that one try to interpret, for instance, the exultant American attitude after driving al Qaeda and the Taliban from the cities of Afghanistan in the winter of 2001. “To account for this phenomenon, we must trace the impact of the biblical models of the triumphant God and his victorious people as understood in the moral framework of right producing victory and wrong producing defeat. We need to explore the zealous interpretations of defeat and examine the psychic impact of unresolved defeat.” (CACAE, 274-5).

The failure to understand the Vietnam defeat is central to understanding the present American crisis. The Nixon - Kissinger ambition to withdraw without appearing to be defeated was based upon the idolatrous Deuteronomic principle that victory for one side and defeat for the other clearly reveals God's justice and power. This "places the honor of self or nation in the position of ultimate significance. Whenever this occurs a terrible distortion in perception follows. Having lost its due sense of finite worth, a nation embarks on campaigns to sustain its presumed infinite superiority, using means that are the very antithesis of the virtues it seeks to defend...It calls for a defense in every theatre of competition. The sense of proportion disappears as the nation squanders its energies against spectres on every hand. Every battlefield, no matter how dubious, is pronounced holy..."(CACAE, 280).

The basic approach to the so-called "war against terrorism" is marked by enthrallment to the Deuteronomic principle. The current interpretations of the crisis, which place blame firmly outside ourselves and repeat the naïve resolve never to make a mistake again like Vietnam, "...simply confirm in us the conviction that we are the innocent in which the guilty should be bombed..."(CACAE, 289) To admit defeat, to "disenthrall ourselves" is the task before America's would be Protestant leaders. The authors say "...our culture's blindness to tragedy has been the superficial grasp of the theology of the cross by our dominant Protestant tradition...What American religious leaders need today is Paul's theology of the cross, with its grasp of human weakness..."(ibid 290).

The conclusion of this general part of the authors' analysis is that "to admit defeat should be to acknowledge the transcendent justice of God. To admit defeat should mean to have discovered that the justice we sought to accomplish in Vietnam after 1954 and the current effort to rid the world of terrorism cannot be claimed as identical with divine justice - indeed, may have been repudiated by it..."(ibid, 290).

The heart of Jewett and Lawrence's argument, to give it the necessary political weight and significance, is linking a distorted theology to popular culture, Captain America, the Lone Ranger, Superman, Rambo etc. This has to be done so as to demonstrate in terms of cultural sociology the dominance of the Deuteronomic Principle. The authors point to the enthusiasm of the US Ambassador to Germany in asking *Der Spiegel* for 33 poster size copies of the cover of the magazine when it rendered Bush and his team as pop culture military heroes in February 2002 The President was flattered. (CACAE, 40-43). It is necessary to single out the exact forms in which legal processes are short-circuited as a matter of popular imagination. Hence the authors speak of Pop Fascism. The impatience with the UN and the Security Council have deep roots. The four tenets of American Pop Fascism are

- “1. that super power held in the hands of one person can achieve more than the workings of democratic institutions;
2. that democratic systems of law and order, of constitutional restraint, are fatally flawed when confronted with genuine evil;
3. That the community will never suffer from the depredations of such a super leader, whose servant hood is allegedly selfless;

4 that the world as a whole requires the services of American super-heroism that destroys evildoers through selfless crusades” (CACAE, 42-43)

The iconic character of John Brown and the song *The Battle Hymn of the Republic* illustrate this. Jewett and Lawrence claim it comes directly from chapter 20 of the Book of Revelation, where the saints rule the earth after the destruction of the beast (CACAE, 63). The message of John Brown, as developed by H.D. Thoreau, was not to recognize unjust laws and, that, in any case, he could not be tried by his peers, because these did not exist. Instead, in Brown’s own words, “..the crimes of this guilty land will never be purged away, but with blood” (CACAE, 172-3). The impatience with restraint shows itself after 9/11 with the warning of Senator John McCain that the terrorists must be disabused that America has not the stomach to wage a ruthless war, risking unintended damage to humanitarian and political interests (CACAE, 175).

Despite the argument that populist religion has widespread pull in American society, the authors are fully aware of the disciplinary dimension of identity formation. The struggle to exclude and demonize the other requires suppressions of the self, and a repressive construction of the self, if the latter is not to disintegrate into a seamless mass of boundary-less self and other. It is not only no accident but a permanent feature of the holy American wars that they are fought with a systematic deception not only of international opinion but also of American domestic opinion. This is not openly to facilitate manipulation of domestic opinion in a democracy, but also to preserve the image of crystalline purity of the super hero warrior America.

There is no need of facts because, say the authors, “... the man who is privy to God’s will cannot any longer brook argument, and when one declines the arbitrament of reason, even because one seems to have all reason and virtue on one’s side, one is making ready for the arbitrament of blood” (CACAE, 187). At the same time wariness of overt anger and extremism means that the violence perpetrated has to remain largely hidden, even from oneself. The door is opened to impassive killings, for pure motives and without the need to regard consequences. The same time artful zeal, in the hands of a Nixon-Kissinger style team can only be impervious to regret, since it is driven by desire for power, rather than any transcendent norm of justice. Not restrained by public disapproval they can arrange the deaths of hundreds of thousands:

“Their protestations about innocent motives are sufficient to defend the most blatant misuse of power. Such individuals will despise constitutional precedents and make political use of the very religious leaders and traditions that could stand in judgment of them, as the equally artful Bill Clinton showed. The only things they fear are the cracks in the zealous façade. That they will consider journalists and congressional investigators as mortal enemies is logical...”(CACAE, 188).

Jewett and Lawrence see a clear alternative in international law. The famous inscription from Isaiah at the United Nations envisages the nations bringing their disputes to it voluntarily, looking for impartiality. The idea of law is no respecter of persons (CACAE, 318). It clearly need not have a particular religious denominational foundation. However, the solution, which the authors propose to restore the place of law in America’s international relations, is probably foreclosed by the modernity that Campbell has described through the work of Blumenberg on the significance of

Westphalia as a secularization process.

The problem, as Jewett and Lawrence see it, is then the American mistake of stereotyping. This is a religious and not an intellectual problem. The stereotypes are of good and evil, "...beliefs that provide a clear and apparently defensible sense of the identity of and solution to evil and an equally clear and gratifying sense of national self-righteousness. To give them up is to acknowledge problematic aspects of one's national or peer-group history..."(CACAE, 237).

It is impossible to do justice to the richness of the authors' argument for law as the true foundation for world order. It involves a multifaceted journey through American obsessions with crusades, evil, conspiracies, redemptory violence, triumph list resurrections and, most of all, certainty about matters which, as Paul says, can only be seen through a glass darkly. However, perhaps the key element of their perspective, is that Jesus was always anxious to ensure that his gatherings were not of like-minded persons. He always chose people who had acted out stereotyped roles that made co-existence impossible: tax collectors, prostitutes, despised outcasts, Roman collaborators (CACAE, 242). To complement this perspective, one needs to develop *institutions of coexistence*, structures of customs and law that allow competing groups to interact peaceably, by treating ideological opponents as equals (CACAE, 243). *Zealous nationalism* will oppose this as it seeks to redeem the world by destroying enemies. However, the authors oppose to it, *prophetic realism*, which "avoids taking the stances of complete innocence and selflessness. It seeks to redeem the world for coexistence by impartial justice that claims no favored status for individual nations"(CACAE, 8).

So the idea of law itself must rest on a deeper metaphysic. The prophetic vision views humans as involved in a tangled web of their own sin, social alienation, in which the best they can hope to achieve is a modicum of justice by the grace of God (CACAE, 198). As for the events of history, victories and defeats of nations, whether they "...may reveal the justice and power of God is a matter that may be glimpsed at times, but only *in a glass darkly*, with the eyes of faith." (CACAE, 280).

III. JOHN LEWIS GADDIS AND THE AMERICAN FOREIGN POLICY TRADITION.

It is possible to be more specific about the history of the doctrine of pre-emptive attack within a post-modern theoretical framework of identity. So far some explanation has been provided for the pre-emptive appropriation of the idea of international law into American identity so that it performs an essential part in defining the boundaries of American identity and threatens the integrity of its other. However, it is possible to go further. A second essential part of Campbell's argument was that the ontological lack in the identity that affirms itself in opposition is that it has to reaffirm the process of *self-constitution in opposition, through repetitive re-enactment of its foundations*. Gaddis provides just this interpretation of history, again within a critical perspective. He sees explicitly the implications for changing views of international law.

Gaddis warns against the potential self-destructiveness of a process that he describes in

the secular Greek terms of hubris, rather than in the Judeo-Christian term of demonic or blasphemous spiritual pride. It is a form of madness to equate one's own security with that of the whole planet. Yet it has been the case in decisive moments of American history, since the very beginning of the Republic to pre-empt danger through an expansion that is, in the final analysis, unilateral and hegemonic. The central part of Gaddis's argument is that, in moments of crisis, America will inevitably, given the pull of an already constituted identity, repeat its most practiced responses automatically. The post 9/11 era is such a moment. Gaddis himself concludes on a critical note that the only way out of the madness of hubris is to come to see oneself as others see one. Yet that necessitates very dynamic and pressing insistence on consensus by its erstwhile Allies. Meanwhile a new doctrine of pre-emption will render the UN Charter redundant.

I come to Gaddis largely because of his celebrity as a very major historian of America and the Cold War, particularly, more recently, as the author of the post Cold War reflections, *We Now Know: Rethinking Cold War History*¹⁶. These works translated him to a Professorship of History and Political Science at Yale University. Gaddis argues that from the time of the 1812 War with Britain, which involved the traumatic surprise British burning of Washington in 1814, America's response to threats to its security has been that safety comes from enlarging rather than from contracting its sphere of responsibilities (SSAE, 12-13). Gaddis's manner of describing this process itself reveals a nationalist mindset. He says: "Most nations seek safety in the way most animals do; by withdrawing behind defences, or making themselves inconspicuous ...Americans, in contrast, have generally responded to threats - and particularly surprise attacks - by taking the offensive, by becoming more conspicuous, by confronting, neutralizing, and if possible overwhelming the sources of danger rather than fleeing from them. Expansion, we have assumed, is the path to security (SSAE, 13). It is clear that Gaddis is proud to be American and sees nothing clumsy in the extraordinary distinction that he makes between Americans and most other nations as animals.

Early 19th century applications of the doctrine were, firstly John Quincy Adams note to Spain that it must either garrison Florida with sufficient forces to prevent further incursions, or it must "cede to the United States a province...which is in fact a derelict, open to the occupancy of every enemy, civilized or savage, of the United States..." (SSAE, 17). The same philosophy applied throughout the whole 19th century to expansion into the Amer-Indian West, to the Mexican hinterland, and finally interventions in Central America.

A second feature of American policy, after expansionism, was unilateralism, that the US could not rely upon the goodwill of others to secure its safety, and that real independence required a disconnection from all European interests and politics. For instance the Monroe doctrine was based upon the premise that Great Britain would enforce it, if necessary, but the US would not agree to the common statement between the US and Great Britain to exclude other European powers from the Americas, that GB had proposed (SSAE, 24). Instead, even at this time the US expected to obtain what it wanted, hegemony on the American continent, without having its hands tied by an alliance with Great Britain.

¹⁶ (1997) Council of Foreign Relations

The final feature of US policy highlighted by Gaddis was hegemony, that from the start the US should not co-exist on the North American continent (again JQ Adams) on equal terms with any other power (SSAE, 26). This policy gradually became the one of making certain that no other great power gained sovereignty within geographical proximity of the US. It was a key reason for resistance to Confederate secession. Gaddis concludes that despite the difference between a continental and a global scale, the American commitment to maintaining a preponderance of power- as distinct from a balance of power - was much the same in the 1990s as in the days of JQA. The policy was always stated to avoid hypocrisy, as GWB said in June 2002 at West Point "America has, and intends to keep, military strengths beyond challenge." (SSAE, 30).

The underlying theory is that this tradition is so embedded in American historical consciousness that in case of default Americans will fall back on the trio of expansion, unilateralist and hegemony. If there is a disconnection between security and how it has been achieved, it is better to accept the moral ambiguity, for instance that one does not really want to return what has been taken (such as Mexican territory), preferring to live by means that are at the same time difficult to endorse (SSAE, 33).

This part of Gaddis's argument is most cogently stated. The rest is not so clear. His problem in pointing to an American experience is that FDR chose a different response to the Pearl Harbour surprise attack, one which was multilateral, based on sovereign equality and consent of allies, and one which repeatedly rejected the possibility of pre-emption. There were to be four Great Powers in the UN, and a quiet American predominance would be based on consent. Pre-emption as a device was no longer necessary because the threat from the Axis, and then the Soviets, was actual, not potential (SSAE, 51-58). It is not clear, to myself why, in Gaddis's argument, the US did not take the chance to pre-empt Soviet power in Europe, nor why it preferred to build a wall which pitted the West, not the US alone, against communism. There was no felt need to rethink this in the 1990s because the US faced no obvious adversaries (SSAE, 66)

However, it is clear that even before 9/11 US leadership thinking was reverting to older patterns. Gaddis quotes the US Commission on National Security/21st Century warning in March 2001, "The combination of unconventional weapons proliferation with the persistence of international terrorism will end the relative invulnerability of the US homeland to catastrophic attack" (SSAE, 73-74). After 9/11 the Bush Doctrine became a program to identify and eliminate terrorists wherever they are, together with the regimes that sustain them. The return of pre-emption reflects the return of frontier danger, but today's dangers are not on a frontier and targets can be everywhere. The National Security Doctrine ((Sept.2002) provides a legal form for its argument: international law recognizes "that nations need not suffer an attack before they can lawfully take action to defend themselves against forces that present an imminent danger of attack" There is a preference for pre-empting multilaterally, but if necessary "we will not hesitate to act alone". This type of pre-emption requires hegemony, so that there is "the capacity to act wherever one needs to without significant resistance from rival states".(SSAE, 86-87)

At the same time Bush in his West Point speech and in the NSD suppose that American hegemony is broadly acceptable because the Hegemon is relatively benign and it is

linked with certain values, abhorrence of targeting innocent civilians for murder - which associates unchallengeable strength with universal principles (SSAE, 88-89). However, there are problems of the relationship of pre-emption hegemony and consent (SSAE, 95) This crystallized over Iraq. The determination of the US was to shake up a status quo in the Middle East that had become dangerous to the security of the US (SSAE, 99). Yet it unsettled Allies as well, and in 18 months the US exchanged a reputation as the great stabilizer for a reputation as the principal destabilizer (SSAE, 101). Here Gaddis makes a distinction between JQ Adams and Bush. The former thought the US should not go abroad in search of monsters to destroy, lest it become the dictatress of the world. It should confine itself to allowing no great power to gain sovereignty in its proximity (SSAE, 28-29). However, Gaddis comments, for the present: "...a nation that began with the belief that it could not be safe as long as pirates, marauders and the agents of predatory empires remained active along its borders has now taken the position that it cannot be safe as long as terrorists and tyrants remain active anywhere in the world" (SSAE, 110)

Gaddis himself regards this as arrogant, an equation one nation's security as coterminous with that of everyone else (SSAE, 110). Instead the US should return to the system of quasi-federalism represented by the Cold War alliances, balancing the leadership needed in seeking a common good against the flexibility required to satisfy individual interests. This is a reference to the consensual coalition maintained through the Cold War to contain international communism (SSAE, 112-113). Hegemony requires consent, which also translate the idea that Americans need to fear what the Ancients called the sin of pride. They need to see themselves as others see them, for consent to hegemony rests on others having the conviction that the alternative to American hegemony is worse (SSAE, 117).

IV. CULTURAL INTERPRETATIONS OF CERTAIN AMERICAN INTERNATIONAL LAW DISCOURSE CHALLENGING COLLECTIVE SECURITY

What the cultural studies approach offers, perhaps with some conceit, is the possibility of understanding nuances in the uses of international law language which could very well appear collective, multilateral, and rule of law-oriented, but actually involves elisions of meaning and barely concealed, as it were Plan B agendas, which offer unilateral strengthening of a supposedly failed multilateral resolve and a determination to enforce a single view of international legal obligation. That is to say, having already appropriated international law into American identity, American elite reactions to alternative interpretations of the law will be inclined to assume that those making the interpretations are putting themselves outside the law and beyond the boundaries of the United States.

At the same time, the heart of the cultural argument concerns perception rather than concepts. Is there a danger? Why will not others face it? Why one should nonetheless act alone? Bitter arguments boil down to apparently irresolvable differences as to facts. Yet concerns about the scarceness of facts are recurrent. These concerns may point to defective qualities of judgment and perception. They may also point to a lack of a

mature, reflective willingness to submit to a framework for impartial judgment.

So the cultural context argument supposes that one will be able to identify in certain American international law arguments – that is, those close in spirit to the present Bush Presidency – characteristics typical of that Presidency. It is not at all intended to suggest that the legal arguments are unprofessional in the sense of being opportunistic or instrumentalist. They are most probably as sincerely held as the views of the Administration. Rather, the argument is, in a way, more crippling. It is that the international lawyers are so embedded in the dominant American culture *that they provide an unreflective and therefore faithfully representative reproduction of the dominant culture in international law terms.*

It is a very slippery matter to argue that the United States is hostile to a concept of international law as such, or to a concept of collective security. As has been seen from the interpretations of Jewett, Lawrence and Gaddis, the strongest Bush Presidency supporters could argue that American and world security go together and that the primary aim of American policy is to tighten and make more effective multilateral institutional frameworks for ensuring collective security.

In his very measured (i.e. unzealous) critique of the role of his country and of many of its international law writers and legal advisers, *The United States and the Rule of Law in International Affairs*, John Murphy argues that “...one may safely conclude that the current US administration is no fan of the collective security approach enshrined in the UN Charter”. He contrasts Oscar Schachter’s definition of an indivisible peace which all States have an interest in maintaining, with John Bolton’s apparent view that the US should essentially confine interest in the threat or use of force to circumstances arguably justifiable as an exercise of individual or collective self-defense. For instance this would cover an attack against the US itself, a close ally or a massive threat to the US through the use of terrorism, e.g. Iraq.¹⁷

However, it is precisely the willingness of the US to take an apparently much more altruistic, but nonetheless disturbing, view of its mission, that both Gaddis and Jewett and Lawrence have noticed. Gaddis relates that the justification for pre-emptive strike in Cuba in 1898 culminated in Roosevelt’s “international police power” role for the US in 1904. “Chronic wrongdoing, or an impotence which results in a general loosening of the ties of civilized society, may...ultimately require intervention by some civilized nation...”(SSAE, 21) It is rather this zealous approach which appears in the ascendancy and which puts pressure on the rest of the international community to facilitate a multilateral approach, under menace of unilateralist behaviour by America *if the rest of the world fails in its duties.* Jewett and Lawrence see in this type of reasoning an unconscious equation of American and universal interest, rooted in a zealous self-righteousness, which, by definition is unreflective. The logic of the anti-communist crusade was a mirage of the US as a selfless Christian nation - in the eyes of John Foster Dulles - struggling against a conspiracy of evil (CACAE, esp. 90) In a section titled arrogant missteps of global idealism, the authors point to the tendency, reappearing in the Kennedy administration’s religiosity, to treat God as man’s “omnipotent servant”, with “faith as a sure-fire device to get what we want“ (CACAE, 96). This led to the

¹⁷ (2004) Cambridge, 192

Kennedy myth of calibrated brinkmanship “the belief that if you stand tough you win” (CACAE, 100). Jewett and Lawrence trace Britain’s place in this crusade back to Churchill. He had warned that to check the expansion of the communist block “the English-speaking peoples - a sort of latter-day *master race* - must sooner or later form a union” (CACAE, 80).

The difficulty with this brand of collective security again comes with America’s response to “the failure of resolve” of others to confront “immanent threats”.

Take again Murphy’s measured critique of his country and some colleagues concerning Kosovo. Murphy goes against the general current of scholarship and opinion that this intervention by NATO was justifiable, morally if not legally, as a form of humanitarian intervention in the face of impending humanitarian disaster. In an extensive treatment, he points to the fact that NATO imposed as a last minute condition for the Rambouillet negotiations - when it looked as if they were succeeding -- a NATO force with free access to Serbia, and independence for Kosovo after three years -- NATO violated the Charter when it did not return to the Security Council after talks broke down.¹⁸ As for the humanitarian argument, a ground military intervention might have been appropriate, but the exclusive reliance on bombing both exacerbated the situation hugely in Kosovo and led to a great loss of civilian life in Serbia.¹⁹

Yet it is possible to see quite a different perception of these events in the eyes of the “zealots” of the new Bush approach to a “collective security of the willing”. Such a precedent as the Kosovo NATO intervention points both to the way the Security Council should go in the future and how the coalition of the willing should go, if the Security Council fails in its resolve. In the July 2003 issue of the *American Journal of International Law*, among a wide range of contributing authors, there are a number who, in my judgment, show an unambiguous black/white perception of the nature of *evil (terrorist threats and rogue states)* which turn issues into resolve and willingness to use force in the face of indisputable danger. Everywhere precedents exist of coalitions of the willing and Kosovo is one such precedent.

This is how Jane Stromseth presents what still appears essentially a constructive proposal for a resurrected collective security within the United Nations. In *Law and Force after Iraq: A Transitional Moment*²⁰, she notes that all major protagonists in the Security Council seek to explain their actions within its framework and the Security Council itself has shown an evolution of the idea of “threats to the peace” to include humanitarian emergencies, protection of democracies, etc (at 633). Stromseth accepts that the new American NSD, as a response to 9/11 has raised concerns about the reassuring nature of US power in many parts of the world (at 636). Yet through the later 1990s and in the immediate build up to the 2003 war, the Council *lacked the collective spine on Iraq* (author’s italics) (at 636). She opposes France’s wish to use the Council to counteract American power, while the final fact nonetheless remains “...if France and others are not willing to support coercive diplomacy backed by a credible - and authorized - threat of force, then the United States will cease to turn to the Council...”(

¹⁸ *The United States etc.*, 155

¹⁹ *ibid*, 160-161

²⁰ *A.J.I.L.* vol.97, No 3 (July, 2003), 628-642

at 637).

The fundamental issue and the recommended institutional response are defined in carefully chosen, but ultimately zealous terms. “(W)hat is especially needed today is a careful re-examination of the concept of imminence as well as of “necessity” and “proportionality” - in short the scope of the right of self-defense - in response to the urgent and unconventional threats posed by terrorist networks bent on acquiring weapons of mass destruction...”(at 638). Immediately it is clear that regional self-defense organizations would be a good place to start (at 638). There is the ANZUS, for Australia has experienced directly the harm of terrorist attacks (at 638,- supposedly Bali ?). The next step could be to work with Britain and others on a similar initiative within NATO. The OAS could be next after that (at 638).

None of this need appear a challenge to the doctrine of collective security, that is unless one wonders about the “fall back” position if, in the view of America, the collective collaboration fails.

At one level Stromseth is clearly advocating multilateralism, but for Jewett and Lawrence that was usually unbalanced in favor of American dominated intentions, even during the Cold War. Stromseth argues: “America’s friends and allies will be critically important in long-term counter-terrorist efforts...”(639). But what if America’s friends fail her? In the 1990s there was an increasing disconnect between Security Council mandates and the means to enforce them, for some of which Stromseth blames the US. However, in other cases “coalitions of the willing enforced Security Council demands when the Council was not prepared to expressly authorize force - as in the 1991 efforts to protect Iraqi Kurds, the 1999 intervention in Kosovo, *and the 2003 Iraq war.*” (author’s italics)(at 628). Stromseth shows no awareness that the Kosovo action was problematic in the sense highlighted by Murphy and numerous other very prominent Americans that he cites, such as Richard Bilder and Zbigniew Brzezinski.²¹ One has to be completely clear that for Stromseth Kosovo and Iraq are all about *collective spine in the face of an evident danger that requires an automatic response*. Whether there are independently agreed criteria to determine if international legal standards had been violated and what might then be a legally permissible response are not matters Stromseth considers.

The priority for *resolve* over careful deliberation is clear in Stromseth’s recommendations for Security Council revitalization. In her view others are making pleas for equity in representation, while what is really needed is a category of long term non-permanent member that clearly articulates the contribution it is prepared to make - in terms of finances, material or forces, to maintain peacekeeping and other enforcement purposes, including such UN purposes as the protection of human rights (at 641)

Another attempt to bring together Bush’s new war strategy and collective security is Richard Gardner’s, *Neither Bush nor the “Jurisprudes”*²². Here, once again, it is necessary to read between the lines of Gardner’s argument to recognize the underlying

²¹ *The United States etc*, at 155 and 161

²² AJIL vol. 97, No.3 (July, 2003) 585-590.

cultural patterns it represents. The Bush doctrine of pre-emptive self-defense, as a doctrine of general application is so ominous as to merit universal condemnation. As Gardner says, effectively, it would give ex post facto justification to Japan's attack on Pearl Harbor (at 588). The proper way to approach the Iraq problem was by reference to previous UNSC resolutions about material breach, although when the US finally realized this, public opinion at home and abroad had come to see the Iraq war as the first application of a new doctrine of preventive war (at 588-589).

Gardner's concept of collective security once again means that states should aim to implement their view of the meaning of Security Council resolutions, along with such other states as are willing to meet their obligations. The decisions of NATO (invoking art.5 of the NATO in the context of terrorist attack) and the United Nations "provide a sufficient legal basis for military actions the *United States needs* (author's italics) to take to destroy terrorist groups operating in countries that do not carry out their obligations to suppress them..."(at 589).

Once again there is a totally uncritical treatment of the so-called Kosovo precedent, as a way of representing regional backup for the universal organization. Gardner says that the successful military campaign undertaken by NATO to put an end to ethnic cleansing in Kosovo "protested against by some UN members but not disowned by the Security Council, provides another example of a reinterpretation in practice of article 2/4, this time to permit humanitarian intervention to stop genocide or a similar massive violation of human rights where the intervention has the sanction of a regional organization" (at 589)

Gardner's arguments need to be read very carefully. The importance of Gardner's conclusions is in the last sentence. The Bush administration is right in asking for international law to be re-examined in the face of the new dangers of *catastrophic terrorism* (author's italics) but wrong in its proposed solution. Instead a modest reinterpretation of the UN Charter is enough. In particular, out of four interpretations, the one most in keeping with the Kosovo and Iraq "precedents" is the first.

"Armed force may now be used by a UN member even without Security Council approval to destroy terrorist groups operating on the territory of other members when those other members fail to discharge their international law obligations to suppress them"

In terms of the analysis of Jewett and Lawrence, who question the emotional and psychological stability of their *fellow Americans* (author's italics) when they perceive danger, Gardner's reinterpretation is once again a form of *carte blanche*. It is no wonder that Gardner concludes his modest proposal to find his way between Bush and the "Jurisprudes" with the words: "The United States needs to claim no more from international law than this. The rest of the world should concede no less" (at 590). No sentence could show more clearly what Gardner means by collective security. There is an objective necessity that America will recognize, and one can only hope that one's allies will as well.

Similar comments may be made about the arguments of Ruth Wedgwood, *The Fall of*

*Saddam Hussein: Security Council Mandates and Preemptive Self-Defense*²³. She sets her task “-whether to accept the procedural blockage of the Council, or to seek an alternative route to legitimacy and the recognition of legality” (at 577). Of course, procedural blockage, much as Blair’s “unreasonable veto” means opposition to the wishes of the US and its Allies”. West African regional organization practice in relation to Liberia and Sierra Leone, as well as NATO’s intervention over Kosovo would suggest that regional organizations might be able to take enforcement action without prior Security Council approval. Redwood recognizes there are difficulties in predicting customary law change, but the characterization of evil personalities is not long in coming and shows clearly the US “cops and robbers” view of the world:

“But surely one central ingredient is the moral necessity of action – the credible invocation of shared community purposes. Indeed, Justice Holme’s “bad man” theory of law may have an unexpected application – where a particularly disruptive personality causes more than one genocidal conflict, alternative methods of countering his renewed threats are likely to be tolerated. This theory of exception plausibly fits the example of Slobodan Milosevic and Charles Taylor, as well as Saddam Hussein.

It is a further step to suppose that any *non-regional* “coalition of the willing” can substitute for Council action...In the light of the UN Charter’s human rights commitments, the new Community of Democracies may be entitled to more substantial weight than any geographical artifact.” (at 578).

This long quotation illustrates a total dissolution of the formal aspect of law into a series of material, somehow authoritative judgments about evil to be punished, which takes on a definitely new character, now that the Cold War is passed, in terms of the post 9/11 threat of terrorist attack in the form of WMD. The “bad man” takes on a cosmological dimension. Redwood distinguishes deterrence and containment as the core doctrines of the Cold War. The brave new world is where there are no credible disincentives to non-state terrorists who have access to WMDs. Indeed, a “rogue state that is utterly heedless of its people...may not care about the potential collateral damage from a responsive military strike” (at 582). The question is whether a state can use preemptive force in unique cases:

“-when intelligence is reliable and timing is sensitive, and a state is sponsoring or hosting a network acquiring weapons of mass destruction...(T)he abstract answer to many strategists is yes- a given regime might have a record of conduct so irresponsible and links to terrorist groups so troubling that the acquisition of WMD capability amounts to an unreasonable danger that cannot be abided ...In a teleological understanding of the Charter, strengthened by commitments to human rights and democracy, defensive force may be necessary to counter the unpredictable violence of states and non-state actors. This should inform the reading of Article 51 as much as the scope of Chapter VII...”(at 584)

Once again the whole remit of a formal approach to law vanishes. Instead one has the unilateral demonization of the opponent with whom one is in no human relationship whatsoever. Indeed, it is precisely the teleological interpretation of a very general

²³ AJIL vol. 97 No.3 (2003) 576-585

reference to international law, the so-called principles of democracy and human rights embedded in the UN Charter, which allows the “Community of Democracies” to draw an absolute boundary between themselves and the “other”, the rogues states and the “terror network with unworldly motivations” (at 583). The two elements of Campbell’s characterization of the working of identity are most clearly present here.

Firstly there is the projection of responsibility and evil entirely outside of oneself onto the other. International law merely functions as an additional boundary-drawing instrument to achieve this goal. Of course, the Community of Democracies and the rogue states and non-state terrorist networks are an, as it were, standard post-modern example of a binary opposition. The self and the other are not separate. They are a single entity. The second dimension of Campbell’s analysis, here vitally illuminated by Gaddis, is the repetitive application of this defensive identity mechanism, through the specific instrument of the preemptive attack to terrorists and rogue states, following the end of the Cold War and the disappearance of the “communist menace”. Gaddis himself thinks the Cold War was remarkable for American abstention from the doctrine of preemptive attack, but he does say it will appear where America feels most acutely threatened, America meaning the embattled post-Westphalia unsuccessfully secularized identity of which both Campbell and Jewett/Lawrence write.

Finally, John Yoo, in his contribution, *International Law and the War in Iraq*²⁴, operating within the same parameters as Wedgwood, i.e. non-state terrorist networks and rogue states, elaborates considerably on her analysis of how defensive measures to counter the unpredictable violence of states and non-state actors should inform a reading of Article 51 etc. The three criteria for the use of preemptive force that Yoo elaborates all depend upon judgments about levels of danger, material perceptions of the other. The first question is whether a nation has WMD and the inclination to use them? Apart from the Iraq case, in future the decision will depend upon intelligence about rogue nations’ WMD programs and their ability to assemble a weapon (at 575). The second question nations will have to take into account is what Yoo calls “the available window of opportunity.” The problem is of course the suicide bomber, immune to traditional methods of deterrence, besides being difficult to trace in innocent populations. The “window of opportunity” may exist for the “United States and its allies” before a rogue nation transfers weapons to a terrorist organization. If it had to wait for the transfer to occur, it would be more difficult “for the United States, for example,” (now apparently without its allies), to act, given the sporadic nature of terrorist attacks (at 575). The third question, or consideration, is the degree of harm from a WMD attack, given that “the combination of the vast potential destructive capacity of WMD and the modest means required for their delivery make them more of a threat than the military forces of many countries”(at 575).

The final stage of Yoo’s argument has the merit that it reduces to nonsense a whole tradition of secular authority in international relations that Campbell highlights as beginning with Hobbes and the Westphalia settlement. That is the apparent construction of order based upon the opposition of the domestic and the foreign and the paradox of a state system, which rests upon the mutually exclusive suppositions that each is a self for itself and an other for all the others. Yoo finds himself, along with the whole of the

²⁴ AJIL vol. 97 (2003) 563-576

international law profession, trapped in what is not a Logic of his own making. Starting from the reasonable supposition that the degree of harm from a WMD attack would be catastrophic, he appears to commit himself to the view that danger is unlimited in degree, all pervasive in extent and requiring ceaseless preemptive attacks. In other words we are in an impossible position, at the bankrupted end of an international law tradition. He says:

“...Thus, even if the probability that a rogue nation would attack the United States directly with WMD were not certain, the exceptionally high degree of harm that would result, combined with a limited window of opportunity and the likelihood that if the United States did not act, the threat would increase, could lead a nation to conclude that military action is necessary in self-defense. Indeed, as President Bush recently cautioned: ”If we wait for threats fully to materialize, we will have waited too long”” (at 576).