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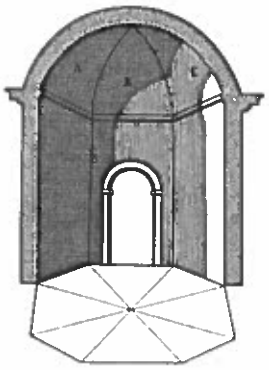

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A Phenomenological Theory of the Human Rights of the Alien

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ABSTRACT. International human rights law is profoundly oxymoronic. Certain well-known international treaties claim a universal character for human rights, but international tribunals often interpret and enforce these either narrowly or, if widely, they rely upon sovereign states to enforce the rights against themselves. International lawyers and diplomats have usually tried to resolve the apparent contradiction by pressing for more general rules in the form of treaties, legal doctrines, and institutional procedures. Despite such efforts, aliens remain who are neither legal nor illegal and who thereby slip through a discourse that claims universality. I ask: why does international legal discourse claim a universality of human rights enforceable by impartial, politically neutral tribunals when it also recognises that a state may refuse to recognise some groups as "persons"? I turn to the works of Bernhard Waldenfels for an explanation. To that end, I briefly outline two examples of state-centred human rights treaties. I then reconstruct Waldenfels' explanation as to how a territorial sense of space needs an alien exterior to the space. The territorial structure assumes time is frozen as of the date of the foundation of the structure. The body of the alien is taken as a biological body. The personality, motives, and actions of the alien are the consequence of the imagination of people inside the territorial boundary. The dominant international legal discourse reinforces and institutionalises such a territorial sense of space and frozen time because the territorial state is considered the primary legal subject of international law. I also retrieve, however, an experiential but concealed sense of space and time. To retrieve this sense of space and time requires that lawyers see the world through the twilight of legality heretofore ignored as pre-legal.

KEYWORDS. Human rights, universality, (il)legal aliens, phenomenology, experiential time and space, Bernhard Waldenfels

INTRODUCTION

Discourse concerning international human rights law is currently confronting a serious problematic. On the one hand, human rights

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treaties claim a universal character to human rights.[1] Human rights have been said to apply to all persons independent of their national origin, ethnicity, race, language, religious beliefs, and nationality. On the other hand, international tribunals, when confronted with the interpretation of the treaties, have deferred to the legitimacy of the state to define who is a national (and, therefore, who is an alien), to consider what inhabitants 'owned' the universal rights, to enforce the rights of human subjects against the state itself, and even to expel aliens from its territorial borders – often to states whose territory was the habitual abode for the expellee's family only several generations earlier. This apparent contradiction inside the international human rights discourse has plagued judges, international lawyers, and public officials of international organisations to this day.

Bernhard Waldenfels' wide-ranging, prolific and deep contribution to this issue harkens the serious study by a lawyer. For, Waldenfels explains why this contradiction exists in contemporary legal discourse and, further, he offers an opportunity for lawyers to break from its hold. I intend to retrieve Waldenfels' contribution with respect to both aspects of the contradiction. I shall do so by setting out the contradiction as exemplified by two sets of multi-lateral human rights treaties: the International Convention of Civil and Political Rights and a series of treaties of the European Community. I shall then turn to Waldenfels' explanation as to why the legal discourse might be tilted in favour of the sovereign state over the alleged universal rights of the human subject who finds her/himself defined as an alien. I shall privilege Waldenfels' notion of the twilight of a structure and I shall link his notion to the paramountcy of the state in the international legal discourse. Waldenfels raises two elements of a structure that bear upon such a paramountcy: the territoriality of space and the quantification of time. For, the international human rights discourse is tilted in favour of the legal structure of a territorial state, and time begins, for such structure, when it is founded at a specific point in quantifiable time. Waldenfels explains the importance of a very different sense of space and time. Against the latter background, I shall briefly

suggest the sorts of questions that Waldenfels raises if lawyers desire to escape from the contradiction that plagues our discourse.

1. An Inner State-Centred Human Rights Discourse

The *International Covenant of Civil and Political Rights, 1966*,[2] exemplifies the universalist claims of human rights. Its preamble recognises "*dignity*" as "inherent" of "*all members* of the human family." The *Convention*'s rights, ratified by most states on the globe,[3] are described as "equal and inalienable" based upon "universal respect" for "everyone." Article 4 entrenches several rights that a sovereign state may never derogate. Included is "the recognition" of "everyone" "everywhere" as a "person before the law." The *Convention* establishes a "committee" [the Committee] which has, over time, evolved to become much like a court. As a supplement to the treaty, an *Optional Protocol*,[4] provides a procedure for hearing individual complaints against states that have ratified the treaty and *Protocol*. Several other provisions of the treaty also manifest a universalism to its rights and duties.[5] A Committee decision is considered a 'precedent' in the common law system. The *Covenant* also requires that states regularly report their legislative protections of human rights to the Human Rights Committee. The states party to the *Convention* have also agreed that, in addition to hearing individual grievances against states, the Committee may issue "Comments" as to how the universal rights of the *Convention* are to be interpreted. These "Comments" are generally acknowledged as the more sensitive commentaries about the legal protection of all human beings. The "Comments" offer interpretative guidelines that influence the practice of lawyers.

Similarly, by the 1950s, the European judicial institutions had begun to recognise the universal jurisdiction of supra-state judicial bodies that deferred to universal human rights. By the 1960s the (inter-) national community of Europe had acquired a distinct legal personality, its own

institutions, its own legal capacity, and an apparent unlimited freedom to legislate and adjudicate human rights disputes. A series of treaties had their ostensible objective to protect "everyone," including "national minorities": the *European Convention of Human Rights, 1950*,[6] *Protocol No. 4* of the *European Convention*, concerning *Protecting Certain Additional Rights*,[7] the *Framework Convention for the Protection of National Minorities, 1994*,[8] the *European Convention on Nationality, 1997*,[9] and the *European Convention on the Adoption of Children, 1967*.[10] The European treaties have been interpreted and enforced against customary international norms and the apparent desire to prevent the recurrence of the all too familiar treatment of aliens during the 1920s and '30s. Even domestic courts of state members have recognised the binding character of these treaties upon domestic judicial institutions. By the mid 1990s, the International War Crimes Tribunal for the former Yugoslavia could hold that a human rights regime had generally "supplanted" the sovereign state regime that had prevailed since *Westphalia* (1648).[11]

At first sight, the European human rights regime seems to guarantee protection of all who find themselves working and living in the territories of the member states. The European *Human Rights Convention* for example, aside from the usual exemptions, recognises a legal duty upon the state not to discriminate on grounds of race and nationality.[12] As with the *International Covenant of Civil and Political Rights*, the traditional legal rights are guaranteed to "everyone." Further, the *Treaty of Rome* sets out in Articles 7, 48, and 59 that nationality is one of the prohibited grounds of discrimination. Further, the pivotal posited distinction between citizen and non-citizen would trigger the non-discrimination obligation if citizens were protected in certain circumstances where an ethnic group was denied security of the person. Discrimination would also lie on grounds of nationality of an alien if one were required to live in a degrading environment, or if one's family were forcibly disrupted.[13] In like vein, the European Community aims to alleviate the ethnic stresses and strains inside the territorial borders of states by protecting national minorities in

Framework Convention for the Protection of National Minorities, 1994.[14] Further, the *European Convention on Nationality, 1997,* has outlined certain principles that states must follow in their domestic nationality legislation. In particular, all persons possess the right to a nationality, statelessness is to be avoided, no one may be "arbitrarily' deprived of one's nationality, and one's nationality may not be automatically affected by marriage, dissolution of marriage or the change of nationality by one of the spouses during marriage. Article 2(a) defines 'nationality' as "the legal bond between a person and a State and does not indicate a person's ethnic origin." The general principles would seem to protect all residents, including non-EU aliens.[15] Article 7(3) of the *Convention concerning Nationality* explicitly prohibits the enforcement of domestic nationality laws against an individual if s/he *does not possess a nationality in another state* (that is, if s/he is stateless). The sole exception, which can be traced back for at least 200 years, occurs where the individual acquired the nationality by fraudulent means. Further, Article 9 of the *Nationality* treaty imposes a duty upon states parties to "facilitate" the recovery of nationality by former nationals who lawfully and habitually reside on its territory. Article 6(3) defers to residence in the territory of the state as the primary *indicia* of the needed bond for nationality. Article 6(3) continues that domestic law must not require residency longer than ten years.

In like vein, the Parliamentary Assembly of the Council of Europe has resolved in a *Protocol* to the *European Convention of Human Rights* in 1993 that 'national minorities' are "a group of persons in a state who a) reside on the territory of a state and are citizens thereof, b) maintain long standing, firm and lasting ties with that state."[16] The consequence would seem to be that if the European Community only expanded its membership, there would no longer be 'aliens' and 'foreigners' in their midst. We could finally forget about the dark century of Europe. Or does the legal discourse allow us to so forget? The issue needs to be faced as to why the two sets of human rights treaties render the universality of human rights problematic.

A) The International Covenant of Civil and Political Rights, 1966

Let us initially study one treaty provision, Article 13 of the *International Covenant*, before we address why the state constructs an alien. Article 13 provides as follows:

> An *alien lawfully in the territory* of a State Party to the present Covenant may be expelled therefrom only in pursuance of a decision reached *in accordance with law* and shall, except where *compelling reasons of national security* otherwise require, be allowed to submit the reasons against his expulsion and to have his case reviewed by, and be represented for the purpose before, the competent authority or a person or persons especially designated by the competent authority.

Let us look closely at three issues addressed in the provision: first, who is "lawfully in the territory"; second, when is an expulsion of an alien "in accordance with law"; and third, what institution decides whether the national security warrants harm to the alien.

1) Who is "lawfully in the territory"

The first issue that one needs to address is the concept of 'lawfulness.' For, Article 13 only protects aliens that are "lawfully in the territory." The *Convention* establishes a "committee" to investigate complaints from other states and from individuals, to render reports and to offer interpretive guidelines of the terms of the treaty. Over time, the "committee" has evolved into a court-like tribunal. Commentators give great weight to the Committee's interpretive opinions and the opinions are generally acknowledged as the more sensitive international enunciations to universal human rights. In this light, the Committee has addressed 'lawfulness' in one of two ways: first, lawfulness incorporates the standards of treaty and customary international law;[17] second, 'lawful' signifies "justified by law."[18] The first avenue does not help us since it is the treaty that begs 'what is lawfulness'? The second approach returns the official to the

expelling state's own posited laws as the referent of justification for the state expulsion of an alien. For example, the Human Rights Committee held in *Canepy* that 'lawfulness' concerned whether a visa permit had expired or whether one had entered the state's territory without the proper forms as required by the state's regulations.[19] Indeed, the Committee has held that the expulsion of an individual must be enforced even if the expulsion is "perverse."[20]

2) When is an expulsion in "accordance with law"?

This takes us to a second issue: what does "accordance with law" signify? In interpreting this phrase, the Committee has once again deferred to the state to posit what is "law" with respect to whom, when and why an inhabitant may be expelled. The Committee has expressed that "[t]his means that *national law* concerning the requirements for entry and stay must be taken into account in determining the scope of that protection." "*It is in principle a matter for the State* to decide *who* it will admit to its territory" except where there are considerations of non-discrimination, inhuman treatment or family life are impacted negatively (*Comment 15*, para. 5). A recent study of the *Covenant* advises that "it is doubtful whether article 13 prohibits the adoption and implementation by States Parties of laws which authorise expulsion on arbitrary grounds" (Joseph, 2000, 268, para. 13.02).[21] Indeed, the study continues that expulsion is legal whenever the domestic laws "discriminate on the basis of race, even though this would render the article 13 procedural safeguards *essentially useless for aliens expelled on those grounds.*"

One possible strain of decisions of the Committee counters the expelling state's standpoint. Here, the arbitrary enforcement of the expulsion order has been subject to scrutiny. The Committee has defined "arbitrariness" as "inappropriateness, injustice and lack of predictability."[22] In addition, *Comment No. 15* suggests that the state must administer the expulsion laws "in good faith." But such procedural conditions do not

compromise the ultimate authority of the expelling state to decide when, how and whom to expel. The Committee has considered 'arbitrariness' as "above," not "inside" the state's posited laws.[23] Further, as long as officials apply a domestic law "in good faith," the expulsion is "in accordance with law." In sum, the universality of human rights has been displaced by an inner discourse which defers to the authority of the state to posit legal restrictions and conditions when an inhabitant may be expelled.

3) National security through the perspective of the Familiar

This takes us to a third issue: 'who decides and what is the standard to which it decides whether compelling reasons of national security exist to warrant expulsion of an inhabitant?' If there are compelling reasons of national security, the expellee has no right to representation and no right to have her or his expulsion reviewed according to Article 13. Once again, the tribunal has incorporated the standpoint of the expelling state. Indeed, the Committee has stated in *V.M.R.B. v. Canada* that "[i]t is not for the Committee to test a sovereign State's evaluation of an alien's security rating...."[24] And in *Hammel v. Madagascar*, the Committee has considered that a state had followed Article 13 when, without a "review," the state's official granted the complainant two hours notice "to pack his belongings" before he was deported. Further, the Human Rights Committee has held that the "review" required in Article 13 could be satisfied *in absentia*.[25] Along the same lines, the Committee stated in its interpretative *Comment* of Article 13 that "[i]t is not within the powers of the Committee to evaluate whether the competent authorities of the State party in question have interpreted and applied the domestic law correctly in the case before it under the *Optional Protocol* unless it is established that they have not interpreted and applied it in good faith or that it is evident that there has been an abuse of power." To be sure, officials must be authorised to expel the particular individuals by the state's laws and they must do so for the reasons (such as national security) of the interest of the laws. Again; the

recent Joseph study concludes that "Article 13 is probably of little use to the many asylum-seekers who are forced to flee their home States suddenly, and traverse borders illegally" because of the discretionary authority of the expelling state (Joseph 2000, 270, para. 13.07). This deference to the expelling state is reinforced by the difficulty of domestic courts themselves to obtain from the expelling state's officials the evidentiary basis for the national security risk and to link the latter with the particular expelled person. As the onus of proof is placed upon the expellee in such a circumstance, the evaluation of the security threat of the alien is effectively non-justicible. In sum, the universalist human rights discourse leaves it to the state to posit whom to expel as an alien, and when.

4) Who is an alien?

So, the individual human being is recognised as a legal person with universal human rights in the universalist discourse of human rights. But inside this universalist discourse, there is an inner discourse that effectively defers to the sovereign state to decide 'what is legal' and 'what is an issue of national security.' We are left with the inquiry as to 'who decides who is an alien?'

The critical idea of an 'alien,' in the pre-human-rights era of the international law of nationality, was that all inhabitants in Europe (where public international law took formation in modern times) had a nationality. One had a nationality if one had a legal bond with the state. This was usually manifested by a domestic statute that conferred the legal status of citizenship on the individual. However, during the 19th century, the idea took hold that one had a nationality if one lived a substantial period in the territory of the state despite lacking formal citizenship with the right to vote. The national need not be a citizen if she or he or her/his parents were born in the territory of the state (*jus sanguinis*) or if s/he resided for a certain period in the state's territory (*jus soli*). The important point for our purposes is that one had a nationality either in the state of habitation

or a state of origin. If one inhabited the territory of one state and had a nationality in another state, one was considered an alien. The binary, national/alien, defined one's legal status. It was left to the particular state to decide the criterion of nationality for its populace because 'who is a member of the state' has historically been the ultimate *domaine reservée* of sovereignty. This was so because the *indicia* of a sovereign state was its legal authority to determine which human beings could be members of the state. Thus, the authority of a state to expel a human being was associated with such sovereignty.

Since the *Treaty of Westphalia* (1648) – more of a symbolic moment than the initiator of a new international legal order of equal sovereign states – the subject of the international legal order has not been the national but the sovereign state. The state has conferred nationality. The national (and corresponding alien from another state) is the object of the state's actions. As a consequence, legal duties have been owed by a state to another state. One such duty has been the legal duty of a state to protect its nationals when they crossed the state's border into the territory of another state. In the latter circumstance, the residents were considered aliens of the state where they newly resided. If one state harmed the nationals of another state, the harm contravened a duty of one state towards the state of nationality. The legal authority of a state to expel aliens derived from the authority of a state to regulate the actions of its nationals (even if abroad) and of all aliens within its territorial boundaries.[26] Perhaps one may already appreciate that the duty of a state A to protect its nationals missed those inhabitants who lacked a nationality or who were nationals of a state B that state A had not recognised as a juridical person in the international legal order.

The above background is critical to understanding why the oxymoron plagues the international human rights discourse. For, it may well be a common view amongst the public, philosophers, and even international lawyers that the advent of human rights treaties and international institutionalised procedures to investigate human rights abuses has displaced the

traditional state-centred discourse that we have inherited with *Westphalia*. Indeed, as already noted, the International Criminal Court for the former Yugoslavia has so suggested.[27] But when one turns to particular provisions and doctrines, too many and too complex to elaborate in this short essay, it is remarkable how the international legal culture has fallen back upon the sovereignty paradigm that preceded the human rights treaties of the 1950s and 1960s. In particular, the universal rights of human beings and the duties of states to protect such rights have been displaced by an inner state-centred discourse. The deference to the state to define its own nationals, their rights and the conditions of their expulsion has left large groups of inhabitants vulnerable to the inhumane actions of state officials, of para-military groups, and the sex slave business. Common law lawyers had a doctrine for this phenomenon during and before the 19th century: *damnum absque injuria*. Despite the universalist discourse and the openness of officials who work within that discourse, inhabitants have remained who could not be incorporated into the state-centred discourse. Even the human rights sensitive Human Rights Committee has accepted the alien/national binary.[28] Because an alien has been understood in terms of its opposite (a national), the Committee – and as well as many other international tribunals – has privileged the legal authority of the sovereign state to determine who is a national and an alien and to expel large groups from the scope of the universalist rights.

B) The European human rights treaties

Now, a lawyer might well respond to my above discussion of the *International Covenant* as 'soft law.' 'Soft law' is more hortatory and coloured with 'oughts' than is a 'hard law' discourse which posits binding rules. Further, one might retort, the Committee itself is not a judicial tribunal. Indeed, even the *International Court of Justice* at Den Hague confers mere References which possess a recommendatory authority rather than a binding decision in a *lis inter partes* such as characterises a domestic court.

Despite the error of such view, I shall heed its caution and address another human rights regime: the European. In this regime, the treaties have been expressly incorporated into domestic Constitutions in several state parties to the treaties. Further, whether or not such has been so, the executive, legislative and judicial branches of governments in the state parties have acted as if they were bound by the human rights regime. Further, the European Community has established institutions with all the trappings of a court to interpret, apply and enforce the human rights treaties.

The problem is, though, that, like most legal issues perhaps, the devil is in the details. And the details reinforce the fundamental contradiction that we just observed with respect to the *International Covenant of Civil and Political Rights*: namely, that despite the claim of the universality of human rights, the state itself may define who is entitled to protection as a national of the European Community. An important issue, for example, is 'which institution resolves whether an inhabitant is a national (or an alien) of the state?' This is an important question because a national of the European Community depends upon whether an inhabitant is a national of a state member. Further, if an inhabitant lacks such a legal bond, may the state member posit those rights to which the alien is entitled? Third, may a state posit a lower standard of protection to the nationals of another member-state than to its own nationals? Is the standard only related to due process or does it relate to the social-economic conditions such as housing, public education and the like? If an inhabitant is categorised as an 'alien' and if s/he lacks the nationality in any other state, is such an inhabitant afforded the same standard of protection by virtue of the universality of human rights?

First, let us turn to the *European Human Rights Convention*. Article 15 provides that the state member "may take measures derogating from the obligations of the Convention to the extent required by the exigencies of the situation" "in time of war or other public emergency threatening the life of the nation." It is left to the state member to consider when that time has arrived. Further, Article 16 explicitly allows the state to impose "restrictions on the

political activity of aliens" despite the protection to "everyone" of the freedom of expression (Article 10), political freedoms (Article 11) and non-discrimination on grounds of "national or social origin" or "association with a national minority, birth or other status (Article 14). Further, the entrenchment of rights, such as the right to life [Article 2(1)], and the restrictions of rights granted to "everyone" must be "by law" [Article 11(2), for example]. But what does one mean "by law"? Does this refer to the domestic laws posited by a state's legislature or court? Again, Article 6 of the *European Human Rights Convention* guarantees a fair trial to "everyone." But the European Court of Human Rights has held that "everyone" does not include a deportee because the deportation of an alien does not involve civil rights, according to the Court.[29] And again, when due process is required of a state when it expels an inhabitant, *Protocol 7* to the *Human Rights Convention* provides that due process is only guaranteed if one is "legally resident" in the territory of a states party to the treaty. But what does "legally resident" mean? Once again, given the positivist view of law as it is taught and practised in Western industrialised countries, it would appear to be left to the state to define who is "legally resident." Further, Article 1(2) of the *Protocol* provides that an expellee may "a) submit reasons against his expulsion; b) have his case reviewed; and c) be represented either before the competent authority which is reviewing his case or before a person or persons designated by that authority." However, once again, the inhabitant to be expelled must be "legally resident in the territory of the [expelling] State." Once again, it appears to be left to the state to define who legally inhabits a state's territory. Is someone "legally resident" if s/he lacks a nationality in any state by virtue of the posited enactments of the state of residency and the state of origin? Further, even if the stateless person is granted due process protection before being expelled, it is sufficient, we find, that the "review" of the alien's case is an administrative review by an administrator without appeal to a judicial tribunal.[30] Nor need the expellee actually be present to such an administrative "review." Nor is there a requirement for an oral hearing of the expellee.

Let us look closely at another European human rights treaty. Who is a 'national minority' has been addressed in the *Copenhagen Document* (1990).[31] And the *Copenhagen Document* has been followed up with the *Framework Convention for the Protection of National Minorities, 1994.*[32] Article 5(2) of the *Framework Convention* recognises that each state party to the treaty has a duty to "refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation." Article 6(2) adds that the state has a duty "to take appropriate measures to protect persons who may be subject to threats or acts of discrimination, hostility or violence as a result of their ethnic, cultural, linguistic or religious identity." The *Framework Convention* provides, however, that the state retains the legal authority to define who is a national and who is not, what rights to grant to nationals and what rights to grant to non-nationals. The preamble affirms, for example, that "the effective protection" of national minorities must be "within the rule of law, *respecting the territorial integrity and national sovereignty of states.*" More generally, the *Convention* fails to bind the sovereign states but rather sets out hortatory and permissive expectations.[33] The text of the *Framework Convention*, for example, uses such terms as "take appropriate measures" and "as far as possible," not infrequently inferring that the provisions remain 'oughts.' At best, the *Convention* provides *indicia* of future international customary norms. Further, the *Framework* only confers rights to individuals, not rights to members of a minority group that defines itself in terms of its own collective memories.[34] Nationality concerns a criterion of group membership. Further, the *Framework* treaty ignores the social, educational and economic protection that is needed to accompany the daily life of a resident alien.

Aside from the above deference to the state, the *Framework Convention* leaves it to each state party to define who is a "national minority." Heinrich Klebes, the Clerk of the Parliamentary Assembly of the European Union, has written that the Western European states were anxious about any duty to protect alien inhabitants who inhabited their own

territory. Each state party has continued to distinguish between citizens and aliens despite the claimed universality of the human rights regime of the Community.[35] Further, the *Convention* maintains a distinction between nationals who are social-cultural minorities on the one hand and aliens who, though distinguished by social-cultural differences from the rest of the populace, lack a nationality. To take an example and only as an example, Germany defined a "national minority" as a person who is a member of an ethnic minority who was also a national of the Federal Republic. This definition had the effect of excluding enormous numbers of migrant workers from recognition and protection awarded to German citizens.[36] Despite the initial impression that the European human rights regime guaranteed universal protection to all inhabitants of states members, the state retains the authority to define 'who is a national,' 'who may be expelled,' and 'what rights may restrict the alien actions in the territory of the state.' The authority of the state to resolve these issues impacts upon the access of alien inhabitants to housing, public education, employment, ownership of property, ownership of a business, movement within the territory of the state, movement within the EU, financial programs for the retention of one's cultural, linguistic identity, access to legal aid, and the protection of some traditional constitutional rights guaranteed in constitutional and legislated rights codes.

What about the *European Convention on Nationality, 1997*? Interestingly, the *Convention* explicitly reaffirms the authority of the state member to denaturalise if the citizen's conduct is "seriously prejudicial to the vital interests of the 'State Party'" [(Article 7(1)(d)], where there is "a lack of a genuine link between the State Party and a national habitually residing abroad" [Article 7(1)(e)]; or where "it is established during the minority of a child that the preconditions laid down by internal law which led to the *ex lege* acquisition of the nationality of the State Party are no longer fulfilled" [Article 7(1)(f)]. Further, if both parents lose their nationality, the child too may lose her/his nationality [Article 7(2)]. To be sure, Article 3(2) of the *Nationality Convention* states that the domestic law is valid only

insofar as it is consistent with "applicable international conventions, customary international law and the principles of law generally recognised with regard to nationality." However, European precedents exemplify that a margin of appreciation is often afforded a sovereign state's judgement concerning an alien's expulsion.

Although, on paper, it would appear that the European Community has proscribed statelessness, a close reading of the text of the treaty suggests that the 'treaty requirements' may be construed by state officials as only of recommendatory power rather than of a binding authority. Article 3(1), for example, leaves it to each state to set down the terms and conditions of 'who is qualified to be a national.' Article 3(1) provides, in particular, that "[e]ach state shall determine under its own law who are its nationals." Article 5(2) thereupon provides that the principle of non-discrimination between nationals ("on grounds of sex, religion, race, colour or national or ethnic origin"), whether nationality is acquired by birth or through subsequent nationalisation procedures, should only "guide" the state parties to the treaty. Article 5 explicitly possesses only hortatory influence. Further, the guidance to the state's discretionary authority only addresses non-discrimination "*between its nationals.*" Indeed, the very provision that seems strongly worded against discrimination on grounds of "national or ethnic origin" does not address discrimination against non-EU nationals as well as all persons lacking a member state's nationality. Further, the relationship between an alien and the European Community rests upon the "legal bond" between the alien and the state party to European human rights treaties [(20(1)(b)]. This "legal bond," in turn, is defined, once again, in terms of the posited domestic laws of the state. So, for example, Article 20(2) provides that, in cases of state succession, "[e]ach state Party may exclude persons considered under paragraph 1 from employment in the public service involving the exercise of sovereign powers." In effect, certain occupations and professions remain reserved for those higher on the legal hierarchy of the national-alien spectrum: nationals. Once again, the state is authorised to define who is a national

and who is an alien [Article 7(1)(a) to 7(1)(g)]. Enough has been retrieved of Europe's human rights treaties to affirm the legitimacy of the state to decide 'who is an alien,' what rights the alien has, when may the alien be expelled, and which aliens may be admitted. The universal protection of all persons has turned out as a surface protection. The universalist human rights discourse has deferred to the state to posit and enforce laws that relate to aliens as a special category of human beings.

2. The Twilight of a Border

One needs to ask 'why?' Why do the treaties which hold out the universality of human rights also provide for a deference to the sovereign state as the ultimate arbiter as to who is an alien, what rights the alien has, when the alien may be expelled, and which aliens may be admitted into its territory? We need to interrogate how the above-mentioned state-centred discourse has taken hold of the construction of the legal category of 'alien' and why. This is the entry point where Bernhard Waldenfels' works about the alien bear practical insight for the international lawyer. "Questioning," according to Waldenfels, "is only a transitional state, marked in advance by schemes of pre-knowledge and pre-scriptions" (1993b, 5).[37] Instead of observing the perceived world as posited, interrogation lets the perceived world be. Interrogation responds to the being of the perceived world. Interrogative thinking relates to responses "which awaken our thinking and keep it awake" (1993b, 12). In the spirit of this sense of "interrogation," I wish to ask 'what is the pre-knowledge which awakens the universal legal knowledge and language of lawfulness, national security, and aliens?' As Waldenfels expresses my focus, "[o]nly the person who sees how experiences are arranged in the very beginning will distrust a normative euphoria even when it mounts to rational self-determination" (1996, 40).

The entry point for Waldenfels' contribution is his notion of the 'twilight.' The twilight, Waldenfels describes, is associated with light. The

light slowly emanates from a shadowy spell of drowsiness when we become conscious after a deep sleep. Waldenfels offers three possible contexts when the twilight arises: first, the weak light in the evening or morning; second, dim lighting in general; and thirdly, "indefiniteness" or "unclarity" in a figurative sense. The *twi* of twilight, he says, means "half, split, separated or doubtful, unsteady." Such a cloudiness of the twilight characterises every human experience. Included in such a cloudy twilight is the alien who is constructed as separate from and alien from the dominant culture of a state.

Waldenfels describes the cloudiness of the twilight of a structure in a manner that bears insight of a legal order. He describes how, when we also begin to see the light in the morning, we begin to see the contours of space. We see walls and windows in the room. We see objects that occupy space – a clock, a book, a ray of light with floating particles of dust - as do we see the dresser where the objects are situated. The building rests upon a foundation. The foundation may have a deep basement; it may rest upon sand; or it may rest, indeed, upon water. Pillars protrude from the foundation. A space-less wild is given form. Once constructed, space is detachable from the objectless realm of non-knowledge. Waldenfels defines such space as an "order" that is "a *regulated (that is, not arbitrary) connection of one thing and another*" (1996, 1). In the Appendix of *Order in the Twilight*, he suggests that an order "does not derive from a governing authority but from the mutual linkage of statements." This, in turn, leads to the twilight intermediary realm of which no one is the master (1996, 134). And again, "order, understood as the regulated connection between one thing and another, does not by any means bind us to such a vertical concept of order" (1996, 15). The social-cultural order or structure is presupposed as represented in a territorial state.[38]

Since we officials analyse concepts from the external point of view, as Hart and Raz have explained, the best that we can do is to picture or imagine the other side of the boundary of the structure. Since we only 'know' or recognise objects as knowledge if they are recognisable within

the boundary of the structure, whatever is on the other side of the boundary is imagined. The judges, as the "guardians" of the structure, simply cannot recognise the claim of a stranger on the other side of the boundary except through the recognisable signs of our official discourse (1990, 21-2). As Waldenfels suggests about structures generally, the familiar knowledge, internal to the "operative standards" (*Masswerk*) or "measuring rods" (*Masstabe*), are detached from experienced events. And as Merleau-Ponty explains, we intellectualise *about* experiences. The twilight is a margin of what is known and we officials only know concepts. As Waldenfels describes, one crosses over into the twilight from the certainty of knowledge to the uncertainty of the non-knowledge (1996, 119).

Philosophers have feared the twilight with *horror alieni*, Waldenfels warns us. The twilight has been imagined as a threat to one's body, language, person, and friends (1995b). Waldenfels describes the twilight as "wild," the place for wolves, totally incomprehensible, arbitrary, nothingness, barbaric, evil, chaos, and savage. Unreason prevails in the twilight (1996, 66-9). But "an abyss" of non-duty arises from behind every duty that we claim to know, according to Waldenfels (1995a, 41; Miller). Wildness lacks a structure with operative rules and standards. Waldenfels points out that once we cross the boundary of the structure to the wild, we become anxious for we are never at home. Knowledge is divided between *Heimwelt* (home world) and *Fremdwelt* (strange world) (1997, 28-35). The alien, arbitrariness, violence, and the extra-ordinary characterise the exteriority (1996, 114-16). Such a violent realm lacks the connectedness that one needs to recognise a 'thing' (1996, 100). It is this lack of recognisable connectedness that leads one into madness, fear, alarm, horror, awe, or astonishment.

Whenever one crosses the boundary into the twilight of legal consciousness, there is always a remainder that exceeds a legal structure. The excess remains untouched. This remainder, Waldenfels describes as "extra-ordinary." We take as the familiar, legal concepts and the standpoint of the structure. The ordinary being is drawn from familiar concepts in the

legal discourse of the structure. As a consequence, we cannot measure or recognise or know the stranger even though we claim to do so. The twilight, in contrast, is indeterminate, vague, immeasurable, shadowy. In the twilight, we lack concepts that can explain or justify the twilight in terms of operative standards. The twilight is located "sideways" from the interior, on the other side of the clear and unambiguous boundary of a structure.

The possibility of such a remainder and the impossibility of knowing the remainder render any feeling of omnipotence on the part of state officials as vulnerable. For, the twilight is groundless. It is located exterior to a knowledgeable realm or, at least, the twilight is a zone of indeterminate knowledge.[39] In "Hearing Oneself Speak," Waldenfels goes so far as to describe how, drawing from Derrida's "Signature, Event Context" (Derrida 1982, 317; 1984, 8), the 'inter-space' between officials of a structure on the one hand and creatures or others exterior to the structure on the other composes "waves" of atoms of air that carry the voice.[40] These waves last even after the voices that moved the atoms have died. Or disappeared. Or become unrecognisable. The atoms "spatialise themselves" (1993a). Similarly, Waldenfels says in "Meaning without Ground" that the twilight exceeds the spatio-temporal mathematical realm of knowledge (1992, 378). Unlike the structure's measurable, unitary, and linear knowledge, the twilight possesses competing forms of social organisation and lines of development (1992, 380). The twilight is the intermediary "between facts and universal structures." Waldenfels continues that "an intermediate region opens up where *alternative forms of organisation* and *diverging lines of development* appear." No one human subject and no legal institution is master of the intermediate twilight. The above spatial terms used to describe the twilight continue when Waldenfels describes the twilight as a gap or fissure in the structure. This fissure is unordered or un-ruled. The traditional forms of organisation on the interior cannot measure the twilight. For action is measured against an established rule, Waldenfels reminds us, and the twilight lacks such established rules.

The sting of the alien – whether ethnic or civic – does not arise in a vacuum. The alien dwells in the very twilight between the boundaries of each equal sovereign state. In order for the laws of the sovereign state to be considered binding, the alien needs to be recognised as a juridical person in the international legal order. A structure of equal sovereign states thereby sets the organisational grid that ultimately posits whether a human being has legal standing before its institutions and the extent that s/he does. The only structure that we have organised – the international legal structure – has had units that were pictured in terms of a territorial boundary. This incorporates the possibility of a remainder to any action of a territorial state. And this raises the spectre of an alien as an inevitable consequence of public international law. The consequence has been an unlimited drive of the state to conquer the strangers that it has produced. The state has de-naturalised, expelled, kidnapped, tortured, maimed, imprisoned, poisoned, confiscated assets, denied food and shelter, and executed aliens within the territorial space of its boundary – frequently under the colour of law.[41] Conversely, the aliens, located within an international legal structure that only recognises sovereign states as juridical persons and that recognises only nations as worthy of statehood, have also had to claim to be nationals of a state. Without such a nationality, the international legal discourse just will not protect the stateless human being except to the extent that existing states have previously agreed to be bound by treaties that confer rights to the stateless persons. We have seen in Section One above the extent to which the more human-rights-sensitive states of the globe have addressed the latter possibility. Thus, both in-nation and out-nation have claimed recognition as legal existent as juridical persons (that is, as states) in the international legal structure. The recognition as a legal person is a legal recognition even though the nation may exist as a social-cultural entity independent of legal status. As a consequence, the international legal discourse grants in its own voice (universality of human rights) what it takes from its states-centred voice (which defines who is an alien, what rights the alien has, and when the alien may be expelled).

For example, when presented with problems where a state has expelled an individual (let alone a large group), the Human Rights Committee has accepted the alien/national binary.[42] Because an alien has been understood as a human being who lacks a nationality, one who lacks a nationality is especially vulnerable to the whims and dictates, the xenophobia and nationalism, of the state's dominant nation. An inner discourse inside the international human rights law discourse has authorised and enforced the existence of aliens who are neither legal nor illegal and where *damnum absque injuria* prevails. If the inhabitants lack legal status in any state, the state is free to expel, torture, or exterminate them *en masse*. It is remarkable that the atrocities committed by state officials today not infrequently coincide with victims who are stateless in fact if not in legal form. Examples permeate contemporary history: Stalinist Russia, Nazi Germany, Poland, and Italy in the inter-war period, Uganda of the 1970s, and the recent historical experiences in Ethiopia, Kuwait, Palestine, Vietnam, Sri Lanka, Bangladesh, the former Yugoslavia, Rwanda, Estonia, Latvia, the Czech and Slovak Republics, and on it goes. Newly independent states, such as Sri Lanka and Bangladesh, defined nationality in a manner that excluded large numbers of long-time residents in their territory. Large numbers of certain nomadic groups, such as the Roma of Romania or the Badoons of Kuwait have lacked a nationality in any state since the inception of the state system. Even in Canada, Australia, and New Zealand, large numbers of aboriginal peoples remain stateless with a serious absence of social and economic protection as afforded nationals. Further, ethnic groups have been legally granted nationality by a state only to face circumstances where the granting state would not diplomatically protect its nationals if they resided on the territory of another state. Not infrequently, the group has resided in a neighbouring state – not of their individual choice – for several generations only to be expelled by the latter. But because of their linguistic, religious, or racial identity, the diplomatic protection of the group not infrequently remains problematic. Nationals have even resided within the territory of a state of nationality only to be denied

the minimum legal, economic, or social security required by the state to legal (and illegal) aliens.

In sum, to the question, 'who is an alien,' the international legal discourse has deferred to the authority of the state to posit laws and procedures that recognise legal identity. As a consequence, inside the universalist human rights discourse there has been concealed the monologic construction of the alien by a sovereign state. Large groups of aliens have slipped through the gap of the monologue. The aliens have oftentimes been neither legal nor illegal. And because the international discourse, at least until recently in the universalist human rights claims, has recognised states as the primary juridical subjects of the international legal structure, the unrecognised aliens have lacked standing if the state-subjects so determined. Something about the international human rights discourse has concealed an inner discourse which works against the universalist character of human rights of all human beings.

3. The Locus of the Alien as Exterior to a Territorial Structure

Waldenfels has brought our attention to the role of the territorial state in the need for an alien. I now wish to address a second aspect of Waldenfels' works. Here, drawing from Merleau-Ponty, Waldenfels identifies how the alien is constructed by what he calls "the Familiar." The Familiar is physically located within the border of the enclosed territorial space. The alien is located external to the border of the territorial space. This sense of space takes form when borders demarcate an inside from an outside. Such a sense of space is secure when its boundary is physically protected from the wolves and beasts in the unrecognisable objectless wild exterior to the enclosed space. Such a view of territorial space is described in vivid terms by the early philosophers, such as Hugo Grotius and Emmanuel de Vattel, of modern international law. Only a territorial state has been recognised as the juridical subject of public international law.[43]

Because territorial space separates the inside from the outside, we picture or imagine or represent the ghost-like figures at the limit of our gaze, the boundary of the structure setting the limit. We reason from recognisable units inside the structure. When we try to reason about the aliens beyond our borders, we mirror the stranger as a replica of ourselves. But because the alien does not fit our self image – either our image of our biological bodies, or of the way we reason (through analysis) or of our ideal-directed values or of our language or religion – we come to fear and even hate the alien once we confront the alien as a possible source of action. We desire to bring the alien within our legal structure: that is, to intellectually conquer the alien by classifying the human being. We do so in order to have what we conceive as peace with the outsiders and with ourselves. Heretofore, in the context of the structure of sovereign states, we bring peace by assimilating, conquering, or killing the body of the alien. The alien remains outside the law, forever foreign, an enemy, a threat to the interest of the whole, a remainder that cannot be fitted into our legal knowledge. The image of the alien, which I, as an official, project with horror into the ghost-like, barbaric figures of the wild, is absent from my knowledge of legal concepts and, therefore, drawing from Plato's *Symposium*, absent as object of my unlimited desire – unless, of course, its figures unite with us by crossing back into the space of our familiar institutional structure of the state.

In the context of such a view of territorial space, the alien is imagined as having a physical body composed of a physio-chemical mass. What human bodies are recognisable are located as if on a longitude and latitude point on a map. The body inside the territorial boundary of the structure can be surveyed. An official can perceive the physical mass or body on the enclosed territory. The physical traits of the face and physical body of the alien become very important in this regard so that the members of the Familiar may differentiate the physical-chemical body of themselves and other nationals from the bodies of aliens. Racism and sexism are thereby built into the very construction of the alien as external to territorial space.

But because the alien's intentionality, personality, and personal and collective memories can only be imagined, not perceived, by us officials of the Familiar, our imagination constructs what we take as the essence of the alien – with her/his different colour of skin, physical shape, face, forehead, and the like. Even the alien's clothes become important in our imagination of the alien on the exteriority of the familiar legal structure of the state.

The legal official of Anglo-American general jurisprudence is no exception to such an endeavour of imagination. As H.L.A. Hart and Joseph Raz have especially pointed out, the official decides a case from the viewpoint of the structure as a whole – that is, from the inside of the boundary of the legal structure. Rules compose the units of the legal order, the structure of the Familiar. The official distances her/his decision from her/his personal views about the content of a rule. Unless categorised inside the legal order, the alien is projected exterior to what Hart describes as the "pre-legal," the primitive legal order, or what the European intellectual tradition has labelled as the home of the barbarian (Aristotle, Cicero, Seneca, Lucretius), a "creature" (Hobbes), "a wolf" (Hobbes), a "savage" (Locke), or "primitive" (John Austin and Hans Kelsen) or what Waldenfels describes as the "wild." The exterior world of the alien is totally incomprehensible, arbitrary, nothingness, barbaric, evil, chaos, and lacking in reason (Waldenfels 1996, 66-9). It is no surprise that legal and political officials to this day imagine the alien with *horror alieni.* The alien is perceived as a threat to the public order, language, customs, symbols, and identity of the subject. It is no wonder that the leading representative of the Anglo-American world only recently described a religious movement as led by "barbarians." Once we look beyond what we take as the boundary of our territory and of our knowledge, we become anxious (1996, 114-16).

The only legal issue, in a territorial sense of legal authority, is whether an official acts within the *vires* of its office. Joseph Raz describes such an inquiry as the "sources thesis."[44] If located outside the border, the nation-

al, though becoming an alien to another state, remains the private property of her/his state of nationality. A national may cross a border only with the consent of the neighbouring state. The international legal order incorporated John Start Mill's notion of a free person to describe the subject. However, instead of the individual human subject being free from the state, the state was free from other states. The subject, as autonomous or free, possessed perfect freedom to choose and act as he or she desired within an "inner sphere of life" (Mill 1970, 306). One could scrutinise the person's action when the action caused harm to another. In the latter case, the action was "other-regarding"(Mill 1962, 129).

It follows from the above that the alien's claims, interests and collective values cannot be coherently known from the familiar legal concepts inside the boundary of the Familiar. The Familiar may, accordingly, dispense with, burn, torture or expel the alien's body. After all, the alien's body, again, is the product of the imagination of the official about the Unfamiliar on the externality of the territorial legal structure. If located inside the boundary of the subject's territory, an object – even a human being *cum* alien – is passive or "acted upon" (Spinoza 1985, 1: 408-617) by the subject. The national of another state is such a passive object. All the more so is a human being who lacks the legal status as a national of a legal structure. Accordingly, the national, if located inside the boundary of the territorial space, is the object of unlimited possession by the subject, the state.[45] Even today, the state possesses "ultimate title" or "underlying title," as the Canadian Supreme Court has often put it, of all territory within its borders. The subject's title includes all land, plants and animals. In a federal state such as Canada, the ownership of the territory is divided between the national and the provincial states. The remainder of the personal and collective experiences of aboriginal peoples is categorised as "inchoate." The latter peoples may lease territory – they may not sell it – because only the state owns the territory.[46] At best, the state holds the territory "in trust" for them for their necessary shelter and food. The only legal issue, in a territorial sense of legal authority, is whether an official acts within the *vires* of its office inside the structure of the state. The 'bar-

barian' on the other side of the border is immaterial to legal analysis unless the concepts of the Familiar direct and official to incorporate the alien as a legal person deserving of protection by virtue of her/his nationality in another state.

The question 'why is an alien is strange?,' then, depends upon what is excluded by the structure's boundary, not by some claim about the rights of nationals of a state. For, a territorial-like boundary differentiates the analysable units from the non-analysable, the 'is' from the 'ought,' law from non-law, law from 'morality.' Even when a jurist, such as Lon Fuller, claims that legality includes aspirations about morality,[47] there remains a non-analysable and, therefore (according to analytical jurisprudence) a non-knowable exteriority from the legality. The exteriority exists when legal rules direct officials to incorporate moral 'oughts' in hard and clear cases. Thus, the legal structure may well claim to possess a totality of legal authority within its physical borders all the while that it must postulate an exteriority that it cannot and must not assimilate for the rules of the legal structure to be binding.

This is important because the state that de-naturalises citizens (or expels citizens and residents from the territory of the state) has invariably considered the ethnic, linguistic, or racial group so de-naturalised as pre-existing the social contingency that was believed to necessitate the de-naturalisation. However, in the Trial Chamber of the International Criminal Tribunal for Rwanda, 1998, the Court found, after extensive evidence from anthropological historians, that clear ethnic divisions had not developed until the state took formation under the suzerainty of Germany and, after 1917, of Belgium.[48] Ethnic divisions were posited by the Belgian state during the 1930s with mandatory identity cards for the three newly created ethnic divisions. An expert witness, Alison Desforges, concluded that although the ethnic divisions were "not completely appropriate to the scene," the ethnic divisions became "an absolute reality" (cf. Sartre). The problem is that during the 20th century, the nation conquered the state and the necessary bonding with the state's posited laws required the construction of ethnic outsiders for the

identity of the new nation that took on the territorial boundary of the state.

The alien is imagined, then, to come from an object-less (this is von Uexkull's term) realm that the dominant international legal discourse cannot recognise except as an exteriority of the units that alone have, for four hundred years, been considered the 'real' or the 'is' of public international law. The stateless person of the international legal structure is not recognised unless officials of the sovereign state enclose the alien's felt experiences within the boundaries of legal categories of the familiar.

4. The Construction of an Alien in Measurable Time

I now aim to re-visit the territorial state and, drawing again from Waldenfels, note how the dominant discourse of public international law has presupposed a sense of time that begins on the day when the legal structure is founded. Most states celebrate such a date as the state's 'birthday.' The boundaries of the state structure exclude an exteriority from what the philosopher (and, in our case, the lawyer) takes as legal knowledge. The structure is a totality in that it denies the very 'existence' of how the alien has experienced or is experiencing the world. The alien is not recognizable as a familiar concept with which we lawyers are familiar. Differences do exist. But they do so only as differences between analysable concepts of the Familiar. We can only categorise the alien as having radically different experiences from our own as officials of the state and as citizens of the state. The particular experiences of the alien are not recognisable. The alien has to be categorised as a 'them' or 'the Jewish problem' or the 'Palestinian problem' or 'the Iraq problem' as if we lawyers had nothing to do with their experiences. So too, our own experiences must remain distanced from our analysis of the familiar legal concepts and the enclosure of even our own particular felt experiences. Experiential time, in sum, 'is' non-existent, legally speaking. We commonly reject experiential time as an

'ought,' a subjectivity, which corrodes the purity of legal analysis of familiar concepts. As such, the biological body of any one alien is left over from our analysis, a threat to the very stability and security of our familiar legal structure. We may even play a role in torturing or even killing the biological body of the alien without harming the viability of the territorial state – or so we believe. Indeed, the physical body of some imagined alien, uncategorised in our own official language, reminds us officials that our legal knowledge and legal method have not conquered all that remains absent from the structure.[49] The structure maintains peaceful so long as officials only recognise the boundaries of the structure as definitive of what exists, legally speaking. Peace reigns to the extent that we officials violently deny the existence of the experiential time of ourselves and of our imagined alien. Juridically-defined persons are just that – juridically defined by officials who only recognise units that can be de-composed within the *vires* of the structure. The boundary that differentiates the interiority from the exteriority makes legal existence possible.

Because experiential time is excluded as subjective and therefore non-law, the rule of law is believed to be purified of social contingency. Already, one can appreciate that as long as one pictures legality in the territorial terms of a structure, the legal analysis of texts is tidy. One does not have to address, for example, 'what is the character of the non-law which legal analysis excludes from the territorial legal structure?' We can only access the alien's voice through the language that we officials recognise in the legal structure. As Waldenfels says, the alien's experiences are inaccessible to the consciousness of those who accept the boundary of the territorial structure (1990, 22). The point could also be put in terms of the stranger being unable to access the dominant legal discourse where expert knowers of the units of the Familiar feel 'at home' and confidently resolve disputes from the external standpoint of the structure (Conklin 1998, 69-101).

The loss of experiential time also plagues the very foundation of a legal order. Since the state takes form when officials enclose territory with

boundaries, legal time begins with the act of conquest or discovery of the territory. Such a beginning is measured by clock time. The state as territorial space begins with a particular year, month, and day of a calendar. Even Canadian statutes end with the precise year of the reign of the monarch. The territory is discovered as if the territory were *terra nullius* (even though over eleven millions of human beings had lived on the territory without boundaries in North America). If already settled, time begins as if the territorial unit did not exist as a legal entity beforehand. Legal analysis as to rights and duties begin with such a mythic first moment, according to the infamous late eighteenth century English judgement of *Campbell v. Hall* (1774).[50] In the case of a revolution, time begins with the written constitution of the founding fathers. As a consequence, such a quantifiable legal time begins when borders distinguish the legal order from the "beasts" and "wolves" which lack a written language (Hobbes 1968, 187, 378). Legal time is distinguished from the "pre-legal" where inhabitants were "bonded" together by "unofficial rules" based upon "kinship, common sentiment and belief" (Hart 1994, 92). The alien remains a challenge for our discourse to conquer, not to address as a discursive partner when one gazes towards the partner at the boundary of the spectrum. When the alien cries out from the twilight, s/he already speaks too late for me to help her/him or for me to hear her/him. I can only respond, as a legal official, through the indirect voice about an *imagined* stranger. My response pre-censors the felt experiences of the stranger precisely because, as a lawyer, I categorise particular experiences within the boundaries of the official language of the legal structure. As Waldenfels himself says, the distance to the extra-ordinary radical stranger is "insurmountable" (1990, 24). I cannot even assimilate the traits of such a radical alien except as an image or picture of who s/he is. These ramifications confront us, only if we understand the twilight of a legal structure in a dimension of territorial space whose founding beings legal time.

Returning to the *International Covenant of Civil and Political Rights*, I pointed out how the *Covenant* itself suggests that states have consented

to be bound by duties of the treaty to protect "everyone." But I have also just explained that time begins with the founding of the borders to territorial space. And once founded, officials analyse instruments of the state as if time were a-temporal. As a consequence, the time experienced by the human object of the state is unnecessary to the analysis of legal knowledge. For, legal knowledge is a territorial knowledge which begins with the foundation of the territorial border. The requirement of lawfulness in treaties becomes stuck with the decomposition of rules posited in the treaties and in customary norms. The rules gain their authority by their rational linkage to the intent of the founding fathers of a constitution. Despite this absence of incorporation of experiential time, it is precisely such experiential time that bonds linguistic, religious, and ethnic collectivities together. A blind spot brought on by a special sense of space and time produces the spectre of an alien who is neither legal nor illegal.[51]

5. The Forgotten Experiential Time of the Alien

Why is the inner state-centred international legal discourse a-temporal? I shall raise two arguments for the exclusion of a temporal sequence from the state-centred discourse.

First, we lawyers are ingrained with a special method of finding legal knowledge. We take a rule as the unit of analysis. A rule is a concept or, at least, one type of a concept. This unit is metonymous of the whole structure: the analysable concept stands for the whole structure of concepts and institutions inside the boundary of the state. This structure, we have seen, is independent of the space and time that an individual human being experiences. The problem is, as Waldenfels points out, that the concept is considered analytically prior to a context-specific experience (1996, 64). At most, drawing from Merleau-Ponty, we officials intellectualise *about* a particular experience (1996, 52). A category that applies to only one person could hardly be considered a law (1996, 2; 1989b; Dallmayr).

Accordingly, we officials reconcile relationships amongst the analysable units (the rules) and combine them into a whole intellectualised structure of units. Such an analysis is linear in that it deciphers vertical and relationships up and across a spectrum of possible units (1996, 7). Again, particular differences are understood in terms analysable concepts *inter*-se. The particular differences of felt experiences of the alien are of a very different phenomenon. The one is a legal construction and the latter is a social phenomenon. Binaries are prevalent (1996, 37-8). The analytic reasoning thereby creates its own grounds (1996, 26-7). Since the analytic reasoning considers only the *analysanda* as a member of the legal 'is,' the legal official may only picture non-analysable 'things.' The alien is one such non-analysable object because s/he lies external to the boundary of legal knowledge. Once again, as nationals of a state, we must fantasise about the alien non-nationals who may have lived in the territory of the state of origin several years earlier. We believe the alien to dwell on the other side of the border of the legal structure (of the state) (1996, 8).

The analysis of concepts as the method of legal thinking marks another factor why experiential time is forgotten. The analysis reinforces the self-referential character of a legal structure. Why the structure is self-referring is that its units of construction are knowable analytic units. Indeed, the analysis of concepts (*sc.* rules) constructs the very boundaries that differentiate the Familiar from the wolves of exteriority (1996, 78). There is a boundary surrounding the structure as if the structure were a fortress that excluded other exterior structures from interfering in its territory. We exclude the exterior deliberative choices as *ultra vires* and include deliberative choices as *intra vires*. The analytic units delineate the boundaries of jurisdiction. Officials are familiar with the language (the relationships of signs) that represent such units. The de-composition of analytic units re-connects the revised units into new relationships so that the whole is reproduced through the analytic act. This reproduction happens through the re-signification of the wills of institutional authors, such as courts and legislatures (1996, 95). In a civic state, the state is grounded

in an idea (such as of a republic or constitutional democracy) that is associated with constitutional texts and democratic institutions (Greenfield 1996).

There is a third reason why the dominant international legal discourse excludes a consideration of experiential time from the categorisation of the alien. Drawing from Karl Jung, a personal memory is distinguished from the shared values of a collective memory. But such a collective memory too is experienced before an official begins to de-compose a concept in the analytic act. Such a collective memory is excluded from the structure of analysed concepts as 'oughts.' Further, the official deliberates and decides in the context of institutional constraints that condition her/his role: it is her/his role in the institutional hierarchy that constrains her/him, not her/his conscience experienced through time. Further, the experiential time, to the extent that it is recounted in a trial or an appellate court – the experiential time of the witness or of a previous judge as s/he justified her/his decision – is signified through an indirect voice: the officials repeat what the witness said or what another judge or legislature said. Even the witness re-states her/his experience as a re-telling of how s/he experienced an event.

The consequence of the forgetting of the collective memory is that an intellectualising act displaces the social, economic, or political context (1996, 95-6). Just as Dworkin suggests, the legal structure "works itself pure" (1996, 47-80. If one remains on this side of the structure's boundaries, as legal officials must, one needs fixed norms that shift into purification machines where rules are stripped of experiential time and the latter is expelled as non-existent. This purification machine, I have pointed out in contrast with Waldenfels, is through the re-signification of the signs that represent the conceptual referents. As a consequence, officials are "detached" from the experiences that they conceptualise. "If the order is detached from its genealogy," Waldenfels explains, "what results is a logicism, legalism, moralism – that is, forms that in their striving for universalisation are themselves particular and coercive" (1996, 122). In the

process, the exteriority, being unknowable, is forgotten. One needs to be mindful that "[t]he production of an order happens initially in the space of experience, namely in such a way that what happens condenses in determinate events and the reference network forms knots in determinate places."

Waldenfels emphasises that the analytic method forgets the heterology of voices that 'speak' exterior to the structure. I have argued, with examples from the common law experiences in the UK, USA, and Canada, that the legal language is monologic *vis à vis* the non-knower (Conklin 1998) and, further, that justice, as the hearing of a heterology of voices, is concealed and overlaid by the legal monologue (Conklin 2002). Waldenfels too describes how a structure generally conceals such a heterology of voices (1996, 75-8). The decomposition of rules is a critical factor in such a loss of collective memory (1989, 189; Dallmayr 1989, 692-94). After all, only the rules are recognisable as elements of legal reality. The externality of the structure, to which experiential time is projected, matters little to the formal analysis of legal rules and principles.

As a consequence, the territorial paradigm of the structure conceals phenomenal time – that is, the time as experienced by a human agent. As Waldenfels describes, the dialectic, which Waldenfels associates with phenomenal time, is distinguished from the analytic method of isolating a thought that dissolves experience into a collation of analytic units that are related to one another. To use a metaphor of H.L.A. Hart, something may well be "buried" underneath legal concepts. Interestingly, Waldenfels likens analytic reasoning in a similar manner (1977, 103, 105-07). Part of this drowning of experience is the official's belief in one legal structure which, we have now explained, idealises the world of experiences. This idealisation proceeds as the analytic method works itself pure of all contradictions, a claim that has not been absent from a leading legal theorist of this past generation. The analytic method is a-temporal; for, the only time that time matters arises in constitutional law where the official must 'know' the intent of the founding fathers of the constitution (1996, 36).

Legal history becomes a history of the evolution of rules and institutions of the territorial structure. Such a phenomenal time is frozen as an a-temporal rule. The consequence of the freezing of experiential time is that the analyser forgets her/his felt experiences as well as the felt experiences of the alien (1990; 1989, 189-90). After all, the official concentrates upon the binary inclusions and exclusions already recognisable in the structure of categories. Waldenfels adds that "every general norm first appears as a *foreign* body not assimilated by our experience" (1967, 45). Analysis of categories sucks out the sting of the alien. But because the structure is understood in a territorial paradigm and because the experiential time is concealed in legal analysis of such a paradigm, the officials must thereupon assimilate or conquer the bodies that remind the official that s/he has not succeeded in her/his conquest of experiential time.

Accordingly, we lawyers can never know a radical alien in the sense of enclosing the alien under our categories in an a-temporal manner. After all, we have forgotten the importance of experiential time as we decompose categories and then join their transcendental commonality together into a 'new' concept. We may believe that we are enclosing the stranger with our de-composed categories. But we categorise our image of ourselves all the while that we claim to be hearing the stranger. The analytic act 'begins' when the experiential time 'ends.' The unit of legal analysis is a concept that is familiar to the officials who offer the standpoint of the stricture. Only a territorial paradigm that accepts the twilight as a physical "zone" or "border" or "boundary": only such a territorial paradigm entertains the possibility of the comparison of 'facts' in terms of a distanced and anonymous standard that transcends felt experiences.

Even the notion of a dialogue, as elaborated by Waldenfels (cf. Conklin 1998, 213-48), contemplates an "inter-space" between agonists. The respondents stand opposite each other as they respond to each other's response. When we return to the territorial dimension of the international legal structure, dialogue possesses monologic features because the dialogue presupposes that differences may be bridged and "collected"

into a shared common rule. Waldenfels himself admits to the role of a rule in bridging the differences in the twilight.[52] Lawyers certainly dialogue with each other and with judges. But such a dialogue is a monologue *vis-à-vis* the alien whose meanings remain inaccessible to the lawyers' dialogue. A dialogic relation involves the opportunity of partners to respond to each other's utterances. The alien cannot respond from the language of her/his experiential space and time. If s/he can afford the expert knower of the official language of the territorial structure, s/he may respond only through the vocabulary and grammar of the official language. The alien has been excluded from the latter. The distance from the official voices to the voices of the wolves in the twilight of the territorial structure is extra-ordinary and "insurmountable" (1990b, 24). Thus, an untranslatable gap or *differend* prevents the state-centred legal discourse from assimilating the voices of the radical alien. As an official, I am trapped inside the official language of the sovereign unit, with its very special vocabulary and grammar (Conklin 2002). We fear the unrecognisable alien whose language we officials cannot recognise. The alien lives in a pre-legal space which we can only picture or imagine. For, we can only see as far as the structural frontier that is located at the twilight. As such, the alien is a radical whom we must secretly (even today) consider barbaric, uncivilised, beastly, primitive, savage, or, as Waldenfels puts it, like a wolf, notwithstanding our attribution of universal human rights to "everyone."

6. The Retrieval of an Inner Discourse of Experiential Time

I now wish to end this essay by returning to one further insight which Waldenfels offers to lawyers and judges in industrialised Western states. Waldenfels frequently writes about an "inner discourse" that can be retrieved from a dominant discourse. International human rights discourse, at first sight as I we saw in Section One of this essay, is an official discourse with universal claims about the rights of all human beings. On

closer examination, however, we found that even the human rights treaties have deferred to an inner discourse which is state-centred. The state is considered in this inner discourse as the legitimising source of who is an alien, the aliens' rights, the enforcer of such rights, and the decisions to expel aliens. There lies concealed inside the international law discourse, however, a second inner discourse. This second inner discourse defers to the experiential space and time of the alien as well as of the official. Collective memories of a community are an important phenomenon of such an inner discourse. There is nested in the inner discourse the idea that the alien belongs or bonds with an ethnic, religious, linguistic, or national group. The role of the lawyer/judge is to identify such collective memories and then to relate the terms of a treaty with the identified collective memory which the alien shares with others. Such a role emulates, I believe, what Waldenfels describes as 'the Third.' For the role of the official is not to take the external standpoint of the legal structure as a whole but to respond to the meant objects which both the alien and the official have experienced in space and time.

It is experiential time that raises the prospect of the dialogic relation that Waldenfels privileges as the opening for order in the twilight. Waldenfels argues (cf. Conklin 1998, 213-47) that dialogue would set the condition for the official to "return" to the alien (1989, 73). Dialogue is an intertwining that allows us to know the experience of the alien (1989, 72-6; 1995b, 42-44). But such a dialogue calls for us to understand the collective memories of the alien as well as of ourselves. The un-concealment of collective memories encourages us to open up our analytic enquiries into the very experiential bonding that we officials have excluded from analysis as pre-legal. It is experiential time that the competent constitutional lawyer incorporates into her/his analysis of the constitutional rights and duties of legal officials towards Aboriginal peoples, an experiential time that one carries over to the modern legal structure from the pre-legal and pre-European unwritten laws of Amerindian and Inuit tribes and from the pre-legal oral and gestural tradition that ignited Antigone to

exclaim her defence (Conklin 2001, 26-34). It is experiential time that the competent lawyer incorporates into her/his interpretation of statutes and treaties and written constitutional texts without admitting to such an incorporation. In an experiential dialogue, one need not "jump" from the "pre-legal" to the legal on an act of faith as Hart and Kelsen put it. In dialogue, the alien is not defined in terms of a radical alien to the self-image of the proto-typical juridical person of the legal structure; rather, the alien is understood, in Gadamer's sense of understanding, by how our collective memories become unconcealed inside the frozen time that has heretofore mortified the analytic method. The dialogue that Waldenfels aspires to bring to our attention remains a monologue unless and until we unconceal the experiential time that we have forgotten that we have even forgotten. We do not know what is unconcealed in this respect, just as a blueprint of Aboriginal collective memories is not possible when we begin the process of un-concealment. We cannot envision or picture what a consciousness of experiential time would bring. Perhaps, the best we can do to retrieve the territorial state's loss of collective memory against the blackground of our human frailties, extraordinary state power, and a-historical analytic legal method – along with the contemporary skills-oriented university, CNN, and liberal political rhetoric – is to become conscious that it is precisely the spatial structure that delimits and hides the engine of social critique. The latter motive-force is nested in the suffering of the experiental body in experiental time."

The counter-intuitive dependence of the spatial structure upon experiential time arises, I suggest, because, for a boundary to 'exist' in a territorially constructed space, there must be an inside and an outside. The analysis of the units of the structure takes for granted that there remains an inside and outside, a 'here' and a 'there,' a law and non-law, an 'is' and an 'ought,' a law and a morality. But to assume or claim that there is an 'outside' infers that one actually knows what is on the other side of the fence in order to differentiate the inside from the outside. How else could the official differentiate the non-analysable from the analysable than to imply that s/he knows what is non-analysable? Further, the very idea of a

boundary between a territorial structure and the wild depends upon the very exteriority that legal analysis considers non-law. The very standpoint of the structure depends upon the very non-legal remainder that legal analysis excludes as pre-legal and, therefore, non-binding. That is, when officials analyse rules, the analysis depends upon the officials' excluded non-law for what they include as legality.

In order to incorporate experiential time into legal analysis, Waldenfels sides with Gadamer in widening a sense of tradition. The past is lived, not reconstructed, Waldenfels advises (1996, 130). Further, Waldenfels is critical of the analytic method of reasoning (1996, 130). Further, Waldenfels warns us lawyers that "[t]he pre-beginnings we are speaking of here do not lie somewhere at a far-off distance; they are inscribed in the body of the present like a birthmark." Why so? Because we construct the pre-legal social phenomena as we construct the territorial boundary through our analysis of rules. The structure, by Waldenfels' admission in the *Order in the Twilight*, "retains its weight only so long as it remains incomparable, outside any series, also *outside the temporal sequence*" (102). But once we interrogate the construction of the territorial space with a boundary, we are driven to incorporate a temporal sequence of the collective memories and expectations of the alien as much as the official.

This is the point that Waldenfels introduces his notion of the Third. The Third is not some impartial judge or arbiter of social interests. After all, the judge is an official of the legal structure. Further, the judge analyses a legal unit from the standpoint of the structure that her/his colleagues have constructed through the analysis of rules. Further, the guardian of the legal order, as King Kreon, Plato, and the Supreme Court of Canada have described the judiciary, possesses a special method or technique that inflates the price of the guardian's services. The 'impartial' judge/lawyer may well read a text, such as the *International Covenant of Civil and Political Rights* or any one of the European human rights treaties, as if the experiential time of the alien were immaterial from the external vantage point of the territorial legal structure and its beginning in frozen time.

Waldenfel's Third, instead, is a "spontaneous philosophy whose truth ... goes beyond the method [*einer spontanen Philosophie, deren Wahrheit ... über sie (sc. die Methode) hinausgeht*]" (1999, 101). The phenomenal Third makes possible another seeing, thinking, and acting (1999, 121). The Third implicitly or explicitly treats the alien as someone whose experience of space and time is recognised and the object of a response. Such an experiential space and time privileges the meaning-constituting acts of the alien. The alien is no longer an alien. The alien's voice is now worthy of response. The Third hears and responds to the voice of the alien and, contrary to Jacques Derrida, the phenomenal Third raises the possibility that law can be just.[53]

The phenomena of inter-responses induce a "way of thinking" that changes the official of the legal structure, the fantasised alien and the Third itself (1999, 101). So, the standpoint of the Third transgresses the territorial and a-temporal knowledge of lawfulness, national security, and 'who is an alien.' The alien, as a consequence, is never radically different from the officials and populace of a state as we officials have believed. Conversely, the state is never utterly alien to the alien (1999, 116). As noted above, there is an alien in the 'we' and a 'we' in the alien when the phenomenal Third takes hold of our understanding because, in place of the territorial knowledge that postulates a border between the we and the stranger, the one responds to the other's responses to its responses.

Let us endeavour to begin such a retrieval of the second inner discourse of public international law.

A very important voice in my retrieval of the second inner discourse arises from the International Court of Justice decision in *Nottebohm.* Nottebohm had been born in Germany. As a young man (in 1905), he had moved to Guatemala where he had carried on a business until 1943. In March or April of 1939 he had left Guatemala in the direction of Germany. One month after World War II began, Nottebohm's lawyer applied for Nottebohm's naturalisation in Liechtenstein. Liechtenstein granted its nationality to Nottebohm. The issue was whether Nottebohm

was a national of Liechtenstein in international law. It did not matter that Nottebohm had been born on a particular territory called Germany. Luckily for him, Nottebohm would have had little likelihood of protection if international law had attributed his nationality to Germany, something which was possible because he was born there.[54] Indeed, German law (and most European state laws) would likely have de-naturalised him. Once de-naturalised, there would have been no state that could legally protect him. Few would have wanted to do so.[55] If Nottebohm were considered as a mass on a particular territory, then Liechtenstein would have had the legal duty to protect Nottebohm against Guatemala which had expropriated his assets. However, the International Court refused to accept his claim of nationality in Liechtenstein.

Instead, the Court responded to Nottebohm as someone who had a biography. The Court responded to him "*personally*" as if his experiences deserved a response from the Court as the phenomenal Third.[56] The Court interrogated his experiential bonding with the communities in Guatemala, a factor that legal analysis would ordinarily have excluded as non-(legal) knowledge. Such an interrogation was phrased in terms of his experiential "link," "effective attach[ment]" with others in society, or "the individual's *genuine connection* with the State which assumes the defence of its citizens by means of protection as against other States."[57] Nottebohm was not located on one side or another of a border. The Court responded to the "*social* fact of *attachment*, a *genuine connection of existence*, interests and sentiments, together with the existence of reciprocal rights and duties."[58] Several *indicia* addressed his experiential bonding: his habitual residence, *family ties*, *participation in public life*, *attachment* evidenced by the State, *attachment* to his children, and the like.[59] On the 'facts,' Nottebohm's "actual connections with Liechtenstein were extremely tenuous" for he lacked "any *bond of attachment*," let alone a "*genuineness*" of a bond with the social life of Liechtenstein. Conversely, he had had "a long-standing and close connection" with Guatemala.[60] The dissenting judges, incidentally, fell back upon a Cartesian sense of territorial space and a-temporal time.

Nottebohm represents an inner discourse of public international law just as does the state-centred inner discourse. Like the terms of the international human rights treaties, the two inner discourses contradict each other in fundamental respects. Instead of a sense of time that begins with the founding of the state structure, *Nottebohm* exemplifies a sense of time that draws from the experiential meanings of the alien. Instead of a territorial sense of space that posits a border that separates the known concepts from the unknown wild of an objectless realm, *Nottebohm* exemplifies how it is possible to understand the alien in a sense of space that is experiential. Upon a re-reading of treaties, precedents and commentaries, one can retrieve from public international discourse a reinforcement of the experiential sense of time and space.

Nottebohm is not simply one isolated example of an inner discourse that we lawyers may discard as an aberration of the state-centred legal dominant legal discourse. Some decisions and general comments of the International Human Rights Committee, for example, do begin to work out the ramifications. For example, in interpreting Article 27 of the *Covenant* ("minorities shall not be denied the right, in community with the other members of their group, to enjoy their own *culture*, to profess and practise their own *religion*, or to use their *own language*"), *General Comment 23* responds to those who *share a community* and who "belong" with others in a common culture with collective memories. The "belonging" addresses one's "enjoyment of *a particular culture.*" A culture consists of "*a way of life.*" The Court did not exempt itself from a perspective of territorial space, however, for the "way of life" that the Court considered important has to be "closely associated with territory and use of its resources."[61] Except for that isolated caveat, the national need not be someone whom a state has constructed; for, the critical issue was whether the individual's collective memories bonded him with a territory. Such a bonding did not even have to require that he be a permanent resident of the state. The Committee, through its Comment, responded to migrant workers and mere visitors who shared a bonding with the community. Even time seems to have

been quite alien to the linear clockwork time for the Committee did not believe that one needed to measure a time when the ethnic, religious or linguistic minority came into existence (*General Comment*, para. 5.2). The critical issue was solely whether an individual shared collective memories with others so as to belong with the minority.[62]

The Committee has also taken on the role of the phenomenal Third in its responses to aboriginal peoples. The Committee has responded to individuals who still "*belonged*" with her/his tribe or community even though s/he may have left the territory of her/his Reserve. Again, the Committee responded to instances where one shared social and emotive ties with a community.[63] In *General Comment 23*, the Committee understands "culture" to include attachment to land resources, shared experiences of fishing and hunting, and cultural memories signified by ethnic songs, clothes, dances, books, media, family practices, and other gestures. Recent Supreme Court of Canada decisions have similarly heard the voices of contemporary human beings in the light of their collective memories of the very early contacts of their ancestors.[64] Evidence of such collective experiences has been admitted to the Third even though it is oral or otherwise inadmissible in the ordinary course of the neutral Third.[65] And time no longer begins, as it did in Canada for over a century, in 1867 with the enactment of a founding text.[66]

One may retrieve the phenomenal Third from another strain of the international human rights discourse. Article 12(4) of the *Covenant* provides that: "[n]o one shall be arbitrarily deprived of the right to enter his own country."[67] What does "in his own country" signify? Is one in his own country if s/he is located in the territory that has granted him the privilege of nationality? Do we have, once more, an example of *damnum absque injuria*? To the contrary. In the *Stewart Case* (1993), the Committee decided that "special ties to or claims" to Canada had grown as Stewart, who had been born in Scotland, had moved to Canada at age seven, and had lived in Canada for many years.[68] Thus, his "own country" was Canada despite the fact that, according to the laws of Canada and of

Scotland, he remained a national of Scotland since he had been born there. Stewart's meaning-constituting life world "belonged" to Canada, not to Scotland. His family and friends were in Canada. The Committee described his experiential ties as "the *web of relationships* that form his or her *social* environment." It is "the strong *personal and emotional links* an individual may have with the territory where he lives and with the *social* circumstances obtaining it" that inculcates a *bond* with one's "own country."

In like manner, in *Winata and Li Case* (2001), the complainants had arrived in Australia on visitor's and student's visas in 1985, had a *de facto* marital relationship, produced a son and had resided in Australia for ten years. Australia then ordered the couple deported to Indonesia which the son had never visited.[69] Australia gave the 10 years old son the discretion to remain in Australia, having obtained naturalization there by birth according to Australia's definition of a national. But, no state had granted the couple any nationality, their student visas having long expired. They were aliens that were neither legal nor illegal. Under the territorial sense of space and the a-temporal sense of legal analysis, the family would have slipped through a crevice of the universalist legal discourse. But the Human Rights Committee took a different tack by responding to the memories that Winata and Li had experienced in Australia for most of their adult lives. They had had a "strong and effective family life" with deep experiences of bonding with Australia. As Merleau-Ponty would have described the bonding, experiences had marked out space and time (1992, 77, 101).[70]

Permit me to retrieve one final case which reinforces the possibility of an inner discourse which privileges experiential space and time: the *El-Megreisi Case.*[71] Youssef El-Megreisi was a stateless person residing in the UK and born in Libya. The circumstances bringing rise to the complaint are, as described by the complainant, horrific though regrettably all too common. Picked up by the Libyan secret police, he never was returned to his home nor was any family member ever informed of his whereabouts, let alone allowed to visit him. After three years he was allowed a visit by

his wife and he was informed that there were no charges against him, although his family were not informed of the name or location of the military camp where he was detained. The Committee admitted authority to consider his complaint. Further, it was held that he had been and was subjected to arbitrary arrest and detention contrary to Article 9 of the *Covenant.* Further, because he had been detained for three years incommunicado when allowed a visit by his wife and again incommunicado thereafter and in a secret location, he was subjected to torture and cruel and unusual treatment, contrary to Articles 7 and 10(10) of the *Covenant.*

I have privileged how the "Comments" of the International Human Rights Committee, established pursuant to the *International Covenant of Civil and Political Rights, 1966*, defers to the state to decide whether to expel an inhabitant of a state (*General Comment 15*, para 5): "[t]he Covenant does not recognize the right of aliens to enter or reside in the territory of the State party. It is in principle a matter of the state to decide who it will admit to its territory." However, the "Comments" also exemplify the inner discourse that recognizes the experiential sense of space and time that Waldenfels brings to our attention. For the above-quoted "Comment" continues that "in certain circumstances an alien may enjoy the protection of the Covenant even in relation to entry or residence, for example, when considerations of non-discrimination, prohibition of inhuman treatment and respect for family life arise." Although a state may place restrictions as to the alien's movement, residence and employment upon entry, once aliens have entered a state, "they are entitled to the rights set out in the Covenant." Paragraph 7 sets out universal rights that the inner human rights discourse has recognised. This paragraph focuses upon the space and time that an individual socially and culturally experiences as s/he bonds with others in an ethnic, national, linguistic, or religious group: "the inherent right to life, protected by law," protection against torture and cruel and unusual treatment, liberty and security of the person, treated with humanity if lawfully deprived of liberty, liberty of movement and free choice of res-

idence, freedom to leave a state, equal before the courts and tribunals, entitled to a fair and public hearing before a competent court, recognition before the law, and protection against "arbitrary or unlawful interference with their privacy, family, home or correspondence." Children are especially recognised as having special protection in this context. The Committee explains the crux of the matter: aliens live "in community with other members of their group, ... enjoy their own culture, ... profess and practise their own religion and ... use their own language." A state is under a duty, according to paragraph 8 of the General Comment No 15, not to arbitrarily prevent an alien from returning to her/his country if the state has posited restraints upon the alien or deported the alien to a third country. This duty is recognised in Article 12(4) of the *Covenant*.

Conclusion

Bernhard Waldenfels' work encourages the international lawyer to "interrogate" the assumptions of the territorial and a-temporal sense of a modern legal structure. He begs the question as to why human beings may lack legal status despite the universal character of human rights treaties. This question takes one to the territorial sense of space which locates an object as a physio-chemical mass inside a space bounded by an imagined boundary. A mound of stones or some such sign is needed to provide evidence of a state's ownership of this space. As time proceeds, fortresses and a border are built. Perhaps even a wall is constructed to mark an inside from an outside. Force is needed to construct such a form. Time begins with the construction of the form.

The space and time which had been experienced by human beings before the construction of the territorial space is considered "pre-legal" and, therefore, not binding of officials of the territorial space. The alien dwells in such an objectless pre-legal world. The alien lives with beasts,

wolves, and barbarians. The literary and philosophic lineage of such beasts is traceable to the half-human, half-beast of the mythic creatures of Greek epics.

Now, I have retrieved from public international law two inner discourses. Each inner discourse presupposes a radically different sense of space and time. In the first, the territorial structure needs an alien in order to exist as a structure. In order to have an inside there has to be an outside. In addition, what is knowledgeable must be recognisable inside the boundary of such a structure. Legal knowledge is territorial knowledge. What is exterior to such a structure is unrecognisable. It just does not exist. It dwells in the twilight of opaque interpretations and imagined figures on the other side of the border.

The second inner discourse, however, privileges the social–cultural attachment of a human being to the territory in which s/he lives. What is important are bodily meanings of each and all. The body of the alien is active rather than a passive thing that is acted upon. The alien is deserving of a response. But we officials can only respond in terms of familiar categories because our legal order presupposes that knowledge is territorial. We guard the structure which our categories have formed. The retrieved second inner discourse postulates a concrete being thrown into the world of human experience. Instead of a monologic voice of a state, we have a dialogic response to responses. With such a possibility, entrenched but concealed in public international law, the alien is neither legal nor legal. The alien experiences fore-structures and expectations of meant objects. Such meant objects draw from the collective memories of ethnic, linguistic, religious and national groups. The officials of the state as much as of the alien possess unconscious collective memories. Such memories lack a sense of time frozen from the founding of the territorial structure. The role of the international lawyer is transformed from the passive observer of the territorial structure and its boundary to the active interrogator of the collective memories of both the officials and populace of the subject state and of the alien who has hitherto been imagined by

such officials and populace. The body *actively* responds *towards* another body. The universality of human rights is interestingly nested in the multiplicity of voices of particular differences.

Thus, an optical illusion has permeated the analysis of the binding laws of a modern state: the state's posited laws gained a plenary and exclusive authority over all human subjects within the state's territorial boundaries; and yet, the territorial dimension of the state's legal structure freezes experiential time, and excludes as pre-legal the very social bonding that authorises the plenary, exclusive and coercive legal structure. Accordingly, at the very moment that the authorising origin of the state's written laws is associated with the social bonding of the inhabitants, this very bonding is excluded from the official language of the state. My argument here is that the ethnic nation provides the authorising origin that jurists have postulated as necessary for the domestic legal structure's laws to be binding. The nation can be 'seen' and 'heard' in the physical territory where the inhabitants of the national group have lived.[72] And since the state was understood in terms of territorial space, the laws of the state are binding upon all inhabitants locate in that space.

The legitimacy of the binding laws of the state, a legitimacy that the public international law has hitherto recognized and reinforced, presupposes a sense of space and of time that encourages two consequences. First, the felt bonding of ethnic groups, whose identity is not recognised of legal status, may be excluded and expelled from the official discourse of the state. Second, at the same time that legal analysis excludes the phenomenon of experiential space and time from the legal structure, the arguments and evidence of international lawyers may also ignore the construction of the 'we' and the 'they' that the public international law presupposes. With the internationally-protected inner freedom of the sovereign state to think, to will, and to act without interference from the other juridical persons,[73] the official language of the sovereign legal unit becomes monologic *vis-à-vis* ethnic nationalities that are located inside and outside its territorial border and its a-temporal sense of time. For territo-

rial space alone has been definitive of 'who is a juridical person.' The modern international legal structure – a structure that has recognised sovereign and equal territorial states as the primary legal persons of the international legal structure – has set the conditions for the units (sovereign states) to be forever unhappy. Given its territorial knowledge, the state needs an alien in order to mark its identity *vis-à-vis* an outside. The imagined alien poses as a potential object to be conquered and assimilated in a never-ending possessive individualism that public international law foments and institutionalises. The territorial and a-temporal paradigm of a structure is thereby interminably problematic in an international legal discourse which also accepts the universalist character of human rights.[74] But then, if we lawyers began to realise that the sting of the alien is concealed within layers and layers of a territorial and atemporal structure and if we began to appreciate that the very legitimacy of our binding laws has, in contrast, been produced from experiential time, we would, I suspect, fall back upon an image of a legal order that is very different from that with which we officials are familiar. But an image nonetheless.

NOTES

1. Indeed, the International War Crimes Tribunal for the former Yugoslavia has recently held that a human rights regime has "supplanted" the sovereign state regime that has prevailed since *Westphalia* (1648). *Prosecutor v. Tadic* Appeals Chamber, International Court for the Former Yugoslavia, 1995 Case No. IT-94-1-AR72, October 2, 1995,

http://www.un.org.icty/tadic/appeal/decision-e51001.htm Para. 97.

2. Adopted December 16, 1966, 999 U.N.T.S.171, Ca T.S. 1976 No. 47, entered into force on March 23, 1976 after receiving the required number of ratifications (and accessions) of 35 states. As of the date of writing, 149 states of a possible 190 have ratified the treaty. Switzerland is in the process of entering the UN, making 190 members.

3. At the date of writing, 149 of 190 states members of the United Nations have ratified this treaty.

4. Adopted 1966, entered into force March 23, 1976. G.A. res. 2200A (XXI), 21 UN GAOR Supp. (no. 16) at 59, U.N. Doc. A/6316, 999 U.N.T.S. 302.

5. By Article 2(1) each State Party to the treaty "undertakes to respect and ensure to *all individuals* within its territory and subject to its jurisdiction the rights recognised in the present

Covenant, without distinction of any kind, such as race, colour, sex, *language*, *religion*, political or other opinion, *national* or social *origin*, property, *birth* or *other status*." Article 10 proclaimed that "*all persons*" deprived of their liberty shall be treated "*with humanity*" and with respect for their "*inherent dignity*." Article 26 "*guarantees*" "*to all persons*" "equal and effective protection against discrimination on any ground" such as race, colour, *language*, *religion*, *national* or social *origin*, *birth* or *other status*. With one exception, the specific provisions of the *Covenant* apply to "*everyone*" and "*all persons*." The exception (Article 27) "protects" persons "*belonging*" to "*ethnic, religious and linguistic minorities*" to "*enjoy their own culture*, to profess and practise *their own religion*, or to use their *own language*." The parties promise never to derogate from several enumerated rights of which the most important, for our purposes, is the "*right of recognition everywhere as a person before the law*" of "*everyone*" (Article 16).

6. Signed November 8, 1950, entered into force February 3, 1953, 213 UNTS 221. Ratified. by 44; 1 signatory not ratified it as of May 7, 2003.

7. Adopted September 16, 1963, entered into force May 2, 1968, E.T.S. 46. Signatures 4, Ratified by 37 as of May 7, 2003.

8. Signed February 1, 1955, entry into force, February 1, 1988, ETS no. 157. 7 Signatures (not ratified), 35 Ratified as of May 7, 2003.

9. Signed November 6, 1997, entry into force, March 1, 2000, ETS No. 166. signatories 14, Ratified 9 as of May 7, 2003.

10. A further series of treaties as well as Resolutions of the Council of Ministers have addressed the traditional circumstances of individual de-naturalisation (dual nationalities, stateless children, and nationality of spouses upon marriage). The agenda of the Parliamentary Assembly has, since 1954, included the possibility of a European Convention on Statelessness and Multiple Nationality. [10] Chan "The Right to a Nationality as a Human Right," *Human Rights Law Journal* 12 (1991): 1-14 at 7, citing Parliamentary Assembly of the Council of Europe, Doc. 236.

11. *Prosecutor v. Tadic* Appeals Chamber, International Court for the Former Yugoslavia, 1995 Case No. IT-94-1-AR72, 2 October 1995, http://www.un.org.icty/tadic/appeal/decision-e51001.htm Para. 97.

12. *Sotgui v. Deutesches Bundspost* [1974] E.C.R. 153, 164; *Van Binsbergen v. Bestuur van de Bedriifsvereniging voor de Metaalnijverheid* [1975] 1 C.M.L.R. 298, [1974] ECR 153, 164.

13. See Guy S. Goodwin-Gill, *International Law and the Movement of Persons between States* (oxford: Clarendon, 1978), 162-63.

14. Signed February 1, 1955, entry into Force, February 1, 1988, ETS no. 157. 7 Signatories. 35 Ratifications. as of May 7, 2002. States parties agreed to be bound by the duty "if there is sufficient demand" "to endeavour to ensure, as far as possible and within the framework of their educational systems," and that minorities be taught the minority language. The parties undertake to "refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation." States possessed the duty to "create the conditions necessary for the effective participation of persons belonging to national minorities. (Article 15). By Article 16, the parties "shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting their rights and freedoms..." By Article 17, state parties undertake "not to interfere with the right of members of national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other

States, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage." The *Convention* acknowledged the duty of the Member States to respect the equal access of ethnic minorities to the media, private educational institutions, and cross border contacts. In addition, the Parties members agree to promote affirmative programs for minority groups in all areas of economic, social, political, educational, and cultural life (Articles 4-6, 12, 15). Full and effective equality between nationals and minority groups is affirmed [Article 4(1), 7, 8, 9, 10]. These programs should aim to preserve the identity of the minority groups with respect to their religion, language, traditions and cultural heritage (Article 5).

15. The *Convention* provides that "a) everyone has the right to a nationality" [Article 4(a)], b) that "statelessness shall be avoided [Article 4(b)]; c) that "no one shall be arbitrarily deprived of his or her nationality;" and d) that one's nationality should not be "automatically" affected by marriage, the dissolution of marriage between a national and an alien, nor the change of nationality by one of the spouses during marriage. No state party to the *Convention* may place a reservation with respect to Article 4. The only circumstance when nationality may be withdrawn is a nationality obtained on fraudulent grounds, false information or the concealment of relevant facts [Article 7(3)]. Article 5(1) prohibits the domestic adoption of nationality rules "which amount to discrimination on the grounds of sex, religion, race, colour or national or ethnic origin." In addition, Article 5 provides that "each state shall be guided by the principle of non-discrimination between its nationals, whether they are nationals by birth or have acquired its nationality subsequently." Article 18 incorporates the non-discrimination requirement into the international rules regarding state succession. Further, each state Party to the *Convention*, when a party to the cession of territory, agreed to choose whether to grant nationality to the inhabitants of the ceded territory in a manner that prevented statelessness.

16. Klebes, "Draft Protocol on Minority Rights to the ECHR" *Human Rights Law Journal* 14 (1993): 140 as quoted by Keller "Re-thinking Ethnic and Cultural Rights in Europe" at 31, fn 12.

17. See, e.g., *Suarez de Guerrero v. Colombia* 45/1979; *A v. Australia* 560/1993. Human Rights Committee. Also see *Comment 16*, para. 4; *A. v. Australia* 560/1993, para. 9.5; Human Rights Committee; Jean-Mariem Henckaerts, *Mass Expulsion in Modern International Law and Practice* (Dordrecht: Kluwer, 1995), 29.

18. *A v. Australia* 560/1993, per Bhagwati.

19. *Canepa v. Canada* 558/1993.

20. *Maroufidou v. Sweden* 58/1979.

21. In addition, *each individual* in a mass expulsion must establish that the application of the order is arbitrary to her/him individually. If the expulsion is retrospectively imposed against someone for an act committed earlier, this would seem to be arbitrary. Whether it is not in accordance with law is another question.

22. *Van Alphen v. The Netherlands* 305/1988, para. 5.8; *A. v. Australia* 560/1993, para. 9.2.

23. Also see Joseph (2000, 211-12, para. 11.10).

24. *V.M.R.B. v. Canada* 236/1987. This opinion was reinforced in *J.R.C. v. Costa Rica* 296/1988, para. 8.4.

25. *Hammel v. Madagascar* 155/1983.

26. Even a recent treaty that espoused the protection of "minorities" in the European Union only protects aliens who have a nationality of one of the members of the Union. Foreign workers

and visitors who lack such a nationality are not considered a 'minority' despite the universalist character of the rights enunciated in the treaty. *Framework Convention for the Protection of National Minorities, 1994*. Signed February 1, 1955, entry into force, February 1, 1988, ETS no. 157. The definition of a "national minority" is left unclear and undefined so that the sovereign states only protect minorities that were nationals of one of the member states of the European Union. *European Convention on Nationality, 1997* Signed November 6, 1997; Entry into force, March 1, 2000, ETS No. 166.

27. See supra, endnote 1.

28. *Canepa v. Canada* 558/1993; *Stewart v. Canada* 538/1993.

29. See Application No. 7729/76, 7 D & R 176; Application No. 8244/78, 17 D & R 157.

30. Protocol No. 7 to the European Convention for the Protection of Human Rights and Fundamental Freedoms," *European Law Review* 10 (1985): 73-6, at 74.

31. June 29, 1990. Council of Europe, *Human Rights in International Law: Collected Texts* (Council of Europe Publishing, 2000, 2d.): 521-38. Paragraphs 26-40 set out a cluster of rights to protect national minorities such as the use of mother tongue, their own educational, cultural and other associations, the practice of their own religion, unimpeded contacts amongst each other, and the dissemination of information in their own tongue that would protect the identity of a national minority. Further, paragraph 32 of the *Document* 'guarantees' that "persons belonging to national minorities have the right to freely express, preserve and develop their ethnic, cultural, linguistic or religious identity and to maintain and develop their culture in all its aspects, free of any attempts at assimilation against their will."

32. Signed February 1, 1955, entry into Force, February 1, 1988, ETS no. 157. 7 Signatories. 35 Ratifications, as of May 7, 2002. States parties agreed to be bound by the duty "if there is sufficient demand" "to endeavour to ensure, as far as possible and within the framework of their educational systems," and that minorities be taught the minority language. The parties undertake to "refrain from policies or practices aimed at assimilation of persons belonging to national minorities against their will and shall protect these persons from any action aimed at such assimilation." States possessed the duty to "create the conditions necessary for the effective participation of persons belonging to national minorities. (Article 15). By Article 16, the parties "shall refrain from measures which alter the proportions of the population in areas inhabited by persons belonging to national minorities and are aimed at restricting their rights and freedoms..." By Article 17, state parties undertake "not to interfere with the right of members of national minorities to establish and maintain free and peaceful contacts across frontiers with persons lawfully staying in other States, in particular those with whom they share an ethnic, cultural, linguistic or religious identity, or a common cultural heritage." The *Convention* acknowledged the duty of the Member States to respect the equal access of ethnic minorities to the media, private educational institutions, and cross border contacts. In addition, the Parties members agree to promote affirmative programs for minority groups in all areas of economic, social, political, educational, and cultural life (Articles 4-6, 12, 15). Full and effective equality between nationals and minority groups is affirmed [Article 4(1), 7, 8, 9, 10]. These programs should aim to preserve the identity of the minority groups with respect to their religion, language, traditions and cultural heritage (Article 5).

33. Perry Keller, "Re-thinking Ethnic and Cultural Rights in Europe," *Oxford Journal of Legal Studies* 18 (1998): 29-59.

34. This is confirmed in the *Convention*'s "Explanatory Memo," *Human Rights Law Journal* 16 (1995): 101-13, para 31. Klebes writes that "[i]t is not *national minorities* in the sense of an ethnic link with another 'nation' (for example, the Hungarians in Slovakia and in Rumania.)" that is the object of the *Framework Convention*. Klebes, "The Council of Europe's Framework Convention for the Protection of National Minorities," *Human Rights Law Journal* 16 (1995): 92-98.

35. Perry Keller, "Re-thinking Ethnic & Cultural Rights in Europe," *Oxford J of Legal Studies* (1998) 18: 29-59.

36. This only included Danes, the Sinti, and the Roma who had German citizenship. Keller, "Re-thinking Ethnic and Cultural Rights in Europe" at 44, fn. 61. Of a population of over 80 millions in the late 1990s, Germany, for example, had 7.3 million non-nationals. 50% of the non-nationals had lived in Germany for over 10 years. 30% of the non-nationals had lived in the territory for over 20 years.[36]About 1.63 million non-national children were born in Germany each year.

37. References to Waldenfels works will be cited without his name.

38. The word 'order' can also be used, Waldenfels says, as a particular rule that has a criterion. The notion of a 'structure' or 'system' is better used in the context of legal theory so as to avoid the confusion between an order as structure and a rule as an *analysandum*, a very great deal having been written in analytical jurisprudence about the nature of a rule.

39. "[M]eaning without ground' means that the process of the formation of meaning can never be established on a final foundation because contingent presuppositions are involved from the beginning. The attempt to provide a complete foundation would inevitably lead to the result that the concrete ordering activity which brings forth the life-world evades our grasp." (1992, 376).

40. I use the term 'inter-space' because is best manifests Waldenfels' spatial understanding of the twilight.

41. Germany was not the only state in the inter-war period which authorised the de-naturalisation of individuals. Some other states were Austria, Poland, United Kingdom, Netherlands, Belgium, France, Italy, Spain, Poland, Turkey, Greece, and the Soviet Union.

42. *Canepa v. Canada* 558/1993; *Stewart v. Canada* 538/1993.

43. A state has had to possess a territory, a population, a government (in a centralised bureaucratic sense expected of Western European states), and a capacity to enter into relations with other states.

44. See esp. Joseph Raz (1979, 1985). If a rule is posited by the appropriate institutional source – such as a government agency or minister or court - then the rule is considered valid or authoritative. All human beings and all physical objects within the border of the territory are objects to be possessed by the state as if a worm at the end of a fishing rod. The official legal discourse re-presents the alien as a category that can be analysed: that is, that can be de-composed into increasingly minute categorical elements. Legal knowledge is a *Vor-stellung*.

45. I extend here and perhaps turn upside down the theory of C.B. Macpherson in *The Theory of Possessive Individualism* (Oxford: Oxford University Press, 1962).

46. *Guerin v. The Queen*, [1984] 2 SCR 335.

47. See generally, Conklin 2006a.

48. Trial Chamber of the International Criminal Tribunal for Rwanda, 1998, Case No. ICTR-96-4-T, www.ictr.org/ENGLISH/judgements/AKAYESU/akay001.htm.

49. The body is *used* in the legal order, as Waldenfels remarks of structures generally (1996, 7) "What precedes the human and rational order sinks down to a means and material once the 'transition' has been made 'from the crudity of a merely animal creature to humanity."

50. *Campbell v. Hall* 1 Cowp. 204, 98 E.R. 1045.

51. There is a sign, "stateless," and two treaties granting legal status to them and "preventing" the phenomenon of statelessness. But only 42 states have ratified the said treaty. International legal discourse has displaced the term in favour of "internally displaced" or "refugee" or "externally displaced," although the latter terms cloud over the lack of a nationality (and therefore, a lack of the legal status of an alien) for many persons.

52. 1991, 166. I have argued that the official discourse is monologic *vis a vis* non-knowers of the authoritative legal language because officials re-read the expression of non-knowers in an indirect voice that intellectualizes the non-knower's voice through the vocabulary, grammar and genre of the authoritative language. (Conklin 1998, 115-170).

53. Derrida, (1990, 948) "*S'addresser à l'autre dans la langue de l'autre, c'est à la fois la condition de toute justice possible, semble-t-il, mais cela parait non seulement impossible en toute rigeur (puisque je ne peux parler la langue de l'autre que dans la mesure où je me l'approprie et l'assimile selon la loi d'un tiers implicité) mais même exclu par la justice comme droit en tant qu'elle semble impliquer un élément d'universalité, le recours au tiers qui suspend l'unilateralité ou la singularité des idioms.*"

54. Germany, of course, began to de-nationalise citizens *en masse* and *de jure* with the *Cancellation of Naturalisation and Deprivation of Nationality Act, No. 581, 1933.* Art. 2 of the 1933 Law provided that "Reich nationals residing abroad may lose their German nationality if they do harm to the German interests by conduct hostile to the Reich and the German nation." On 25 November 1941, Order No. 11 de-naturalised all Jews who resided outside the physical borders and on 10 March 1943, the *Hauptsturmführer* ordered all Jews resident in the occupied territories de-naturalised of the foreign state "either prior to or, at least, on the day of the deportation."

55. Open-ended domestic naturalisation 'laws' in most European countries at the time would have likely left Nottebohm an alien who was neither legal nor illegal so that no state would have had a duty to protect him against another state even against a state at war with the state of residence. This list of European states includes Portugal, Belgium, Egypt, Austria, Italy, the Netherlands, the Soviet Union ("constructive renunciation" of citizenship due to a citizen's living abroad and "against the interests of the People" or due to the citizen's commission of "acts against the People"), the United Kingdom, Poland, Slovakia, Hungary, Rumania, the Protectorate of Bohemia-Moravia, and France.

56. *Nottebohm Case,* 24.

57. *Nottebohm Case,* 23.

58. *Nottebohm Case,* 23.

59. *Nottebohm Case,* 22.

60. *Nottebohm Case,* 26.

61. Human Rights Committee, *Comment 15*, para. 3.2.

62. A concurring opinion by Mrs. Higgins in *T.K.v.France* continues this point of view with the assertion that the existence of persons belonging to a minority is "a factual matter," *T.K.v.France* 220/1987.

63. *Lovelace v. Canada* 24/1977, para. 14.

64. See, e.g., *R v. Marshall* [1993] 3 SCR 456, para. 15-17, 22-35, 41-44.

65. There are many recent examples of this. By way of example and only as an example, see *Delgamuukw v Province of British Columbia* [1997] 3 SCR 1010, para. 85-7. *R v. Marshall* [1993] 3 SCR 456.

66. Until the 1990's the major texts for Canadian constitutional law – both English and French – concentrated upon the rules and precedents concerning the interpretation of the founding *British North America Act, 1867.*

67. For the territorial sense of "his own country" see the *Canepa Case* where the majority narrowed the interpretation of the *Stewart* understanding of "in his own country." Communication No 558/1993: Canada 20/06/97.

68. *Stewart v. Canada* 538/1993.

69. *Winata and Li v. Australia* 930/2000.

70. See, e.g., *Stewart v. Canada* 538/1993, para. 12.3.

71. Communication No. 440/1990: Libyan Arab Jamahiriya. 24/03/94. CCPR/C/50/D/44-/1990.

72. Why ethnicity won out in a modern industrial state is examined in Gregory Jusdanis, *The Necessary Nation* (Princeton & Oxford: Princeton University Press, 2001).

73. The sovereign unit of the international legal structure not surprisingly shared J.S. Mill's sense of freedom as an "inner sphere of life" whose boundary "society" could only infringe when the unit caused harm to another unit. See esp. J.S. Mill, "On Liberty" Mary Warnock ed. (Glasgow: William Collins, 1962), 129, 137. This notion of the inner sphere of life of the individual human subject, in the context of the proprietary character of a right, is examined in Conklin, *In Defence of Fundamental Rights* (Alphen aan den Rijn: Sijthoof & Noordhoff, 1979): 125-32, 140-54.

74. As an example, Michael Kearney describes how the structure of the nation-state has become problematic between the USA and Mexico. See Kearney, "Migration, Diasporas and Transnationalism," *Journal of Historical Sociology* 4 (1991): 52-74.

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