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EDITORS’ INTRODUCTION

Jasmine Moussa*
Bart Smit Duijzentkunst†

The French say that ‘to learn a foreign language is to learn a foreign culture’. During the Second Annual CJICL Conference, ‘Legal Tradition in a Diverse World’, held on 18 and 19 May 2013 at the University of Cambridge, participants explored whether we should say the same about learning foreign law. Legal systems do not merely provide a syntax in which to fit our normative believes. They breed intuitions about law, a sense of what is right and wrong, what is proper and what is inappropriate. A common lawyer may delight in the combat of a cross-examination, while a civil lawyer cringes about the complaisance of the judge. One nation may be built on the pages of its constitution, while another seeks to remains free from the shackles of a written code. And one rule may seem liberating to some, but oppressive to others.

Having lived, studied and worked in a wide range of legal systems, many international and comparative lawyers are acutely aware of these contradictions. Perhaps one has studied in a foreign legal system; researched alien laws; or had to navigate a new legal regime in one’s legal practice. Novel legal lexicon may feel like a foreign language. Like a language, however, law is not just about rules; it is an institution through which we communicate our moral convictions and desires, reflecting both our shared history and our aspirations for the future. In a world where legal systems increasingly interact, and were global problems call for innovative legal solutions, it is imperative to look beyond law’s analytical foundations. To better understand each other’s point of view, we must examine the historical, cultural and emotional bases of legal traditions. It is these foundations that the Second Annual CJICL Conference sought to explore, and which has resulted in the present issue.

Similar to the conference, this issue opens with the reflections on the importance of diversity of legal traditions by Judge Abdulqawi Yusuf. In his Keynote Address, the Judge sets out the ways in which the International Court of Justice seeks to protect this diversity; and he reveals the similarities
between Somali customary law and the contemporary international legal order. Professor H Patrick Glenn, in his Guest Lecture published in this issue, explains why the state is best understood as legal tradition, a term he defines as 'legal information which has come from those who have preceded us'. This issue also features another highlight of the conference, the Keynote Debate between two of the world's most experienced international litigators representing the 'Anglo-Australian' and the French legal tradition. Moderated by Professor Catherine Redgwell, Professors James Crawford and Alain Pellet debate the merits and pitfalls of each other's advocacy traditions—the CJICL is delighted to be able to publish the transcript of their interaction.

Of the many excellent conference papers presented in Cambridge, only a small selection could be published here. The issue opens with a series of three articles on a particularly controversial issue in many legal traditions, namely the role that military courts and commissions play within a legal community. Yaël Ronen examines the use of Israeli military courts in the occupied territories on the West Bank. She warns that, while military tribunals may seem to function as civilian courts, they do operate within a 'dualist legal order' in which security legislation threatens the primacy of the law of occupation. Speaking with the authority of a practitioner, Lieutenant-Colonel Stephen Strickey next discusses the tension between military discipline and the civilianization of military justice in countries that share an Anglo-American legal tradition. His comparative analysis shines light on the challenges faced by both legislators, military judges and military commanders. Jonathan Hafetz completes the series with a discussion of the use of military commissions to prosecute Guantanamo Bay detainees. Having provided legal assistance to Guantanamo Bay detainees himself, Hafetz argues that the use of military commissions in these cases devalues both the legal and the moral significance of war crimes prosecutions.

Moving from the procedure to the substance of international criminal law, Valerie Oosterveld's contribution identifies an 'ongoing dialogue on sexual violence between the international and national spheres'. As she points out in her detailed analysis, neither sphere should adopt a complaisant attitude towards gender violence. Next, Ulf Linderfalk examines how our traditional uses of language can explain the existence and identity of special regimes in international law. Focusing on the notion of 'proportionality', his article explores how the various ways in which legal regimes apply this notion expose their differences and similarities. Seventy years after its publication, Francesco Messineo revisits Angelo Piero Sereni's *The Italian Conception of International Law*, questioning whether there indeed is such a conception, or whether this has been
lost in the globalisation of international legal scholarship. Geoffrey Gordon’s contribution also challenges the notion of national conceptions of international law, arguing that there is an innate cosmopolitan tradition, originating from the teachings of the School of Salamanca, which permeates thinking about the legal relations of states and individuals in the international sphere. Cosmopolitan ideals also reverberate in the debate over third generation rights, which Rosa Freedman examines. She proposes to study these rights through the lens of hybridity, which may better explain their roots, appeal and implications. A more down-to-earth—but no less sharp—analysis is provided by Neil Dower’s discussion of the demise of the anti-suit injunction in English courts, at the behest of the European Court’s of Justice on-going efforts to bring European legal systems under a common tradition. Freya Baetens and Cheah Wui Ling investigate the various traditions in the research and teaching of international law across the world. They present suggestions for the improvement of, inter alia, ‘clinical’ learning, research collaborations and the plight of young academics. Finally, Sir Elihu Lauterpacht concludes the issue with personal reflections on the legal traditions he encountered both in his career as an international lawyer and at the conference.

Naturally, the conference and this issue would not have materialised without the tremendous support of many. In particular, we would like to thank our principal sponsors Brill-Martinus Nijhoff, Freshfield Bruckhaus Deringer LLP and the Whewell Fund, University of Cambridge; and our sponsors Oxford University Press, Hart Publishing, Springer, Cambridge University Press and the Faculty of Law, University of Cambridge. As our conference convener, Emma Bickerstaffe’s tireless efforts and ability to keep us focussed have been invaluable. We are also grateful to Professor James Crawford, Professor Christine Gray, Cameron Miles, Sidney Richards, Lorne Neudorf, Rav Singh and our managing editors for advice and support; the Cambridge Faculty members and others who agreed to chair the various panels; the more than 50 speakers who presented papers at the conference; and all participants who attended the event. For the production of this issue, we greatly relied on the kind and generous support of the 2014 editorial team, who helped with the copy-editing of many of its articles.
DIVERSITY OF LEGAL TRADITIONS AND INTERNATIONAL LAW: KEYNOTE ADDRESS

Abdulqawi Yusuf*

Keywords
Diversity, legal tradition, International Court of Justice

1 Introductory remarks

I was pleasantly surprised by the title of your conference: ‘Legal traditions in a diverse world’. Your positive outlook on the endurance of the diversity of legal traditions, which is the way I read the title of the conference, is encouraging. Diversity is a value to be cherished and protected in all realms of human endeavour, as well as in nature, customs and cultures. But my question to you is this: can we take for granted the continued diversity of legal traditions, or do we have to fight for their survival in a globalizing world? If we have to fight for diversity, is it worthwhile doing so? I will return to these questions a bit later, but let me tell you first why I am raising them.

I am raising these questions for two reasons. First, I have spent a part—maybe a small one, but nevertheless an important part—of my professional life on the preservation and protection of diversity through the law. My first experience was as a participant to the UN conference on biological diversity, whose task was to write a convention that would help save genetic resources, animal and plant species, as well as ecosystems, from human destruction. That convention was concluded and has been in operation for almost exactly 20 years, having entered into force in December 1993.1 My second experience was in UNESCO,
where I had to advise on the elaboration of a convention on cultural diversity, whose main objective was to safeguard cultural traditions and expressions against homogenisation in the context of globalization. Here, the task was to identify tools in the law and legal traditions of various countries, which could protect an important diversity that was considered to be under threat. Again, a convention was concluded and came into force in 2007.2

The second reason is that I received my initial training as a lawyer in one of the most diverse legal systems in the world. Somalia’s mixed legal system includes civil law, common law, customary law, and Islamic law. I feel that this diversity has been of great help in my work in international law. For example, I find a lot of similarities between the Somali customary law, or Xeer (pronounced ‘Heer’), and international law. Xeer is a decentralised system designed to regulate relations among and within clan families or clan coalitions, and although it borrows from the other legal traditions and systems, it modifies them and adapts them to its own design. Thus, for example, in a case decided by the Somali Supreme Court in 1964, the Court said the following about the relationship between Sharia law and customary law in Somalia:

Sharia law as applied in the Somali Republic has been modified in certain respects by customary law. First, even though the spread of Islam among the Hamitic tribes put an Islamic gloss upon the customary organization existing in the country, it did not produce any effective change in the tribal customs relating to compensation of damages.3

Of particular relevance to my current occupation is the judicial system in the Somali Xeer. It is based on the consent of the parties. I do not, therefore, find it singular that the jurisdiction of our Court is similarly based on the consent of the parties. The composition of the Xeer court varies depending on whether the elders nominated to sit on the bench are from the respective clans of the opposing parties, or whether they are from third-party clans. If they are from the same clans as the parties, and nominated by them, they have to be equal in numbers from each side. That will remind you, I am sure, of arbitration at the international

level. However, in this case the decision must be adopted by consensus. If, instead, the elders come from a third-party, their number has simply to be uneven in order to allow them to adopt their decisions by majority vote—exactly as we do at the Court. Thus, one could say that I am an elder sitting on a third-party Xeer Court, which happens to deal with international law, instead of Somali customary law.

2 Diversity of legal traditions and international law

In light of the theme of your conference, the question I would like to address is: what role do legal traditions play in the creation and application of international law? To what extent does international law draw on legal traditions? Is it derived from only some or from most of the many legal traditions of the world?

It is not a paradox to say that the universality of international law depends on diversity. Indeed, in the case of international law, universalisation and globalization do not reduce diversity; they actually promote it. For international law, universalisation means borrowing and adapting concepts and principles from different legal traditions. Thus, diversity plays a different role in international law. The more international law can draw on multiple legal traditions, the more universal it will be considered. International law was, in its origins, based on uniformity and homogeneity, and thus diversity allows it to break out of those bounds.

The legitimacy of international law also depends, to a great extent, on its ability to represent diverse legal traditions. As observed by Georges Abi-Saab:

If we really want international law to take hold and be taken seriously by all, it has to be, both in its creation and in its interpretation and application, the product of the community as a whole, reflecting, by synthesis or symbiosis, the legal visions, needs and aspirations of all the components of this community.4

As we all know, international law has not always drawn inspiration from a variety of legal systems. Many international law textbooks inform us that the origins of contemporary international law are to be found in the Jus Publicum Europaeum

and that in its early development little use was made of legal systems other than Roman civil law and Anglo-Saxon common law. There is some truth to that assertion, but that is not because other peoples and nations outside Europe were incapable of producing international legal rules, or because they did not have such legal rules.

Rather, in the 19th century, European states, which happened to be the most powerful nations during that period of human history, formed themselves into a sort of club of ‘founders’ which arrogated to itself the right to admit other members to the family of nations to whom international law would be applicable. These 19th century European nations and those among their legal scholars who supported the colonial/imperial designs of their countries, used, inter alia, two fundamental concepts to exclude others from the family of nations: constitutive recognition (according to which a foreign state would not be considered sovereign and independent unless it received a ‘birth certificate’ from the European powers) and a subjectively defined ‘standard of civilization’ (according to which those who did not belong to the same religious faith and civilization as the European powers, were considered barbarian, and beyond the pale of the law of nations). Oppenheim, for example, tells us that as late as the First World War:

[T]he position of States such as Persia, Siam, China, Abyssinia, was to some extent anomalous. Although there was considerable international intercourse between these States and States of Western civilization, there was a question of how far relations with their governments could usefully be based upon the rules of international society, since they belonged to ancient but different civilizations.5

He could have added Japan, the Ottoman Empire, Morocco, and the Indian and African states with which the European powers concluded treaties, but which they still excluded from the realm of international law.

This position was adopted by the European powers to find a philosophical justification for the colonial enterprise. We all know how much colonialism, and its contempt for the traditions and civilizations of the peoples of other continents—as well as the treatment of their territories as terra nullius—has contributed to oppression and human rights violations in the colonized countries. The public law of Europe of the time, and the theories and writings of its scholars

5 R Jennings & A Watts (eds), Oppenheim’s International Law, Volume I, Peace (9th ed, 1997) 89.
who provided a legal justification for colonization, played a prominent role in this state of affairs, and there is no denying it. But that is not the subject of our talk today.

The question here is, instead: when did the public law of Europe begin to change into international law? And when did international law start to universalise and to enrich itself with the legal traditions of all nations? Different scholars will perhaps place this at different periods in the early part of the 20th century; but my own answer is that the public law of Europe gradually metamorphosed into international law with the creation of international organizations such as the League of Nations, the International Labour Organization (ILO) and the Permanent Court of International Justice (PCIJ). This does not mean that international law was immediately enriched with the traditions of non-European nations—as late as the mid-30s, when Mussolini invaded Ethiopia, one of Italy’s main arguments before the Council of the League of Nations was that Ethiopia, as much as it may claim to be an old Christian nation, could not be considered as a civilized nation and was consequently beyond the pale of international law. But the first seeds of change were planted in the constitutive instruments of those organizations, and in the Statute of the PCIJ, of which I will give you some examples shortly. These universalist seeds were also planted due to the participation in those organizations of the newly-independent Latin American Republics, some Asian countries such as China, Siam (now Thailand) and Japan, and a couple of African states, namely Ethiopia and Liberia.

These seeds were to bear fruit later with the elaboration and adoption of the UN Charter and the universal declaration on human rights. It is indeed with the adoption of the San Francisco Charter and the creation of the UN system that, in my view, we can really speak of the universal vocation of international law.

Finally, with the advent of decolonization and the consequent emergence of over one hundred newly independent states onto the global stage, it may be said that the real universalisation of international law started in earnest. International law became truly universal. This was, however, a gradual and slow process. Scholars from the Third World began to criticise the orthodox theories of international law, such as the doctrines propounded by Martens, Wheaton, Westlake, Hall and Liszt, and later Oppenheim and Fauchille, which maintained that international law was entirely developed through treaty and custom by the Christian states of Europe.

These Third World scholars started writing more and more about international law in the 1960s, bringing their own historiography, culture, and legal traditions to bear on the concepts and norms of international law. They spoke of
the contribution of Buddhism,\textsuperscript{6} Islamic doctrine,\textsuperscript{7} Confucianism,\textsuperscript{8} Hinduism,\textsuperscript{9} and the 'Afro-Asian' states to international law in lectures delivered at the Hague Academy of International Law or in their own scholarly publications,\textsuperscript{10} as the Third World found its voice in the aftermath of decolonization in the 1950s and 1960s. As evidence that international law did not exist only in Europe, they pointed to the existence of regulated international legal and commercial relations between, for example, the Afro-Asian states and foreign governments, and of treaties concluded between kingdoms in those continents.

However, in some western legal circles there was not only fear, but also resistance to the views and positions of Third World scholars and governments. For example, in 1972, Sir Gerald Fitzmaurice prepared a special report on the future of international law for the 1973 Centenary Session of the Institute of International Law.\textsuperscript{11} In this report, he affirmed that one of the threats posed to international law was the lack of acceptance by the newly independent states of the rules of international law as they had been developing until that time.\textsuperscript{12} He also strongly criticised some of the concepts proposed by Third World authors and governments, such as the right of peoples to self-determination,\textsuperscript{13} the patrimonial sea,\textsuperscript{14} and permanent sovereignty over natural resources.\textsuperscript{15}

Others were more open-minded and, I would say, more enlightened. I would most notably refer here to Bernard V A Röling, whose remarkable 1960 book entitled \textit{International Law in an Expanded World} advocated the evolution of a 'New World Law' consonant with the new sociological structure of the international community of nations. In the introduction to his book, Röling stated, inter alia, that 'law is not constant in a community, but a function...it ought to change with changes in views, interests and power relations'.\textsuperscript{16} In his view, the traditional

\begin{itemize}
\item \textsuperscript{6} K N Jayatilleke, 'The principles of international law in Buddhist doctrine' (1967) 120 \textit{RdC} 441.
\item \textsuperscript{7} R Mahmassani, 'The principles of international law in the light of Islamic doctrine' (1966) 117 \textit{RdC} 201.
\item \textsuperscript{8} K Iriye, 'The principles of international law in the light of Confucian doctrine' (1967) 120 \textit{RdC} 1.
\item \textsuperscript{9} K R R Sastry, 'Hinduism and international law' (1966) 117 \textit{RdC} 503.
\item \textsuperscript{10} T O Elias, \textit{Africa and the Development of International Law} (2\textsuperscript{nd} edn, 1988); R P Anand (ed), \textit{Asian States and the Development of Universal International Law} (1972).
\item \textsuperscript{12} Ibid, 205-13, 224-28, 239-45 and 251-54.
\item \textsuperscript{13} Ibid, 232-35.
\item \textsuperscript{14} Ibid, 217-19.
\item \textsuperscript{15} Ibid, 228-230.
\item \textsuperscript{16} B V A Röling, \textit{International law in an expanded world} (1960), x.
\end{itemize}
law of nations had to change before it could act as the binding element in a world community, and a ‘continuous struggle must be waged for the new law’. Similarly, Judge Robert Jennings, in an article published in the 1980s, observed that it was imperative to ‘develop international law to comprehend within itself the rich diversity of cultures, civilizations and legal traditions’; according to him:

[...]the first and essential general principle of public international law is its quality of universality; that is to say, that it be recognized as a valid and applicable law in all countries, whatever their cultural, economic, socio-political, or religious histories and traditions. International law must now develop and change to make it more suited to the new and global community of states.

The fears of Fitzmaurice never materialised, and the rules and concepts put forward by the newly independent states gradually found their way into general international law, thus enabling it to acquire a more universal outlook reflective of a diverse international community.

3 The ICJ and the diversity of legal traditions

Having made this brief excursion into the evolution of international law and its relationship to legal traditions, I would like to focus on how the International Court of Justice, the principal judicial organ of the United Nations, incorporates and accommodates the diversity of legal traditions into its jurisprudence. How and to what extent has the Court enabled international law to change and to accommodate the profoundly different international community, which exists today, and through what means and methods? If ‘international law, like all law, must change with the changing circumstances’, how has international law adjusted to reflect and incorporate the diversity resulting from the legal traditions and systems of numerous new states? What is the role of the Court in this context?

I would argue that the Court has played and continues to play an active role in this regard. Legal diversity and the differences between legal systems were among the early seeds planted by the drafters of the Statute of the PCIJ in order

\[17\] Ibid.


to introduce an element of universality into its mission; this is very important because, as you know, the Statute then served as the blueprint for the ICJ’s own Statute. Although their conception of diversity was certainly more limited than ours today, the drafters sought to accommodate and incorporate diversity in the PCIJ Statute through three provisions in particular:

1. Article 9, which states that the Court’s bench must represent the principal legal systems and main forms of civilization;
2. the possibility to append separate and dissenting opinions to the Court’s judgments, provided for under Article 57; and
3. the designation of the ‘general principles of law recognized by civilized nations’ as a source of international law in Article 38, paragraph (1)(c) of the Statute.

I will examine each of these provisions before concluding with a few reflections on the gradual movement of international law to a universal international law whose development needs to receive continuous inputs and contributions from various parts of the world and from diverse legal systems and traditions.

### 3.1 Judges representing the ‘main forms of civilization’ and the ‘principal legal systems of the world’

I observed earlier, quoting from Georges Abi-Saab, that in order to be considered universal, international law must be a product of the community, and a synthesis and symbiosis of its legal traditions. In the same vein, the ICJ must, again in the words of Georges Abi-Saab, ensure that it is ‘not dominated by the legal or social culture or special interests of any segment thereof’, especially ‘if it wants to be taken seriously as a World Court … universalist in its composition, outlook and vocation, truly representing and at the service of the international community in its entirety’.  

Let us begin with the composition of the Court. Article 2 of the Statute of the ICJ provides that:

> The Court shall be composed of a body of independent judges, elected regardless of their nationality from among persons of high

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moral character, who possess the qualifications required in their respective countries for appointment to the highest judicial offices, or are jurisconsults of recognized competence in international law.

The requirement that judges are to be elected ‘regardless of nationality’ is qualified by two further provisions. First, Article 3 states that no two judges may be of the same nationality. Second, and more importantly, Article 9 provides that:

At every election, the electors shall bear in mind not only that the persons to be elected should individually possess the qualifications required, but also that in the body as a whole the representation of the main forms of civilization and of the principal legal systems of the world should be assured. [Emphasis added]

Article 9, which reproduces the corresponding provision of the Statute of the PCIJ, has become much more important today than the drafters of the PCIJ Statute could have imagined. They could not have foreseen the changes brought about by decolonization, which has resulted in a much more diverse and multicultural world, nor the emergence (and decline) of socialist and communist legal systems and the growth of Afro-Asian perspectives of international law.

In fact, while the Committee of Jurists responsible for presenting the draft Statute of the PCIJ to the Council of the League of Nations noted that the condition specified in Article 9 was imperative ‘if the Permanent Court of International Justice is to be a real World Court for the society of all nations’, it was also quite clear that it was closely linked to a concern to ensure a balance between the principle of equality of states and the demand by certain powerful nations to have a permanent seat on the bench.\(^\text{21}\) At the same time, the Committee sought to assuage the fear that one of the two perceived principal legal systems of the time would be imposed upon the other.

Indeed, the reference in Article 9 to the ‘principal legal systems of the world’ was, at that time, understood to be confined to the common law (or Anglo-Saxon) and civil (or continental) law systems of the western world. The Committee

of Jurists emphasised that what they envisaged was not the representation of particular schools of thought but rather that they wished to ensure a diversity of backgrounds in terms of legal education:

Ce qu’on a voulu … c’est qu’au moment où un système de droit est engagé dans un litige, les autres systèmes de droit puissent en être immédiatement rapprochés, de manière à ce que ce soit vraiment l’esprit juridique de toutes les nations qui se tiennent en permanence au siège.\(^\text{22}\)

Article 9 also refers to ‘the main forms of civilization’, which the Committee understood to be a broader concept, with a greater reach than ‘legal systems’. As we have seen, the use of the term ‘civilization’ has a highly controversial legacy. It was deployed by colonial powers to distinguish their ‘civilized nations’ from the ‘others’ considered barbaric or savage. It was also used to justify the march of colonialism by reference to a ‘civilizing mission’. However, the term could be viewed today as a simple metaphor for cultural diversity in a broad sense. The sweeping changes to the international community in the 1950s and 60s made the plea for equitable geographical representation on the bench more urgent than ever before, and the tipping point was perhaps reached in the South West Africa cases,\(^\text{23}\) the final outcome of which became highly controversial and ultimately prompted the readjustment of the Court’s composition in order to remedy the underrepresentation of the newly independent states.

The election procedure itself (Article 4 of the Statute) plays an important part in determining the composition and in realising Article 9’s objectives. The election procedure adopted by the Committee of Jurists was steeped in power politics: while the equality of states was emphasised, Lord Phillimore (UK) suggested that the ‘material force’ of the new Court was contingent on the presence of judges from the Great Powers and therefore the electoral process required a means to ensure a seat for each of the major powers.\(^\text{24}\) The solution was to submit the candidates, nominated by the national groups of the Permanent Court of Arbitration (PCA), to a double vote, before both the General Assembly and the Security Council. This was designed to ensure that both major

\(^{22}\) Comité consultatif de Juristes, ibid, 710 (emphasis added).

\(^{23}\) South West Africa (Ethiopia v South Africa), Second Phase, ICJ Reports 1966 p 6; see also South West Africa (Ethiopia v South Africa; Liberia v South Africa), Preliminary Objections, ICJ Reports 1962 p 319.

\(^{24}\) Comité consultatif de Juristes, above n 21, 105.
powers—now the P5 of the Security Council—and the other nations (as a group) could either promote or try to block the election of a candidate, via the Security Council and the General Assembly respectively. This soothed both the concerns of the less powerful states, which called for sovereign equality, and those of the powerful ones, which were reluctant to submit to adjudication by a bench which did not include their nationals.  

In practice, the diversity mandated by Article 9 is fulfilled today by ensuring an equitable geographical distribution of seats. This distribution corresponds, by convention, to the composition of the Security Council, with five seats allocated to the permanent members of the Security Council and the remaining seats allocated across the five UN regional groups. At present, there are three judges from Africa, two from Latin America and the Caribbean, three from Asia, five from WEOG—the Western Europe and Other states Group—and two from Eastern Europe. Equitable geographical representation has also been endorsed by the founding instruments of other international tribunals; both the Rome Statute and the ITLOS Statute expressly provide for it, in addition to requiring that Judges come from the ‘principal legal systems of the world’. During the drafting of the PCIJ statute, a Colombian proposal providing for the geographical representation of the different continents was in fact rejected; but we find ourselves today, to a great extent, in the situation originally envisaged by it.

The next question is, to what extent the diversity of the bench affects and influences the adjudicative process? How does a judge’s background affect his performance on the bench? In this context, it must be emphasised that the judges of the ICJ do not represent their state or region, but strive to apply international law as determined either by the international community as a whole or by the states parties to a case. As stated by Mr Bourgeois during the debate of the Committee of Jurists:

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25 Mr Elihu Root, who was the US representative on the Committee of Jurists, proposed that the election of the Judges be entrusted jointly to the Assembly and Council. The practical effect of this idea was, according to him ‘d’assurer aux petites Puissances la protection de leur intérêts par l’Assemblée, où elles sont en majorité, et aux grandes Puissances la protection des leurs par l’activité du Conseil où elles ont la prépondérance’, Comité consultatif de Juristes, above n 21, 109.


27 Documents au sujet des mesures prises par le Conseil de la SDN aux termes de l’Article 14 du pacte et de l’adoption par l’Assemblée du statut de la Cour permanente (1920) 72.
chosen not by reason of the State of which they are citizens, but by reason of their personal authority, of their past career, of the respect which attaches to their names known over the whole world. These judges will represent an… international spirit which is the safeguard of [national] interests, within the limits of their legitimacy.  

The particularly collegial deliberation process of the Court—which involves all judges in the drafting of the decision until the final text of the judgment is agreed upon—facilitates a true exchange of ideas and approaches from diverse horizons and constitutes a working method suitable for accommodating different traditions. This was aptly described by Edward McWhinney in the following terms:

[The judges] interact among each other with the cross-currents in their legal education and professional formation operating to produce collegial decision-making that transcends conventional political-ideological, ethno-cultural and legal-systemic divisions.  

At the same time, as Judge Levi Carneiro stated in a dissenting opinion:

[It is] inevitable that every one of us in this Court should retain some trace of his legal education and his former legal activities in his country of origin. This is inevitable, and even justified, because in its composition the Court is to be representative of “the main forms of civilization and of the principal legal systems of the world”.

In sum, it may be said that the diversity on the bench ensures that judgments will be elaborated in a manner that takes into account different legal systems and, in the particular case of ad hoc judges, the Court may be fully apprised of issues which might be specific to a legal culture relevant to a case before it.

Finally, it should perhaps be mentioned that Article 9 has also been relied upon by judges to expand the sources of international law, enriching the law by reference to ‘the wisdom of the world’s several civilizations’. In North Sea

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28 Comité consultatif de Juristes, above n 21, 7-8.  
30 Anglo-Iranian Oil Co. (United Kingdom v Iran), ICJ Reports 1952 p 93, 161 (Judge Levi Carneiro, diss).  
31 Gabčíkovo-Nagymaros Project (Hungary/Slovakia), ICJ Reports 1997 p 7, 97 (Judge Weeramantry, sep op).
Continental Shelf, Judge Ammoun identified the existence of a principle of equity in international law by surveying a wide range of ‘the great legal systems of the modern world’, ranging from the Roman *jus gentium*, the common law, Islamic law, Chinese law in harmony with the Marxist-Leninist philosophy, Soviet law, Hindu law, and the principles underlying the customary laws of Asian and African countries. Later, Judge Tarazi, in his opinion in the *Tehran Hostages* case, referred to the existence, in Islamic law, of a principle of inviolability of foreign envoys, which was echoed by the Court in its judgment:

> The principle of the inviolability of the persons of diplomatic agents and the premises of diplomatic missions is one of the very foundations of this long-established régime, to the evolution of which the traditions of Islam made a substantial contribution.

According to a subsequent article by Judge Mosler, Judge Tarazi’s contribution had ‘strengthen[ed] the authority of the Court’s statement that this principle formed part of the corpus of generally accepted principles of law’.

Judge Weeramantry, who often referred to Article 9 and its importance, refused to accept the ‘shallow cosmopolitanism which so often presents itself as embodying “the universal”’ and sought to ground a universal international law on the wisdom and teachings of a broad range of civilizations, cultures and legal traditions. For him, the Court’s Statute ‘expressly opened a door to the entry of such principles into modern international law’ by way of Article 9 and Article 38, paragraph 1(d) of the Statute. Article 9 in particular mandated the Court to ‘search in all these traditions and legal systems for principles and approaches that enrich the law it administers’.

These notable views confirm that the best way in which universal international law can be further developed is by drawing upon the legal and ethical prin-

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32 *North Sea Continental Shelf (Federal Republic of Germany/Denmark; Federal Republic of Germany/Netherlands),* ICJ Reports 1969 p 3, 140 (Judge Ammoun, sep op).

33 *United States Diplomatic and Consular Staff in Tehran (United States of America v Iran),* ICJ Reports 1980 p 3, 58 (Judge Tarazi, diss).


37 *Gabčíkovo-Nagymaros Project*, above n 31 (Judge Weeramantry, sep op) 109.
principles of numerous cultures and civilizations, as the Court has sometimes done in its judgments, and as the Judges mentioned above and many others, before or after them, did in their individual opinions.

### 3.2 General principles of law

Article 38, paragraph (1)(c) of the Statute was meant to constitute another route through which domestic legal systems could influence the content of international law. The objective here was not, however, to ensure that diverse legal traditions be taken into account, but to identify, as far as possible, certain principles which are common to all legal traditions. According to this Article, one of the sources of international law to be applied by the Court is 'the general principles of law recognized by civilized nations'.

Like the provisions examined earlier, Article 38, paragraph (1)(c) was borne out of a compromise between common law and civil law members of the Committee of Jurists of the League of Nations. However, they appear to have switched roles in the drafting of this provision, with some members adopting positions at variance with certain tenets of their own legal system. Thus, it was some of the members of the Committee of Jurists from the civil law tradition, where the role of the judge is usually limited to the application of the law as codified, who sought to grant a broad discretion to international judges to identify principles inherent to the 'legal conscience of civilized nations' (Baron Descamps of Belgium)\(^{38}\) or 'in accordance with law, justice and equity' (Mr Lapradelle of France).\(^{39}\) They were concerned with avoiding the risk of non liquet, whereby the judge might be forced to abstain from resolving a dispute if there was no governing rule under treaty or customary law. A type of rule was required which would enable the judge to 'complete' or 'fill gaps' in the law as necessary.

Meanwhile, the common law members—educated in a tradition where the judge participates in the law-making process through the creation of precedent—sought to constrain the discretionary power of international judges, in keeping with a positivist and voluntarist position. Phillimore (UK) and Root (US) were concerned that the promotion of 'subjective conceptions of the principles of justice' and the open-ended nature of the provision would discourage states, which subscribed heavily to the voluntarist tradition, from submitting themselves to the Court's Statute. In their view, such states would not be 'disposed to accept the

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\(^{38}\) Comité consultatif de Juristes, above n 21, 306.

\(^{39}\) Ibid, 295.
compulsory jurisdiction of a Court which would apply principles, differently understood in different countries’ or which would ‘administer not merely law, but also what it deems to be the conscience of civilized people’. In order to encourage states to submit to the Court, they thought it necessary to limit judicial discretion and strictly circumscribe the sources of law.\footnote{Lord Phillimore, for example, referred to the ‘serious differences of opinion [which] arose from the continental idea of justice; at the outset strict limitations are imposed on the judges, then through fear of restricting them too much they are given complete freedom within these limits. The English system is different: the judge takes an oath “to do justice according to law”’, ibid, 315. He added that the main issue was to limit the function of the international judge to the application of the law and to deny him the power to engage in law-making, ibid, 316.}

A compromise solution was proposed which provided for general principles but confined them to certain ‘maxims of law’ or principles that were derived from the general principles of municipal law, constituting those principles which are accepted by all nations \textit{in foro domestico}.

The use of the adjective ‘civilized’ again warrants comment. It would appear that some of the drafters considered it superfluous and wanted to drop it.\footnote{For Mr de Lapradelle, for example, ‘qui dit droit dit civilisation’, ibid, 335.} However, the pejorative colonialist connotation remains and, for this reason, the reference to civilized nations is viewed today as an archaic formula, ‘entirely devoid of any particular meaning’\footnote{A Pellet, ‘Article 38’, in Zimmermann et al (eds), \textit{The Statute of the International Court of Justice: a commentary} (2nd edn, 2012) 836.} and ‘tacitly dropped in today’s literature’.\footnote{S Rosenne, \textit{Law and Practice of the International Court: 1920-2005} (4th edn, 2006) 1602.} Indeed, in his separate opinion in \textit{North Sea Continental Shelf}, Judge Ammoun affirmed that the anachronistic and unjustified formulation was the result of an oversight, because ‘the general principles of law mentioned by Article 38, paragraph (1)(c), of the Statute, are nothing other than the norms common to the different legislations of the world’, so that any other limitation would be arbitrary:

\begin{quote}
In view of this contradiction between the fundamental principles of the Charter, and the universality of these principles, on the one hand, and the text of Article 38, paragraph 1(c), of the Statute of the Court on the other, the latter text cannot be interpreted otherwise than by attributing to it a universal scope involving no discrimination between the members of a single community based upon sovereign equality. The criterion of the distinction between civilized nations and those which are allegedly not so has thus been
\end{quote}
a political criterion—power politics—and anything but an ethical or legal one.\textsuperscript{44}

The Court, notwithstanding a plethora of doctrinal debate, has generally eschewed reference to Article 38, paragraph (1)(c). As Judge Gaja has observed, the Court is ‘understandably reluctant to apply general principles in a way that would imply a selection among municipal rules and thus the use of a large amount of discretion in finding the more appropriate rule’.\textsuperscript{45} Pellet also notes that it ‘has been expressly mentioned only four times in the entire case law of the Court since 1922 and each time, it has been ruled out for one reason or another’.\textsuperscript{46}

The Court often uses expressions such as ‘generally recognized principle of procedural law’; ‘an established rule of law’; or ‘general and well-recognized principles’. For example, in \textit{Corfu Channel}, the Court found that ‘indirect evidence is admitted in all systems of law, and its use is recognized by international decisions’ and consequently allowed circumstantial evidence to be admitted to the Court.\textsuperscript{47} In the \textit{UN Administrative Tribunal} opinion, the Court held that ‘according to a well-established and generally recognized principle of law, a judgment rendered by such a judicial body is res judicata and has binding force between the parties to the dispute’.\textsuperscript{48} Later, in the \textit{Nuclear Tests} cases, the Court described the principle of good faith as ‘one of the basic principles governing the creation and performance of legal obligations’.\textsuperscript{49} These are all principles determined by the Court to be fundamental legal precepts inherent to and necessary for the operation of the international legal order.

In practice, the Court has surmounted the difficulties inherent in the application of Article 38 (1)(c) by taking inspiration from principles that are also present in domestic systems, and adapting them to the body of international law such that they become its own creation. At the same time, the role of Article 38(1)(c) has changed over the years. Today it is more common to refer to general principles of international law rather than general principles derived from \textit{foro domestico} and transposed to the international plane. These are principles inherent

\textsuperscript{44} \textit{North Sea Continental Shelf}, above n 32, 134 (Judge Ammoun, sep op).
\textsuperscript{46} Pellet, above n 42, 833.
\textsuperscript{47} \textit{Corfu Channel (United Kingdom v Albania)}, ICJ Reports 1949 p 4, 18.
\textsuperscript{49} \textit{Nuclear Tests (Australia v France)}, ICJ Reports 1974 p 253, 268.
to and derived from the international legal system itself, such as those contained in the United Nations Charter as purposes and principles governing the conduct of all states and codified in the ‘Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in accordance with the Charter of the United Nations’, which was adopted by the General Assembly in its Resolution 2625 (XXV).\(^50\)

### 3.3 Separate and dissenting opinions

Article 57 of the Statute of the Court states that:

> If the judgment does not represent in whole or in part the unanimous opinion of the judges, any judge shall be entitled to deliver a separate opinion.

Article 95 clarifies that any Judge may attach an individual opinion ‘whether he dissents from the majority or not’. In addition, this provision allows a judge to make a declaration, in which he records his position without stating his reasons in detail. Dissenting and separate opinions have become a significant feature in the Court’s jurisprudence: in the 641 decisions (Judgments, Orders and Advisory Opinions) rendered by the Court by mid-2013, over 1,146 individual opinions or declarations were appended. Moreover, it may be said that they constitute the building blocks of future approaches and analysis by the Court as a whole and often inspire its subsequent decisions.

The inclusion of dissenting opinions in the Statute was subject to much debate and was not a foregone conclusion. Dissenting opinions are strongly rooted in the common law tradition; while they are almost unknown in the civil law tradition where courts deliver collective judgments. In light of this dichotomy, the provenance of Article 57 is, in fact, quite surprising.

The 1899 Hague Convention for the Pacific Settlement of International Disputes provided that arbitrators could record their disagreement with an award, without being able to provide reasons. However, by the second Hague Convention in 1907, opponents of dissenting opinions prevailed, and any reference to dissenting opinions was omitted.\(^51\)

In 1920, the Committee of Jurists proposed to allow judges to indicate their dissent but expressly forbade them from stating the reasons for the opinion. Mr

\(^{50}\) GA Res 2625 (XXV), 24 October 1970.

Fromageot, the French proponent of the provision, argued that ‘anything that might give umbrage to States must be avoided’ and that it might impede the independence of national judges before their governments.52 More surprisingly, the French proposal received the support of the British and American members. Meanwhile, other members trained in the civil law system—such as the Brazilian, Italian and Japanese members—all supported the publicity of the dissenting opinions, but they were in a minority.

However, when the draft scheme was presented to the Council of the League of Nations, it was the French representative on the Council, Mr Leon Bourgeois, who proposed an amendment to allow fully reasoned dissenting opinions to be appended to decisions, in order to ensure that ‘the play of the different judicial lines of thought would appear clearly’.53 Notwithstanding the opposition of the Dutch and Italian members, who found the idea ‘foreign to Continental procedure’, the proposal was adopted.

In light of this history, the allowance made in the Statute of the Court for dissenting opinions should not be seen as a feature of the common law, but rather as another means to ensure the influence of diversity of legal traditions so that the principal legal systems of the world are expressed in the Court’s jurisprudence.

The objectives and reasons for allowing individual opinions at the ICJ are in fact closely aligned with the aims of Article 9 of the Statute. Judge Jennings argued that the presence of individual opinions was essential to ensure that all views are accounted for, which is an important guarantee of the universality of international adjudication at the ICJ.54 Similarly, Judge Ammoun stated that individual opinions allow us to ‘ascertain the extent to which [a judgment] expresses the opinion of the Court, and what objections judges no less qualified than those who supported it were able to bring against it’; for him, the authority of those opinions was also derived from the fact that the judges were elected, according to Article 9, to represent the main forms of civilization and principal legal systems of the world.55

Today, many international tribunals provide for individual opinions (ECHR, IACHR, ACHPR, ITLOS, ICTY, ICTR). However, some notable outliers exist. The

52 Quoted in M O Hudson, The Permanent Court of International Justice 1920-1942: A Treatise (1943), 206.
53 Documents, above n 27, 50.
WTO Dispute Settlement Body allows only anonymous dissenting opinions. The Court of Justice of the European Union does not allow for dissenting opinions, delivering only a single judgment (although a healthy dialectic between the opinion of the assigned Advocate-General and that of the Court often increases legal diversity). More recently, the ILC’s initial proposal for an International Criminal Court Statute precluded individual opinions for fear that a division of the Court might undermine the authority of the judgment. However, this proposal was rejected and Article 45 of the Rome Statute now provides for dissenting opinions.

4 Conclusions

Having recognised the importance of diverse legal traditions to the universality of international law, I wish to conclude with some reflections on the future of diversity within the international legal order. Are common and civil law traditions destined to remain the predominant legal systems influencing international law? Can we envisage an expansion of the sources of international law to accommodate other legal cultures or visions?

I would like to go back for a moment to what I said earlier, when I referred to Third World scholars who—in reaction to the Euro-centric views of western scholars on international law and apparently tired of all the talk about international law having developed only in Europe—wrote about the contributions of Asia and Africa to international law. In this regard, I must say that, in the same way that I find fault with the doctrines of Westlake, Fauchille, Oppenheim, and other European positivists of the 19th and early 20th century for their parochial and Euro-centric views which equated the public law of Europe with international law, I also find the ‘contributionist’ theories of Third World scholars rather unsatisfactory.

In particular, I find somewhat inadequate the writings of those Third World scholars who, for example, contend that pacta sunt servanda was also found in Asian or African legal traditions, or point to the practice of the ‘silent trade’ and diplomatic exchanges between African sovereigns and European merchants to demonstrate the African contribution to international law. This is inadequate for two reasons. First, while there is no doubt that different systems of public law and inter-state practices existed in various parts of the world and not only

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56 Commentary to the Draft Code of Crimes against the Peace and Security of Mankind, ILC Ybk 1994/II(2) 26, Art 45, para 5.
in Europe, and in some cases even much earlier than in Europe,\(^{57}\) it cannot be denied that 19\(^{th}\) century Europe exercised a hegemonic influence on international law and that European positivist scholars invented constitutive recognition and the standard of civilization, first, to exclude others from the magic circle of the so-called club of ‘civilized nations’, and later to impose European public law concepts and rules on the rest of the world. It could perhaps be added that they were temporarily successful in their imposition of these concepts—although, crucially, this transformation from European public law to international law was not the end of the story, as the subsequent universalisation of international law brought about fundamental changes both to the scope and content of the law.

Secondly, I believe that a more interesting and productive approach is to consider what impact and positive contribution legal traditions have made to international law by applying a value-added test. The importance of this approach lies in the fact that international law will be truly universal only if it can, in the words of Robert Jennings, ‘comprehend within itself the rich diversity of cultures, civilizations and legal traditions’\(^{58}\). We must therefore identify how diverse cultures and traditions have added new legal precepts to these old concepts and changed them for the better.

By way of illustration, I will point to a few examples of innovative principles and rules based on the legal traditions of Third World states that have made their way—or are in the process of making their way—into international law, thus representing an added value to international law, making it more reflective of universality through incorporation of diverse values. It must, however, be recognised that these value-adding principles and rules postdate the decolonization of the Third World, and therefore have resulted from the active participation of formerly colonized countries in the development of international law after their independence. Needless to say, much more research will be required to identify similar concepts and principles fulfilling the value-added test in the pre-colonial period. This is particularly true with reference to African and Asian countries, given that the colonial period constituted the parenthesis within which the public law of Europe transformed itself, mostly because of the phenomena of colonialism and imperialism, into international law.

\(^{57}\) A good example is the treaty inscribed in the Pan Water Vessel of San exhibited in the National Palace Museum of Taipei, Taiwan (China), which records the settlement of a territorial dispute between two adjacent feudal states of San and Ze (late Western Zhou Dynasty, circa 9th century to 771 BC), giving a full account of the joint survey by all parties involved of the lands to be surrendered as well as a map of such lands and Ze’s oath-taking scene.

\(^{58}\) Jennings, above n 54, 49.
In the post-colonial period, these concepts and principles include, for example, in the case of Latin America, the concept of local custom and the principle of *uti possidetis juris*, both of which have been recognised in judgments of the International Court of Justice.\(^5\)

I could also add the notion of patrimonial sea, which partly inspired the corresponding African concept of Exclusive Economic Zone that was incorporated into UNCLOS following active participation of African states at the Third United Nations Conference on the Law of the Sea (1973-1982) and is now recognised as a customary norm of international law.

In the case of Africa in the post-colonial period, one could point to the recognition of collective rights in conventional instruments and the gradual recognition, at the impetus of Afro-Asian countries in the UN, of the right of peoples to self-determination not only as a principle, but as a right. This has resulted in the recognition of 'peoples' as bearers of rights and obligations in international law.\(^6\)

I could add the expanded concept of refugees under international law, introduced by the 1969 OAU Convention on Refugees;\(^6\) the conventional codification of the right to development, the right to a clean environment, or other collective rights in treaties concluded among African states;\(^6\) as well as the innovative principles and rules underlying the Kampala Convention on displaced persons\(^6\) and the African Charter on Democracy, Elections and Governance.\(^6\) Even more interesting is the right of a regional organization to intervene forcefully in its member states in certain circumstances

\(^5\) As to local custom, see *Asylum (Colombia/Peru)*, ICJ Reports 1950 p 266, 276; *Right of Passage over Indian Territory (Portugal v India)*, ICJ Reports 1960 p 6, 39. As to *uti possidetis juris*, see *Frontier Dispute (Burkina Faso/Republic of Mali)*, ICJ Reports 1986 p 554, 565; *Land, Island and Maritime Frontier Dispute (El Salvador/Honduras: Nicaragua intervening)*, ICJ Reports 1992 p 351, 386-388; *Frontier Dispute (Burkina Faso/Niger)*, Judgment of 16 April 2013 (Judge Yusuf sep op).

\(^6\) GA Res 1514(XV), 14 December 1960; GA Res 2625 (XXV), 24 October 1970.

\(^6\) OAU Convention Governing the specific aspects of refugee problems in Africa, 10 September 1969, 1001 UNTS 45, Art I(2) (In addition to those individually persecuted, '[[the term “refugee” shall]] apply to every person who, owing to external aggression, occupation, foreign domination or events seriously disturbing public order in either part or the whole of his country of origin or nationality, is compelled to leave his place of habitual residence in order to seek refuge in another place outside his country of origin or nationality').


such as genocide, crimes against humanity and war crimes, which is now recognised under the constitutive Act of the African Union.\textsuperscript{65}

In my view, an important vector of diversity in the future of international law will be that of regional diversity. The application, interpretation and creation of international law by regional organizations and regional courts are likely to provide a key impetus in the development and evolution of international law. These regional forums can be likened to the ‘laboratories’ of federal systems: experimentation and legal innovation often occur at the decentralised level, where legislators (in this case, international legislators) are closer to their constituents. From there, effective legal principles and rules and best practices can be diffused to and copied by other systems and—eventually and progressively—seep into the fabric of universal international law. Therefore, regional diversity is likely to be an engine for the development of international law in the years to come.

Africa represents an excellent example of the potential contribution regional diversity can make to general international law. In recent years, the African Union assumed an important role in legal production and codification. Importantly, many of these African conventions constitute considerable improvements in relation to the global international law instruments. Take, for example, the protection of peoples’ rights in Africa. The African Charter of Human and Peoples’ Rights not only expressly recognises the rights of peoples within the Charter, it dedicates six articles to peoples’ rights, extending from the right to self-determination, the right to natural resources, the right to economic, social and cultural development, the right to peace and security and the right to a safe and healthy environment.\textsuperscript{66} This recognition of peoples’ rights is unprecedented and unmatched by any other multilateral human rights instrument. Moreover, the African Commission, a quasi-judicial body responsible for monitoring rights protection under the Charter, became the first such body to define the concept of ‘peoples’ for the purposes of the African Charter, and to apply it to concrete cases brought before it.\textsuperscript{67} There is reason to hope that the best aspects of these regional developments will begin to pervade and influence general international

\textsuperscript{65} Constitutive Act of the African Union, 11 July 2000, 2158 UNTS 3, Art 4(h).

\textsuperscript{66} See above n 62.

law and gradually turn into global standards.

Furthermore, the influence of regional adjudicative tribunals and quasi-judicial bodies on general international law is beginning slowly to take hold. While the ICJ is often reluctant to cite the jurisprudence of regional tribunals or quasi-judicial bodies, the Diallo case marked a significant departure from this trend. The Court, when determining the legality of Diallo’s detention and expulsion under Article 12(4) of the African Charter on Human and Peoples’ Rights, took note of the fact that its finding was consonant with the relevant precedents of the African Commission on Human and Peoples’ Rights. Furthermore, the Court referred to the interpretation by the European Court of Human Rights and the Inter-American Court of Human Rights of analogous provisions under their regional instruments in support of its conclusion.

In light of the above, it may be concluded that your conference’s positive outlook on the endurance of the diversity of legal traditions appears justified. In addition to domestic legal traditions, we note the growing importance of regional traditions as the role of regional organizations in international law-making keeps acquiring more importance. These regional traditions are likely to provide fresh impetus to the development and evolution of universal international law as some of their innovative legal rules, principles and practices are gradually transferred to the universal level, and as international judicial bodies find inspiration in those rules and practices in resolving international disputes.

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69 Ibid, 664.
70 Ibid.
THE STATE AS LEGAL TRADITION

H. Patrick Glenn

Keywords
State, Legal Tradition, Information

Professor Glenn’s Guest Lecture was delivered on Saturday 18 May 2013 in the Law Faculty of the University of Cambridge, as part of the Second Annual CJICL Conference. The Guest Lecture was followed by the UK launch of Professor Glenn’s new monograph, The Cosmopolitan State (Oxford University Press, 2013). It was made possible with the generous support of Oxford University Press.

It is a great pleasure to take part in this conference on ‘Legal Tradition in a Diverse World.’ It is a large topic and itself indicates dissatisfaction with narrow themes in a time of so-called globalisation. Narrow themes should of course not be abandoned, but there is a place for speculation across legal disciplines when many borders are being put in question. This is what globalisation does, as various means of transport—of people, goods and information—reduce the effectiveness of national boundaries and raise possibilities of collaboration which did not previously exist. These new forms of collaboration may produce new forms of law, and may reduce the importance of law which is older in origin. In short, globalisation requires us to rethink the justification for existing law, and to think of the potential justification for law which is proposed. This large intellectual process could be undertaken in the abstract, with little historical or local input, but the circumstances of globalisation argue against such a disembodied enquiry. There is simply too much out there, too varied in content, for a debate which is not as fully informed as possible. What we know as history therefore cannot be escaped, since different historical options have been taken by others, who urge them upon us.

The state has become of primary interest, since in spite of its omnipresence there are those who have predicted its demise, or at least argued for its

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irrelevance.\footnote{For its demise, see K Ohmae, The End of the Nation State (1995); and for the (unsuccessful) claim of irrelevance, P Evans, D Rueschemeyer & T Skocpol, Bringing the State Back In (1985).} State law is therefore also in question, as alternatives present themselves. It becomes necessary, therefore, to ask why we do have states and state law and my answer to this question is that we have them because of tradition. The state is best seen as tradition. There is no other adequate explanation, having the same explanatory power or the same possibilities of nuance in contemporary circumstances. This is an explanation, however, which requires further explanation and justification in what are said to be modern, or postmodern, times. Why is the future of the state in large measure conditioned by the past?

I propose to tackle this large question by asking three questions: what does it mean to speak of tradition in law, or a legal tradition; why is the state best seen as legal tradition; and finally why the state as legal tradition is an appropriate conceptualisation for contemporary, and future, times. The first question then concerns the nature of legal tradition.

1 The concept of legal tradition

The word tradition comes to us from the Latin ‘tradtio’ or handing down, and there are those who maintain that tradition is still thought of best as a \textit{process} of transmission of information.\footnote{See notably Y Congar, Tradition and Traditions: An historical and a theological essay (trans. M Naseby & T Rainborough, 1966) 296 (‘Tradition means, in itself, a transmission from person to person’).} There is no denying the importance of such transmission, and the more of it the greater will usually be the force of the tradition. Yet it appears as a necessary \textit{feature} of tradition, without capturing its essence, since we are left in a normative void as to what it is that the tradition says. It is content which interests the lawyer, who is largely content to leave large social processes to the social sciences. A.W.B. Simpson therefore speaks of legal tradition as \textit{something which} has come down to us from the past\footnote{A W B Simpson, Invitation to Law (1988) 23 (‘law is essentially a tradition, that is to say something which has come down to us from the past’) (emphasis added).} and this attention to content allows us to draw distinctions between civil and common law traditions, or French and English legal traditions, or public and private international law traditions. The process of traditio is present and often
presumed (or the tradition is dead or at least frozen\(^4\)) but we are primarily interested in that which is said.

A legal tradition is therefore best conceived as legal information which has come to us from what we know as the past. In the absence of clear notions of past, present and future, and a linear concept of time, it can be thought of as legal information which has come from those who have preceded us.\(^5\) A precise beginning of a tradition is often difficult to establish but there is a zone of time in which information is first captured or recorded so that it may become a primary source of what will eventually become a tradition. The initial capture may be either by memory or by writing. In the common law world it was the initial writing (of writs) and the subsequent, recorded, judicial treatment of them. Memory played a large role in this but written forms of capture became more and more important, even official, through the centuries.\(^6\) The common law thus illustrates the accretion inherent in a legal tradition, as initial information is recorded and accessed later, while subsequent acting on the information is itself recorded and folded into the ever-expanding information base of the tradition.

That which is discarded, initially or through later abandon.

Much is discarded, or sloughed off, is perceived as of no subsequent use by those involved in the process. It will often become inaccessible and disappears forever, even to historians. The process of loss of information tells us something important, however, about the nature of the information preserved. It is inherently normative; hence its recording and preservation. The example of a legal tradition is thus representative and an acute form of a wider phenomenon of capture or preservation as a sign of normativity. Legal information is preserved for purposes of future use; symphonies or poetry are preserved for their beauty, but they also contain lessons on how symphonies or poetry are best composed.

It is said today that electronic means of recall are indiscriminate and so much contemporary captured information is of no use, yet we do not yet know the survival rate of such information. Discs become obsolete; machine-recording becomes untranslatable by other machines. So the filtering process of prior

\(^4\) For frozen or suspended traditions which may revive, as with the Hebrew language, see the decision of the Supreme Court of Canada in *R v Powley* [2003] 2 SCR 207, 221-2, 223 (hunting rights of a Métis community surviving despite a ‘decrease in visibility’ of the community since 1850, becoming even an ‘invisible entity’ from the mid-nineteenth century to the 1970s, in which the community ‘went underground’).


\(^6\) For orality (and memory) as a principal means of capture and recall in the common law, see J H Baker, *The Law’s Two Bodies* (2001).
information goes on, not entirely subject to anyone’s control, but this has perhaps always been the case. New technology only accentuates an existing phenomenon.

The conclusion that tradition is best seen as information is important for the resulting permeability of social structures. Information flows more freely than water and any process of reification or rigid separation of structures is impossible over time. Closure may be attempted but is rarely successful; put differently, there is no regress stopper in the face of informational challenge, whether internal or external. There have been massive efforts of state closure over the last two or three centuries; the process of globalisation is now suggesting their impossibility. Information is thus a matter of influence. Since no rigid boundaries can be drawn, traditions may be more or less influential and a broad spectrum of influence is possible. When the state went out of favour in North American social science in the twentieth century it did not disappear and has now been brought ‘back in’. The teaching of a general theory of the state (Allgemeine Staatslehre) has declined in Germany but remains alive, though less influential, today. The notion of failed or failing states is not one which allows a sharp distinction; there is simply a decline in influence of the notion of a state and its institutions.

This inclusive notion of tradition as normative information is not one which is incompatible, moreover, with nineteenth and twentieth century notions of a national legal system. A national legal system is an instantiation of a particular legal tradition, much influenced by concepts of power, sovereignty, and command. Hobbes, Bodin and Austin preceded contemporary positivists, who thus occupy a discernible place in the history of legal thought. Today there is a ‘burgeoning’ group of normative positivists who defend the notion of positive, state law on normative grounds. They recognise it is not simply fact, but the result of a tradition which requires defending in present circumstance. The influence of the state has weakened and they come to its defence, on normative grounds.

The inclusive nature of the normative information of tradition also means that no sharp distinction can be made of the contributions of different disciplines, as they are now recognised. The normative tradition of the state has been

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7 See H Lawson, Closure: a story of everything (2001) 1, 119 (closure is always subject to failure because texture (new information) offers new closure which in turn potentially undermines current closure).
8 Evans et al., above n 1.
9 Best captured by travel warnings in respect to particular states.
the object of reflection by private lawyers, public lawyers, public international lawyers, private international lawyers, political theorists, political philosophers, and specialists of international relations. They still today perceive the state from different perspectives but it is the nature of a tradition to accommodate all, with varying influence. Today there is great debate about a possible constitutionalisation of public international law or about the internationalisation of constitutional law but this is entirely understandable in present circumstances, and entirely compatible with the working of tradition. No one is in control, and the tradition of having someone in control has correspondingly lost much of the influence which it had. The debate is more interesting, and tradition provides a means of conceptualising what is going on. The results are unpredictable but this has always been the case for major institutional shifts which often take hundreds of years to become even visible to the participants.

If we have a general idea of thinking about tradition in law, why then is the state best thought of as legal tradition?

2 Why is the state best thought of as legal tradition?

There is a wide variety of contemporary thought about the state. It is seen as an instrument of trading,\(^\text{11}\) a site of competition,\(^\text{12}\) and a product of communication technology.\(^\text{13}\) Public international lawyers see it abstractly as a combination of territory, government and people. Realists of international relations occupy themselves with the motives of those who direct it. Those who would have removed it from contemporary analysis would concentrate rather on its constituent and democratic, elements, such as political parties, interest groups, and the like.\(^\text{14}\)

None of this can be taken as irrelevant in attempting to capture the contemporary state. It is in some measure all of those things. In all views, however, the state exists as a result of prior information. If we take simply the public international law example, it is information of the last three centuries which teaches us to look for a government, a defined territory and a recognisable people. Prior

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\(^\text{12}\) G Sørensen, *The Transformation of the State: Beyond the Myth of Retreat* (2004) 36 (the ‘competition state’).
\(^\text{13}\) R Rosecrance, *The Rise of the Virtual State: Wealth and Power in the Coming Century* (1999), notably xi-xii (the ‘products of the mind’ which surpass material forces), 31 (‘virtualization’).
\(^\text{14}\) Evans et al., above n 1.
to this time there was no such canonised information and the notion of a state floated freely, bereft even of a name until the linguistic innovation of Machiavelli became current.\textsuperscript{15} There is debate about the Treaty of Westphalia as a source or origination of the information and we see again the problem of the origins of a tradition.\textsuperscript{16} The state as we know it has now become a large bureaucracy and there are many institutionalist legal philosophers who have seen it in this light.\textsuperscript{17} Why is the state characterised, however, as an institution with a large bureaucracy? It is true that most states are institutionalised and bureaucratised, but is this empirical phenomenon a free standing one with no informational supports? It appears rather that there is an information base which was necessary for the institutions and bureaucracy to develop. Gunboats exist, but who has them and whether they are a legitimate form of government is not an empirical fact. Other visible features of the contemporary state should also not be seen as simple fact, however established they may appear at a given time.

The informational base of the contemporary state becomes more evident if we take a longer, historical perspective. The contemporary state is often said to be of recent origin,\textsuperscript{18} and the theory of public international law derives its definition of the state essentially from the seventeenth century. There is no-one, however, who can impose such a time-limited notion of the state and many disciplines chose to ignore it. Anthropologists and historians, for example, use no fixed definition but distinguish it from tribal or familial forms of human organisation. Its genealogy can therefore be seen as very ancient.\textsuperscript{19} We therefore see different historical conceptions of the state and different information used for its construction. The state of the twentieth century was not the same as the state of the sixth century, but if both can be credibly treated as states (and this is

\textsuperscript{15} For Machiavelli and the linguistic move from ‘il stato’ as a general state, of a ruler for example, see Q Skinner, ‘The State’, in T Ball, J Farr & R Hansen (ed’s), Political Innovation and Conceptual Change (1989) 101 (the most important linguistic innovation of Renaissance Italy).


\textsuperscript{17} This was the case for Neil MacCormick for most of his career; see N MacCormick, Institutions of Law: An Essay in Legal Theory (2007); N MacCormick & O Weinberger, An Institutional Theory of Law (1986).

\textsuperscript{18} See, for example, A Vincent, Theories of the State (1987) 10 (Greek or medieval states are therefore ‘misnomers’); J Chevallier, L’Etat (1999) 9; M van Creveld, The Rise and Decline of the State (1999) 1 (distinguishing governments from states); C Morris, An Essay on the Modern State (1998) 17 (speaking of ‘modern state’ pleonastic).

\textsuperscript{19} See, for example, in anthropology, B Trigger, Understanding Early Civilizations: A Comparative Study (2003) 92; in history, H Claessen & P Skalnik (eds), The Early State (1978) 3.
the case), then the notion of the state varies according to the information used in determining its existence.

One particular feature of the state is important and illustrates its base of information. Governments, territories and peoples are all material in character, and contemporary public international law teaches that they are the constituent elements of a state. The state, however, is distinct from any particular combinations of government, territory and people. Governments notably may change, often violently, but a state may also endure in spite of changes in its territorial definition or in the definition of its people. It may endure even in the absence of a (precisely) defined territory. Some therefore say that the most important element of the contemporary state is its abstract character, which allows it to persist through changes of government and even in the periods of interregnum. ‘Le roi est mort, vive le roi’, it is conveniently said. Yet the abstract character of the state, its personification as an enduring legal person beyond precise changes to its constituent elements, has never been free from controversy. Its origins lie in the Roman law notion of the corporate personality (the universitas), complemented either by a ‘fiction’ theory of its existence (requiring a formal creator of the fiction) or an organic one (which simply looks to a pre-existing community). Gierke rejected the fiction theory, since there was no prior, single creator of a state’s fictional personality, and the alternative of a fiction created by formal grant, used in much of the western world, has never been free of controversy even where it is accepted. Outside the western world it is seen as a simple fiction and largely mistrusted, which explains in part the weakness of many states in the world as enduring institutions. Whatever is the best explanation of the corporate personality of the state or ‘Crown’, there appears to be no denying that we are dealing with simple information, shorn of any material base. The essential character of a state, its existence beyond material and immediate features, is thus composed exclusively of information which is centuries old in character. It is transmitted and accepted tradition.

The debate in public international law on whether recognition of a state is declarative or constitutional is therefore largely misplaced. A state is not a fact, the existence of which can be declared, or a discretionary matter which can be

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20 For Gierke, see the English translation by Maitland of his Political Theories of the Middle Ages (1951).
22 For rejection of the corporate personality and abstract state in the Islamic world, see Glenn, above n 5, 195, with references.
left to other states to constitute by their declarations. It is, as Professor Crawford of this University maintains, a matter of normative judgement, controlled by law.\textsuperscript{23} It may be discussed whether the law in question is public international law, national law, or some combination of national, international and transnational law, but the history of the state and the controversy surrounding it precludes any treatment of it as simply factual.\textsuperscript{24}

The influential character in the world of the normative information which is supportive of contemporary states is also indicative of the traditional character of the state. This influence is shown in a number of ways. There is first of all the ‘utter particularity’ of each state, in the language of Phillip Allott.\textsuperscript{25} No state is the same as any other and there is no authority capable of imposing a precise character to any state. It is a combination of local circumstance and the influence of a common law (of English, French, Spanish, German origin) which controls the institutions of a particular state.\textsuperscript{26} This is why we see English parliamentary regimes in many places, French-type Conseils d’Etat, courts based on a Spanish-style audiencia, German-style judicial review by specialised courts, and so on. The tradition of a state is largely free of specific content; each state is free to adopt models with which it can work, given local circumstances. The model chosen, there is still a question of ongoing adaptation. So the tradition of the state is little more than persuasive, very general, information, necessarily more influential in some cases than others. There are more specific versions of states but they are recognisable as English, or French, or American, or German and none of them is other than influential. They are traditional in character and both within and without their places of origin exercise no more authority than this, but it is often authority which requires no further legitimation.

Second, whatever the model chosen, it may be more or less successful as a state. The expression ‘failed state’ is today freely used and there is some truth behind an expression so largely used. How is a state a failure? Absent an effective government a state continues to exist (it is an abstraction, as a corporate personality), but there are limits beyond which the fiction of a corporate

\textsuperscript{23} J Crawford, \textit{The Creation of States in International Law} (2007).
\textsuperscript{24} Nor would it be appropriate in most circumstances to see the state as somehow constituted in a single charismatic moment, or single document. The oldest states are ones which came slowly to be accepted as such, with no single, constitutive moment, and many of the states which have been recognised are seen as ‘failed.’
\textsuperscript{25} P Allott, \textit{The Health of Nations: Society and Law Beyond the State} (2002) 117-8 (‘of the nature of a nation to be uniquely itself’).
\textsuperscript{26} H P Glenn, \textit{The Cosmopolitan State} (2013), 112ff.
personality cannot be taken. If years have gone by without the government of a state being capable of exercising control of a territory, at a given point one must conclude that the abstraction of a state is no longer sustainable. The conclusion will be more convincing if at the same time the state is composed of warring factions, each with their own territory. Between an operative state and a failed state there are, however, many degrees of state existence and support. The English language does not adequately reflect this but the French with their notion of étatisation seem to have captured the notion well.

Tradition does not, except in particular instances, declare itself as binding, so these examples of state models as being influential in character, but no more than influential, are all examples of the traditional character of the state. We are more and more frequently faced with the question of the degree of acceptance of the state tradition—in some cases the acceptance is clear and unchallengeable; in other cases there is very little acceptance. Both are examples, however, of why the state is best seen as tradition. The case for this view of the state is becoming stronger in present circumstances.

3 Why the state as legal tradition is an appropriate conceptualisation for contemporary, and future, times

The state today is a weaker construction than it has been in the last two centuries, even though it has now replaced the empires which previously held sway. Where the state unquestionably exists, it is not the state which it once was. This results both from the growth of state-supported international agencies, which have multiplied greatly and which inevitably drain authority away from their supporting states, and from the growing inability of states to provide effective answers to the many problems which have become transnational in character. Information technology and the movement of populations are perhaps the most visible examples. Therefore the state today must live with many remedial devices which may or may not be of its own creation, and many laws of diverse

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27 Books are now being written on general refusals of state-like forms of government; see, for example, J C Scott, The Art of Not Being Governed: An Anarchist History of Upland Southeast Asia (2009), notably ch 6 (`State Evasion, State Prevention'). It is of course possible to see such phenomena not as a rejection of the state, but as dissent from the state tradition by a minority within a state, such as India, but the overall effect is to weaken the existing state.

28 Van Creveld, above n 18.
provenance. It faces internal and external diversity of a range and extent which it has not seen in its modern history.

As a result the state, which continues as an effective institution in most places, becomes more and more receptive to non-state order and non-state sources of law. It is even a question of whether the law of a state incorporates non-state sources of law, or the reverse. Four examples may be noted. The first is law generated by international agencies, which states in many cases simply accept, as ‘conveyor belts’ between the international and the local.29 The second is arbitration, refused by many if not most states in the nineteenth century as incompatible with guaranteed resort to state tribunals.30 The third is transnational private regulation (TPR), often industry specific and industry-created, accepted by the state when it has no effective instruments of its own to deal effectively with the regulation required.31 A fourth is the resort to non-state religious law in the name of religious liberty, as states move farther away from a ruler’s choice of religion as the religion of the state.32 All of these are examples of what German doctrine now refers to as the ‘open state’, one which has become permeable to external influence and no longer closed. In reality the state still exercises much control over sources of law and the notion of an ‘open’ state is an exaggeration, but the state today is learning to co-exist with many different forms of social ordering. It is becoming more and more cosmopolitan.

This modern position of the state, one of coexistence and collaboration and not of sovereignty, is compatible with its fundamental nature as one of tradition.

29 C Eberhard, Le droit au miroir des cultures (2006), 142 (‘courroies de transmission’).
32 The principle at the time of the Treaty of Westphalia (1648) was cuius regio, eius religio. The principle of freedom of religion is now the constitutional guarantee most frequently found in national constitutions; J Martinez-Torrón and C Durham (eds), Religion and the Secular State (2010) 6; D Law & M Versteeg, ‘The Declining Influence of the United States Constitution’ (2012) 87 NYU LR 762, 773 (97% of constitutions in 2006).
Traditions are composed of normative information and the flow of information is ultimately uncontrollable. Closure is never complete. We are therefore now witnessing challenge to an existing institution, in the same way challenges have been made in the past to the tribe, the manor, the city or the kingdom. It may be that we have reached the end of the line, and there is nothing larger and more powerful which may replace the contemporary state. In that case we shall simply continue with a more and more diverse range of states, more or less tolerant, or tolerated, by alternative sources of normativity. This is nothing to fear and there is much to be said in favour of a more collaborative state in the future.

33 See Part I above.
ANGLO-AMERICAN AND CONTINENTAL TRADITIONS IN ADVOCACY BEFORE INTERNATIONAL COURTS AND TRIBUNALS

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Keywords  
Advocacy, Tradition, International Courts and Tribunals

The Keynote Debate ‘Anglo-American and Continental Traditions in Advocacy before International Courts and Tribunals’ took place on 19 May 2013 in the Divinity School of St John’s College, Cambridge, as part of the Second Annual CJICL Conference. The debate pitted Professor James Crawford against Professor Alain Pellet and was moderated by Professor Catherine Redgwell. It was made possible with the generous support of Freshfields Bruckhaus Deringer. The CJICL expresses its gratitude to Professors Crawford, Pellet and Redgwell for their kind permission to print this transcript; and to Naomi Burke, Godsglory Ifezue, Christopher Sargeant, Estelle Wolfers and Lawrence Li for their help with the transcription.

Professor Catherine Redgwell (CR): It is a really great pleasure to be here and to moderate this keynote debate on Anglo-American—perhaps I should say Anglo-Australian—and continental traditions in advocacy before international courts and tribunals. I know that our very distinguished debaters need no introduction, but there may be a few things that you may be unaware of. What you do know, of course, is that Professor Alain Pellet is Professor of Public International Law at the Université Paris-Ouest Nanterre La Défense and is currently the President of the French Society of International Law. You are also aware that he attained the age of majority, that is 21 years, in the International Law Commission (ILC)...

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Professor Alain Pellet (AP): 22

CR: Ok, well, I am sure that is the age of majority somewhere...[laughter]. In the ILC he tackled one of my favourite subjects: reservations to treaties. He has been counsel in over 60 cases before the ICJ and arbitral tribunals. On my right is Professor James Crawford, who is of course the Whewell Professor of International Law here at Cambridge. He also served—and they were contemporaneous for a large spell—on the ILC, where he tackled such lightweight subjects as the International Criminal Court and state responsibility. He also has extensive advocacy experience, with 50 cases before the ICJ and other international tribunals and over 20 arbitrations.

What you might not be so aware of is that they have appeared—as they are now—on opposite sides in over a dozen cases, and that they have appeared together in others. They have also written, of course, on advocacy before international courts and tribunals, and together they wrote the following about advocacy before such courts and tribunals.¹ They refer to it as an 'aventure sociale'; it obliges persons formed by very different methods of thinking and modes of legal reasoning to form an 'intellectual coexistence'. Among other things, the diversity of approaches is reflected in modes and styles of pleadings. It is this that will be our first topic for debate: the style of oral proceedings. I turn to the stylish Professor Pellet to kick us off.

AP: Thank you very much. I will be a bit longer than for the next topic as I want to make some preliminary points. First, usually I am extremely rude—I hope I will be so today as well [laughter]—but exceptionally I want to do something polite and thank the organisers, which I really do because I think you succeeded amazingly in having this conference.

My second preliminary point is that, during this debate, I will speak only for myself. I have not really exchanged views with James on what we are going to say; we have just tried to agree on the different topics and I suppose that the two of us will mainly base ourselves on our rather heavy experience as advocates before the World Court, primarily, and accessorily before international arbitral tribunals, including ICSID. Therefore, I think we will present, unavoidably, an impressionistic rather than a scientific view. I am not sure that it can be dealt with scientifically, but certainly I will not try to do so. So you will hear about the Anglo-American tradition as perceived by Alain Pellet, and

the continental tradition as viewed through James Crawford’s lens, which is unavoidable subjective.

When I speak of the Anglo-American tradition, I speak of persons, rather than an abstract concept. For me, advocacy in the Anglo-Saxon or Anglo-American tradition would be personified by Sir Ian Brownlie, Sir Arthur Watts, Dame Rosalyn Higgins, Rodman Bundy, Sir Michael Wood, Professor Vaughan Lowe and Professor Alan Boyle. They are persons and when you speak of styles, clearly they have very different styles. My perception of advocacy before the ICJ is wider than my practice in the arbitration field. I am probably part of what they call the invisible (or too visible?) bar of the ICJ. The late Sir Ian Brownlie would have said ‘the Mafia of the ICJ’, so both of us are Mafiosi [laughter]—and this leads me to my second general remark concerning the whole topic.

When you know how different these colleagues—and néanmoins amis as we say in French—I have just mentioned are, you can certainly wonder whether there can be such a thing as an Anglo-American tradition of advocacy before the ICJ and even less so before other international tribunals. Yet, I have the feeling that the Anglo-American—in French we usually say ‘Anglo-Saxon’, which has the great advantage of including Australians who are not Anglo-American as far as I know—that the Anglo-Saxon touch in advocacy does exist and can be contrasted with the continental approach. I have participated in something like 60 or 70 legal teams, both in contentious and non-contentious cases, and I have always been struck by the fact that, as a Frenchman, I have never, or nearly never, had any problem in understanding—to understand a point of view does not mean to share it!—the views of my German, Italian or Spanish colleagues—not to speak of the Belgians. We can understand one another. By contrast, I have quite often the impression that my Anglo-Saxon colleagues and I have problems in understanding one another and that the opposition between Anglo-Saxon empiricism and Latin Cartesianism is not that much of a caricature. It does, I think, correspond to a deep cultural difference, which goes beyond legal advocacy or legal culture but is rooted in our respective educational background and in culture tout court, not only legal culture. I must say that—although I hate looking too nice to my old accomplice—James Crawford is no doubt an Anglo-Saxon, but he has an extraordinary quality—not shared by all his colleagues—in that he genuinely listens and always tries to understand the other’s point of view. Even more, quite often he succeeds in understanding! [laughter] With several of his colleagues I have the impression that I can explain again and again what I have in mind; it usually does not work.

With this regrettably indulgent parenthesis closed, I must admit that the
worst are usually not the Australians, nor the Americans or the Canadians, but the British. Each of my British colleagues—including the Scots for that matter—is an island, with sometimes for me a totally disconcerting way of thinking [laughter]. This said, I must say that this diversity is certainly one of the most fascinating and enjoyable parts of being an international advocate, if that means something. This confrontation of points of view is extremely intellectually enriching. It is also a necessity: before the large world tribunals—when you speak before the ICJ with 15 or 17 judges, or when you speak before the ITLOS you have 21 or 23 judges—the judges all come from different parts of the world. Even if they virtually all speak English, at least half of them think ‘continental’. They do not think English, they do not think common law. When a team is correctly constituted, it has to have a good balance between the various legal cultures of its members—keeping in mind that when you speak of legal cultures, I think it is wrong to say that there are more than two. With the greatest respect for the Islamic or the Chinese cultures, international law is made up of two legal cultures, not of hundreds. I think that what is important is to have a real balance between those two. As very aptly written by the much missed Keith Hight: ‘counsel must always remember that it is an International Court that we are addressing, and that this International Court does indeed function internationally—not in one, but in two official languages.’

Indeed, pleading styles before the ICJ, to take again the example I know best, are extremely different. I would think that this comes more from personal inclination than from legal culture, as far as the styles are concerned. Indeed, although Ian Brownlie was my mentor in my first case, in Nicaragua v United States of America, I have never imitated his pleading style, which I found terribly boring [laughter]. But I suppose that Michel Virally, who was a French leading counsel in the 60’s or 70’s, was this kind of advocate; while in spite of his seemingly gruff attitude, James Crawford is infinitely more lively. That said, and again with probably James as a most notable exception—I think the organisers made a very bad choice in asking James to be the representative of Anglo-American culture—with his exception—maybe joined by Philippe Sands in some kind, and

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Traditions in International Advocacy

in the past by Rosalyn Higgins—there is at least a dominant trait amongst British advocates: they try to be impassive. Impassivity is not always equivalent to boringness or a soporific tone, but it happens. Yet as was shown by Sir Derek Bowett, Sir Eli Lauterpacht or recently by Sir Frank Berman, you can be impassive while being quite enthralling. These British colleagues have understood that respect to the Court does not mean being as boring as you can [laughter]. Sam Wordsworth, for example, is the paragon of this incredibly British inimitable tone, which combines firmness and forensic stillness with apparent modesty and an air of untouchability. This is very British. Sir Arthur Watts also had this fascinating behaviour. Yet, whereas equanimity seems a dominant trait amongst British counsel, this is certainly less true for their American colleagues. Just to take two usual suspects, Rodman Bundy and Paul Reichler are extremely expressive and lively in their pleadings before the ICJ. Before ICSID tribunals, I have seen people like John Veeder be quite intense pleaders as well.

Now if you turn to the Latin side, the picture is completely different. I suggest that Latin pleadings are characterised by two aspects. First, we usually are more lively and passionate; either for what I would call a colourful note—like Luigi Condorelli, who is a very passionate pleader—or a more dramatic or even tragic register—like Marcelo Kohen [laughter]. The second trait is that our continental style is also more flowery, with more dramatic gesture and effets de manche. Personally I try to avoid this, although I confess that I cannot always help it [laughter]. Then there is the problem with our literacy. Again, all of this is a cliché—and there are of course exceptions—but Latin lawyers, especially the French, have a tendency to refer to their literary heritage. Indeed, contemporary references are most often recognised. But when you venture—as I did recently at ITLOS—to recite some of Corneille’s stanzas, I am afraid it flops. Whether we—the French, the Latins—like it or not, the universal culture is Anglo-Saxon, or Anglo-American; I am afraid more American than English, although Alice in Wonderland is probably the most quoted book before the World Court [laughter]. I confess en passant that I am quite wary of the frequent references by our Anglo-Saxon colleagues to the white rabbit or Cheshire cat; this is English, not French! I think it is too much [laughter]. As has been aptly noted, humour is often culture specific and can even be offensive.

Now, very quickly, jokes… Jokes are a very important part of pleadings before the Court. Can you afford joking before the World Court? This is a fascinating

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3 Dispute concerning delimitation of the maritime boundary between Bangladesh and Myanmar in the Bay of Bengal (Bangladesh/Myanmar), ITLOS, ITLOS/PV.11/15/Rev.1, 24 September 2011 (morning), 19.
topic that probably warrants a doctoral thesis [laughter]. I will only give you my short answer: yes you can, but with some restraint. Second, I think that the English sense of humour is quite different from the continental sense of humour. Our English counterparts will usually say that humour is misplaced before the court. Quite recently Sir Michael Wood was pleading in a case before ITLOS. Our adversaries were exaggerating and repeatedly used quotes from English authors and even invoked Star Trek; I suppose only two of the 23 judges knew what it was about [laughter]. Then Sir Michael started his speech saying I can assure you that I will not be quoting any English poets; there will be no Shakespeare, no Poe, no Blake; there will not even be rabbit—all of them having been quoted by our opponents. “There will be no Sherlock Holmes and there will certainly be no Star Trek” and then he went on and added a lot of purely British jokes [laughter]. And this is my last word in this section—I promise my other comments will be much shorter—usually our British colleagues’ humour is a good representation of the English sense of humour and my distinguished Australian friend is no exception, in that he has a good sense of scratching without hurting. Thank you [applause].

CR: I will now give the floor to the gruff but lively Professor Crawford.

Professor James Crawford (JC): Well, I will start at the end, with the jokes. I once had a map speech starting with the lines ‘some maps are born great, some achieve greatness, and some have greatness thrust upon them’ [laughter]. Since the case was about a non-annexed map, unrelated to the treaty, the point of the joke—and Shakespeare is universal—was immediately caught by the tribunal. But general jokes—‘did you hear the one about the man who…’—do not work; the jokes must be relevant to the case. In the Kosovo case, I declared the independence of South Australia. Later on the spouse of one of the judges asked me if she could be president of South Australia [laughter]. This was a sure sign that they were still thinking about the declaration of independence, which of course was not unlawful but was completely ineffective. The Court was not asked in the Kosovo case whether the declaration was ineffective, but whether it was unlawful. You do not tell jokes in the Court, but you do want to keep them awake [laughter]. The late Tom Franck and I had a competition to see who could make most of the bench laugh, or at least smile. His team won, quite unfairly, with a reference to

4 Ibid., ITLOS/PV.11/7/Rev.1, 15 September 2011 (afternoon), 17.
6 See Accordance with International Law of the Unilateral Declaration of Independence by the Provisional Institutions of Self-Government of Kosovo, ICJ Verbatim Record, CR 2009/32, 10 December 2009 (morning), 47.
someone’s mobile phone going off in the audience. That makes Alain’s point, that jokes are very culture specific and that you have to be very careful. That is enough on jokes, let us talk seriously.

Alain mentioned some of the characteristics of French advocates. When I think of French advocates, I think of Alain, because he is quite unusual in being totally dominant as an advocate on the francophone side. Of course I have heard other advocates and I worked with them—Pierre Dupuy, Jean-Pierre Cot, Marcelo Kohen, Luigi Condorelli, Pierre Klein and some of his Belgian colleagues—but Alain has probably done more cases than they have done all together. Why is that? Because he is, quite frankly, the best. It is a bit difficult to draw characteristics from the best of the bunch, but I will take the risk and do it: lively, yes; dramatic, yes; flowery, not normally; gestures, yes. His greatest gesture was probably with an egg—in Bangladesh/Myanmar.

AP: Ah, l’œuf... [laughter]. That was a boiled egg, because it was in response to a point made by Alan Boyle [laughter].

JC: Good to know it was boiled; that reference was lost in translation [laughter]. Literary references: very rarely—from Alain I understand that is because of the worldly intransitivity of French culture [laughter]; he has to bear with Shakespeare, and Sherlock Holmes. But I once compared the agent of an opposing state to Winnie-the-Pooh, who wanted both condensed milk and honey on his bread; that reference was completely lost on the audience [laughter].

One thing that Alain did not mention was length, because French advocates go on and on and on [laughter]. Now it is true that it takes you 30% more words to say in French what you would otherwise have said in English; that is why French translators always complain about your speed. The English translators have to do less, the French ones more, so they are always telling you to slow down. In the East Timor case, the first case that Alain and I were in together, the crucial and only point that Australia could win on was the Monetary Gold principle—without it we would have lost. So we argued the point twice: once in English and once in French. Those days the bench was much more francophone. The anglophones could understand the English way of arguing and the francophones would understand the French way of arguing. So I argued the Monetary Gold

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7 Bangladesh/Myanmar, above n 3, ITLOS/PV.11/8, 16 September 2011 (afternoon), 33. For the video recording, see <http://wm.rosebud-media.net/itlos/archive/20110919_itlos_en_007.asf> [accessed 15 August 2013].

8 Territorial and Maritime Dispute (Nicaragua v Colombia), ICJ Verbatim Record, CR 2012/11, 26 April 2012 (afternoon), 18.
case for 45 minutes in a characteristically restrained way. Then Alain argued the Monetary Gold case for about two hours [laughter]. Even the Australian team was wilting by the end of it. But we won on the Monetary Gold case. And since then I have always thought repetition is a bad thing in pleading, but not when it is repetition of the same argument in French and English.

With regard to differences of style, the first point to make about francophone advocacy, which is brought to a high pitch by Alain and some of his colleagues, is that, I think, it is more difficult to be bad in French than it is in English. At least, most of the francophone advocates I have heard have been good or very good. They sound wonderful because they are speaking such a lovely language. But Alain is really head-and-shoulders above the rest. On the other hand, he is not characteristic of the French bar—if he even is a member of the French bar.

AP: No, no.

JC: He is not a member of the bar. He wears his academic robes; the francophones are very colourful and there is no problem wearing academic gowns. We have to wear black gowns and wigs—although as an Australian I do not wear a wig. The consequence of the colour comes out in the advocacy to some degree. I have also sat on a francophone tribunal at the OECD, with Jean Massot of the Conseil d'État as President. I did about 30 cases with him, employment cases mostly. We never disagreed on points of substance, except in one case. We always agreed independently on what the result would be. That made me very sceptical of the view that anglophone and francophone lawyers tend to think differently. They may think in different ways, but in the end they come to the same conclusion in relation to a given fact situation. The difference between us was that when he wrote the judgment, which he did most of the time, it was about a page-and-a-half—considerant etc—blowing the argument out of the water in three lines. When I wrote the judgment, which I did in a minority of cases, it was ten or fifteen pages, blowing the argument out of the water very slowly. These are public judgments and you can tell who has written them at a glance.

By contrast, in terms of advocacy French advocates take longer and they are in a way more thorough. They use more references than English advocates in general—Alain is particularly good at this because his mastery of the jurisprudence of the Court is unequalled—and they present it in a scholarly way. That is because they are scholars; there are almost no French advocates at the interna-

9 East Timor (Portugal v Australia), ICJ Verbatim Record, CR 95/7, 6 February 1995 (morning), 51-60.
10 Ibid., 60-83 and CR 95/8, 7 February 1995 (morning), 8-33.
tional level who are full-time members of the bar. That raises the question which
does not really fit within this first theme but which I will raise: what is going to
happen with the next generation of advocates? That is an important question and
quite a difficult one to answer. There is a major competition on the anglophone
side between the large law firms—one of them is our sponsor—and the interna-
tional lawyers who are professors. I am not so sure that the professors will retain
the dominant status that they have enjoyed in the past. Eli [Lauterpacht] was in
his generation—if I may say that of a generation that is still going on—one of
the great advocates. To give you an example: his speech in the resumed Nuclear
Weapons case in 1995 on the science was a masterful piece of work, one of the best
speeches that has even been delivered on science\textsuperscript{11}—a very difficult thing to do,
because you know much more than the bench does about science and you got to
convey it in a way that does not send them to sleep and makes them vote your
way. Eli went to the bar before he became an academic lawyer and has always
been both. He is very unusual in his generation in that respect. Now we have
a new generation of people who are approaching international advocacy more
from the side of the profession, or the professions I should say, as they belong to
different sorts of bars. And whether the academics will be allowed to or will want
to maintain their past dominance in advocacy is in question. It is very difficult
trying to do both jobs and whether the university will allow us to do both jobs is
another question [applause].

\textbf{AP:} Just one point: I want to join you in saying that the best pleading I
have ever heard was Eli’s in the Nuclear Test case—and unfortunately I was his
opponent [laughter].\textsuperscript{12}

\textbf{CR:} Our debaters have very kindly consented to take questions after each
point of debate—there are more to come—so it is over to you for any burning
questions or comments.

\textbf{Caroline Foster:} When you appear before the international court repre-
senting a state, do you consider that what you say could be taken to represent
state practice, and if not, why not?

\textbf{Rafal Manko:} I have a question whether on the civil law side, would you say
that for example German lawyers as pleaders before the ICJ are different from the
\textsuperscript{11} Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court’s Judgment
of 20 December 1974 in the Nuclear Tests (New Zealand v France) Case, ICJ Verbatim Record, CR

\textsuperscript{12} See A Pellet’s contribution to The Function of Law in the International Community: Tribute to
French, or would you say that the civil law side of litigants is rather homogenous. You argued there were just two legal systems, but would you divide these further or rather not?

**Marie Claire Cordonier Segger:** Thank you for this excellent opening session in this debate. My question is, is there a point that you are actually in contention on at the moment? [laughter]

**JC:** Alain and I wrote a joint article in the Hafner *Festschrift* in which we represented the civil and common law sides, which you might like to read, and Alain was very upset because I kept agreeing with him [laughter]. My preference is to minimise the differences between the common law and the civil law in many respects and Alain’s is to maximise them. As for state practice, yes, definitely, because what you say in the International Court is read by the agent and approved by the agent, and it is as such a representative view of the state. Of course it is not usual for counsel to make commitments on behalf of the state—that is only for the agent—but nonetheless what you say is very carefully looked at. I do not think there is any doubt that it constitutes state practice. But it is state practice *sub modo*, because it is not free of the environment in which it occurs. The Court has to decide and the state has a compelling interest to present the best case, irrespective of what it really thinks. There may be a discrepancy between the actual view of the state on some particular issue and the view that you tell the state they will have to argue if they are going to have any chance of winning the case. That obviously has to be factored in. The stream does not rise above the source and the advocate does not rise above the court, so I think it is state practice *sub modo*. The second question in relation to Germans: yes. I have seen fewer Germans in action than francophones—with whom I count the Italians and the Belgians. Germans are somewhere in between the two, or at least the ones I have heard. They are really quite good and in the case of Simma and Frowein very good indeed. They tend to be less flowery, shorter, less literary and very much to the point [laughter]. And as for where we disagree, well, Alain will tell you that we do.

**AP:** I would say that I hope we do, at least under the rules of the game. On the two points on the contention and state practice, I entirely agree, unfortunately, with James [laughter]. Let me just add one thing on state practice. I think it is very interesting to use the pleadings before the ICJ or elsewhere to establish *opinio iuris*. *Opinio iuris* is something terrible to be proven, but I think it is good evidence of *opinio iuris*; so it is not only practice but maybe even more *opinio iuris*.

On the Germans: my view is that it is easier for me to be on the same
ground with my German colleagues than with my British colleagues. Their way of thinking is really proximate to ours. The problems with the Germans is that they are very interested in knowing whether they should put dots between I C J or not and this for me is rather exasperating [laughter]. Sometimes I put one and sometimes I put three dots without thinking, and this will keep you busy for long discussions with the Germans [laughter]. Beside this we have no real problems.

CR: We will now move on to our second debating point on which I think we may find perhaps a greater degree of divergence between the different common law and civil law approaches to authorities and evidence.

JC: There is a big difference between authority and evidence. Authority is the body of case law and other material on which you base what you say when making arguments. Evidence is the set of materials for the case, the documents and in some cases oral testimony. In terms of reference to authority, I think there is not a great deal of difference. I have a practice of almost never referring to academic writings but referring only to decisions of the Court or to good decisions of tribunals because—and it is part of the reason the Court does not refer to academic arguments either—if you refer to one you have to refer to them all—and good heavens, there are so many of them! There are a few canonical works which are exempt from that, Shabtai Rosenne’s book on the International Court being perhaps the most notable among them.\(^14\) I think there is a slight difference of presentation in that the francophone advocates tend to footnote their texts in a certain way—certainly Alain does—which is quite a good idea because it means that the other side has to go and check if the references are right or not, which takes up valuable time; so my practice is to assume Alain is right and go around his argument by another route [laughter]. I do not think there is a great deal of difference in terms of reference to authority and that is part of the point. Despite differences in style and education, we are dealing with the same subject matter. I reject the idea that there is a French international law or an English international law: there is just international law. It is a bit like the elephant in the room of course, because for linguistic reasons no one ever grasps the whole beast—it is absolutely impossible—and you do perceive it to some extent through the prism of your own language. But I like to believe and I do believe that you still perceive the same object and not a different object. When it comes to evidence, however, there are major differences. Good francophone advocates are as good as anyone in mastering the dossier, which is the written bundle of evidence. But some have said of the Court that it has the worst of

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both worlds: it has lots of written evidence and lots of oral material as well. The francophone style in normal courts is to have a case properly pleaded in writing and then to have very brief oral advocacy—which in my experience on the OECD Administrative Tribunal is usually pretty ineffective, so you are left with the dossier. The English style used to be almost entirely oral advocacy with very little in writing, but that has changed with skeleton arguments. Skeleton arguments are approximating to pleadings, even in domestic cases and certainly in international cases. I think there is an important cultural difference in that francophone judges and francophone advocates tend to disdain oral examination of witnesses, whereas Anglophone and US counsel tend to think more highly of it. The Court is having to decide how to handle oral testimony in some of the pending cases involving scientific questions, the Whaling case for example.\textsuperscript{15} It brought it on itself, because in the Pulp Mills case it said—and quite rightly—that parties have to stop presenting evidence as advocacy through scientific advocates, which had been the previous practice.\textsuperscript{16} So we are about to see how that works out in the Ecuador v Colombia case,\textsuperscript{17} if it does not settle, or the Whaling case, which will not settle, and see how the Court manages. Even so, I would say there is not as much difference as you would think. A very senior French advocate had to do the first cross-examination of his life in the Corfu Channel case—the first case the Court had—where there was expert evidence about the placement of mines in the Corfu Channel.\textsuperscript{18} The question was whether it was possible for the border guards on the coastline not to have known that the mines had been laid; quite a precise question, well handled by the Court. In the course of the case the French advocate had to conduct his first cross-examination ever, cross-examining a Yugoslav Naval Officer, and he extracted very valuable concessions from the Yugoslav Naval Officer, \textit{inter alia} that Yugoslavia had laid the mines. He swore for-ever-after that cross-examination was the best method for getting at the truth [laughter].

\textbf{AP:} Well, the chair was right in saying that there \textit{are} differences and we agree on what they are, so I will be very brief. With the authorities, there is no such

\textsuperscript{15} See \textit{Whaling in the Antarctic} (Australia v Japan; New Zealand intervening), ICJ Verbatim Record, CR 2013/9, 27 June 2013 (morning), 38-71; CR 2013/10, 27 June 2013 (afternoon) 14-33; CR 2013/14, 3 July 2013 (afternoon), 14-59.

\textsuperscript{16} \textit{Pulp Mills on the River Uruguay} (Argentina v Uruguay), ICJ Reports 2010, p 14, 72.


\textsuperscript{18} \textit{Corfu Channel} (United Kingdom v Albania), ICJ, Minutes of the Sittings held from November 9th, 1948, to April 9th, 1949, Part I, p 537-643.
thing as *stare decisis* in international law. With regret my British colleagues accept that and I think that they accept that *jurisprudence constante* is much more efficient than to stick to the strict doctrine of precedent. There is no difference between us because it is like that and clearly you cannot change the law, even the British accept that. That said, I think that they have some problem to accept or are not prepared to admit something else in the international law of evidence: it is the formidable un-formalism of the rules of evidence. For me there is only one rule of evidence before the ICJ: the rule is that there is no rule. My British and American colleagues have great difficulty to accept that. It causes them disarray and perplexity, probably because in the common law system the rules of evidence are extremely developed, much more than in the continental laws. We sometimes have long discussions in legal teams on the burden of proof—which is not a problem: you have to prove your case. There is no such thing as the burden of proof I think, but my American colleagues love to discuss at lengths the burden of proof, which I think is wrong. Of course you must have some limits—you can only present honest evidence—but that is all.

The second point—and it might be seen as having some links with honesty—is the dealings with witnesses and experts. The British, and even more the American advocates, are fond of having expert witnesses. I think its rubbish; as a Frenchman I would not trust a word of whatever a witness says. Even more so, for me prepared statements are totally insane. My view is that it has not worked, at least before the ICJ. The British and Americans are supposed to be very good in cross-examination, but what I have seen was desperate and of no use [laughter]. We should not introduce experts and I think the judges are not much more impressed than I am.

A last word on evidence—on something that for me is a real concern. This concern is the shocking tendency in modern international advocacy to use very exaggerated lengthy written pleadings. I have less in mind the pleading pieces themselves—although some are too lengthy—than the manner to put everything as an annex. This is true not only for the ICJ but may be even worse before arbitral tribunals. I think that the responsibility for this regrettable situation lies mainly with two culprits. First, modern technology: photocopying and the internet make it much easier than in the past to accumulate so-called evidence without any discernment, *au hasard*, just in case. I think it is regrettable and counter-productive. Now, I think technology in itself is neutral. It is what you make of it that is not neutral and somebody has to take responsibility for this really worrying drift. Here I am rather serious—I really mind this—and I am sorry to say that this responsibility is incumbent upon law firms like our
sponsor. American and British law firms indulge in massively using these modern amenities, probably to impress their clients, but it is not helpful at all for the judges and the arbitrators. I am really exasperated by that and I call for reason in this respect. Too much is too much and we are well over too much. Once again, I think this drift is the responsibility of the big Anglo-American law firms.

JC: I have not yet heard an effective cross-examination in the Court, but I recently heard one in the Kishenganga arbitration between Pakistan and India. It was a cross-examination of one of their experts by Samuel Wordsworth, now a QC, who had the Court transfixed; it devastated the witness—it completely disproved what he was saying. So it can be effective in the hands of a master, but it requires very careful preparation. Because of the limited amount of time in the Court it is unlikely that the circumstances will allow for cross-examination in ICJ proceedings. But in arbitrations you will sometimes see very effective cross-examinations. I think the Court is a bit betwixt and between at present on the question of evidence.

I agree entirely with what Alain said about excessively long pleadings. A particular abuse committed by myself—I fully admit—is submitting a rejoinder that is longer than the counter-memorial. The Court has really got to do something about that: either by enforcing the rule that the rejoinder can only respond to questions of difference, or by introducing a rule that there will in general be only one round of written pleadings, with a further exchange of information prior to the case—I think there is a need for the Court to be brought up to date with any continuing situation, especially in environmental cases. But that does not require a second round of written pleading. In a couple of cases recently, one side produced a memorial and the other side produced a counter-memorial, and then the claimant told the Court it was happy to go to trial on the basis of those pleadings. In one case the other side was extremely upset because they had reserved a number of issues for the rejoinder. In the other case they were forewarned and they accepted it. Long second round pleadings are an unsatisfactory practice and I think the Court should start to indicate maximum length, because if you have a good case you can make your case in three hundred pages—you do not need six or seven hundred. I think it would help in terms of economy of pleading. I agree entirely also with annexes. The tendency is to pile material on. The whole basis of documentary references before the court is going to have to change anyway because the internet has transformed things.

Material on the internet is publicly available within the meaning of the Court’s rules; therefore everything is publicly available—including the works of Corneille. I understand [laughter].

CR: The floor is now open for questions.

Henri Decoeur: I am curious to know your opinion about a new generation of litigators who might have been trained in both traditions and whether this will lead to a new style of advocacy, where they may be picking the best of both traditions or perhaps the worst.

Daniel Behn: I wonder if either of you could say, in your experience, what is the most bizarre evidentiary information that has ever been presented in a case that you have been involved in?

Mutaz Qafisheh: As a non-anglophone or francophone, I feel that when French jurists speak in English, the English is clear for me; and when the English speak in French, their French is clear for me. From my studies of international law at Geneva, I have noticed a difference between common law or Anglo-Saxon law, and continental law. When I read pieces of the ICJ, for example, or various books written in French or in English, I could not really notice a difference. My impression is that international law and the Court are heading towards a more truly international route, especially when we look at, for example, dissenting opinions of young English or young French judges of the ICJ. From your experience and impressions, where is the Court heading? Are we going towards a more anglophone, a more Anglo-American or more Anglo-Saxon system, or towards a more continental system, or are we forming a new international law approach that will be truly international?

Rumiana Yotova: Both of you referred to the use of modern technology in international disputes, so I was wondering if you could elaborate a bit more on that with reference to oral pleadings, because there seem to be different trends in investment arbitration as opposed to the ICJ. Can you identify best practices and good strategies for the use of modern technology?

[Conference participant] I have two questions and I would be very interested in your impressions. The first is about diversity in the advocates before the International Court. One thing that we have gleaned from your discussion is that it is very difficult to generalise about Anglo-American and continental advocacy before the Court because the cast list is very small. There is a divergence of views, I think, both among states and among those who practice in international law as to whether the Court is really interested in seeing new and different people. It seems to some that there is a certain novelty in having somebody new stand up before the Court but I am not sure whether
actually, genuinely, the Court is interested in hearing from new people or if they prefer to hear from those they know and trust. My second question is about procedural reforms in the Court, whether you could comment on your views on the prospects for procedural reform. I am not just talking about the length of pleadings, but also about the time-frames before the Court—in a matter in which you were both recently involved, the written pleadings closed, I think, seventeen months before the Court held a two-week hearing. It seems to me that this is an area that is ripe for reform and I would be interested in your views.

**JC:** Henri, thank you for your question about the possibility of people with training in both traditions. I think it is happening, to some degree. Alain has appeared in more than 40 cases. One of the reasons for that is his quality; another is that a number of them have been francophone-only cases. It is said the English party always feels they need a francophone on board but the French party does not always feel that they need an anglophone on board. Are the differences converging? They are to some extent, but this depends on the question I already identified as 'what happens in the next generation?' One thing that the large Anglo-American firms are doing—certainly in arbitration and even before the Court—is proliferating interlocutory proceedings, which is causing no end of trouble, and quite a lot of indiscipline. That is Anglo-American and not francophone, very definitely, and something that needs to be brought under control.

Acknowledging the internet in oral proceedings: well, the old disciplines about publicly available material have broken down, and have not been replaced by any new disciplines. The Court’s sense in recent practice directions has been to say that everything has to be on the table in advance, which is fine, but if you cannot police that absolutely, I think there is something of a problem.

As to the question of whether the Court welcomes new voices, I think it does very much. One of Alain’s associates, Alina Miron, presented the map speech for Thailand in the recent Temple case.\(^\text{20}\) It is the best map speech I have heard, and it made her an instant overnight celebrity in Thailand, where it was broadcast. I think they very much welcome that—and I remember Kate Parlett making her debut at the Court as well for Costa Rica.\(^\text{21}\) But there is a tendency, if you have been practising for a while and if you obey the basic rules—and the most

\(^{20}\) *Request for Interpretation of the Judgment of 15 June 1962 in the Case concerning the Temple of Preah Vihear (Cambodia v Thailand)* (Cambodia v Thailand), ICJ Verbatim Record, CR 2013/3, 17 April 2013 (morning), 34-50.

\(^{21}\) *Dispute regarding Navigational and Related Rights (Costa Rica v Nicaragua)*, ICJ Verbatim Record, CR 2009/3, 3 March 2009 (morning), 43-52.
important basic rule is ‘do not make any statement that you know not to be true’; you can make arguments that you know to be bad arguments, and sometimes you have to. I think the Court does come to trust certain advocates, because it recognises that they are making the best argument available—which may not be a very good argument, but they are not telling lies. That is something that you must never do with the Court, irrespective of professional traditions or whatever. On questions of fact, if you know something to be the case, you can be silent about it, but you cannot say the contrary, otherwise you discredit yourself very quickly.

On procedural reform, I think the Court is in for a period of procedural reform—I very much hope so. In particular, I think the Court needs to develop an accelerated procedure, whereby when states parties are prepared to accept it, the Court will undertake to deal with the case within one or at most two years from beginning to end; indeed it took the International Tribunal for the Law of the Sea one year to deal with the Bangladesh/Myanmar case. There is no reason why a case should take six or seven years. In order to do so the parties will have to agree to have one round of written pleadings only and not to have bifurcation of jurisdictional or admissibility objections. There are some prerequisites, but I hope the Court can develop procedures that will meet some of these concerns. Presently there are more inter-state arbitrations than there are real cases before the Court, and that is a matter of some concern.

AP: In respect to legal ‘bi-cultures’, well, we can have the best or the worst of two worlds, but I think that concerns first the new generation. I think your generation is much more ‘international’ than we were; I was never trained in any other country than mine, while most of you have changed continent, changed language. Again, I think international law is not just Latin or common law; it is both. This said, all of you, including James, always speak of francophone lawyers, and I think it is not a problem of francophonia; honestly, it is not because the French look to be dominant among the continental lawyers that it is a problem of language. I think language does not really matter; we have not spoken of that—and yes, my experience in the ILC is that we should keep both languages. I am a bit of a traitor: I think there is only one international language and this is not French. Personally I think that English is okay; it is a good way of communication. Usually you are very generous in accepting my strange English. However, I think that it is very useful to have what I would call a ‘checking language’. For example, in the ILC drafting committees, it was very interesting to see that sometimes you cannot translate a draft in French into English or from English into French, and

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22 See Bangladesh/Myanmar, above n 3, (Judgment, 14 March 2012).
this is a bad sign—if you want to make good international law, you must be able to so. For this reason I am still advocating two languages—it happens to be French in the ICJ, but I think it does not really matter: what you need is to have another language corresponding to another culture.

Well, you asked what was the most bizarre experience. In that respect, probably the most incredible one was the Republic of Congo v France, where a French advocate appeared who is seen as one of the best—he is a very bad lawyer and a bad man as well. I was advocate for France and he was the advocate for Congo. He made an incredible show and some minutes before the end of the allocated time he still had not said a single word on the real case. President Shi, who is Chinese and a very reserved man, interrupted him and said ‘I would like to speak a few words; may I interrupt you for a moment? It has been agreed by the Parties that for the second round, each Party will have a maximum time of one hour; now it is already 10.35 a.m.”

Maitre Vergès (that is his name) did not, however, tackle the topic—he was incapable of doing so [laughter].

You have asked many questions that call for a lengthy answer. I draw your attention to a good article by Cesare Romano on the americanisation of international litigation. It is well perceived and it is quite right that the Latin countries should be aware that the field is changing. Yet even if all judges speak English, or are used to English or common law reasoning, their background remains what it is. I am a nullity in French law; I know nothing about French law, I have forgotten everything—I took my degrees 45 years ago and I have no idea of French law. I am not an advocate in the French bar and inside my international legal teams, quite often I am asked, ‘what does French law say on this or that?’ Very shamefully, my answer nearly ritually is—and has to be—‘I have no idea; I do not know.’ But I am French, and my legal background is French, even though I do not practice French law.

Well, the lengths of cases—I think it deserves another discussion. My view is that the Court cannot be reformed, really, and it does not matter: it has no more cases.

CR: We will move to our final debating point, which is merging relations with the client and duty to the Court. Alain, I think you were going to lead on this. We will try and keep the comments brief to allow a final few minutes for questions.

AP: Thank you. Well, these are both interesting questions. I think they are

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Traditions in International Advocacy

bound, so it does not really matter to merge them.

Relations with the client: if there are differences, it is much more a problem of personality of counsel than a real difference in culture. If I can summarise what I would have developed if we had more time, I would say, brutally, that usually I see my British or American counterparts as being more keen to please the client than we are, and certainly than I am. Just to give you an example, in a case, not very long ago—and I can tell you which one although the adversary is sitting in front of me—in Indonesia/Malaysia, we lost, rightly, by fifteen votes against one. The one who voted for us—I was for Indonesia, James was ‘Malaysian’—was the Judge ad hoc appointed by Indonesia. In that case, my British and American colleagues kept on explaining to the client, ‘oh, we have fifty percent at least’. It was wrong—it was a lost case, we knew that, and I was really shocked. You could say, ‘well, it was specific to these counsel’; honestly, I am not sure. I have seen quite regularly that my Anglo-Saxon counterparts are rather more accommodating to the client. In the same way, they also have more than we have—and certainly than I have—an inclination for procedural incidents. I think that making procedural fuss is not good strategy. But I have no doubt that my American and British colleagues, particularly the Americans, are more inclined to create these kind of incidents, and I must admit that, usually, it pleases the clients. The client loves to show its muscle on this ground. I disapprove.

I will end this part on the relations with the client by reading something that was written by James, so he will not have his word on this topic, because I do it for him [laughter]. I quote: ‘evidently it is the function of the advocate to comply with the instructions of the government or other party and to present the case in as forceful and vigorous a way as possible. At the same time it is not the function of the advocate simply to say things for money, nor unquestioningly to present the client’s case in the way the client would have it without regard to any of the actual difficulties. Rather, it is the function of the advocate to seek to persuade the tribunal in such a way as to preserve the essentials of the client’s case. This is a delicate matter requiring trust between the client, through the agent, and the advocate. In search for a proper outcome the advocate is not merely a mouthpiece, but rather an active intermediary.’ I could not have said it better. Clearly, James and I have no difference on this. I nevertheless have a perception that Anglo-Americans are a bit too accommodating to their clients.

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and they should not be.

As for the duty to the court, I think the question is very different whether you speak of the ICJ or of an arbitral tribunal, in particularly in investment cases. For the Court, I think it works well, I have never seen any excesses. Therefore, I would rather mind to have a very detailed deontological code; it is superfluous. For ICSID tribunals I have the other view: I think we must try to have some deontological guidance and, if possible, very tough ones. My second remark—and it will be the last one—is that I have always heard my Anglo-American colleagues saying, ‘we must help the Court, we must be helpful to the judges.’ Come on, we must be helpful to the client! We must be honest to the Court—I have never lied before the Court and I hope I will never do. We must be clear in not letting the client produce some fraudulent documents. I have been told that in one case—in which I was not appearing—something like that happened. But ‘never lie’ is the only limit; besides this, the issue is to make the best case for the client. The outcome will be a solution adopted after the adversarial process and the judges can deliberate between themselves. So, I rather smile at my colleagues who claim that we must be helpful to the Court. Once again, I think we must be helpful to the client, and being helpful to the client is to be helpful to the Court.

**JC:** You may wonder why states fight cases that they are bound to lose. I had the same experience with the *Libya/Chad* case, in which Alain was on the other side; we knew in advance that we would lose that case.\(^\text{27}\) The point of settlement of that case was the reference to the Court, it was not the decision of the Court. In fact, with a lot of work the firm that is now Eversheds (it had a different name then) put together a quite decent argument, which you will see in the dissenting opinion,\(^\text{28}\) and it stood up for about 15 minutes, and it then laid down and died. The client was left in no doubt about that. We have recently seen an example of a case, where again I was against Alain, where I told the client—I will not mention the name of the party—again and again, ‘you will not get the line you want. You may get something that is acceptable, but you will not get the line you want.’ They did not listen. I went to the capital concerned and gave a series of seminars to professors and others who had never read the Court’s jurisdictional judgment, did not understand the case, and had the fixed idea that this line they would never get was the line they were going to get. If the client does not want to listen there is not much you can do; you argue the case as well as you can, including arguing in the alternative, in the second round, which is what we did. There comes a

\(^{27}\) See *Territorial Dispute (Libyan Arab Jamahiriya/Chad)*, ICJ Reports 1994, p 6.

\(^{28}\) Ibid, Dissenting Opinion Judge Sette-Camara, p 93.
point where you simply have to do your best and then comply with instructions. And instructions may turn out to be right or wrong; in another case I protested against bringing in what seemed to be extraneous matters. I was told ‘no, we must put them in’. It turned out that the client was right and I was wrong, because the extraneous matters were no longer extraneous to the case.

Duty to the court: I have nothing to add to what Alain said. The forgery case, Qatar v Bahrain case, backfired very seriously.\(^{29}\) I think one of the counsel, not the senior counsel, was partly responsible. So you should never use forged documents—that almost goes without saying. You do have a duty of honesty; beyond that your duty is to the client.

It is important, in presenting a case, to leave the Court with an alternative. I think in retrospect that was a mistake I made in the Gabčíkovo-Nagymaros case.\(^{30}\) We knew we were going to lose aspects of that case and we could have lost it all; it could have been a 100% win for Slovakia, which it was not. Hungary could not have won it without giving the Court an alternative to the status quo, and I think we did not do that. I think the strategy of pleadings is very important, to give the court somewhere to go if you are to get the result that is tolerable to the client. You need to be honest with the client about the chances—I agree entirely with what Alain said about Indonesia/Malaysia, where I was on the Malaysian side. We knew we were going to win that case, but we won it because of Eli Lauterpacht, who made the argument that succeeded; I made the argument that failed.

**CR:** That leaves us about three minutes for a final question or two.

**Simon O’Connor:** I would just like your thoughts on the very interesting question that came up in an early panel, about the client of government lawyers. I would be interested in your thoughts who the clients of international lawyers are. I think there is a difference between international advocates and international lawyers, and there is also a question about your clients and the interests you represent.

**Geraldo Vidigal:** I would like to know how clients react to and whether they are satisfied, to some extent, with dissenting opinions that favour their case when they lose, and whether it matters if it is delivered by the ad hoc judge, and if it is a stronger dissenting opinion or not.

**JC:** The question who the client is is very interesting and becomes a problem in certain cases. Not so much at the International Court, because in the

\(^{29}\) See *Maritime Delimitation and Territorial Questions between Qatar and Bahrain (Qatar v Bahrain)*, ICJ Reports 2001, p 40.

\(^{30}\) See *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, ICJ Reports 1997, p 7.
International Court there will have been a decision of one party—and probably both—to take the case to that level. That tends to aggregate the bureaucracy behind you. It may also shift the locus of power in the bureaucracy from the internal ministry associated with the actual dispute to the ministry of foreign affairs, which can be quite helpful in dispute settlement. The problem is where you have a third interest in the case, which is not the interest of either of the governments. That was true, for example, in the Volga Prompt Release case between Australia and Russia, because there it was the interest of the ship owner, who was neither Australian nor Russian, and was paying for the case—in fact the Russians did not really want the case and that did not help.\textsuperscript{31} I think maritime cases are notorious for bringing in third parties. More recently, in Argentina \textit{v} Ghana case, there was an interest of a third party, the judgment creditor.\textsuperscript{32} It was not represented before the Court, but it was present in the Court. In interstate arbitration, we do not really have mechanisms for presentation of third views. That can be a real problem.

In response to the question about dissents, I have never known a government that lost and that was happy about the dissent [laughter]. There is a case on annulment at ICSID at present, \textit{Deutsche Bank v Sri Lanka}.\textsuperscript{33} There is a very strong dissenting opinion. That is enormously helpful in terms of annulment because you read the dissent—I speak for counsel of the losing party—and you think ‘how on earth did the majority get where they got?’ Even in the International Court, where there is no appeal, it is some solace. For example, a number of judges would have got rid of the 1977 Treaty in the Gabčíkovo-Nagymaros case. I got some solace from that, though I do not think Hungary got any.

\textbf{AP:} Well, on the first question, it is true that you have the impression when you look at the case law of the International Court that it is only about sovereign interests. It is interesting that this is not always the case and that behind the scenes you sometimes have very powerful interests. In two recent cases—I will not tell you which ones—I was surprised to see that I was not paid by the states; I was paid by private entities. It is well known that \textit{Barcelona Traction} was not a case between Belgium and Spain, but between the shareholders of the Barcelona and

\textsuperscript{31} The ‘Volga’ Case (Russian Federation \textit{v} Australia) Prompt Release, ITLOS (Judgment, 23 December 2002).

\textsuperscript{32} The ‘ARA Libertad’ Case (Argentina \textit{v} Ghana), ITLOS (Order on Provisional Measures, 15 December 2002).

\textsuperscript{33} See Deutsche Bank AG \textit{v} Democratic Socialist Republic of Sri Lanka, ICSID Case No ARB/09/2 (Award, 31 October 2012).
Spain. I agree with James also on that.

On the dissenting opinions, certainly for French or more generally continental lawyers, it is strange. When I started as a student or a young professor, I was absolutely against it. I thought it threatened the authority of the Court. Now I have changed my mind. I think it is very useful, and it can shine a light on some very important points. However, there must be no exaggeration; one of the actual judges apparently has decided that he will append to any decision of the Court (whether a judgment or any kind of order) an opinion at least twice as long as the Court’s decision itself. I think that is rather outrageous. But I believe dissents can be helpful. I think the same goes for judges ad hoc: you can criticise the principle, but I do not. I think it is more comfortable for states to have the possibility of having a judge ad hoc. For judges ad hoc it is terribly important to be able to express themselves and to decide whether they would dissent or deliver only an individual opinion. My recommendation to future judges ad hoc is that, even if his or her appointing side loses, it is better to append an individual opinion than a dissenting opinion. A dissenting opinion is a clear signal that your appointing party has lost.

BLIND IN THEIR OWN CAUSE: THE MILITARY COURTS IN THE WEST BANK

Yaël Ronen*

Abstract
The military courts operating in the West Bank do not ordinarily regard the criminal system they enforce as governed by the law of occupation. Their reasoning for this view reveals that they perceive themselves as quasi-domestic courts. This approach removes the guarantee of basic protection for protected persons under the law of occupation, leaving suspects and defendants hostage to potential vagaries of the military commander in enacting the security legislation. The courts’ responses to this shortfall in protection are principally that in practice, many of the international standards have been incorporated into the law applied in the military courts by duplication of Israeli law, and that Israel’s High Court of Justice offers means of ensuring compliance of the criminal process with international law. Both responses further reflect the courts’ abdication of their role in guaranteeing legal protection under the law of occupation.

Keywords
Military courts, law of occupation, monism, dualism, Israel

1 Introduction
Immediately upon the assumption of governmental authority in the West Bank in 1967, Israel established military courts in the West Bank and the Gaza Strip. On 7 June the military commander of the Israeli Defence Forces in the West Bank (the ‘military commander’) issued Proclamation No 3, to which was annexed the Security Provisions Order (West Bank region) 1967.1 The Security Provisions Order (SPO) came into force immediately. It authorized the military commander to establish military courts, stipulated their rules of procedure, and set out a list of

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Compilation of Proclamations, Orders and Appointments of the IDF Command in the West Bank Area No I(1967), 5.

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offences punishable by these courts. On the same day, the military commander ordered the establishment of military courts. Over the past 46 years these courts have issued hundreds of thousands of judgments and other decisions.

Prior to the Israeli occupation, the most recent experience in maintaining a military court system by an occupant was in Germany, in the aftermath of the Second World War. The Fourth Geneva Convention (GC IV) had not yet been adopted; the only controlling norms were the Hague Regulations, which do not regulate the criminal process. Nor did pertinent international human rights law exist at the time. Instead, the US military government for Germany issued a directive on the fundamental principles to be adhered to in military government courts, according to which it was `desired that Military Government Court proceedings in all essential points conform to the traditional procedures

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2 Security Provisions Order (Judea and Samaria) 1967, Art 5, section B and section C respectively.
5 Geneva Convention Relative to the Protection of Civilian Persons in Time of War, 12 August 1949, 75 UNTS 287 (GC IV).
6 Convention (IV) Respecting the Laws and Customs of War on Land and its Annex: Regulation concerning the Laws and Customs of War on Land, 18 October 1907, 187 CTS 227.
of American law ... [and] respect the guaranties of personal rights provided by German Constitutions.\(^7\) As a result, the Israeli military courts have been the first to discuss the applicability of international law to a military court system and their jurisprudence is unprecedented.

This article explores the applicability and enforcement of the international law of occupation with respect to the criminal process in the military courts. It demonstrates that the courts address the matter from the perspective of courts acting within a domestic legal order, despite the fact that they draw their authority from international law. This gap undermines the application of international law and deprives defendants of the legal protection of the law of occupation.

Section 2 discusses different approaches to the relationship between international and domestic law and explains how these play out under occupation. Section 3 provides a brief description of the military court system and examines the practice of the courts. Section 4 describes the military courts’ perception of the legal order within which they operate and their consequent refusal to apply the law of occupation. Section 5 examines the responses to the critique that this refusal has elicited and demonstrates that these responses are themselves predicated on the self-perception of the courts as domestic ones. This section also demonstrates the ensuing shortfall in protection. The final section of this paper draws conclusions on the unique character of Israeli military courts.

2 The occupation legal order and the international legal order

The relationship between a domestic legal order and the international one is often described through the distinction between monism and dualism. In brief, monism suggests that national and international law are part of a single system of law, in which international rules trump national ones. Dualism, on the other hand, considers national and international law as different legal systems; it maintains that international rules can only enter the domestic legal system by being transformed into domestic rules.\(^8\) These are explanatory theories that are of little relevance from an international legal perspective, where international law


holds primacy over domestic law.\textsuperscript{9} Adherence to a monist theory supports this primacy; yet even a dualist theory does not invalidate it, since failure to observe an international rule incurs international responsibility. International law does not prescribe one theory or the other. All things being equal,\textsuperscript{10} however, a monist system better facilitates compliance with international law, because international law holds normative superiority within it. Under a dualist approach, on the other hand, compliance may depend on \textit{ex post facto} international enforcement in case of violation of an international rule.

In democratic states, dualism is justified as a preservation of the separation of powers: while the executive negotiates treaties, the legislature has the last word on their application within the domestic order. This justification is inapplicable to a regime of occupation, where both executive and legislative powers are vested in the military commander. Moreover, unlike a democratic state’s constituency, which may forfeit the protection of international law in the first instance and delegate the power to enforce it to external institutions, the population of an occupied territory cannot be deemed to have voluntarily made such a choice. Such considerations invite the conclusion that monism should prevail \textit{de lege ferenda}. \textit{De lege lata}, however, international law is silent on how it should be integrated into a regime of occupation.

Israel has adopted a monist approach insofar as concerns its actions as an occupant. The preambles of Proclamations Nos 2 and 3 state that they are promulgated ‘in order to ensure proper governance and to maintain safety and public order’, evoking Hague Regulations Article 43.\textsuperscript{11} Proclamation No 2, stating the law applicable in the territory, preserves existing law (subject to military enactments) as required by the law of occupation.\textsuperscript{12} Most importantly, Article 35 of the SPO originally provided that

\begin{quote}
a military court and its administration shall follow the provisions of the Geneva Convention of 12 August 1949 relating to the Protection
\end{quote}

\textsuperscript{9} Eg Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331, Art 27. This is not strictly a monist approach, since it does not necessarily imply that the source of domestic law is international law but merely that the latter takes precedence over the former.

\textsuperscript{10} They rarely are. It would be incorrect to assume that in practice states leaning towards monism comply with international law more than those which are more dualist.

\textsuperscript{11} Proclamation No 2 regarding Governance and Law Arrangements and Proclamation No 3 regarding Entry into Force of the Provisions of Security Order, 7 June 1967, Compilation of Proclamations, Orders and Appointments of the IDF Command in the West Bank Area No 1 (11 August 1967) 3-5.

\textsuperscript{12} Ibid, s 2.
of Civilians in War insofar as concerns judicial proceedings, and where this Order conflicts with the said Convention, the provisions of the Convention shall prevail.

Article 43 of the Hague Regulations has been cited by military courts at an early stage as enjoining the military commander to ensure public order and safety in occupied territory including by the establishment of military courts. The same approach, namely that the military government derives its legal authority directly from international law and specifically the law of occupation, was declared by the Israeli Supreme Court sitting as High Court of Justice (HCJ). At the same time, Israel has from an early stage denied the de jure applicability of GC IV on the ground that the preceding regimes in the West Bank (including East Jerusalem) and the Gaza Strip had not been sovereign ones, although it undertook to comply with the humanitarian provisions of the Convention.

GC IV Article 64 allows the occupant to subject the population of the occupied territory to penal provisions which are essential for enabling the occupant to fulfil its obligations under the Convention, to maintain the orderly government of the territory, and to ensure the security of the occupant, its members and property. This can be done through establishment of military courts, for which GC IV sets certain parameters. The Convention was drafted at a time when international human rights law was in its infancy, and the applicability of this body of law extraterritorially and to enemy nationals was unthinkable. Yet GC IV reflects the understanding that enemy nationals are particularly vulnerable to mistreatment, and are thus in need of special protection, including in military courts which are an organ of the military government. The Convention therefore provides fundamental guarantees of fair trial and physical integrity.

Article 66 stipulates that military courts should be properly constituted and non political, and must sit in the occupied territory. Articles 67-77 provide minimum guarantees of fair trial and treatment of detainees and defendants. The occupant’s

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14 Abu Itta and Others v Commander of IDF Forces in the West Bank and Others, HCJ 69/81 PD 37(2) 197, 228, 301 (1983); Jamait Iscan v IDF Commander in Judea and Samaria, (1983) HCJ 393/82 PD 37(4) 785, para 23.
16 It has been contested whether civilians may serve as judges in military courts; G von Glahn, The Occupation of Enemy Territory: A Commentary on the Law and Practice of Belligerent Occupation (1957) II6.
authority to ensure orderly government is further constrained by international human rights law insofar as it is applicable in occupied territory. Military courts are therefore both empowered by international law and function as its guardians.

3 The military courts: background

The Israeli military courts operate under the terms of the SPO, amended over a hundred times since 1967, and complemented through numerous additional orders on specific issues. Like all military enactments, the SPO was drafted by the Military Advocate General (MAG) and was put into force by the military commander, who is the highest legislative and executive instance within the military government.

Two courts of first instance operate in the West Bank, as well as a Military Court of Appeal. In 2009 a military court of first instance for youth was established with jurisdiction over defendants under the age of sixteen, the rulings of which may be appealed in the Military Court of Appeal. The courts sit in single judge or three judge formations. Since 2003 all judges are trained lawyers. At the time of writing there are eighteen military career judges serving in the courts of first instance, and four military career judges in the Court of Appeal. In addition there are reserve service judges in both instances.

The jurisdiction *ratione materiae* of the courts is stipulated in the SPO as encompassing any offence defined by enactments of the military commander (referred to as the ‘security legislation’) and any offence under Jordanian law. Broadly speaking, the security legislation establishes offences of two categories: acts which jeopardize military interests or the safety of the territory, ordinarily

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18 The military commander originally established five courts for the West Bank and Jerusalem area; Order regarding Establishment of Military courts, above n 3. The number of first instance courts has varied through the years in light of changing circumstances.


21 2009 SPO, Arts 16, 17, 19.

referred to as ‘security offences’ (encompassing a range of conducts, from use of firearms to unauthorized exit from the West Bank into Israel); and acts which jeopardize public order under the meaning of Hague Regulations Article 43 (such as violations of licensing provisions and traffic regulations).  

Jordanian law is applied in the case of ordinary crimes. The military courts also exercise judicial review over administrative orders issued by the military commander against individuals relating to administrative detention, restriction, surveillance and assigned residence, and deportation.

The SPO makes no qualifications as to the jurisdiction of the military court _ratione personae._ Historically, military courts were intended to try the local population of the occupied territory, but the military courts in the West Bank and Gaza Strip have interpreted the SPO as also empowering them to try Israeli nationals and residents when those are charged with offences committed in the occupied territories. Nonetheless, since the early 1980s the Attorney-General’s policy has been to prosecute Israeli nationals and residents, including those actually residing in the occupied territory, before Israeli courts. Review of all administrative orders by the military commander remains in the hands of the military courts, even when issued against Israelis. Under the Interim Agreement concluded by Israel and the PLO in 1995, offences committed by Palestinians in Area A and B were largely excluded from the jurisdiction of the military courts. Nevertheless, the SPO preserves the military courts’ jurisdiction over all acts which harm or are intended to harm the security of the West Bank, irrespective

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23 Hadar, above n 3, 187. Traffic violations constitute some 40% of indictments.

24 Ordinary crimes are estimated at 7-8% of indictments. For detailed analysis of the security legislation as of 1975 see M Drori, _The Legislation in the Area of Judea and Samaria_ (1975).

25 2009 SPO, Arts 275, 278

26 Ibid, Art 296(c), sitting as an appeals commission.

27 Ibid, Art 297(e), sitting as an appeals commission.

28 Ibid, Arts 307-310, sitting as the Commission to Examine Deportation Orders.

29 _Military Prosecutor v Abu Janem_, above n 13, 135-136

30 IDF spokesperson, cited in Yesh Din, above n 4, 59. The jurisdiction of Israeli courts is provided for in Emergency Regulations (Judea and Samaria and the Gaza Strip—Jurisdiction in Offences and Legal Assistance) 1967, s 2(a), as extended by the Law for the Extension of Validity of the Emergency Regulations (Judea and the Samaria—Jurisdiction in Offences and Legal Assistance) 2012.

31 Israeli-Palestinian Interim Agreement on the West Bank and the Gaza Strip, 28 September 1995, 36 ILM 557, Annex IV Article I. In Area A, the Palestinians exercise powers and responsibilities for internal security and public order as well as for civil affairs; ibid Annex I. In area B they exercise powers and responsibilities for public order and civil affairs; ibid Annex III.
of where precisely within the West Bank they were committed.\textsuperscript{32}

Under the security legislation, the Military Court of Appeal is the highest judicial instance. However, under Israeli jurisprudence, all governmental organs, including the military government in the occupied territory, are subject to Israeli administrative law.\textsuperscript{33} In accordance with an instruction of the Attorney-General, issued shortly after the occupation of the West Bank and Gaza Strip, Palestinians resident in those areas may appeal to the Israeli Supreme Court sitting as High Court of Justice. On this basis tens of thousands of Palestinians have petitioned the HCJ against military authorities’ actions and decisions,\textsuperscript{34} including by the military courts.

The SPO stipulates the fundamental substantive criminal provisions, procedure and laws of evidence applicable in the military courts. It also provides for residual sources of law: in procedural matters not regulated by the SPO, first instance courts may adopt measures that appear to them ‘most suitable in order to do justice’,\textsuperscript{35} while the Military Court of Appeal follows the procedure of the Israeli Defence Force (IDF) courts martial.\textsuperscript{36} In matters of evidence the SPO provides that the courts should follow ‘binding rules in criminal matters in courts of the State of Israel’.\textsuperscript{37}

The legal instruments establishing the courts and regulating their operation do not mention international law explicitly. SPO Article 35, mentioned above, was replaced at the end of 1967 by a provision concerning the calculation of a period of detention within a convicted person’s sentence.\textsuperscript{38} This provision had nothing to do with the original content of Article 35, nor, for that matter, with the surrounding articles, but it did obfuscate the obliteration of any reference to GC IV. At around the same time as Article 35 was replaced, various other provisions of the SPO were amended, apparently in order to comply with substantive provisions of GC IV.\textsuperscript{39}

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\textsuperscript{32} 2009 SPO Art 7(d).
\textsuperscript{33} Jamait Iscan v IDF Commander in Judea and Samaria, (1983) HCJ 393/82 PD 37(4) 785, para 33.
\textsuperscript{34} Kretzmer, The Occupation of Justice: The Supreme Court of Israel and the Occupied Territories (2002) 20.
\textsuperscript{35} 2009 SPO, Art 8, originally SPO 1967 Art 11.
\textsuperscript{36} 2009 SPO, Art 153.
\textsuperscript{37} Ibid, Art 86.
\textsuperscript{38} Security Provisions Order (Amendment No 9) (Judea and Samaria) (Order No 144) 22 October 1967, Compilation of Proclamations, Orders and Appointments No 8, 303; for the Gaza Strip and Northern Sinai, 11 October; central Sinai, 31 December; Shlomo region, 29 November; Golan Heights, 3 October.
\textsuperscript{39} By January 1968 the SPO itself had been amended ten times, and numerous other orders have
4 The military courts’ self-perception as operating within a domestic legal order

The law of occupation in general, and GC IV specifically, is rarely invoked before the military courts as a standard by which to review the validity of military orders.\textsuperscript{40} The few issues that have come up in this context include the competence of the military commander to establish the military courts; the military courts’ jurisdiction over Israeli nationals; their jurisdiction with respect to offences defined under Jordanian law and to offences committed extraterritorially; the absence of a right of appeal; and the requirement to publish penal orders.

In only a handful of cases, early on in the occupation, have military courts acknowledged the law of occupation as the source of their authority.\textsuperscript{41} The prevalent view among the military courts is that their authority derives only from the SPO and is governed exclusively by the security legislation.\textsuperscript{42} The following

\textsuperscript{40} The present discussion is limited to cases where the courts were willing to concede the applicability of GC IV to the territories as a matter of international law, either through an interpretation in this light of Article 2 or on the basis of Israel’s unilateral commitment to comply with the humanitarian provisions of the Convention, eg Military Prosecutor v Bakkir (1969) 48 ILR 478, para 14(d).

\textsuperscript{41} Eg Military Prosecutor v Al Nasser Nablus 348/69, Selected Judgments of the Military Courts vol 1, 272, 277 (1969); Military Prosecutor v Bakhis and Others, Ramallah 144/68, Selected Judgments of the Military Courts vol 1, 371, 374 (1968); Abu Janem, above n 13, 140; see also Military Prosecutor v Udda, Samaria 5708/01+5732/01, Selected Judgments of the Military Courts vol 13, 269, 277 (2002); Schwartz v IDF Commander, Appeals Commission (Judea and Samaria) 5/06 (31 October 2006, available on Nevo Database) 10; Drori, above n 24, 161.

\textsuperscript{42} Eg Military Prosecutor v Hamza, Hebron 185/67, Selected Judgments of the Military Courts vol 1, 497, 500 (1968); Military Prosecutor v Haroufa, Bethlehem 48/69 Selected Judgments of the Military Courts vol 1, 565, 567 (1970); Military Prosecutor v Zohair, Bethlehem 87/68, Selected Judgments of the Military Courts vol 1, para 9 (1968); Military Prosecutor v Al Nashash and Another, Ramallah 2015/92, Selected Judgments of the Military Courts vol 7, 365, 369 (undated); Radwan v Military Prosecutor and Military Prosecutor v Radwan, Single Judge Appeals Gaza 28/98 and 29/98, Selected Judgments of the Military Courts vol 11, 1, 7, 8 (1998); Military Prosecution v Naji (Abu Hamid), Beit El (available in Nevo Database) (23 September 2003) 2; Military Prosecutor v Salem,
sections address the manner in which this view informs the military courts’ stance regarding the applicability of international law, in particular GC IV, and their powers of judicial review of the security legislation in light of international law.

4.1 Applicability of the law of occupation

In a few cases the military courts acknowledged the direct applicability of international law. However, the military courts overwhelmingly adopt a dualist view, under which there are two distinct legal orders. One order is the internal law of the occupation regime, where the security legislation is the highest norm. The other order is the international legal one, where the security legislation is subordinate to customary and applicable conventional law. The military commander is accountable under this order only to his superiors or to international players—states or organisations. On the basis of this typology, the military courts have consistently applied dualist doctrines of reception, which condition the applicability of international law on it having been received in some form into the domestic orders. The military courts apply the doctrines under Israeli law: conventional law requires transformation through legislation, while customary law is automatically incorporated into the law of the land, but defers to conflicting explicit primary legislation, which in the occupied territory means the security legislation.

In line with these doctrines, in a few cases the courts found that the Hague Regulations were invocable because they constituted customary international law. In some cases provisions of GC IV regarded as conventional law were found applicable on the ground that they had actually been transformed into the SPO or into the General Staff Orders. The replacement of SPO Article 35 was


Hamza, above n 42, 500.

Salem, above n 42, 9.


Schwartz, above n 41, 14.

Abu Janem, above n 13, 133-134; Schoenbohm, above n 46, 355. Staff orders are not invocable in
interpreted by the military courts as an early transformation of GC IV, which the military commander later retracted. In most cases, however, the military courts held that since GC IV had not been transformed into the law of the territory, it was not invocable in the military courts.

Furthermore, even when the courts were willing to consider, arguendo, that the law of occupation was applicable, they held that in case of conflict with security legislation, the latter prevails. An example is Abu Alaان (2010), where a question arose as to the interpretation of an order allowing forfeiture of property in the course of a criminal legal process. While the majority interpreted the order in a manner which it held to be in line with international law, the dissenting judge opined that the only possible interpretation of the order in light of its context was a different one, and one which he regarded as possibly contravening the law of occupation. He did not explore the matter further, since he held that the express military order enjoyed priority even if it violated international law.

An exceptional case in this respect is Udda (2002), where the question arose whether the military commander was competent under Article 66 of GC IV to establish the military courts. The court stated that international law and the laws of armed conflict were 'super-norms' from which the security legislation derives its authority. Moreover, the court held that in case of direct conflict between the security legislation and customary international law (which it held Article 66 to be), the latter prevails.

Mostly, however, the military courts have found that no conflict existed between GC IV or the Hague Regulations and specific provisions of the security legislation. This is true regardless of whether they considered that GC IV had no applicability and only addressed its status in obiter dicta, where the status

49 Military Prosecutor v Al Takruri, Hebron 230/70, Selected Judgments of the Military Courts vol 2, 137, 148 (1971). The court nonetheless held that GC IV might have been transformed into the security legislation by other means; Salem, above n 42, 10.
50 Eg Hawaja v Military Prosecutor, Ramallah MiscReq212/92, Selected Judgments of the Military Courts vol 7, 350, 355 (1992); Zohair, above 42, para 9; Schoenbohm, above n 46, 354-355; Military Prosecutor v Atoun, Judea 3831/06 (decision) (available on Nevo database) (12 September 2006).
51 Salem, above n 42, 8-9.
52 Military Prosecutor v Abu Alaان, Military Court of Appeals (Judea and Samaria) 3443/09 (available on Nevo database), President Mishnayot, 19 (2010).
53 Ibid, Vice-President Benichou 32.
54 Udda, above n 41, 275, 277.
55 Haroufa, above n 42, 567: security legislation amending local law to penalize bribery was in line with GC IV Art 64; Zohair, above n 42, para 12, 20: publication of a military order in Arabic through village leaders and posters in the public domain is in compliance with GC IV Art 65, as
of GC IV was not even mentioned; or where the superiority of GC IV was acknowledged. An exception was Al Takruri (1971), where the court found that the order granting the military courts jurisdiction over offences under local law (Jordanian law) was prima facie contrary to the principles of Article 64 of GC IV. The court noted that, following the annulment of Article 35 of the SPO, GC IV was no longer formally binding upon it, but that military courts had in the three years since the annulment of Article 35 never relied on the annulment. However, the court avoided deciding which norm takes priority, and instead referred the matter to a bench of three judges. The latter eventually acquitted the defendant on the ground that his specific conduct did not constitute an offence under Jordanian law, rendering the conflict of norms question moot.

Regardless of the classification of specific norms as customary or as conventional law, and regardless of the findings on whether particular military orders

56 Military Prosecutor v Jaber Hebron 57/69 Selected Judgments of the Military Courts vol 1, 515 (1969): GC IV allows imposition of capital punishment; Military Prosecutor v Ya'i and Another Gaza 1410/74, Selected Judgments of the Military Courts vol 4, 25, 27 (1974): compatibility with GC IV Article 73 where there is no right of appeal on decisions of the military courts; Ajuri v Military Commander, Judea and Samaria Appeals Commission 3/02, Selected Cases of the Military Courts in the West Bank 14 (Part I) 406 (2002), Appeals Commission set up under Art 85(c) of the 1970 SPO (Order 378); Military Prosecutor v Al Khatib, Ramallah 196/67, Selected Judgments of the Military Courts vol 1, 363, 364-365 (undated); Al Haj and Others v Military Prosecutor, Gaza MiscReq 452/93, Selected Judgments of the Military Courts vol 7, 539 para 10(c) (1993); Schoenbohm, above n 46, 354-56.

57 Bakkir, above n 40, para 14: the military commander cannot grant the military courts extraterritorial jurisdiction without an express provision; Wildman, above n 43, para 17: the provisions invoked in the charge sheet do not allow extraterritorial jurisdiction, which might be in violation of general principles of international law, embodies in GC IV Art 67; Al Nasser, above n 41: the military court is not bound by Jordanian criminal procedural law; Udda, above n 41, 276-77: validity of the establishment of the military courts.

58 Order regarding Jurisdiction in Criminal offences (No 30) 1967, later incorporated in 2009 SPO, Article 10(a).

59 The court noted that some GC IV provisions may have binding effect through its incorporation in staff orders, but refused to rely on this and noted that no court had previously based a ruling on the applicability of GC IV solely on this incorporation; Al Takruri, above n 49, 151-153.

60 Ibid, 155.

conflicted with these norms, all these analyses are misconceived in the very resort to doctrines of reception. They draw on, and are clearly influenced by, the consistent application of the doctrines of reception by the HCJ with respect to the applicability of the law of occupation in petitions submitted to it. However, the HCJ and the military courts operate in different types of legal orders. The HCJ derives its authority from Israeli constitutional law and conducts its review of the military government in the occupied territories in light of Israeli law. Accordingly, it must reconcile differences between Israeli law and the international legal order before international law is enforceable. In contrast, the military courts operate not within a domestic legal order but directly within the international one. The reference to reception by the military courts is therefore unwarranted. As exceptionally noted by one panel, the military commander cannot cut off the branch it sits on.  

4.2 Hierarchical status of the law of occupation vis-à-vis the security legislation

The power of military courts to review the military commander’s legislative orders is implied in GC IV Article 67, which stipulates that ‘[t]he courts shall apply only those provisions of law which were applicable prior to the offence, and which are in accordance with general principles of law…’. This provision requires the military courts to apply certain principles irrespective of any contrary security legislation. Military courts have on rare occasions mentioned this provision, but have not regarded it as an independent source for their authority. For example, in Zohair (1968) the court held that a defendant could not challenge the validity of security legislation but held that the court itself had an inherent power to refuse to implement an order of the military commander if the order patently violated the ‘general principles’ of international law mentioned in Article 67.  

While the court’s conclusion on its power of review was correct, it is nothing short of incredible that the court deduced the relevance of Article 67 by analogy from the applicability—itsy by analogy!—of Article 67 to domestic courts of the
occupied territory (i.e. Jordanian or Palestinian courts), even though Article 67 applies directly to military courts of the occupant.66

Ostensibly, if the courts hold that international law does not constitute part of the legal order of the occupation, the issue of its hierarchical status vis-à-vis the security legislation does not arise at all. Indeed, military courts have for the most part held that they have no power to hear claims against the validity of the security legislation, except where the SPO itself expressly provides for such power. This recalls the position held by the Israeli HCJ prior to the adoption of the constitutional Basic Laws, namely that it could not review primary legislation. It is indeed no coincidence that whatever willingness the military courts have shown towards reviewing security legislation began in the mid 1990s, following the constitutionalisation of Israeli law. Without the HCJ ruling that a court may declare a law which was incompatible with 1992 Basic Law: Human Dignity and Freedom unconstitutional and invalid because of unconstitutionality,67 it is unlikely that the military courts would have made even the small advances that they have.68

Yet there is still strong opposition among the military courts to the review of the security legislation in light of international law. An extremely forceful example of the security legislation’s immunity from review is Haj Muhammad (2008). The defendant was charged with two offences, one of which was manslaughter of a person whose identity was unknown. The crime took place in an area designated under the Interim Agreement as Area A, where, according to the Interim Agreement, jurisdiction over criminal matters lies with the Palestinian Authority. However, as noted earlier, the SPO preserves the jurisdiction of the military courts over offences committed in Area A which harm or are intended to harm the security of the West Bank. The military courts have interpreted this provision as extending to offences against Israelis.

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66 According to scholarly literature, local courts of the occupied territory may refuse to apply law of the military government that is patently beyond its power under international law; see M Greenspan, The Modern Law of Land Warfare (1959) 246, cited in Zohair, above n 42, para 10. In practice, local courts do not take this liberty, out of concern for their self-preservation; see E Benvenisti, The International Law of Occupation (2nd ed 2012) 324. Nor would any occupant subject itself to rulings of local courts. In this last respect, military courts are significantly more powerful than local courts.


68 View expressed by military court judge; interview on file with author.
Another enactment issued by the military commander in June 2007 declares that the military courts have jurisdiction when the victim is unidentifiable, if there is ‘evidence that supports the possibility that he or she was Israeli’.\textsuperscript{69} This notice empowers the military court to convict a person even if not all elements of the crime had been proven beyond reasonable doubt. The Military Court of Appeal expressed its discomfort with this contravention of ‘fundamental criminal legal principles’, but held that since its own authority derives strictly from the SPO, it must abide by the military commander’s notice.\textsuperscript{70} Importantly, at issue was not merely the establishing of jurisdiction (the requisite facts for which, according to some views, need not be proven beyond reasonable doubt). Since the security legislation is only applicable in the military courts and not in local courts (where jurisdiction would otherwise lie), the choice of jurisdiction brings about the application of particular substantive law—the security legislation—and thus potential conviction for offences that are not necessarily punishable otherwise. If this is done on the basis of insufficiently proven factual criteria, it violates the principle \textit{nullum crimen sine lege}.\textsuperscript{71}

The resistance to judicial review in light of GC IV, like the resistance to the applicability of the law of occupation, evidences the military courts’ self-perception as part of a separate domestic legal order. The objections expressed by the courts to judicial review of primary legislation under GC IV are almost without exception grounded in domestic constitutional principles, especially those which apply in Israeli law. One objection is that unlike the Israeli parliament, which opted to limit its legislative power by adopting constitutional norms, the military commander had not chosen to limit his powers, or, if he had limited them by adopting SPO Article 35 in its original formulation, has since retracted the limitation.\textsuperscript{72} This reasoning mistakenly assumes that it is for the military commander to determine his own authority. Moreover, the analogy from Israeli law is incorrect, since the constitutional norms of Israeli law are regarded as having been adopted by parliament acting not in its legislative capacity but as the constitutional assembly of the state;\textsuperscript{73} this is partly

\begin{itemize}
\item \textsuperscript{69} Cited in \textit{Haj Muhammad}, above n 42, para 12.
\item \textsuperscript{70} Ibid, paras 6, 14.
\item \textsuperscript{71} The expansion of the court’s jurisdiction is not, in itself, a violation of general international law or GC IV but only of the Interim Agreement. Consequently, even without any proof of the victim’s identity, the law of occupation recognizes the court’s jurisdiction. However, if the security legislation is regarded as the exclusive source for the court’s jurisdiction, the law of occupation cannot be relied upon to expand that jurisdiction.
\item \textsuperscript{72} \textit{Salem}, above n 42, 7-8.
\item \textsuperscript{73} \textit{United Mizrahi Bank}, above n 67.
\end{itemize}
in acknowledgment that the authority of constitutional law cannot depend on the legislator’s consent to be bound by it. With respect to the legal order of the occupation there is no need for such legal construct, since the source of international law (the community of states) is truly distinct from the source of the security legislation (the military commander).

It has been argued that the military courts have no power of review because GC IV does not have the appearance of a constitution. To this one panel has responded that basic principles that do resemble a constitution can be found in customary international law. However, it is interesting to note the common expectation that normative superiority under international law take a form that is similar to that of domestic constitutional law. This expectation reflects, as do the other arguments, a mistaken, domestic, view of the normative framework.

Another reservation to review is evident in the debate whether the military courts are the appropriate venue for judicial review (if such is possible). In Salem (2003) the court held that even if the compatibility of the military commander’s orders with international law was reviewable, military courts are not necessarily the institutions empowered to conduct the constitutional review, as this power may be reserved for the HCJ. A different view was held in Udda (2002), namely that not only the HCJ but also the military courts may declare a piece of security legislation incompatible with international law. This controversy echoes a similar one that had arisen earlier within domestic Israeli law, on whether constitutional review was possible in all courts or only in the HCJ. The very engagement with the question of which court is empowered to conduct a constitutional review assumes that there are different types of courts. Within the military legal order, however, there is no such variety. The proposition that a ‘constitutional’ challenge in light of international law ought to be brought before the HCJ raises a separate question, discussed below, namely whether the military courts can legitimately exempt themselves from enforcing international law on the ground that the HCJ can do so. Moreover, it is noteworthy that the military courts have been open to the view that the military government is subject to review under Israeli constitutional law since the latter applies to all organs of the state of Israel, regardless of where they operate, while rejecting

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74 Salem, above n 42, 8.
75 Schwartz, above n 41, 13.
76 Salem, above n 42, 7.
77 Udda, above n 41, 275.
review under customary international law, even though the applicability of the customary law of occupation to all military organs operating in the West Bank is far better established under Israeli jurisprudence than the applicability of Israeli constitutional law, such as Basic Law: Human Dignity and Freedom.

5 Digging in their heels

The refusal of the military courts to apply the law of occupation, let alone employ it as a standard of review, deprives the residents of the occupied territory of the protection of international law. Such an approach is always problematic from an international human rights legal perspective; in the case of occupation it is particularly disturbing. In independent, democratic states, political conventions and custom protect against abuse of power by the government, as do legal mechanisms, both substantive (a bill of rights) and procedural (constitutional review). In occupied territory the military government is not representative of the population, and is not accountable to the population through the political process. It is precisely for this reason that Article 67 of GC IV places an obligation directly on the courts of the occupant, irrespective of the legislative and executive acts of the military commander. If the military courts refuse to apply international law and to accord it superiority over the security legislation, they renegade on their role as protectors of the population and leave it dependent on the benevolence of a hostile government.

However, according to the military courts, the non-enforceability of international law is offset in practice by two elements. One is that the military courts interpret the security legislation by reference to Israeli law, as a proxy for compliance with international human rights law. The other is that while international law is not enforceable in the military courts, it can be enforced in the HCJ. The present section argues that these responses are themselves premised on a misperception of the courts as domestic institutions of a democratic state and do not adequately address the shortfall in protection under international law.

80 Jamait Iscan, above n 33, para 23; Gaza Coast Regional Council and Others v Israeli Knesset, HCJ 1661/05, PD 59(4) 481, para 9 (2005).
81 These stances are implicit in many judgments, but have been stated explicitly in interviews with the author.
5.1 Israeli domestic law as proxy for compliance with international law

Israeli law plays a dominant role in the military courts. The security legislation was originally modelled on military law, but has gradually evolved with the conscious instigation and encouragement of the courts to emulate Israeli civilian criminal law. As noted above, with respect to procedure and evidence, this emulation is entrenched in the SPO itself. It has also expanded to substantive criminal law. The military courts have repeatedly emphasized that they are neither bound by Israeli criminal law nor do they apply it directly, but they draw on it in interpreting the security legislation. Israeli law must not be duplicated blindly but must be examined in light of the difference in circumstances prevailing in Israel and in the occupied territories; but emulation constitutes the default prescription, divergence from which must be clearly justified.

Although the reference to Israeli law is hardly surprising as a matter of convenience, courts have on more than one occasion justified it on normative grounds, namely that Israeli law is a best practice guide, both for administration of justice and as a mechanism to balance the maintenance of security against protection of defendants’ rights. Indeed, the civilianisation of the law has been hailed for replacing draconian arrangements appropriate for a state of exception with norms applicable in a state of normalcy.

The proposition that the qualified emulation of domestic law is an adequate alternative to direct application of international law raises a number of difficul-

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82 Military Prosecutor v. Abu Saleem, Military Court of Appeals (Judea and Samaria), Detention Appeal 157/00, Selected Judgments of the Military Courts vol 11, 217 (2000).
83 Military Prosecutor v Abu Sneina, Military Court of Appeals (Judea and Samaria) 353/03 (available on Nevo Database), Judge Friedman para 18 (4 April 2004).
84 Casey and Others v Military Prosecutor, Military Court of Appeals (Judea and Samaria) 22/95 (available in Nevo database) 8 (13 March 1995); Military Prosecutor v Bayumi, Ramallah 3027/83, Selected Judgments of the Military Courts vol 6(2), 463, para 11(d) (1983).
85 Abu Al Hija v Military Prosecutor, Military Court of Appeals (Judea and Samaria) 1643/05 (available in Nevo database) 43, with examples (7 September 2011). In addition, use of the same legal system as that which is applicable in Israel enables the maintenance of equality among defendants when criminal proceedings relating to certain events are conducted simultaneously in the military courts and in civilian courts within Israel: Abu Sneina, above n 83, Judge Gordon, 10. Dinstein has argued that emulation of the occupants’ national law is prima facie evidence of the genuineness of the occupant’s concern for the welfare of the population. Y Dinstein, The International Law of Belligerent Occupation (2009) 121. This litmus test has not been applied in the case law.
86 Benichou, above n 4, 325.
ties. First, in practice the military courts’ rejection of claims grounded in international law is not contingent on the applicability of law similar to that of Israel, but follows a principled stance on the inapplicability of international law. Second, Israeli law itself is not necessarily compliant with international human rights law.\(^{87}\) Admittedly, the military courts must not apply Israeli law blindly. However, given the general policy of emulation, it would be difficult for a military court to disapprove of a norm that is sanctioned under Israeli law, especially on the ground that it violates international law, since such a step would challenge not only substantive Israeli law but also the state’s juridical institutions. Third, and most importantly, the use of domestic standards of a democratic state as proxy for compliance with the law of occupation disregards the inherent factual and normative differences between the two regimes.

An example of a pertinent factual difference concerns familiarity with the law and its language: Article 71 of GC IV provides that accused persons ‘shall be promptly informed, in writing, in a language which they understand, of the particulars of the charges preferred against them’. The SPO is silent on translation, while Israeli procedural law only provides for translation of proceedings but not of documents.\(^{88}\) In the West Bank, only the security legislation is published in Arabic. The MAG has undertaken to translate all charge sheets into Arabic, but only following a petition to the HCJ.\(^{89}\) The paucity of regulation in domestic law is natural. The laws of an independent state on the right to counsel are premised on all professional participants in the legal process—judges, prosecutors and defence counsel—being equally versed in the law of the land. But under an occupation regime, there is an enormous disparity in legal expertise, between the court and prosecution on the one hand, and the defence on the other. Standards that are appropriate for ensuring equality of arms in a democratic state are therefore insufficient in occupied territory. Heavy reliance on the domestic law of the occupant risks exacerbating the already inherent inequality of arms stemming from the fact that the court is an organ of the same regime as the prosecution, and compromising the right to facilities

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\(^{89}\) Al Alarj v IDF Commander in the Area, HCJ 2775/11 (available in Nevo database) (3 February 2013).
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...to ensure effective defence. The right to a fair trial should be interpreted as placing a much heavier burden on the military legal system in comparison with the domestic system. This might include measures that are largely irrelevant in independent states, such as an obligation to translate legislation, case documents and jurisprudence to the language of the territory. Judges of the military courts dismiss the problem of translation as theoretical, on the ground that, in practice, most defence lawyers are Hebrew speakers and defendants routinely waive the right to have the charge sheets translated into Arabic. They fail to note that defendants waive this right because insisting on it would prolong the trial. Application of quasi-domestic law, regardless of how modern and progressive, without addressing these idiosyncratic problems, merely obfuscates flaws in the process.

A blatant expression of the failure to appreciate the inequality of arms is the explanation by the military court of the recourse to Israeli law, _inter alia_ on the ground that ‘from the personal perspective, all those involved, whether in legislation or in adjudication, have been raised and educated in the Israeli system. It is only natural that they turn to the sources of law familiar to them’. The challenge to the defendant is not even mentioned.

An example of a normative difference concerns periods of detention: the maximum period of detention before the end of trial under the SPO are longer than those under Israeli law. This is contrary to the international standard, since Article 71 of GC IV requires that defendants be brought to trial ‘as rapidly as possible’, a stricter standard than the ‘reasonable time’ standard under international human rights law, which governs domestic legislation. A domestic standard is tailored to a democratic society, where limitations on rights

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91 GC IV Arts 65, 71, 72.
92 Ben Natan, above n 90, 40–41.
93 G E Bisharat, ‘Courting justice? Legitimation in lawyering under Israeli occupation’ (1995) 20 _Law & Social Inquiry_ 349, 362; Ben Natan, above n 90, 8. It is also a result of Palestinian lawyers boycotting the Israeli system.
94 Abu Sneina, above n 83, Judge Gordon, 9–10.
95 2009 SPO (as amended) Art 44 (18 months and extensions of six months for adult defendants accused of security offences; for defendants charged with non-security offences one year and extensions of six months for adults and three months for minors; Criminal Procedure Law (Detention Powers) 5756–1996 (Israel) Arts 61–62 (nine months and extensions of 90 days).
are *prima facie* deemed to be in pursuit of legitimate aims and proportionate.\(^{97}\) Such considerations deriving from the social contract and the fundamental (although not blind) trust in the good faith of government do not prevail in occupied territory.\(^{98}\) Maximum periods of pre-trial detention must therefore be shorter than in the domestic order. Yet the matter does not stop there: at issue is also the discretion of the courts in approving initial and extended detention. In the absence of political mechanisms to hold the government in check, the judiciary bears a heavier burden to shield the population from potential abuse of power. The judges of the military courts regard themselves as having been strong and successful proponents of significantly shortening detention periods under the security legislation, to bring them into greater proximity with Israeli law. However, the goal of the military courts should be to limit detention periods even beyond what is permissible within Israel. The same rationale applies to other restrictions on human rights implicated in the criminal process.

This proposition appears to defy the conventional wisdom that situations of armed conflict may justify greater limitations on, or derogations from, rights.\(^{99}\) It is important to note, however, that while the existence of conflict might justify greater restrictions on the population in order to maintain security, there is nothing inherent to conflict that *a priori* justifies compromising procedural rights once a person is in the hands of law enforcement agencies. This is particularly true when hostilities are no longer taking place, as is generally the case under occupation.

The military courts regularly acknowledge the need to take the circumstances of occupation into account, but ironically these are invoked to justify greater limitations on rights. One oft-cited factor is the security threat, as grounds for more severe restrictions on liberty in comparison with Israeli law.\(^{100}\) Another diversion from Israeli law was the rejection of the Israeli *Kinsey* doctrine, according to which defendants may only testify against co-perpetrators after the conclusion of their own trials, when they no longer have an incentive to offer falsely-incriminating testimony.\(^{101}\) In *Badarna* the military court decided

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\(^{98}\) Bisharat, above n 93, 381.

\(^{99}\) National security is a legitimate ground for limiting rights, refs; armed conflict may also constitute a public emergency as defined in ICCPR Art 4.

\(^{100}\) Ben Natan, above n 90, 38.

\(^{101}\) *Kinsey v The State of Israel*, CrimApp 194/75 PD 30(2) 477(1976). This doctrine was eventually also rejected within Israel in *The State of Israel v the District Court of Beer-Sheva*, HCJ 11339/05 (8
not to apply the Israeli doctrine, arguing that it was irrelevant since Palestinian defendants never incriminate their partners in crime before an Israeli court.\textsuperscript{102}

One might argue that especially in situations of hostility, emulation of domestic law has the advantage of richness, precision and detail,\textsuperscript{103} which remove a large measure of discretion from the hands of executive and even judicial institutions whose interests and aspirations are frequently in opposition to those of the population.\textsuperscript{104} However, precision is not a virtue in itself: detailed rules formulated for a democratic, politically and legally accountable regime may be insufficiently protective in a regime of occupation. The present analysis does not suggest that drawing on domestic law—in particular Israeli law—is injudicious. Clearly it is advisable to apply a coherent system which is highly developed and dynamic.\textsuperscript{105} Yet emulation of norms and regimes must follow from a careful examination of their transferability in light of pertinent differences. International law does not offer specific guidelines for such an examination, but it does highlight that at issue are power relations that are not sovereign and democratic.

5.2 The HCJ as a forum for challenging violations of international law

The other response to criticism that the military courts are not receptive to challenges of incompatibility with international law is that defendants can and do bring claims to this effect before the HCJ. Since the security legislation is often modelled on Israeli law, challenges are sometimes brought against the constitutionality of the original Israeli law. If the challenge succeeds and the law within Israel is amended, the change is soon emulated with respect to the security legislation,\textsuperscript{106} through jurisprudence or military enactments.

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\textsuperscript{102}Badarna \textit{v} Military Prosecutor, Appeal (Judea and Samaria) 282/94 (available on Nevo Database).

\textsuperscript{103}Abu Sneina, above n 83, Judge Gordon, 10; Benichou, above n 1, 326.


\textsuperscript{105}One might nevertheless query whether the coherent system needs to be that of the occupant; Ben Natan, above n 90, 44. Following the Second World War, different approaches were adopted to this matter: The US, for example, held that it was appropriate to approximate the military legal order in Germany to local law, so that it be familiar to the population; Greenspan, above n 66, 259. This probably does not eliminate the imbalance but possibly reduces it.

\textsuperscript{106}See, e.g., CrimReqMisc 8823/07, \textit{A v State of Israel}, II February 2010 (available on Nevo Database), which concerned a challenge (under Israeli constitutional law) to a legal provision allowing
Enforcement of international law by the HCJ may appear advantageous to defendants since a civilian court may have a more rights-protective ethos than an organ of military government. Moreover, in the HCJ the security legislation is regarded as secondary legislation, and is therefore subject to administrative review in addition to the constitutional review under which incompatibility with international law would fall.

However, the HCJ is a domestic court, operating within a non-criminal legal order. Its capacity to second-guess the balance struck by the executive is limited because of its status as an instance of review, lack of expertise and democratic deficit. As a result, it does not substitute its own discretion for that of the military commander, but only examines whether the commander acted within the limits of his authority and within the margin of reasonable conduct. The military courts, being organs of the executive itself, need not exercise the same restraint in overseeing the military commander; and as trial instances their scrutiny can and ought to be much more stringent than that of the HCJ. In practice, military judges do not articulate reliance on their personal acquaintance with the military system, although in one early case a judge stated that since acquaintance with military material is a prerequisite for the authority to judge, judges must not dissociate themselves from their knowledge as military personnel. In the event, the judge relied on his personal knowledge to reject the defendant’s claim that a particular order had been given retroactive effect.

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107 Harpaz and Shany, above n 104, 546.
109 But see *Mamduch Avra v Military Commander in Judea and Samaria*, HCJ 317/13 (available on Nevo database), para 14 (27 January 2013), in which the HCJ criticized the military court for not exercising greater control of the military prosecution.
110 *Hamza*, above n 42, 499. Ironically, the court relied on personal knowledge to reject the defendant’s claim that he was convicted on the basis of retroactive legislation, stating that the order in question had been made known to the population prior to the formal publication in the Compilation of Proclamations, Orders and Appointments.
In addition, the expectation that the HCJ apply to petitions of defendants from occupied territory the same rights-protective approach that it exercises in domestic disputes is debatable, for example due to the adversity of the petitioners’ interests to the society to which the court is committed.\textsuperscript{111} It is not that the military courts are immune to these biases. However, their bias is openly acknowledged, and international law governs their conduct precisely in order to temper the effect of that inherent bias. Surrender of the responsibility to enforce international law to a domestic court is therefore a dereliction of duty. Ironically, the problem is further exacerbated by the fact that the HCJ increasingly invokes international human rights law in its West Bank-related judgments. This apparently welcome move operates to the detriment of the local population, since the HCJ applies it to derogate from non-derogable rules of the law of occupation.\textsuperscript{112}

6 Conclusions

The Israeli experience is unique: it is the only instance in which an occupant has acknowledged its status as such and has established a military court system that is subject to international legal norms. It is unique also in its factual circumstances: a prolonged occupation in which criminal proceedings concern a wide range of conduct, long after active hostilities have ended; and contiguity with the territory of the occupant, which renders domestic legal institutions accessible, physically and procedurally. Under these circumstances, the temptation to downplay the courts’ character as military institutions trying civilians, with the negative connotation that the existence of such institutions carries, is understandable. However, the military courts operate within a carefully crafted legal order, which aims to mitigate the inherent biases of a military system through the protection of international law. Failure to appreciate the particular position of the courts within this order risks resulting in the removal of protection to defendants without adequate substitutes.

The military courts in the West Bank consider themselves to be operating within a dualist legal order, in which the security legislation constitutes the highest norm. They therefore deny the primacy of the law of occupation over


the security legislation, and as a standard for their own review of executive and legislative conduct of the military commander. Instead, the military courts rely heavily on quasi-Israeli law and defer to the HCJ as primary enforcer of international law. However, both measures are merely a continuation of the dualist perspective, and do not provide an adequate substitute for the application of the law of occupation by the military courts themselves. Moreover, the emulation of domestic law applicable in a democratic regime has the aura of normalcy, which obfuscates the exceptionality of occupation.

The intention of the courts is noble. They emulate Israeli law because it seems to offer a balancing mechanism between the needs of law enforcement and human rights. If the alternative were a legal vacuum, this approach would be beyond reproach. However, there is no legal vacuum, since international law is directly applicable. It may be less developed than domestic law, but it offers the appropriate framework for balancing law enforcement against human rights in an occupied territory. Applying international law directly rather than quasi-domestic law is likely to make the military courts unpopular with the military government. But their primary duty is to guarantee defendants their right to fair trial and other rights relating to the criminal process.
‘ANGLO-AMERICAN’ MILITARY JUSTICE SYSTEMS AND THE WAVE OF CIVILIANIZATION: WILL DISCIPLINE SURVIVE?

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Keywords
Military justice, military courts, civilianization

In 1980, the esteemed American jurist Robinson Everett published an article with the somewhat visionary title ‘Some Comments on the Civilianization of Military Justice’.

Civilianization denotes the reform of traditional aspects of a military justice system to resemble its civilian criminal justice counterpart.

The notion of civilianization contemplated by Judge Everett over 30 years ago was quite different, however, from the reform, in the 1990s and beyond, within a number of ‘Anglo-American’ military justice systems, in particular those ‘founded … in Great Britain and her former colonies’.

While various articles in US military

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4 Ibid.

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law circles may have coined the term ‘civilianization’, the US stands as one of the last bastions of the ‘Anglo-American’ military justice systems to withstand the pressure from various external sources to shift toward a more civilianized system.

At the centre of the military justice system is the commanding officer. As one author states, ‘first and foremost, military justice is one of the primary tools a military commander has to maintain discipline within the ranks’. This sentiment is echoed by America’s allies in the UK’s Military Service Law Manual, which refers to the commanding officer as the ‘heart’ of discipline with similar views held in Canada and Australia.

While the military justice systems of numerous militaries share this rationale, recent history questions this premise. Other than the US, which has resisted the wave of reform exhibited in allied military justice systems as of the 1990s, the modern view of discipline in Australia and the UK has resulted in the military justice system trending closer towards a civilianized model, with Canada retaining the military character of the system.

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5 See generally Everett, above n 1; Sherman, above n 2; D Karlen, ‘Civilization of Military Justice: Good or Bad’ (1973) 60 Mil LR 113; and K J Hodson, ‘Military Justice: Abolish or Change?’ (1973-74) 22 Kan LR 31 (where the authors discuss civilianization in the American military justice system).
6 Dhal, above n 3.
8 Hansen, above n 7, 423.
commanding officer in the aforementioned Commonwealth countries has been significantly reformed in the court martial process. In the US, the role of the commanding officer in the military justice system has been under scrutiny by legislators and commentators alike, with the Secretary of Defense recently recommending to Congress that certain powers of the commanding officer be eliminated.

This paper argues that while the US has been criticised for not ‘modernizing’ its military justice system, its system arguably represented the ‘first wave’ of civilianization in ‘Anglo-American’ military justice systems in the 1950’s, with the UK, Canada and Australia following with reforms in the 1980’s and 1990’s. While the latter three countries have been struggling to balance the disciplinary requirements of a military justice system with constitutional requirements and judicial decisions, the US’ system has remained surprisingly static. However, recent events suggest that the American military justice system could be entering


15 See generally Everett, above n 1; Sherman, above n 2; Hansen, above n 7 (where the authors discuss changes to the US system); Pitzul & Maguire, above n 12 (Canada); F B Healy, ‘The Military Justice System in Australia’ (2002) 52 Air Force L Rev 93 (Australia); Rubin, above n 12 (UK).

16 See Barry (2001), above n 14, 45.
its second wave of civilianization, in which it will undoubtedly look to its allies
for comparative models.\textsuperscript{17}

The paper is divided into three parts. Part A will briefly outline the impact of
civilianization on the military justice systems in the UK, Canada, Australia and
the US, respectively. Part B will examine how civilianization has affected the
involvement of the chain of command in the court martial process. Finally, Part C
will offer recommendations for legislators, legal officers and policy experts when
considering comparative models as the basis for possible reforms.

1 The impact of civilianization

1.1 The United Kingdom

1.1.1 The genesis of the ‘Anglo-American’ military justice system

Perhaps expectedly, the very term ‘courts martial’ derives its name from the
evolution of English military jurisprudence.\textsuperscript{18} Prior to 1521, military discipline
was the responsibility of the Court of the High Constable and Earl Marshal.\textsuperscript{19}
Eventually, this jurisdiction became the ‘Court of the Marshal’ (when the holder
of the Office of the Lord High Constable was beheaded in 1521).\textsuperscript{20} In 1666, the
Judge Advocate General was given the task to supervise ‘courts-martial’ for the
British Army, with the Judge Advocate of the Fleet performing the same task for
the Navy (from 1661).\textsuperscript{21}

The enactment of the Mutiny Act in 1689 proved to be ‘the beginning of
an era’\textsuperscript{22} in that it codified military offences in statutes (mutiny and desertion)
and provided a rudimentary court martial procedure to try offenders.\textsuperscript{23} From
1689 to 1881, successive Articles of War were promulgated by the Crown to

\textsuperscript{17} See generally, ibid (where the US military justice system is under scrutiny).
\textsuperscript{18} See Judiciary of England and Wales, Military: The constitutional position, function and history of the
Judge Advocate General (JAG), <http://www.judiciary.gov.uk/about-the-judiciary/the-judiciary-
in-detail/jurisdictions/military-jurisdiction#headingAnchor2> [accessed 14 October 2013] (UK
JAG website).
\textsuperscript{19} Ibid.
\textsuperscript{21} See UK JAG Website, above n 18; but see R Lorenzo Ponce de Leon, ‘The Coming of Age of
263, 274-275 (where the author describes the unique role of the JAF and the Chief Naval Judge
Advocate).
\textsuperscript{22} Stewart-Smith, above n 20, 26.
\textsuperscript{23} Ibid, 26-27.
work in conjunction with the Mutiny Act to ensure the discipline of soldiers in times of conflict.\footnote{24 Ibid.} The 1881 Army Act and the 1866 Naval Discipline Act were the statutory bases for military justice until each of the services promulgated their respective Discipline Acts in 1955 (Army and Air Force) and 1957 (Navy) respectively: \footnote{25 Ibid, 25; see also S Rowlinson, 'The British System of Military Justice' (2002) 52 AF LR 17, 18.} 'much of each of them is devoted to the disciplinary code of the service to which it relates and the setting up and procedure of the tribunals to try offences against it.' \footnote{26 See Stewart-Smith, above n 20, 25.} While the military justice system '[enjoyed] a longstanding detachment from civilian legal developments and norms,' \footnote{27 G R Rubin, 'United Kingdom Military Law: Autonomy, Civilianization, Juridification' (2002) 65 MLR 36, 44.} various decisions from the European Court of Human Rights (ECtHR) \footnote{28 European Convention for the Protection of Human Rights and Fundamental Freedoms, 4 November 1950, 213 UNTS 221 (ECHR); see generally European Court of Human Rights, Questions and Answers, <http://www.echr.coe.int/Documents/Questions_Answers_ENG.pdf> [accessed 14 October 2013].} from the 1990s onwards paved the way for substantial modifications to the British military justice system. \footnote{29 See De Leon, above n 21, 270.}

### 1.1.2 Findlay and the era of civilianization

Arguably, the civilianization era in the UK began in 1997 with the decision of the ECtHR in \textit{Findlay v United Kingdom}. \footnote{30 See \textit{Findlay v The United Kingdom}, no 22107/93, Judgment of 25 February 1997, ECHR 1997-I, no. 30.} The Court examined if the court martial, as it was composed in 1991, satisfied the right to be tried before an independent and impartial tribunal in accordance with Article 6(1) of the European Convention of Human Rights (ECHR). \footnote{31 Ibid; see also ECHR, above n 28, Art 6(l).} Given that a senior ranking officer convened the court martial and selected the prosecutor, the Court determined that the tribunal was not 'free of personal prejudice or bias' \footnote{32 De Leon, above n 21, 271-272; see also H McCoubrey, 'Due Process and British Courts Martial: A Commentary Upon the Findlay Case' (1997) 2 J Armed Conflict L 83, 86-87.} and not objectively impartial. \footnote{33 De Leon, above n 21, 272.} The outcome of the \textit{Findlay} decision was the enactment of the 1996 Armed Forces Act (AFA) that served to 'make sweeping changes to the British courts-martial system.' \footnote{34 McCoubrey, above n 32, 87; see also Armed Forces Act 1996, c. 46 (UK) (AFA 1996).}

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1.1.3 The 1996 AFA and further challenges

The 1996 AFA resulted in four major changes to the British military justice system. First, the ability of the chain of command to approve or revise sentences was repealed. Second, the judge advocate was given a more prominent role as ‘a member of the court martial’ and their rulings on law were now binding on the panel. Third, the ability of the convening officer to select the prosecutor was removed in favour of a ‘Prosecuting Authority’—a senior legal officer who determines the charges and the type of court martial. Finally, the ability of the convening authority to select the members of the panel was substituted with a ‘court administration officer’. While the 1996 AFA did not amalgamate the three services, the legislation modified the respective Army, Air Force, and Naval Discipline Acts in the aforementioned fashion.

The changes advanced in 1996 did not serve to lessen the ECtHR’s criticisms of the British military justice system. In addition to unfavourable judgments in 1999 and 2002, the Court rendered two rulings in December 2003 that were critical of the tri-service aspect of the military justice system. For instance, in *Grieves v the United Kingdom*, the Court was critical of the Royal Navy’s court martial system (under the Naval Discipline Act of 1957) due to the role of the Chief Naval Judge Advocate (CNJA) in appointing judge advocates for (naval) courts martial. Despite the changes enacted in 1996, further reforms would be required.

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35 See McCoubrey, above n 32, 87.
36 Ibid; see also AFA 1996, above n 34, s 15.
37 McCoubrey, above n 32, 87; see also AFA 1996, above n 34, sch.1, Part III, ss. 19 (Army), 35 (Air Force), 51 (Navy).
38 Ibid.
39 McCoubrey, above n 32, 87; see also AFA 1996, above note 34, sch. 5, Part II.
40 McCoubrey, above n 32, 87; see also AFA 1996, above note 34, sch.1, Part III, ss. 19 (Army), 35 (Air Force), 51 (Navy).
41 McCoubrey, above n 32, 87.
42 See De Leon, above n 21, 272-274; see also *Cooper v United Kingdom*, no. 48843/99, 16 December 2003, ECHR 2003-XII.
43 Ibid; see also *Grieves v United Kingdom*, no 57067/00, 16 December 2003, ECHR, 2003-XII.
1.1.4 The 2006 Armed Forces Act: trending towards a civilian system

The death knell for the traditional British military justice system may have been the 2006 ECtHR decision in Martin v United Kingdom. In this case, the accused was an 18 year-old dependent of a military member stationed in Germany, who was accused of murder. The ECtHR, using the Findlay rationale, determined that the court martial lacked independence and was not sufficiently impartial, thus violating Article 6(1) of the ECHR.

With the myriad of ECtHR decisions in its wake, the British Parliament was left with no choice but to reform the military justice system. One year prior to the Martin decision, the government tabled the Armed Forces Bill 2006 that received Royal Assent in November 2006, but the bill did not come into force until October 2009. The resulting Armed Forces Act 2006 (AFA 2006) served, inter alia, to replace ‘traditional’ ad hoc courts martial with a standing court. The ‘new’ court martial is comprised of a civilian judge advocate and a panel of three, five or seven (military) members depending on the offence charged. It is a ‘court of record’ similar to a civilian criminal court. The panel votes (by majority) on guilt or innocence. The judge advocate does not vote in matters regarding the guilt or innocence of the accused but does have a vote regarding sentence if there is an equality of votes. The court martial has powers of punishment ranging from imprisonment for life to minor punishments. Consistent with earlier reforms, there is a right of appeal to the Court Martial Appeal Court and, ultimately, to the Supreme Court. Finally, the reforms created an independent Director of Service Prosecutions (DSP); where ‘there is no requirement that the DSP be a member of [Her Majesty’s] forces’. The current DSP is a civilian.

44 De Leon, above n 21, 276-277; see also Martin v United Kingdom, no. 40426/98, 24 October 2006, ECHR.
45 See De Leon, above n 21, 276-277.
46 Ibid.
48 Ibid, at 280; see also Armed Forces Act 2006, c.52, 2006 (UK) (AFA 2006).
49 AFA 2006, above n 48, s 154.
50 Ibid, s 155 (1)-(3).
51 See De Leon, above n 21, 284-285.
52 AFA 2006, above n 48, s 160(1).
53 Ibid, s 160(2), s 160(4).
54 Ibid, s 164, s 217.
55 Ibid, s 272, s 274; see also Courts-Martial (Appeals) Act 1968 c.20 (UK).
56 Explanatory Notes, Armed Forces Act 2006 c.52 (UK) s 364 (Explanatory Notes AFA 2006).
1.2 Canada

1.2.1 Inheriting the British system

It is not surprising that Canada, similar to the other British colonies, adopted its military justice system from the UK.\textsuperscript{57} Indeed, ‘[i]t has been suggested that the early history of the Canadian military justice system is, in effect, the history of British military law’.\textsuperscript{58} Following the foundation of Canada in 1867, the Militia Act ‘adopted the British Army model for a code of discipline’.\textsuperscript{59} Such legislation was logical given the presence of British troops in Canada both prior to and following confederation.\textsuperscript{60}

From the promulgation of the Militia Act in 1868 until the conclusion of World War II, Canada utilised the British military discipline system in each of its armed forces (Army, Navy, Air Force).\textsuperscript{61} It was not until 1950 that Canada formed a uniform code of military justice in the National Defence Act (NDA).\textsuperscript{62}

1.2.2 The National Defence Act and the Charter: Canadianization of the British system

The NDA retained the two-tier system of military justice inherited from the British: summary trials and courts martial.\textsuperscript{63} The period from 1950 until the mid-1980’s represented a relatively calm era in military justice with little legislative action.\textsuperscript{64} This relative tranquility, however, would dramatically change with the enactment of the Canadian Charter of Rights and Freedoms in 1982,\textsuperscript{65} which guarantees ‘fundamental legal, equality, and language rights for all individuals as Canadian citizens, including fairness in criminal and penal matters before the courts’.\textsuperscript{66} While the advent of the Charter led to a significant shift from the traditional British military model,\textsuperscript{67} further reform was in the offing

\textsuperscript{57} See generally Pitzul & Maguire above n 12, 2.
\textsuperscript{58} Ibid, 2.
\textsuperscript{59} Ibid, 3.
\textsuperscript{60} Ibid, 2-3.
\textsuperscript{61} Ibid, 3-5.
\textsuperscript{62} Ibid, 5.
\textsuperscript{63} Ibid, 3, 6.
\textsuperscript{64} Ibid, 6.
\textsuperscript{65} The Constitution Act, 1982, being schedule B to the Canada Act 1982 (UK), c.11 (Charter).
\textsuperscript{66} C Madsen, Another Kind of Justice: Canadian Military Law from Confederation to Somalia (1999) 132.
\textsuperscript{67} See Pitzul & Maguire, above n 12, 8.
as a consequence of the most important judicial decision in Canadian military justice history—*Regina v Genereux*.

### 1.2.3 *R v Genereux*: reinforcement of a *sui generis* military justice system

The *Genereux* decision by the Supreme Court of Canada was the first Charter challenge to the traditional court martial system. At issue was section 11(d) of the Charter—the right to be tried before an impartial tribunal—in relation to courts martial. The Court determined that, among other things, the ability of the chain of command to appoint the prosecutor (on recommendation from the Judge Advocate General) and members of the court martial panel violated the Charter’s guarantee of a court’s independence. Importantly, however, the Supreme Court acknowledged the military justice system as a separate system of justice.

### 1.2.4 Somalia and Bill C-25: The modern era of Canadian military justice

The *Genereux* decision was followed by a dark incident in Canadian military history. During a UN-sponsored mission to Somalia in 1993, Canadian soldiers captured, tortured and killed a Somali teenager. The result was a firestorm in Canada that led to the disbandment of the Canadian Airborne Regiment and a public inquiry and other reports that examined, *inter alia*, the military justice system. This resulted in the drafting of Bill C-25, an Act to Amend the National Defence Act, in 1998. Bill C-25 ‘marked the first substantial amendments to the Code of Service Discipline in a post-Canadian Charter of Rights and Freedoms environment.’ Reforms included the statutory recognition of the role and functions of the Judge Advocate General, while removing its power to

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68 *R v Genereux*, [1992] 1 S.C.R. 259 (where the Supreme Court of Canada reinforces the need for a separate military justice system); See Pitzul and Maguire, above n 12, 9.
70 See Charter, above n 65, s11(d).
71 See *Genereux*, above n 68, 302-325.
72 Ibid, 293.
73 See Madsen, above n 69, 1-36 to 1-37.
74 Madsen, above n 66, 144-150; see also Madsen, above n 69, 1-36 to 1-39.
75 See *An Act to Amend the National Defence Act*, S.C. 1998, c.35 (Bill C-25).
76 See Madsen, above n 69, 1-38.
review any finding of a court martial to ensure legality; the establishment of an independent Director of Military Prosecutions and Director of Defence Counsel Services; and the abolishment of the death penalty. The position of Court Martial Administrator was created to statutorily eliminate the ability of the chain of command to appoint panel members.

Following the enactment of Bill C-25, the military justice system was subject to an independent review in 2003 by a former Chief Justice of the Supreme Court of Canada. The former Chief Justice stated that ‘Canada has developed a very sound and fair military justice framework in which Canadians can have trust and confidence’ and made 88 recommendations, approximately 50 of which dealt with the military justice system. Based on the aforementioned recommendations, the government tabled legislation in 2006, 2008 and 2010 but all three bills died on the Order Paper. A subsequent bill, Bill C-15, is currently under consideration before the Canadian Parliament.

Following the introduction of Bill C-15 in Parliament, a second independent review of the military justice system was undertaken by retired Chief Justice Patrick LeSage of the Ontario Superior Court of Justice that was tabled in Parliament in June 2012. In terms of the military justice system, the report supported the previous findings of the ‘importance and uniqueness of the military justice system’ and, quoting the Lamer Report, affirmed that ‘[the] military justice system is sound, but some modifications will assist in ensuring its continued strength and viability’.

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77 See Goetz, above n 11.
78 Ibid.
80 Ibid, 1.
81 Ibid, 112-119.
82 An Act to Amend the National Defence Act, 2006, H.C. Bill C-7 (Canada) (Bill C-7); An Act to Amend the National Defence Act, 2008, H.C. Bill C-45 (Canada) (Bill C-45); An Act to Amend the National Defence Act and to make consequential Amendments to Other Acts, 2010, H.C. Bill C-41 (Canada) (Bill C-41).
83 An Act to amend the National Defence Act and to make consequential Amendments to Other Acts, 2011, H.C. Bill C-15 (Canada) (Bill C-15); see also, Office of the Judge Advocate General, Department of National Defence, Amendments to the National Defence Act: Background and Amendment Highlights (October 2011).
85 Ibid, 10.
86 Ibid, 12.
1.3 Australia

1.3.1 The early years

Australia, like Canada, traces its roots back to English military law. When Australia was formed as a penal colony in 1788, British military discipline applied to the force that accompanied the prisoners. In 1901, the various colonies formed a Commonwealth and the Australian Constitution provided the Federal Parliament the power, ‘[to] make laws for the peace, order and good government of the Commonwealth…’ Parliament later passed the Defence Act 1903 (Cth), which specified that the provisions of the British Army Act 1881 and Naval Discipline Act 1866 applied to the Australian Army and Navy respectively. When the Australian Air Force was founded on 31 March 1921, it was made subject to the Defence Act 1903. Following the formation of the various military services, the Australian military justice system generally utilised British legislation until 1985.

1.3.2 The modern era

In 1985, the Defence Forces Discipline Act (DFDA) amalgamated the three services and conferred upon them a comprehensive system of discipline law that reflected civilian criminal standards and processes. In the twenty years following the enactment of the DFDA, the Australian military justice system withstood numerous constitutional challenges before the High Court of Australia. Three cases—Re Tracey, Ex parte Ryan; Re Nolan and Another, Ex parte Young; and Re Tyler and Others, Ex parte Foley—examined whether the jurisdiction exercised by a military tribunal was appropriate in relation to the Constitution. In terms of civilianization, the Court examined whether the service tribunal—in this circumstance a court martial—was improperly exercising a (civilian) judicial power stip-

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88 See F B Healy, above n 15.
89 Ibid, 94.
90 Ibid, 95.
91 Ibid, 96.
92 Ibid, 93.
93 Ibid, 96.
94 Ibid, above n 87, 429.
95 See Healy, above n 15, 128; See also Re Tracey, Ex parte Ryan (1989) 166 CLR 518; Re Nolan and Another, Ex parte Young (1991) 172 CLR 460; Re Tyler and Others, Ex parte Foley (1994) 181 CLR 18.
ulated in Chapter III of the Australian Constitution. In upholding the unique nature of military tribunals, the Court 'accepted that a service tribunal which was trying offences under [the DFDA] had all the characteristics of a Court exercising judicial power.'

The Australian military justice system enjoyed a 10-year period free from High Court scrutiny until the 2004 case of Re Aird, which involved a service member charged with rape while on leave in Thailand. The Court narrowly held that in the circumstances, a court martial had jurisdiction to hear the charge against the accused.

In terms of removing the commanding officer from the court martial process, Australia appeared to follow the lead set by Canada. Challenges to the UK and Canadian military justice system led the Chief of the Defence Force (CDF) to request an independent review of the Australian military justice system in the late 1990’s. Recommendations from the 1997 Abadee Report resulted in various amendments that served to eliminate the ability of a convening authority to review the outcome of a court martial convened by that authority. Recommendations from a subsequent report in 2001 eventually led to the statutory establishment of the Director of Military Prosecutions (DMP) and Registrar of Military Justice (RMJ) in June 2006, following the enactment of legislation amending the Defence Force Discipline Act 1982. The establishment of these two positions in statute removed the prosecution discretion and convening authority of the chain of command. At this point, the amendments to the Australian court martial system retained the military character of the system. Indeed, in contrast to Canada and the UK, both the DMP and RMJ were military officers.

Change towards a more civilianized model, however, would be forthcoming in the near future.

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96 See Healy, above n 15, 128. See also Commonwealth of Australia Act, 1900 (Imp), 63 & 64 Victoria, c.12 (UK) (Australian Constitution).
97 Tracey, above n 87, 430 (referring to Re Tracey, Ex parte Ryan).
98 See Re Aird (2004) 209 ALR 311; see also Mitchell & Voon, above n 12, 396.
99 See Mitchell & Voon, above n 12, 407-408.
101 Ibid, para 29(a).
102 J C S Burchett, Report of an Inquiry into Military Justice in the Australian Defence Force (July 2001) recc. 47 and 48 (to create DMP and RMJ respectively); Defence Legislation Amendment Act (No.2) 2005 (Cth) ss 188F, 188G.
103 Australian JAG Report 2005, above n 12, paras 62, 82(c).
105 Ibid.
future.

1.3.3 The beginning of civilianization

From 2003-2005, the Senate Foreign Affairs, Defence and Trade References Committee conducted the most comprehensive inquiry of the military justice system in Australia’s history.\(^{106}\) The Senate Report is arguably the beginning of the ‘civilianization era’ in Australia. In its examination of service tribunals, the Committee examined developments in other Commonwealth countries such as the UK and Canada, noting that ‘recent overseas developments also indicate that the current Australian disciplinary system is outdated and may not adequately protect Service personnel’s rights’.\(^{107}\)

Following submissions and testimony from the Australia JAG and other witnesses before the Committee,\(^{108}\) the Report made sweeping recommendations to the military justice system that included, \textit{inter alia}, the abolishment of traditional courts martial to be replaced by a permanent military court.\(^{109}\) As will be discussed below, this attempt to civilianize the military justice system—some 8 years following the Senate’s recommendations—has arguably resulted in a cautionary tale for those charged with developing and implementing military justice policy.

1.3.4 The brief rise of the Australia Military Court

The government agreed with the Senate’s recommendation to abolish the traditional \textit{ad hoc} courts martial and create a permanent military court.\(^{110}\) To that end, the Australian Parliament passed the Defence Legislation Amendment Act (DLAA) 2006 and the Australia Military Court (AMC) was established on 1 October 2007.\(^{111}\) In terms of the AMC’s legal framework, the legislation creating

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\(^{106}\) See Jones, above n 11, 77; See generally Australia Senate Report, above n 10, paras 1.17-1.19.

\(^{107}\) Australia Senate Report, above n 10, para 5.45.

\(^{108}\) Ibid, paras 5.8-5.18; 5.19-5.32.

\(^{109}\) Australia Senate Report, above n 10, at li-liv.


the court specified that it was not a ‘court’ under Chapter III of the Australian Constitution but a ‘service tribunal’ under Article 51 (vi), the defence power.\textsuperscript{112}

The AMC retained the character of a service tribunal.\textsuperscript{113} Its judges were military officers. The Registrar of the AMC (formerly the RMJ) referred charges to the court, and the DMP and the Director of Defence Counsel Services (DDCS) were respectively responsible for prosecuting and defending matters before a military judge alone or a military judge and jury.\textsuperscript{114} In supporting the military nature of the AMC, the explanatory memorandum outlining the legislation highlighted the requirements of deployability, a knowledge and understanding of military culture and credibility with members of the ADF as key ‘philosophies and characteristics’ of the court.\textsuperscript{115}

1.3.5 \textit{Lane v Morrison: the end of the AMC}

The AMC operated from 1 October 2007 until 26 August 2009.\textsuperscript{116} The latter date undoubtedly stands as a watershed moment in Australian military justice, when the High Court decided its first constitutional challenge against the legality of the AMC in \textit{Lane v Morrison}.\textsuperscript{117} In \textit{Lane}, the Court examined if the permanent military court established by the DLAA 2006 was improperly exercising the powers of a Chapter III (civilian) court.\textsuperscript{118} The Court determined that although the DLAA 2006 stated that the AMC was a ‘service tribunal’, the legislation also deemed it a ‘court of record’, thus closely resembling a civilian Chapter III court.\textsuperscript{119} The Court struck down the DLAA 2006 thus invalidating the AMC and all of its prior judgments.\textsuperscript{120}

\textsuperscript{112} DLAA (2006), above n III, s114 (1) Note 1 and 2.
\textsuperscript{113} See Explanatory Memorandum, \textit{Defence Legislation Amendment Bill 2006} (Cth), para 4 (‘the AMC is a “service tribunal” under the DFDA…’) (Explanatory Memorandum DLAA 2006).
\textsuperscript{114} Ibid, para 62, 83 (military judges), para 103 (Registrar of the AMC); See also Government of Australia, \textit{Department of Defence, Australian Military Court—Fact Sheet}, undated, 2 (‘all prosecutions will be conducted through …[the DMP]. A new Director of Defence Counsel Services provides legal representation for the accused’), <www.defence.gov.au/mjs/resources/AMC%20fact%20sheet.pdf> [accessed 31 Oct 13].
\textsuperscript{115} Explanatory Memorandum DLAA 2006, above n III, para 4.
\textsuperscript{116} See DoD government website, above n III.
\textsuperscript{117} \textit{Lane v Morrison} (2009) 239 CLR 230 (Lane).
\textsuperscript{119} See Press Release, above n 118; Duxbury, above n 118, 181-182; see generally \textit{Lane}, above n 117.
\textsuperscript{120} See DoD Government website, above n III.
1.3.6 The aftermath of Lane: a return to the old system (for now)

The government was obviously left in a precarious position. With no service tribunal in place to address serious disciplinary cases, Parliament was forced to enact legislation to revive the ‘traditional’ court martial system. In 2010, the government announced that a new military court would be established not under the defence power but pursuant to Chapter III of the Constitution. The court—known as the Military Court of Australia (MCA)—would be a permanent court comprised of civilian judges with military experience. The legislation creating the court provided that all charges would be tried by judge alone with no military panel or jury, regardless of the seriousness of the offence.

The debate over the bill was short lived with the calling of an election in July 2010. In the interim, the government passed further legislation to allow for the ‘traditional’ system of courts martial to act as the service tribunal for serious disciplinary offences in the ADF. Ironically, the traditional system of courts martial was later examined by the High Court whereby it expressed no concerns regarding its constitutionality.

In 2012, the Australian Parliament later introduced the MCA Bill that was similar to that proposed in 2010. As with the previous bill, the MCA Bill 2012 provides for any service offence to be tried by judge (or judges) alone. Not surprisingly, the problems associated with the lack of a jury or panel has

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124 Ibid, para 93-94.
125 See Letter from Senator Trish Crossin, Chair of the Senate Legal and Constitutional Affairs Legislation Committee to Senator the Honourable John Hogg, President of the Senate, 23 July 2010 (on file with author).
126 Military Justice (Interim Measures) Amendment Act 2011 (Cth).
127 See Haskins v Commonwealth of Australia (2011) 244 CLR 22 (Haskins) and Nicholas v Commonwealth of Australia [2011] HCA 29 (Nicholas).
brought forth considerable criticism during committee study.\textsuperscript{130} Academics, practitioners and interest groups identified a likely constitutional challenge to the MCA based on section 80 of the Constitution.\textsuperscript{131} ‘The Committee’s final report, while recognising this limitation to the bill, recommended that it proceed through Parliament.’\textsuperscript{132} Following the election in September 2013, it is unclear whether the MCA Bill 2012 will become law.\textsuperscript{133}

1.4 The United States

It is against the backdrop of civilianization over the past twenty years that this paper now turns to developments in the US. In stark contrast to the three countries examined above, the American military justice system has remained generally unaffected by the recent trend away from a command-based model in the court martial system.\textsuperscript{134}

1.4.1 Mirroring the British Articles of War

The American military justice system can be divided into two distinct eras: the period under the Articles of War enacted by the Continental Congress on 30 June 1775 until the enactment of the Uniform Code of Military Justice (UCMJ) in 1951 and the period from this date into the new millennium.\textsuperscript{135}

\textsuperscript{130} See Australia Defence Association, Submission to the Australian Senate on Legal and Constitutional Affairs, Submission to the Senate Legal and Constitutional Affairs Committee Concerning the Bills to Establish a Military Court of Australia, 16 September 2012, para 43 (Australia Defence Association submission); G Appleby & J Williams, Submission to the Australian Senate on Legal and Constitutional Affairs, Submission: Inquiry into the Military Court of Australia Bill 2012 and Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012, 12 July 2012, 4 (Appleby & Williams submission); A Street, Submission to the Australian Senate on Legal and Constitutional Affairs, Submission of Alexander Street, SC, 11 July 2012, para 9 (Street submission).

\textsuperscript{131} See Streetsubmission, aboven 130, para 31; AustraliaDefence Force submission, aboven 130, para 47. See generally Appleby & Williams submission, aboven 130, 3 (stating that ‘the constitutional guarantees of the military accused should be the same as to other citizens’).

\textsuperscript{132} Parliament of Australia, Senate Foreign Affairs, Defence and Trade References Committee, Provisions of the Military Court of Australia Bill 2012 and the provisions of the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 (9 October 2012).


\textsuperscript{134} See generally Hansen, above n 7.

As with Canada and Australia, the US adopted British military law. As such, the American Articles of War mirrored those from Great Britain.\textsuperscript{136} The various iterations of the American Articles of War ‘provided for trial by courts-martial, although the jurisdiction and composition of these courts were modified from time to time’.\textsuperscript{137}

### 1.4.2 The inter-war years: reflecting on the military justice system

Up until World War I, interest in the military justice system had been waning, but soon thereafter, the Acting Judge Advocate General of the Army expressed criticism of the military justice system because of numerous cases, which had handed out the death sentence to offenders without legal review by his office.\textsuperscript{138} Upon returning to his post, the Judge Advocate General quelled this dispute by defending the system thereby indirectly ‘permit[ting] autonomy for local commanders in matters of military justice’.\textsuperscript{139} This ‘Crowder-Ansell dispute’ led to the critical question of whether ‘the will of the commander or the rule of law [should] reign supreme in the American military justice system’.\textsuperscript{140}

### 1.4.3 The UCMJ and the modern military justice system

In comparison to other conflicts in which America was involved, World War II was fought by ‘[a] soldier [who was] a regular citizen’.\textsuperscript{141} Many were appalled with the state of the military justice system and ‘a hue and cry arose for reform’.\textsuperscript{142}

This became the precursor to the second era of the American military justice system. In 1948, the Elston Act was enacted, which included a prohibition of unlawful command influence, automatic appellate review in certain cases and a Miranda-like warning—years before that historic case would be decided.\textsuperscript{143}

The changes advanced by the Elston Act had only just entered into force when in 1948 Secretary of Defense James Forrestal appointed a committee led by Harvard Law Professor Edmund Morgan (who was a protégé of Ansell).\textsuperscript{144} The

\begin{itemize}
  \item \textsuperscript{136}Ibid, 4.
  \item \textsuperscript{137}W T Cox III, ‘The Army, the Courts and the Constitution: The Evolution of Military Justice’ (1987) 118 Mil LR 1, 6.
  \item \textsuperscript{138}See Cox, above n 137, 9-10; Cooke, above n 135, 5-6.
  \item \textsuperscript{139}Cox, above n 137, 10.
  \item \textsuperscript{140}Ibid.
  \item \textsuperscript{141}Ibid, 11.
  \item \textsuperscript{142}Ibid, 12.
  \item \textsuperscript{144}Ibid, 127; see also Cooke, above n 135, 7.
\end{itemize}
committee, formally named ‘The Uniform Code of Military Justice Committee,’ was tasked to, \textit{inter alia}, ‘integrate the military justice system across the three services’ and ‘modernize the system to promote public confidence and protect the rights of the service member, without impeding the military function.’

Ultimately, a bill was introduced in Congress in 1948. Following some minor changes—including changing the name of ‘Judicial Council’ to ‘Court of Military Appeals’—and approximately 18 months of study and debate, President Truman signed the bill into law on 5 May 1950. The UCMJ went into effect on 31 May 1951.

It has been suggested that the UCMJ in 1951 reflected certain aspects of civilianization in that ‘the new Code was an effort to combine … the old command-dominated military justice system and the civilian criminal justice system with its heavy emphasis on due process.’

\subsection*{1.4.4 Amendments to the UCMJ and civilianization}

Following the original enactment of the UCMJ in 1951, the American military justice system has not been without judicial scrutiny. Towards the end of the ‘feeling out’ period between 1951 and 1969, the Supreme Court issued a seminal ruling on the fledging system in \textit{O’Callahan v Parker}. From a comparative perspective, this case is strikingly similar to the Canadian \textit{Genereux} case given that amendments to enhance the system were slated to go forward as the respective courts scrutinized the ‘old’ system.

The Supreme Court did not look favourably on the military justice system in 1969. Indeed, ‘[t]he military justice system was still seen as vastly different—and inferior.’ While the case primarily dealt with the nexus between the offender’s military duties and the service offence, the Court was scathing in its general impressions of the military justice system. For instance, Justice Douglas, writing for the majority, bluntly stated, ‘courts-martial as an institution is singularly inept

\begin{itemize}
\item[145] Cox, above n 137, 13.
\item[146] Ibid, 14; see also Barry (2002), above n 14, 70–72.
\item[147] See Barry (2002), above n 14, 71.
\item[148] Cooke, above n 135, 8; see also Barry (2002), above n 14, 70; Hansen, above n 7, 427–428.
\item[149] See Cooke, above n 135, 10–13.
\item[151] See Cooke, above n 135, 3; Pitzul and Maguire, above n 12, 9.
\item[152] Cooke, above n 135, 3.
\item[153] See Cox, above n 137, 21.
\end{itemize}
in dealing with the nice subtleties of constitutional law.\textsuperscript{154} Notwithstanding this admonition, the Military Justice Act of 1968 ‘would do much to dispel such criticisms.’\textsuperscript{155}

The 1975 decision in Schlenger v Councilman\textsuperscript{156} was noteworthy in establishing the ‘modern’ military justice system as separate from the civilian system.\textsuperscript{157} As with Genereux in Canada,\textsuperscript{158} the Court validated the military justice system as a unique and fair system of justice.\textsuperscript{159} This notion of ‘maturity’\textsuperscript{160} was later reinforced by the Supreme Court in a number of cases including Weiss v United States.\textsuperscript{161} It was thus observed that ‘the Court’s decisions indicate increased respect for military justice as a system of justice.’\textsuperscript{162}

1.4.5 The 50th anniversary of the UCMJ and calls for change

This ‘period of stability’\textsuperscript{163} in the American military justice system remained until the 50th anniversary of the UCMJ.\textsuperscript{164} In 2001, the National Institute of Military Justice (NIMJ)—a nonprofit, nongovernmental organisation—sponsored a commission to ‘examine the current operation of the Code and to evaluate the need for change.’\textsuperscript{165} Unlike their allies in Canada, Australia and the UK, where calls for change were spurred by parliamentarians or the courts, this commission was chaired by retired Chief Judge Cox (of the United States Court of Appeals for the Armed Forces) with other members comprised of retired JAG officers and university professors.\textsuperscript{166} Following receipt of 250 comments and testimony from over 20 organisations or individuals, the Cox Commission Report was released in May 2001.\textsuperscript{167}

\begin{itemize}
\item \textsuperscript{154} O’Callahan, above n 150, 265.
\item \textsuperscript{155} Cooke, above n 135, 13.
\item \textsuperscript{156} Schlenger v Councilman, 420 U.S. 738 (1975).
\item \textsuperscript{158} See Genereux, above n 68.
\item \textsuperscript{159} Schlenger v Councilman, above n 156, 420.
\item \textsuperscript{160} Cooke, above n 135, 17.
\item \textsuperscript{161} Weiss v United States, 510 U.S. 163 (1964); see also Cooke, above n 135, 17.
\item \textsuperscript{162} Cooke, above n 135, 17.
\item \textsuperscript{163} Ibid, 16.
\item \textsuperscript{164} See generally Barry (2001), above n 14, 42.
\item \textsuperscript{165} See Barry (2002), above n 14, 85.
\item \textsuperscript{166} Ibid, 85–86.
\item \textsuperscript{167} Ibid, 86; see also Cox Commission, Report of the Commission on the 50th Anniversary of the Uniform Code of Military Justice (2001) (Cox I report).
\end{itemize}
The Executive Summary identified the pretrial role of the convening authority to select court martial members as an area of concern and recommended increasing the independence of military judges, implementing additional protections in death penalty cases and repealing the rape and sodomy provisions of the UCMJ. Following release of its recommendations, the reaction of the military justice community appeared mixed. A second Cox Commission was established in 2009 and recommended changes to the military justice system that focused on appellate, trial procedure and investigative processes.

1.4.6 Recent cracks in the command-centric model

The military justice system has also been examined by the executive and legislative branch in light of high-profile sexual assault cases. Allegations of sexual assault at a US Air Force’s basic military training site have resulted in 12 confirmed or alleged victims of sexual assault since June 2011. In a statement to the House Armed Services Committee in January 2013, the Chief of Staff of the US Air Force stated that six accused had been court-martialled with four trials scheduled in the future.

Further, in early 2013, a decision by a reviewing authority to dismiss the sexual assault conviction rendered by a court martial was met with a decision by the Secretary of Defence to examine the role of the convening authority (a function of the chain of command) in that particular case and its role in the military justice system generally. On 13 March 2013, the Senate Armed Services Subcommittee on Personnel heard testimony relating to sexual assault in the

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168 Barry (2002), above n 14, 98.
173 Welch statement, above n 172, 2.
military where they examined, among other things, the role of the chain of command in the military justice system and reforms made in Canada and the UK. In early April 2013, the Secretary of Defense put forth the recommendation that Congress remove or amend certain authorities of the commanding officer to review the findings or sentence at court martial.

Despite the recent interest in the US military justice system, as compared to its three allies, America remains the sole country to retain the commander as the key actor in court martial procedures (with Australia retaining the current system on an interim basis). The next section of the paper will compare the effect of civilianization in the countries noted above with a focus on the impact these changes have made to the chain of command’s involvement in the court martial process.

2 Civilianization and the chain of command

2.1 The United Kingdom: continuing the slide towards civilianization?

Reforms in the UK continue to push its military justice system further towards civilianization, in no small part due to pressure of the ECtHR which eliminated the chain of command from the court martial process in the Findlay case in 1997.

2.1.1 The 1996 AFA, Findlay and the removal of the commander from the court martial process

The Findlay decision had a chilling effect on the involvement of the chain of command in the military justice system. Prior to Findlay and the amendments in the 1996 AFA, the convening officer approved the charges and type of court martial, convened the court and appointed the president and members. The cumulative effect of the Findlay decision coupled with the legislative changes in

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175 See Senate Armed Services Committee hearing, above n 171, 59.
177 See generally Senate Armed Service Committee hearing, above n 171, Hagel letter, above n 13, Panetta letter, above n 13.
178 See Hansen, above n 7, 421, 432; Military Justice (Interim Measures) Amendment Act 2011 (Cth), above n 126.
179 See De Leon, above n 21, 267; Hansen, above n 7, 441 (where the author describes the effect of the AFA 1996); see generally Genereux, above n 68.
180 See Hansen, above n 7, 439-440.
the 1996 AFA created a quasi-civilian system such that ‘these changes had the collective effect of significantly reducing the role of the commander in military justice and converging the military and civilian systems of justice.’

2.1.2 The Armed Forces Act 2006: grappling with the role of the chain of command

The debate surrounding the role of the chain of command in the military justice system persisted in Britain well into the new millennium. For instance, in testifying before a Parliamentary Committee studying the 2006 Armed Forces Bill, the Chief of the Air Staff was concerned, that ‘the military justice system and the aspects of it which are covered in the Armed Forces Bill clearly recognise that difference from civilian life.’ In contrast, the Judge Advocate General (who is a civilian) conceded this point while stating that any amendments to the court martial system should mirror its civilian counterpart, opining that ‘the court martial system should reflect the Crown Court in all respects except where there are good operational reasons for differences.’

In terms of the chain of command’s involvement in the disciplinary process, one former Chief of the Defence Staff, Lord Boyce, objected to changing the role of the commanding officer in the British system, ‘[i]f you diminish [the commanding officer’s] authority or start to erode his authority you will get a fracture which is ultimately going to cause failure.’

Despite Lord Boyce’s warning, the ECtHR cases and the amendments in 1996 and 2006 resulted in the removal of the commander from the court martial process. In terms of the administration of courts martial, the commanding officer has given way to a civilian administrator who ‘is responsible for arranging the trial.’ The administrator selects the witnesses and any officers ‘under the command of the higher-authority (i.e. the old convening authority) will not be selected as members of the court martial.’ Finally, the reviewing provisions

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181 Ibid, 441.
183 Ibid, para 76.
184 British Parliamentary Report, above n 182, para 42.
185 See Hansen, above n 7, 441-442 (describing the changes made through the AFA 1996).
186 Ibid, 441.
187 Ibid.
following trial were also removed along with the corresponding authority to quash or substitute a sentence.\(^{188}\)

It seems clear that the amendments in 2006 delineated ‘serious matters’—to be kept free from the chain of command\(^ {189}\)—from ‘discipline matters’ that could be handled within the unit.\(^ {190}\) In fairness to those charged with implementing the amendments, the long shadow cast by the ECtHR following a decade of criticism coupled with Parliamentary review may have led to a bill that inundated the military justice system with civilianized procedures in an effort to demonstrate that the system was ECHR compliant.

### 2.1.3 Possible impacts of Findlay and AFA 1996, 2006 on the military justice system

It is difficult to measure the degree to which the removal of the commanding officer from the court martial system has affected discipline. Scholars examining the civilianization of the British military justice system have commented favourably.\(^ {191}\) One commentator noted, ‘[o]ne could reasonably believe that the Armed Forces Act 2006 is a significant step towards the establishment of a genuine self-contained system of military law and jurisdiction in Great Britain.’\(^ {192}\) Another commentator presents an interesting counterpoint that appears to underlie the civilianization dilemma, namely that ‘[t]he expertise and awareness of the unique military environment, a traditional key component of military justice, has been significantly diminished.’\(^ {193}\) Given its modernised structure, the court martial system now restricts involvement from the chain of command: prosecutions are headed by a civilian Director of Service Prosecutions (DSP) (although the position could be filled by a military officer) and adjudicated by a civilian judge.

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\(^{188}\) See AFA 1996, above n 34, s 16, sch. 5; see also AFA 2006, above n 48, s 272-275; J Blackett, *Rant on the Court Martial and Service Law* (2010) 8.02.


\(^{190}\) Ibid.

\(^{191}\) See De Leon, above n 21, 292; Dhal, above n 3, 3.

\(^{192}\) De Leon, above n 21, 292.

\(^{193}\) Hansen, above n 7, 456.
advocate.\textsuperscript{194} One could surmise that this aspect of the military justice system has become de facto civilian.

A related question regarding civilianization is whether there is an end-state other than that of a civilian criminal justice system. For example, despite the arguments that the civilianization of the system in 2006 was a positive trend,\textsuperscript{195} it arguably remains viewed as a flawed system. Supporting this notion is the reaction following the tragic events of 13 September 2003, when British soldiers captured and abused an Iraqi detainee.\textsuperscript{196} Three years later, seven soldiers were court-martialled for offences including manslaughter.\textsuperscript{197} One accused plead guilty and the remaining six were acquitted or the charges were dismissed by the judge advocate following closing of the prosecution’s case.\textsuperscript{198} The outcome of the courts martial eventually led to a public inquiry and human rights organisations demanding a complete overhaul of the military justice system.\textsuperscript{199} Despite the fact that the judge advocate was a civilian and the chain of command presumably had no involvement in the convening, prosecution or adjudication of the cases, it has been asserted that ‘[t]he military court-martial is an inherently self-serving institution with a tendency to operate as a damage limitation mechanism.’\textsuperscript{200}

Thus the trend towards civilianization could continue. Further amendments to the 2011 Armed Forces Act allow the DSP to delegate prosecutions to civilians—not solely to military officers as was previously the case.\textsuperscript{201} Whether or not ceding the prosecutorial and judicial function to civilians is in the best interests of fairness to the accused and discipline in the British Armed Forces may be debatable, but it appears clear that the UK military justice system is moving closer to a civilian criminal justice system model.\textsuperscript{202}

\textsuperscript{194}See AFA 2006, above n 48, s 362, 364.
\textsuperscript{195}De Leon above n 21, 292.
\textsuperscript{197}Ibid.
\textsuperscript{198}Ibid.
\textsuperscript{200}See Rasiah, above n 196, 195.
\textsuperscript{201}Armed Forces Act 2011, c.52, 2011 s. 21 (UK) (AFA 2011).
\textsuperscript{202}See generally M D Conway, ‘Thirty-Ninth Kenneth J. Hodson Lecture in Criminal Law’, (2012) 213 Mil LR 212 (where the Director General of the Army Legal Services outlines the various changes to the UK military justice system).
2.2 Canada: initial change then ‘holding the line’

In describing the impact of civilianization on modern military codes, one author has claimed, ‘Canada was one of the first countries to lead this revolution.’\(^{203}\) In contrast to Australia, this ‘revolution’ was not self-imposed.\(^{204}\) As discussed above, the implementation of the Charter in 1982, coupled with the Supreme Court’s decision in *Genereux* and the aftermath of the Somalia affair, forced the Canadian government to make changes to its military justice system.\(^{205}\)

2.2.1 The Dickson Report: balancing the needs of the chain of command with the right to a fair trial

Just as the Elston Act served as an important pre-cursor for the changes to the 1950 UCMJ in the US,\(^{206}\) the Dickson Report one year prior to the legislative amendments in 1998 attempted to strike the delicate balance between involvement of the chain of command in the military justice system and Charter concerns.\(^{207}\)

Brian Dickson was a retired Chief Justice on the Supreme Court of Canada and a decorated veteran in World War II.\(^{208}\) Following the Somalia affair, he was tasked by the Minister of National Defence to produce a report examining the workings of the military justice system and make recommendations.\(^{209}\) Between the drama of the Somalia Inquiry hearings and the legislative changes made under Bill C-25, the ‘Dickson Report’ served as a measured independent view of the unique challenges of retaining the traditional powers of the commanding officer in consideration of the legal rights outlined in the Charter.

Dickson bluntly noted that ‘[t]he commanding officer is at the heart of the entire system of discipline.’\(^{210}\) This statement may appear trite, yet in the shadow of the Somalia Inquiry it was possible that the military justice system would be radically restructured.\(^{211}\) Thus, when considering legislative amendments in relation to the commanding officer’s role in the court martial process, the context

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\(^{203}\) Hansen, above n 7, 421.
\(^{204}\) See generally Australia Senate Report, above n 10, ch 1.
\(^{205}\) See generally Pitzul & Maguire, above n 12; Madsen, above n 69, 1-38.
\(^{206}\) See Morris, above n 143, 125.
\(^{208}\) See Madsen, above n 66, 147.
\(^{209}\) See Dickson Report, above n 207, 2-3.
\(^{210}\) Ibid, 12.
\(^{211}\) See Madsen, above n 66, 148.
in which these changes were made are important—the very existence of the military justice system was at stake.

2.2.2 Bill C-25: modernizing the court martial system by introducing independent actors

The 1999 changes to the military justice system served to eliminate the traditional role of the commanding officer from the court martial process. As noted earlier, the combined impact of *Genereux* and Bill C-25 eliminated the chain of command from any involvement in the selection of panel members, assignment of prosecutors and review of sentence. These changes included the creation of an independent (military) Director of Military Prosecutions (DMP) and (civilian) Court Martial Administrator. Once charges were referred to the DMP, the sole involvement of the chain of command in the court martial process was for the commanding officer and the next senior officer to provide a letter to the DMP explaining how the alleged offence impacted discipline. The decision to proceed (or not) with charges and the conduct of the prosecution rests solely with the DMP.

2.2.3 ‘Holding the line’ in the military justice system: resisting civilianization

Over the past decade, no major tensions between civilianizing the military justice system and the requirement for a separate system of justice to enforce discipline have arisen. For instance, there have been no Supreme Court challenges to the military justice system since *Genereux* in 1992 and the National Defence Act has not been significantly amended since 1998. Further, in the four draft bills introduced in Parliament to address the Lamer Report recommendations, the government appears to have consistently ‘drawn the line’

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212 See Hansen, above n 7, 437.
213 See Goetz, above n 11.
214 Ibid.
215 Ibid.
217 See Goetz, above n 11.
218 Four omnibus military justice bills have been introduced into Parliament following the enactment of Bill C-25: Bills C-7, C-45, C-41 and C-15. See Bill C-7, above n 82.
in resisting further changes relating to the chain of command’s involvement in the military justice system and civilianization in general.\footnote{218} These bills, including the one currently under study in Parliament, do not make any significant changes to the commanding officer’s limited role in the court martial system.\footnote{219} In contrast, the bill proposes to reinforce the unique military character of the system by introducing principles of sentencing with the aim ‘to promote the operational effectiveness of the Canadian Forces by contributing to the maintenance of discipline, efficiency and morale.’\footnote{220}

It is difficult to measure the impact upon discipline, if any, of removing the commanding officer from the court martial system. When examining the number of courts martial following the changes in 1999, the chain of command appeared to be uncomfortable with the new process.\footnote{221} However, the consistent number of courts martial in the following decade suggests that the chain of command has subscribed to the new system and that the 1999 amendments have served to enhance the military justice system as a means to instil discipline.\footnote{222} In this regard, a recent survey on the military justice system conducted by the Office of the Judge Advocate General stated, ‘[t]he [military justice system] as a whole effectively meets the needs of the chain of command.’\footnote{223}

\subsection*{2.3 Australia: in the throes of civilianization}

Australia appeared to have a well-functioning, constitutionally compliant military justice system before the Senate produced its 2005 report.\footnote{224} The myriad of

\begin{itemize}
\item \footnote{218}{See generally Bills C-7, C-45 and C-41, above n 82; see also Bill C-15, above n 83.}
\item \footnote{219}{Ibid.}
\item \footnote{220}{Ibid, s 203.1(l).}
\item \footnote{224}{See Australia Senate Report, above n 10, paras 5.33-5.44.}
\end{itemize}
change in Australia in the intervening years represents a clear warning for allied military justice systems of the potential complexities of civilianization.

2.3.1 The Australia Senate Report: recommendations for reform

The Senate’s examination of the military justice system did not truly come ‘out of the blue’; rather, it was a response to a number of inquires into the military justice system that compelled the legislative branch to consider the issue. It was clear from the outset that the Senate was not receptive to the traditional role of the commander in the military justice system. The Committee gave little credence to the testimony of the Australian CDF when he stated that ‘the control of the exercise of discipline, through the military justice system, is an essential element of the chain of command.’ Although the Committee, ‘accept[ed] [the] basic premise’ and the general validity of this proposition, it concluded that ‘the weaknesses in the system … all suggest that current structures are adversely affecting the rights of Service personnel.’

The Committee appeared to defer to the opinion of civilian practitioners that subscribed to the opinion that service tribunals fundamentally lacked fairness, independence and impartiality due to ‘the very nature of the military adjudicating the military.’ In the end, the Committee made 23 recommendations regarding the military justice system, which were prefaced by this statement, in bold typeface: ‘[a]ll recommendations are based on the premise that the prosecution, defence and adjudication functions should be conducted completely independent of the ADF.’

2.3.2 Fallout from Lane: moving further away from the chain of command

Given the abbreviated tenure of the AMC following Lane, it is difficult to gauge what effect, if any, the revised court martial process had upon military discipline. However, in a 2008 speech, the former Chief of the Australian Army expressed his views on the dissonance between civilianized reforms to the military justice system and the distrust of the chain of command to administer this system: ‘I was concerned with the implicit view shown by the recommendations that the

\[225\] Australia Senate Report, above n 10, para 1.4; see also Duxbury, above n 118, at 162.
\[226\] Ibid, para 5.1.
\[227\] Ibid, para 5.19.
\[228\] Ibid, para 5.19.
\[229\] Ibid, li (Recommendations).
military could not be trusted with the military justice system and it needed to be taken from us’.230

Regardless of these concerns, the Australian military justice system is in the throes of civilianization. The 2012 proposed legislation creating the Military Court of Australia would eliminate the court martial system for trial by civilian judge (or judges) alone regardless of the seriousness of the offence.231 The legislation (as in 2010) also provides for an ‘emergency provision’ whereby the courts martial could be convened in operational theatres if and when necessary.232

While the legislation has yet to be enacted, the bill stands as a cautionary tale for military justice reform. For instance, it is interesting to speculate what a service member accused of a serious offence would prefer—a court martial convened by the RMJ with the requisite military judge and panel, or trial before a civilian judge with no benefit of a jury. Further, the notion of a court martial on ‘stand-by’ for operational reasons risks a significant number of years passing before military prosecutors and military judges would be called upon to prosecute and adjudge a service member for what could be a serious service offence.233

Despite these perceived shortcomings, the CDF was a strong proponent of the MCA Bill 2012 before Senate Committee hearings in September 2012.234

In light of submissions before the Senate Committee as to the likelihood of constitutional challenges to the right to be tried by a jury,235 it is debatable if discipline and fairness to the accused are best served by creating a new civilianized

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231 See Explanatory Memorandum MCA Bill 2012, above n 128, para 10; Military Court of Australia Bill 2012 (Cth), s 65 (MCA Bill 2012).
233 See generally Returned and Services League of Australia, Submission to the Inquiry by the Senate Legal and Constitutional Affairs Committee into the Military Court of Australia (undated) (Returned and Services League submission); G Early, Inspector General Australian Defence Force, Submission to the parliamentary inquiry into the Military Court of Australia Bill and the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012 s 4(b) (IG submission).
235 See Street submission, above n 130, para 9; IG submission, above n 233, s 4(a); Submission of Associate Professor A Duxbury, Dr R Livoja and Associate Professor M Groves, Submission to the Senate Standing Committee on Legal and Constitutional Affairs: Inquiry into the Military Court of Australia Bill 2012 and the Military Court of Australia (Transitional Provisions and Consequential Amendments) Bill 2012, 6 (Duxbury submission).
system. Indeed, one could take the view that the current system is compliant with both the Australian Constitution and international conventions. In the end, whatever form the Military Court of Australia will take, prudence is recommended for any further iteration of the bill should the 2012 version not become law. The uniqueness of a military justice system as *sui generis* does not preclude adopting elements of the civilian criminal justice system to enhance the fairness and transparency of courts martial. However, caution is advised when considering the impact of importing civilian criminal justice practices to a military disciplinary system under the assumption that the former is the standard to which the latter must aspire. This premise was best captured in the written submission of the Inspector General of the ADF before the Senate Committee. He emphasised that the military and civilian justice systems are divergent in a key respect in that the former has the primary role to assist the chain of command in maintaining order and discipline in the ADF.

Amongst the four countries examined in this paper, the US stands alone in retaining the ‘traditional’ command-centric military justice system. While the Uniform Code of Military Justice has withstood major reform for some time, it appears that the US military justice system could be on the precipice of the ‘second wave’ of civilianization.

### 2.4 The United States: entering the second era of civilianization?

While the US has been criticised in academic circles for not ‘modernizing’ their military justice system in step with their allies, this paper argues a counter-point: the American military justice system has struggled with civilianization some 20 years before their allies and has not faced the external pressures experienced in the UK, Canada and Australia.

In comparison with their allies, the US’ modern era of military justice reform

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236See generally Duxbury submission, above n 235, 1-2; Australia Defence Association, *Submission to the Senate Legal and Constitutional Affairs Committee Concerning the Bills to Establish a Military Court of Australia* (16 September 2012), para 14.

237IG submission, above n 233, at para 2.

238See Barry (2001), above n 14, 45.


240See Karlen, above n 5, 60; see also Hansen, above n 7, 421-422; Hodson, above n 5, 53; see generally Everett, above n 1; Sherman, above n 2.
began following World War II.\textsuperscript{241} In terms of the role of the commander in relation to the court martial process, the Elston Act in 1948 and the UCMJ\textsuperscript{242} in 1950 ushered in the ‘modern military justice system in the United States’\textsuperscript{243}

Arguably, civilianization was once again on the agenda with the enactment of the Military Justice Act of 1968.\textsuperscript{244} The theme of civilianization was further evident with the enactment of the Military Rules of Evidence in 1980: ‘[t]he adoption of the military rules accomplished the goal of further legitimizing the military justice system by grounding it when possible on established federal practices...’\textsuperscript{245} Finally, the promulgation of the Military Justice Act of 1983 further points toward civilianization with the extension of the Supreme Court’s ability to hear matters from the Court of Military Appeals.\textsuperscript{246} These legislative initiatives did not fundamentally alter the command-centric focus of the chain of command in relation to court martial procedures, unlike what would later befall the UK, Canada and Australia.\textsuperscript{247}

In comparison with countries noted above, it appears the US is not ‘lagging behind’ in terms of modernization, but was the forerunner in considering the role of the commander in its military justice system.

Despite the relative stability in its military justice system over the past 60 years, recent events suggest that the role of the commanding officer in the US court martial system may be reformed.\textsuperscript{248} As noted earlier in this paper, a series of high-profile events related to the military justice system has caused the legislative and executive branch to examine the current structure in detail.\textsuperscript{249}

From a comparative perspective, during a March 2013 Senate Armed Services Subcommittee hearing studying sexual assault in the military, one senator observed the decision in Great Britain and Canada to remove certain historical responsibilities from the chain of command and questioned if such reform would be problematic in the US military justice system.\textsuperscript{250} ‘The Judge Advocates’

\textsuperscript{241}Morris, above n 206, 125-126.  
\textsuperscript{242}Ibid, 127-128.  
\textsuperscript{243}Barry (2001), above n 14, 42.  
\textsuperscript{244}See Morris, above n 206, 135.  
\textsuperscript{245}Ibid, 137.  
\textsuperscript{246}Ibid, 137-138.  
\textsuperscript{247}Ibid, 135-139.  
\textsuperscript{248}See generally Senate Armed Services Committee Hearing, above n 171; Hagel Statement, above n 13.  
\textsuperscript{249}See Mulrine, above n 13; Panetta letter, above n 13; Hagel letter, above n 13; Senate Armed Services Committee Hearing, above n 171; Hagel statement, above n 13.  
\textsuperscript{250}See Senate Armed Services Committee hearing, above n 171, 59.
General from the Armed services and the Acting General Counsel generally supported the role of the commanding officer in the court martial system or were silent on the issue.\textsuperscript{251} In the end, recommended changes to the UCMJ came less than one month following testimony of the DoD Acting General Counsel before the same Senate subcommittee, as the Secretary of Defense announced recommendations to Congress to amend the convening authority’s ability to review sentences in two significant ways.\textsuperscript{252} First, the discretion for a convening authority to set aside a conviction for serious offences would be removed.\textsuperscript{253} Further, any changes made by a convening authority to a court martial finding or sentence would require written reasons.\textsuperscript{254}

In contrast with its allies and while there appear to be fissures in the historical traditions of the commanding officer in the American military justice system, those responsible for superintending military justice have been steadfast in their support and confidence in this ‘traditional model’.\textsuperscript{255} While it could be debated whether or not the US has or will enter a ‘second wave’ of civilianization, all four countries examined in this paper continue to incorporate civilian criminal justice procedures into their respective military justice systems. The next section of the paper offers some recommendations in this regard.

3 Recommendations

3.1 Canada and Great Britain: study the impact of civilianization

Given the transformation of the Canadian military justice system over the past decade, it would be beneficial to study the impact of removing the chain of

\textsuperscript{251}See Senate Armed Services Committee Hearing, above n 171, 42, 59 (statement of Lieutenant General D Chipman, Judge Advocate General of the Army); Senate Armed Services Committee Hearing, above n 171, 46-47 (statement of Major General V Ary, Judge Advocate to the Commandant of the Marine Corps).

\textsuperscript{252}See Hagel statement, above n 13; Senate Armed Services Committee hearing, above n 171, 42-44 (statement of Acting General Counsel R Taylor).

\textsuperscript{253}\textsuperscript{254}Ibid.

\textsuperscript{255}See e.g. Senate Armed Services Committee Hearing, above n 171, 52-53 (Statement of Lieutenant General Richard Harding, Judge Advocate General of the Air Force), 53-54 (Statement of Vice Admiral DeRenzi, Judge Advocate General of the Navy and Statement of Major General Ary, Judge Advocate to the Commandant of the Marine Corps).
command from the court martial system and the consequences, if any, on discipline and its relationship to operational effectiveness. As part of his statutory role to superintend the administration of the military justice system, the JAG must table a report to Parliament each fiscal year.\(^{256}\) Traditionally, the report examines a number of issues within the military justice system, including a qualitative survey that examines the views of the chain of command to identify any systemic issues of concern.\(^{257}\)

Following the 1999 amendments, one survey indicated some confusion about the role of the chain of command in referring charges and convening courts martial.\(^{258}\) However, that survey (in 2000) and subsequent surveys conducted in 2007 and 2010 show that respondents took the view that the military justice system met the needs of the chain of command to instil discipline.\(^{259}\)

While the respective reports indicated that the chain of command is generally satisfied that the military justice system—as a whole—meets the needs of the chain of command,\(^{260}\) further study is required regarding the court martial system. For instance, all three surveys indicate that court martial proceedings are unduly administrative.\(^{261}\) It is unclear whether these comments are related to the relative lack of involvement of the chain of command once charges are preferred or some other factor.

In this context, given the relative stability in the number of courts martial in recent history coupled with the conclusion of combat operations in Afghanistan,\(^{262}\) it is recommended that the JAG conduct a more detailed study to capture the chain of command’s views regarding the commanding officer’s role in the court martial process. In particular, information pertaining to whether

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256 National Defence Act, R.S.C., 1985, c. N-5, s 9.3(2) (Canada).
258 See JAG Annual Report 2001, above n 221, 42.
or not the amendments have strengthened or weakened the perceived ability of the commanding officer to maintain discipline could provide valuable insight in determining if the modified role of the chain of command in the court martial process has served to impact operational effectiveness. Finally, additional surveys with the Canadian Military Prosecution Service and legal officers serving in regional offices who advise commanding officers would also capture any recommendations in relation to the potential involvement of the chain of command in the court martial process once charges are laid.

A similar recommendation applies to the British military justice system. The multitude of changes following the Findlay decision in 1997 and the enactment of the AFA 1996 and 2006 have transformed the role of the commanding officer in the court martial process. It is unclear whether such changes are perceived positively by the chain of command or, more importantly, balance the interests of discipline and operational effectiveness with fairness toward the accused. To that end, an internal or independent review to examine the impact of the changes on the British military justice system in light of the 1996 and 2006 amendments is recommended. Given the tenor of civilian-like changes in the military justice system over the past decade, an independent review could focus its recommendations on how to integrate civilian authorities within the military milieu while examining if the modified system should allow for some involvement by the chain of command in the court martial process.

3.2 Australia and the United States: consider modifications to the current system

Australia is clearly trending towards the adoption of a civilianized military justice model. While the Lane decision in 2009 required interim legislation to re-establish the traditional court martial system, the proposed Military Court of Australia is arguably not a better system than the more ‘traditional’ system currently in place. Indeed, the current system was not viewed negatively by the High Court in 2010. Given the tumultuous recent history of military justice reform in Australia, perhaps the best advice can be gleaned from the current Australian DMP, who stated that the military discipline system would not survive should the MCA Bill 2012 be struck down on constitutional grounds. In light

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263 See Hansen, above n 7, 441; Blackett, above n 188, 4.02, 5.142.
264 See Haskins, above n 127, para 21; Nicholas, above n 127.
265 Brigadier L A McDade, Director of Military Prosecutions, Submission to the Inquiry into the Military Court of Australia Bill 2012 and the Military Court of Australia (Transitional Provisions and
of this expected constitutional challenge, perhaps a re-examination of the MCA Bill 2012 is in order should it not pass into law.

In contrast, the US is currently reviewing the role of the chain of command in the court martial process both on deployed operations and in the context of sexual assault cases. Pending recommendations and potential legislative amendments on these issues, the role of the commanding officer could change in the coming months. However, based upon the recent Senate subcommittee hearings and statement by Secretary of Defense Hagel, it does not appear that the 'traditional' role of the commanding officer will be radically altered. When considering potential changes to the role of the commanding officer in the American military justice system, an in-depth study on comparative practices amongst ‘Anglo-American’ allies is recommended to fully understand the possible impact of altering the traditional role of the chain of command in relation to discipline in the American context.

3.3 Establishing an Allied Military Justice Committee

One recurring theme throughout this paper has been that every country examined above has cited the other in some regard. Despite this perceived reliance on comparative military law, it is proposed that legislators and those groups advocating reform must approach this exercise with great caution. For instance, academics may correctly point to the Genereux decision as a watershed moment in Canadian military justice but fail to appreciate the political climate surrounding Bill C-25 and its impact on legislative reform. In other cases, many academics are understandably unfamiliar with comparative military justice systems.

Given the scope of changes discussed above, there appears to be a need for those charged with the superintendence of military justice systems in those

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266 See Senate Armed Services Committee Hearing, above n 171; Panetta letter, above n 13; Hagel letter, above n 13; Hagel statement, above n 13.
267 See Panetta letter, above n 13; Hagel statement, above n 13.
268 See Hagel statement, above n 13.
269 See Hagel Statement, above n 13; Senate Armed Services Committee Hearings, above n 171.
270 Ibid; see generally Senate Armed Services Committee Hearings, above n 171 (where numerous TJAG’s were supportive of the command-centric military justice system).
271 See e.g. Australia Senate Report, above n 10, paras 5.45-5.67 (citing developments in Canada, the UK and the US); Cox I Report, above n 167, fn 4 (where the Report references the Findlay and Genereux cases as a catalyst for change in the UK and Canada respectively).
272 See Madsen, above n 66, 144-150.
273 See De Leon, above n 21, 266.
countries to be aware of significant legislative or judicial decisions amongst the ‘Anglo-American’ countries. In this regard, it is proposed that these four countries form an *ad hoc* Military Justice Committee to keep appraised of developments in their respective countries. While one academic has proposed a similar idea to include civilian judges and academics, this paper proposes a slightly modified recommendation with the Committee limited to uniformed military justice practitioners charged with advising their respective Judge Advocates’ General (or his/her equivalent) on strategic military justice policy. This would allow military justice experts to gain an in-depth view of reform from the policy-makers themselves and therefore benefit from the context in which the reforms are proposed.

4 Conclusion

It is unquestionable that the US and their ‘Anglo-American’ allies have travelled different paths in attempting to reconcile the need for discipline in an armed force with that of ensuring that an accused is provided with fair and due process. While academics have cited the lack of change in the American military justice system when compared to its allies, further examination reveals that it was the US, not its allies, that underwent a significant period of civilianization some 20 years before the term arguably became in vogue across military justice circles. The pace of reform over the past 20 years calls into question whether or not this wave of civilianization threatens the very existence of the ‘Anglo-American’ military justice systems. While numerous reports in these countries subscribe to the notion of the commander as the ‘heart of discipline,’ it appears that such notion

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274See Dhal, above n 3.
275See Fidell, above n 239, at 216 (‘[m]ilitary justice experts, including judges, civilian practitioners, and academics, should meet more often’).
276Ibid.
278See Dhal, above n 3.
279See generally Hansen, above n 7, 452; Fidell, above n 239, 210 (noting that US jurisprudence does not follow international developments in military justice).
280See generally Everett, above n 1; Sherman, above n 2; Karlen, above n 5; Hodson, above n 5.
281See Dhal, above n 3.
282See Manual of Service Law, above n 9, 1-1-2; Dickson Report, above n 207, 12.
could be at risk should this trend of civilianization continue. Whether or not the US will retain its current system has yet to be determined; but those entrusted with the superintendence of the military justice systems in the aforementioned countries would be wise to pay heed to the effect of civilianization among their closest allies and to question whether such reform is in the best interests of discipline and fairness to the accused.
DIMINISHING THE VALUE OF WAR CRIMES PROSECUTIONS: A VIEW OF THE GUANTANAMO MILITARY COMMISSIONS FROM THE PERSPECTIVE OF INTERNATIONAL CRIMINAL LAW

Jonathan Hafetz*

Abstract
One of the most important questions in the current Guantanamo detainee litigation is whether the United States may prosecute individuals in military commissions for offenses that are not recognized as war crimes under international law. The United States maintains that such offenses—particularly, material support for terrorism and conspiracy—are violations of the 'US common law of war', a form of customary domestic liability in armed conflict distinct from international law. This paper offers a critique of the US theory from the perspective of international criminal law practice and theory. In particular, it explains how the US position unduly expands the conception of war crimes liability, thereby distorting the meaning of a war crime and undermining the value of prosecuting conduct on that basis.

Keywords
International criminal law, war on terror, legal tradition

1 Introduction
Since the 9/11 attacks, the United States has sought to prosecute terrorism suspects detained at the US Naval Base at Guantanamo Bay in military commissions. The fall-out from this legal experiment is still being experienced more than a decade later. The commissions, which are the subject of several court decisions and rounds of federal legislation, continue to raise an array of substantive and procedural issues. Among the most significant is the use of commissions to prosecute individuals for offences that are not recognized as war crimes under international law. The United States maintains that such offences—particularly, material support for terrorism and conspiracy—are violations of the 'US common law of war', a form of customary domestic liability in armed conflict that is distinct

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from international criminal liability. Since every pending military commission prosecution and every prior commission conviction (seven in total) has included the charge of material support for terrorism or conspiracy (or both), the issue has significant practical consequences for the existing system. More broadly, it raises important questions about the nature of war crimes and a state’s ability to prosecute offences in a specially created tribunal outside its regular criminal justice system.

Military commissions have a long, but checkered history in the United States.\(^1\) While their use has generally been upheld, they have nonetheless generated concerns by jeopardizing the traditional supremacy of civilian authority over the military and the protection of the constitutional rights of the accused through the criminal process.\(^2\) Military commissions have thus historically been confined to martial law, occupied territory, and, in limited circumstances, offences that violate the international law of war.\(^3\)

This paper examines military commissions from the perspective of legal traditions in conflict. It argues that the United States’ common law of war theory presents a conflict between national and international conceptions of war crimes and criminal liability more generally. The US theory presents several problems. First, allowing individual countries to unilaterally define war crimes undermines the conception of war crimes as resting on shared ideals among nations. Second, the United States’ common law of war theory effectively criminalizes any participation in armed conflict, undermining the idea of war crimes as exceptional and diluting the expressive value of war crimes prosecutions. Third, creating a specialized military tribunal to prosecute offences, such as material support for terrorism and conspiracy, that normally serve as the basis for federal terrorism prosecutions jeopardizes the principle of legality and the fair-trial guarantees established under international law and in prosecutions before international criminal tribunals.

2 Prosecuting terrorism in military commissions

The United States first established the post-9/11 military commissions through President George W. Bush’s November 13, 2001 executive order, which autho-

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2 Ex parte Milligan, 71 US (4 Wall) 2 (1866).

rized the military trial of foreign nationals who were members of al Qaeda or who had engaged in, aided and abetted, or conspired to commit a terrorist attack.\textsuperscript{4} The order proved highly controversial for several reasons, including the scope of liability, lack of procedural safeguards, and absence of congressional authorization. The Supreme Court invalidated these commissions in its 2006 decision in \textit{Hamdan v Rumsfeld} on separation of powers grounds (\textit{Hamdan I}).\textsuperscript{5} The Court held that the commission convened to try the defendant, Salim Hamdan, violated a federal statute, the Uniform Code of Military Justice (UCMJ), which demands greater procedural parity between commissions and courts-martial, the regularly established US military courts. The UCMJ, moreover, conditioned the use of military commissions on compliance with the international law of war. The commission convened to try Hamdan, the Court found, violated at least one provision of the law of war: Common Article 3 of the Geneva Conventions, which prohibits ‘the passing of sentences and the carrying out of executions without previous judgment pronounced by a regularly constituted court, affording all the judicial guarantees which are recognized as indispensable by civilized peoples’.\textsuperscript{6} The majority opinion concluded that the commission failed to meet Common Article 3’s ‘regularly constituted court’ requirement, while a plurality opinion further concluded that the commission neglected to provide ‘all the judicial guarantees which are recognized as indispensable by civilized peoples’ by allowing for the admission of coerced evidence and permitting the defendant’s exclusion from his trial. The same plurality also concluded that the commission lacked authority to proceed because conspiracy—the sole charge against Hamdan—was not a war crime under international law.

Within months of the Supreme Court’s decision, Congress enacted the Military Commissions Act of 2006 (\textit{2006 MCA}), providing the legislative authorization that the Supreme Court had said was lacking.\textsuperscript{7} The 2006 MCA codified a range of offences as war crimes, including providing material support for terrorism (\textit{MST}), conspiracy, and murder in violation of the law of war. In response to possible \textit{ex post facto} concerns, the statute noted that it was merely codifying offences that have ‘traditionally been triable by military commissions’ and was


\textsuperscript{6} Geneva Convention Relative to the Treatment of Prisoners of War, 12 August 1949, 75 UNTS 135, Art 3 (\textit{Third Geneva Convention}).

not establishing any new crimes. In 2009, following President Obama’s decision to maintain reformed military commissions, Congress enacted a second statute, the Military Commissions Act of 2009 (2009 MCA).\(^8\) Although the 2009 MCA provided additional procedural safeguards, including restrictions on the admission of hearsay and heightened protections against the use of coerced evidence, it maintained the same substantive offences. The legislation prompted concern among key Obama administration officials that at least some of those offences were not war crimes under international law,\(^9\) which could lead federal courts to reverse hard-won convictions and undermine the system’s legitimacy.\(^10\) The 2009 MCA contained a similar ex post facto qualification, but further clarified that the listed offences had ‘traditionally been triable under the law of war or otherwise triable by military commission’, implicitly acknowledging that not all the offences were established international law violations.\(^11\)

In 2008, a military commission convicted Salim Hamdan of providing MST and sentenced him to an additional five-and-one-half month in prison. David Hicks, the first Guantanamo detainee convicted before a military commission, had pled guilty to MST earlier that year. Although he was released from US custody, Hamdan appealed his conviction.\(^12\) In 2008, Ali al-Bahlul, who had served as a propagandist for al Qaeda, was convicted by a military commission on charges of conspiracy and solicitation as well as MST, and sentenced to life imprisonment. Al-Bahlul appealed. The Court of Military Commissions Review (CMCR) upheld both Hamdan and al-Bahlul’s convictions. It recognized that the crime must violate some international norm to be prosecuted in a military commission, but concluded that the crimes charged against Hamdan and al-Bahlul violated international law.\(^13\) Both defendants sought review in the US Court of Appeals in the DC Circuit, the first Guantanamo military commission convictions to be reviewed by federal courts.

\(^11\) 10 USC § 950p(d).
\(^12\) Hicks did not appeal his conviction because the government had insisted that all those who plead guilty before military commissions—a total of five of the seven commission convictions to date—waive their right to appeal.
In defending Hamdan’s conviction before the DC Circuit, the US government abandoned its contention that international law recognized MST as a war crime. It argued instead that because MST had long been recognized as a war crime under domestic law and practice, it could be tried by military commission. In *Hamdan v United States* (*Hamdan II*), the DC Circuit rejected the government’s argument and reversed the conviction. It concluded that the 2006 MCA—the statute under which Hamdan was convicted—authorized the retroactive prosecutions only of offences prohibited as war crimes triable by military commission at the time those offences occurred. Hamdan was prosecuted for conduct occurring between 1996 and 2001. Such pre-2006 MCA conduct, the Court said, was controlled by Article 21 of the UCMJ, which permitted military commission jurisdiction over violations of the *international* law of war, not a separate domestic common law of war. International law, the DC Circuit concluded, did not recognize MST as a war crime at the time of Hamdan’s alleged conduct (nor, it noted, does it currently recognize MST as a war crime). Accordingly, the Court ruled that the 2006 MCA did not authorize Hamdan’s prosecution for MST for conduct pre-dating the statute and that to conclude otherwise would raise serious *ex post facto* problems under the US Constitution.

The DC Circuit subsequently vacated al-Bahlul’s conviction for conspiracy and solicitation since the government acknowledged that international law does not consider those charges to be war crimes, making al-Bahlul’s prosecution for pre-2006 MCA conduct impermissibly retroactive as well. The government sought *en banc* review before the full DC Circuit in *al-Bahlul*, although the gravamen of its challenge was to the DC Circuit’s ruling in *Hamdan II* that commission jurisdiction over pre-2006 MCA conduct under the statute in effect at the time—Article 21 of the UCMJ—is limited to violations of the international law of war. The DC Circuit granted the request, and the case was heard by the full Appeals Court in the fall of 2013. No decision has yet been issued. In the interim, the commissions’ chief prosecutor, Brigadier General Mark Martins, moved for the dismissal of conspiracy charges from all pending commission cases, including those involving the defendants implicated in the 9/11 attacks and the destruction of the USS *Cole* in 2000, but his request was refused by the convening authority, which oversees the tribunal system.

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14 696 F.3d 1238 (DC Cir, 2012).
The United States’ attempt to prosecute MST and conspiracy as war crimes before military commissions raises important constitutional questions. One such question is whether the Define and Punish Clause of Article I of the US Constitution restricts Congress’ power to prosecute in military commissions violations of international law or whether, as the government maintains, Congress may also authorize punishment of offences traditionally tried under a separate US common law of war. Even if Congress has that power, another issue is whether prosecuting non-international law of war violations in military commissions violates the jury trial guarantee of Article III and the Fifth and Sixth Amendments to the Constitution, which protect a defendant’s right to a criminal trial in civilian court. Because the DC Circuit interpreted 2006 MCA as retroactively authorizing prosecution only of international law of war violations, it did not address the permissible scope of congressional power or other constitutional limits on military commission jurisdiction. However, Judge Kavanaugh, who authored the panel opinion in *Hamdan II*, suggested in a concurring footnote—that neither of the other two panel members joined—that Congress could, consistent with Article I, authorize the trial of offences that do not violate international law. Judge Kavanaugh maintained that Congress’s war powers ‘are not defined or constrained by international law’, and that the United States could ‘be a leader in the international community’ by authorizing war against a terrorist organization and expanding the category of war crimes beyond those recognized under international law. These issues will have to be confronted if the full DC Circuit or the Supreme Court concludes that the 2006 MCA applies retroactively or if the current—or a future—administration decides to charge other terrorism suspects in military commissions for post-2006 MCA conduct. Indeed, the government has contemplated using a military commission in at least one such case. The US common law of war theory thus suggests the possibility of a shadow military court system in which Congress is free to define war crimes outside of international law and to have them adjudicated in military commissions rather than in Article III courts.

This paper does not address these constitutional issues, but rather examines

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17 US Constitution, Art I, §8, cl 10. The clause provides that Congress shall have the power ‘[t]o define and punish piracies and felonies committed on the high seas, and offenses against the law of nations.’

18 *Hamdan II*, 480.

the US common law of war theory from perspective of conflicting legal traditions. The sections below describe: (1) how the creation of a separate branch of domestic war crimes liability threatens the conception of shared norms underlying international criminal law; (2) how offences such as MST and conspiracy would significantly expand war crimes liability and undermine the conception of a war crime itself; and (3) how military commissions threaten international criminal law principles of legality through the retroactive imposition of liability and the diversion of prosecutions to a forum that provides defendants significantly fewer protections than the existing domestic court system which is capable and willing to prosecute the offences.

3 The US common law of war and international law

International law rests on a consensus among nations regarding shared values and norms, and not on a particular country’s unique heritage or tradition. Early modern theorists such as Pufendorf and Vattel viewed the establishment of international standards as important to both peace and prosperity. As Vattel explained, nations must ‘reciprocally conform to general rules’ to prevent resorting to violence and war.20 This notion of shared norms—and of membership in a larger community—is central to international law and to conceptions of its role in constraining state behaviour.21

A defining feature of international criminal law is that its scope is limited to crimes of exceptional severity. As Margaret de Guzman has observed, ‘the gravity of international crimes is the […] primary conceptual foundation of international law’s authority to administer criminal justice’.22 In addition to establishing a basis for liability, shared ideals regarding crime severity have important jurisdictional consequences.23 They provide the basis for prosecuting individuals in an international forum and imposing liability even over the opposition of concerned states. Those ideals also potentially authorize any state to prosecute certain offences under principles of universal jurisdiction, even if

20 E de Vattel, _The Law of Nations_ (1797) III.viii.§137.
those offences would otherwise fall outside the jurisdiction of their national courts.\textsuperscript{24}

War crimes are among the oldest offences under international law.\textsuperscript{25} They have developed over the centuries through custom and usage, reflecting an evolving consensus on conduct so extreme it is prohibited even during armed conflicts, where state-sponsored violence is the generally accepted norm.\textsuperscript{26} Further, the Rome Statute suggests that not all war crimes are equal, giving the International Criminal Court (ICC) jurisdiction over war crimes ‘in particular when committed as part of a plan or policy or as part of a large-scale commission of such crimes’.\textsuperscript{27}

A separate ‘US common law of war’ jeopardizes the principle that war crimes rest on shared conceptions of exceptionally grave conduct. It suggests that each state may unilaterally define its own sub-set of war crimes, creating the possibility of multiple and inconsistent definitions of criminal liability during armed conflict.

International criminal law, to be sure, is evolving. It has been described as a hybrid—‘public international law impregnated with notions, principles, and legal constructs derived from national criminal law, [international humanitarian law], as well as human rights law’.\textsuperscript{28} Disagreement persists over international criminal law’s parameters, particularly on issues surrounding collective guilt and vicarious liability. Holding individuals liable for substantive crimes perpetrated by others has been controversial since Nuremberg and remains so today.\textsuperscript{29}

But while states may disagree at the margins, legitimate international prosecutions are now limited to those offences broadly understood to constitute international criminal law violations. One of the main achievements of the Rome Statute has been to define a set of widely accepted international crimes, including war crimes. Any state wishing to prosecute offences beyond those contained in the Statute should bear the burden of demonstrating that the particular offence is widely accepted by the international community as a recognized violation of international criminal law or is validly proscribed by national law and falls within

\textsuperscript{24} Ibid.
\textsuperscript{25} W Schabas, An Introduction to the International Criminal Court (2007) 65.
\textsuperscript{26} Sosa v Alvarez-Machain, 542 US 692, 732 (2004) (classifying war crimes as among a narrow ‘handful of heinous actions—each of which violates definable, universal, and obligatory norms’).
\textsuperscript{28} A Cassese, International Criminal Law (2\textsuperscript{nd} edn, 2008) 7.
\textsuperscript{29} J D Ohlin, ‘Joint Intentions to Commit International Crimes’ (2011) 11 Chicago JIL 693.
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the legitimate scope of national jurisdiction.

The United States does not argue that MST or conspiracy—which both ground liability on theories of vicarious responsibility—are offences under international law. It is not, in other words, offering a competing interpretation of a shared norm of substantive criminal liability. Rather, it is seeking to prosecute individuals based on what it claims is a separate domestic tradition of war crimes that exists outside of and independent from internationally accepted norms.

The domestic common law of war theory is another manifestation of the United States’ view that international law should not constrain its ability to wage a global armed conflict against al Qaeda and associated terrorist organizations (the so-called ‘war on terror’). This unilateralist impulse underlay US interrogation practices after 9/11, in which the harsh, often brutal treatment of detainees was premised on the theory that they fell outside the Geneva Conventions because they were members or supporters of a non-state terrorist organization.30 The Supreme Court ultimately rejected this position in Hamdan I, determining that at a minimum Common Article 3 applies to all individuals in US custody,31 and the Obama administration has sought to reform US interrogation practices along those lines.32 But the impulse to avoid international law persists through the United States’ effort to prosecute terrorism suspects in military commissions under its theory of a domestic common law of war.

4 The military commissions’ expansive notions of liability undermine the theory and expressive value of war crimes under international criminal law

The US common law of war theory posits a sweeping expansion of individual criminal liability during armed conflict. Under the guise of domestic law, it seeks to bring within the scope of war crimes conduct that exceeds even the broadest notions of collective liability articulated by international tribunals since Nuremberg. Under international law, war crimes are considered grave offences and liability is premised on personal culpability. The US common law of war theory, however, turns this notion on its head. It seeks to impose liability for

31 Hamdan I, 629.
virtually any participation in armed conflict and effectively transforms all enemy fighters into war criminals, even if they do not themselves participate in or commit a war crime. The theory diminishes the expressive value of war crimes prosecutions and is in tension with the aim of international criminal justice to stigmatize only the most egregious conduct as meriting the label of war crime.

4.1 Conspiracy and MST

The charges of MST and conspiracy underscore the unprecedented scope of war-crimes liability in military commissions, as does the charge of murder in violation of the law of war, which was the main issue in the prosecution of Canadian detainee Omar Khadr.

The MCA makes it a war crime to provide material support to a terrorist organization engaged in hostilities against the United States, including financial assistance, training, expert advice or assistance, and personnel. The MCA's definition of material support borrows directly from the federal MST statute, which is frequently used to prosecute terrorism suspects in federal court. By criminalizing 'support', the MCA does not require that the defendant participate in a specific terrorist attack or otherwise engage in conduct in violation of the law of war. Hamdan, for example, was convicted of MST based on evidence that he had served as Osama bin Laden's personal driver before 9/11 and was captured in November 2001 in Afghanistan while driving a car containing two anti-aircraft missiles and an al Qaeda-issued document authorizing the bearer to carry a weapon in Afghanistan. Another Guantanamo detainee, Noor Mohammed, pled guilty to MST charges in a commission prosecution based on his having served as a trainer at an al Qaeda-affiliated military training camp. Neither individual was accused of committing or assisting in the commission of a terrorist act nor of otherwise engaging in a war crime under international law.

The Defense Department has similarly used the charge of conspiracy to prosecute individuals in military commissions for their support for and connection to al Qaeda without showing that they sought to commit or participated in the commission of a war crime. The MCA covers any conspiracy to commit one or more of the substantive offences triable by military commission under the act,

33 10 USC §950t(25).
as long as there is some overt act to effect the conspiracy’s object.\textsuperscript{36} The MCA’s broad language encompasses conspiracy both as a stand-alone criminal offence and a form of vicarious criminal liability. Under the former, an individual may be held liable for the inchoate crime of agreeing to commit unlawful acts, regardless of whether those acts are actually committed. Liability thus typically attaches for agreeing to join a criminal organization with the intention of furthering its purpose, and committing some minor overt act in furtherance of that purpose. Under the latter formulation, some other substantive crime has been committed, and an individual is held vicariously liable for that underlying substantive offence committed by his co-conspirators as long as it was reasonably foreseeable.\textsuperscript{37}

Following the enactment of the 2006 MCA, the government charged Hamdan with conspiracy based on the allegation that he had ‘join[ed] an enterprise of persons’ that shared a ‘common criminal purpose’ to commit a variety of criminal acts.\textsuperscript{38} It charged another Guantanamo detainee, Ibrahim Ahmed Mahmoud al Qosi, with conspiracy for conducting arms training and periodically serving as Osama bin Laden’s driver and bodyguard in 2001.\textsuperscript{39} It charged Sufyian Barhoumi with conspiracy for receiving explosives training from and later becoming an explosives trainer for al Qaeda.\textsuperscript{40} The government’s conspiracy charge against al-Bahlul centred on his working in al Qaeda’s media office before 9/11, during which time he helped prepare propaganda videos for the organization.

In none of these cases, including al-Bahlul’s, did the government allege that the defendant committed or directly participated in a violation of the law of war. These cases are illustrative of the prosecution charge sheets in most military commission cases in that they assert a conspiracy to commit war crimes by inferring a defendant’s ‘agreement’ from his alleged association with al Qaeda members and acts in support of the organization. The charge sheets typically do not allege the commission of any underlying substantive offence.\textsuperscript{41}

Military commission charges of conspiracy and MST exceed even the most

\textsuperscript{36} 10 USC §950t(28).
\textsuperscript{38} Although Hamdan was charged under the prior, 2006 version of the MCA, the statute’s definition of conspiracy did not change when it was amended in 2009. The commission acquitted Hamdan of the conspiracy charge, convicting him only on the material support count.
\textsuperscript{41} See e.g. Wala, above n 37, 686.
controversial forms of vicarious liability under international law. MST has never been recognized as a war crime in an international tribunal, and the US effort to treat it as such at Guantanamo is unprecedented. The argument against conspiracy liability is in a sense even clearer, as it has been considered and rejected as a basis for war crimes prosecution under international treaties and by international tribunals. Conspiracy’s attempted resuscitation highlights how the United States is using military commissions to circumvent international-law limitations on collective and vicarious criminal responsibility.

Vicarious and membership-based liability theories proved highly contentious in criminal prosecutions after World War II. Their proponents, including Murray C Bernays, a lawyer in the US War Department, saw conspiracy as a legal vehicle for obtaining mass convictions. As Bernays observed, once a conspiracy had been established among the Nazi government and its party and state agencies, ‘each act of every member thereof during its continuance and in furtherance of its purposes would be imputable to all other members thereof’. The International Military Tribunal at Nuremberg (IMT) nonetheless refused to recognize conspiracy to commit war crimes as an offence in violation of the law of war despite some ambiguity in the London Charter and over the prosecution’s objections. Tribunal members resisted recognizing conspiracy as a war crime not merely because ‘[t]he Anglo-American concept of conspiracy was not part of European legal systems and arguably not an element of the internationally recognized laws of war’. They also believed that the malleability of conspiracy-based liability could lead to prosecutorial abuses and drag ‘innocent people into the prosecution’s net’, thus jeopardizing the trials’ legitimacy. The criminal tribunals conducted by the Allied Powers after the IMT under

46 Hamdan I, above n 3, 610-II; HM Attorney-General, The Trial of German Major War Criminals (1949) 21 (IMT Judgment); Charter of the International Military Tribunal, 8 August 1945, 82 UNTS 284, Art 9.
48 Ibid, 553.
49 See Danner & Martinez, above n 44, 115.
Control Council Law No 10 also declined to treat conspiracy as a war crime.\textsuperscript{50} The Charter for the International Military Tribunal for the Far East (\textit{IMTFE}), charged with prosecuting members of the Japanese government following World War II, likewise refused to confer jurisdiction over a conspiracy to commit any crime except a crime against the peace.\textsuperscript{51} The Nuremberg Principles, drafted to memorialise the lessons from the World War II prosecutions, exclude conspiracy from its list of war crimes and further state as a core principle that only ‘[c]omplicity in the commission of […] a war crime […] is a crime under international law’.\textsuperscript{52}

The IMT did declare certain organizations criminal based on a separate provision of the London Charter,\textsuperscript{53} thus facilitating membership-based prosecutions under Control Council Law No 10. But the IMT sought to limit organizational liability based on the principle that ‘criminal guilt is personal’.\textsuperscript{54} Membership offences prosecuted in subsequent Nuremberg tribunals were thus confined to senior officials whose organizational roles and activities tied them to the commission of war crimes and to individuals who participated in some way in advancing the organization’s criminal purpose. Moreover, the Nuremberg-era criminal membership precedents have since been criticized and do not reflect the current status of international law.\textsuperscript{55}

Post-Nuremberg developments reinforce the international consensus against imposing conspiracy liability for war crimes. The Geneva Conventions of 1949 and Additional Protocols of 1977 do not recognize liability for conspiracy to commit war crimes.\textsuperscript{56} Neither does the Statute for the ICC nor do the Statutes for the International Criminal Tribunal for the Former Yugoslavia (\textit{ICTY}) or the International Criminal Tribunal for Rwanda (\textit{ICTR}), even though the latter both

\textsuperscript{50} Trials of War Criminals Before the Nuremberg Military Tribunals under Control Council Law No 10, vol 15 (1949), 1077–1080.
\textsuperscript{51} IMT Judgment, \textit{International Military Tribunal for the Far East} 48 (1948) 413, 449–51.
\textsuperscript{52} Principles of International Law Recognized in the Charter of the Nürnberg Tribunal and in the Judgment of the Tribunal, ILC Ybk 1950/II, 377.
\textsuperscript{53} See IMT Judgment, 67–83.
\textsuperscript{54} Ibid, 67.
include conspiracy liability for genocide.\textsuperscript{57}

International criminal law, to be sure, continues to struggle with the contours of vicarious liability, as debates over the scope of the Joint Criminal Enterprise (\textit{JCE}) doctrine suggest. Like conspiracy, JCE provides a way to hold individuals responsible for their role in group criminality. Although the ICTY Statute does not specifically include JCE, judges have found that the Statute implicitly permits holding a defendant liable for his participation in crimes committed pursuant to a common plan or design, even if the defendant did not perpetrate the offence itself.\textsuperscript{58} The Rome Statute expressly provides for criminal liability where a person ‘contributes to the commission or attempted commission of […] a crime by a group of persons acting with a common purpose’.\textsuperscript{59} Under JCE III, the doctrine’s most expansive incarnation, individuals may be held liable for the acts of others that fall outside the scope of the common criminal plan but that are nevertheless reasonably foreseeable.\textsuperscript{60}

JCE has properly been criticized for allowing overly expansive forms of liability that erode the principle of personal culpability and have the potential to slip into a form of guilt by association.\textsuperscript{61} But even in its broadest form, JCE remains a mode of participation—a way to prove an individual’s perpetration of serious crimes and ‘not a crime in itself’.\textsuperscript{62} It requires a completed substantive war crime, such as wilful killing, that is committed pursuant to a common plan or scheme and by a perpetrator with the intent to execute that scheme.\textsuperscript{63} JCE is not a stand-alone inchoate crime, and does not support the type of liability that conspiracy can for mere criminal agreements.\textsuperscript{64} JCE, moreover, not only imposes

\textsuperscript{57} Statute of the International Criminal Tribunal for the Former Yugoslavia, SC Res 827, 25 May 1993, Art 4(3)(b); Statute of the International Tribunal for Rwanda, SC Res 955, 8 November 1994, Art 2(3)(b). The international community’s acceptance of conspiracy liability for genocide may be explained by the sheer magnitude of the wrongdoing and the intricate, elaborate, and systemic planning necessary to carry it out.


\textsuperscript{59} Rome Statute, Art 25(3)(d).

\textsuperscript{60} \textit{Prosecutor v Tadić (Judgment)} (ICTY, Appeals Chamber, Case No IT-94-1-A, 15 July 1999) para 220 (\textit{Tadić}).

\textsuperscript{61} See Danner & Martinez, above n 44, 132–37.

\textsuperscript{62} \textit{Prosecutor v Kvočka (Judgment)} (ICTY, Appeals Chamber, Case No IT-98-30/1-A, 28 February 2005) para 91.

\textsuperscript{63} \textit{Tadić}, para 189–90.

\textsuperscript{64} \textit{Rwamakuba v Prosecutor (Decision on Interlocutory Appeal Regarding Application of Joint Criminal Enterprise to the Crime of Genocide)} (ICTR, Appeals Chamber, Case No ICTR-98-44-AR72.4, 22 October 2004) para 30.
a higher *mens rea* requirement than conspiracy, but also requires an *actus reus* that has some causal relationship to the war crime, in contrast to the relatively minor and insubstantial ‘overt act’ that furthers the goal of the conspiracy, independent of its causal relationship to the war crime.\(^65\) JCE liability thus remains narrower than conspiracy-based liability under the MCA, which can be imposed based on a person’s participation in or support for al Qaeda unconnected to the commission of a substantive offence.\(^66\)

### 4.2 Murder in violation of the law of war

The potential scope of liability under the US common law of war is perhaps most dramatically illustrated by the government’s interpretation of the MCA offence of murder in violation of the law of war.\(^67\) This was the principal charge against Omar Khadr.\(^68\) While the MCA does not define violations of the law of war, the Military Commissions Manual, which provides guidance to the Defense Department in interpreting the MCA, says that an accused may be convicted by a military commission if he engaged in conduct ‘traditionally triable by military commission (e.g., spying; murder committed while the accused did not meet the requirements of privileged belligerency) even if such conduct does not violate the international law of war’.\(^69\) The prosecution alleged that Khadr violated the law of war by intentionally throwing a hand grenade during a firefight that led to the death of a US Army Special Forces officer in Afghanistan.\(^70\) Khadr ultimately pled guilty in exchange for a promise to transfer him to Canada to serve out the

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65 Wala, above n 37, 704.
66 Cassese, above n 28, 33.
67 10 USC §950v(b)(15).
69 *Manual for Military Commissions* (2012) IV-13. Although a prior version of the Manual was in effect at the time of Khadr’s prosecution, this provision of the Manual did not change when it was updated in 2012. Thus, acting as a combatant, or directly taking part in hostilities, is deemed a war crime, if done by an unprivileged belligerent. See D Frakt, ‘Direct Participation in Hostilities as a War Crime: America’s Failed Efforts to Change the Law of War’ (2012) 46 *Val U LR* 727, 738.
70 It also charged Khadr with conspiracy and material support for terrorism based on allegations that he received weapons training, engaged in surveillance and reconnaissance against the US military, and took part in converting and planting improvised explosive devices (*IEDs*). See Glazier, ‘Still a Bad Idea: Military Commissions under the Obama Administration’, Loyola Law School of Los Angeles, Legal Studies Paper No 2010-32, <http://ssrn.com/abstract=1658590> [accessed 7 November 2013].
The remainder of his eight-year sentence.\textsuperscript{71}

The theory behind Khadr's prosecution portends a radical expansion of war crimes liability. International humanitarian law (IHL) sanctions the use of force both by and against combatants during armed conflict, as long as they meet the requirements for lawful combatants, which include operating under a legally accountable chain of command, identifying themselves through a uniform or emblem, displaying their arms openly, and adhering to the laws of war.\textsuperscript{72} Under international law, lawful combatants enjoy a privilege of belligerency, which protects them from domestic criminal prosecution for killing or wounding members of an opposing force. International law, however, also regards lawful combatants as legitimate targets for the opposing force during the armed conflict.

By contrast, individuals who do not qualify as lawful combatants cannot invoke the combatant's privilege. Since al Qaeda does not meet these requirements, its members would not qualify as lawful combatants, but instead would be treated as unprivileged belligerents.

In contrast to a lawful combatant, an unprivileged belligerent such as Khadr does not have immunity under international law for engaging in legitimate acts of warfare, such as throwing a hand grenade at an enemy soldier during a firefight. But international law also does not criminalize the ordinary killing of combatants, even if carried out by an unprivileged belligerent.\textsuperscript{73} Khadr could thus have been prosecuted for murder under either Afghan or US criminal law.\textsuperscript{74} Khadr cannot, however, be prosecuted under international law unless his conduct itself constitutes a war crime—for example, if he had used a prohibited weapon or deliberately targeted civilians.\textsuperscript{75}

Charging Khadr with a war crime for an otherwise legitimate use of military force during armed conflict contradicts black-letter IHL. It transforms a conduct-based-liability rule into a status-based rule. It rests, moreover, on a theory that all potentially lethal uses of force by unprivileged belligerents are war

\textsuperscript{72} Regulations Concerning the Laws and Customs of War on Land, 29 July 1899, 187 CTS 227, Art 1 (Annex, Hague II).
\textsuperscript{74} J C Hanson, `Murder and the Military Commissions: Prohibiting the Executive's Unauthorized Expansion of Jurisdiction' (2009) 93 \textit{Mn LR} 1871, 1882–3.
crimes. Any member of an enemy force in the conflict against al Qaeda or its affiliates who, for example, shoots back at a US soldier during a firefight is thus by definition subject to prosecution as a war criminal.

4.3 Implications of the US theory of war crimes in the war on terror

The Guantanamo military commissions represent significant departure from existing notions of criminal liability during armed conflict and from the conception of a war crime itself. As David Glazier has observed, charges of MST, conspiracy, and murder in violation of the law of war effectively collapse the distinction between *jus ad bellum* and *jus in bello* that is central to the law of armed conflict.\(^\text{76}\) *Jus ad bellum* rules regulate the decision to use force and can subject to prosecution those responsible for deciding to unlawfully commence hostilities, as demonstrated by the use of ‘crimes against the peace’ at the Nuremberg and Tokyo tribunals after World War II and the inclusion of the crime of aggression under the jurisdiction of the ICC. *Jus in bello* rules, which govern the actual conduct of the war, assign combatants on both sides equal rights and responsibilities, imposing liability based on individual conduct and not the justness of one side’s cause.\(^\text{77}\)

The Guantanamo military commissions, by contrast, can impose liability based solely on the decision to become part of the enemy force. The commissions thus dispense with idea of personal culpability that has historically been critical to war crimes liability. In its place, the commissions provide a strict liability rule in which all members of the opposing side are committing a war crime simply by participating in armed conflict. The concerns generated by the commissions’ approach are exacerbated by the absence of any requirement that prosecutions focus on the most serious offenders. In contrast to international tribunals, which have traditionally been required to pursue high-level perpetrators,\(^\text{78}\) commissions are free to pursue minor offenders, and have continued to do so.

Military commissions’ expansive jurisdiction undermines the notion of war crimes as exceptional and dilutes the symbolic function of war crimes prosecutions. A principal motive for war crimes prosecutions under international law lies

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\(^{76}\) See Glazier, above n 70, 79–80.

\(^{77}\) Ibid.

\(^{78}\) SC Res 1329, 30 November 2000 (approving official policy of the ICTY and ICTR of prioritizing prosecution of ‘civilian, military, and paramilitary leaders’). See also Danner & Martinez, above n 44, 95–6.
in their expressive value.\textsuperscript{79} The magnitude of the crimes, the multiple communities served, and the resource and political constraints on the number of prosecutions that can feasibly be brought, differentiate international criminal justice from domestic prosecutions.\textsuperscript{80} The crimes that are prosecuted—and the sentences imposed upon conviction—are laden with symbolic value. Sanctions imposed under the rubric of war crimes and other international law violations help craft historical narratives and embed normative values across borders.\textsuperscript{81} Those sanctions also communicate the outrage of the international community.\textsuperscript{82} The appropriate legal characterization of criminality under international criminal law thus provides ‘a vocabulary that gives voice to the special gravity of the offense’.\textsuperscript{83}

US military commissions seek to harness international criminal law’s expressive purpose by characterizing the 9/11 attacks and other wide-scale attacks against civilians by non-state actors as war crimes. But the commissions reach too far. By adopting a theory of liability that essentially permits one side to treat all enemy fighters as war criminals—regardless of their personal involvement in the commission of specific offences—military commissions undermine their own expressive aims. They minimize the stigma of being branded a war criminal and dilute the impact of prosecutions for actual violations of the law of war, such as wilful killing.

5 Evading legality and due process

The United States’ attempt to prosecute MST and conspiracy as war crimes not only circumvents international criminal law’s limits on substantive liability and requirement of personal culpability. It also contradicts the principle of legality by seeking to punish conduct that was not illegal at the time. The US government argues that MST and conspiracy charges against Guantanamo detainees do not run afoul of this principle—enshrined in domestic law under the Constitution’s \textit{ex post facto} clause—because both are offences traditionally triable by military

\textsuperscript{81} See Drumbl, above n 78, 61, 173.
\textsuperscript{82} \textit{Prosecutor v Aleksovski (Judgement)} (ICTY, Appeals Chamber, Case No IT-95-14/1-A, 24 March 2000) para 185.
\textsuperscript{83} Greenawalt, above n 23, 1092.
commissions as part of the US common law of war. The government relies mainly on selective historical examples dating from the Civil War.\textsuperscript{84} Those examples, however, involved military commissions that exercised hybrid jurisdiction over domestic criminal offences based on martial law and over war crimes,\textsuperscript{85} or that involved charges alleging participation in a completed war crime.\textsuperscript{86} The Civil War tribunals, moreover, predated the development of the modern law of war. This section will not attempt a detailed analysis of the government’s historical evidence,\textsuperscript{87} but rather will make two main points. First, even assuming there is some ambiguity regarding the meaning of this evidence—which is both temporally remote and fragmented—modern international criminal law cautions against expanding substantive liability in this manner. Second, charges such as MST and conspiracy—as well as other MCA offences that have a firmer basis in international law—demonstrate an attempt to circumvent the regular federal court system and channel cases to a specially created forum designed to provide defendants fewer protections and facilitate convictions. In this respect, the commissions diverge from internationally recognized guarantees afforded to the accused. They also lack a central justification for the creation of specialized tribunals in international criminal justice to address exceptionally grave criminality—the inability or unwillingness of existing domestic tribunals to prosecute the offences fully and fairly. Here, the existing democratic court system not only has the authority, but also has a demonstrated capability of prosecuting the very terrorism offences over which the commissions claim jurisdiction.\textsuperscript{88}

The tension between substantive justice and legality is an old and recurring one in international criminal law. The former seeks to prohibit and punish dangerous or egregious conduct even if it was not legally prohibited when it was carried out. By contrast, the principle of legality—\textit{nullum crimen sine}


\textsuperscript{86} See \textit{Mudd v Caldera}, 134 F.Supp 2d 138, 147 (DDC, 2001) (affirming, on later federal court review, the original military commission’s determination that the defendant, Dr Samuel M Mudd, was properly convicted under the law of war for having ‘aided and abetted President Lincoln’s assassins’).

\textsuperscript{87} For a persuasive rebuttal of the government’s evidence in support of its argument that conspiracy is part of a separate domestic common law of war, see Glazier, above n 84.

\textsuperscript{88} See Zabel & Benjamin Jr, above n 34.
lege—permits the imposition of criminal liability against an individual only if he engaged in conduct that was regarded as a criminal offence under applicable law at the time.89

The struggle between these competing principles dates to the origins of modern international criminal law. At Nuremberg, prosecutors sought to charge Nazi officials with crimes of aggression and crimes against humanity even though neither was firmly rooted in international law. The IMT ruled that defendants could be punished for atrocities that the world recognized as abhorrent even if they were not strictly defined as criminal when committed.90 Robert Jackson, the chief prosecutor, maintained that the nature of international law at the time of the Nuremberg trial prevented rigorous application of the principle of retroactivity.91

Since Nuremberg, however, the principle of legality has become firmly rooted in international law. It is recognized in human rights treaties that define the rights of the accused.92 It is also reflected in international humanitarian law treaties,93 and is widely regarded to fall within Common Article 3’s requirement—applicable in all armed conflicts—that trials ‘afford all the judicial guarantees recognized as indispensable by civilized peoples’.94 The nullum sine principle has also been established in statutes creating international tribunals and in their case law.95 It has, in short, been transformed ‘from a principle of justice to a binding rule of customary international law, applicable to international tribunals as well as to states’.96

International criminal law, to be sure, is not static and requires space to develop. Some latitude is important given international criminal law’s aspiration to address the most serious criminality and the potential for ambiguity inherent in its decentralized structure. As international criminal law is applied to new circumstances, existing offences and elements of those offences develop through a

89 See Cassese, above n 28, 36–7.
90 United States v Göring (Judgment) (1946), in 1 Trial of the Major War Criminals Before the International Military Tribunal (1947) 171, 219.
93 Third Geneva Convention, Art 99(I); Fourth Geneva Convention, Art 67.
94 See Glazier, above n 70, 66.
95 See e.g. Rome Statute, Art 22.
process of interpretation and clarification. International tribunals, for example, have played a significant role in developing international law regarding crimes against women, including rape and other types of sex-related violence. But while courts may adapt existing offence to new circumstances, they may not simply create new crimes. Further, where faced with conflicting interpretations of a rule, courts should generally adopt the interpretation that favours the accused.

Salim Hamdan’s MST prosecution illustrates how military commissions circumvent the principle of legality. International law did not at the time (and does not now) criminalize providing oneself as personnel or serving as an armed bodyguard and driver—the conduct that formed the crux of the MST charge and conviction in Hamdan’s prosecution. As noted above, the government’s theory of the case—that Hamdan had provided support to unlawful combatants (or ‘unprivileged belligerents’, under present terminology)—would effectively criminalize any assistance to an opposing force during armed conflict.

Moreover, although US domestic criminal law would today appear to cover Hamdan’s conduct under the federal MST statute, it did not clearly do so at the time in question. The amendments to the federal MST statute expressly giving it extraterritorial reach post-dated Hamdan’s conduct. More importantly, providing ‘service’ and ‘personnel’ (defined as one or more individuals who may be or include oneself) to a designated terrorist organization—which formed the basis of the allegations against Hamdan—were not added to the federal MST statute until 2004, several years after the conduct in question.

The MCA undermines the principle of legality not only by expanding the scope of substantive liability, but also by allowing the government to divert cases from the regular federal criminal court system to a specially created

97 Prosecutor v Aleksovski (Judgment and Sentence) (ICTY, Appeals Chamber, 24 March 2000) para 127.
99 Rome Statute, Art 22(2).
100 Military Commission Order No 2-09, 16 July 2009 (listing the charges).
102 Congress added these terms when it amended the MST statute in 2004. See 18 USC §2339A(b) (2004) (amending 18 USC §2339A(b) (1996)).
tribunal that affords defendants fewer rights and protections. The commissions’ forum-diversion potential is underscored by the possible prospective use of military commissions to prosecute offences such as MST that are prohibited under federal law—precisely the scenario envisioned by Judge Kavanaugh in his concurring footnote in *Hamdan II*. The MCA replicates an offence contained in the federal criminal code, thus giving the government the option of prosecuting the same conduct in a commission rather than a federal court as long as the defendant is subject to the commissions’ personal jurisdiction as an ‘alien unprivileged enemy belligerent’.103

The potential for forum-diversion is present even in the handful of instances where the alleged conduct of a Guantanamo detainee may constitute a law-of-war violation, as in the case of Khalid Sheikh Mohammed and four other defendants accused of attacking civilians on 9/11. These individuals could have been prosecuted in federal court not only under various domestic anti-terrorism statutes, but also under the War Crimes Act.104 Enacted in 1996 to implement the Geneva Conventions, this federal statute provides jurisdiction over war crimes committed by or against US nationals. The MCA, in short, permits the government both to criminalize conduct that was not illegal at the time by labelling it a ‘domestic war crime’ and to divert the prosecution of actual war crimes to a specialized forum to more easily obtain a conviction, limit a defendant’s rights, and minimize public access despite existing war-crimes jurisdiction in the regular domestic courts.

The creation of a specialized forum for terrorism prosecutions brings the commissions into conflict with fair-trial guarantees established under international law, notwithstanding the Obama administration’s efforts to reform the commissions. Common Article 3, which applies to the US armed conflict against al Qaeda and associated forces, requires the use of ‘regularly established courts’ and protects against specially created tribunals that do not follow accepted international standards. While Common Article 3 itself does not define the specific requirements of a regularly constituted court, the procedural protections for individuals tried during armed conflict contained in Article 75 of the First Additional Protocol to the Geneva Conventions, which are considered to be customary international law, provide additional guidance.105 Further, human rights law, which is generally considered to provide standards for international criminal tribunals,106

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103 10 USC §§948a, 948c.
104 18 USC §2441.
106 K Watkin, ‘Controlling the Use of Force: A Role for Human Rights Norms in Contemporary
contains specific guarantees that must be provided to the accused, including the presumption of innocence, the right to counsel, the right to be tried without delay, and the right of the accused to examine witnesses appearing against him and to call witnesses in his favour. While the 2009 MCA, as written, appears to comport with several of these guarantees, deviations in practice have been significant. For example, the US Department of Defense has undermined effective representation of counsel through limitations on attorney-client communications and by giving less favourable treatment to defence requests for expert testimony and other trial-related expenses than to similar requests by the prosecution. The MCA also denies defendants’ their choice of counsel, limiting defence counsel to US military judge advocates and civilians who are US citizens.

Transparency, moreover, remains a significant problem in the military commissions. Not only has the government sought to censor detainee testimony regarding their own mistreatment by US officials, but an unnamed US government agency was recently discovered to possess the power to secretly censor the feed of the proceedings that the public and news media receive on a 40-second delay—all apparently without the knowledge of the presiding military judge. The commissions have conducted closed hearings to discuss legal issues regarding classified information, also from which the defendant himself is excluded. Although the MCA expressly bars the admission of evidence obtained by torture and other coercion, this protection is jeopardized by the government’s misuse of the classification process, restrictions on the identification of, and access to, potential witnesses, and limitations on discovery, all of which inhibit a defendant from demonstrating that a particular statement was coerced.

The larger picture that emerges is of a shadow criminal justice system without fixed rules or an internalized commitment to principles of legality and due

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107 ICCPR Art 14.
108 See Glazier, above n 70, 103–6.
109 10 USC §§948k, 949c.
112 10 USC §948r(c).
113 Glazier, above n 70, 109.
The commissions’ improvised nature infects nearly every aspect of their proceedings, undermining their integrity and fairness.\textsuperscript{114} International criminal law has historically relied on the creation of new tribunals to prosecute offences, from the IMT at Nuremberg to ad hoc tribunals (ICTY and ICTR), hybrid tribunals (such as the Extraordinary Chambers in the Courts of Cambodia and Special Tribunal for Lebanon), and now a permanent criminal court at The Hague. These tribunals are predicated on the assumption that existing domestic courts are incapable or unwilling to prosecute offences that the international community deems sufficiently grave to warrant judgment and punishment—an assumption best embodied by the Rome Statute’s complementarity principle.\textsuperscript{116} A different impulse, however, underlies the creation of the Guantanamo military commissions. Under the pretext of war crimes, the commissions create a specialized tribunal whose main purpose is not to adjudicate conduct that the regular domestic courts—whether Article III civilian courts or military courts-martial—lack the capacity to address. Rather, they provide an escape valve for cases the government wishes to prosecute in a geographically remote, lower-process forum, whether because its evidence is too weak or tainted to support a conviction in the regular federal courts or because trying the defendants in the United States is considered too politically controversial.

Like the military commissions’ substantive overbreadth in defining offences, the commission’s procedural deficiencies undermine the expressive function served by war crimes prosecutions. Adherence to legality and due process helps avoid perceptions of bias and victor’s justice.\textsuperscript{117} It also helps maintain the focus on the alleged conduct rather than on the denial of judicial guarantees. The exclusion of US citizens from the jurisdiction of Guantanamo military commissions exacerbates this problem by reinforcing asymmetries between fora, with the more rights-protective federal criminal courts reserved for citizens of the prosecuting state and less rights-protective military tribunals designated exclusively for foreign nationals. Whereas international criminal justice seeks to express condemnation of egregious conduct through prosecution in a capable, but neutral forum, the Guantanamo military commissions attempt to convey

\textsuperscript{116} Rome Statute, Art 17.
opprobrium by shifting a category of cases away from a capable, but neutral forum (federal courts) to a second-class forum—a message embodied by the common refrain that foreign terrorism suspects do not ‘deserve’ to be tried in the regular court system.

6 Conclusion

This paper has explained how the prosecution of offences by military commissions at Guantanamo clashes with the conceptualization and treatment of war crimes under international law. It has described several problems flowing from the United States’ position that it may try by military commission offences, such as MST and conspiracy, that are not recognized as war crimes under international law based on the notion of a separate US common law of war. In defending the government’s position that it may—at least prospectively—treat MST as a war crime, Judge Kavanaugh noted that the ‘United States may be a leader in the international community, not just a follower.’118 This view of the United States as a norm entrepreneur is problematic even aside from the constitutional limitations on Congress’ power to define offences triable by military commissions. By expanding the scope of criminal liability so broadly in order to secure convictions, the United States undermines the meaning and purpose of designating conduct a war crime and prosecuting it on that basis.

118 Hamdan II, 480.
International criminal law is often seen as more progressive than many domestic legal traditions in its consideration of gender-based crimes such as rape. That said, domestic legal traditions have profoundly influenced how international criminal law has addressed gender-based crimes, especially crimes of sexual violence. In turn, international criminal law has also, to a lesser extent, influenced domestic law on gender-based crimes, again especially with respect to sexual violence. This seems to indicate an ongoing dialogue on sexual violence between the international and national spheres, but a closer examination raises questions about the appropriateness of that exchange. For example, have the correct domestic laws been considered when searching for international general principles of law on rape? Has gender-based discrimination in domestic laws been taken into account when considering the lessons those laws provide to international criminal law? And, perhaps most central to the consideration of whether there should be a flow of influence from the domestic to the international and back to the domestic: are the circumstances of international criminal law—namely the context of genocide, crimes against humanity or war crimes—so different from domestic circumstances that there can be no useful comparison?

This article begins with an examination of two examples of the flow from domestic to international criminal law. The first example relates to how rape has been defined by international criminal courts and tribunals. It demonstrates that, after an initial rejection of engagement with the domestic sphere, international criminal law has cautiously (in the case of the International Criminal Court) or fully (in certain cases before the International Criminal Tribunals for the
Former Yugoslavia and Rwanda and the Special Court for Sierra Leone) embraced common domestic definitions of rape. The second example stems from the manner in which two international criminal tribunals dismissed evidence of sexual violence, seemingly influenced by widely-held domestic misconceptions about rape and sexual violence. Both examples demonstrate that, while there are positive aspects of the flow from the domestic to the international—for example, through the adaptation of domestic criminal procedures crafted to minimise retraumatisation of sexual violence survivors—there are also dangers. This is because domestic approaches to sexual violence contain within them certain assumptions, for example that rape is mainly a ‘private’ or opportunistic act, or that rape allegations against accused persons are somehow both less reliable and more damaging. These assumptions tend to be inaccurate and therefore harmful when they form the basis of legal reasoning at the domestic level. When transposed to the international level, they not only lead to flawed judgments, they also set regressive precedent.

This paper then turns to a discussion of the flow from international to domestic criminal law. It examines how domestic implementation of the Rome Statute of the International Criminal Court (ICC) and its Elements of Crimes, or domestic interpretation of the judgments of international criminal tribunals, present the possibility that outdated domestic legislation on sexual violence will be revised on a widespread basis. However, here again caution is needed. The international law on rape, in particular, is not entirely clear—can it provide a helpful road map for domestic reform? The answer to this will depend, it seems, on the state of domestic law on sexual violence prior to the reform.

This paper concludes that international and domestic criminal laws on sexual violence are indeed linked, but that they are not, and should not, be interchangeable. The International Criminal Tribunal for Rwanda (ICTR), in the first international criminal judgment considering the definition of rape, created a strong demarcation between international and domestic criminal law.\(^1\) This demarcation has since been eroded, creating a flow from the domestic to the international and back again. This conversation may assist in adding clarity and certainty to under-theorised aspects of sexual violence in international and domestic law. However, it may also add confusion where relatively dissimilar contexts (such as peacetime and war time) are treated as similar or where underlying gender-based discrimination is not acknowledged and addressed.

\(^{1}\) Prosecutor v Akayesu (Trial Judgment) (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-4-T, 2 September 1998) paras 596-7, 686-7 (Akayesu).
1  The influence of domestic law on international criminal law

1.1  The definition of rape

Domestic law has had a significant influence on how international criminal courts and tribunals have defined and characterised the prohibited act of rape and other forms of sexual violence. The International Criminal Tribunals for the Former Yugoslavia and Rwanda, and the states negotiating the Elements of Crimes for the ICC, were the first to elaborate the actus reus and mens rea for rape as a prohibited act within genocide, crimes against humanity and war crimes. The end result has not been one single approach to the elements of rape, but rather four different approaches reflecting varying levels of engagement with domestic law.

The first international criminal tribunal to consider the elements of rape was the ICTR, in the case of Prosecutor v Jean-Paul Akayesu. As there was ‘no commonly accepted definition’ of rape in international law at that time, the ICTR’s Trial Chamber looked to the domestic context for guidance. It found that certain national jurisdictions define rape as non-consensual intercourse. However, it also reasoned that it was important to ‘include acts [in the definition of rape] which involve the insertion of objects and/or the use of bodily orifices not considered to be intrinsically sexual’, as this was a common form of humiliation and harm during the Rwandan genocide. The Trial Chamber concluded that ‘the central elements of the crime of rape cannot be captured in a mechanical description of objects and body parts;’, presumably rejecting domestic approaches containing such descriptions. The Trial Chamber preferred an approach similar to that found in the Convention Against Torture and Other Cruel, Inhuman and Degrading Treatment or Punishment, which ‘does not catalogue specific acts in its definition of torture’, focusing instead on the conceptual framework of state-sanctioned violence. It felt that ‘[t]his approach is more useful in international

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2  Ibid, para 596.
3  Ibid, paras 596, 686.
4  Ibid.
5  Ibid, paras 597, 687.
6  See the domestic definitions referring to body parts in Prosecutor v Furundžija (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber II, Case No IT-95-17/1-T, 10 December 1998) para 180 (Furundžija). The Akayesu trial judgment did not indicate which domestic definitions had been considered.
7  Akayesu, above n 1, paras 597, 687.
The Akayesu Trial Chamber seemed to come to the conclusion that there needed to be a specific international definition of rape for two reasons: first, because 'rape (during genocide) is a form of aggression' and the aim of the international definition should be to capture that aggression from the victim's perspective (the invasion of the victim's body); and second, in order to respect 'cultural sensitivities involved in public discussion of intimate matters' and the 'inability of [some] witnesses to disclose graphic anatomical details of sexual violence they endured'. In other words, it appears that the Trial Chamber felt that the context of genocide (or other international crimes) was so different from that of 'common' domestic rape that domestic methods of defining the crime were not comparable or applicable. The Trial Chamber thus made a strong demarcation between domestic and the international approaches to defining rape. It therefore adopted a definition of rape meant specifically for international criminal law: 'a physical invasion of a sexual nature, committed on a person under circumstances which are coercive.' One major difference between this definition and those at domestic law is that rape can be understood as involving forms of violence not involving penetration, such as sexual mutilation.

The second tribunal to consider the definition of rape was the International Criminal Tribunal for the Former Yugoslavia (ICTY). While the ICTY began by following the Akayesu approach, it fundamentally shifted its analysis shortly after, in Prosecutor v Furundžija. In that case, the Prosecutor, and then the ICTY Trial Chamber, took a very different approach to that found in Akayesu.

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8 Ibid, para 597.
9 Ibid. See also A-M de Brouwer, *Supranational Criminal Prosecution of Sexual Violence: The ICC and the Practice of the ICTY and the ICTR* (2005) 107-8, who points out that this definition defines rape by what it does to the victim, rather than from the perspective of the perpetrator, and that this is consistent with the way the prohibited acts of murder and torture are defined in international criminal law. This view was confirmed by one of the Akayesu trial judges, who has indicated that the definition of rape in Akayesu was intentionally worded so as to change 'the law's perception of women's experiences of sexual violence': N Pillay, 'Equal Justice for Women: A Personal Journey' (2008) 50 *Az LR* 657, 666-7.
10 Akayesu, above n 1, para 687.
11 Ibid, paras 596-7.
12 Ibid, para 598.
13 De Brouwer, above n 9, 107. This approach was subsequently followed by the ICTR: *Prosecutor v Musema (Trial Judgment and Sentence)* (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) paras 226-8 (Musema).
14 *Prosecutor v Delalić (Trial Judgment)* (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-21-T, 16 November 1998) para 479.
The Prosecutor proposed that rape be defined in terms of penetration, thereby reverting to the perpetrator-focused definition common in domestic criminal codes. The Trial Chamber agreed, defining rape as:

1. the sexual penetration, however slight:
   a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator; or
   b) of the mouth of the victim by the penis of the perpetrator;
2. by coercion or force or threat of force against the victim or a third person.

The Trial Chamber arrived at this definition after concluding that, because there was no definition of rape in conventional or customary international law or general principles of international law, it was necessary to look to principles of criminal law common to the major legal systems of the world. In the Chamber’s view, this was the best way to arrive at an accurate definition that satisfies the principle of specificity, *nullum crimen sine lege stricta*. The Chamber seemed to imply, through this comment, that the *Akayesu* approach was not sufficiently specific. Thus, the Trial Chamber examined the definitions of rape found in the criminal codes and case law of Argentina, Australia, Austria, Bosnia and Herzegovina, Chile, China, England and Wales, France, Germany, India, Italy, Japan, the Netherlands, Pakistan, the Socialist Federal Republic of Yugoslavia, South Africa, Uganda and Zambia at the time of the crimes considered in this case, and found that, while the national approaches differed,

15 *Furundžija*, above n 6, para 174. See also De Brouwer, above n 9, 114.
16 *Furundžija*, above n 6, para 185.
17 Ibid, para 177. For a critique of the resort in this way to national laws, see De Brouwer, above n 9, 115, who pointed out that the Trial Chamber’s consideration of fellatio used international law to ground its conclusion, and that the same international law could have informed the rape discussion. It is puzzling that the judges did not consider the *Akayesu* definition as amounting to a definition of international criminal law: N Hayes, ‘Creating a Definition of Rape in International Law: The Contribution of the International Criminal Tribunals,’ in S Darcy & J Powderly (eds), *Judicial Creativity at the International Criminal Tribunals* (2010) 128, 138.
18 *Furundžija*, above n 6, para 177.
19 De Brouwer, above n 9, 112. This implicit conclusion of the *Furundžija* trial judges has been pointedly critiqued by MacKinnon, who feels that it is fallacious to argue that ‘without such specification, the defendants—guards of concentration camps charged with sexual assault on prisoners in their custody—might not have known with sufficient precision that what they were doing was a crime’: C MacKinnon, ‘Defining Rape Internationally: A Comment on *Akayesu*’ (2006) 44 *Colum J Transnat’l L* 940, 946.
20 *Furundžija*, above n 6, para. 71 (n 207-14).
the underlying trend was that domestic laws consider rape to be forced physical penetration of certain body parts. At the same time, it cautioned against a ‘mechanical importation or transposition from national law into international criminal proceedings’ because international trials differ in important ways from national trials. However, this latter point seemed only to apply to the issue of forced fellatio, on which the Trial Chamber noted lack of domestic uniformity as to whether or not it could be considered rape and decided that it should be considered rape under international criminal law. The end result is that the Furundžija approach can be considered as directly informed by domestic laws but also carrying domestic limitations—the Furundžija definition is narrower than that of Akayesu, as it likely excludes penetration by a perpetrator’s finger or tongue, which are not ‘objects’ under the definition. It also seems to exclude situations where perpetrators force two victims into fellatio or vaginal or anal rape.

The Furundžija definition was altered just over two years later, in Prosecutor v Kunarac et al. In its judgment, the ICTY Trial Chamber again engaged in a significant manner with domestic laws on rape. The Trial Chamber agreed with the reasoning in Furundžija that precision was required in order to satisfy the principle of legality (again, seemingly critiquing the Akayesu definition as imprecise), and generally agreed with the Furundžija elements of crime. However, it felt that the element requiring coercion, force or threat of force was ‘more narrowly stated than is required by international law’. The Trial Chamber felt that there are other factors that might render an act of sexual penetration non-consensual or non-voluntary on the part of a victim. It therefore looked to ‘general legal principles of law common to the major national legal systems

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21 Ibid, paras 179, 181. It did find, however, lack of uniformity on how states dealt with forced oral penetration, and decided that it should be considered rape under international criminal law: ibid, paras 182-4.
22 Ibid, para 178. See also the caution expressed in para 177.
23 Ibid, paras 182-4.
24 De Brouwer, above n 9, 115.
25 Ibid, (n 134). Note that De Brouwer feels that the word ‘perpetrator’ is meant to include ‘victim’ in this instance.
26 Prosecutor v Kunarac et al. (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-96-23-T & IT-96-23/1-T, 22 February 2001) para 437 (Kunarac).
27 Ibid, para 438.
28 Ibid. These factors include physical or mental incapacity, inducement by surprise or misrepresentation: paras 446-56.
In order to determine whether there is a ‘common denominator’ embodying the principles to be adopted in the international context, the Trial Chamber examined national laws in the same states considered in Furundžija, as well as the laws in place at the relevant time in Bangladesh, Belgium, Brazil, Canada, Costa Rica, Denmark, Estonia, Finland, Korea, New Zealand, Nicaragua, Norway, the Philippines, Portugal, Sierra Leone, Spain, Sweden, Switzerland, the United States and Uruguay. As a result, the Kunarac Trial Chamber considered that the ‘wider or more basic principle’ to be drawn from the review of domestic laws was not that force, threat of force and coercion were necessary but that ‘absence of consent or voluntary participation’—in other words, a violation of sexual autonomy—is required. In the Trial Chamber’s view, coercion, force and threat of force are evidence of absence of consent, but a focus on non-consent is the central or core concern of domestic legislators.

As a result of its analysis, the Kunarac Trial Chamber adopted a definition of rape slightly altered from that in Furundžija: ‘the sexual penetration, however slight: (a) of the vagina or anus of the victim by the penis of the perpetrator or any other object used by the perpetrator or (b) of the mouth of the victim by the penis of the perpetrator, where such sexual penetration occurs without the consent of the victim.’ It continued: ‘[c]onsent for this purpose must be consent given voluntarily, as a result of the victim’s free will, assessed in the context of the surrounding circumstances.’

The Kunarac definition of rape was upheld on appeal and has since become the most widely used definition in the ICTY, ICTR and Special Court for Sierra Leone. The definition has been

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29 Ibid, para 439.
30 Ibid. The ‘common denominator’ language was quoted from Furundžija, above n 6, para 178.
31 Kunarac, above n 26, paras 443-5, 447-51, 453-6.
32 Ibid, para 440. See also paras 441, 457.
33 Ibid, para 458.
34 Ibid, para 460.
35 Ibid.
37 See e.g. Prosecutor v Kvočka (Trial Judgment) (International Criminal Tribunal for the Former Yugoslavia, Trial Chamber, Case No IT-98-30/1-T, 2 November 2001) paras 177-9; Prosecutor v Semanza (Trial Judgment and Sentence) (International Criminal Tribunal for Rwanda, Trial Chamber III, Case No ICTR-97-20-T, 15 May 2003) paras 344-346; Prosecutor v Taylor (Trial Judgment) (Special Court for Sierra Leone, Trial Chamber II, Case No SCSL-03-01-T, 18 May 2012) para 415.
lauded by some,\textsuperscript{38} and critiqued by others,\textsuperscript{39} for introducing non-consent into the definition of the crime. Some view non-consent as an invalid consideration in the overarching context of genocide, crimes against humanity and war crimes.\textsuperscript{40} For example, Hayes is concerned by the ‘circular logic required to address the inappropriateness of discussions of consent given the practical realities of international crimes’.\textsuperscript{41} In her view, since the overarching requirements of genocide, crimes against humanity or war crimes will need to be proven prior to the determination of the prohibited act of rape, she asks: ‘[w]hy, therefore, introduce an element which will be presumed to have been proven once jurisdiction has been established?’\textsuperscript{42} Others make a related argument that the circumstances surrounding genocide, crimes against humanity and war crimes are so inherently coercive that non-consent must be presumed.\textsuperscript{43} In other words, they feel that ‘the peculiar characteristics of crimes of sexual violence under international law militate in favour of shifting the focus away from consent as an element of the crime.’\textsuperscript{44} They feel that the issue of consent might, at most, serve as an affirmative defence that could be raised by the accused in exceptional cases.\textsuperscript{45} On the other hand, some commentators argue that the international and domestic contexts are not entirely dissimilar and therefore a systematic demarcation between the two approaches on non-consent to sexual violence is not necessary, and may in fact create an over-inclusion of victims in a prosecution and negate the rights of the accused.\textsuperscript{46}

The analysis of domestic law in \textit{Kunarac} raises the crucial question of whether the correct domestic law was examined. The Trial Chamber examined laws governing ‘ordinary’ rape. Schomburg and Peterson have suggested that it would have been more appropriate to examine national laws criminalising sexual acts between individuals in unequal positions of power ‘irrespective of

\textsuperscript{39} See De Brouwer, above n 9, 119-124.
\textsuperscript{40} See Pillay, above n 9, 668 (n 30); W Schomburg \& I Peterson, ‘Genuine Consent to Sexual Violence Under International Criminal Law’ (2007) 101 \textit{AJIL} 121, 125-6; Hayes, above n 17, 150.
\textsuperscript{41} Hayes, above n 17, 150.
\textsuperscript{42} Ibid. See also Schomburg \& Peterson, above n 40, 138.
\textsuperscript{43} See Schomburg \& Peterson, above n 40, 138.
\textsuperscript{44} Ibid, 139.
\textsuperscript{45} Ibid.
the consent of the victim' because such inequality is common during times of war or mass atrocity. They cite to domestic laws considering, for example, sex between a prison guard and an inmate as better proxies for international laws governing rape between, for example, a soldier and a detained civilian. This question is valid: if domestic laws are being used as a form of analogy to inform international criminal law, then it is better to use laws that most closely resemble the international context. That said, Schomburg and Peterson acknowledge that, even in these contexts, 'autonomous relationships between individuals remain possible and may even be formed between members of the opposing parties. 'Ordinary' domestic rape laws may indeed be of assistance in drawing the line between criminal and non-criminal acts in those specific circumstances. These seemingly contradictory considerations certainly introduce more complexity into the domestic-to-international conversation.

There is a fourth definition of rape adopted within international criminal law. In 1999 and early 2000, states drafted the ICC's Elements of Crimes, including the elements for the crime against humanity and war crime of rape. Given the timing of that drafting, state representatives only considered the Akayesu and Furundžija precedents—the Kunarac trial judgment was not issued until 2 February 2001, after the adoption of the finalised Elements of Crime on 30 June 2000. Again, domestic laws and approaches formed a central part of the discussion around how to elaborate the elements for the prohibited act of rape. In determining the actus reus, there was strong support for reflecting the Akayesu focus on 'invasion' of the victim's body (i.e. defining the crime from the victim's point of view), including the fact that 'invasion' is gender-neutral (thereby permitting prosecutions of male rape). However, some states also

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48 Ibid, 138 (n 119). Another example might be sex between an adult and an individual under a certain age. E.g. Bulgaria's Criminal Code contains an offence for sexual intercourse with a person under 14 years of age under which consent is not a valid defence: M C v Bulgaria (2003) XII Eur Court HR 1, para 72.
49 Schomburg & Peterson, above n 40, 125. See also Engle, above n 46, 806, 810.
52 E La Haye, 'The Elements of War Crimes—B. Other Serious Violations in International Armed Conflicts, Article 8(2)(b)(xxii)—Rape, Sexual Slavery, Enforced Prostitution, Forced Pregnancy,
'recalled that most national criminal legislation defines the *actus reus* as forced physical penetration'.\(^{53}\) In addition, there was agreement that the constituent elements of rape needed to be defined in detail to create clarity and legal certainty (making it clear that many states were uncomfortable with the broad conceptual *Akayesu* approach on its own).\(^{54}\) Thus, references to 'invasion' and penetration were combined, reflecting an approach meant to incorporate both domestic considerations and international specificities: '[t]he perpetrator invaded\(^{55}\) the body of a person by conduct resulting in penetration, however slight, of any part of the body of the victim or of the perpetrator with a sexual organ, or of the anal or genital opening of the victim with any object or any other part of the body.\(^{56}\) However, there was a limit to how far domestic approaches were considered: a proposal by a group of Arab states to, in effect, exclude marital rape was rejected.\(^{57}\)

The intersection of the domestic and the international was also evident in the discussion around the second *actus reus* element for the ICC's elements of crime—that rape is committed by force, threat of force or coercion—wording clearly taken from the *Furundžija* definition. Two proposals, from the United States and Switzerland, replicated this language, which the *Furundžija* trial judgment noted was found in national legislation.\(^{58}\) However, states felt that more precision was needed as to the range of circumstances in which force or coercion was present, hence they included an illustrative list formed from observations in *Furundžija*\(^{59}\) and an influential United Nations Special Rapporteur report.\(^{60}\) The second constitutive element therefore reads:

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\(^{53}\) Ibid.

\(^{54}\) Ibid, 190.

\(^{55}\) There is a footnote here which states, '[t]he concept of “invasion” is intended to be broad enough to be gender-neutral': ICC Elements of Crimes, above n 50.

\(^{56}\) Ibid, 8(2)(b)(xxii)-1-War Crime of Rape, element 1.

\(^{57}\) Proposal submitted by Bahrain, Iraq, Kuwait, Lebanon, the Libyan Arab Jamahiriya, Oman, Qatar, Saudi Arabia, the Sudan, the Syrian Arab Republic, and United Arab Emirates concerning the elements of crimes against humanity, UN Doc PCNICC/1999/WGEC/DP.39, 3 December 1999. This document proposed a supplementary element in Article 7 (1) (g) (I): Rape stating 'Nothing in these elements shall affect natural and legal marital sexual relations in accordance with religious practices or cultural norms in different national laws'; ibid, 1.

\(^{58}\) La Haye, above n 52, 187; *Furundžija*, above n 6, paras 180, 185.

\(^{59}\) *Furundžija*, above n 6, para 174.

The invasion was committed by force, or by threat of force or coercion, such as that caused by fear of violence, duress, detention, psychological oppression or abuse of power, against such person or another person or by taking advantage of a coercive environment, or the invasion was committed against a person incapable of giving genuine consent. 61

As La Haye notes, ‘[t]he intention of the drafters here is clearly to point out that coercive circumstances are not restricted to the use of physical force.’ 62 In addition, the drafters decided not to include non-consent as an element of the crime when coercive circumstances are involved, an approach contrary to that of the later-decided Trial and Appeals Chambers judgments in Kunarac. 63

The decision to exclude reference to non-consent as an element of crime necessitated that the ICC’s Rules of Procedure and Evidence also reflect this approach, leading to controversial discussions. 64 There was debate as to whether consent could be an affirmative defence if non-consent is not an element of the crime to be proven by the prosecutor. The resulting discussion reflected the tensions outlined earlier as to whether there should be a clear demarcation between domestic and international approaches to rape, in this case on procedural rules surrounding rape. Many state delegates were of the view that it was a misnomer to speak of consent as a defence because genocide, crimes against humanity and war crimes occur in coercive circumstances that negate or vitiate consent. 65 However, others were of the view that, despite the wording of the ICC’s elements of crime for rape, consent is always relevant as a defence (as in many domestic laws). 66 Yet other state representatives felt that consent might only rarely be relevant due to the special nature of international criminal law, but if there was a possibility that defendants might raise it, it had to be addressed in the Rules. 67 Once there was agreement that the Rules needed to include something about consent as a defence, domestic concerns arose again: for example, when

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61 ICC Elements of Crimes, above n 50, arts 7(1)(g)-1, 8(2)(b)(xxii)-1, 8(2)(e)(vi)-1-War Crime of Rape, element 2. The element ends with a footnote, which reads ‘[i]t is understood that a person may be incapable of giving genuine consent if affected by natural, induced or age-related incapacity…’
62 La Haye, above n 52, 189.
63 Ibid.
65 Piragoff, above n 64, 370-371, 372.
66 Ibid, 373.
67 Ibid.
the use of a separate hearing was proposed to determine admissibility of defence evidence, those from civil law backgrounds expressed fear that such proceedings would pre-judge the ultimate issue.\(^{68}\) Ultimately, a rule permitting an \textit{in camera} procedure was adopted, along with a rule on when consent cannot be inferred by the Court.\(^{59}\) This latter restrictive approach was meant to satisfy both sides (those who felt no defence was appropriate and those who felt the rights of the accused would be compromised without a defence) and to provide a sensitive procedure that avoids, as much as possible, retraumatising the victims while respecting the accused’s rights.

The definition of rape adopted in the ICC’s Elements of Crime was deeply informed by domestic legal concerns—hence the reference to ‘penetration’ as rape’s defining feature. Yet certain domestic limitations in some rape laws—such as those stating that only women can be rape victims, that only penile penetration is rape, and that rape cannot occur in marriage\(^{70}\)—were deliberately not incorporated. In addition, non-consent was not made an element of the crime that must be proven, thereby taking a very different approach than many domestic jurisdictions, although consent can be raised as a defence in certain limited circumstances (as in many domestic jurisdictions). State delegates were influenced by the \textit{Akayesu} argument that the definition of rape must be responsive to the realities of genocide, crimes against humanity and war crimes,\(^{71}\) which often involve forms of brutality intended to add humiliation upon degradation,\(^{72}\) and yet there was a desire to incorporate domestic wording to indicate specificity and to satisfy the principle of legality. This reveals a concerted attempt at balancing international contextual differences with domestic ‘lessons learned’,\(^{73}\) but these provisions have not yet been tested in a final ICC judgment.\(^{74}\)

\(^{68}\) Ibid, 374, those from common law backgrounds were more comfortable with the idea of a \textit{voir dire}.


\(^{71}\) \textit{Akayesu}, above n 1, para 597.

\(^{72}\) This point was made recently in \textit{Taylor}, above n 37, para 1196.

\(^{73}\) The ICC approach was partially followed in \textit{Prosecutor v Issa Hassan Sesay et al} (Trial Judgment) (Special Court of Sierra Leone, Case No SCSL-04-15-T, 2 March 2009) paras 144-145, perhaps for the same reasons (although the reasons were not articulated).

\(^{74}\) However, they have been considered at the confirmation of charges stage. See e.g. \textit{Prosecutor v Jean-Pierre Bemba Gombo} (Decision Pursuant to Article 61(7)(a) and (b) of the Rome Statute on the Charges of the Prosecutor Against Jean-Pierre Bemba Gombo) (International Criminal Court, Case
The four definitions of rape in international criminal law demonstrate radically differing levels of engagement with domestic rape laws, and are an apt illustration of what Robinson terms the ‘fast-paced transnational conversation’ in international criminal law.\(^{75}\) The Akayesu case represents a rejection of the validity of domestic law to inform the international definition, because the domestic approach of individual rapes was seen as too different from, and therefore not helpful to, the context of mass rape during genocide.\(^{76}\) In addition, the focus on the victim’s experience as opposed to that of the perpetrator was considered to be progressive: this concentration on the intent of the act, rather than its technicalities, was seen as overcoming the patriarchal limitations of domestic law.\(^{77}\) It was also seen as more consistent with the approach to other crimes within international criminal law, and was perceived as avoiding the dangers of relying upon constantly evolving national law.\(^{78}\) The Furundžija and Kunarac definitions demonstrate a deep engagement with domestic law, bringing into international law the concern about discerning general principles from evolving domestic approaches to rape. In addition, these definitions bring into international criminal law the debates extant at domestic law about the focus on the perpetrator’s actions (or harm to family honour or society) rather than the experience of the victim.\(^{79}\) The Kunarac definition in particular also introduced new debates about the validity of including a reference to non-consent (taken from the domestic level) in an international criminal legal definition,\(^{80}\) where


\(^{77}\) Eriksson, above n 70, 369, notes that in the context of the Rwandan genocide, this definition ‘opens the way for a variety of acts that the perpetrator intended to be sexual and the victim experienced as invasive. It is therefore victim-sensitive since it considers the experience of the victim as the starting point.’ This may be ‘idealistic’, 375.

\(^{78}\) See Musema (International Criminal Tribunal for Rwanda, Trial Chamber I, Case No ICTR-96-13-A, 27 January 2000) para 228: the Akayesu conceptual approach of rape is preferable because of the ‘dynamic ongoing evolution of the understanding of rape [in national jurisdictions] and the incorporation of this understanding into principles of international law.’


\(^{80}\) See Hayes, above n 17, 140-148.
the context is already one of genocide, crimes against humanity or war. The ICC definition seemingly attempts to satisfy the principle of legality through a balancing of these views: a recognition of the special context of international criminal prosecutions and the identification of certain legal elements found in many domestic criminal laws on rape as well as a limited procedure for a defence of consent. While the Kunarac definition is the one most used at the moment within international tribunals, the impending closure of the ICTY, ICTR and Special Court for Sierra Leone may result in the ICC’s elements becoming more influential. This may ultimately be positive, as it would bring consistency to international law and would also provide an inclusive definition capturing vaginal, oral or anal penetration of a victim by a perpetrator, as well as less common harms such as when a perpetrator uses a finger to effect penetration, or a male victim is forced to use his penis to penetrate (either vaginally, orally or anally) a male or female perpetrator.

These differing approaches illustrate that there is an underlying friction within international criminal law—at least when considering rape—that has not yet been definitively resolved: when should international criminal law necessarily be unique in its approach and when is it useful for it to be informed by domestic law? This is most clear in the discussion over whether the context of genocide, crimes against humanity and war crimes is so fundamentally different from that of ‘everyday’ rape that domestic notions of rape are inapplicable. Despite the central role played by domestic law in its analysis, the Furundžija trial judgment cautioned against a ‘mechanical importation or transposition from national law into international criminal proceedings’ because international trials differ in important ways from national trials. Schomburg and Peterson, and many state delegates involved in drafting the ICC’s Elements of Crimes, felt similarly that there is necessarily a difference between the international criminal law approach to rape and the practice under some domestic criminal laws, and this difference ‘pays heed to the nature of international criminal law

81 See Schomburg & Peterson, above n 40, 125, 139.
82 The United Nations Security Council requested the ICTY and ICTR to ‘take all possible measures to expeditiously complete all their remaining work … no later than 31 December 2014’: SC Res 1966, 22 December 2010, op para 3. The mandate of the Special Court for Sierra Leone will end after the completion of the 2013 appeal in the Taylor case: Special Court for Sierra Leone, Ninth Annual Report of the President of the Special Court for Sierra Leone June 2011–May 2012 (2012) 27.
83 See V Oosterveld, ‘Gender and the Charles Taylor Case at the Special Court for Sierra Leone’ (2012) 19 William & Mary J of Women and the Law, 7, 12-13, for a discussion of this in the context of the Special Court for Sierra Leone.
84 Furundžija, above n 6, para 178. See also the caution expressed in para 177.
as a legal system *sui generis*.\(^85\) This has been echoed in critiques of other areas of international criminal law by authors such as Druml and Osiel.\(^86\) However, there are others who fear that, by deeming sexual violence amounting to genocide, crimes against humanity or war crimes as ‘extraordinary’, this type of violence becomes conceptually divorced from so-called ‘ordinary’ sexual violence to the detriment of both forms (and potentially to the detriment of the principle of legality).\(^87\) The circumstances that contribute to ‘everyday rape’—namely, widespread gender discrimination—also contribute to rape during genocide, war or mass atrocity. The need for further theorisation is also clear in the discussion around whether regular domestic rape laws, or only domestic rape laws considering inherently unequal power relationships, should inform international criminal law. Finally, the tension is also evident, even if largely implicit, in the rejection of discriminatory rape laws as a basis for determining general principles of law for the purposes of delineating international criminal law.

Domestic law has unmistakably informed international criminal law’s definitions of rape, but it has also influenced decision-makers’ assumptions. Both the *Furundžija* and *Kunarac* trial judgments acknowledged that certain domestic rape laws excluded male victims, or rape within marriage, from the definition of rape.\(^88\) Other examples of domestic rape laws of concern are those that require costly medical certificates,\(^89\) require corroboration of the rape victim’s testimony, enable perpetrators to escape prosecution and punishment by marrying their victims, or subject victims of rape to prosecution for moral crimes or defamation.\(^90\) Clearly, some domestic laws (or related police practices or judicial judgments) on sexual violence operate under inaccurate stereotypes. For example, in many national jurisdictions, there exists a ‘false stereotype of women as non-credible complainants of sexual abuse unless they complain at the first opportunity’.\(^91\)

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\(^85\) Schomburg & Peterson, above n 40, 139.


\(^88\) *Furundžija*, above n 6, para 180; *Kunarac*, above n 26, paras 444, 454-455.


these domestic practices are used to inform—consciously or not—international criminal law, they may lead to poorly reasoned decisions.

1.2 The characterisation of rape evidence

An examination of two cases—one from the Special Court for Sierra Leone, and one from the ICTR—reveals that widely-held domestic misconceptions about sexual violence have been imported into international criminal proceedings, thereby negatively affecting the characterisation of rape evidence. The first example relates to Prosecutor v Fofana and Kondewa, popularly known as the Civil Defence Forces or CDF case, at the Special Court for Sierra Leone. In that case, the Prosecutor attempted to amend the CDF indictment to include charges of rape as a crime against humanity, sexual slavery as a crime against humanity, forced marriage as a crime against humanity (under the category of other inhumane acts) and outrages upon personal dignity as a war crime.\(^\text{92}\) This was rejected by a majority of the Trial Chamber on the basis that adding such charges would result in undue delay prejudicing the rights of the accused to a fair and expeditious trial and amount to an abuse of process that would bring the administration of justice into disrepute.\(^\text{93}\) As a result, the Prosecutor brought a subsequent motion to ask the Trial Chamber if he could introduce evidence of gender-based violence (including sexual violence) to prove the existing charges of the crime against humanity of inhumane acts and the war crime of cruel treatment.\(^\text{94}\) Again, two of the three judges rejected this request, even though it was consistent with the practice of other international criminal tribunals.\(^\text{95}\)

\(^{92}\) *Prosecutor v Sam Hinga Norman et al.*, (Prosecution Request to Amend the Indictment against Samuel Hinga Norman, Moinina Fofana and Allieu Kondewa) (Special Court of Sierra Leone, Case No SCSL-04-14-PT, 2004).

\(^{93}\) *Prosecutor v Sam Hinga Norman et al.*, (Decision on Prosecution Request for Leave to Amend the Indictment) (Special Court of Sierra Leone, Case No SCSL-04-14-PT, 20 May 2004) para 10(c). For a critique of this decision, see V. Oosterveld, ‘The Special Court for Sierra Leone’s Consideration of Gender-based Violence: Contributing to Transitional Justice?’ (2009) *Hum Rights Rev* 73, 89-96.

\(^{94}\) *Prosecutor v Sam Hinga Norman et al* (Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence) (Special Court of Sierra Leone, Case No SCSL-04-14-PT, 24 May 2005) para 3.

\(^{95}\) *Prosecutor v Sam Hinga Norman et al* (Decision on the Urgent Prosecution Motion Filed on the 15\(^{th}\) of February 2005 for a Ruling on the Admissibility of Evidence) (Special Court of Sierra Leone, Case No SCSL-04-14-PT, 23 May 2005); *Prosecutor v Sam Hinga Norman et al* (Reasoned Majority Decision on Prosecution Motion for a Ruling on the Admissibility of Evidence) (Special Court of Sierra Leone, Case No SCSL-04-14-PT, 24 May 2005). The proposal of the Prosecutor is consistent with the
These decisions led to two indications that discriminatory assumptions present in some domestic systems may have influenced the majority judges’ reasoning. First, the majority judges seemed to enforce a higher standard on the admission of evidence of sexual violence and forced marriage than they did for other kinds of evidence, by proactively (and, in some cases, prospectively) expunging from the record actual evidence of these acts, evidence that might be about these acts, and evidence that was potentially linked to these acts. This imposition of a higher standard on evidence of rape has been noted in domestic rape cases in many jurisdictions. Second, and linked to (and perhaps underlying) the first point, one of the judges reasoned that ‘gender evidence’ (in this case, referring to evidence of sexual violence and forced marriage) amounts to ‘prejudicial evidence’ because it is ‘of a nature [as] to cast a dark cloud of doubt on the image of innocence that the Accused enjoys under the law until the contrary is proved. This regressive language is reminiscent of past assumptions in many domestic jurisdictions (and, unfortunately, present assumptions in others) that allegations of rape and other forms of sexual violence are somehow less reliable (more likely to be false) and yet more damaging for a male accused than other types of allegations. This assumption was explicitly repudiated by the Special Court’s Appeals Chamber: ‘the right to a fair trial enshrined in Article 17 of the Statute.
cannot be violated by the introduction of evidence relevant to any allegation in the trial proceedings, regardless of the nature or severity of the evidence.\textsuperscript{101} Despite this admonition, the experience of the Special Court for Sierra Leone in the CDF case demonstrates that discriminatory assumptions about sexual violence formed at the domestic level can permeate international criminal proceedings.

A different example can be seen at the ICTR in the case of \textit{Prosecutor v Rukundo}. The ICTR's Trial Chamber had originally convicted Rukundo, an ordained priest and military chaplain for the Rwandan Armed Forces, of committing genocide by causing serious mental harm to a young Tutsi woman by sexually assaulting her in May 1994 at the Saint Léon Minor Seminary in Gitarama prefecture.\textsuperscript{102} The victim had testified that, on Rukundo's arrival at the seminary, she asked if he could hide her.\textsuperscript{103} He responded that he could not help her because her entire family had to be killed.\textsuperscript{104} She assisted him in carrying some items to his room, in the hope that he would change his mind and hide her, but once at the room, he locked the door, placed his pistol on the table, forced the young woman into the bed, opened the zipper to his trousers, and tried to have sexual intercourse.\textsuperscript{105} He was unsuccessful in raping her, so he instead rubbed himself against her until he ejaculated.\textsuperscript{106} The Trial Chamber held that the act was of a sexual nature taking place under coercive circumstances in which the Tutsi refugees at the seminary were regularly abducted and killed.\textsuperscript{107} A majority of the Trial Chamber concluded that the young woman had suffered serious mental harm, considering the 'highly charged, oppressive and other circumstances surrounding the sexual assault'.\textsuperscript{108} Given the totality of the circumstances, a majority of the Trial Chamber convicted Rukundo of committing genocide through the sexual assault.\textsuperscript{109} However, a majority of the Appeals Chamber reversed this conviction. It reasoned that 'genocidal intent is not the only reasonable inference to be drawn from Rukundo's assertion [that the

\textsuperscript{101}\textit{Prosecutor v Fofana and Allieu Kondewa (Appeals Judgment)} (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-04-14-A, 28 May 2008) para 446.

\textsuperscript{102}\textit{Prosecutor v Rukundo (Trial Chamber Judgment)} (International Criminal Tribunal for Rwanda, Trial Chamber II, Case No ICTR-2001-70-T, 27 February 2009) paras 4, 574-6.

\textsuperscript{103}Ibid, para 373.

\textsuperscript{104}Ibid.

\textsuperscript{105}Ibid.

\textsuperscript{106}Ibid.

\textsuperscript{107}Ibid, paras 381, 383-5.

\textsuperscript{108}Ibid, paras 388-389.

\textsuperscript{109}Ibid, para 576.
young woman’s family had to be killed].\textsuperscript{110} The Appeals Chamber majority held that the act committed against the young woman was ‘qualitatively different from the other acts of genocide perpetrated by Rukundo’, such as the search for Tutsis on the basis of identity cards and lists and their subsequent killing or assault.\textsuperscript{111} Instead, the Appeals Chamber majority considered the sexual assault of the young woman by Rukundo to be ‘unplanned and spontaneous’, and therefore ‘an opportunistic crime that was not accompanied by the specific intent to commit genocide’.\textsuperscript{112} As a result, it reduced the Trial Chamber’s 25 year sentence to 23 years.\textsuperscript{113}

Judge Pocar issued a partially dissenting opinion that should be applauded for its sensitivity to combating false stereotypes around sexual violence and a more accurate characterisation of sexual violence in the context of international criminal law. In his view, the majority’s ‘alternative explanation for Rukundo’s utterances before the sexual assault is not reasonable’:\textsuperscript{114} these words ‘clearly conveyed Rukundo’s knowledge that his victim was Tutsi and that she and other members of her family should be killed for this reason alone.’\textsuperscript{115} This was ‘compelling evidence’ of Rukundo’s genocidal intent at the time of the assault, ‘in particular coupled with the serious nature of his crime and the campaign of massive violence directed against Tutsis in the area in which he was found to have participated.’\textsuperscript{116} Judge Pocar also felt that the majority’s differentiation of Rukundo’s sexual assault from his other acts of genocide was unreasonable.\textsuperscript{117} In his view, the majority ‘does not fully appreciate the seriousness of the crime’ of sexual assault—it is not qualitatively different from other prohibited acts (such as killings and serious bodily injury) for which Rukundo has been held responsible.\textsuperscript{118} In his view, the majority’s reference to the sexual assault as merely ‘opportunistic’ incorrectly confuses motive and intent: even if the perpetrator’s motivation is entirely sexual, it does not follow that the perpetrator does not have the requisite intent (in this case, genocidal intent) or that his conduct does not


\textsuperscript{111} Ibid, para 236.

\textsuperscript{112} Ibid.

\textsuperscript{113} Ibid, para 269.

\textsuperscript{114} Ibid, para 3 (Judge Pocar).

\textsuperscript{115} Ibid.

\textsuperscript{116} Ibid.

\textsuperscript{117} Ibid, para 4.

\textsuperscript{118} Ibid.
cause severe pain and suffering.\textsuperscript{119}

The reasoning of the majority of the Appeals Chamber reflects similar dismissals at the domestic level of sexual violence as a ‘private’ act of lust.\textsuperscript{120} The result is that, just as often happens at the domestic level, the ICTR in this case missed the opportunity to contextualise the acts of Rukundo as part of overarching gender discrimination. Erroneous assumptions seem to have informed the majority reasoning in the ICTR’s Rukundo case (that sexual violence is mainly a ‘private’ or opportunistic act) and the Special Court for Sierra Leone’s CDF case (that rape allegations against accused persons are somehow both less reliable and more damaging). When these discriminatory assumptions are transposed to the international level, they not only lead to flawed judgments, they also set regressive precedent, potentially prejudicing future sexual violence prosecutions.

2 The influence of international criminal law on domestic criminal law

Part I illustrated ways in which domestic criminal law on sexual violence, and assumptions inherent within certain iterations of that law, have had an impact on international criminal law. This Part discusses how the conversation is (somewhat) mutual, albeit much more diffuse and therefore harder to track, in its flow from the international to the domestic. It also discusses the potential for a much wider international-to-domestic conversation as a result of state implementation of the Rome Statute of the ICC.

The most obvious measure of international-to-domestic impact comes in the adoption of international legal precepts within domestic law. There is anecdotal evidence that certain international criminal law approaches to sexual violence have been transposed into domestic law. For example, the Akayesu definition of

\textsuperscript{119} Ibid, para 10.

rape has been adopted in a few domestic jurisdictions. Moreover, many states have implemented the ICC’s crimes, including the prohibited acts of rape and other forms of sexual and gender-based violence, into domestic law. Some have even incorporated or accorded status to the ICC’s Elements of Crimes, and therefore their specific definitions of rape and other prohibited acts. Ni Aoláin documents ‘evidence of significant modifications to domestic laws related to sexual violence, trafficking, stalking, and domestic violence in states that have ratified the International Criminal Court statute.’ Of the 122 States Parties, only 27 have not introduced any subsequent domestic legislation addressing violence against women; however, it is not clear how closely the domestic legislation accords with the international definitions of sexual violence crimes, nor is it clear that these changes are all directly in response to the Rome Statute. In addition, it appears that at least some of these states have chosen more restrictive definitions of rape than found in international criminal law. This latter point has been confirmed by Chappell, Grey and Waller, who created a database of domestic definitions of ‘ordinary’ sexual violence crimes and found that ‘[i]n relation to rape, most penal codes contain a narrower definition than under the ICC’s Elements of Crimes.’ For example, ‘[w]hereas the Elements of Crimes defines rape as vaginal, oral or anal penetration of the victim, as well as forced sexual penetration of the perpetrator by the victim, national penal codes often define rape in terms of vaginal penetration only’, require proof of the victim’s non-consent, or categorise rape as a crime against the victim’s honour and not as a physical and psychological violation.

Another example of the flow of legal norms on sexual violence from the international to the domestic is seen in Sierra Leone. In three of its cases, the Special Court for Sierra Leone brought a great deal of focus to the various

121 See Pillay, above n 9, 667, who notes that the Akayesu definition has been incorporated ‘virtually verbatim’ in South Africa, California and Illinois.
122 Eriksson, above n 70, 433.
123 Ibid (citing the United Kingdom and New Zealand).
124 Ni Aoláin, above n 87, 9.
125 Ibid, 17-18, 21.
126 See Eriksson, above n 70, 433 (provides the example of Bosnia-Herzegovina). See also examples of recent law reform in which restrictive definitions of rape were adopted include Kenya and Ethiopia (failing to criminalize marital rape): Combrinck, above n 120, 131.
128 Ibid.
forms of sexual violence that took place against civilian women, girls, men and boys during the civil war.129 For example, it outlined typologies of rape—such as gang rape, rape in public, rape with objects, and forced sexual intercourse between captured civilians—and the institutionalised nature of sexual slavery by the rebels.130 This brought increased attention to sexual violence more generally in Sierra Leone and seems to have contributed to law reform efforts culminating in the adoption of the Sexual Offences Act 2012.131 That Act protects a wide variety of individuals who were previously effectively or actually unprotected in law (such as spouses, children and mentally disabled individuals) and criminalises a wide variety of behaviour that was previously largely overlooked, such as rape inside and outside of marriage, non-consensual sexual touching, incest and sexual harassment.132

These examples of actual international-to-domestic impact (although limited), however, indicate the potential for much larger future impact inherent within the Rome Statute of the ICC and its Elements of Crimes. The Rome Statute is governed by the doctrine of complementarity, under which the ICC can only intervene if and when domestic jurisdictions fail to bring genuinely to justice those suspected of having committed the crimes listed in the Rome Statute.133 Currently, the Rome Statute has been ratified by 122 states,134 and this number is expected to increase in the future. Therefore, more than half of all UN Member States have an incentive to implement domestic laws ensuring that they can pros-

129 Taylor, above n 37, paras 415-32, 874-1191, 1964-2192; Sesay (Special Court of Sierra Leone, Case No SCSL-04-15-T, 2 March 2009) paras 143-77, 1283-1309, 1459-75, 1575-83; Prosecutor v Sesay (Appeals Judgment) (Special Court for Sierra Leone, Appeals Chamber, Trial Chamber II, Case No SCSL-04-15-A, 26 October 2009), paras 726-41; Prosecutor v Brima et al (Trial Judgment, Case No SCSL-04-16-T, 2007) paras 92-95, 691-722, 966-1188; Prosecutor v Brima (Appeals Judgment) (Special Court for Sierra Leone, Appeals Chamber, Case No SCSL-04-16-T, 22 February 2008), paras 88-110.
130 See e.g. Taylor, above n 37, paras 894-5, 903, 913-14, 919, 927, 930-32, 961, 966, 970-2, 980-1, 989, 992, 999, 1007, 1015-6.
131 Sexual Offences Act 2002 (Sierra Leone); V Oosterveld, notes on discussions at 'Expert Group Meeting on the Legacy of the Special Court for Sierra Leone', International Center for Transitional Justice and the Special Court for Sierra Leone (6-7 February 2013, Freetown) (on file with author).
132 Sexual Offences Act 2002, above n 131, ss 5-10, 13, 19-34.
ecute genocide, crimes against humanity and war crimes, if they wish to retain jurisdiction. On the issue of sexual violence, if a state has a restrictive definition of rape (for example, a definition which excludes the possibility that men or boys can be victims of rape), it may be found by the ICC as unable or unwilling to investigate or prosecute genuinely the crime against humanity or war crime of rape, and the state may lose jurisdiction. This possibility provides motivation for states to reform outdated sexual violence laws, at least for the purposes of prosecuting sexual violence taking place in the context of genocide, crimes against humanity and war crimes. Such steps may also prompt a review of existing laws governing rape as an 'ordinary' crime. That said, the ICC itself has been criticised for not adequately evaluating the state of domestic laws on sexual violence in comparison to the Rome Statute, thereby creating a 'gender justice shadow of complementarity': if this is correct and it continues, then the impetus for reform provided by complementarity will likely diminish.

Domestic implementation of the Rome Statute of the ICC and its Elements of Crimes, or domestic interpretation of the judgments of international criminal tribunals, present the possibility that outdated domestic legislation on sexual violence will be updated on a widespread basis—a possibility already realised in a number of jurisdictions. However, here again some caution is needed. International criminal law is still somewhat unsettled in terms of the definition of rape and is at the early stages of theorising other forms of sexual and gender-based violence (such as forced marriage). Thus, the same problem exists as for the domestic-to-international flow: international criminal law on sexual violence is still dynamic, so domestic laws incorporating today's approach may become outdated with future international judgments.

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136 Eriksson, above n 70, 432, 437.
138 Chappell, Grey and Waller, above n 127.
3 Conclusion

This article has explored the ongoing and two-directional interaction between domestic and international criminal law. It has done so by, first, examining the flow from the domestic to the international in the context of the definition of rape and in legal assumptions made around the characterisation of rape in two international criminal tribunals. While there are some positive aspects to this domestic-to-international dialogue, such as the consideration of a wide variety of forms of rape, there are also some key questions that have yet to be answered. Is it accurate to compare domestic law on ‘ordinary’ rape with international law on rape as part of genocide, crimes against humanity or war crimes? Or should domestic laws on sex between power-imbalanced individuals be the comparator? Is the context of international criminal law so different from that of domestic ‘ordinary’ crimes that it merits an entirely different definition of rape? Or does such an approach undermine the understanding that there is a continuum of sexual violence from peacetime to war time or times of mass atrocity?\textsuperscript{140} If international criminal law separates itself entirely from domestic laws on rape, will it unacceptably divorce itself from the intentions behind such violence regardless of its context?\textsuperscript{141} And, how best to ensure that inaccurate or discriminatory domestic assumptions about sexual violence do not become embedded within international criminal law?

International criminal law is also informing domestic criminal law on sexual violence,\textsuperscript{142} or has the possibility of doing so, largely due to the influence of domestic implementation of the Rome Statute or domestic application of international criminal tribunal judgments through law reform. As O’Rourke urges, however, it is important to undertake feminist critical-reflective analysis on whether this is a positive norm transfer between international criminal law and domestic law.\textsuperscript{143} The changing nature of international criminal law on sexual violence, which is developing incrementally and which is still under-theorised, may make it difficult for states to determine exactly which precepts should be

\begin{footnotesize}
\begin{enumerate}
\item[For a discussion of the dangers of a complete separation in a wider context, see Robinson, above n 75, 129, 151-3.]
\item[It should be noted that international criminal law has also informed regional criminal law: see \textit{M C v Bulgaria}, above n 48, paras 102-7, 163.]
\item[For the perspective of transitional justice, see C O’Rourke, ‘International Law and Domestic Gender Justice, or Why Case Studies Matter’ in M Fineman et al (eds), \textit{Feminism and Transitional Justice} (2012) cited in Ní Aoláin, above n 87, 18.]
\end{enumerate}
\end{footnotesize}
borrowed.

The ICTR’s original demarcation in Akayesu, between international and domestic criminal law on sexual violence, has a role to play, whether in protecting international criminal law from false domestic stereotypes and discriminatory domestic laws or in allowing context-specific and gender-sensitive development of norms. In other words, both domestic and international law on sexual violence should never be used (by either system) in an uncritical manner without considering the potential impact of their differences in context and specificities.\(^{144}\) However, international and domestic criminal law should not be worlds apart, either. Sexual violence in peacetime has similarities to sexual violence in conflict or mass atrocity, as the existence and acceptance of the former permits the latter to take place in exaggerated forms.\(^{145}\) Our struggle, as international criminal lawyers, is in trying to balance these realities.

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\(^{144}\) On this point more broadly, see A Zammit Borda, ‘Precedent in International Criminal Courts and Tribunals’ (2013) 2 CJICL 287, 295 and 305.

\(^{145}\) Ó Ní Aoláin et al, above n 139, 45–9.
TOWARDS A MORE CONSTRUCTIVE ANALYSIS OF THE IDENTITY OF SPECIAL REGIMES IN INTERNATIONAL LAW—THE CASE OF PROPORTIONALITY

Ulf Linderfalk*

Abstract
This article inquires into the defining features of special regimes in international law. It starts from the assumption that a special regime, rather than simply a collection of rules and principles, is a variety of language. If international legal scholars wish to come to grips with the identity of special regimes in international law, as the author suggests, they should be less concerned with phenomena such as the resolution of normative conflicts and the systemic interpretation of treaties. Instead, they should study carefully the effect on the communication of legal propositions of transferring a piece of language from one particular part of international legal discourse to another. The argument proceeds in three steps. First, as the author argues, proportionality is a term that may be used to express many different meanings. Because of this, utterers may wish to bolster proportionality propositions in language tailored specifically to support an understanding of their intended meanings. Second, the author provides examples of the usage by international lawyers of the term proportionality in discussions of three different areas of regulation, namely state responsibility law, the law of maritime delimitation, and the law of the European Convention on the Protection of Human Rights and Fundamental Freedoms. As the examples go to show, the supporting language used by utterers in communicating proportionality propositions varies greatly with the particular law discussed. Third, the author explains how such differences help in clarifying the different defining features of different areas of regulation.

Keywords
Special regimes, proportionality, concepts, conceptual terms, pragmatics

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1 Introduction

Over the last fifty or so years, international law and legal practice have become increasingly specialised. As stated by the International Law Commission (ILC) Study Group on Fragmentation of International Law, ‘[w]hat once appeared to be governed by “general international law” has become the field of operation for such specialist systems as “trade law”, “human rights law”, “environmental law”, “law of the sea”, “European law” and even such exotic and highly specialised knowledges as “investment law” or “international refugee law” etc.’ As a result of this development, increasingly lawyers have started referring to international law as being made up of general international law and a number of special regimes. The idea of the existence of special regimes in international law raises questions about the identities of such regimes. Generally, and more or less as a matter of course, international lawyers appear to be thinking of a special regime primarily as a collection of rules and principles. This was the approach of the ILC Study Group. It quite naturally led the Group to focus its attention on the formal relationships that exist between norms of international law, and phenomena such as legal hierarchy, the resolution of normative conflicts, the filling of legal gaps, and the systemic interpretation of treaties.

As this article will take for granted, although the generally adopted idea of a special regime as a collection of rules and principles might facilitate easy reference, if taken to imply a definition of the concept, it does not withstand analysis. If international law is a legal system—and the ILC Study Group maintained it is—for the same reason that no one rule of international law can ever be described separately from any other such rule, a special regime cannot be identified with merely a set of rules and principles. Hence, the fundamental question remains: what are the defining features that allow us to think about particular spheres of regulation, such as international human rights law or international trade law, as special regimes separated from other such spheres of regulation and from general international law? Differently stated, if we choose to continue thinking about the international legal system as consisting partly of a series of special regimes, in what sense can we be justified in doing so?

To investigate ways towards a more constructive analysis of the identity

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of special regimes in international law, I will approach the issue from a new angle. Throughout the article, I will conceive of special regimes as varieties of language. The concept of a *language variety* is defined by sociolinguistics as a set of linguistic forms (such as words, lexicalised phrases, and grammatical or pragmatical patterns) used under distinctive social circumstances. Speaking about varieties of a language like English is simply a way of recognising that, within a particular community of people joined by some particular common field of interest or activity, particular language patterns may often develop that are partly different from the patterns existing among English-speaking people in general. Consequently, communities of practice such as neurobiology, odontology, archaeology, literature, carpeting, printing, running, yoga, or rugby football each demonstrate their own distinctive language patterns. If there are things like special regimes in international law, as I will suggest, those regimes can be looked upon similarly.

In a conceptual universe where different international legal regimes are looked upon as language varieties, focus is naturally shifted from the international rights and obligations entailed by those regimes to the language used by participants in international legal discourses in the communication of legal propositions. Since I believe that concepts are always formed relative to other concepts, I am accordingly of the opinion that the identity of a special regime is best studied relative to other such regimes and to general international law. However, rather than looking to the purely formal side of those relationships, I suggest analyses should focus upon language contact phenomena such as borrowing and loan translation. What should be investigated is the effect on the communication of legal propositions of transferring a piece of language from one particular part of international legal discourse to another. It is the purpose of this article to illustrate how such studies may be conducted.

The article is designed as a case study. Hence, I will confine my investigation of the identity of special regimes in international law to one particular element of the language used in international legal discourse, namely conceptual terms. A *conceptual term* is a term used for the verbal representation of a concept; a *concept*, in turn, is the generalised idea of an empirical or normative phenomenon or state of affairs, or a class of such phenomena or states of affairs. To make the investigation manageable, I will tailor it around one conceptual term in particular,

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namely *proportionality*. Proportionality has long been used in the context of regulatory fields such as the law of state responsibility, the law on the use of force, international human rights law, and the law of armed conflict. Proportionality language is gaining in popularity, however, and it can now also be observed in other areas, such as the law of maritime delimitation and international finance law. While preliminary studies indicate that the effect of proportionality on legal communication varies greatly with the particular sphere of regulation addressed,\(^6\) proportionality appears to be a particularly suitable candidate for studying the identity of special regimes in international law.

This article will consider the usage of proportionality in the communication of propositions about state responsibility law, the law of maritime delimitation, and the law of the European Convention on the Protection of Human Rights and Fundamental Freedoms (*ECHR*). The following three questions will be addressed:

1. What is the meaning potentially borne by the term proportionality in the context of a discussion about state responsibility law, maritime delimitation law, and the law of the ECHR respectively?

2. Given the answer to question (1), what is the effect on legal communication of transferring proportionality from a discussion of one of the three areas of international law to any of the others?

3. What does the answer to Question (2) tell us about the defining characteristics of special regimes?

The three questions will be addressed in turn, in sections 3, 4, and 5 of the article, respectively.

### 2 Theory

The purpose of this article presupposes a theory that can explain the meaning of a term like proportionality when used in the context of a contribution to international legal discourse. Similarly, it presupposes a theory that can explain the dependency of human verbal communication on socially defined contexts.

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To meet those concerns, I have found it convenient to draw on the branch of linguistics generally known as pragmatics. Pragmatics is the study of language use and human verbal communication. According to pragmatics, every act of human verbal communication includes three elements. It includes an utterer, i.e. a speaker or writer; it includes an addressee, i.e. a listener or reader; and it includes an utterance, i.e. a word or a string of words used by an utterer on a particular occasion.

As implied by the focus on both utterer and addressee, pragmatics work on the assumption that using language is to engage in social interaction. Consequently, when an utterer makes an utterance, it is always in the expectation that it will affect the attitudes, beliefs, or behaviour of some person or persons. Consider, for instance, the following sentence uttered by a person, Jane, addressing her husband, John: ‘it’s raining!’ If we take for granted that the utterance is made while the two are preparing to leave home to go to work, Jane may wish to cause John to think that he had better bring an umbrella; she may wish to cause John to think that now he may not need to water the plants in the garden (as he suggested he would do earlier that morning); she may wish to cause John to offer her a lift to work; or she may wish to cause John to think that he should help Jane move tables from the garden inside (as she is planning a garden party later that evening).

According to pragmatics, any sound theory of utterance meaning will have to accommodate this social aspect of human language. Whatever motivates Jane, in some way or another, to utter ‘it’s raining!’, has to be accounted for as part of the meaning of her utterance. For the same reason, whether Jane wishes to cause John to think he had better bring an umbrella, whether she wishes to cause John to think that he may not need to water the plants, whether she wishes to cause John to offer her a lift, or whether she wishes to cause him to think that he should help her move tables inside, in order for John to fully understand Jane’s utterance, she must communicate this intention to him. Pragmatics has assumed as its main tasks to explain how she may possibly do this.

In addressing this explanatory task, pragmatics note the relevance of context. Certainly, the lexicon and grammar of a language such as English may help utterers signal to addressees in whatever way they wish to affect their attitudes, beliefs, or behaviour. For instance, if Jane actually wishes to cause John to bring an umbrella, she may use a grammatical imperative: ‘bring an umbrella!’ Similarly,

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7 For an excellent, easy-to-read introduction to the topic, see e.g. SC Levinson, Pragmatics (1983); D Blakemore, Understanding Utterances: An Introduction to Pragmatics (1992).
8 Cf J Lyons, Semantics (1977) 725.
9 For an excellent overview of this topic, see Blakemore, above n 7, Chap. 1, especially 16 ff.
if Jane wishes to cause John to think that he does not need to water the garden plants, she may use a sentence expressed as a tag question: ‘now you don’t need to water the plants anymore, do you?’ In the final analysis, however, pragmatics find that there is no one-to-one correspondence between the grammatical form of a sentence and the intention or intentions that it may be used to communicate. If Jane wishes to impose on John the task of helping her move tables from the garden inside, she does not necessarily have to use an imperative sentence like ‘Help me move the tables inside!’ As implied by the example, depending on the context, this intention may be communicated equally well using a declarative sentence like, ‘it’s raining!’ The context may be such that communication may not even require the usage of the grammatical verb. If, for instance, Jane and John already spent plenty of time arranging furniture for the garden party, Jane may succeed in imparting to John that now she wishes that he helps her move tables inside by uttering a grammatically incomplete sentence like ‘lucky us!’, or ‘more exercise for you, darling!’

By the meaning of an utterance, pragmatics generally understand the intention that the utterer wishes to communicate by making it. Admittedly, an utterer cannot use just any string of words to communicate just any intention. However, as the examples show, the meaning of an utterance can never be determined independently of context. This observation sets the parameters for my further inquiries into the meaning of proportionality in international legal discourse. In this article, I am not really interested in any particular intention of any particular utterer. I am interested in utterances containing the term proportionality, but as far as the purpose of this article goes, I will have to address the meaning of such utterances generally, although I will do so in the particular context of state responsibility law, the law of maritime delimitation, and the law of the ECHR respectively. Stated differently, the term proportionality is the focus of this article rather than any particular utterance using that term. This means I will have to limit my inquiries to the meaning potential of proportionality. The meaning potential of proportionality in international legal discourse is what the uttering of proportionality potentially does to the beliefs, attitudes or behaviour of participants of that same discourse. For ease of reference, I will be terming this as the functionality of the term.

The functionality of a term such as proportionality must not be confused with the actual function or effect of its utterance. While the functionality of a piece of language may help an utterer affect the beliefs, attitudes, or behaviour of an

10 Cf Lyons, above n 8, 725; Blakemore, above n 7, 5-6, 112.
addressee in some particular way, the actual effect can never be guaranteed. As I already explained, this is because the understanding of an utterance is always dependent on a particular context. If Jane utters ‘it’s raining!’ to her husband John, her utterance may cause John to think that he should help Jane move tables from the garden inside. In that sense, causing people to think that they should help utterers move tables from the garden inside is part of the functionality of the sentence ‘it’s raining!’ However, in order for Jane’s utterance actually to cause John to think that he should help Jane move tables from the garden inside, John has to interpret the utterance in the context of certain assumptions, such as the assumption that Jane is throwing a garden party later that evening. If instead John chooses to interpret Jane’s utterance in the context of the assumption that a rain shower will give the plants all the water they need, it will obviously affect him differently.

The functionality of a piece of language, such as a term or a sentence, is context-dependent too, but in a different sense. As explained, the actual effect of the utterance of a piece of language is dependent on whether some particular contextual assumption was actually used by a particular addressee in the process of understanding it. The functionality of a piece of language, on the other hand, is dependent on whether some certain kind of contextual assumption is available to some certain potential addressee or addressees. For instance, if the potential addressee of the utterance of a sentence like ‘it’s raining!’ does not know that the utterer is throwing a garden party later that evening, and cannot be expected to figure that out by himself—based, for instance, on the general situation prevailing at the occasion of the utterance—then this same sentence can never work to help the utterer cause the addressee to think that he should help the utterer move tables from the garden inside, not even potentially. Henceforth in this article, I will use the term cognitive environment to refer to the entire set of contextual assumptions available to an addressee.

This intimate relationship between the functionality of a piece of language and the cognitive environment of the addressee or addressees of an utterance of that same piece of language explains the dependency of human verbal communication on socially defined contexts. Obviously, the cognitive environment is not the same for every participant in a discourse. In a strict sense, of course, it varies from person to person. However, as pragmatics have noted, it typically varies also more generally, depending on such factors as the time and place of an utterance

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12 Ibid, 38 ff.
and the identity of the utterer. Consequently, the cognitive environment of a participant in international legal discourse on 11 September 2013 is typically not the same as that of that same participant twelve years earlier, on 11 September 2001. The cognitive environment of an international lawyer based in Germany is typically not the same as that of a lawyer based in the People’s Republic of China. The cognitive environment of an international lawyer reading a judgment of the International Court of Justice is typically different than that of a lawyer listening to a junior colleague at an international conference. Similarly—and more importantly for the purpose of this article—the cognitive environment of participants in a discourse will typically vary depending on the socially defined context. If a special regime is looked upon as a socially defined subpart of international legal discourse, this means that we can expect the cognitive environment of international lawyers engaged in the discourse of state responsibility law to be partly different from the cognitive environment of lawyers engaged in the discourse on maritime delimitation law or the law of the ECHR. As I will discuss in section 4, this helps to explain the different effect of proportionality on the communication of propositions about those three branches of international law.

3 The meaning potential of proportionality

Like all conceptual terms, the functionality of proportionality is intimately connected with its role as an intermediate link in legal inferences. On the one hand, proportionality is a link to the criterion or criteria used for the categorisation of an action as proportionate (or not proportionate). Take, for instance, the proportionality test applied to countermeasures. Let us assume for the sake of argument that, according to international law, the assessment of the proportionality of a countermeasure shall be done based on three different criteria. Consequently, a countermeasure M taken by a state S is not proportionate if: (a) the effects of M extend over a period of time, which is markedly longer than the extension in time of the injury originally suffered; or (b) M necessarily affects a principle or an interest, which is markedly more important than the principle or interests originally injured; or (c) M necessarily causes a material loss, which is markedly more extensive than the material loss earlier

13 See e.g. Levinson, above n 7, 54 ff.
14 See Linderfalk, above n 5, Section 2.
suffered. Properties like (a), (b), and (c) are used to identify a countermeasure as not proportionate. For this reason, they may be referred to as identifying criteria.\(^{16}\)

On the other hand, proportionality is a link to the inferences allowed by the categorisation of a particular action as proportionate (or not proportionate).\(^{17}\) In the case of the proportionality test applied to countermeasures, if a countermeasure M taken by a state S is not proportionate, then this prompts at least the following conclusions: (d) S has the obligation immediately to terminate M; (e) S has the obligation to offer assurances and guarantees of non-repetition; and (f) S has the obligation to make full reparation for the injury caused. In the context of law, inferences like (d), (e), and (f) are usually referred to as legal consequences.\(^{18}\)

Because of its role as an intermediate link in legal inferences, proportionality has an economising functionality.\(^{19}\) It may help utterers write and talk about law in a more economic fashion. In the case of our example, if proportionality had not existed, the relevant international law would have had to be stated by means of a rather long list of rules:

1.2
If (a), then (d). If (a), then (e). If (a), then (f).
1.2
If (b), then (d). If (b), then (e). If (b), then (f).
1.2
If (c), then (d). If (c), then (e). If (c), then (f).

Using proportionality as an intermediate link between identifying criteria and legal consequences, the statement can be considerably shortened:

If (a), (b), or (c), then M is not proportionate.
1.2
If M is not proportionate, then (d). If M is not proportionate, then (e). If M is not proportionate, then (f).

\(^{16}\) Linderfalk, above n 5, Section 2.
\(^{17}\) Ibid.
\(^{18}\) Ibid.
\(^{19}\) Ibid, Section 3.
Now, if proportionality would seem to economise the verbal expression of international law, the really interesting thing about the role of conceptual terms in legal inferences is that it allows utterers to use this term for many other purposes too.  

First of all, proportionality has what may conveniently be referred to as a normative functionality. Like many conceptual terms used in legal discourse, proportionality is tied to a series of moral and political norms. Depending on whether those norms are available to addressees or not, uttering proportionality may work to provoke reactions that international law itself cannot provoke. Take, for instance, the case of Olsson v. Sweden. The social authorities of Sweden decided to transfer the custody of a child from its natural to its foster parents, and to impose severe visiting restrictions upon the former. The natural parents brought a complaint to the European Court of Human Rights, arguing a violation of Article 8 of the ECHR. The Court obviously had to decide whether the interference with the complainant’s right to his private life was necessary in a democratic society ‘for the protection of the rights and freedoms of others’. In the practice of the Court, such a decision requires a weighing of the conflicting interests involved. Weighing involves, on the one hand, the mutual interests of natural parents and children in developing a family relationship, and the psychological harm risked by the absence of an opportunity of developing such a relationship. On the other hand, weighing also involves the potential harm caused to a child’s personal development if deprived of a stable and harmonious living environment. In a case like this, by referring to the outcome of the consideration as proportionate, the Court would typically provoke a more favourable reaction than by just saying that the one conflicting interest overrides the other. It would do so because, in political discourse, the concept of proportionality is tied to norms that value the equal respect of the interests of all human beings and the means-end rationality of governmental interference with private life.

Second, proportionality has a systemising functionality. According to the ontological stance taken in this article, concepts are formed through a process

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20 On the many functionalities of conceptual terms in international legal discourse generally, see Linderfalk, above n 5, Sections 3-8.
23 Olsson v. Sweden (No. 2), above n 21, paras 87-91.
24 Ibid, paras 87-91.
of abstraction. They are the result of the ability of the human brain to perceive of particular properties of phenomena or states of affairs as characteristics shared by all entities belonging to the extension of some certain concept.  

This means that by the mere nature of what they represent, conceptual terms like proportionality will always express an assumption about the existence of some certain systemising criterion or criteria. If, for instance, a particular action taken by a state is referred to by an utterer as not proportionate, then the utterer may be taken to commit herself to the assumption that there is some certain property or properties that can be used to distinguish actions that are proportionate from actions that are not. Depending on the availability of this assumption, the usage of proportionality may prompt addressees to make further inferences about the particular action in question. The addressee may come to learn, for instance, that the particular action is inequitable; that it is unjust; or that it is not instrumental to, or not necessary or sufficient for, the achievement of some certain defined purpose, for instance the protection of national security.

Third, proportionality has an emancipating functionality. As earlier indicated, a proportionality assessment is inevitably relative to some certain criterion or criteria. Such criteria derive from the intended purpose of the particular law at issue. It can be argued that it is an intended purpose of the ECHR not only to ensure the protection of human rights, but also to allow for such limitations of rights that are necessary in a democratic society. Similarly, it can be argued that it is the intended purpose of the law of maritime delimitation to ensure equitable division of maritime areas, and that it is at least one of the intended purposes of the law of state responsibility to ensure that the adoption of countermeasures does not lead to inequitable results. What makes those observations relevant in this context is the fact that, obviously, in no case did law-makers define purposes in any detail. They did not have any exact understanding of the notions of ‘equity’ and ‘necessary in a democratic society’. Rather, they intended the precise meaning of those notions to be determined based on institutional practices like everyday language conventions, the moral principles followed within the community where the law is to be applied, the teaching of natural science, and—in the case of the law of the ECHR—the practice of the institutions of the Council of Europe. From this observation, there is but a small step to contending that the meaning of ‘equity’ and ‘necessary in a democratic society’—and hence also the contents

of the criteria applied in the assessment of an action as proportionate—should be determined based not on the institutional practices existing at the time of the making of each respective law, but in accordance with institutional practices as they develop. This explains the emancipating functionality of proportionality. Depending on the way addressees understand the definition of the purpose or purposes of the relevant international law over time, proportionality potentially helps utterers muster acceptance for arguments about the lex lata independently of any law-makers’ understanding.

Fourth, proportionality has a formative functionality. As noted by linguistics, the meaning of a conceptual term is typically dependent on its relationship with other conceptual terms belonging to the same language system. To illustrate, the meaning of ‘football’ (in the sense of the ball object) is dependent on its relationship with the concept of the game known as ‘football’. The meaning of ‘kick’ is dependent on its relationship with ‘foot’. The meaning of ‘arm’ is dependent on its relationship with ‘finger’, ‘shoulder’, and ‘body’, and so on. Every such proposition about the relationship between two conceptual terms implies the existence of some principle that can explain why, for instance, ‘kick’ is more closely related to ‘foot’ than ‘sky’, or why ‘arm’ is more closely related to ‘shoulder’ than ‘maritime transport’. The formative functionality of conceptual terms builds on this fact. Consequently, depending on whether an addressee can acquaint herself with the organisational principle or principles assumed by an utterer in referring to an action as proportionate, proportionality may facilitate the addressee’s understanding of other conceptual terms, which the utterer may also wish to use. For example, if an addressee learns that in the conceptual universe of an utterer, a proportionate limitation of a human right must be strictly necessary to attain some particular purpose, then this would typically help her capture what the utterer means by proportionality rules. Similarly, if an addressee learns that in the conceptual universe of the utterer, a proportionate division of maritime areas is instrumental to the achievement of an equitable result, this would typically help her understand what the utterer means by equitable principles.

Fifth, proportionality has a camouflaging functionality. In describing the identifying criteria and legal consequences tied to a conceptual term, utterers will always be dependent on the available means for the determination of law. As we all know—whether because the relevant means in fact offer very scant information, or because different authorities give completely different pictures of

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26 See e.g. Lyons, above n 8, 231 ff.
27 Ibid.
the prevailing legal state of affairs—the description given may often be the result more of the utterer’s own moral and political universe than of her assessment of the relevant means for the determination of law. The usage of a conceptual term as a link between identifying criteria and legal consequences may help to conceal this. This is certainly the case with proportionality. Depending on whether or not the addressee is already familiar with the poor productivity of the relevant means for the determination of law, proportionality potentially helps utterers convince addressees that in fact they are in possession of knowledge that will allow them to provide a fairly good description of the *lex lata*.

**4 The effect of proportionality on legal communication**

**4.1 The dependency of legal communication on the functionality of proportionality and the role of supporting language**

What is the effect on legal communication of transferring proportionality from a discourse on one area of international law rather than another? To answer this question, first of all, we need to clarify the dependency of legal communication on the meaning potential (or functionality) of proportionality. The meaning potential of proportionality should not be confused with its meaning on particular occasions of utterance. By the *meaning of an utterance*, pragmatics generally understand the intention that the utterer wishes to communicate by making it. Communication is said to occur when an addressee captures the communicative intention of the utterer. Stated in the inverse, miscommunication occurs when the addressee does not capture such a communicative intention.

Although it may not be the primary focus of an utterer and an addressee when communicating, naturally, the meaning potential (functionality) of language bears on that activity. As already indicated in section 2 of this article, although the meaning of utterances can never be determined independently of contexts, an utterer cannot use just any string of words to communicate just any intention. Consequently, whether or not an addressee succeeds in capturing the communicative intention of an utterer in uttering a conceptual term will typically depend partly on the functionality of this term, and partly on whether the addressee actually uses the relevant contextual assumption or assumptions.

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28 See Blakemore, above n 7, 3 ff.
Given the dependency of the functionality of a conceptual term on cognitive environments—that is, the entire set of assumptions available to an addressee—there are several reasons why utterers and addressees may at times find themselves to be miscommunicating. First, the addressee may simply not have access to the relevant contextual assumption or assumptions. If, for instance, an utterer uses proportionality for the sole purpose of camouflaging for an addressee the true nature of his argument, the addressee might already be familiar with the poor productivity of traditional legal methodology. The utterance will then obviously not have the intended effect. Similarly, if an utterer uses proportionality for the purpose of convincing an addressee of the correctness of his argument, it might be that the addressee bases her understanding of the utterance on a different moral or political norm than the one assumed by the utterer. This norm might exercise a different persuasive force upon her, with the result that, again, the utterance will not have the intended effect.

Second, the addressee may have access to the relevant contextual assumption or assumptions, but for some reason may choose to understand the utterance against the background of some other assumption that is also available to her. Let us assume, for instance, that an utterer uses proportionality for the purpose of transferring to an addressee the proposition that some particular human rights limitation has some particular property, such as that it is unjust. The addressee may know that, depending on the situation, utterers use different systemising criteria to categorise human rights limitations as not proportionate; apart from the criterion assumed by the utterer, human rights limitations may also be categorised as not proportionate because they are not sufficient for the achievement of some certain defined purpose. In such a situation, although the addressee is certainly familiar with the systemising criterion assumed by the utterer, it might be that the addressee expects the utterer to be applying the latter criterion rather than the former. Similarly, all things being equal, since proportionality has more than one functionality, it might be that the addressee bases her understanding of the utterance on some assumed underlying moral or political norm because she thinks that, for the utterer, proportionality is more a tool for emancipation than systemisation. In neither case will the utterance have the intended effect.

An utterer may take action to avoid such misunderstandings. For example, if an utterer uses proportionality for the purpose of camouflaging for an addressee the true nature of his argument, he may stress that it is the result
of a ‘proportionality calculus’. \(^{29}\) Similarly, if an utterer uses proportionality as a tool for emancipation rather than systemisation, he may highlight ‘the evolutive character’ of the relevant law generally. \(^{30}\) This seems to be the reason why in discourses on different areas of international law, the usage of proportionality may affect communication differently. A special regime, according to the perspective taken in this article, is a socially defined subpart of general international legal discourse. If cognitive environments vary depending on socially defined contexts, as pragmatics claim to have established, then it seems a reasonable guess that in discourses on different areas of international law, utterers will need to use different supporting language to ensure that communication succeeds. The following sub-sections 4.2-4.6 confirm this assumption at least to the extent of discourses on the law of state responsibility, maritime delimitation law, and the law of the ECHR.

4.2 How utterers draw attention to assumed moral and political norms

If an utterer uses proportionality for the purpose of convincing addressees of the correctness of his argument, he may wish to add language to ensure the availability of his assumption about the underlying moral or political norm or norms. To facilitate further reference, I will refer to this as normative supporting language. In each of the three discourses considered in this article, utterers use such language rather frequently. In the case of state responsibility law, supporting language is conspicuously ambiguous. Some utterers call attention to ‘the need to ensure that the adoption of countermeasures does not lead to inequitable results’. \(^{31}\) Others point out that, according to international law, the proportionality of a measure ‘is tested by what appears reasonably necessary to induce the wrongdoer to cease its course of action’. \(^{32}\) This ambiguity seems to be just a natural consequence of the ambivalence felt by international lawyers when trying to define the ultimate purpose of countermeasures. \(^{33}\) Many utterers try to

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\(^{29}\) See below at § 4.6.

\(^{30}\) See below at § 4.4.


\(^{33}\) Cf Cannizzaro, ibid, 889-916.
avoid this difficulty by using non-committal normative language. Consequently, utterers stress that ‘the test of proportionality is very important’ and that it is a ‘basic condition for the lawfulness of a countermeasure’. They warn that, since recourse to countermeasures involves the great risk of causing an escalation, and hence a worsening of conflict, countermeasures should be ‘a wager on the wisdom, not on the weakness of the other [p]arty’. They infer that countermeasures should be proportionate as long as they serve goals ‘which are consistent with the expressed desire of the international community’.

In the discourse on maritime delimitation law, overall, normative supporting language takes on a more homogenous character. Indeed, in many cases, when trying to direct addressees’ awareness to the moral and political dimension of proportionality, utterers merely repeat language used earlier by others. Consequently, utterers stress that ‘the final line [of delimitation] should result in an equitable solution’. They remind us that equity in this context is an emanation, not of ‘abstract justice’, but of ‘justice according to the rule of law’, why any delimitation should be ‘both equitable and as practically satisfactory as possible’. The emphasis generally is on disproportion rather than any ‘general principle’ of proportionality. Hence, as emphatically stated, when proportionality is considered, the task is not one of ‘completely refashioning nature’, but of ‘remedying the disproportionality and inequitable effects produced by particular geographical configurations or features’. More specifically, the task is to verify that a delimitation line does not lead to ‘an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation

34 Gabčíkovo-Nagymaros Project (Hungary v Slovakia), Judgment, ICJ Reports 1997 p 223 (Judge Vereshchetin, diss) (Gabčíkovo-Nagymaros).
36 Rayfuse, above n 32, 72.
37 Maritime Delimitation in the Black Sea (Romania v Ukraine), ICJ Reports 2009 p 61, para 120 (Maritime Delimitation in the Black Sea), citing Arts 74 and 83 of the UNCLOS.
38 Continental Shelf (Libya/Malta), ICJ Reports 1985 p 13, para 45, citing Continental Shelf (Tunisia/Libya), ICJ Reports 1982 p 192, para 71.
39 Territorial and Maritime Dispute (Nicaragua v Colombia), Judgment of 19 November 2012, para 244, citing Barbados/Trinidad and Tobago Maritime Delimitation, Award of 11 April 2006, 27 RIAA, para 215.
40 Continental Shelf (Libya/Malta), above n 38, para 57.
41 Ibid, para 57, citing Anglo-French Continental Shelf, 18 RIAA, para 101.
42 Maritime Delimitation in the Black Sea, above n 37, citing Anglo-French Continental Shelf, ibid, para 210.
In the discourse on the law of the ECHR, as a way of generally introducing the concept of proportionality, utterers often start by pinning down the standard that ‘a fair balance has to be struck between the demands of the general interest and the requirements of the protection of the individual’s fundamental rights’. An explicit general definition of the concept of ‘fair’ is typically not provided, however. Instead, this concept is often explained implicitly, in a piecemeal fashion, by reference to the particular systemising criterion or criteria considered in the application of the proportionality test to particular cases. Consequently, depending on the specific context of use, utterers may refer to a measure as disproportionate when it entails an ‘individual and excessive burden’; when it is the result of an arbitrary or discriminatory application of a rule of law; when it is not ‘accompanied by specific reasoning’; when it thwarts ‘the free expression of the people in the choice of the legislature’; when public authorities have failed to act with ‘diligence’ or within a ‘sufficiently prompt’ time-frame; when the decision-making process resulting in the adoption of a measure does not involve a judiciary; when the measure is contrary to the demands that ‘pluralism, tolerance and broadmindedness without which there is no “democratic society”’, and when there is no access to a court or possibility of appeal.

4.3 How utterers draw attention to assumed systemising criteria

If an utterer uses proportionality for the purpose of prompting addressees to make further inferences about a particular action, he may wish to add language to ensure the availability of his assumption about the systemising

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43 Bay of Bengal Maritime Delimitation (Bangladesh/Myanmar), ITLOS Case No 16, (Judgment, 14 March 2012) para 233, citing Maritime Delimitation in the Black Sea, above n 37, para 122.  
47 Frodl v. Austria, Judgment of 8 April 2010, para 35.  
48 Scoppola v. Italy (No. 3), Judgment of 22 May 2012, para 84.  
50 Scoppola v. Italy (No. 3), above n 48, para 98.  
51 Otto-Preminger Institut v. Austria, Judgment of 20 September 1994, para 49.  
criterion or criteria used in referring to this action as either proportionate or non-proportionate. I will refer to this as systemising supporting language. In each of the three discourses considered in this article, utterers resort to such language, although less so in the discourse on maritime delimitation law than in the others. In the case of state responsibility law, systemising supporting language shows the same teleological ambivalence as the language illustrated in sub-section 4.2. Consequently, some utterers stress the effects of countermeasures, which must be ‘commensurate with the injury suffered’. Others call attention to the long and short term goals of countermeasures, noting that ‘proportionality requires not only employing the means appropriate to the aim chosen’, but that it ‘implies, above all, an assessment of the appropriateness of the aim itself’. A conspicuous number of utterers use language tailored to avoid taking a stance in the discussion of what might be the ultimate purpose or purposes of countermeasures. They refer instead to criteria such as ‘how serious the unlawful conduct attributed to both parties was’, or whether or not an action violated ‘an essential provision of a treaty’, or a provision ‘essential to the accomplishment of the object and purpose’ of a treaty.

In the case of maritime delimitation law, supporting language once again takes on a more homogenous character. Utterers remind us that ‘the real role of proportionality is one in which the presence of different lengths of coastlines needs to be taken into account so as to prevent an end result that might be “disproportionate” and hence inequitable’. They call attention to the function of proportionality assessment, which is to ‘verify that the [delimitation] line [...] [provisionally drawn] does not, as it stands, lead to an inequitable result by reason of any marked disproportion between the ratio of the respective coastal lengths and the ratio between the relevant maritime area of each State by reference to the delimitation line’.

In the case of the law of the ECHR, supporting language is extremely varied. This would seem to be the consequence of the great number of systemising criteria assumed, as illustrated in sub-section 4.2. The impression is, however,

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54 Rayfuse, above n 32, 51, citing Cannizzaro, above n 32, 897.
55 Gabčíkovo-Nagymaros, above n 34, 194 (Judge Herczegh, diss).
56 Ibid, 195.
57 Ibid.
58 Barbados/Trinidad and Tobago Maritime Delimitation, above n 39, para 240.
59 Maritime Delimitation in the Black Sea, above n 37, para 122.
that utterers do not consider all criteria generally applicable. Judged by the usage of supporting language, some criteria are regarded as context-specific, in the sense that as far as utterers are concerned, the relevance of criteria varies with the particular right and cultural context considered. Some utterers make this explicit. As stated by the European Court of Human Rights, in the context of Article 3 of Protocol 1 to the ECHR: ‘There are numerous ways of organising and running electoral systems and a wealth of differences, inter alia, in historical development, cultural diversity and political thought within Europe which it is for each Contracting State to mould into their own democratic vision.’

4.4 How utterers draw attention to assumed definitions of legal purposes over time

If an utterer uses proportionality for the purpose of mustering acceptance for an argument about the lex lata independently of any law-makers’ understanding of it, he may want to add language to ensure the availability of his assumption about the definition of the purpose or purposes of that law over time. I will refer to this as emancipating supporting language. In the discourse on state responsibility law, utterers sometimes resort to such language, although this may not always (or even typically) be the case. Utterers caution that ‘judging the “proportionality” of countermeasures is not an easy task’, adding that it ‘can at best be accomplished by approximation’. They refer to what they claim is ‘widely recognised’, namely ‘that the test of proportionality … is very uncertain and therefore complex’. They remind us that, according to the ILC, ‘there is no uniformity … in the practice or the doctrine as to the formulation of the principle, the strictness or flexibility of the principle and the criteria on the basis of which proportionality should be assessed’.

In the discourse on maritime delimitation law, emancipating supporting language is more widely resorted to. Some utterers are fairly explicit about their assumptions. They remark, for example, that although certain, ‘drawing a delimitation line in a manner that is mathematically determined by the exact ratio of the lengths of the relevant coastlines … would in many cases lead to an inequitable result’. Or, even more explicitly, they bolster their propositions in

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60 Hirst v. UK (No. 2), Judgment of 6 October 2005, para 61.
61 Air Services Agreement, above n 35 , para 83.
62 Gabčíkovo-Nagymaros, above n 34, 223 (Judge Vereshchetin, diss).
63 Ibid.
64 Barbados/Trinidad and Tobago Maritime Delimitation, above n 39, para 328.
The Convention sets a goal to be achieved, but is silent as to the method to be followed to achieve it. It restricts itself to setting a standard, and it is left to States themselves, or to the courts, to endow this standard with specific content. 

Other utterers choose to communicate their assumptions implicitly, emphasising either the shared responsibility of law-maker and judiciary for achieving an equitable result, or the general nature of the proportionality/disproportionality test, which by sheer necessity demands that equity constantly be defined anew, in relation to each and every particular case of delimitation. Consequently, they remind us that the disproportionality test cannot be ‘applied in a mechanical fashion’; that it ‘does not depend upon a mathematical operation’; and more specifically, that ‘taking account of the disparity of coastal lengths does not mean a direct and mathematical application of the relationship between the length of the coastal front [of Parties]’. Utterers explain that, within the constraints imposed by law, a judiciary ‘has both the right and the duty to exercise judicial discretion in order to achieve an equitable result’. They emphasise that while it is the task of the judiciary ‘to check for a significant disproportionality … [w]hat constitutes such a disproportionality will vary according to the precise situation in each case’.

In the case of the law of the ECHR, emancipating supporting language is more homogenous. Since the late 1970’s, utterers have stressed that the ECHR is ‘a living instrument which … must be interpreted in the light of present-day conditions’. Although this is the exact phrase often resorted to, utterers sometimes use similar language, stressing for instance that regard must be had to ‘the changing conditions in Contracting States’, or that states, in applying the

65 Continental Shelf (Libya/Malta), above n 38, para 28.
66 Territorial and Maritime Dispute (Nicaragua v. Colombia), above n 39, para 194.
67 Ibid, para 166, citing Continental Shelf (Libya/Malta), above n 38, para 68.
68 Maritime Delimitation in the Area between Greenland and Jan Mayen (Denmark v Norway), ICJ Reports 1993 p38, para 69.
69 Barbados/Trinidad and Tobago Maritime Delimitation, above n 39, para 244.
70 Territorial and Maritime Dispute (Nicaragua v Colombia), above n 39, para 240.
71 Application No 5856/72, Tyrer v UK, Judgment of 25 April 1978, para 31. For more recent examples, see e.g. Application No 19010/07, X and Others v Austria, Judgment of 19 February 2013, para 139.
72 Ünal Tekeli v Turkey, Judgment of 16 November 2004, para 54.
ECHR, ‘must necessarily take into account developments in society and changes in the perception of social, civil-status and relational issues, including the fact that there is not just one way or one choice when it comes to leading one’s family or private life.’

4.5 How utterers draw attention to assumed relationships between conceptual terms

If an utterer uses proportionality for the purpose of facilitating addressees’ understanding of other conceptual terms, he may want to add language to ensure the availability of his assumption about the organisational principles used for the explanation of the relationship of proportionality with other conceptual terms. I will refer to this as formative supporting language. In each of the three discourses considered in this article, utterers resort to such language. To begin with, utterers frequently use composite terminology such as ‘disproportionality’, ‘the test of proportionality’, or ‘the proportionality principle’. In all such cases, the assumed relationship with ‘proportionality’ can be inferred by addressees using nothing more than the grammar of the English language. Apart from such obvious examples, in the discourse on state responsibility law, by contrasting countermeasures with neighbouring concepts such as ‘reprisals’, ‘sanctions’, and ‘retorsion’, utterers imply that the proportionality test does not necessarily apply equally to all. By proposing terminology like ‘external’ and ‘internal’ proportionality, utterers imply that proportionality takes on a more general meaning. By suggesting that a particular action is not ‘clearly’ or ‘manifestly disproportionate’, utterers imply that the meaning of proportionality is dependent on a burden of proof.

In the discourse on maritime delimitation law, when utterers describe the role of proportionality assessments in the whole of delimitation proceedings—as

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73 Scoppola v Italy (No 3), above n 48, para 94.
74 Maritime Delimitation in the Black Sea, above n 37, para 210.
75 Rayfuse, above n 32, 50.
77 Rayfuse, above n 32, 44.
78 Ibid, 51, citing Cannizzaro, above n 32.
79 Air Services Agreement, above n 35, para 83; Gabčíkovo-Nagymaros, above n 34, 223 (Judge Vereshchetin, diss).
either the consideration of a relevant circumstance,\textsuperscript{80} or a final check upon the equity of a tentative delimitation\textsuperscript{81}—it would seem they similarly aim at bringing assumed organisational principles to the attention of addressees. It suffices to quote the International Court of Justice in \textit{Territorial and Maritime Dispute (Nicaragua v. Colombia)}:

\begin{quote}
In the \textit{first stage}, the Court establishes a provisional delimitation line between territories (including the island territories) of the Parties. In doing so it will use methods that are geometrically objective and appropriate for the geography of the area. This task will consist of the construction of an equidistance line, where the relevant coasts are adjacent, or a median line between the two coasts, where the relevant coasts are opposite, unless in either case there are compelling reasons as a result of which the establishment of such a line is not feasible … In the \textit{second stage}, the Court considers whether there are any relevant circumstances which may call for an adjustment or shifting of the provisional equidistance/median line so as to achieve an equitable result … In the \textit{third and final stage}, the Court conducts a disproportionality test in which it assesses whether the effect of the line, as adjusted or shifted, is that the Parties’ respective shares of the relevant area are markedly disproportionate to their respective relevant coasts.\textsuperscript{82}
\end{quote}

There is a clear parallel between the way proportionality is described in the overall context of maritime delimitation proceedings, and the way it is often described in the context of at least some rights laid down in the ECHR. Proportionality assessments (in the narrow sense) are said to be a final test in the overall methodology used by the European Court for assessing whether or not a measure interfering with a right constitutes a violation of the obligations of a state under the ECHR or not. Off and on, this methodology is described as consisting of either two or three stages.\textsuperscript{83} According to the description, when following the three-stage procedure, the Court first establishes whether a ‘pressing social need’ justi-

\textsuperscript{80}See e.g. \textit{Continental Shelf (Libya/Malta)}, above n 38, paras 55-66.
\textsuperscript{81}\textit{Barbados/Trinidad and Tobago Maritime Delimitation}, above n 39, para 238.
\textsuperscript{82}\textit{Territorial and Maritime Dispute (Nicaragua v Colombia)}, above n 39, paras 191-193.

\textsuperscript{83}See e.g. Application No 27308/74, \textit{Rousk v Sweden}, above n 49, para 113; Application No 13470/87, \textit{Otto-Preminger Institut v Austria}, above n 51, para 50 (Judges Palm, Pekkanen and Makarczyk, diss) para 3; Application Nos 13914/88; 15041/89; 15779/89; 17207/90, \textit{Informationsverein Lentia and Others v Austria}, Judgment of 24 November 1993, para 39; Application Nos 41340/98,
fies the interference,\textsuperscript{84} in assessing whether such a need exists, contracting states have a certain margin of appreciation.\textsuperscript{85} Second, the Court inquires whether or not there are other means to achieve the same end that would interfere less seriously with the right concerned.\textsuperscript{86} Third, since there must always be ‘a reasonable relationship of proportionality between the means employed and the aim pursued’, the Court ascertains whether ‘a fair balance’ has been struck between the demands of the general interest and the requirements of the protection of the individual’s fundamental rights.\textsuperscript{87} When following the two-stage procedure, the least restrictive interference test is considered by the Court either as an integral part of the proportionality assessment, or it is discarded altogether. By so describing the role of proportionality, obviously utterers communicate an assumption about the relationship of proportionality assessment with other assumed stages of decision-making. For instance, in referring to proportionality assessment as the final test in a three stage-procedure, utterers imply that neither does the proportionality test entail an assessment of the alleged aim of an infringement measure, nor does it entail an assessment of whether it is instrumental to, and strictly necessary for, the achievement of this aim.

\subsection*{4.6 How utterers draw attention to assumed productivity of traditional legal method}

If an utterer uses proportionality for the purpose of convincing addressees that she can provide a fairly good description of the \textit{lex lata}, she may want to add language to ensure the availability of the assumption that she is in fact possessing knowledge allowing her to provide this description, which I will henceforth refer to as \textit{camouflaging supporting language}. Given that proportionality assessments always involve the comparison of two units, the justification of any such assessment in a particular case inevitably presupposes the correctness of two separate decisions. First, whoever makes the determination has to explain exactly which units she is comparing and why. Second, she has to explain how exactly—that is, based on which criterion or criteria—she is making the

\textsuperscript{84} See e.g. \textit{Sigurður A. Sigurjónsson v Iceland}, above n 83, para 41.
\textsuperscript{85} See e.g. \textit{Otto-Preminger Institut v Austria}, above n 51, para 50.
\textsuperscript{86} See e.g. \textit{Glor v Switzerland}, above n 83, para 94.
\textsuperscript{87} See e.g. \textit{Rousk v Sweden}, above n 49, para 113.
comparison. As seen in sub-section 4.3, while in all three discourses considered in this article, utterers typically take great pains to provide the first part of the explanation, they typically say very little (or nothing) that can help addressees obtain anything like an idea about the latter. However, and interestingly, the language utterers use to support their opinions about the proportionality of actions may be seen to imply that those propositions are still the result of the application of law, rather than the usage by the utterer of any discretion that law leaves to those that apply it.

Consequently, utterers refer to proportionality assessments using terms such as ‘the test of proportionality’,88 or the proportionality ‘rule’.89 Utterers indicate that assessments are the result of a ‘proportionality calculation’,90 or a ‘proportionality equation’,91 or again the outcome of ‘the requisite’ or ‘correct balance’.92 They appeal to ‘the essential criteria’ for assessing the proportionality of an action.93 In so far as it concerns the frequency of usage of language of this kind, generally, no great difference can be noted between the discourses on state responsibility law, maritime delimitation law, and the law of the ECHR. If there is a difference, it would seem to lie rather in the sources of authority invoked by utterers to support the existence of said ‘tests’, ‘requirements’, and ‘rules’, or to determine the meaning of concepts such as ‘requisite’ and ‘correct’. Whereas in the discourse on state responsibility law, utterers often refer rather sweepingly to ‘doctrine and jurisprudence’,94 or to what they claim to be ‘well-known’,95 in the other two discourses, references are typically more precise, directing attention to particular case law, such as ‘the North Sea Continental Shelf cases’,96 or ‘the Hirst Judgment’.97

88 Continental Shelf (Libya/Malta), above n 38, para 74; Gabčíkovo-Nagymaros, above n 34, 223 (Judge Vereshchetin, diss).
89 Air Services Agreement, above n 35, para 83.
90 Continental Shelf (Libya/Malta), above n 38, para 74.
91 Application No 30814/06, Lautsi and Others v Italy, Judgment of 18 March 2011, (Judge Rozakis &Judge Vajić).
92 Ibid.
93 Scoppola (No. 3), above n 48, para 99.
94 Gabčíkovo-Nagymaros, above n 34, p 223 (Judge Vereshchetin, diss).
95 Air Services Agreement, above n 35, para 83.
96 Continental Shelf (Libya/Malta), above n 38, para 74.
97 Scoppola (No. 3), above n 48, para 99.
5 Defining characteristics of special regimes

It is time to start pulling strings together. As indicated in section 4, the usage of proportionality affects communication differently in discourses on state responsibility law, maritime delimitation law, and the law of the ECHR. Depending on the particular discourse and functionality considered, the language used to support the communication of an opinion about the proportionality of an action can be anything from extensive to practically non-existent. It can take various forms, from a seemingly habitual repetition of a single phrase to a rich variety of impasses short of any visible pattern. I will now move on to analysing the implications of those observations for a discussion of the identity of special regimes in international law.

To make the analysis fairly simple, I will conduct it on the basis of two variables only. Consequently, I will take into account, first, the amount of language generally used to support the communication of proportionality propositions in the discussion of one field of law relative to a discussion of any of the others. Second, I will take into account the variation in the language exploited. As I will take for granted, when extensive language is used supporting the understanding of some certain kind of communicative intention equivalent to some certain functionality of proportionality, this shows that overall, within the relevant language community, this potential meaning is much appreciated. When supporting language is limited, this shows either that the potential meaning considered is little appreciated, or that utterers think it obvious that the assumption required for the understanding of an intention is already available to addressees. When supporting language takes the form of a more or less habitual repetition of a single phrase, this shows that the required assumption is fairly specific and widely agreed upon. In the inverse, when supporting language takes on a heterogenous character, this shows that the required assumption is either contentious or highly complex.

As shown by the usage of normative supporting language in the three discourses, utterers assume different moral and political norms. More surprisingly perhaps, norms have different persuasive force. In the discourse on maritime delimitation law, a high degree of repetition of supporting language indicates a degree of consensus about the identity of the underlying norm: delimitation should result in an equitable solution. This should not be surprising since this is already explicitly stated in Articles 74 and 83 of the 1982 United Nations Convention on the Law of the Sea. In and of itself, equity is certainly a very vague concept, but in the context where it is used, it seems to have taken on a very specific meaning.
guably, if the norm had been less specific, more supporting language would have
had to be used by utterers wishing to draw on the normative functionality of pro-
portionality. In relative terms, this would seem to confer a high degree of persua-
sive force on the assumed underlying norm. Comparison with the discourse on
state responsibility law—where supporting language is ambiguous between two
alternative norms—confirms this conclusion. In the discourse on the law of the
ECHR, supporting language indicates the assumption of a normative framework
rather than any single norm—the idea of the democratic society. In a superficial
sense, this idea is consensual; indeed, it is what drives much of the work of the
Council of Europe. In that sense utterers certainly agree on what it is exactly
that confers normativity upon proportionality. At the same time, as observed in
sub-section 4.2, supporting language varies greatly with the specific context of
the use of proportionality, which is why I am inclined to infer that the contents
of this idea are not very clear. While the idea of the democratic society has an
immediate ethical appeal, it would still seem to have a persuasive force lacking in
at least the corresponding norms underlying the usage of proportionality in state
responsibility law.

As shown by the usage of systemising supporting language in the three
discourses, utterers assume organisational schemes that are not only different
but are also more or less clear and developed. Less supporting language is
used in the discourse on maritime delimitation law than in any of the other
fields of law. This difference may be explained by the fact that, in discussing
maritime delimitation law, while there is still some confusion about the concept
of relevant coasts, utterers and addressees alike have less of a problem
identifying the units to be compared—in this case, the lengths of the relevant
coasts and the areas delimited. In the discourse on the law of the ECHR,
the underlying normative framework seems quite naturally to entail a great
number of systemising criteria. The general impression is that utterers do not
consider all criteria generally applicable. Judged by the usage of supporting
language, some criteria are regarded as context-specific, in the sense that as far

98 Cf R Clayton, ‘Regaining a Sense of Proportionality: the Human Rights Act and the Proportion-
and the Principle of Proportionality in the Jurisprudence of the ECHR (2002), 244, quoting Austria v
99 See especially preambular para 4 of the ECHR; and Art 1(a), and preambular para 2, of the Statute
of the Council of Europe.
100 See e.g. Bay of Bengal Maritime Delimitation, ITLOS Case No 16, (Judgment, 14 March 2012) paras
480–495.
as utterers are concerned, the relevance of criteria varies with the particular right and cultural context considered.\textsuperscript{101} This would explain why utterers spend so much time clarifying and explaining criteria. In the discourse on state responsibility law, the ambiguous purpose of countermeasures explains why utterers sometimes emphasise the appropriateness of aims and sometimes the injury suffered by the state taking countermeasures. It also explains why utterers refer to non-committal criteria such as the object and purpose of a treaty.

As shown by the usage of emancipating supporting language in the three discourses, utterers perceive differently of their own roles relative to international law-makers. In the discourse on state responsibility law, supporting language leaves the impression that, while utterers certainly recognise their role in the development of international law, they do not take this role for granted. It might be that this is just the consequence of the fact that, in this field of law, utterers are still struggling to understand the moral and political dimension of proportionality. Arguably, before you can form an idea of your own role relative to the operation of some law, you would first need to have a fairly developed understanding of its normative underpinnings. In the discourses on maritime delimitation law and the law of the ECHR, utterers would seem to have fully accepted that they too play a role in the development of each respective regime. In the case of the former, utterers still seem very anxious of vindicating their assumed role. In the case of the latter, utterers appear rather more comfortable, given the long tradition of repeated references to the ECHR as a 'living instrument which must be interpreted in the light of present-day conditions'.\textsuperscript{102}

As shown by the usage of formative supporting language in the three discourses, utterers assume different conceptual schemes. If we disregard composite language such as 'proportionality test' or 'proportionality calculus', which needs nothing more than knowledge of English grammar to be understood, the conceptual schemes assumed in the discourses on maritime delimitation law and the law of the ECHR are better developed than in the discourse on state responsibility law. The qualitative difference lies in the emphasis put by utterers participating in the former two discourses on the role of proportionality in the overall context of the relevant judicial decision-making process.

As shown by the usage of camouflaging supporting language in the three discourses, utterers assume different legal universes. This should not be

\textsuperscript{101} The following statement by the European Court would seem to be symptomatic: Scoppola (No. 3), above n 48, para 83.
\textsuperscript{102} Above n 71.
surprising, since in the discourses on maritime delimitation law and the law of the ECHR, but not in the discourse on the law of state responsibility, most of the discussion takes place in the immediate context of a vast body of judicial practice.

A cognitive environment includes not only contextual assumptions aiding the comprehension of an utterer’s intention equivalent to some certain functionality of proportionality. It also includes assumptions about the relative importance for the utterer of the many different functionalities of this term. As shown by the usage of supporting language in the three discourses generally, utterers make different priorities. This difference would seem to lie mainly in the way utterers conceive of the emancipating and camouflaging functionalities of proportionality.

To begin with the emancipating functionality of proportionality, it would seem to be more appreciated in the discourse on maritime delimitation law than in the discourses on state responsibility law and the law of the ECHR. In the discourse on state responsibility law, admittedly, some emancipating supporting language is used, but not to the extent of the usage of such language in the other two discourses. In the discourse on the law of the ECHR, the habitual repetition of supporting language leaves the impression that, as utterers see it, the evolutive character of the ECHR is not really a matter that needs to be debated. In other words, if the emancipating functionality of proportionality was certainly a priority of utterers in the early years of existence of the ECHR, it is not any more.

The camouflaging functionality of proportionality would seem to be more appreciated in the discourses on maritime delimitation law and the law of the ECHR than in the discourse on state responsibility law. First, it is only in the former two discourses that utterers add precise references to earlier case-law to near-empty phrases, such as ‘the test of proportionality’ or the proportionality ‘rule’. Arguably, camouflaging is typically easier when backed by previous decisions taken by international judicial bodies such as the International Court of Justice or the European Court of Human Rights, although analytically speaking, those decisions cannot help justify an argument. Second, only in the discourses on maritime delimitation and the law of the ECHR are proportionality assessments referred to as a final stage in an overall methodology used by judiciaries when deciding on the legality of an action. As noted in sub-section 4.5, such categorisations may serve a formative function. However, it may also serve to emphasise the importance of the camouflaging functionality of proportionality. Utterers may find it difficult not to recognise the role of judicial discretion for the outcome of a proportionality assessment. At the same time, they may want to communicate that, in the final analysis, proportionality assessments
play only a minor role in the whole of the relevant decision-making process. Judged by the development of the discourse on maritime delimitation law in the 21st century, the camouflaging functionality of proportionality would now seem to be more appreciated by utterers participating in this discourse than ever before. Up until recently, proportionality assessment was generally described as a second stage of the delimitation process—that is, as a factor to be taken into account in the context of the consideration of relevant circumstances. Now, as explicitly confirmed by the International Court of Justice in *Maritime Delimitation in the Black Sea*, the understanding is that proportionality assessment serves as ‘[a] final check for an equitable outcome’\textsuperscript{103} and, hence, that it forms only a third stage in the whole of the delimitation process.

As a general conclusion, it would seem that if we are justified in speaking about state responsibility law, maritime delimitation law, and the law of the ECHR as parts of different legal regimes, then this is because:

- Discussion of those areas of law generally takes place in the context of partly different moral and political universes.
- Discussion of those areas of law generally takes place in the context of different assumed schemes for the organisation of legally relevant data.
- Lawyers active in those areas of law generally perceive of their own roles in the making of international law differently.
- Discussion of those areas of law generally takes place in the context of partly different *conceptual* universes.
- Discussion of those areas of law generally takes place in the context of partly different *legal* universes.
- Depending on the area of law discussed, priorities of discussants are generally different.

To some extent, this conclusion confirms what other scholars have already guessed.\textsuperscript{104} My article has developed and substantiated their ideas, anchoring them firmly in a theory of pragmatic meaning and human verbal communication. The further implications of the conclusions remain to be explored.

\textsuperscript{103} *Maritime Delimitation in the Black Sea*, above n 37, para 122.

\textsuperscript{104} Above n 2.
IS THERE AN ITALIAN CONCEPTION OF INTERNATIONAL LAW?

Francesco Messineo*

Abstract
In 1943, Angelo Piero Sereni wrote The Italian Conception of International Law, a book explicitly aimed at restoring Anglo–American respect for Italian international lawyers after the Fascist period. On the seventieth anniversary of the publication of this work, it is worth considering whether there is, in fact, such a thing as an 'Italian' conception of international law. Methodologically speaking, does thinking of international law in terms of national schools make sense? Although a comparative approach to international law is back in vogue, this article questions the validity of any attempt at finding any 'Italian distinctiveness' in the intellectual history of the Italian school(s) of international law. Sereni's enlisting of ancient masters to an 'Italian' conception between the 13th and 18th centuries is for the most part untenable. While a distinctively Italian conception of international law arguably came into existence in the 19th century with Mancini's theory of nationalities, Anzilotti successfully set out to dissolve this into the 20th century European mainstream of positivist international law. The ensuing absence of an 'Italian' conception may give pause for thought to contemporary proponents of 'comparative international law'.

Keywords
Comparative international law, Italy, history of international law, legal positivism, natural law, Fascism, Marxism, Catholicism, Alberico Gentili, Pasquale Mancini, Dionisio Anzilotti, Roberto Ago, Angelo Piero Sereni.

1 Introduction

A ‘comparative’ approach to international law is back in vogue these days, slowly re-emerging from the near-fatal blow dealt to it by the demise of ‘Soviet

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international law.\textsuperscript{1} Many authors are once again investigating the impact of national legal traditions in the construction of international law, but Italy has so far been rather neglected.\textsuperscript{2} For instance, consider Martti Koskenniemi’s recent claim that ‘international law is a “German discipline” in a way that it cannot be said to be “French”, “British” or indeed an “American” discipline’.\textsuperscript{3} He did not even mention the Italian school in his analysis, let alone include it as one of the possible alternatives to the pervasive German influence. True, he affirmed that international law is, in the eyes of many, a sort of ‘European political vocabulary’.\textsuperscript{4} But this was a rather truncated Europe, as far away from the Mediterranean Sea as Mitteleuropa and the Danube can be. Italy was also conspicuously absent from the recent Oxford Handbook of the History of International Law, with the exception of a few pages on the Oxonian scholar Alberico Gentili and a handful of references to other authors.\textsuperscript{5}

At the other end of the spectrum, Angelo Piero Sereni claimed in his 1943 book, The Italian Conception of International Law, that modern international law was essentially Italian. The complex relations between the independent or semi-independent comuni during the Renaissance period were, in his view, a springboard for future European-wide transformations which created international law as we know it today.\textsuperscript{6} Also, he argued, it was Gentili, not Grotius, the ‘realistic and passionate’ man who employed ‘juridical precision’ to solve the ‘urgent problems of his times’, unencumbered by the ‘tedious … abuse of quotations’ which is found in Grotius;\textsuperscript{7} and while it was silly to argue over who the real ‘father’ of


\textsuperscript{4} Ibid.

\textsuperscript{5} B Fassbender & A Peters (eds), The Oxford Handbook of the History of International Law (2012). In contrast, the book contains contributions by Italian scholars.

\textsuperscript{6} A P Sereni, The Italian Conception of International Law (1943), 118-22.

\textsuperscript{7} Ibid, 116.
international law was, or indeed to dwell on Gentili’s superiority or older age, the two authors could certainly be deemed equal. They were the product of the same ‘epoch, theories and historical problems’.8

My intention here is not to defend the Italian school of international law from unwarranted obliteration at the hands of Northern European scholars. As we shall see, international legal academia is alive and well in Italy—its scholarly production needs no advocates, only keen readers. My aim is rather to critically revisit Sereni’s book seventy years after its publication.

Can we really identify an ‘Italian’ conception of international law? And even if such ‘Italian’ conception existed, would it be radically different from, say, the ‘German’, ‘French’ or ‘British’ conceptions? After all, legal historians such as Paolo Grossi would probably argue that all of these national schools, in fact, belong to the same European legal order, their differences merely variants of the same ‘modern legal myths’ feeding legal positivism.9 The broader methodological question underlying this article is whether attempts to separate schools of international law according to nationality really advance our understanding of the discipline. Can the influence of different legal traditions in international law really be fruitfully understood in terms of ‘comparative international law’?

2 An ‘Italian school’ obviously exists

In the broadest sense of the word ‘school’ (a group of academics engaged in the study of a certain area of human knowledge), there is no doubt that an Italian school of international law exists. A relatively high number of Italians have always featured prominently in the relevant professional circles. We can count five Italian judges at the World Court (Anzilotti at the Permanent Court of International Justice, which he also presided; Morelli, Ago, Ferrari Bravo and Gaja at the International Court of Justice); one judge at the International Tribunal for the Law of the Sea (Treves); one member of the Appellate Body of the World Trade Organisation (Sacerdoti); three judges at the International Criminal Tribunal for the Former Yugoslavia (Cassese, who also presided it, Pocar, Lattanzi as judge ad litem); one judge ad litem at the International Criminal Tribunal for Rwanda (Lattanzi); two judges at the International Criminal Court (Politi and the current Vice President, Tarfusser); many counsel appearing before the International Court of Justice (nine of them appearing between 1999 and

8 Ibid, 115-7.
9 P Grossi, Mitologie giuridiche della modernità (3rd edn, 2007).
2012); and of course a constant (if automatic) presence at the European Court of Human Rights (including Balladore Pallieri, who presided it in the 1970s) and at the European Court of Justice.

Moreover, an Italian was the first President of the Institut de droit international, Pasquale Stanislao Mancini. As we shall see, he was a Risorgimento man with eclectic interests spanning from poetry to politics, although he did not disdain some old-fashioned nepotism, having sponsored his son-in-law Augusto Pierantoni to join the Institut at its foundation in 1873. Since then, Italians have always been conspicuously present at the Institut (the current list of Italian members amounts to about a dozen). For its part, the UN-established International Law Commission has had four Italian members since 1957 (Ago, Arangio-Ruiz, Ferrari Bravo and Gaja).

Italian scholars have featured even more prominently at the Hague Academy of International Law. The Academy’s summer courses started in 1923 and have since been an excellent indicator of who constitutes the ‘Invisible College’ of international lawyers. Of the 1300 published courses given at the Academy since its opening, around 10 per cent were given by 81 Italian scholars. In total, 69 out of the 83 summer sessions held so far have had at least one Italian scholar as a teacher. Furthermore, Italians gave 10 of the Academy’s ‘general courses’ in public international law (Cavaglieri in 1929, Salvioli in 1933, Morelli in 1956, Quadri in 1964, Ago in 1974, Monaco in 1968, Conforti in 1988, Capotorti in 1994, Condorelli in 2010, Gaja in 2011) and four of the ‘general courses’ in private international law (Ago in 1936, Vitta in 1979, Pocar in 1993, Picone in 1999). These are regarded as important signs of international recognition in the field of international law. Interestingly, at the Academy, Italians taught mainly in French (114 out of 130 courses). In fact, Italians taught only in French until 1959, when Sereni was the first Italian to give a course in English.

Quite tellingly, of the prominent Italian international lawyers considered above, only three are women: Judge Lattanzi; Loretta Malintoppi, a counsel who appeared before the International Court of Justice; and Boschiero, the only woman, among the 81 Italians, who has taught at the Hague Academy of International Law. These numbers do not quite reflect the important contribution of many other female Italian scholars to international law; rather, they confirm the existence of wider diversity issues at the top of the profession, both in Italian academia and in international law more generally.11

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11 See e.g. the important empirical study conducted by C Rose & S Kumar, ‘Diversity and the Field
According to the latest figures, there are at least 268 scholars in public and private international law employed by Italian universities, plus at least 70 academics specialising in European Union law. The reasons for these high numbers are structural. As many as 71 Italian universities currently conduct teaching and research in law. Of these, the vast majority are state universities, whose law schools usually have no entry selection, and as such, student numbers are very high compared to more selective higher education systems. Because the study of international law is compulsory for most students undertaking a law degree, and because of additional international law teaching needs at other faculties (political science, economics), many universities employ more than one chair in international law and a few associate professors and researchers. Furthermore, a number of prominent law review journals and yearbooks are based in Italy, such as the Rivista di diritto internazionale (established in 1906); La Comunità Internazionale; the Comunicazioni e Studi dell’Istituto di Diritto Internazionale e Straniero della Università di Milano; the Rivista di diritto internazionale privato e processuale (focusing on private international law); and the Italian Yearbook of International Law, catering for an international audience. The Journal of International Criminal Justice was founded by Cassese and is still managed by an Italian scholar, while the European Journal of International Law has consistently had a number Italian editors and contributors. Italians regularly publish articles in other English and French language journals. But is their work any good? During the latest Research Quality Assessment conducted nationally (VQR 2004-2010), fellow academics anonymously reviewed selected writings by international lawyers based at Italian universities and found that 57.1 per cent of the reviewed outputs were either ‘good’ or ‘excellent’, 21.6 per cent were ‘acceptable’, and 21.3 per cent were of ‘limited’ value or worse. Although not outstanding, these figures were better than the national average for law subjects, perhaps confirming the suspicion that Italians are rather harsh markers.

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13 The increase in the last 30 years has been quite marked: Antonio Cassese had counted 131 scholars in the late 1980s: A Cassese, ‘Capitolo terzo - diritto internazionale’, in L Bonanate (ed) Studi internazionali (1990) II, 113, 115–6.
14 See above n 12.
15 Ibid.
In sum, international law scholarship is alive and well in Italy, as testified inter alia by the activities of the Società Italiana di Diritto Internazionale, the learned society of the profession. But can we identify a distinctively ‘Italian’ conception of international law in this multifarious production?

3 An ‘Italian conception’ may not exist

3.1 Renaissance Italy as a laboratory of international legal practice

While any attempt to appropriate the heritage of the whole Roman Empire on behalf of Italy would, in fact, be ludicrous, it must be conceded that ‘Italy’ was born well before the Italian state was established in 1861. An intellectual history of ‘Italian’ international legal thinking would thus need to start somewhere near the creation of an ‘Italian’ language and culture (as opposed to a ‘Latin’ one)—perhaps in the late 13th century, when Sicilian poets at the court of Frederick II influenced Tuscan writers such as Dante, Petrarch and Boccaccio in laying the literary foundations of Italian culture, sonnet by sonnet, unrequited love by unrequited love. Dante was also—some would say chiefly—a political writer, and his De Monarchia can indeed be explored in search of insights on the organisation of a world legal order. Obviously, one would need to consider the international dimension of later developments in the history of Italian political thought, such as Machiavelli’s Principe. In Sereni’s view, however, these were not legal writers. Sereni’s history of Italian international legal doctrine begins with the 14th century’s jurist par excellence, Bartolus of Sassoferrato.

In enlisting Bartolus to public international law, Sereni is forced to stretch reality slightly. Possibly the most noteworthy commentator of the Corpus Iuris Civilis, Bartolus is known to international lawyers for his treatise on reprisals and for what is often considered the first work on private international law. So far, so good. However, Sereni tries to persuade his readers that Bartolus was also a public international law theorist, because of his work concerning the

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17 Koskenniemi, above n 16, 56-7.
18 Sereni, above n 6, 58.
19 Bartolus of Sassoferrato, Tractatus represaliarum (1354).
20 See J H Beale (ed), Bartolus on the Conflict of Laws (1914).
relationship between Italian cities. In Sereni’s view, the semi-independent cities of Italian Renaissance were precursors of modern states, because the concept of *superiorem non recognoscentes*, at the basis of a modern conception of sovereignty, was conceived of at the time.

The last remaining vestiges of the Holy Roman Empire could be equated to today’s international community—a system of coordination of sovereign entities, rather than a superior authority. Sereni even affirms, in no uncertain terms, that ‘the modern international society is but the same empire transformed and amplified’ and that ‘the international community of today is … the ancient *civitas Christiana*, which united all the peoples of Europe in one organism under the supreme authority of the emperor and the pope’. The *civitas* was gone, but the international community remained. In this regard, Sereni quoted approvingly from Giorgio Balladore Pallieri (1905-1980), according to whom the end of ‘imperial and papal authority’ had not destroyed ‘the general juridical order that centered in these powers’. The rules concerning the relationships between subjects of the empire were still in existence, because ‘even after claiming and obtaining their internal and external independence’, the newly created states ‘continued to cultivate among one another relations still based on the same rules as existed when the pope and the emperor were authorities superordinated over the other powers’. Westphalia was not a moment of creation of a new legal order, but rather one in which ‘the legal order of the ancient Holy Roman Empire’ was ‘limited in its jurisdiction solely to international matters because of the formation of modern states’, and transformed to cater for the reluctance of modern states ‘to admit in any field whatsoever a power superior to them’.

Of course, it is theoretically possible to conceive of all struggles of contemporary international lawyers as footnotes on the historical arc created by the end of the empire. During the Renaissance, says Sereni, the Holy Roman Empire, still technically sovereign over Italian cities, but in fact more and more devoid of power, was fetishized by writers as ‘a messianic dream, an ideal aspiration’ which had little to do with reality. As a *divertissement*, these words should perhaps

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21 Sereni, above n 6, 60.
22 Ibid, 61.
23 Ibid, 119.
25 Ibid, 68-9 (Sereni’s translation).
26 Ibid.
28 Sereni, above n 6, 60.
inspire caution in keen cosmopolitan technocrats of today, who are also fetishizing the ‘international community’ as a unifying aspiration while they are busy managing the daily relations between international actors. But from a historiographical point of view, Sereni’s approach is both flawed and drearily Eurocentric. First, there is an obvious risk of juxtaposing entirely different situations by imposing present concepts to a distorted view of the past. Second, even taking Sereni’s approach seriously, the most interesting aspect of Bartolus’ work, at least for our purposes, would not be the one concerning the internal dealings within the Empire, but the one concerning the relationship between the Holy Roman Empire and other peoples, classified by Bartolus as the Christian allies (‘the Greeks’), the non-Christian friends (‘the Tartars’), the permanent enemies (‘the Turks’), and those (‘the Indians’) with whom ‘*non habemus pacem nec guerram, nec aliquid facere*’.29 Did Bartolus provide us with a specifically ‘Italian’ conception of dealing with them? Not really—his Roman law approach and his Latin prose were the European standard for the time, and Sereni’s passionate defence thereof (comparing Bartolus to artists such as Michelangelo, Mantegna and Bramante) somewhat misses the mark. Sereni is forced to admit that ‘it was only later that international law acquired distinct content and autonomous characteristics of its own.’30 That is precisely the point.

Sereni is much more persuasive in his description of Renaissance Italy as a laboratory of international practice. Between the late 13th and the 16th centuries, the Italian states were at the centre of a very advanced and complex web of commerce, art and enterprise. Their relations with each other and with overseas countries, as well as the methods through which they settled international disputes, often amounted to the first legal scaffolding of contemporary ‘international law’.31 Indeed, Sereni is correct in pointing out that ‘some international institutions that still exist, such as legations, consulates, extradition, and international settlements, are related to institutions which originated or at least reached their full development in Renaissance Italy’.32 But this is not a contribution in terms of an Italian ‘conception’ of international law, rather the building blocks of crucial aspects of the whole of international law.

Furthermore, modern international law still had to be born as a discipline. Fertile ground was to be found in ‘proud Protestant sixteenth-century England,

29 Ibid, 61-2 (‘we have no peace nor war, nor we do anything at all’).
31 Ibid, 10-55.
32 Ibid, 118.
freed from all subordination to the emperor and the pope, where Alberico Gentili (1552-1608), an Italian Protestant persecuted by the Inquisition, found refuge. Gentili became the first Italian lawyer tenured at Oxbridge, and a very successful practitioner advising the English government as well as the Spanish embassy on matters of international law. But, leaving aside all issues concerning the relationship between Gentili and Grotius, the question here is whether we can really appropriate Gentili on behalf of an 'Italian' conception of international law. Given that he wrote in Oxford and that his books were in Latin, a nationalist appropriation of his work would be as wrong on behalf of Italy as it would on behalf of the United Kingdom. Gentili is certainly one of the main starting points of the construction of the European language of international law—not British doctrine, nor an Italian conception.

Nor can we find a better candidate for Italian appropriation in Pierino Belli from Alba (1502-1575), whose *De re militari et bello tractatus (A treatise on military matters and warfare)* was somewhat ahead of his time, especially in light of certain 'humanitarian' considerations contained therein. As Cavaglieri remarked, Belli was held in contempt by Gentili, who went very close to plagiarising Belli's work without even acknowledging his existence. Sereni praises Belli's 'breadth of ideas [that were] truly exceptional for his times' and his 'lofty' idealism. For Sereni, Belli was 'the last great writer of the Italian theologico-religious tradition'—that is, a natural lawyer. A Catholic writer quite at ease with the Spanish theological school of Vitoria and Suarez, Belli had long served in the Spanish military. Once again, assigning him exclusively to an 'Italian tradition' would be rather preposterous. As a natural lawyer, he was one of the earliest representatives of a certain mode of international legal thinking which was later to be eradicated by legal positivists. But before the 'magnificent and progressive fate' of positivism could take hold, Risorgimento had to occur, with its nationalist political theories still imbied of natural law.

33 Ibid, 105.
35 Pierino Belli of Alba, *De re militari et bello tractatus* (1563), vol I (photostatic reproduction, 1936).
37 A Cavaglieri, 'Introduction', in Pierino Belli of Alba, *De re militari et bello tractatus* (1563), vol II (1936 translation), I1a-28a.
38 Sereni, above n 6, 99.
39 Ibid, 97.
3.2 The Risorgimento and the theory of nationalities

Sereni charitably jumps, in the space of a few pages, from the 16th to the 19th century. This period of ‘decline of international law in Italy’ coincided with the long decline of the small Italian Renaissance states faced with the military and economic competition of the ascending European monarchies. In that period, Italy became little more than a crucial battleground in Europe’s eternal pursuit of a balance of power, and Italian international lawyers had very little to contribute compared to their non-Italian colleagues such as Zouche, Pufendorf, Wolff, Vattel or G F de Martens.40

The situation radically changed in the 19th century. At the foundation of the Institut de droit international in 1873, Italian theories were very well known in European circles. Pasquale Stanislao Mancini (1817-1888) was the first president of the Institut and a prominent politician of the new Kingdom of Italy, of which he was the Foreign Minister between 1881 and 1885.41 His theory of nationalities, which he first formulated in the 1850s, gave an international legal dimension to Giuseppe Mazzini’s political project of Italian liberation from foreign domination. A refugee from the Kingdom of the Two Sicilies to Piedmont, Mancini developed his theory along certain basic premises which well reflected the spirit of the times.

Echoing the earlier Neapolitan philosopher Giambattista Vico (1668-1744), Mancini held that nations were the basic units of human organisation.42 Not only did he argue that every nation ‘should constitute one state and one alone’, he further argued that a nation should be ‘left free to organise itself as an independent state’ according to the ‘principle of the self-determination of the peoples’; that nations should be equal, and so should the states deriving therefrom; that arbitration should be compulsory; and that a legal order capable of settling disputes among nations should be established. Finally, Mancini stated that the pope should not be a territorial sovereign.43 These principles were further developed by a number of Italian international lawyers, such as Terenzio Mamiani (1798-1885) and Pasquale Fiore (1837-1914). Indeed, Fiore’s natural law approach

42 See generally his 1851 opening lecture at the University of Turin: P S Mancini, ‘Della nazionalità come fondamento del diritto delle genti’, in A Pierantoni (ed) Diritto internazionale: prelezioni (1873) I.
43 Sereni, above n 6, 163-4.
made him very well known outside Italy.\textsuperscript{44}

The political nature of the nationalities doctrine determined both its fortune and its fate. ‘Nation’ is a most elusive concept—and a dangerous one at that. One of the purposes of Sereni’s 1943 book was to disentangle the Italian doctrine of nationalities from the Italian racist laws of 1938 and from the ‘absurd German theories’ which Fascist Italy adopted because of its ‘spirit of servility towards Germany’.\textsuperscript{45} Indeed, the declared aim of Sereni’s book was to persuade his Anglo–American audience that Fascism and Nazism had no influence on the Italian conception of international law.\textsuperscript{46} And yet, it is worth going back to Mancini’s opening lecture at the University of Turin, in 1851, when he first expounded his theory of nationalities. The following passage on race, ignored by Sereni, indisputably contains the very Italian seeds of those ‘German’ absurdities:

\begin{quote}
Race, which expresses an identity of origin and blood, is another important constitutive element of the Nation. Precisely in this relationship the Nation takes from the Family. After Linnaeus’ initiative, man’s natural history became the subject of insightful studies, thanks to which anthropology can now declare to have gained this truth, that among men there is an evident plurality of races with more or less distinct characters, the furthest apart being the white and the [black], without them going outside the limits of natural varieties of an original and unique species. Where more than one race co-habited or violently juxtaposed on the same territory, there was no establishment of one Nationality, nor there could be if not after a slow fusion of the ones with the others, the mutual absorption of reciprocal qualities, and thus the formation of a new composite race. [...] When considering ancient descriptions of racial characteristics of European peoples..., we are forced to believe in the durable persistence of certain transmissible characteristics of race, which must certainly affect the national spirit. It is this self-substratum, this foundation of physical and moral characteristics that are in common with one’s brothers, that men usually love of the race they were born into: and it is this greater analogy of feelings and trends which establishes a stronger
\end{quote}

\textsuperscript{44} Ibid, 171-2.

\textsuperscript{45} Ibid, 176.

\textsuperscript{46} Ibid, vii-viii (and see below).
tie between individuals of the same stock in comparison to those who are alien therefrom.\footnote{Mancini, above n 42, 31-3.}

Despite these odious words, Mancini does not \textit{equate} nationality and race, as Nazi theories would later do. A theory of nationality could exist even independently of racial considerations.\footnote{For a criticism of the German mythology of race from the point of view of another theory of nationalities, see A Messineo, `Gli elementi costitutivi della nazione e la razza', (1938) 89 III-2115 \textit{Civiltà Cattolica} 209, one of the isolated examples of strong official criticism by the Catholic church at the time of the adoption of racial laws by Fascist Italy.} Mancini’s conception is shaped by multiple ‘factors of nationality’, such as history, customs, laws, religion, territory and language, with race being only one of these. For Mancini, a ‘consciousness of nationality’ is the essential element binding all of these factors together, so that a nation is, ultimately, what an organised people believe it is.\footnote{Sereni, above n 6, 162.} But this slightly more nuanced approach did not impede the later ideological use of the idea of ‘nation’ as a tool in the intellectual arsenal of abhorrent supremacist doctrines. Furthermore, from the point of view of the doctrine of international law, the theory of nationalities was actually unworkable as the organisational criterion of a world community dominated by states, some of which were (and still are) pluri-national.\footnote{In this regard, it is interesting to note that the current Constitution of Bolivia, entered into force in 2009, defines the state of Bolivia as a ‘Pluri-national’ entity.} Stating that nations and states must coincide would obviously lead to a constant state of war. But there is also a positive aspect to the theory of nationality. Its most important legacy is the subsequent development of the principle of self-determination of peoples, which would find its zenith after the Second World War.\footnote{For a detailed assessment of the Italian theory of nationalities (also) in this light see L Nuzzo, \textit{Origini di una scienza: diritto internazionale e colonialismo nel XIX secolo} (2012), 87-168; on the link between the theory of nationalities and self-determination, see also A Cobban, \textit{The Nation State and National Self-Determination} (rev. edn, 1969).}

At the outset, the theory of nationalities had been very successful because of its resonance with the project of national unification.\footnote{For a complete history of the Italian school of nationalities, see E Catellani, ‘Les maîtres de l’École italiennes du droit international au XIXe siècle’, (1934) 46 \textit{RdC} 705.} It was only natural, as Sereni remarks, that it would all but disappear once the Italian state came of age.\footnote{Sereni, above n 6, 174 (the doctrine ‘wore itself out toward the end of the century when the Risorgimento was well-nigh accomplished’).} In this regard, a somewhat ironic twist ensued. Mancini, the architect
of the principle of self-determination, concluded his career as Foreign Minister of the Kingdom of Italy, presiding over the first colonial efforts of the newly constituted nation.\textsuperscript{54} He was thus forced to defend himself in Parliament against those accusing him of clearly contradicting his professed views on the right of peoples to be free.\textsuperscript{55} A shrewd politician, Mancini had realised that times had changed, and his protestations of coherence appeared rather unpersuasive.\textsuperscript{56} His incongruous turn to colonialism perfectly symbolises the Italian transformation from a people needing liberation from Austro-Hungarians, Bourbons and popes to the European Great Power, eager to share in the booty of a renewed ‘civilizing mission’.

As far as international law was concerned, Guido Fusinato’s (1860-1913) eventual admission that states, not nations, were the formal subjects of the international legal order was the final attempt of the Italian school of nationalities to reconcile with international practice.\textsuperscript{57} By then, natural law was soon to definitely give way to legal positivism, whose cloak of ostensible neutrality was much better suited to the new foreign policy of the Italian Kingdom.

3.3 Anzilotti’s eternal dominance

3.3.1 Fifty shades of black

From the early 20\textsuperscript{th} century onwards, international legal scholarship in Italy could be described as a battleground between various shades of legal positivism. No neo-natural lawyer, no realist apologist of power, no Marxist, no post-structuralist, feminist or critical legal scholar has come to dominate the intellectual arena of Italian international law. If the ‘Italian school’ had to be reduced to one person to whom almost every prominent scholar was intellectually indebted, this person would undoubtedly be Dionisio Anzilotti (1867-1950).\textsuperscript{58} Although the debate has, at times, strayed from his strictest positions, especially in the case of the followers of Santi Romano (1875-1947) and Balladore Pallieri (1905-1980), the

\textsuperscript{55} Ibid.
\textsuperscript{56} Ibid.
\textsuperscript{57} Sereni, above n 6, 173-4.
\textsuperscript{58} See inter alia: D Alland, Anzilotti et le droit international public (2012); L Passero, Dionisio Anzilotti e la dottrina internazionalistica tra Otto e Novecento (2010); F Salerno, ‘L'affermazione del positivismo giuridico nella scuola internazionalista italiana: il ruolo di Anzilotti e Perassi’, (2012) 95(1) Riv Dir Int 29.
mainstream of Italian international legal academia never abandoned the linguistic perimeter of ‘black letter’ law which Anzilotti defined at the beginning of the last century. There are, of course, exceptions, such as Gabriele Salvioli’s (1891-1979) Catholic natural law approach or Mario Giuliano’s (1914-1988) Marxist outlook, but these are so sparse as to confirm the general trend.

Obviously, stating that the Italian school is both ‘positivist’ and ‘dualist’ on account of its founder may well be true and not leave us any wiser. As Gaja remarked in 1992, ‘many possible meanings may be attached to the view that an international lawyer is a positivist and a dualist’. Rather than accounting for all the possible variants of positivism or mapping the many sub-schools in which the Italian school is in fact articulated, the purpose of this section is to consider two general points. First, can we identify some unifying factors in Italian international legal scholarship since Anzilotti? Second, do these factors make the Italian school in any way distinctive or separate from the classic ‘black letter’ side of the European legal tradition?

3.3.2 The creation of the modern Italian school

Many have remarked that Georg Jellinek (1851-1911) colourfully chastised late 19th century international lawyers for being the last indulgers in the ‘orgies’ of natural law in an age of widespread codification of private and criminal law. Dionisio Anzilotti took it upon himself to rescue the Italian school of international law both from the politicised endeavours of Mancini and from the naturalism of Fiore. Crucially, Anzilotti’s project was also directed at rejecting Hegelian and Austinian conceptions, negating any possibility of law among states because of the lack of a conceivable authority superior to them. In this regard (and perhaps in

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59 I use the term ‘black letter’ with the same neutral (or even positive) connotation with which it is employed by E Lauterpacht, ‘Foreword’, (2012) 1 CJICL 1.
62 Such an exercise was recently undertaken by the ‘doyen’ of Italian international lawyers: Ziccardi, above n 2.
63 G Jellinek, System der subjektiven öffentlichen Rechte (1892), 297, quoted in Alland, above n 58, 39; Passero, above n 58, 178; Sereni, above n 6, 210.
65 Alland, above n 58, 45-58.
Is There an Italian Conception of International Law?

Anzilotti’s project was perfectly in line with the evolution of the study of law in Italian universities at the time, under the combined influence of German and French doctrines.\(^\text{67}\) As Sereni put it, it was necessary to establish once and for all that ‘the Italian science of law [was] separate from politics, religion, morals and the wishful thinking of well-meaning professors.’\(^\text{68}\) This science had, as its object of study, the \textit{lex lata}, which was composed of the legal rules which are actually observed by the states in their relations, organised into a system of ‘basic principles’ derived from those rules.\(^\text{69}\) Gaja has closely analysed how Anzilotti’s thinking evolved over the years with respect to basic questions such as the nature of the international legal system (his was a voluntarist approach, including the notion of customary international law as a form of tacit agreement) and the relationship between domestic and international law, often considered a model of dualism.\(^\text{70}\) The latter was to become one of the most enduring legacies of his theory within the Italian school.\(^\text{71}\)

However, the crucial point is that Anzilotti imported to Italy the teachings of Heinrich Triepel (1868-1946) and other German public law theorists.\(^\text{72}\) While recent studies have underlined that this process of translation was heavily influenced by Italian juridical culture,\(^\text{73}\) it is particularly telling that such a mediation occurred through the theories of Santi Romano,\(^\text{74}\) who had in turn been deeply influenced by French ‘institutional’ theorists, Maurice Hauriou

\(^{66}\) H Lauterpacht, \textit{The Function of Law in the International Community} (1933).

\(^{67}\) See P Grossi, \textit{Scienza giuridica italiana: un profilo storico} 1860-1950 (2000), 83. An important influence on Anzilotti was his contemporary, Donato Donati (1880-1946), a constitutional law and public international law scholar, whose works were among the first in Italy to adopt a positivist outlook in international law: see e.g. D Donati, \textit{I trattati internazionali nel diritto costituzionale} (1906). Donati was also very influential on Rolando Quadri and other subsequent Italian scholars.

\(^{68}\) Sereni, above n 6, 277.

\(^{69}\) Ibid, 212.

\(^{70}\) Gaja, above n 61.


\(^{72}\) See Passero, above n 58, 177-211, citing \textit{inter alia} H Triepel, \textit{Völkerrecht und Landesrecht} (1899).

\(^{73}\) Salerno, above n 58.

\(^{74}\) See in particular S Romano, \textit{L’ordinamento giuridico: Studi sul concetto, le fonti e i caratteri del diritto} (1917), translated as S Romano, \textit{L’ordre juridique} (2nd trans. edn, 2002); S Romano, \textit{Corso di diritto internazionale} (4 edn, 1939).
(1856-1929) in particular.\textsuperscript{75} These fertile debates between French and German theories were the building blocks of Italian juridical science in the 20\textsuperscript{th} century.\textsuperscript{76} A successful fusion of French and German theories was expressed by Tomaso Perassi (1886-1960), whose theory of sources influenced Anzilotti himself, as well as the Italian school more generally.\textsuperscript{77} For Sereni, it was important to underline that the reaction to Anzilotti’s theories by Romano, Balladore Pallieri and Perassi had not in fact challenged the two fundamental objectives that Anzilotti had set out to achieve, namely to eradicate natural law and to affirm international law against realist apologists of power. Although fundamental to understanding how positivism evolved in Italy, the conflict between Anzilotti’s and Romano’s theories was ‘actually one of degree rather than substance’, because each of these authors ‘accept[ed] the positivist method’.\textsuperscript{78}

And so did the other great masters born at the outset of the 20\textsuperscript{th} century. Among the most prominent successors of Anzilotti and Perassi in the Rome La Sapienza chair of international law, Gaetano Morelli (1900-1989) came to embody the Kelsenian and norm-oriented side of the positivist Italian school.\textsuperscript{79} The first Italian judge at the International Court of Justice (from 1961 to 1970), he devoted his academic career to issues of international procedure spanning across public and private international law.\textsuperscript{80} In this regard, it is worth mentioning that one of the many explaining factors of the Italian school’s norm-oriented approach is that the teaching and research in private and public international law were joined in one single chair of ‘international law’, so that the two disciplines greatly influenced each other. International law was taught as an advanced technical subject involving the rigorous exegesis of text.

After Morelli, the next Italian to become a judge at International Court of Justice was Roberto Ago (1907-1995), to whose contribution we shall presently turn. From the same generation, Rolando Quadri (1907-1976) had a great influence in Italian legal academia spanning across both private and public international law.\textsuperscript{81} His ‘monist’ interpretation of Article 10(1) of the Italian

\begin{itemize}
  \item \textsuperscript{75} Sereni, above n 6, 266-7.
  \item \textsuperscript{76} See generally Grossi, above n 67.
  \item \textsuperscript{77} See Salerno, above n 58, 50-60.
  \item \textsuperscript{78} Sereni, above n 6, 267-8.
  \item \textsuperscript{79} On Morelli in general, see F Salerno (ed), \textit{Il ruolo del giudice internazionale nell’evoluzione del diritto internazionale e comunitario: atti del Convegno di Studi in memoria di Gaetano Morelli organizzato dall’Università di Reggio Calabria (Crotone 22-23 ottobre 1993)} (1995).
  \item \textsuperscript{80} See G Morelli, \textit{Cours général de droit international public} (1956 I) 89 RdC 437; G Morelli, ‘La théorie générale du procès international’ (1937 III) 61 RdC 253.
  \item \textsuperscript{81} See generally P De Sena, ‘Quadri, Rolando’, in Birocchi et al, above n 41, 1641.
\end{itemize}
Constitution, to the effect that both treaties and customary international law would prevail over constitutional provisions by virtue of the *pacta sunt servanda* rule, was one of the very few departures from Anzilottian dualism in the Italian school.\(^{82}\) However, his overall construction remained a positivist one, albeit with a ‘realistic’ emphasis on international practice,\(^{83}\) which was later to be further developed by Paolo Picone (b. 1940). But it is now time to turn to Roberto Ago, the perfect example of how Anzilotti’s successful doctrinal project brought the Italian school into the European positivist mainstream.

### 3.3.3 An example: attribution of internationally wrongful conduct in Ago

One of the defining features of Anzilotti’s construction was an emphasis on rules on responsibility for internationally wrongful acts. A true legal system based on positive law must provide for certain consequences when rules are violated. It is, therefore, not accidental that responsibility became one of the areas in which the contribution of the Italian school has been most enduring throughout time, especially at the International Law Commission—thanks to the Special Rapporteurs Roberto Ago, Gaetano Arangio-Ruiz (b. 1919), and Giorgio Gaja (b. 1939).\(^{84}\) It is useful to consider whether this contribution, although certainly fundamental, can in fact be disentangled from its broader international context—and consequently whether it can be deemed ‘Italian’ in any meaningful way. I will use the example of Ago’s proposals on the attribution of internationally wrongful conduct to states, which is just one small sub-set of the many issues concerning responsibility.\(^{85}\)

As Ago put it in 1971, states only act through human beings, because ‘the State, as a legal person, is not physically capable of conduct’.\(^{86}\) The same is true of international organisations and other collective entities. It follows that

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\(^{82}\) See Cannizzaro, above n 2, 5-8. It should be pointed out that this ‘monist’ system was ultimately relying on a domestic constitutional law provision to come into existence—even Italian ‘monists’ are formally dualists after all.

\(^{83}\) See the last edition of his seminal textbook: R Quadri, *Diritto internazionale pubblico* (5th edn, 1968).


\(^{85}\) On Roberto Ago in general, see R Luzzatto, ‘Ago, Roberto’, in Birocchi et al, above n 41, 11. I will focus only on states here, but analogous considerations apply to international organisations and possibly other subjects of international law.

international law must be able to determine when a certain conduct can be attributed to a state, especially in the context of assigning responsibility for the breach of international obligations. The concept of attribution of conduct is a relatively recent one in the history of international law. The main reason for this is that international responsibility itself emerged quite late as a discrete subject of study. In his 1923 lectures on state responsibility at the Hague Academy of International Law, De Visscher started out by observing that it was not until Triepel and ‘especially’ Anzilotti’s works, of about twenty years earlier, that state responsibility had started acquiring a theoretical framework.\(^87\) And it was not until shortly after De Visscher’s lectures that Eagleton published his seminal monograph on the topic.\(^88\) In fact, Grotius and his Italian precursors Pierino Belli and Alberico Gentili had considered in passing the complex question of the responsibility of a sovereign for the wrongs of its citizens and vice versa.\(^89\) And some initial ideas on the consequences of *pacta sunt servanda* had been considered by Zouche, Pufendorf, Van Bynkershoek and Wolff in the 17\(^{th}\) and 18\(^{th}\) centuries.\(^90\) Furthermore, in his famous 19\(^{th}\) century work, Calvo addressed at some length the question of the responsibility of the government for the acts of its agents.\(^91\) Nonetheless, it was only in the 20\(^{th}\) century—with Triepel, Anzilotti, De Visscher, Eagleton and the 1928 *Factory at Chorzów* case before the Permanent Court of International Justice (to which Anzilotti clearly gave a significant contribution)\(^92\)—that international responsibility started its evolution from being at the margins of international legal discourse into being (one of) ‘the best proof[s] of [the] existence and the most credible measure of [the] effectiveness’ of international law, in line with Anzilotti’s project.\(^93\)

In the course of this evolution, the idea of ‘imputability’ or ‘attribution’ of acts and omissions to states always featured prominently. Anzilotti conceived

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\(^88\) C Eagleton, *The Responsibility of States in International Law* (1928).


\(^90\) Crawford, Grant & Messineo, above n 89, 378.

\(^91\) C Calvo, *Le droit international théorique et pratique*, vol III (5th edn, 1896) 120-35.

\(^92\) *Factory at Chorzów (Germany v. Poland) (jurisdiction)* (1927) PCIJ Ser A No 9; *Factory at Chorzów (Germany v. Poland) (Merits)* (1928) PCIJ Ser A No 17.

what has become the classic account of attribution, according to which attributing a certain conduct to a state or an international organisation does not imply an assessment of the causes of a certain act, nor of the ‘culpability’ or ‘intentions’ of the state or international organisation—even if one accepted that an assessment of the volitions of abstract collective entities were at all possible. In Anzilotti’s theory of international responsibility of 1902, attribution of conduct is described as the result of legal criteria, not sociological or psychological inquiries.\(^\text{94}\) It was, as he put it, ‘a pure result of the law’.\(^\text{95}\) Crucially, for Anzilotti, negligence, culpa, or intentions of the human beings acting on behalf of the state were wholly irrelevant to the attribution of conduct to a state or an international organisation.\(^\text{96}\)

This quintessentially positivist position was only one of the premises elaborated upon by Roberto Ago when he became the Special Rapporteur on State Responsibility at the International Law Commission.\(^\text{97}\) His first draft of the Articles on State Responsibility contained 11 separate provisions devoted to the attribution of conduct to states. These provisions were simplified and shortened in the final 2001 version of the Articles,\(^\text{98}\) which maintained, in substance, Ago’s approach.\(^\text{99}\) Even a cursory reading of Ago’s reports is sufficient to realise that his approach was not exclusively ‘Italian’ in any meaningful sense: the history of international responsibility may well have started with Anzilotti, but other influences were fundamental in Ago’s construction.\(^\text{100}\) This means that what could possibly be considered the most enduring Italian contribution to the codification of public international law—rules on attribution of internationally wrong-

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\(^{94}\) See Anzilotti, *Teoria generale*, reprinted in *Scritti*, above n 64, 1, 121-148.

\(^{95}\) Anzilotti, *Corso*, above n 64, 222.


ful conduct—was not the product of some Italian distinctiveness, but rather of Anzilotti’s successful internationalisation of the Italian school.

3.4 The unintended consequences of legal positivism

3.4.1 The measure of Anzilotti’s success

The example of attribution of conduct should have clarified that Anzilotti’s success in founding the Italian school of international law rendered it relatively indistinguishable from other European counterparts. By discarding Mancini’s national school and Fiore’s natural law, Anzilotti transited Italian international legal scholarship into the mainstream of European legal thinking. This achievement was so profound that one may wonder whether it did not in fact have certain costs. At least two aspects should be considered: first, a form of indirect complacency with the Fascist Regime; and second, a certain lack of intellectual diversity within the Italian school, at least for the first part of the 20th century. Both are rooted in an understanding of law and the legal method as ‘neutral science’.

3.4.2 The complex relationship with Fascism

We have seen that Sereni’s main aim in 1943 was to show that Fascism had had no impact on international legal scholarship in Italy. He devotes a whole chapter to disproving the existence of a fascist conception of international law,101 and clearly states in the preface that the book ‘also has a political purpose’, which is ‘to show that a deeply rooted love for justice and freedom pervades the writings of all the greatest international lawyers of Italy’ and that ‘a silent but efficient resistance against fascist influence … has been maintained by most of the Italian scholars’.102 These words were written while the Second World War was still ongoing, and they come from an Italian who had to take refuge in the United States because of the racial laws introduced by the Italian regime. They must therefore be understood in their context, and with unbounded respect for their author. However, they also must be qualified. First, none of the Italian professors of international law refused to pledge allegiance to Mussolini’s regime in 1931, when this was made a requirement for holding an academic position.103 Second, although the production of prominent Italian international lawyers was never couched in terms of adherence to a fascist international legal doctrine (which

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101 Sereni, above n 6, 269-78.
103 Salerno, above n 2, 308-9.
indeed never emerged as such in Italy), the actual record of the legal positions advanced by scholars at the time is rather problematic, even if it was couched in terms of formally positivist legal positions.\textsuperscript{104} In other words, it is possible to identify, from the mid-1930s onwards, ‘a benevolent approach towards positions maintained by fascism’,\textsuperscript{105} for example in relation to the war against Ethiopia (notably by Santi Romano and even by Sereni himself).\textsuperscript{106}

While Anzilotti’s positivist method somewhat shielded Italian international lawyers from the pressure of coming up with a fascist doctrine of international law, and allowed them to confidently retreat into very abstract questions,\textsuperscript{107} it also allowed politically unsavoury positions to be adopted with an aura of neutrality towards the regime. As had been the case before Fascism,\textsuperscript{108} when the patria called, legal arguments were clearly tailored to fit the position of the government and to defend Italy. In Bartolini’s persuasive view, ‘the screen apparently provided by positivism in analysing legal issues can hardly be said to be totally impermeable to political assessment’.\textsuperscript{109} Indeed, critical legal scholars would argue that such impermeability simply could not exist.

3.4.3 The missing branches: Catholic and Marxist conceptions

Another critique which may be levied at the solid positivist foundations laid down by Anzilotti is that they could only support a limited set of architectural choices. By enlisting Italian international law to the European mainstream, many possible competing narratives were lost, two of which will be considered here.

The first, and perhaps most obvious, concerns the influence of the Roman Catholic Church in international law. Catholicism was one of the dominant cultural forces in 20\textsuperscript{th} Italy, yet its conception of international law remained mostly outside the mainstream of scholarly production. We have seen that Gabriele Salvioli was an exception,\textsuperscript{110} but there were not many others. The writings of An-
tio Messineo (1897-1978), a Jesuit intellectual working at the influential magazine *La Civiltà Cattolica*, remained an isolated attempt at expounding a Catholic doctrine of international law. And while it is true that the official position of the Holy See is that natural law should be at the heart of the world’s juridical order, even in the 21st century, this position is definitely not shared by the majority of Italian scholars.

The fact that no Catholic doctrine of international law emerged from within the Italian school can perhaps be explained historically. Italian international law was born as a proudly secular enterprise. Mancini’s position against the temporal power of the pope and his fervent anti-clerical speeches in Parliament were quite standard for a Risorgimento man: after all, Italy’s unification project involved the invasion of the Papal States and the conquest of Rome. Anzilotti’s later endeavours were explicitly directed at eradicating natural law, the Church’s standard doctrine in matters of international law. What is more startling, however, is that the unfettered cultural presence of the Church throughout 20th century Italy did not inspire a reconsideration of natural law principles within the Italian school of international law as one of the possible exit strategies from strict positivism—not even in a secularised form separated from the ‘revealed truth’ of religion. In other words, it is somewhat surprising that Italy did not produce its own equivalent of an international legal theorist such as Philip Allot, nor a humanist conception such as that of Antônio Augusto Cançado Trindade.

It is equally startling that, despite the great cultural influence of the Italian Communist Party throughout the 20th century, the Italian conception of international law was almost completely impermeable thereto. This may have to do with the Italian Communist Party’s ‘orthodox’ Marxist approach. For the Party, international law was simply a bourgeois instrument of oppression benefiting the

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113 See an exemplary excerpt in Scovazzi, above n 54, 678.
‘imperialist warmonger side’ of the Cold War. Yet, some international lawyers joined the Party, including Mario Giuliano (1914-1988), a very prominent member of Roberto Ago’s school. But just as was the case with Ian Brownlie, who was a member of the Communist Party of Great Britain until 1968, this did not translate into an abandonment of the positivist method. Cassese explicitly laments that Giuliano’s scholarly production ends up following ‘the most traditional style of the Italian school’ except for some conclusions concerning international law as superstructure. Of course, there were some exceptions in more recent times, such as Aldo Bernardini (b. 1935), whose conception of international law is explicitly critical of ‘bourgeois’ positivism. But, overall, in the country of Antonio Gramsci, legal positivism was so hegemonic that no counter-hegemony even came close to emerging amongst international lawyers. This is in stark contrast with persisting Marxist legacies in other international legal circles, as well as in Italian culture more generally.

3.5 The more recent heresies of pragmatic utopians

The rather sobering conclusion reached so far is that the successful creation of an Italian school of international law led to its loss of distinctiveness compared to Mancini’s ‘theory of nationalities’. The more Anzilotti’s project became successful, the more Italians were effectively joining the European mainstream of legal positivism—what we may call ‘black letter law’—as the legal method of choice. Given the well-known hierarchical structure of Italian academia, it is not surprising that little space was left for outsiders. But a word of caution is needed. The broad strokes I have painted above do not take into account the most recent developments in Italian scholarship in international law. There appears to be more interest towards theoretical, historical and critical approaches to the discipline today than ever before. These ‘heresies’ from Anzilottian rigour

118 Cassese, above n 13, 118. See M Giuliano, La comunità internazionale e il diritto (1950).
120 Cassese, above n 13, 119.
122 A point made also by Bernardini himself: ibid, 173. See also Francioni & Lenzerini, above n 116, 17–22.
are part of the rising theoretical movement in international law more generally. Once again, Italian international lawyers are gregarious members of the ‘Invisible College’, and this College is finally becoming more diverse.

Some would argue that these developments have long been brewing. A certain departure from strict positivism had already been noticed by Antonio Cassese (1937-2011) in a short historical note published in 1990. From the 1960s onwards, he argued, the ‘monolithic’ methods of Italian international law began to ‘crumble’. New trends emerged within positivism, such as the ‘decline of formalism’ in favour of a renewed attention to practical and contemporary problems; a slightly more open mind towards normative, rather than descriptive, projects, with renewed attention to the practice of states; and an interest towards the history of the discipline. In Cassese’s view, all of these elements led to a much more varied landscape, in which prominent scholars such as Benedetto Conforti (b. 1930) and Luigi Condorelli (b. 1938) emerged as enlightened (or critical) positivists, well versed with the reality of the application of legal norms in domestic legal orders. The roots of this change were indeed already contained in the above-mentioned ‘realist’ outlook of Rolando Quadri and Paolo Picone. But it is not unfair to note that these scholars were all fully committed to ‘legal methodology’ and a ‘strict distinction between de lege lata enquiries and de lege ferenda proposals’.

Because of these developments, things have certainly changed in Italian legal scholarship since Anzilotti. In fact, Cassese himself was one of the most prominent international lawyers of his time, and he came to embody a certain mode of thinking about international law, as far removed from strict positivism as it was possible to be while still ‘playing the game’, i.e. remaining inside the linguistic parameters of positive international law. In a rather self-effacing account of his career written three years before his death, he described his academic beginnings as those of a torn young scholar forcing himself to be ‘a strict legalist’ despite his real ‘desires and tendencies’. He soon became aware

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124 Cassese, above n 13, 125.
125 Ibid, 125.
126 Ibid, 128-30.
128 Ibid, 134-5.
130 Ibid, 140.
131 The many important Italian authors born in 1940 or thereafter are not individually considered here.
that while positivism had the advantage of clarifying the distinction between law and history or politics, therefore enabling lawyers to ‘keep politics at bay’, such a distinction could lead to inadvertent subservience towards power, as had happened during Fascism.\footnote{Ibid, 146.} Furthermore, positivism constituted a ‘powerful shield of state sovereignty’.\footnote{Ibid.} In his view, it was necessary to move beyond the strict parameters agreed upon by States when ‘the need to oppose glaring injustice’ exceptionally required one to do so.\footnote{Ibid, 147.} Law was not to be a world of abstract Platonic ideas, and lawyers should engage in a ‘strict and rigorous legal method’ to understand legal institutions and in a more general analysis of the ‘political, social or economic motivations’ leading to those institutions, never shying away from suggesting how the law should be changed.\footnote{Ibid, 149.}

The last collection of essays Cassese edited, published posthumously and appropriately named Realizing Utopia, opened with his remarks on international law’s need for ‘judicious reformers’, a label he borrowed from Aldous Huxley to identify those who are neither utopians, nor disillusioned technicians.\footnote{A Cassese (ed), Realizing Utopia: the Future of International Law (2012), xvii-xviii.} And yet, the positive method was never completely abandoned by Italian international lawyers, not even by Cassese. Some would argue that his constant analysis of the \textit{lex lata} from the point of view of what the law ought to be occasionally led to a form of wishful legal thinking—not unlike previous idealist-but-positivist international lawyers such as Hersch Lauterpacht. But Cassese’s utopias, like Lauterpacht’s, were always quite pragmatic: the revolution was to be dressed in the same language states had chosen to bind themselves to, otherwise it would never become effective.

## 4 The flaws of a comparative approach to international law

There is nothing especially ‘Italian’ about this tension between the many possible shades of black letter law, from pitch dark to dark grey: this is the same debate international lawyers have had throughout the 20\textsuperscript{th} century and beyond. But this lack of distinctiveness of the Italian school is not worrisome in itself. The most
radical criticism that could be levied to Sereni’s book of 1943 is that there is no particular need for an Italian conception of international law. Of course, analysing whether different legal traditions can influence our perception of international legal problems may be interesting, precisely in order to avoid parochialism.

Focarelli argues that ‘international law should be remythologized by investigating all the legal traditions known in comparative legal analysis, rather than on (Western) jurisprudential grounds, and its reality in the sphere of communication.’ Indeed, a comparative approach serves to protect the diversity of international legal cultures, as Judge Yusuf argues elsewhere in this issue. This is a rather different project from that of defending the national pride of a community of scholars, as Sereni arguably set out to do. But is an emphasis on this ‘comparative’ perspective fruitful? Paradoxically, one of the key insights of ‘comparative international law’ seems to be that engaging in ‘comparative international law’ may not always be a good idea. National schools may well exist, but talking in these terms invariably risks silencing dissenting voices and reinforcing the scholarly positions of the majority. This is especially true in a Continental European context, where disproportionate respect towards the academic authority of old and current masters often asphyxiates the creation of new ideas. In contrast, in those contexts where originality is more emphasised (at times overzealously so), the very process of identifying a ‘legal tradition’ may well become impossible:

For instance, it has always been exceedingly difficult to say whether America has a national tradition in international law. To illustrate, who in the American legal academy could summarize the main tenets of the American approach to international law? Even assuming such a brave step were taken, for every such enunciation by, say, Anne-Marie Slaughter or W. Michael Reisman, one could point to a countervailing summation by, say, Jack Goldsmith or David Kennedy. The point is, within the American society of international law scholars, there are a sufficient number of diametrically opposed positions that it becomes impossible to brand one position dominant or orthodox.

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140 Mamlyuk and Mattei, above n 1, 428.
In fact, there are possibly as many Italian conceptions of international law as there are scholars with Italian passports, in Italy and abroad. While there is no uniquely Italian conception of international law, there certainly is an Italian school in the broadest sense: that is the community of practice of those 268 academics and their Italian colleagues abroad, who in large part (but no longer exclusively) follow the European mainstream of norm-oriented, or positivist, international law. Future studies of this community of practice would need to consider certain sociological aspects which were not dealt with in Sereni’s book of 1943, nor that could be dealt with here. For instance, analysing the reciprocal influence of academic international law and Italian diplomatic practice may shed some light on whether Italian international lawyers have still sometimes been tempted to cast a benevolent eye on legal positions helpful to Italian foreign policy, following the example of Mancini’s about-turn from self-determination to colonisation.
THE INNATE COSMOPOLITAN TRADITION OF INTERNATIONAL LAW

Geoffrey Gordon*

Abstract
This article develops an account of innate cosmopolitanism in international law and relations. Innate cosmopolitanism stands for the proposition that the world as a whole should be considered as an entity relevant in international legal theory, which has interests and a will of its own capable of giving rise to norms of international law. Although innate cosmopolitanism has not been the subject of a dedicated scholarship, in contrast to better known traditions such as liberal cosmopolitanism and cosmopolitan constitutional theory, the concept of innate cosmopolitanism has informed the historical development of international law. Tracing its development from the 16th century Spanish School, this article addresses the scope and substance of the tradition of innate cosmopolitan thought in the discourse of international law; its domain relative to other streams of cosmopolitan thought in international law; and a critical evaluation of the role of innate cosmopolitan ideas in the discourse and development of international law.

Keywords
International law, cosmopolitanism, world phenomenon, sources of law, international legal theory, Spanish school, telos, intersubjectivity

1 Introduction

There exists, in international law, a long cosmopolitan tradition that is poorly recognized for what it is. I refer to it as innate cosmopolitanism, to distinguish it from better known streams of cosmopolitan thought, including liberal cosmopolitanism and cosmopolitan constitutional theory in international law and relations. Innate cosmopolitanism stands for the proposition that the world as a whole represents a phenomenon with interests and even a will of its own, and is capable of establishing a foundation for universal norms under international law. Innate cosmopolitanism has never been expressly developed as a doctrine in its own right, and thus lacks the consolidated vocabulary and critical engagement enjoyed by other schools of cosmopolitan thought, such as liberal cosmopolitanism and cosmopolitan constitutional theory. But despite the relative neglect

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of innate cosmopolitan ideas as part of a distinct theoretical construct, the innate cosmopolitan conception, in a variety of terms and contexts, has been central to the narrative and development of modern international law. Moreover, though it has not been developed as part of an express doctrine or school of thought, the innate cosmopolitan idea has been joined to a common historical narrative. This history of the idea, which is consistently taken to find its roots in the Spanish School of the 16th century, has come to function as something like an alternative pedigree, or bona fides, capable of legitimating the innate cosmopolitan appeal to the world as a whole as a discrete source of world norms under international law. This article proposes to observe innate cosmopolitanism as a distinct theoretical construct, and briefly sketches its role in the discourses of modern and contemporary international law over time. In doing so, I aim to address the following: the scope and substance of the tradition of innate cosmopolitan thought in the discourse of international law, including its central concepts, terms and principles; its distinct domain, relative to other streams of cosmopolitan thought in international law; and a critical evaluation of the role of innate cosmopolitan ideas, once recognized, in the discourse and development of international law.

First, it bears noting that international law and international lawyers have regularly been described as cosmopolitan, but the term in this context has remained elusive, or has been taken as self-evident, and is rarely explained with any thoroughness. What does cosmopolitanism generally mean in international law? It does not properly refer to any narrowly orthodox theory or practice of international law, which presumes a consensual system of relations among equal and independent sovereign states. Rather, at its most broad, the cosmopolitan obtains to the cosmopolis: a harmonious and inclusive, universal order. That order stands in opposition to the consensual system, which allows for a cooperative (or uncooperative) anarchy of normative relations. Likewise, when international lawyers are described as cosmopolitan, the association invokes aspirations to a system of law capable of purposefully sustaining order in the world on unified terms. Their cosmopolitan order is an objective one, pretending to a normative authority that is superior to its subjects in principle and defined independently of them. In contrast with the subjective system of international law as it is classically described, cosmopolitanism represents a normative condition that is neither definable nor revocable by state subjects individually, nor by any other subjective actors in their individual capacities. Cosmopolitanism replaces the political authority of sovereign states (and their legacy) with the authority of universal norms.

Cosmopolitan aspirations at law to world order, independent of the political will of states and other subjective interests, have lately received critical atten-
tion. Scholarship has shed critical light on progressive aspirations to the would-be greater good of a unified cosmopolis of world relations, not mediated by subjective attachments. This critical scholarship makes clear that cosmopolitan doctrine, despite its apparent antinomy with orthodox ideas of a consensual system of law among states, is neither wholly oppositional nor exactly subversive in its relationship to international law and international legal discourse. Rather, the cosmopolitan ethos runs like a *leitmotif* throughout the work of diverse scholars and practitioners in modern international law. Appreciating the cosmopolitan undercurrent of international law—and especially, as I argue here, appreciating the innate cosmopolitan undercurrent of international law—can be crucial to appreciating the historical project of international law, a project that is bound up with the tension between aspirations to objective international norms, and a subjective international system. The critical attention to cosmopolitanism generally, however, has not adequately distinguished among distinct cosmopolitan doctrines, methods and norms, and has not brought out the special role and tradition of innate cosmopolitan ideas in the discourse of international law.

2 Distinguishing innate cosmopolitanism from other cosmopolitan schools of thought

Liberal cosmopolitanism is the dominant theory of cosmopolitanism in political theory, and it is regularly applied to international law for purposes of critique or innovation. Moreover, it is a well-developed ethical doctrine in political theory, lately represented by figures such as Simon Caney, Kok-Chor Tan, Allen Buchanan and Thomas Pogge, among others, and develops norms out of what are taken to be universally-acceptable moral premises, independent of the powers of states and other actors in the international system.1 Liberal cosmopolitanism is expressive of normative individualism, and bound up with the core norms and values of human rights doctrine. Constitutional cosmopolitanism, on the other hand, is more clearly situated in international legal scholarship, and examines the possibility or reality of a world constitution, lately also incorporating basic tenets of liberal cosmopolitanism, including normative individualism.2


tional cosmopolitanism is closely related to international constitutionalism, and accordingly has received increasing attention in international legal scholarship as theories of world constitution have enjoyed renewed interest. Constitutional cosmopolitans differ from liberal cosmopolitans insofar as the former identify world norms with the formal establishment of a global political settlement among actors in the international system, creating a new world order independent of its constitutive parts. Constitutional cosmopolitanism is particularly bound up with the method of international law, as it turns on questions of formal sufficiency derived from positive terms of international law. Innate cosmopolitanism broadly shares the legal method of constitutional cosmopolitanism, insofar as it seeks to ascertain law from a historical source, rather than moral premises in the first instance, but distinguishes itself by reference to a historical source—the phenomenon that is the world as a whole—which precedes and is not contingent upon its acknowledgment as a matter of positive international law.

Despite differences among liberal, constitutional and innate cosmopolitanism, each seeks to establish some autonomous normative power, an objective normativity for the world as a whole, as against the system of subjective authority identified with the relations of equal and independent states. In aspiring to objective world norms exhibiting autonomous bases of legitimacy, each of the three aspires to world norms superior to international politics. Liberal and innate cosmopolitanism, however, emphasize different aspects of cosmopolitan thought: liberal cosmopolitanism emphasizes individuals in the world; innate cosmopolitanism emphasizes the individuality of the world. Constitutional cosmopolitanism, by contrast, is relatively agnostic as between the two: either cosmopolitan vision, liberal or innate, might yield a constitutional arrangement provided it satisfies a certain formal baseline of constitutional legitimacy.

In terms of discourse, each of the three cosmopolitan streams is differently situated. The differences may be conceived as points along a line: at one end, liberal cosmopolitanism represents, as noted, an ethical discourse applied to law; at the other end, constitutional cosmopolitanism represents a legal discourse largely congruent with traditional terms of international law, however radical its use of those terms. Between the two, innate cosmopolitanism represents a legal discourse that eschews some of the traditional terms of international law. The differences are discernible by reference to the different allowance for ascertaining law and different appreciation of sources exhibited by each cosmopolitan

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school of thought. Liberal cosmopolitanism ascertains law—or the need for legal change—by a deductive, or special constructivist method, the source of which is identical with the substance of select moral premises. Constitutional cosmopolitanism, on the other hand, adheres by comparison to a typically legal, formal means of law-ascertainment, locating constitutional development in traditionally acknowledged sources of international law. Innate cosmopolitanism, falling between the two, maintains the posture of legal discourse, but nonetheless goes outside the limits of modern international law. In maintaining the posture of legal discourse, innate cosmopolitanism exhibits a framework for law ascertainment by which law is discerned as a discrete historical product, not according to any fixed substance. In going outside the limits of modern international law, innate cosmopolitanism allows for the ascertainment of legal norms independent of convention and custom, according to a source not otherwise acknowledged in the positive law of the modern international system. That source is the will or interest of the world as a whole, the normative expression of which is entirely independent of its affirmation—or rejection—by any one or several of the subjective constituents (such as states) that it comprises.

Where liberal cosmopolitanism presents a well-articulated ethical theory, and constitutional cosmopolitanism observes more closely the traditional constraints of international law, innate cosmopolitanism is roughly predicated on an intuition that is basically sociological in character: the world as a whole represents a discrete social or political collective capable of exhibiting subjective characteristics, including discrete interests and a will of its own, like other individuals and collectives. Moreover, where liberal cosmopolitanism functions primarily to measure existing institutions against an ethical cosmopolitan standard, and where constitutional cosmopolitanism functions primarily to articulate or identify formal standards by which a cosmopolitan constitution may be recognized, innate cosmopolitanism functions primarily like a heuristic device. Never expressly developed as a discrete doctrine, innate cosmopolitanism has served as an implicit model to guide the development of the international system towards certain normative ends associated with the interests or will or the world as a whole, discerned in roughly sociological and historical terms.

The normative ends of the innate cosmopolitan heuristic model include the purportedly objective ends of an interdependent world, and an affirmation of its interests above and beyond the politics of sovereign states and all other

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The Innate Cosmopolitan Tradition of International Law

exercises of subjective interest. Moreover, those ends are taken to be not only desirable, but necessary to make a coherent doctrine out of modern international law: where the cooperative venture that a strictly subjective system represents is perceived as not rising in theory to the level of a binding system of law, innate cosmopolitanism establishes an objective authority, in the form of the world as a whole, capable of grounding the normativity of international law. In this way, from Vitoria and the beginning of the narrative of modern international law onwards, innate cosmopolitanism addresses a question of what, if anything, makes rules binding among subjective actors who are nominally sovereign. It does so with a perhaps deceptively straightforward argument: the world itself also represents a subjective actor in the sum of its interdependent social conditions.

As the sole all-inclusive subjective actor, the world represents an objective actor vis-à-vis every other subjective actor—every other political collective—within its parameters. This does not necessarily elevate the world normatively above other, smaller political collectives: local and regional attachments may in fact be stronger in terms of immediacy. The global collective, however, does enjoy an exclusive claim to objectivity as against all of those other collectives and particular attachments. Accordingly, the world society represents the primary level of social or political order, though not the most immediate. Local and regional collectives enjoy normative status as part of the public order arising out of a world social phenomenon, and they are all co-constitutive of one another. The co-constitutive relationship arises out of the perception of a common capacity for social interaction, taken to establish the essential condition from which world norms will arise in a situation of global interdependence. Because the essential condition is uniform, certain bedrock norms ordering the proper expression of the common social capacity will inhere across the whole of the interdependent sphere. But while the bedrock norms will be common across the interdependent sphere, social interaction will also give rise to diverse norms across time and space. Norms will vary with historical, material and cultural conditions in the world, while the basic phenomenon of a unified world unit with normative consequences will not. Affirming the proper expression of normative authority enjoyed by the world as a whole becomes a matter of proper observation or discernment.

Where liberal cosmopolitanism affirms the individual and particular, innate cosmopolitanism attempts to redeem the whole. The world itself is the essential unit for normative purposes, an independent sociological phenomenon. The

method is largely inductive: the world represents a complex but unified social phenomenon exhibiting certain historically contingent but generally applicable norms, which are discoverable with sufficient observation and reflection. The generally applicable norms associated with the world collective may alike be seen to underlie or arise out of the diversity of particular norms in sub-global collectives. In either case, the norms that flow from the innate cosmopolitan model must be discerned by reference to the sum total of normative behavior bearing on interdependence in the world collective. The differences between liberal and innate cosmopolitanism, however, can be deceptive: the individuals that make up the global basis of the liberal cosmopolitan order are treated only according to properties that are held to be universal, or universally-acceptable, across all individuals. The liberal cosmopolitan order is wholly consolidated around one normative source, an individual abstracted, such that all of the world’s individuals are consolidated by abstraction into one universal individual. The effect is a narrow normative mandate: the individual serves as the singular normative source for world justice. The top-down model of innate cosmopolitanism, by contrast, purports to recognize normative diversity in the world. The bedrock normative phenomenon is not, or is not supposed to be, an abstraction, and the innate cosmopolitan methodology is neither deductive nor constructivist. Rather, the innate cosmopolitan model purports to draw its normative underpinnings from the observation of the diversity of acts, experiences and expectations expressive of the world phenomenon at any given point in time.

Predicated on the observation and expression of global interests and global will, innate cosmopolitanism vindicates the subjectivity of the world itself. Consider Judge Weeramantry’s reading of the UN Charter, in his dissent from the Court’s advisory opinion in *Legality of the Threat or Use of Nuclear Weapons* case:

The Charter’s very first words are ‘We, the peoples of the United Nations’—thereby showing that all that ensues is the will of the peoples of the world. Their collective will and desire is the very source of the United Nations Charter and that truth should never be permitted to recede from view. In the matter before the Court, the peoples of the world have a vital interest, and global public opinion has an important influence on the development of the principles of public international law.6

Judge Weeramantry’s statement of the Charter regime captures the basic thrust of innate cosmopolitanism: a mandate in the name of world society or community, and a vision of the world with a social and political interest of its own on which new authority will be based and from which it will draw. Moreover, Judge Weeramantry nowhere in his opinion suggests that the Charter rises to the level of a formal constitutional document, though it reflects the related idea of a constituted collective—and here the relative closeness of innate cosmopolitanism and some constitutional cosmopolitan theory is clear. In positing the constituted world collective as capable of normative authority, Judge Weeramantry turns to its vital interests, as well as an expression of public opinion in its name, to discern the norms available to the Court in its treatment of the matter before it. As such, he employs devices typical of innate cosmopolitanism in application. The attribution of interest and will to a world collective represents an extraordinary legal authority where none might otherwise be available, such that international law may be established by reference to the vital interests of the world collective, as well as global public opinion, in addition to other sources. In this manner, his opinion reflects perhaps the central purpose for which the innate cosmopolitan model is invoked: as a means around positive law limitations in international law.

3 The history, in brief

As noted, though innate cosmopolitanism has not been recognized as a discrete school of thought even by its adherents, scholars and practitioners referring to innate cosmopolitan ideas tend regularly to invoke a long history of innate cosmopolitan ideas, in each case largely as though for the first time. The vocabulary has never been sufficiently conformed or consolidated, such that the same historical lessons are repeated in various contexts, and scholars and practitioners regularly refer for a variety of purposes and in a variety of ways to a common history. Furthermore, because the innate cosmopolitan premise of a world social or political collective capable of establishing norms and normative authority is so difficult to establish empirically, the history of innate cosmopolitan ideas plays an unusually significant role in the argument for innate cosmopolitan normativity. The history of the idea, captured and recaptured in repetitious exercises, serves as a pedigree and bona fides where other support is lacking. In sum, the descriptive and normative uses of the history

of the idea are conjoined: the descriptive analysis of innate cosmopolitanism’s historical role in canonical works founds its normative potential. Consequently, the regular recourse to an intellectual history of innate cosmopolitanism has bound application of the innate cosmopolitan model to the historical narrative of cosmopolitanism in international law more closely than other, better recognized forms of cosmopolitanism.

Below, I review the tradition of the innate cosmopolitan idea, from its canonical historical roots as they have been invoked, through its 20th century revival, into its contemporary articulations. The presentation is highly partial and selective, in the interests of economy. The intent for present purposes is not to identify all or even most innate cosmopolitan thinkers, nor to capture the whole of the innate cosmopolitan idea; rather it is to offer here only a few select examples capable of illustrating main attributes of the innate cosmopolitan idea in the discourse of international law.

3.1 The Spanish School

The roots of the historical narrative are identified in the work of the Spanish School of the 16th century, reflecting the role of the innate cosmopolitan idea as an enduring supposition in support of a coherent system of international law. I turn now very briefly, to a small selection of representative works from the Spanish School, still among the works relied on by contemporary writers in invocations of innate cosmopolitan ideas.8

Francisco de Vitoria, working at the University of Salamanca in the early 16th century, developed his ideas in a period of radically disintegrating religious and social cohesion among the peoples of Europe, against which lingering normative cohesion was devolved from the Roman Empire and ecclesiastical authority. At the same time, the world was expanding as a function of the exploration and exploitation of the new world, further stretching the viability of norms and bonds that had historically anchored rules of conduct among peoples in the old world. To substantiate normative cohesion in the face of revolutionary social disintegration, coupled with the expansion of the known world, Vitoria posited a normative potential vested in a comprehensive phenomenon of human collectivity, not identified with imperialist authorities, and also distinct from—but inclusive of—new and independent peoples. The comprehensive phenomenon that he perceived enjoyed the ‘force of law’ sufficient to make its norms ‘binding upon nations’

and ‘capable of conferring rights’ and ‘creating obligations’. The phenomenon that Vitoria described would represent, by virtue of being comprehensive, an objective foundation for international law, capable of sustaining international rules over increasingly independent peoples, but without subjecting them to imperial control. He supported this objective foundation by positing an interdependent relationship among the peoples of the world to counter the rise of political independence, an interdependent relationship founded neither in imperial nor ecclesiastical community.

The interdependent foundation that Vitoria established encompassed the world as a whole, taking the entirety of the world of people as a discrete collective entity with interests of its own, capable of establishing an independent or autonomous normative potential. The world as a whole represents a comprehensive collective with normative power by virtue of a capacity and inclination for communication that adheres universally, even if only in potentiality, across the whole of humanity. In keeping with an Aristotelian premise of a natural propensity for communication, Vitoria founds the normative authority behind international law in the idea that ‘[n]ature has established a bond of relationship between all men.’ Thus there is a distinct, all-inclusive social phenomenon, not to the exclusion of peoples and states, but different from them, more expansive in scope, and not dependent on them.

The world norms, or universal norms that flow from the world phenomenon, are not to the exclusion of local and particular norms: the same capacity and inclination for social interaction that underlies some universal norms of conduct also give rise to the differentiation of local norms. Hence Vitoria’s crucial distinction between what was permitted and what was not permitted to Spanish adventurers in the new world: universal norms affirmed a basic allowance for trade, for missionary purposes, and for communication and interaction generally; but beyond the inviolability of those basic allowances on the basis of universal norms, particular norms were not be overthrown, and subjugation of local populations was illegitimate (though ultimately achieved in part on the basis of what was already allowed).

The product is a normative order that is discrete for flowing from the thing itself, namely the human world as a whole, rather than any subjective aspiration to

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control or guide its present or future. Following Vitoria, international normative prescription derives or may derive from the nature and will of the world as a whole, rather than from the subjective positions of the actors who constitute it or would dominate it; thereby world norms reflect an autonomous and objective foundation, rather than any particular, subjective authority:

that international law has not only the force of a pact and agreement among men but also the force of a law; for the world as a whole being in a way one single State, has the power to create laws that are just and fitting for all persons, as are the rules of international law. Consequently, it is clear that they who violate these international rules, whether in peace or in war, commit a mortal sin; moreover, in the gravest matters, such as the inviolability of ambassadors, it is not permissible for one country to refuse to be bound by international law, the latter having been established by the authority of the whole world.13

Thus Vitoria envisioned the world vested with its own authority to effect law, dissociated from the subjective position of any individual not speaking for the inclusive whole of the discrete world phenomenon. Thereby he affirmed an objective normative design intrinsic to the world as a whole, above and beyond the subjective normative designs of the separate states: the law of nations takes its authority in the first place ‘in behalf of the common good of all’.14 On this basis, ‘society at large’, encompassing the whole world, can do as a matter of law what ‘a State can do to its own citizens’.15 Once the nature or will of the world as a whole is determined, as identified with at least a majority of humankind, it may enjoy the force of law ‘even though the rest of mankind objected thereto’.16

Vitoria’s juridical foundations for international law were developed by Francisco Suárez and Grotius, among others, after him. Thus Suárez, in the late 16th to the early 17th century, also at Salamanca for a time, writes of ‘true law’ that has been ‘introduced by the usage and general conduct, not of one or another people, but of the whole world’.17 Furthermore, he affirms a moral and political

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13 Vitoria, above n 10, App C, xc.
14 Vitoria, above n 9, App A, xxxviii.
16 Vitoria, above n 9, App A, xxxviii.
unity in the world, or a universal society, which underlies particular societies. His famous passage is worth quoting in its length:

The human race, into howsoever many different peoples and kingdoms it may be divided, always preserves a certain unity, not only as a species, but also a moral and political unity ... enjoined by the natural precept of mutual love and mercy; a precept which applies to all, even to strangers of every nation. Therefore, although a given sovereign state, commonwealth, or kingdom may constitute a perfect community in itself, consisting of its own members, nevertheless, each one of these states is also, in a certain sense, and viewed in relation to the human race, a member of that universal society; for these states when standing alone are never so self-sufficient that they do not require some mutual assistance, association, and intercourse, at times for their own greater welfare and advantage, but at other times because also of some moral necessity or need. This fact is made manifest by actual usage.\(^{18}\)

Thus, the universal society is a comprehensive political phenomenon founded in human nature. From that political phenomenon flows the normative authority that gives validity and effect to international law. International law represents those rules and principles identified with the nature and interests of humanity, or the world as a whole, distinct from the political authority and interests that remain vested in particular collectives, including sovereign states.

After Suárez, Grotius has been described as the culminating member of the Spanish School.\(^{19}\) Like Vitoria and Suárez before him, he subscribed to an idea of a ‘society of mankind’ that encompasses the world as a whole.\(^{20}\) Grotius founded his society of mankind, derived from the world phenomenon observed by Vitoria and Suárez, in both natural and empirical roots. The natural roots lie in a universal capacity for and inclination to sociability and communication among humans: ‘This Sociability, which we have now described in general, or this Care of maintaining Society in a Manner conformable to the Light of human Understanding, is the Fountain of Right, properly so called.’\(^{21}\) The empirical grounds for affirming the society of mankind lie in a condition of

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\(^{18}\) Ibid, 348-49.
\(^{19}\) Scott, above n 9, 3.
\(^{20}\) H Grotius, *Mare Liberum* (1609), ch 1, 5, 12.
interdependence, which presumes a state of community from which no particular collective can extract itself, and from which condition the need for law arises.\textsuperscript{22}

Notably, among the universal rules flowing from the society of mankind is a right of intervention vested in the world collective and actionable against any local or particular collective. Humankind as a whole possesses certain interests, protected as a matter of norm and law, which particular collectives may not transgress. Thus Grotius holds that, in the case of injustice which ‘no good Man living can approve of, the Right of human Society shall not be therefore excluded’.\textsuperscript{23} Human society is in this way ‘subjectivized’, enjoying objective interests and rights of its own, capable of prosecution against all other individuated societies. In this way Grotius, concluding the line of Spanish School scholarship, made the world phenomenon relatively concrete, like in nature to the increasingly sophisticated nation states of the early 17\textsuperscript{th} century, and likewise cognizable as a matter of law, though human sociability is the well-spring of the objective rights and interests of the human society, rather than a positive product of political process.

3.2 James Brown Scott

Following Grotius, history attests to the rise of individualism in international law and the international system, largely in opposition to the innate cosmopolitan idea. The story began to change immediately prior to the 20\textsuperscript{th} century. One of the publicists especially responsible for the 20\textsuperscript{th} century revitalization of innate cosmopolitan ideas would be James Brown Scott, who did so principally by reference to the Spanish School. Scott promoted republication of Spanish School works, and wrote a number of works celebrating its elevation of the world as a whole as a discrete and foundational ground for world norms and international law. Scott’s work, however, was more than mere restatement. His return to the Spanish School exhibited a clear object and purpose, intended to promote a progressive development of international law by selectively emphasizing and interpreting innate cosmopolitan ideas discernible in the classical scholarship. Thus Scott writes that ‘[Vitoria’s] conception of the community of nations, coextensive with humanity and existing as a result of the mere coexistence of States, without a treaty or convention, is the hope of the future.’\textsuperscript{24}

\textsuperscript{22} Ibid, paras 23-24.
\textsuperscript{23} Ibid, Book II, ch XXV, sec viii, no 2.
\textsuperscript{24} Scott, above n 9, 9a.
The following attributes define the innate cosmopolitan character of international law as Scott understands it to be received from the Spanish School: international law is ‘binding upon individual, upon State, and upon the international community [and it is] an international law coterminous with the human race’;\(^{25}\) likewise, as a matter of international law, ‘[w]e may conceive of … an international community, which, being the world, would have jurisdiction over the States and their inhabitants’;\(^{26}\) moreover, in the absence of any clearer expression, the norms of international law may be both discerned and cultivated by appeal to ‘the opinions of mankind.’\(^{27}\)

The idea of universal human society as a ground for normative authority, for Scott, is not a mere abstraction. Rather, it represents a real and verifiable phenomenon in the world: ‘we are not dealing with the abstract question—if such there be—but with human beings in society’.\(^{28}\) The world as a whole represents a discrete society with normative potential capable of giving effect to international law, and, in the absence of a world legislature representative of the world as a whole, proper observation of the norms of humans in society will yield applicable and appropriate rules of international law. In sum, the world as a whole is capable of making international law and authorizing punishment of its violation.\(^{29}\) Finally, for Scott, international community is ‘not a superimposed State’, but it is ‘coextensive with humanity’; it is ‘self-sufficient’; and it possesses an ‘inherent right to impose its will’.\(^{30}\) In the Vitorian system as described by Scott, exemplary of the innate cosmopolitan model, the international community encompasses the world as a whole and enjoys a will and interests of its own, which establishes norms and normativity foundational to international law.

### 3.3 Hersch Lauterpacht

Another significant proponent of the innate cosmopolitan idea, following Scott, was Hersch Lauterpacht, from whom innate cosmopolitanism received perhaps its most compelling expression. Lauterpacht’s work, however, goes beyond innate cosmopolitan ideas, and the focus on them here. Moreover, his work and its cosmopolitan aspects have lately been revisited by Martti Koskenniemi,

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\(^{25}\) Ibid, 219.

\(^{26}\) Ibid, 213.


\(^{28}\) Scott, above n 9, 138.

\(^{29}\) Ibid, 216.

\(^{30}\) Ibid, 283.
prompting others to do so as well. But cosmopolitanism is a broad term for Koskenniemi. I need here only briefly review aspects of Lauterpacht's work to bring out those specifically expressive of innate cosmopolitan tenets and initiatives. I do so here principally by reference to his reconstruction of the Grotian tradition in international law.

It is clear, first of all, that, for Lauterpacht, Grotius is more than strictly a legal scholar. He is compared with or opposed to Erasmus, Machiavelli, Hobbes and Locke, among others. Grotius's work serves as a model constructed out of political theory, in the way that Lauterpacht makes clear in his earlier treatment of Spinoza, such that the political theory identified with Grotius will help determine the end point of the system that applies to the 'relation of states to humanity'. The legacy of Grotius's political theory and influence in international law is for Lauterpacht 'the tradition of progress and idealism'. Thus Grotius's work comes by the end of the article to represent not only 'a source of evidence of the law as it is, but also as a well-spring of faith in the law as it ought to be.'

The sum of the guiding features of the Grotian tradition as Lauterpacht identifies it remains largely synonymous with much of innate cosmopolitanism. Consider the first principle features that Lauterpacht draws out:

They are: the subjection of the totality of international relations to the rule of law; the acceptance of the law of nature as an independent source of international law; the affirmation of the social nature of man as the basis of the law of nature; the recognition of the essential identity of states and individuals; the rejection of 'reason of State'; the distinction between just and unjust war...

The whole of international relations is subject to international law, which is not reducible to state will alone. Rather, the state is placed alongside individuals internationally, and the law of nature—which is an affirmation of the human social character, not derived from a Hobbesian state of nature—is elevated to a source of norms alongside the formal sources of law identified with state consent.

The social unit that defines international law, and in accordance with which international law is defined, is, alternately, international society and international

31 H Lauterpacht, 'Spinoza and International Law' (1927) 8 BYIL 89, 91.
32 H Lauterpacht, 'The Grotian Tradition in International Law' (1946) 23 BYIL 1, 48.
33 Ibid, 51.
34 Ibid, 51.
community, as the title of Lauterpacht’s most famous work indicates. The international community exhibits ‘social and political realities’ of its own; international society, its own needs. By either term, they represent ‘the legal and moral unity of mankind.’ The unity of mankind, again, derives from the social nature of humankind; thus the law of nature that is crucial to Lauterpacht’s reading of the Grotian tradition is principally identified with ‘the social nature of man and the preservation of human society.’ Moreover, it is from the social character of humankind that international law derives the force of its legal norms: ‘the binding force of even that part of it that originates in consent is based on the law of nature as expressive of the social nature of man.’ In sum:

The place which the law of nature occupies as part of the Grotian tradition is distinguished not only by the fact of its recognition of a source of law different from and, in proper cases, superior to the will of sovereign states. What is equally significant is Grotius’s conception of the quality of the law of nature which dominates his jurisprudential system. It is a law of nature largely based on and deduced from the nature of man as a being intrinsically moved by a desire for social life...

What results is a model of a unified legal system that enjoys an objective normative foundation grounded in a world social phenomenon, its norms directed to the proper expression of the universal social character of humankind in an interdependent world.

3.4 The pretension to observational science and the turn to policy

The effort to reinvigorate the innate cosmopolitan model in international law was complimented by the contemporaneous perception of a world materially changed by the political and industrial revolutions of the prior epoch. Prior to World War II, jurists focused on renewed doctrine for objective norms, founded...
in a world perceived to have arrived at a stage of appreciable interconnectedness; following World War II, energies were turned to actual research programs necessary to verify the perception of interconnectedness and to substantiate the renewed aspiration to objective normative grounds for international law, as well as conceptual inquiries into the professional and policy implications flowing from potential empirical conditions. Research programs engaged in empirical efforts to discover and promote the empirical grounds of the innate cosmopolitan phenomenon included the World Rule of Law Center at the Duke Law School and the Cornell Project on the Common Core of Legal Systems. I focus here only briefly on yet another project, the Committee for the Study of Mankind, as described by a leading member, Quincy Wright, a political scientist who worked across the fields of international relations and international law. The primary object of the Committee for the Study of Mankind, was ‘to make mankind aware of itself and to make this awareness influential at all levels of decision-making.’

Self-awareness reflects a singular, ‘subjective’ psychic capacity associated with the comprehensive human collective. Following the work of the Committee, two objectives are paramount to making mankind aware of itself, namely, world law and world society, which objectives Quincy Wright addressed in the name of the Committee. Law, by Wright’s formulation, is essential to communal self-awareness: ‘to be aware of itself, mankind—the largest and most complex human group—must have a law.’

Society, by the same formulation, is joined to law, though there is a problem of circularity: ‘Neither society nor law can exist without the other, but like the hen and the egg, one or the other must come first.’ Putting to one side the circularity dilemma, the formula guiding the mission of the Committee held as follows: ‘A law of mankind implies that, in some degree, mankind is a society, and this implies that mankind is a public, the members of which, on some matters, have a relatively homogeneous opinion.’ Thus, public order for all-inclusive world society—i.e. cosmopolitan order—resolves into the phenomenon of world public opinion.

World public opinion thereby becomes a primary normative foundation for cosmopolitan community: ‘Thus it is through the development of a world public opinion, manifesting general understanding and recognition of emerging principles of universal law, that mankind can become aware of itself, of its value,

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43 Ibid, 437.
44 Ibid, 439.
46 Ibid, 442.
and of its intuitions of justice, and can become a functioning society'. The research agenda of the Committee became synonymous with research into the nature of world public opinion: 'The analysis of public opinion may suggest the best approach to conscious control of this process [of the consolidation of human society] and to creation of conditions for a more adequate law of mankind.' Significantly, however, the research agenda can be seen to have shifted from discovery of the nature of the cosmopolitan phenomenon, to the means of directing it. The move to direct the cosmopolitan phenomenon reflects what becomes an increasingly clear connection in innate cosmopolitan scholarship between an inquiry into objective world norms and particular programs of world policy.

Against this backdrop of aspirations, consider the work of the New Haven School, for whom perceived interdependence becomes the grounds for a strong claim: 'It is the fact of an interdependent world community that makes some system of international law inescapable.' The scope of interdependence perceived by members of the New Haven School potentially includes acts and expectations discernible in the interpersonal pursuit of any value, anywhere in the world. The complexity of New Haven School theory, however, takes it beyond the innate cosmopolitan model. I explore it here only for certain points of overlap.

Concerning the range of relevant values, McDougal, Lasswell and Reisman write: 'The increasing interaction and interdependence which have been noted in a few spheres of human activity could easily be demonstrated in regard to the pursuit of every value which human beings covet.' Concerning the involvement of every individual, they write: 'sustained global interaction has rendered the life and stable existence of every individual dependent upon numerous factors operating beyond his local community and national boundaries.' The enormity of the field of interdependence, however, reduces to its effects on individuals, '[t]he fact which requires emphasis is the highly personal impact of all this interaction and interdependence upon the lives of individual human beings.'

By positing such an expansive field of transnational interdependence, the

48 Ibid, 443.
51 Ibid, 190.
52 Ibid, 191.
New Haven School purports to make good in definitive manner on the comprehensive objective reality that the innate cosmopolitan model represents. The idea of a possible world community is hardened into a world community that exists undeniably in the everyday acts of individuals everywhere: “The inhabitants of the contemporary globe are, unquestionably, the members of a “group,” not merely an “aggregate,”” since they share a sufficiently high frequency of perspectives and interaction.\(^5\) The global group is synonymous with world community, connoting a relatively thick social order: “The interdetermination of peoples on a global scale and the pervasiveness of its perception justify the characterization of a “world community”.\(^5\)

In sum, adherents of the New Haven School ‘use the expression “world community” ... not in a metaphoric or wistfully aspirational sense but as a descriptive term.’\(^5\) The distinction of the New Haven School from the Vitorian tradition of innate cosmopolitanism is the enhanced proposal to move from intuition and theory to empirical fact, without falling back on the idea of merely-possible community. The naturalist Vitorian reliance on intuition and possibility, though accurate according to the New Haven School as a matter of sensibility, is too subjective to substantiate objective world norms: ‘the early “natural” law approach, though sometimes cognizant of the larger community of humankind, more often adopted partial and unevaluated conceptions of that community and did not develop the notion of interpenetrating community processes embracing all peoples.’\(^6\)

Notably, subjective failure to perceive or appreciate the world community does not diminish its empirical reality. The world community is an objective reality, not contingent on subjective perception, and not merely a possible or theoretical condition to be realized.\(^7\) In consequence, each individual is, objectively and inescapably, a world citizen: “Interdependence has made world power processes and world law as relevant to each individual as the decisions made in the municipality in which he lives. Responsible citizenship, then, extends from the municipality to the limits of the enormous arena in which man interacts.”\(^8\) Likewise, “[i]n the optimum public order which we recommend, the

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\(^6\) Ibid, 256.
\(^7\) Ibid, 256.
\(^8\) Ibid, above n 49, 808-09.
\(^9\) Ibid, 812.
\(^10\) Ibid, 810.
\(^11\) McDougal et al, above n 50, 193.
expectations of all individuals equally comprise authority. In sum, the objective fact of world norms is the sum of subjective acts and expectations in the world interdependent complex, but the subjective actors may be largely unconscious of their contribution to the normative scheme. Consequently, the normative basis shifts between an objective world phenomenon and the countless subjective acts that it comprises. Right policy, then, must be adopted to ensure that the sum or mean of world subjective acts and expectations conform to desirable outcomes, such that the New Haven School tasks itself with ‘the invention and evaluation of the alternatives in policy most economically designed to move us through these troubled times of contending systems toward the more complete and perfect world order we seek.’

The line between inquiry into grounds for world norms, on the one hand, and an exercise in policy-making on the other, is eroded to the point that the complex assertion of interdependence becomes the jumping off point for chosen policy and normative ends.

McDougal expresses the necessity of normative choice anecdotally: ‘It may be that … one may without “disastrous consequences” take coffee from the Arabs and tea from the Chinese, but it does not necessarily follow that one may take cannibalism from the cannibals and remain … wholly dedicated to the minimal-order principle of no cannibalism.’ Moreover, McDougal is clear that the value-goals associated with human dignity, the adopted telos of New Haven School policy, are neither neutral nor transcendent.

Select values associated with human dignity determine the substance and application of international law as a matter of choice and as a matter of observation: ‘an international law so conceived will demand that all specific decisions be related to, or grounded in the authority of, the empirical, social-process, secular values of human dignity.’

Thus the New Haven School conjoins innate cosmopolitanism to particular values of human dignity. But the embrace of human dignity by McDougal, if not the whole of the New Haven School, became largely synonymous with western liberal values in general and U.S. foreign policy in particular. The result being that, as an exercise in world public order proceeding from the world collective,
but embracing select liberal values in particular, the method and policy associated with McDougal took on a liberal hegemonic character. In McDougal’s words, ‘[t]he goal of a law of freedom is not the extreme of anarchy, but an ordered, productive, shared liberty and responsibility.’\(^65\) In the words of critics, however, the New Haven School represents ‘social engineering’ or a cover for US foreign policy.\(^66\)

### 3.5 Contemporary theory

I turn now to two still more current theories of international law, namely, transnational legal process and the interactional theory of international law developed by Jutta Brunnée and Stephen Toope. Both find antecedents or ‘analogies’ in aspects of the New Haven School.\(^67\) In addition to an affirmation of the value of process, acts and expectations—or understandings, another term used by Brunnée and Toope—in the formation and identification of international law, both contemporary schools join an appreciation of intersubjective experience to an argument about the normativity of international law. A comprehensive complex of interaction shapes the identity of actors and norms alike, such that world norms may flow from the world itself as a normative unit. Each goes beyond the formal constraints of international law to identify effective world norms with a global intersubjective process; but for both, something particular about the concept or practice of law serves as a constraint on the normative ends at which that process may arrive.

It bears noting, once again, that neither transnational legal process nor interactional theory is wholly synonymous with innate cosmopolitanism. Transnational legal process entertains a rich idea of process that takes it outside of innate cosmopolitanism in certain respects; likewise the constructivist premises of interactional theory correspond with innate cosmopolitan premises but are not identical with them. I explore transnational legal process and interactional theory for the points of overlap with innate cosmopolitanism, but not to offer a comprehensive treatment of either theoretical school on its own terms.

Consider first Harold Koh’s work concerning transnational legal process. The world as a whole, according to Koh, is still more thoroughly interdependent

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\(^65\) McDougal, above n 60, 126.

\(^66\) M Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (2005), 205-06.

than ever, such that he observes a world-wide, transnational phenomenon, characterized by pervasive interaction and consequent intermixing values and interests. Moreover, in keeping with the heuristic application of innate cosmopolitanism, transnational legal process represents a political model by which to comprehend bedrock normative grounds of international law: transnational legal process arises out of and reflects nothing other than the world ‘body politic’, for which international lawyers, among others, are responsible.  

The world body politic, then, features a ‘global legal process’, which, in itself, is ‘normative, and constitutive’. Koh describes a process that ties the normativity of international law to the internalization of common norms, as a function of shared engagements in legal fora organized around the interpretation and enunciation of common rules, and capable of shaping the interests and even identities of international actors.

The product is a self-perpetuating world phenomenon, contingent on the continued interaction of actors in the world. Legal process is essential to the phenomenon, insofar as values that Koh holds fundamental to legal practice will constrain the range of normative outcomes to be expected as a matter of interaction and process. But while the process is normative, it is not determined. The sum total of acts and expectations will dictate appropriate norms at any point in time, subject to the constraints established as a matter of legal process. Actors in the transnational legal process become ‘carriers of history’ in an international society that is always and necessarily emerging. International society is the merged product of identities and norms that run in two directions, from the international level to the individual actor and back. The sum total of these multi-directional engagements is a unitary phenomenon with normative consequences; the substance of that phenomenon is not fixed, but can be observed in the totality of the acts and expectations in all of the transnational engagements at any given time. In this way, transnational legal process corresponds with the innate cosmopolitan model.

Interactional theory, in contrast with the lawyerly orientation of transnational legal process, relies largely on the international relations school of constructivism, merged with the legal philosophy of Lon Fuller, to observe a constantly changing, intersubjective complex representing the primary or bedrock

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69 Koh, above n 8, 2626.
70 Ibid, 2646.
71 Koh, above n 68, 184, 206-07.
72 Koh, above n 8, 2654-55.
normative grounds of international law. Brunnée and Toope rely on constructivism particularly to show ‘how international law can be an important force in socializing actors and shaping their interests and choices.’\textsuperscript{73} Actors are socialized into the overarching complex from which international law and relations derive their normative force, and in which actors and structure ‘are mutually constituting, and both are inherently social.’\textsuperscript{74} Moreover, interactional theory captures a central feature of innate cosmopolitanism from Vitoria forward, namely an appeal to capacity and communication; interactional theory is rooted in ‘an assumption about human nature, which is that the main goal of human life is not mere survival, but “maintaining communication with our fellows.”’\textsuperscript{75} In sum, the world is an intersubjective complex in which actors will be socialized, and which is a consequence of the natural capacity for and inclination towards communication. As a comprehensive intersubjective complex into which all actors are socialized and which is grounded in assumptions of natural fact, the world as a social whole enjoys an objective claim to normative authority.

Following the work of Fuller, Brunnée and Toope anchor the social complex of global community to a common morality, or the ‘internal morality’ of law, even as international law is made contingent on an ‘external morality’: ‘the internal morality of the law will tend to favor stasis, as upholding settled expectations and predictability, [while] the external morality, rooted in human ends, will appropriately demand change.’\textsuperscript{76} The intersubjective capacity for common understanding bridges the two: ‘the first step in building interactional law is the creation of social legitimacy through the emergence of widely shared understandings.’\textsuperscript{77} Notably, however, there appears some ambiguity typical of the innate cosmopolitan model at this point. It is not clear whether the basic criterion of legitimacy, common understanding, arises naturally or must be manufactured: law is either created or it emerges. I return to this point in critique, below.

The moral calculus of interactional legal theory is part of a Fullerian ‘vision of the moral community that is a direct challenge to international lawyers and IR theorists.’\textsuperscript{78} The internal morality of interactional law represents a

\textsuperscript{74} Ibid, 9.
\textsuperscript{75} Ibid, 19.
\textsuperscript{76} Brunnée & Toope, above n 67, 59.
\textsuperscript{78} Brunnée & Toope, above n 67, 62.
discrete morality appropriate to law, universal in nature, including attributes that law must always and everywhere exhibit to qualify as legitimate and effective. Where transnational legal process observed normative constraints on the world phenomenon arising out of characteristics typical of lawyers and legal practice or legal discourse, interactional theory finds constraints arising out of moral terms identified with law as a theoretical construct.

External morality, on the other hand, reflects historical values associated with a given community. As such, external morality corresponds with the observational premises of innate cosmopolitanism, by which international legal norms must reflect normative acts and expectations discernible in the world community. Brunnée and Toope indicate that ‘modest substantive commitments to an external morality evidence an underlying congruence with commonly shared understandings in society’. The tension between internal and external morality reflects a concern about ends: a fixed and universal internal morality is adopted at least to constrain the range of normative possibilities available to international law, since the allowance for and sensitivity to external morality otherwise admits no clear normative distinction or priority as between competing moralities and corresponding normative ends.

It bears emphasizing that interactional theory is not a theory about what international law might be; rather, it is about what international law must be: ‘The primary test for the existence of law is not in hierarchy or in sources, but in fidelity to internal values and rhetorical practices and thick acceptances of reasons that make law—and respect for law—possible’. In keeping with the innate cosmopolitan model, interactional theory addresses perceived shortcomings in the traditionally-recognized sources of international law, to allow for the expression of norms arising from the global whole, rather than the volition of sovereign states alone. The appeal to a source of law outside of those captured in Art. 38 of the Statute of the World Court is express:

[I]nternational lawyers can finally eschew the preoccupation with legal pedigree (sources) that has constrained creative thinking within the discipline for generations. Sources of law can be understood as shorthand for shared understandings, the processes of their invocation made legitimate both by strong adherence to an

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79 Ibid, 53.
80 Ibid, 69.
internal morality and by highly circumscribed tests of substantive content.'

In sum, interactional theory, in its development of constructivist insights, reflects the innate cosmopolitan model of a unified world social phenomenon with normative consequences capable of conferring objective grounds for international law, irrespective of traditionally-recognized sources, grounds presupposed to underlie and facilitate interaction across the diverse expressions of community in the world. Moreover, Brunnée and Toope expressly distinguish interactional theory from the other schools of cosmopolitanism considered here at the outset: ‘Our theory of legal obligation is not aligned with cosmopolitan liberalism … or with visions of global constitutionalism. Rather, we envisage interactional law as a particular kind of “community of practice”.’

4 A critique

Having traced the contours of the innate cosmopolitan idea, I propose a brief critique formulated along three lines. First, innate cosmopolitanism suppresses political contestation in favor of assertions of observational science or intuition; second, it vests elite actors with an authority for norms even as it situates responsibility for the expression of those norms elsewhere, in the world as a whole as it may be properly observed or intuited; third, it affirms status quo historical conditions by virtue of founding novel normative authority on the nature of the world as it exists at any point in time. Taken together, the three grounds suggest that innate cosmopolitan arguments may ultimately stand, intentionally or not, for policy interests that support the status quo.

In founding a world legal order on the aggregation of observed normative acts and expectations applicable to the world at any given point in time, the rule-making process prefigured by innate cosmopolitanism is emptied of responsibility: the rules appear to create and recreate themselves; they are merely discovered by constant scientific investigation, and announced by the presumptively proper person, body or instrument. Consider the language of Brunnée and Toope, noted above, whereby law ‘emerges’. The norm is observed, rather than deliberated or decided upon, or it is derived from world public opinion, or something like it, rather than the reasoned determination of any

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81 Ibid, 65.
82 Brunnée & Toope, above n 73, 29.
legislator or judge. In light, however, of the vast field contemplated to determine world norms, sociologically or otherwise, at any point in time, the observational method itself reestablishes the contested field of politics in other terms. Any given set of methodological choices by which to comprehend world norms potentially represents a particular policy and discrete set of interests. The complexity of the research apparently necessary to make good on the innate cosmopolitan intuition suggests that it in fact cannot be substantiated or even meaningfully defined. Thus innate cosmopolitanism would suppress subjective international politics by an appeal to science, or sociological observation, but the science or method of observation becomes a new field of contestation, apparently incapable of resolution. 83

The variability of the innate cosmopolitan phenomenon undermines a guiding purpose to achieving an objective authority for international legal norms, namely, the ability to overcome the paradox and self-contradiction of a subjective system of international law. With variability comes manipulability, and the association of law and policy that also characterizes innate cosmopolitanism takes on a particularly controversial character. Furthermore, the limitations of observational method also expose to critique the underlying premises of an interdependent world collective, revealing a consistent limitation of innate cosmopolitan doctrine since Vitoria: the vision of a world social or political complex remains just that; it is still in the first place a vision or matter of intuition, rather than anything more substantial or precise. In consequence, the appeal to world normativity under innate cosmopolitanism can appear quixotic, or worse: political contestation is suppressed, but responsibility is diminished in an affirmation of unsubstantiated ends.

Moreover, innate cosmopolitanism expressly associates normativity with the perceived historical reality of the world. Because the proper observation of acts, experiences, expectations and understandings in the world is theoretically supposed to yield the interests and will of the world, the normativity of the world is discerned in terms of historical fact. Likewise, since the norms that flow from innate cosmopolitanism are effectively discovered by observation of historical acts and conditions of the world, innate cosmopolitan norms are supposed to represent the world as it is. To represent the world as it is, is to represent the status quo. Thereby the innate cosmopolitan model adopts a posture deeply tied to historical circumstance, likewise binding the norms to which the model would

give rise to status quo historical conditions. As a consequence, the historical contingency of innate cosmopolitan norms suggests, at least in theory, a model that ultimately serves to affirm—even in its application for reform—status quo conditions, despite a traditional association of innate cosmopolitan ideas with progressive legal scholarship. There are at least two implications to be drawn. Either the appeal to historical reality appears specious, in which case the innate cosmopolitan argument is emptied of its own pretension to legitimacy; or there is reason to be skeptical about the capacity of the innate cosmopolitan idea to support the progressive ends for which it is traditionally invoked.

5 Redeeming the intuition

The story, however, does not end with the critique. Innate cosmopolitanism purports to offer a compelling account of a world phenomenon, which indeed appears to resonate with an internationally-conscious audience, be it diplomats, scholars, or a world public, loosely defined. The innate cosmopolitan account substantiates the international normative regime in a coherent way: there is a foundational normative potential that lends an authority to international law beyond the subjective authority of its subjects. Likewise, innate cosmopolitanism has indeed enjoyed a long history of appeal, which continues to represent arguably its greatest strength. It has been suggested, in other places and other words, that the persistent historical intuition of innate cosmopolitanism may be its best proof.\(^ 84\) In that light, innate cosmopolitanism functions like a sort of lodestar: a guide by which to orient the ends of international law, and thereby a means of affirming the normativity of the international legal system. In this context, even the most trenchant critic will often appear to share the fundamental intuition that drives the innate cosmopolitan model, exhibiting a faith in the ends of international law even absent any more definitive or scientific exposition of the same.

Consider in particular the critical work of Martti Koskenniemi, who has deconstructed cosmopolitanism generally in international law in a number of places. Koskenniemi’s critical work first explicates the dilemma of indeterminacy, then identifies a corrective, for purposes of international law, in the form of a sort of presumptive normative compass—which normative compass resembles the intuitive faith exhibited by innate cosmopolitanism.

\(^{84}\) Cf Salvador de Madariaga, *The World’s Design* (1938), 84.
In his earlier work, Koskenniemi identifies a normative compass with the imagination; in his later work, it takes on a still more spiritual dimension. He begins from a critique of international law and international lawyers for failing to recognize or acknowledge the inevitability of political contestation, such that the practice and discourse even of progressive and cosmopolitan international law becomes selectively associated with and co-opted by policy agendas. In the first edition of *From Apology to Utopia*, the imagination is the corrective to the critical dilemma: ‘As international lawyers, we have failed to use the imaginative possibilities open to us’, and ‘[n]ormative imagination—reasoned folly—must take over where the technique of legal interpretation left off.’\(^\text{85}\) Imagination already suggests the visionary character that marks the long tradition and appeal of innate cosmopolitanism, and continues to represent perhaps its most persuasive attribute. As of *The Gentle Civilizer of Nations*, just over ten years later, Koskenniemi’s language is changed. The universal is no longer exactly or simply redeemed by imagination; in its place, Koskenniemi explains that the universal ‘is neither a fixed principle nor a process but a horizon of possibility that opens up the particular identities in the very process where they make their claims of identity.’\(^\text{86}\)

Finally, by the time of Koskenniemi’s 2007 address before the London School of Economics, which address represents one of the two fullest statements of revision to his earlier work and response to criticism it received,\(^\text{87}\) the nature of the normative compass that informs his critical project is further developed and changed. To begin with, the critical project is clearly presented as a project of critical universalism: ‘The task for international lawyers is not to learn new managerial vocabularies but to use the language of international law to articulate the politics of critical universalism.’\(^\text{88}\) Furthermore, the politics of critical universalism take on an apparently spiritual character. The horizon of possibility is changed to a horizon of transcendence, and what was once a matter of imagination has become a matter of faith. In the same work, Koskenniemi proposes to reconceive international law such that it might finally fulfill a traditional role as a carrier of the regulative idea of universal community. Moreover, that role corresponds with the actual appeal to international law in the world and by the world. International lawyers ‘are appealed to’ for the purpose of ‘soothing anxious souls’ and ‘to give voice to frustration and outrage’. Thus

\(^{85}\) Koskenniemi, above n 66, 560, 561.

\(^{86}\) Koskenniemi, above n 64, 506 (emphasis original).


\(^{88}\) Koskenniemi, above n 83.
international law is comprehended as a ‘secular faith’ for the world at large, such that international lawyers resemble its priests, capable of ‘re-establishing hope for the human species’.89

Taken together, the foregoing terms and propositions appear of a kind with the ideas and language that have marked innate cosmopolitanism in international law from Vitoria forward as part of a project intended to be progressive, as well as transgressive of subjective orthodoxy in the international system. The innate cosmopolitan model, like the critical universalism described by Koskenniemi, would be progressive and transgressive by virtue of providing a normative telos or orientation capable of moving a system of law otherwise subject to the historical vicissitudes of atomized powers and interests. Koskenniemi’s reliance on faith and hope, and his eschewal of more traditional terms of legal discourse and practice, represents a familiar resolution into normative intuition, a sense of a normative endpoint, reference point or ‘horizon’, one that moves with history but cannot be made perfectly clear, and instead must be discerned at least in part as a ‘gut feeling’.90

In conclusion, that even critical legal theory resolves into an intuitive assumption similar to that of innate cosmopolitanism, attests to the enduring appeal of the innate cosmopolitan idea, despite its discontents. If, ultimately, the innate cosmopolitan intuition will not be denied in the discourse of international law, it must be better understood. The terms of its articulation and the ends to which those terms are applied in the discourse of international law call for more consistency, and more consistent recognition. Doing so will allow for a clearer and more comprehensive critical treatment of innate cosmopolitanism as a school of thought—including the method of innate cosmopolitan argumentation, its premises and the ends to which they are put as well as its particular instantiations.

89 Ibid, 30.
90 Koskenniemi, above n 87, 18.
‘THIRD GENERATION’ RIGHTS: IS THERE ROOM FOR HYBRID CONSTRUCTS WITHIN INTERNATIONAL HUMAN RIGHTS LAW?

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Keywords
Human rights, Third Generation Rights, hybridity

Human rights, which are by nature dynamic and constantly evolving, need to accommodate new rights, just as each generation should contribute to their evolution, in keeping with the aspirations and values of the time.¹

1 Introduction

International human rights law is not static; evolution of human rights is at the heart of the system. United Nations human rights institutions’ mandates require them to develop, as well as protect and promote, rights. Since the beginning of the modern human rights era, individual rights and the human rights system have constantly evolved. Initially, ideological battles centred upon the tensions between and ideological divisions underpinning Civil and Political Rights and Economic, Social and Cultural Rights. The next significant evolution occurred with the advent of Third Generation Rights, also known as ‘Collective Rights’ or ‘Peoples Rights’.² Those rights were rooted in post-colonial discourses, drawing

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on the newly decolonised states’ mosaic of imperial experiences. The most recent development is the second wave of Third Generation Rights. Unlike the first wave, these newer rights cannot be understood as a reaction to colonialism; instead, the concept of ‘hybridity’ can help explain the ideologies upon which they are based, the processes through which they are created as well as the rights themselves.

Hybridity occurs where there is resistance to domination that occurs through colonisation, occupation, intervention, or other power imbalances. Resistance comes from the ‘local’, used not in the parochial sense but to mean the space created ‘in which everyday practices are used’. The local may exist at the national, transnational or global levels.³ Hybridity, then, is not based upon the merging of two different, binary entities; rather, it occurs through the meeting of those entities and the processes of resistance and adaptation on both sides. What emerges is not a mixing of the two, but a third entity that challenges the dominant—substantively or ideologically—while simultaneously incorporating norms and values from both. It goes beyond ‘mimicry’ or repetition of the dominant order, instead becoming ‘an uncertainty which fixes the colonial subject as a partial presence’.⁴ This lens moves the discourse and understanding away from ‘unhelpful binaries’ and ‘towards thinking about the multiplicity of outcomes that might occur when two entities meet and interact’.⁵ The interaction is key, particularly the different level of resistance within each relationship resulting in challenges to the dominant framework that necessarily incorporate ideas and norms from the local and external entities.

Hybridity is a relatively underdeveloped area within legal scholarship. Throughout this article, I develop and apply a framework for understanding hybridity and its role and impact within the international arena. The framework consists of three interconnected elements. Firstly, hybridity is a theory that enables understanding of identities, providing a lens through which cultures may be viewed. Hybridity, or hybridisation, is also a process through which identities and cultures are forged, with a ‘multiplicity of outcomes’ that depend on ‘complex and context-specific realities’.⁶ Traditionally, that process is viewed as occurring

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⁴ H K Bhabha, The Location of Culture (1994) 123.
⁶ Ibid.
Third Generation Rights as Hybrid Constructs

within postcolonial, or other formerly occupied or dominated, societies. Yet, the process of constructing identities, ideologies and objectives also takes place within the international arena. Lastly, hybridity is an entity in terms of the constructs that emerge based on the theory and resulting from the process. All three elements are integral for understanding international human rights law’s current evolutionary cycle.

The impact of non-Western constructs on international law has traditionally been explored through post-Marxist discourses, particularly post-colonialism. Hybridity is a relatively new lens through which these issues can be viewed. The theory has roots within classics and the humanities, but has only recently been applied within social sciences and legal frameworks, albeit using case studies from the local, national or regional level. It is clear that ideological, political, and legal discourses are crucial for understanding current changes to, or attempts to change, international human rights law. The shift in global power and politics has underscored the need to represent hybrid constructs within international law. The international legal system is moving in this direction, with peace-building and interventions, for example, beginning to represent heterogeneous norms that incorporate African, Asian and Islamic ideologies and values on responsibilities, communities and social justice.

Significant literature has explored the ideologies underpinning international human rights law, particularly in relation to the three categories, or ‘generations’, of rights. Much has also been written on the expansion of human rights and the resultant impact on the system as a whole. However, legal scholarship is yet to address systematically the recent second wave of Third Generation Rights. The practical effect is being felt across the international human rights system, with time and resources being allocated to discussions, declarations, resolutions and Special Procedures mandates aimed at developing these newer rights. Those developments are not being examined or discussed within the academy, let alone analysed from an interdisciplinary perspective. There is an obvious need to understand the rights themselves, the reasons that they are being promoted, and the ideologies upon which they are built.

Previous legal scholarship on Third Generation Rights confined discussions

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to substantive rights stemming from post-colonialism.⁹ The recent increase of this category of rights, and the methods used to introduce them into international human rights law, necessitates new research and analysis. If Third Generation Rights are a method for expanding international human rights law, a thorough, interdisciplinary analysis needs to take place. Another explanation is that states promoting Third Generation Rights are attempting to dilute this area of law. That aim would stem from political objectives unrelated to protecting and promoting human rights. If Third Generation Rights are being used to undermine the resources available for traditional rights, and to muddy the water of what constitutes a right, then it is imperative to address that issue.

This article has three main aims: first, to develop a framework for understanding hybridity at the international level; second, to explore the ways in which hybridity operates within the international arena, specifically on international human rights law; and third, to address the current literature gap on the new wave of Third Generation Rights. By advancing the theoretical model, the article develops the ways in which hybridity is used to understand practical developments at the international level. It widens the debate by drawing on a broad range of hybridity literature from across various disciplines in order to produce theories that are then applied to new Third Generation Rights. The article also demonstrates the pressing need to understand how hybrid rights are impacting upon the international human rights system.

2 Hybridity

Hybridity occurs within what Bhabha calls the ‘Third Space’¹¹ that exists between the dominant and the dominated, the coloniser and the colonised. That space may be a metaphor or a place; it is the ‘contact zone’¹² produced by the colonial, or other power-imbalanced, relationship. An alternative both to post-colonial discourses and globalisation, to cultural relativism and universalism, hybridity goes beyond the binaries that exist within those competing theories and instead

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¹¹ Bhabha, above n 4; R C Young, Colonial Desire: Hybridity in Theory, Culture and Race (1995) 37.


¹³ See generally A J Paolini, Navigating Modernity: Postcolonialism, Identity and International Relations (1999), particularly the methodology contained within 5-8.
explores the relationship between the two entities and ‘the multiplicity of outcomes that might occur’.\textsuperscript{14} Instead of focusing on the ‘fact’ of post-colonialism, hybridity results from the ‘markedly unbalanced relationship’ between the dominated and the dominant.\textsuperscript{15} It recognises that intertwining between the local and the foreign, the dominant and the weak, results in construction of a third identity that does more than simply mix the components. Hybridity is ‘a site for transformation and change where fixed identities based on essentialisms are called into question.’\textsuperscript{16} Identities are forged based on ideologies, customs, values and norms emanating from, but not exclusive to, both entities as well as the intertwining of heritages. The hybrid identity is more than the sum total of its parts—it is a wholly new construct created through the interaction between two binaries and the resistance that occurs during that meeting.

Universalists, often advancing a globalisation theory, ‘assume an increasing homogenization of the world’,\textsuperscript{17} while cultural relativists, frequently relying on post-colonial discourses, ‘posit notions of difference and resistance’\textsuperscript{18} in the relationships between the global North and South. Hybridity within international and transnational relationships is viewed through a markedly different lens to that previously adopted by scholars of political science, post-colonialism, classics and law who examine relationships between dominant and dominated actors. Rather than viewing interactions as top-down impositions, hybridity theories are used to understand and interpret relationships that occur at the ‘local’ level.\textsuperscript{19} This includes, but is not limited to, the relationship between actors, ideologies and institutions. It examines the impact that norms and cultures have on national, regional and international systems. Typically, this occurs through power relationships. Although hybridity has been used primarily in relation to case studies from the national level, such as state-building and peace-building,

\textsuperscript{14} Peterson, above n 5, 12.
\textsuperscript{16} Ibid, 3.
\textsuperscript{17} Paolini, above n 13, 6.
\textsuperscript{18} Ibid, 5.
\textsuperscript{19} Richmond & Mitchell redefine the word ‘local’ as referring to ‘the terrain in which everyday practices are used within (and in order to create) a local space. In this sense, the local is not to be essentialized or parochialized; it refers to a space that is, in a sense, transversal, transnational and even global, or at least a feature of most human societies. Whilst the local is the realm in which everyday activities emerge and unfold, a locale is a unique local space conditioned by the everyday traditions, practices, values, identities and moral, ethical or “radical” (i.e., root) sources of the groups in question.’ Richmond & Mitchell, above n 3, 11.
recent attempts have been made to apply the theory to international developments. Understanding hybridity enables scholars to explore national, regional and international developments through an alternative lens—one that seeks to avoid polarising and being polarised.

As a *theory*, hybridity provides a lens through which ideologies, norms and values may be viewed. Theories may also be an input within the international arena. This occurs when governments, or their delegates, demonstrate that their positions have been informed by the hybridity theory. That may occur within regional groups and political blocs, when collective aims and ideologies are constructed, or may take place within international institutions. Post-colonialist theories frequently have been heard at UN human rights bodies. Abebe, the First Secretary at the Permanent Mission of Ethiopia in Geneva, relies upon and adopts post-colonial discourses in his scholarship.\(^{20}\) Those views are then incorporated into statements made on behalf of his government. Other statements delivered by state delegates may be couched in the language of postcolonial discourses rather than relying directly on those theories: China has referred to human rights at as a ‘neo-colonial tool of oppression’,\(^{21}\) for example, while Cuba complained of ‘imperialism’ within UN human rights bodies.\(^{22}\) Theories, then, do not operate only at the abstract level but become inputs within the international arena. Discourses based on hybridity theories are beginning to be adopted within oral statements made within, and reports given to, the UN Human Rights Council. As will be demonstrated with reference to the development of second wave Third Generation Rights, hybridity theories are present within the language of resolutions, decisions and reports on the new rights as well as discussions within UN bodies.\(^{23}\)

As a *process*, hybridity occurs within the Third Space—something that is still being defined and applied within post-colonial studies and across a broad range of disciplines.\(^{24}\) Bhabha’s ‘Third Space’ is a metaphor for the meeting of cultures—where the colonised and coloniser intertwine and from where the distinct hybrid identity emerges.\(^{25}\) Bhabha, at times, also used the Third Space as

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23 See section 4 (below).
25 Bhabha, above n 4, 218.
a place, although those uses were confined to the local, predominantly national, level. Traditionally, that Third Space is viewed as existing within postcolonial societies. Yet, the construction of identities, ideologies and objectives also takes place within the international arena. The Third Space may be mapped onto the international level both as a metaphor and as a place. International institutions, in terms of formal bodies and the place that they provide for like-minded states to meet within regional groups and political blocs, provide a physical Third Space for the construction of hybrid norms, values and ideologies. Hybridity as a process may also be viewed as the way inputs are converted into outputs. Within the international human rights system, the conversion process takes place through intergovernmental negotiations and through coalition-building to form a majority for voting purposes. Both of those conversion processes require inputs to be hybridised, for countries to set out their ideologies, which meet and resist one another, in order to forge new constructions that will be acceptable to the negotiating states.

As an entity, hybridity may exist within tangible matters including art, literature, language and, indeed, law. At the international level, hybrid entities based on theories and processes include: certain international criminal courts and tribunals; aspects of some international instruments; and the second wave of Third Generation Rights. In many respects, it is easier to demonstrate hybridity as an entity owing to its tangible nature, although this third element is not of any greater or lesser importance than hybridity as a theory or as a process.

All three elements—theory, process and entity—are necessary for understanding how hybridity operates at the international level. The elements interconnect and interact with one another, demonstrating that hybridity cannot solely be used as an abstract concept or as a lens through which matters are viewed. The theory of hybridity is at a relatively early stage of its development in terms of when and how it is applied by legal scholars and political scientists. Its importance has been recognised by scholars such as Said, who insists that hybridity is ‘the essential idea for the revolutionary realities today’.

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27 Examples include the Special Court for Sierra Leone and the Extraordinary Chambers in the Courts of Cambodia.
28 Examples include the right to international solidarity and the right to a democratic and equitable international order.
els. Events within the international arena demonstrate a current revolution regarding the Global South moving away from postcolonial discourses and towards ensuring that their own, heterogeneous, norms, values and identities are recognised within international law.

Although first developed within postcolonial studies, with many theorists from that discipline insisting that hybridity only applies to colonial and postcolonial relationships, there is increasing movement towards recognising hybridity’s interdisciplinary roots and application. Political scientists have adopted and extended that analysis to include all cultures and ideologies. Whereas previous imposition of Western constructs occurred without systematic analysis about the impact on indigenous populations, there has been growing recognition of the need to assess the effect at the local level. Political scientists apply hybridity to issues such as peace-building, interventions, state-building, and international criminal courts. Those are all case studies that demonstrate that nothing is purely local or purely international. Hybridity, then, is raised within the context of specific circumstances, with theorists combining individual case studies to draw broader conclusions, including about how events at the national and even regional levels inform the international discourse. Hybridity research within legal scholarship follows similar patterns, using events at the national or regional levels to illustrate and inform research findings. Applying the framework set out above to case studies at the international level, I shall demonstrate how the three elements, combined, can be used to understand how hybridity operates within, and impacts upon, the international arena.

Throughout modern international law, many states were unable to present their norms and ideologies within international institutions. Since the end of the Cold War, and increasingly since the turn of the Millennium, states from the

30 See e.g. Bhabha, above n 4; Young, above n 11.
31 See generally Kuortti & Nyman, above n 15, 2
33 See e.g. Richmond & Mitchell, above n 3.
36 See e.g. O Martin-Ortega & J Herman, ‘Hybrid Tribunals: Interaction and Resistance in Bosnia and Herzegovina and Cambodia’, in Richmond & Mitchell, above n 3, 73.
37 See generally MacGinty, above n 33.
Non-Aligned Movement (NAM) and the Organisation of Islamic Cooperation (OIC), alongside regional allies from Africa, Asia and Latin America, have sought greater representation of their cultures.\(^{39}\) Hybridity is a key method by which African states, and more generally the ‘Third World’,\(^ {40}\) are able to move away from their former consignment to the margins within the international arena. Rather than the developing world being restricted to postcolonial discourses at the international level, and thus promoting ideologies formed as a direct response to colonial experiences, those states, groups and blocs are now promoting hybrid constructs that represent national ideologies based on identities forged within Bhabha’s ‘Third Space’. With the increase in power and strength of developing countries and former colonies, there has been increasing movement away from postcolonial discourses and towards promoting hybrid constructs. Those ideas are beginning to affect the work of international human rights bodies, financial institutions, courts and tribunals.

3 Hybridity and international human rights law

International human rights law provides the perfect canvas from which to draw broader conclusions about hybridity’s impact on international law. The most recent wave or category of human rights are predominantly created and promoted by states from the Global South, particularly from Africa and Asia. Those states’ national ideologies, norms and cultures focus on responsibilities rather than rights\(^ {41}\)—differences clearly illustrated when contrasting the African and European regional human rights treaties and mechanisms.\(^ {42}\) Those countries’ use of the human rights system, with its traditional individual-centred focus, is a stark example of the intertwining of national cultures and norms with the dominant, Western mechanisms and framework. By engaging with the system of ‘rights’, and by seeking to promote their own objectives within that framework, states from the Global South are using hybridity theories to inform their actions and to create processes and constructs that both meet and challenge the dominant ideology.


\(^{40}\) Paolini, above n 13, 4.


\(^{42}\) See generally Obinna Okere, above n 41.
Collective rights are often cited as examples of hybridity within international law; yet those rights were a direct response to colonialism rather than representing states’ own values. They introduced a third category of human rights that complemented, rather than challenged, Civil and Political Rights and Economic, Social and Cultural Rights. The first wave of Third Generation Rights has recently been followed by a second wave of ‘rights’ rooted in hybrid constructs rather than postcolonial discourses. These newer rights are sometimes in direct conflict with existing ways of understanding human rights. Rights are hybrid not only in terms of their substance, subjects and scope, but also in terms of the areas that they seek to bring into the human rights system. As such, it is necessary to examine the latest evolution of human rights in order to determine whether—despite the clear need to enable hybridity as a process—there is room for these constructs within international human rights law.

In terms of the substance of human rights, dominant ideologies stemmed initially from the West (Civil and Political Rights), quickly followed by Soviet notions of rights (Economic, Social and Cultural Rights). From the Universal Declaration, in 1948, dominant ideologies have been at the fore in international human rights law’s development. Until recently, decolonised and developing states, alongside allies from the Non-Aligned Movement, have promoted a ‘Third Generation’ of rights. The first wave of Third Generation Rights focused on ensuring rights directly stemming from colonial experiences—most notably rights to self-determination, development and permanent sovereignty over resources. Those rights are rooted in traditional postcolonial discourses that oppose imperialism and further an ‘anticolonial nationalism’. The Fanonian Framework, for example, insists on resistance and rejection of the dominant imperialist—Western—culture, language and identity, amongst others, in order to realise decolonised states’ national interests.

Current legal, political and ideological battles at the UN, where states are seeking to impact and shape international human rights law, demonstrate that

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44 NAM developed from the Asian-African Conference, a political gathering held in Bandung, Indonesia, in April 1955. The conference was convened in part due to frustration by many newly independent countries unable to secure UN membership due to Cold War politics. The two then-superpowers refused to admit states seen as belonging to the other camp.
46 See e.g. Weston, above n 2.
47 See generally A Memmi, The Colonizer and the Colonized (1957).
48 See generally F Fanon, Black Skin, White Masks (1952); F Fanon, The Wretched of the Earth (1968).
traditional postcolonial discourses are being complemented by, or replaced with, hybridity. Those battles are following a markedly different pattern than occurred during the creation of collective rights. Hybridity is focused on a less oppositional stance than traditional post-colonial discourses; it recognises a more ‘syncretic dynamic’ between the coloniser and the colonised, or the dominant and the dominated. It is a process of ‘engagement with’ rather than ‘opposition to’. That is clearly seen in the way that states from the Global South are using the human rights system, based on the dominant ideology, to further their own constructs and ideologies. The first wave of Third Generation Rights required the previously individual-centred system to change radically in order to include collective rights. Hybrid rights are less oppositional, because they utilise the existing human rights framework in order to promote norms not previously incorporated within that system.

Whereas rights within each of the three traditional categories—Civil and Political; Economic, Social and Cultural; and Collective—largely conform to their respective ideologies, hybrid rights draw upon different norms and values depending on the states involved with the input, conversion and output processes. The theory, process and entity within each of these new rights are different owing to the actors, ideologies, relationships and resistance varying within every context. Hybridity provides a ‘key analytical tool’ for examining each right because it ‘allows for a heightened understanding of differences’ between each case study.

The impact of hybridity, as theory, process and entity, at the international level depends on two distinct factors: (1) the impact of states’ hybrid identities, created at the national level, within the international arena; and (2) the construction of hybrid identities through ‘Third Space’ fora within the international arena. States, particularly from Africa, Asia and Latin America, use political blocs and international institutions to further their own ideologies and objectives as well as to construct hybrid identities and aims at the international level. Political blocs and international institutions provide arenas within which states from the Global South can exercise collective power. Whereas such fora previously were used

50 Paolini, above n 13, 54.
51 Peterson, above n 5, 12.
52 See e.g. E Heinze, ‘Even Handedness and the Politics of Human Rights’ (2008) 21 Harvard Human
to unite behind postcolonial discourses, they are now utilised to create hybrid objectives that member states then collectively promote and support. Individually or in sub-groups, those same countries lack the power needed to challenge dominant states and ideologies. As a bloc, they are able to pursue collective aims. The hybrid constructs created within, and promoted by, political blocs reflect the need for collective aims, forged through the hybridity process within the international Third Space, in order to challenge dominant ideologies. The range of heterogeneous identities within such blocs can be seen in the older alliances of the Non-Aligned Movement and the Group of 77—whose allegiances originally stemmed from anti-imperialism and lack of alignment to the dominant powers—as well as in the more recently created Organisation of Islamic Cooperation and G7+.

All of those blocs span at least three of the five geographic regions, which enables formation of significant cross-regional alliances. Heterogeneity requires objectives to be forged through a hybridity process, resulting in hybrid constructs based on a mosaic of norms, cultures, values and experiences.

Movement away from post-colonialism and towards hybridity can be seen through non-Western and non-dominant states using political blocs to promote norms, values and cultures that go beyond the colonial experience. States that previously were dominated by the West have constructed new identities and ideologies based upon their own national identities and their collective and individual experiences within the international arena. The Non-Aligned Movement and the Organisation of Islamic Cooperation have been at the fore of promoting hybrid constructs of human rights based on non-Western and hybrid ideologies. The Organisation of Islamic Cooperation seeks to promote, amongst others, Islamic values and ideologies, while the Non-Aligned Movement largely focuses on collective objectives based on colonial experiences.

Hybrid human rights are based on hybrid identities, created through hybrid processes and containing hybrid constructs. They are promoted through ‘soft law’ methods that circumvent the need for custom or treaties to create

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53 G-77 was named at its creation in 1964, when 77 states jointly prepared for the UN Conference on Trade and Development. It worked in parallel with NAM, focusing on economic issues. On the relationship between NAM and G-77, see e.g. T G Weiss, What’s Wrong with the United Nations and How to Fix It (2008), 49.

54 G7+ was formed by a group of fragile and conflict-affected states in order to provide a mechanism for focusing on and engaging with peacebuilding and statebuilding. The heterogeneous group brings together states and international actors in order to facilitate development and capacity-building.

55 Morgan-Foster, above n 9.
international law. Those methods include political resolutions and decisions, including at the UN General Assembly and the Human Rights Council, through the creation of Special Procedures mandates to monitor and report on these ‘rights’, and through integration of these norms at the international level. State practice in this regard demonstrates the rise of hybridity and the movement away from post-colonial discourses within the international human rights arena. This brings with it a number of problems, not least: whether the human rights matrix is the most appropriate for dealing with many of these new ‘rights’; the extent to which hybrid rights are being used by states with poor human rights records who seek to dilute or undermine the international human rights system; and whether new ‘rights’ ought to be developed where they are in clear tension, or even conflict, with traditional understandings of what constitutes a ‘human right’. As such, and owing to the little available literature on these new, hybrid rights, it is necessary to explore whether there is room for hybrid constructs within international human rights law.

4 Third Generation Rights

‘Third Generation’ terminology on human rights was first articulated by Vasak in relation to collective rights, or those rights which could only be realised ‘by the combined efforts of individuals, states, public and private associations, and the international community.’ Developed during the process of decolonisation, the first wave of Third Generation Rights can be seen as direct reactions to different aspects of colonialism. Rather than those rights being rooted in ideologies on human rights, they instead can trace their roots to the colonial experience. The advent of the right to self-determination being realised and implemented—that right being the oldest and most enshrined Third Generation Right—clearly is a direct reaction to colonialism and occupation. A peoples’ right to determine who governs over them does not represent a local or regional ideology; rather, it is a collective response to each country’s experience of imperialism. The right to self-determination, then, represents neither a distinct


58 With roots in the US and French Declarations of Independence, as well as the UN Charter and core human rights treaties.
ideology on human rights nor a hybrid construction of a third human rights identity, but a reaction to subjugation and oppression and thus falls under the post-colonial discourse. Similarly, the right to sovereignty over permanent resources is another response to the collective experience of colonialism and occupation, with the imperial powers having laid claim to the resources within states under their control. Again, this right represents a postcolonial discourse rather than having a distinct or hybrid ideology. States that had been formed in response to, and out of the ashes of, colonisation sought to assert rights to govern over themselves, as well as to economic and social development and to participate in and benefit from the common heritage of mankind.

The first wave of Third Generation Rights was crucial to the decolonisation process, enabling newly self-governing states to assert collective rights to matters previously used by colonisers to subjugate and oppress those peoples.

Recent events at UN bodies demonstrate that, in line with theories on hybridity, Third Generation Rights are now being extended beyond postcolonial discourses. That extension has occurred subsequent to many collective rights becoming enshrined and implemented at the international, regional and local levels and, perhaps more importantly, global politics shifting over the past two decades. Significant changes have occurred within the international arena, not least owing to: the end of the Cold War; the rise of Brazil, Russia, India and China (BRIC); economic and other powers shifting away from being the sole preserve of the West; and the increasing number of new political blocs representing alliances between non-Western states. Those changes have enabled decolonised and developing states to make their voices better heard at the international level. The second wave of Third Generation Rights includes development of rights to a democratic and equitable international order; to international solidarity; and to a clean and healthy environment. Rather than being a response to imperialism and based on post-colonial discourses, those rights are founded upon ideologies not previously represented within international human rights law.

The newer ‘rights’, at various stages in their development, reflect ideological perspectives of a range of states that were unable to make their voices heard during international human rights law’s creation and development. However, the rights are not representative simply of a ‘third’ ideology, but rather of the...
many hybrid national identities and values constructed by states at the local level and then intertwined with one another through the hybridity process within the international arena. Each right represents the intertwining of a range of national and regional—local—ideologies as well as the broad range of those states’ colonial experiences. It is that merging of ideologies and experiences that brings different hybrid constructs to the fore within each new right. Each ideological construct depends on the states that create and promote the right, their own human rights objectives and values, and their experiences of the dominant, Western human rights ideologies.

Hybridity can be seen in the ideologies underpinning these newer rights both in terms of the substance and beneficiaries of those rights. Hybrid rights build upon the idea of people’s rights—incorporating collectiveness of people, nations and states. They also develop the subject matter of human rights. Although traditional rights touch upon areas linked to human rights, such as labour and social justice, they are aimed largely at human rights as traditionally understood. One interesting feature of the second wave of Third Generation Rights is that some of them bring into the human rights matrix matters that are linked to human rights but would traditionally have been dealt with through other institutions. In particular, issues that might better be addressed through environmental bodies or financial institutions are being viewed through a human rights prism. This may be owing to hybrid ideologies on human rights, with the use of Bhabha’s ‘Third Space’ to construct new ways of thinking about what constitutes a ‘human right’ and whether such rights can exist within a vacuum. Another, more realist, perspective is that other institutions are less effective than those within the human rights matrix, and therefore states are using hybrid constructs to enable such matters to be brought within the human rights matrix.

Third Generation Rights seek to challenge the dominant position in terms of substance, subjects and scope. The second wave of rights moves that challenge beyond the mosaic of post-colonial experiences and into national and international Third Space constructions of human rights ideologies and objectives.

‘Substance’ refers to the content of a right. Third Generation Rights challenge the dominant, Western and Soviet ideologies on what constitutes a human right. They bring hybrid constructs to the fore; that is, rights that are interdependent on other subject areas that fall outside of the human rights matrix. The right to a clean and healthy environment, for example, is not included in the core human rights treaties but is enunciated in the Additional Protocol to the American Convention on Human Rights in the Area of Economic, Social and Cultural
Rights,\textsuperscript{63} the African Charter on Human and Peoples’ Rights,\textsuperscript{64} the United Nations Declaration on the Rights of Indigenous Peoples,\textsuperscript{65} and in ‘soft law’ documents including UN resolutions,\textsuperscript{66} reports, and the creation of a Special Procedures mandate on the impact on human rights caused by dumping of toxic and illicit waste.\textsuperscript{67} States from the Global South utilise the dominant human rights language and framework in order to bring the environment—a distinct subject area with its own institutions and mechanisms—into the human rights matrix. Many hybrid rights are framed as human rights owing to their ‘impact on other human rights’; describing them in such a way ensures that the rights are viewed through a human rights prism. However, those so-called ‘human rights’ do not have a distinct or tangible substance that can be protected, nor do they have tangible victims whose ‘rights’ may be violated. The rights are immeasurable in terms of implementation. Yet, by framing the rights in this way they become part of the human rights discourse. States, then, have utilised the international Third Space to construct substantively hybrid rights that are informed by and also challenge the dominant ideology.

Another way in which Third Generation Rights challenge the dominant ideology on the substance of rights is through their increased focus on responsibilities and duties rather than on rights. As with Civil and Political Rights and Economic, Social and Cultural Rights, the substance of the first wave of Third Generation Rights focuses on the rights themselves. The right to self-determination is framed in such a way as to focus the substance upon the right:

\begin{quote}
All peoples have the right to self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.\textsuperscript{68}
\end{quote}

\textsuperscript{67} CHR Res 1995/81, 8 March 1995, ‘Adverse effects of the illicit movement and dumping of toxic and dangerous products and wastes on the enjoyment of human rights’.
\textsuperscript{68} Common Article 1, International Covenant on Economic, Social and Cultural Rights (ICESCR), 16 December 1966, 993 UNTS 3 and International Covenant on Civil and Political Rights (ICCPR), 16 December 1966, 999 UNTS 171.
The substance of that right focuses on the ways in which the right may be realised. However, the substance of the newer Third Generation Rights moves beyond focusing on granting individuals ‘freedom from’ state interference or even ‘freedom to’ make demands upon a state, both of which enable the substance of the right easily to be identified. Instead, the second wave Third Generation Rights focuses on responsibilities of states, making it more difficult to identify the tangible rights created by those obligations. The right to a democratic and equitable international order demonstrates hybridity in the right’s substance. The resolution creating a Special Procedures mandate on the right to a democratic and equitable international order sets out 16 substantive aspects of the right. Some of the substantive aspects focus on the right while others focus on states’ responsibilities, including: ‘the shared responsibility of the nations of the world for managing worldwide economic and social issues’; ‘the promotion and consolidation of transparent, democratic, just and accountable international institutions in all areas of cooperation’; and ‘the promotion of equitable access to benefits from the international distribution of wealth through enhanced international cooperation, in particular in international economic, commercial and financial relations’. Hybridity here occurs through the substantive focus oscillating between rights and responsibilities, resulting in a construct that incorporates the polarised, and sometimes competing, ideologies from the Global North and South.

The debate on ‘rights versus responsibilities’ can clearly be seen in the differences between the regional human rights systems. The African Charter on Human and Peoples Rights was the first human rights treaty to set out responsibilities alongside rights. That way of viewing human rights is rooted in Africa’s history and traditions and challenges the dominant, individual-focused ideology. The movement away from substantive focus on rights to the substantive focus on responsibilities shows the impact of hybridity and the construction of ideologies within the international Third Space. As states from the Global South have grown stronger, they have become more able to construct and promote a

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69 HRC Res 8/5, 18 June 2008, ‘Promotion of a democratic and equitable international order’.
70 Ibid, para. 3(a)-(p).
71 Ibid, para. 3(p).
72 Ibid, para. 3(g).
73 Ibid, para. 3(n).
74 African Charter on Human and Peoples’ Rights (Charter), above n 64.
second wave of Third Generation Rights that better reflects hybrid norms and values that challenge the dominant ideology.

‘Subjects’ refers to who is bound by the human rights and to whom those obligations are owed. Third Generation Rights have expanded the subject of human rights both in terms of who, or what, are the rights holders and in terms of who owes the obligations. A main criticism of Third Generation Rights is that, unlike traditional rights, it is difficult to identify who would constitute a victim if one of those rights were to be violated. In many ways, the subjects of these newer rights are unclear, arguably owing to the focus being on responsibilities rather than rights. As such, Third Generation Rights have markedly expanded the subjects of rights.

The first wave of Third Generation Rights brought the idea of collective and peoples’ rights to the fore.\(^{76}\) Whereas previously almost all rights\(^{77}\) focused on individuals,\(^{78}\) Third Generation Rights promote the idea of collective or peoples’ rights. By focusing on rights such as to self-determination, permanent sovereignty over resources, and development, all of which may only be exercised by peoples, Third Generation Rights expanded who or what could be classed as rights holders. The second wave goes further, focusing on states as much as the people who collectively make up a nation or a country. The right to international solidarity and the right to a democratic and equitable order are aimed at states as an entity—rather than a group of people—and at groups of states, as they are collectives or groups of individuals. The Human Rights Council mandate on international solidarity, for example, requires the Independent Expert ‘to promote and consolidate international assistance to developing countries in their endeavours in development and the promotion of conditions that make the full realization of all human rights possible.’\(^{79}\) Although that responsibility discusses the individual as the rights holder, it is only in relation to secondary rights rather than to the right of international solidarity. It appears that states are the primary rights holders and that the realisation of the right to international solidarity will enable those rights holders—the states—to implement all human rights for individuals under their control. This extends the subjects of rights

\(^{76}\) See generally Crawford, above n 10.

\(^{77}\) With few exceptions where the right belonged to an individual but could only be exercised as part of a collective or group.

\(^{78}\) For a historical overview of collective, group and peoples’ rights, see generally I Brownlie, ‘The Rights of Peoples in Modern International Law’, in Crawford, above n 10, 1-16.

\(^{79}\) HRC Res 17/6, 6 July 2011, ‘Mandate of the independent expert on human rights and international solidarity’, para. 1(a).
beyond individuals as rights holders, bringing states under the umbrella of the subjects to whom obligations are owed.

Expanding the subjects of rights from individuals to peoples and then to states themselves is a radical challenge to the dominant ideology. This is particularly true regarding Western notions of human rights, which focus solely on individuals and where some scholars and states at times still resist the framing of certain rights as ‘people’s rights’. Intertwining states and individuals as subjects and rights holders demonstrates hybridity—the construction of a new human rights ideology that is based upon, but also challenges, the dominant ideology while simultaneously incorporating norms and values of states from the Global South.

The second challenge that Third Generation Rights present to the dominant ideology’s notion of the subjects of human rights is who owes the obligations contained within the rights. The newer rights expand the traditional understandings of who is bound by obligations. First, individuals and communities may be obligated to facilitate the rights of others. For example, the Declaration on the Right to Development says that “[a]ll human beings have a responsibility for development, individually and collectively.” 80 This is a radical shift away from individuals solely being rights holders, and is rooted in African human rights ideologies. 81 Secondly, states are made responsible for the behaviour of other states, which uses the traditional human rights framework by building upon foundations laid in the ICESCR 82 whereby parties to that treaty are responsible for ensuring the core minimum obligations within states that have exhausted their maximum available resources. 83 Although African and Asian states have demonstrated that this type of collective responsibility on states for human rights realisation within other states is part of their regional human rights ideology, the idea that states ought to be responsible for rights being realised within other states, as opposed to the narrower responsibility of violations being remedied, challenges the dominant, Western ideology on human rights. Thirdly, other actors may be bound by these obligations. Indeed, expansion of subjects is not just in relation to states and individuals. The right to international solidarity seeks to encourage ‘more in-

80 Ibid, Art. 7.
81 Obinna Okere, above n 41.
82 ICESCR, above n 68, Article 2(1).
ternal actors [...] to take initiatives towards international solidarity, and to practice it in international relations. This broad objective may lead to a range of international actors being bound by obligations under this right, with the Independent Expert insisting on the need to focus on relationships between states and international actors. Again, the international Third Space has been used to create a hybrid construct that expands the subjects of human rights in order to represent hybrid ideologies.

'Scope' refers to where the rights apply and the area where a state is bound by the obligations contained within a right. Traditional rights place obligations upon states to respect, protect and fulfil the right. Generally, the scope of those rights exists within territory where a state exercises control, although there are some instances of extraterritorial applicability. Third Generation Rights extend the scope of rights owing to their extension of the substance and subjects of rights. The right to international solidarity, for example, seeks to place responsibility on states for ensuring sufficient redistribution of wealth to enable other states to have sufficient resources for human rights to be realised within their territories. That scope goes beyond traditional territorial and extraterritorial application of human rights obligations. Instead, human rights become a collective responsibility of all states insofar as there is a global responsibility to ensure that all states are able to implement human rights.

Throughout his reports, the Independent Expert on the right to international solidarity emphasises that it places a responsibility on states:

International cooperation and solidarity are based on the concept of shared responsibility. The notion of common but differentiated responsibilities has potential value in the development of a right of peoples and individuals to solidarity.

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85 Ibid, para. 11.
87 See e.g. Human Rights Committee, General Comment No 31 (2004), UN Doc CCPR/C/21/Rev.1/Add.13, 26 May 2004; Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, ICJ Reports 2004, p 136.
The concept of ‘shared responsibility’ for ensuring that rights are able to be realised within other countries’ jurisdiction results in the scope of human rights being extended beyond traditional understanding of where states owe their obligations. The ideology underpinning shared responsibility goes beyond the postcolonial idea that former imperial powers owe duties to former colonies, and instead is rooted in African ideologies on responsibilities for other states and in post-Marxist discourses on global inequalities. Indeed, drawing on what appears to be post-Marxist theories the Independent Expert emphasises that ‘the duty of solidarity [is] an imperative prerequisite of globalization.’

Bringing these hybrid ideologies into the human rights system using a human rights framework enables states from the Global South effectively to challenge the dominant understanding of the scope of human rights by requiring states to ensure the primary right beyond their own jurisdiction in order to enable realisation of all other human rights within other states’ territories. The collective responsibility that Third Generation Rights place on states results in the scope extending to the transnational and international levels. The responsibilities placed on states transcend national borders and are dependent on matters occurring at the transnational and international levels.

5 Is there room for hybrid constructs within international human rights law?

International human rights law is going through another evolutionary cycle with development of new rights and, more broadly, the way that human rights operate at the international level. Those changes are based on hybrid norms and values, which give rise to hybrid rights that move beyond post-colonialism and challenge the dominant human rights ideologies. Although hybrid rights are at various stages in their development, with some still embryonic, they have significant support from states across four of the five regional groups as well as the two largest political blocs at the UN. Aspects of these hybrid rights, arguably, are incompatible with, or overly expand, the human rights matrix that was largely created by Western states. However, the West’s current approach of claiming that hybrid rights are not ‘rights’ has failed to impact their creation, promotion and development within the international arena. Therefore, it would be better, from both the theoretical and practical perspectives, that these rights are explored

89 4th Session Report of Rudi Muhammad Rizki, above n 84, para. 48.
and discussed at the theoretical as well as practical level in order to ensure that the evolutionary process within the human rights system occurs in a more systematic and less *ad hoc* manner. Understanding the theories underpinning hybrid rights will enable those rights to develop in a way that enhances, rather than undermines, the international human rights system.

Dominance of developing and decolonised states, alongside their allies within political blocs, at the UN results in large numbers of states promoting or supporting new Third Generation Rights. Even though not all states from Africa, Asia, Eastern Europe, and Latin America and the Caribbean support all of the rights, the cross-regional alliances through the Non-Aligned Movement and the Organisation of Islamic Cooperation mean that there are many potential allies available to support new constructions of hybrid rights. Indeed, it is this hybridity that enables each right to stem from subgroups of states that share common values and cultures, or who use the international Third Space to intertwine their national human rights ideologies and construct new rights based on those hybrid norms. The sheer number of states involved with constructing these new rights indicates that they will eventually be embedded within the human rights matrix, regardless of their substance, through votes on non-binding international 'soft law' instruments that are later used as 'proof' of the right's existence.

Hybrid rights, from a realist perspective, are a method for states to challenge and assert their collective strength against the Global North. The objectives behind the rights might be as much about anti-West political aims as about human rights. Indeed, among the states promoting and supporting hybrid rights are known human rights abusers, as well as states with autocratic or dictatorial regimes. A realist perspective highlights that those states' motives cannot purely, or even largely, be concerned with the realisation of human rights, owing to their own poor records for implementing such rights. Arguably, those states are using hybrid rights to dilute the system through rights expansion, which reduces the available resources that can be devoted to any one right. Similarly, the system is undermined by the expansion of what constitutes a right. Hybrid rights are then used to challenge dominant states by shifting the focus away from protecting tangible victims from tangible violations, instead using the human rights matrix to attack Western states for broader concerns relating to global politics and economics.

Although some states might be using the rights as a method to weaken, dilute or undermine the human rights system, from an idealist perspective there are strong ideological reasons for the construction of hybrid rights. The new rights move beyond post-colonial discourses and represent hybrid ideologies,
norms, values and cultures. Indeed, and as social constructivists might insist, the new rights represent heterogeneous ideologies and values that were not represented during the initial creation and development of international human rights law. While they may take away finite resources for other rights, they are also expanding the system and the way in which rights operate in order to make international human rights law more relevant to more states. The rights provide vehicles for realising other rights, and bring into the arena subject areas that necessarily impact on rights. They also seek to ensure that responsibility for rights implementation falls onto the international community as a whole. While this may provide a smokescreen for abusers or allow states to avoid responsibility for their own obligations, it also reflects the difficulties, as set out by post-colonialists and post-Marxist theorists, of imposing Western constructs on weaker and less developed states.

Regardless of the motivations for state behaviour in creating and promoting hybrid rights—in-depth analysis of which goes beyond the scope of this article—they are a significant development of the international human rights system. The methods of creating these new rights, however, make that they are not yet enshrined in international human rights law to the same extent as traditional rights. The West’s lack of support for many hybrid rights means that they cannot be created through traditional methods of treaties and customary international law. States from the Global North simply would not consent to be bound by such laws. Countries currently seeking to include their concepts of ‘rights’ within the international framework instead promote these newer rights through resolutions and decisions at UN bodies and by creating new Special Procedures mandates. It is easier to secure a vote on resolutions, decisions, and new mandates—especially at the UN Human Rights Council where the Non-Aligned Movement

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and the Organisation of Islamic Cooperation dominate proceedings—than to secure agreement on a new international human rights treaty. Those methods are then used as ‘soft law’ to demonstrate the existence of a ‘right’, as occurred with the right to water. It is likely that the rights will continue to develop and that, despite the lack of treaties and custom enshrining many hybrid rights, states will be bound by the obligations contained therein.

The West’s continued opposition to Third Generation Rights means that Western states are unable to engage with, and thus influence, their development. By allowing these rights to be constructed only by states from the Global South, the West is perpetuating their potential abuse. It enables states seeking to divert resources away from their own misconduct to do so, by overburdening the system and shifting the focus away from ongoing abuses within their own territories. Rather than dismissing these new rights, it would be better to understand the ideologies underpinning these rights in order to understand how they will affect the human rights system. Embracing hybridity as the current method of developing international human rights law will provide an opportunity to ensure that hybrid rights develop and are then implemented in such a way as to enable better rights protection and promotion across the world. In that way, the human right system will expand without being significantly undermined or diluted by current developments.

The human rights community, particularly in the West, must make room for hybridity theories and processes, even if it criticises some hybrid aspects of the second wave of Third Generation Rights. The lessons that may be learnt from classicists and political scientists is that top-down imposition of ideologies through globalisation or universalism do not work, while postcolonial or cultural relativist discourses fail to adequately address the issues raised within the international arena. There must be room for ideologies that challenge the dominant, through the construction of alternative narratives and discourses based on heterogeneous norms values and cultures, as well as the experiences and narratives of weaker states operating within the international arena. Caution must be exercised, however, in allowing too much room for hybrid constructs that seek to undermine rather than improve the international human rights system and, more generally, international law. Hybridity must not be allowed to be

93 See generally Freedman, above n 26, 122-128.
used as a smokescreen to mask malignant intentions, particularly towards human rights. There is a need to understand the development of new rights based on hybrid constructs that move beyond post-colonial discourses and give a voice to states that were previously unable to promote their ideologies on human rights. However, human rights scholars must engage further with hybridity theories and processes in order to identify when a right is hybrid and when the so-called hybrid aspects are simply a way of seeking to undermine the human rights system.
1 Introduction

The anti-suit injunction is a traditional international private law (IPL) remedy used by common law courts. This paper shall describe the use of the anti-suit injunction by courts in England, before setting out the approach taken by the Court of Justice of the European Union (Court of Justice) in two landmark cases to the use of anti-suit injunctions within Europe. This paper will ask whether the erosion of this IPL tradition through Europeanisation is to be regretted, concluding that, in this instance, tradition had to be abandoned in the name of progress.

2 The traditional approach to the anti-suit injunction

The anti-suit injunction is a court order rendered against a private party with the aim either of preventing that party raising an action in another forum, or forcing that party to discontinue such an action if already started. If the party disregards the anti-suit injunction and continues with the foreign action, it will face sanctions in the enjoining forum. The anti-suit injunction is a very powerful
tool in preventing duplicative litigation, especially if the party has business, assets, or even attractive business prospects in the issuing forum.\(^1\)

English courts draw their jurisdiction to render anti-suit injunctions from the general power to issue injunctions ‘in all cases in which it appears to the court to be just and convenient to do so’, enshrined in the Senior Courts Act 1981 (England and Wales).\(^2\) The exact extent of the power is ill-defined and has been the subject of a great many cases.\(^3\) For the purposes of this paper, the most important point to note is simply that the courts consider themselves to have jurisdiction to issue anti-suit injunctions, irrespective of the conditions under which they will exercise that jurisdiction.

The courts’ struggle with the correct use of the anti-suit injunction is relevant for three main reasons. First, it helps to explain why the remedy is so controversial and demonstrates some of the reasons the Court of Justice would ultimately choose to ban its use within Europe. Second, it demonstrates that English courts were not ‘trigger happy’ with anti-suit injunctions, which they would only issue in fairly extreme circumstances. Finally, the case law demonstrates a difference in approach between those anti-suit injunctions that protect a contractual agreement to sue in a particular forum and those that do not, a difference that will remain relevant throughout this paper.

The anti-suit injunction is so controversial because it represents an indirect interference with the judicial processes of a foreign sovereign state, as courts in England\(^4\) and the USA\(^5\) have noted. English authority suggests that the courts consider the order to be addressed solely to a party over whom the English court enjoys \textit{in personam} jurisdiction\(^6\) and not to the foreign court, and therefore any interference with the foreign judicial process is not unconscionable. This reasoning has come under much criticism and has been dubbed the ‘English

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\(^{4}\) \textit{Turner v Grovit} [2001] UKHL 65, [2002] 1 WLR 107, para 28 (Lord Hobhouse); \textit{Airbus Industrie GIE v Patel and Others} [1999] 1 AC 119 (HL), paras 131–2 (Lord Goff).

\(^{5}\) The US Supreme Court acknowledged over 150 years ago that in practical terms an anti-suit injunction is a direct interference in the judicial proceedings of an independent forum. \textit{Peck v Jenness} 48 US (7 How) 625 (1949). For a more recent expression of that opinion, citing \textit{Peck}, see: \textit{Laker Airways Ltd v Pan American Airways} 559 F Supp 1124 at 1128 (DC Cir, 1983).

\(^{6}\) \textit{Turner v Grovit}, above n 4, para 23 (Lord Hobhouse); \textit{Donohue v Armco Inc and others} [2001] UKHL 64, [2002] 1 Lloyd’s LR 425, para 19 (Lord Bingham).
Even the House of Lords’ own case law is inconsistent in its application of this theory, with Lord Goff having explicitly acknowledged in *Airbus Industrie* that ‘this part of the law is concerned with the resolution of clashes between jurisdictions’. The controversy within Europe is compounded by a clash of legal traditions: only common law courts will issue anti-suit injunctions, while the civil law tradition views the remedy as offensive against sovereignty and international law. Furthermore, the grant of anti-suit injunctions is self-evidently offensive to the principles of international comity.

The English courts therefore faced something of a minefield in delineating when exactly it would be appropriate to issue an anti-suit injunction. Ultimately, the court would distinguish between two categories of cases: those in which the court was asked for an anti-suit injunction to enforce an agreement to sue in a particular forum—sometimes also expressed negatively as a contractual right not to be sued in another forum—and all other cases.

In the former category of cases, where proceedings are brought in a forum other than that contractually agreed between the parties, there will be a presumption in favour of issuing the anti-suit injunction unless the opposing party can demonstrate compelling reasons why the court should not do so. This is true whether the agreement gives jurisdiction to a court or an arbitral tribunal. These circumstances provide ‘the paradigm case for the prompt issue of an injunction’ with ‘no good reason for diffidence’.

In all other cases, ‘diffidence’ might very well be considered the byword.

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8 *Airbus Industrie*, above n 4, para 131 (Lord Goff).
9 *Re the Enforcement of An English Anti-Suit Injunction* Case 3VA II/95 Oberlandesgericht (Regional Court of Appeal) Düsseldorf 10 January 1996, [1997] ILPr 320, paras 5, 12; J Harris, ‘Restraint of Foreign Proceedings—The View from the Other Side of the Fence’ (1997) *CJQ* 283; Barceló, above n 1, 4.
11 *Donohue*, above n 6, paras 24 (Lord Bingham) and 45 (Lord Woodborough). See also Gee, above n 3, 401–2.
14 Ibid, para 94 (Leggatt LJ).
15 Ibid, para 96 (Millett LJ).
Caution is necessary for the same reasons outlined above as to why the anti-suit injunction is a controversial remedy, especially the interference with judicial proceedings in a foreign sovereign state. In deciding whether to grant an injunction, the court will not apply rigid principles, but will consider whether the party against whom the injunction is sought has acted unfairly in pursuing its action in the foreign forum. This might include, for example, where the foreign action is vexatious or oppressive. It will consider which is the more appropriate forum for resolution of the dispute, but will not issue an injunction solely on the basis of this so-called forum non conveniens doctrine. The court will also consider whether an anti-suit injunction is required to protect a sufficiently important public policy interest, and whether there is any specific reason that the foreign proceedings should be allowed to continue. Such reasons could include, for example, the availability of any remedy in the foreign forum not available in England, or the fact that the foreign proceedings are at an advanced stage. Finally, the court will consider whether the target of the injunction is amenable to the jurisdiction of the court and therefore whether the injunction will provide an effective remedy. In summary, the court will consider numerous factors, with the overarching proviso that it should exercise its power to issue anti-suit injunctions cautiously due to comity and policy considerations.

The dichotomous approach can be explained as follows. The court recognises the possibility for dispute as to the appropriate forum absent contractual agreement, and ‘cannot arrogate itself the power to resolve that dispute by granting an injunction’, a possibility it does not see where the parties have made

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16 De Zeven Provincien, above n 2, para 40 (Lord Brandon); Donohue, above n 6, para 19 (Lord Bingham); National Westminster Bank, above n 12, 1382 (Clarke LJ).
17 Gee, above n 3, 398.
18 British Airways Board and others v Laker Airways Ltd [1985] AC 58 (HL), para 81 (Lord Diplock).
19 Airbus Industrie, above n 4, para 133 (Lord Goff).
20 Ibid.
22 Gee, above n 3, 399.
24 Ibid, para 880 (Lord Goff).
25 Donohue, above n 6, para 19 (Lord Bingham).
26 This refers to the possibility for dispute between itself and another court and not dispute between the parties.
27 National Westminster Bank, above n 12, para 28 (Lord Clarke).
an agreement conferring jurisdiction.\textsuperscript{28}

The stage is set, then, with the English courts willing and able to issue anti-suit injunctions, readily where there is an agreement conferring jurisdiction, hesitantly otherwise. By contrast, most other member states of the European Union view the anti-suit injunction as offensive to sovereignty. Enter the Court of Justice.

3 The Brussels Regime and the Court of Justice approach

The Court of Justice considered the anti-suit injunction in two contexts in two leading cases: \textit{Turner}\textsuperscript{29} and \textit{West Tankers}\textsuperscript{30}. Before considering these judgments, it is necessary to describe briefly the legal climate in which they were handed down.

The first important point to note is the existence of the Brussels Regime. The Brussels Regime is a collective term for a set of instruments allocating jurisdiction between European Union member states in civil and commercial matters.\textsuperscript{31} The relevant instruments to this part of this discussion are the Brussels Convention of 1968\textsuperscript{32} and the Brussels I Regulation.\textsuperscript{33} One of the principal goals of the Brussels Regime is to resolve conflicts of jurisdiction between member states,\textsuperscript{34} which is also one of the reasons that the English courts issue anti-suit injunctions.\textsuperscript{35}

The second important factor to note is the development of the normative concept of ‘mutual trust’ between member states. Mutual trust is mentioned as a foundational principle of the Brussels I Regulation,\textsuperscript{36} though not of the Brussels

\textsuperscript{28} \textit{The Angelic Grace}, above n 13, para 96 (Lord Millett).
\textsuperscript{29} Case C-159/02, \textit{Gregory Paul Turner v Felix Fareed Ismail Grovit and others} [2004] ECR I-3565.
\textsuperscript{30} Case C-185/07, \textit{Allianz SpA (formerly Riunione Adriatica di Sicurtà SpA) and Generali Assicurazioni Generali SpA v West Tankers Inc} [2009] ECR I-663.
\textsuperscript{31} Here used in the sense of both direct jurisdiction and indirect jurisdiction (i.e. recognition and enforcement). For discussion of these terms, see R Michaels, ‘Some Fundamental Jurisdictional Conceptions as Applied in Judgment Conventions’ in E Gottschalk, R Michaels, G Ruhl & J von Hein (eds), \textit{Conflict of Laws in a Globalizing World} (2006) 29.
\textsuperscript{34} Brussels Convention, above n 32, Preamble.
\textsuperscript{35} \textit{Airbus Industrie}, above n 4, para 131 (Lord Goff).
\textsuperscript{36} Brussels I Regulation, above n 33, Recitals 3 and 16.
Convention. In the IPL context, mutual trust has at its heart the notion that courts of one member state should respect the right of the court of another member state to determine its own jurisdiction and respect the result it reaches. The concept clearly underlies the judgment in the Overseas Union case, albeit not expressly mentioned, and was a central part of the ratio decidendi in the Gasser case, decided under the Brussels Convention one year before Turner. Mutual trust has also been argued to be a wide-ranging, long-standing tenet of European law, specifically visible in case law concerning fundamental freedoms.

It was in this context that the Turner case came before the Court of Justice. The facts, in relevant part, are as follows. Turner, a British national, began proceedings for unfair dismissal against his Spanish employer before the Employment Tribunal in London in May 1997. In July 1998, the employer began an action against Turner for a large sum of damages in respect of breach of contract before a Madrid first instance court. Turner sought an anti-suit injunction against these proceedings, which was granted on the basis that the Spanish proceedings were brought in bad faith and with the intent of obstructing the ongoing English proceedings. The injunction was then appealed via the Court of Appeal all the way to the House of Lords, which was obliged to make a preliminary reference to the Court of Justice.

The question referred to the Court of Justice was:

Is it inconsistent with the [Brussels Convention] (subsequently acceded to by the United Kingdom) for the courts of the United Kingdom to grant restraining orders against defendants who are threatening to commence or continue legal proceedings in another Convention country when those defendants are acting in bad faith with the intent and purpose of frustrating or obstructing proceedings properly before the English courts?

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39 See generally F Blobel & P Spath, 'The Tale of Multilateral Trust and the European Law of Civil Procedure' (2005) ELR 528, 533; National Westminster Bank, above n 12, para 28 (Lord Clarke); The Angelic Grace, above n 13, para 96 (Lord Millett). The authors argue that mutual trust is an important element in the decision of the landmark Cassis de Dijon case: Case C-120/78, Rewe-Zentrale AG v Bundesmonopolverwaltung für Branntwein [1979] ECR I-00649.
42 Turner v Grovit, above n 4.
43 Ibid, para 21 (Lord Hobhouse).
Note that the proceedings were already underway before the courts of England, which had accepted jurisdiction under the Brussels Convention. This would mean that under Article 21 of the Brussels Convention the Spanish courts would have to stay or dismiss proceedings, being the court second-seised of the same dispute. Note also that the injunction issued was not enforcing a contractual right of Turner not to be sued in Spain. It was therefore the kind of injunction the English courts hesitate to issue.

The House of Lords relied on this hesitancy in arguing in favour of the anti-suit injunction in its preliminary reference. Other arguments raised included the rather weak contention that issuing an anti-suit injunction does not entail interference with the jurisdiction of the foreign court, discussed above. Finally, it was argued that the anti-suit injunction should be considered compatible with the Brussels Convention as it furthers a legitimate aim of the Convention by providing an effective mechanism to prevent parallel proceedings. The prevention of parallel proceedings was clearly a goal of the Convention, and would later be expressly enshrined in a recital to the Brussels I Regulation. The House of Lords therefore reasoned that, because it achieves a goal of the Convention in a way not expressly prohibited by the Convention, use of the anti-suit injunction should be permitted within Europe.

The crux of the argument against the anti-suit injunction's compatibility with the Convention was based on the doctrine of mutual trust. The anti-suit injunction, it was argued, casts doubt on 'the reciprocal trust established between the various national legal systems'. Advocate General Ruiz-Jarabo Colomer believed this fact should be decisive, as the Convention represented an important landmark in European judicial co-operation, which is 'imbued with the concept of mutual trust, which presupposes that each State recognises the capacity of other legal systems to contribute independently, but harmoniously, to attainment of the stated objectives of integration'.

The Court of Justice agreed, placing the principle of mutual trust paramount in its judgment. The Court deals easily with the UK's arguments in favour

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44 Ibid, paras 24–7 (Lord Hobhouse).
45 Ibid, paras 22–3 (Lord Hobhouse). See also discussion above n 7–11.
46 Ibid, para 36 (Lord Hobhouse).
47 See Brussels Convention, above n 32, Arts 21, 27 (3).
48 Brussels I Regulation, above n 33, Recital 15.
50 Ibid, para 31.
of the anti-suit injunction, reasoning that the Convention deliberately does not permit one court to review the jurisdiction of another and that an anti-suit injunction ‘must be seen as interfering with the jurisdiction of the foreign court’. The anti-suit injunction is, therefore, incompatible with the Convention and the principle of mutual trust, no matter how sparingly, or under what circumstances, it is utilised.

The UK’s argument that the anti-suit injunction achieves stated goals of the Convention was also rejected. The Court points out that the use of anti-suit injunctions leaves no room for the operation of the Article 21 lis pendens rule, which could otherwise have been invoked by Turner to compel the Madrid court to stay proceedings. It also raises concerns that allowing the use of anti-suit injunctions would create new conflicts, not contemplated or regulated by the Convention.

The Court of Justice in Turner effectively banned the use of anti-suit injunctions in situations where the Brussels Convention allocates jurisdiction. Applying the doctrine of mutual trust, the court first-seised which has accepted jurisdiction must allow a court second-seised to determine its own jurisdiction under the Convention, which would mean staying proceedings or declining jurisdiction under the lis pendens rule. English courts would thus no longer be able to issue anti-suit injunctions against proceedings in another member state to protect litigants where the English court has jurisdiction under the Convention, which would include cases where the English court is designated in an exclusive choice of court agreement.

The decision was greeted with disappointment, if not surprise, by English commentators. That the Court of Justice would not look favourably on perceived interference with the Brussels Convention’s allocation of jurisdiction could hardly come as a shock. What, though, of cases where the Convention does not allocate jurisdiction?

This question would come before the Court of Justice in the West Tankers case. The relevant facts are as follows. A ship owned by West Tankers and

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52 Ibid, para 26.
53 Ibid, para 27.
54 Ibid, para 30.
55 Ibid.
56 Jurisdiction under a choice of court agreement is governed by the Brussels Convention, Art 17.
58 West Tankers, above n 30.
chartered by an Italian party collided with and damaged a dock owned by the latter in Syracuse, Italy. The charterparty contained a clause for arbitration of disputes in London. The Italian party was indemnified by its Italian insurers up to the limit of its policy, and recovered the balance of damages in London arbitration without incident. The insurers then began a subrogated action before the Italian courts in Syracuse to recover from West Tankers the sum paid out under the insurance policy. The action before the court was in tort and, but for the potentially effective arbitration clause, the Italian courts would have had jurisdiction under the Brussels I Regulation,\(^5^9\) which had by then largely superseded the Brussels Convention.\(^6^0\) West Tankers applied to the English courts for an anti-suit injunction restraining any proceedings by the insurer other than London arbitration, which was granted because under English law a party pursuing a subrogated right is also subrogated into an arbitration clause binding on the original parties to the dispute.\(^6^1\) The same is not necessarily true in Italian law, and although the New York Convention points to the law of the seat of the arbitration (in this case English law) as the appropriate law to resolve this question,\(^6^2\) it is unclear what result the Italian court might have reached as to its own jurisdiction. The insurer appealed the anti-suit injunction to the House of Lords, which made a preliminary reference to the Court of Justice on the question:

Is it consistent with EC Regulation 44/2001 for a court of a Member State to make an order to restrain a person from commencing or continuing proceedings in another Member State on the ground that such proceedings are in breach of an arbitration agreement?\(^6^3\)

The facts of this case differ from those in *Turner* because the Brussels I Regulation does not allocate jurisdiction where arbitration is concerned. In fact, the Brussels I Regulation expressly excludes arbitration from its scope, as had the Brussels

\(^{5^9}\) Brussels I Regulation, above n 33, Art 5 (3).

\(^{6^0}\) There is continuity between the Brussels Convention and the Brussels I Regulation, per Recital 19 of the Regulation, and jurisprudence of the former is applicable to the latter where relevant. See e.g. the Court of Justice’s references in the *West Tankers* judgment, above n 30, para 28, to several Brussels Convention cases.

\(^{6^1}\) *West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA* [2005] EWHC 454 (Comm).

\(^{6^2}\) Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 10 June 1958, 330 UNTS 3, Art V (1) (a) (*New York Convention*).

\(^{6^3}\) *West Tankers Inc v Ras Riunione Adriatica di Sicurta SpA and Others* [2007] I All ER (Comm) 794, para 23 (Lord Hoffmann) (*West Tankers (HL)*).
The Anti-Suit Injunction and the EU

The Court of Justice had already held in the *Marc Rich* case that the existence of an action on the merits in another member state should not interfere with court proceedings in support of arbitration. Furthermore, since *The Angelic Grace*, the English courts had readily issued anti-suit injunctions in support of arbitration, and commentators, including some eminent civilian scholars, have argued that the protection of an arbitration agreement is a situation in which issuing an anti-suit injunction could be considered justifiable. Finally, it should be noted that London is one of the few truly thriving international arbitration hubs in Europe, and it was feared that any interference with England’s arbitration process might harm London’s arbitration practice. In the totality of the circumstances, and especially because of the exclusion of arbitration from the Brussels I Regulation, it was entirely conceivable that the Court of Justice might reach a different conclusion on the anti-suit injunction in *West Tankers* than in *Turner*.

Ultimately, however, the court reached the same conclusion: the anti-suit injunction could not be used, even in these circumstances, to restrain proceedings in another member state. In a judgment that focused more on broad policy than technical legal arguments, the Court of Justice ruled that, because the Italian courts would have had jurisdiction over the substantive dispute under the Brussels I Regulation but for the arbitration clause, the English courts could not interfere in its decision whether or not to exercise that jurisdiction; to do so would be to interfere with the effectiveness of the Regulation. This is true even though the Brussels I Regulation does not provide a set of rules allocating jurisdiction where an arbitration agreement is concerned and the English proceedings in support of arbitration are expressly excluded from the Regulation’s scope. The English courts must allow the Italian proceedings to run their course, and the Italian court to determine whether it will accept jurisdiction under the Regulation or refuse it under Article II (3) of the New York Convention.

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64 Brussels I Regulation, above n 33, Art 1 (2) (d); Brussels Convention, above n 32, Art 1 (4).
69 *West Tankers*, above n 30, paras 24, 28–30.
70 Ibid, paras 28, 33.
between the courts of the member states requires this result.\textsuperscript{71}

And so it was that the Court of Justice finally prohibited the use of the anti-suit injunction by English courts against proceedings in other European member states, stripping the courts of their traditional remedy in IPL. The decision was met with dismay by English commentators who feared that London might suffer as an arbitration venue, but there was little they could do beyond grinding their teeth and looking towards a new future without anti-European-suit injunctions.\textsuperscript{72}

\section{A new legal tradition}

It is clear that the Court of Justice’s rulings on the anti-suit injunction have substantially limited access to a long-standing and ‘important and valuable weapon’ of the English courts in IPL.\textsuperscript{73} The English courts have long viewed themselves as having the prerogative to issue an anti-suit injunction, to the extent that the order has become a part of English, and indeed common-law, legal tradition.\textsuperscript{74} This tradition has clearly been eroded by the Europeanisation of IPL and the intervention of the Court of Justice.

However, it is important to consider what has come in the anti-suit injunction’s place and not to criticise change for criticism’s sake. The Court of Justice’s rulings in the anti-suit injunction cases, together with its rulings in other IPL cases, have begun to usher in a new paradigm and perhaps the beginnings of a new tradition in European IPL: a tradition of mutual trust.\textsuperscript{75}

\begin{thebibliography}{99}
\bibitem{p71} Ibid, para 30.
\bibitem{p73} \textit{Pena Copper Mines Ltd v Rio Tinto Co Ltd} [1911-13] All ER 209 (CA); \textit{West Tankers} (HL), above n 63, para 19 (Lord Hoffmann).
\bibitem{p74} Barceló, above n 1, 2.
\bibitem{p75} See \textit{Overseas Union}, above n 37; Case C-533/08, \textit{TNT Express Nederland BV v Axa Versicherung AG} [2010] ECR I-04107, paras 49, 54–6; Case C-139/10, \textit{Prism Investments BV v van der Meer} [2011]
\end{thebibliography}
a trust-based system, in which courts in different European member states cooperate and respect one another’s ability to decide and decisions rendered, has been recognised in scholarship.76 This is a move from legal imperialism to legal communitarianism; from unilateralism to multilateralism. It is a new way of approaching cases of *lis pendens* more in line with IPL in an internationalised form, such as the Brussels I Regulation or the proposed worldwide equivalent Hague Convention. This new approach is better suited to our increasingly globalised world.

But how well does this new approach work? At least in theory, where the Brussels I Regulation allocates jurisdiction, the mutual-trust-based approach should work well. In a situation such as in *Turner*, where the English court is the first-seised of an action and takes jurisdiction, any court subsequently seised should of its own motion decline jurisdiction under the *lis pendens* rule.77 Note that this is at any rate a situation in which the English courts would have been hesitant to issue anti-suit injunctions, so it will only be in a tiny minority of cases that a litigant who would otherwise have applied successfully for an injunction must now put his faith in the judgement of the foreign rather than the English court. The situation is different where the English court is second-seised of the same action, in which case it will have to stay proceedings pending the decision of the foreign court and will no longer be able to wrest control over a dispute by way of injunction. The exception to this is where the Brussels I Regulation provides for the exclusive jurisdiction of the courts of one member state, in which case the court having exclusive jurisdiction will be allowed to proceed regardless.78

The English courts were always more ready to issue an anti-suit injunction to protect a choice of court agreement.79 Under the ruling in *Gasser*, the jurisdiction of courts under these agreements was not protected in the same way as exclusive jurisdiction under Article 22 of the Brussels I Regulation, but

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77 Brussels I Regulation, above n 33, Art 27.

78 Ibid, Art 22; *Overseas Union*, above n 37, para 26.

79 See *National Westminster Bank*, above n 12.
was subject to the ordinary *lis pendens* rule at Article 27. In the Brussels I Regulation Recast, which will take effect on 10 January 2015, this rule has been reversed, meaning that proceedings before a court designated in a choice of court agreement will be able to proceed regardless of whether that court was first- or second-seised of the action. The courts of other member states will be required to stay once the designated court has been seised. This should support party autonomy and enhance the effectiveness of choice of court agreements in a far less divisive fashion than the unilateral injunction of proceedings before one court by another. The prohibition of the anti-suit injunction should thus cause little-to-no harm in situations where the Brussels Regime allocates jurisdiction.

The same cannot be said for situations in which the Brussels I Regulation does not allocate jurisdiction, namely, where the anti-suit injunction would have been issued to protect an arbitration agreement. In this case, it is Article II (3) of the New York Convention that allocates jurisdiction to the arbitral tribunal rather than any rule of the Brussels I Regulation. Indeed, because of the exclusion of arbitration at Article 1 (2) (d) of the Brussels I Regulation and the combined case law of *Marc Rich* and *West Tankers*, there is effectively a right to commence parallel court proceedings alongside arbitration. The only thing preventing the parallel arbitration and litigation of the entire dispute is the hope for harmonious application of the New York Convention, which is not subject to oversight and enforcement by a supranational body like the Court of Justice. This is so despite arguments from commentators that the enforcement of an arbitration agreement should be considered a special case, calls for reform to protect arbitration agreements in the Heidelberg Report, and a proffered solution in the Commission’s Green Paper and Recast proposal, ultimately rejected by the

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80 Gasser, above n 38, paras 42–54.
82 Ibid, Recital 22, Art 81.
83 Ibid.
85 Marc Rich, above n 65.
86 West Tankers, above n 30.
87 Barceló, above n 1, 2; Ambrose, above n 7, 419.
88 Heidelberg Report, above n 67, para 123.
90 European Commission Proposal for a Regulation of the European Parliament and of the Council on
European Parliament\(^91\) and discarded as the legislature pursued other legislative priorities.\(^92\) Instead of this, the Recast adds a recital\(^93\) reaffirming the arbitration exclusion in an unclear fashion likely to cause as many problems as it solves.\(^94\) It is also inconsistent with the autonomy-based approach to choice of court agreements taken in the Brussels I Recast.\(^95\) The English courts are therefore quite likely to find themselves in a position where they wish they still had access to anti-suit injunctions to protect arbitration agreements. Nonetheless, this is a problem that could and should be solved by a rethinking of the Brussels I Regulation’s relationship with arbitration\(^96\) and not by the regressive step of re-instating the anti-suit injunction.

5 Conclusion

The replacement of the English tradition of issuing anti-suit injunctions as an IPL remedy by a European tradition of mutual trust in the administration of justice by courts of member states is to be welcomed. It is a progressive step that should bring European countries closer together where the previously prevailing approach in England would be likely to drive them apart. The exception to this positive assessment of the paradigm-shift in European IPL is in respect of arbitration agreements, where the anti-suit injunction has been taken from the English courts without provision of an effective alternative under the Brussels I Regulation or the Recast. This author takes the view that this is a problem inherent in the Regulation’s relationship, or lack thereof, with arbitration, best addressed when the instrument is next reviewed, and certainly not a problem that justifies regression to the archaic practice of restraint of proceedings before foreign courts. In short, this is an area in which tradition should not be allowed to stand in the way of progress.


\(^92\) See the Council’s Press Release on the Recast: Recast of the Brussels I Regulation: towards easier and faster circulation of judgments in civil and commercial matters within the EU 16599/12 PRESSE 483.

\(^93\) Brussels I Regulation Recast, above n 81, Recital 12.

\(^94\) For a summary of the changes and a short comment, see Dowers & Holloway, above n 84.

\(^95\) Ibid, N21.

\(^96\) Ibid.
BEING AN INTERNATIONAL LAW LECTURER IN THE 21ST CENTURY: WHERE TRADITION MEETS INNOVATION

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Abstract
This paper examines the legal tradition of teaching and researching international law at universities all over the world, in order to achieve two main goals. First, this paper maps diverse national and regional legal traditions in teaching and researching international law. For example, what topics are addressed for which target audience? Who teaches international law in preparation for which professions? Can one speak of an Asian, as opposed to an African, European, Latin American or North American way of teaching and researching international law? Secondly, this paper calls for a codification of ‘good practices’ in teaching and researching international law so as to take its global aspirations seriously.

Keywords
International law, legal education, legal profession, legal research, open access

1 Introduction

One means to bring about this desirable condition [settling international controversies without war] is to increase the general public knowledge of international rights and duties and to promote a popular habit of reading and thinking about international affairs.1

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1 E Root, ‘The need of popular understanding of international law’ (1907) 1 AJIL 1, 2.
US Secretary of State Elihu Root published this call for education of the public in matters of international law on the first page of the first issue of the American Journal of International Law—and it remains as important today as it was in 1907. This paper examines the legal tradition of teaching and researching international law at universities all over the world, in order to achieve two main goals. First, this paper maps diverse national and regional legal traditions in teaching and researching international law. For example, what topics are addressed for which target audience? Who teaches international law in preparation for which professions? Can one speak of an Asian, as opposed to an African, European, Latin-American or North-American way of teaching and researching international law? Second, this paper calls for a codification of ‘good practices’ in teaching and researching international law so as to take its global aspirations seriously. Only then can research-led teaching introduce students to different histories and conceptions of international law, in a manner that encourages sensitivity and respect. This is crucial to maintaining the legitimacy and relevance of international law, as it seeks to constructively engage a global audience that is ever more astute and critical.

This commitment impacts what is being taught and researched, as well as how this is done. International law lecturers need to facilitate student engagement with potentially unfamiliar ideas in a meaningful way, which in turn influences scholarship as a whole. To ensure a high-quality diversity of voices in international law, our research and publication processes need to be structured to overcome barriers of resources and access. Educators and researchers have begun to develop and implement a variety of innovative strategies and tools in the teaching and research of international law, such as open access policies, accessible internet platforms, joint anthologies and teaching collaborations. By highlighting positive examples, this paper suggests ways to build upon tradition and use innovation so as to move forward as teachers and scholars of international law. It should also be noted at this point that this is an ongoing research project. The findings and analysis presented in this paper are therefore preliminary in nature, with the aim of encouraging exchange and debate.
2 Mapping national and regional traditions in teaching international law

2.1 Research methodology: quantitative and qualitative data

The methodology which underlies this part of the paper on teaching international law is two-pronged: the authors have conducted an extensive quantitative study of international law courses taught at universities worldwide, which has been complemented by a qualitative analysis based on the discussions and writings of international law lecturers in academic literature as well as within the framework of the International Law Association (ILA).

With regard to the quantitative research part of the project, the authors have collected their empirical data on international law courses based on the information provided by law schools on their official websites. This unfortunately entails the risk that such information is incomplete or not up-to-date. Furthermore, due to the sheer number of law schools, a selection had to be made. For this purpose, the authors have opted to examine international law courses offered at 150 law schools worldwide, based on the rankings of the 'most popular' law schools according to the LLM GUIDE:

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The monthly rankings in the Most Popular LLM Programs section are determined by the number of user page views per LLM program listing. Therefore, the popular LLM programs are simply the programs that LLM GUIDE users have viewed most frequently. The number of user page views also determines the of LLM programs in the geographic-based program searches.

2 International law courses taught at international relations or political science schools have not been included in the survey.

The authors realise that this ‘popularity’ selection criterion is open to criticism but nevertheless opted to use this online database as a starting point of the present study for the following reasons. First, it is a widely used source of information which allows prospective students to compare LLM programmes. Reportedly, many students’ application choices are (at least partially) based on information obtained from the LLM GUIDE. Second, it is a database which compiles input from visitors from all over the world—leading to a more neutral or balanced list for our purposes, compared to country-based lists such as the Times Higher Education ranking or the Shanghai list. Third, contrary to lists which rank universities as a whole, LLM GUIDE rankings are focused on law schools, so the data are not influenced by, for example, very well-performing medical schools. Fourth, LLM GUIDE rankings are based on student input, so teaching experiences have a much larger impact on a school’s ranking than the number of Nobel Prizes or A-list publications of its staff members (although the latter may also be taken into account by students who wish to find out more about a certain school). The relatively modest influence of teaching practices (as opposed to, for example, citations of faculty members’ papers) on the place of a university in global rankings is an oft-lamented issue which, particularly for this paper, needs to be re-assessed. Fifth and finally, ‘most popular’ does not necessarily mean ‘qualitatively best’; however, ‘most popular’ does imply that these schools in many ways set the standards for other schools, so their international law practices, both at LLM and LLB level, deserve most scrutiny.

More specifically, the authors have analysed data of 25 law schools in the USA;

25 in the Americas (outside of the USA); 25 in the UK and Ireland; 25 in Europe (outside of the UK and Ireland); 15 in Africa; 25 in Asia and 10 in Australia and New Zealand. For each of these, the following issues were examined:

- Which topics are addressed in international law courses (e.g. use of force, treaty law)?
- Who is the target audience and is this a mandatory or a voluntary course for these students (e.g. first year undergraduate, final year undergraduate, master's student)?
- Which sources are relied upon (e.g. which reading and other materials are used)?
- Who teaches international law (e.g. profile of professors: practitioners and/or academics)?
- Is a link made between international law and legal practice (e.g. through clinics, moot courts, internships, law clerkships, etc)?

The authors chose to focus on these issues because they give a good insight into the extent to which international law engages today’s law students in an inclusive and relevant manner.

With regard to the qualitative research part of the project: the authors have relied on discussions among and interviews with international law lecturers, for example within the ILA Committee on the Teaching of International Law, as well as several previous studies. These have been referred to in the footnotes where appropriate, but two papers deserving particular mentioning: John Gamble’s ‘International law teaching: glass(es) half full? Rose colored? Red/white and blue?’ and Charlotte Ku’s ‘International law: what to teach and why?’—both of

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which provide interesting insights into the US teaching practice. Throughout the paper reference is made to data obtained from interviews, particularly when a large majority of interviewees, independently from one another, shared a similar approach or opinion.

Based on the data thus retrieved, the authors have answered the following questions: what are common or region-specific obstacles to the communication of international legal knowledge to students in an applicable and globally sensitive manner? Can one speak of an Asian, as opposed to an African, European, Latin-American or North-American way of teaching international law? The answers to these questions in turn serve as a basis for the subsequent section in this paper, in which the authors set out a number of best practices in relation to the research of international law—as the foundation upon which university-level teaching is based.

2.2 Commonalities and diversities in international law courses

2.2.1 Topics taught

There are some clear commonalities in the lecture topics of international law which were found in virtually every course curriculum examined. These are: sources of law; legal subjects; use of force; human rights; and international dispute settlement. There are also notable differences; for example, at many law schools, there is strong emphasis on treaty law in all its aspects, relegating customary law and general principles to a ‘second-rank’ place (which does not entirely square with their—at least officially—equal importance within the hierarchy of sources of international law). Other law schools, not surprisingly in common law countries, seem to elevate case law to the top of the sources hierarchy, almost treating it as a primary rather than subsidiary source. Within the topic of legal subjects, some schools (for example those in Eastern Europe and Asia) discuss sovereign states to the exclusion of nigh all other possible

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9 Both papers are on file with the authors and an abbreviated version will be published in the ‘Meeting report of the International Law Association Committee on the teaching of international law’, in Report of the Seventy Fifth Conference, Sofia (2012) ILA Publications, forthcoming.

10 Many lecturers expressed significant concerns about the confidentiality of their answers, so all interview data have been anonymised. Should readers be interested in examining more specific raw data, the authors are willing to share these, along with relevant details such as geographical location and the interviewee’s level of seniority, keeping in mind the need to limit information to prevent identification and maintain confidentiality.
subjects. Yet other schools extensively discuss the role of regional organisations, individuals and even mankind as a whole (Europe and Africa).

With regard to the use of force, the findings are unsurprising: in the US and a number of like-minded states, the government’s official policy has clearly permeated academic teaching. Humanitarian intervention and pre-emptive strike are included as largely, if not entirely, accepted justifications for the use of force, in addition to collective security and self-defence. The large majority of courses address human rights but, understandably, focus mainly on the international covenants, except in countries where a regional human rights convention is in force (Latin-America, Africa and Europe). Regarding international dispute settlement, most courses focus only or mainly on the International Court of Justice, but others also mention international arbitration and (rarely) forms of alternative dispute resolution.

Some sub-fields of international law, such as international environmental law, international economic law and international criminal law, are taught mainly at western universities, although international economic law in its various aspects (trade, investment and finance) is gaining ground at African universities. There are also significant differences between countries regarding the attention paid to the implementation of international law in the domestic system, which is most often elaborated upon in-depth at common law universities.

2.2.2 Audience and mandatory/voluntary status of the course

International law is offered as a subject at all examined universities and in many (but not all) law schools, and it is a mandatory course in the LLB programme (with the exception of the US where law as such can only be studied at graduate level). Even at universities where the study of international law is not mandatory, such as the Law Tripos at Cambridge, most students choose to take it in practice. Several universities, such as NYU and Leiden, offer a specialised LLM programme that solely focuses on international law topics, but even at universities which do not have specialised tracks, it is often possible to pursue an LLM degree by taking solely or mostly international law courses.

2.2.3 Teaching and reading materials

Broadly speaking, two trends can be discerned in the use of teaching and reading materials which roughly seem to be based on the common law versus civil law divide. At universities in the UK, Ireland, New Zealand and Australia, interna-
tional law is taught with a heavy focus on its development through case law, including the decisions of national courts implementing international rules (or the national laws incorporating them). In continental Europe and Latin-America, international law is taught by emphasising the theoretical structure of the system, relying on analysis in scholarly writings.

The US is somewhat of an in-between case as so-called Restatements are used, which are a set of treatises that seek to inform judges and lawyers.\textsuperscript{11} They are essentially codifications of case law, based on judge-made doctrines that have developed gradually because of the principle of \textit{stare decisis}, or binding precedent. Although Restatements do not form binding authority in and of themselves, they are considered highly persuasive because they have been formulated over several years with extensive input from law professors, practising attorneys and judges. They are meant to reflect the consensus of the American legal community as to what the law is (and in some cases, what it should become).

Evidently, every set of materials has its advantages and disadvantages: common law students might lose sight of the larger international law forest due to their focus on individual case law trees, while civil law students are heavily influenced by the particular approach of whoever happens to be the author of their textbook. An additional problem for the latter is that English is often not their mother tongue and if their textbook is not written in English either, it becomes difficult for them ever to grasp the full meaning of the rules as expressed in the original materials (treaties, case law) which are most often written in English.

\subsection*{2.3 Profiling the international law teacher}

One does not necessarily need to have taken an international law course as a student in order to be subsequently successful as a teacher of international law. Gamble recalls, for example, that he once asked an assembly of members of the American Society of International Law (ASIL) in the 1990s how many in the group had \textit{not} taken an international law course while pursuing their first degree in law and to his surprise, among others, Abram Chayes and Louis Henkin ‘somewhat sheepishly’ raised their hands.\textsuperscript{12} Interestingly, none of the Europeans present at the meeting did so, which could indicate that the entry of international law as a mandatory course within law school curricula occurred

\textsuperscript{11} American Law Institute, \textit{Restatement of the Law (Third): Foreign Relations Law of the United States}.

earlier in Europe. Admittedly, some more candid readers could equally suggest that European international law teachers are less eager to make such a confession than their US counterparts.

What is sorely needed for all lecturers, not merely those lecturing international law, is the re-valuing of the teaching aspect of the job. To put it in a caricatural manner, teaching sometimes seems to have become something every self-respecting, ambitious academic ought to run away from as soon as possible.\footnote{This could be caused by the fact that teaching evaluations play a very small role in the ranking of law schools, as examined in the literature referred to in above n 5 and 6.}

If after some years in academia, one still has a heavy teaching load, it is almost viewed as a sign that one has not been successful in the more prestigious aspects of the academic job, such as research or management. Generally speaking, looking at faculty profiles world-wide, junior academics (assistant and associate professor level) are involved in three or four courses on average, with not-to-be-envied exceptions who have to perform in seven or eight courses. For senior academics (full professors), this number drops to one or two courses on average, with exceptions teaching four or five.\footnote{For both groups, only the official courses in the curriculum were counted, although many academics teach extra hours as guest lecturers.}

If one is to calculate the actual amount of teaching hours,\footnote{Here the local system was adopted to calculate hours, so an hour was counted as an hour if the law school calls it so, bearing in mind that some universities apply a ‘one hour equals 45 minutes of teaching’ system.} taking into account lecture time (but not lecture preparation as well as setting and correcting exams) and time spent practising with students in seminar groups, clinics and moot courts (but not research supervision time), the disparity between junior and senior lecturers is even greater. This is not to say that senior faculty work less hours—but they spend (significantly) less hours teaching.

It is impossible to compute the precise average teaching time put in by individual faculty members, as their web profiles often do not mention the specific allocation of each lecturer within a course. For example, an international law course in an LLB programme consists in many countries of plenary lectures of two hours per week taught by a senior lecturer, as well as seminar sessions in smaller groups, taught by junior lecturers. If such a course lasts five weeks, the senior lecturer will have taught 10 hours, while a junior lecturer covering five smaller groups will have been required to teach 50 hours. In the light of the fact that junior lecturers are on average involved in more courses and typically take on more groups within these courses, it can be concluded that world-wide, the least experienced seem to be carrying the heaviest teaching load. However, it needs to
be emphasised that this is a generalised finding, bearing in mind that there are differences between universities and even within universities, between different departments. Some law schools have a stricter policy whereby all staff members are allocated an equal load of teaching hours. One way to promote the research and development of early career academics is to allocate them lighter instead of heavier teaching loads.\footnote{For example, the National University of Singapore, the home institution of one of the co-authors, allows new faculty to claim a certain amount of teaching relief upon completing mid-term reviews.}

Moreover, in some countries (e.g. Germany or the UK), law schools do not have a separate ‘international law department’, so international law lecturers are linked to the public law department as such. Thus they are required to teach not only international law, but also EU law, national public law, constitutional law, administrative law, land law or tax law. All interviewees who participated in this study and who are working in such a system were asked whether, based on their own perception, they are up-to-date with developments in each of the fields they teach. Not a single interviewee responded that (s)he was. Apart from the personal anguish of having to teach a subject which one barely knows better than the students whom one is teaching, this is also detrimental to the students themselves as it deprives them from gaining insights a true specialist in the matter could have offered them—which is exactly the advantage of university-level teaching.

Additionally, at many universities in continental Europe (unlike the UK and the US), if a course is taught by several lecturers, the course convener tends to be the most junior person on the list. On the one hand, this is understandable, as convening a course entails significantly more (mainly administrative and logistical) work than lecturing in it. On the other hand and weighing in much more heavily, junior lecturers do not yet have the experience senior lecturers have—so it is rather counterintuitive to give them the bulk of additional work, bearing in mind that preparing their lectures properly already takes them more time than it would for a senior member of staff. Several interviewees noted that after taking care of all organisational elements relating to the course, they were too exhausted to prepare the lectures themselves in the manner and at the depth which they would have preferred and would have felt comfortable with. In the words of one interviewee, the most he could do, was ‘to stay one week ahead of the students’.

Many universities today offer their staff members some form of teaching skills courses, including how to approach diversity in the classroom and how
to objectively evaluate students and how to give constructive feedback. In most universities, participation in such courses seems, however, to be mostly obligatory for junior staff members, while senior members are simply assumed to be natural-born teachers, researchers, supervisors, fundraisers, managers, etc. Aside from the perceived unfairness on the part of the junior lecturers who have to invest substantial time in such skills courses, a number of senior interviewees expressed interest in participating but also hesitance at ‘being seen attending’, as if this would equal admitting that they ‘had been doing it wrong for years’. The fairest solution would seem to be that, similar to what is the case in many countries for practising members of the Bar, a system be put in place whereby all members of staff annually have to earn a number of ‘skills credits’. Where a more junior member might for example opt for a course on setting exams, a more senior member might benefit from a seminar on using e-learning environments.

### 2.4 Linking international law and legal practice

Louis Henkin noted in 1979 that:

> today, international law is taught in the universities, practiced by lawyers, weighed by foreign offices, invoked by governments in relations with other governments. About the scope of international law, however, about its role in international relations, about its influence in foreign policies of nations, there is little agreement and, I dare say, little learning and much misunderstanding.\(^\text{17}\)

#### 2.4.1 The lecturer as living link between theory and practice

Unfortunately, such misunderstandings continue to exist to this day, largely due to the increasing ‘academisation’ of the teaching profession. Fifty years ago, rather few (international) law professors were solely academics, regardless of the university they were teaching at.\(^\text{18}\) Their practice enriched their teaching and *vice versa*—while simultaneously, students obtained a realistic picture of the job possibilities offered by the study of (international) law. Today, lawyers are forced to choose: either practice or academia—possibly one followed by the other and some people seem to be yo-yoing back and forth in their careers, but the simultaneous pursuit of both is increasingly being rooted out.

Admittedly, some abuses had to be remedied, as teaching often landed rather low on the priority list, but the cure seems to be worse than the disease and has seriously impoverished the capabilities of lecturers to link international law and practice in a meaningful manner. There are a number of exceptions to this rule, such as James Crawford at Cambridge, Alain Pellet at Paris X or Philippe Sands at University College London. Readers should hereby bear in mind that ‘international legal practice’ is far from limited to its (perhaps most spectacular) form of arguing cases before the International Court of Justice (ICJ) or the International Criminal Court (ICC). Most international law is debated before national courts; as became visible in the Pinochet case before the English House of Lords, the Somali piracy cases before the Dutch Courts and the countless international trade rules which, after being incorporated in domestic law, form the legal basis of many national disputes.19 And even if academics do not follow a litigation vocation, obtaining practical experience is not limited to court work: it also includes working for NGOs, being part of expert committees drafting national statutes to implement international law, being an in-house counsel for a multinational, etc.

However, it is an outstanding matter whether junior lecturers will be able to follow in the footsteps of these examples as the data show many of them report to be so pressed with teaching, publication and fundraising requirements that they lack the energy to build up their practice in addition—provided that their departments would even allow them to. This is a highly negative development, not only for the teaching of international law, as lecturers cannot teach about practice they do not know, but also for their individual development. It makes lecturers unsuitable for any other job and thereby removes their option of choosing a different career path later in life—which several interviewees directly blamed for the burn-out, or at least ‘severely diminished enthusiasm’, of many colleagues.

To make matters worse, even were this deterioration in the well-versedness of lecturers to be recognised, it would be difficult to turn the tide, as by then, law schools might be governed by people who never obtained any practical experience—and what one has never experienced, one often does not miss. One solution would be to establish more part-time lectureship positions with the possibility of obtaining tenure (unlike the current US practice). This is practically already possible at many universities, albeit for other reasons such as parenthood,

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19 In Re Pinochet [1999] UKHL 1; LJN BY6943, Gerechtshof’s-Gravenhage, 22-004047-11 (20 December 2012); LJN BR4930, Rechtbank Rotterdam, 10/960248-10 (12 August 2011).
but it would be hard to defend that the care for a child is an acceptable reason for part-time work, while one’s personal development is not—particularly as the latter also directly benefits the students. Courses can easily be (and often are already) taught by more than one person, this would even enhance the student experience as part of university level education is to be exposed to different styles and approaches.

2.4.2 Mimicking practice: moot courts

In actual practice, it is very unlikely one will ever be asked to sum-up the Montevideo criteria for statehood or to define most-favoured-nation treatment, but lawyers working for a government might well receive a request for advice on the recognition of Kosovo as a state and those associated with a law firm might have to examine whether non-discrimination rules have been violated by the adoption of a particular trade measure. In this light, another useful way of linking theory to practice is for students to ‘pretend’ they are practising lawyers, by means of a fictitious case. The authors have not been able to find even one lecturer who had participated in a moot court and afterwards considered it a waste of time. A small but not negligible number of interviewees did express doubts as to the usefulness of moot courts (particularly the intensive practice sessions which precede the actual moot)—none of whom, again without exception, had participated in a moot court as a student themselves. Unlike the concerns put forward in the previous section on the increasing academisation of the international legal teaching profession, there is a more positive trend emerging regarding the perception of moot courts.

Without making any claim to exhaustiveness and in addition to the many internal moot courts set up within universities, students can participate in a wide variety of international law moot courts organised at the global level, focusing on public international law in general (Philip C Jessup; Telders), human rights (René Cassin; Inter-American Human Rights Moot Court), criminal law (ICC Trial Moot Court), trade law (WTO Elsa), investment law (Frankfurt Investment Arbitration Moot Court; Foreign Direct Investment International

23 <http://www.elsamootcourt.org/> [accessed 14 September 2013].
Arbitration Moot),\textsuperscript{24} humanitarian law (Frits Kalshoven; Jean-Pictet)\textsuperscript{25} and space law (Manfred Lachs).\textsuperscript{26} If there is one comment common to all students who have participated in such moot courts, it is that they have learned much more from them than from most taught courses—which also puts in perspective the effectiveness of the traditional \textit{ex cathedra} style of lecturing.

Luckily, law schools worldwide are starting to understand this, leading to over 550 schools participating in the Jessup competition for example. Also, funding agencies and academic and professional societies are increasingly seeing the relevance of moot courts as an indispensable part of students’ legal training and are supporting the travel and accommodation costs of teams. More can be done, however, to support teams in terms of rewarding the time invested, as many law schools still regard mooting as a useful extra-curricular activity but are not willing to actually include it into the curriculum and offer course credit for participation in a moot court. Also, if mooting is to be generally recognised as a desirable fixed element in every law programme, it ought to be made mandatory for all students. Not all will be able to participate in an international moot court so alternatives ought to be devised within the law school itself—a practice which has already been adopted by a great number of continental European, UK and US universities.

\subsection*{2.4.3 Tasting practice: internships and clerkships}

A final way in which students can be shown how the theoretical study of international law is linked to its legal practice is through internships and clerkships. Unfortunately, this still seems to be the privilege of students at universities in Western Europe, the UK and (to a lesser extent) the US. In particular, universities that are conveniently located near one of the centres of international law (New York, Geneva and The Hague) manage to gain a significant advantage over other universities when it comes to attracting students from all over the world. Some of the wealthier institutions have secured internships for some of their students with, for example, the UN Headquarters, the ICJ and the Permanent Court of Arbitration by concluding specific agreements.

\textsuperscript{24} <http://www.merton-zentrum.uni-frankfurt.de/Start/FIAC_International_Student_Moot_Court/>; <http://www.fdimoot.org/> [accessed 14 September 2013].


\textsuperscript{26} <http://www.iislweb.org/lachsmoot/> [accessed 14 September 2013].
A ready solution does not lie at hand, as living in these cities for three to six months is extremely expensive by all students’ standards and places are limited. Nevertheless, also in this area, additional efforts could be made in terms of offering places more widely (for example, at domestic courts and tribunals which deal with international law, such as the International Crimes Division of the High Court of Uganda) as well as procuring funding for students to take up such positions. In addition, many developing country missions to the UN or the WTO, for example, welcome interested students (regardless of nationality) as they do not have the funds to employ sufficient full-time delegates themselves to follow all relevant meetings. Providing students with access as widely as possible to participate in such internship programmes is particularly important because many positions at international organisations, for example at the ICC, are often offered to people who have previously interned there.

2.5 Preliminary conclusions on the teaching of international law

Clear commonalities exist in the choice of international law topics in the examined course curricula, such as sources of law, legal subjects and use of force—although the precise content and approach may differ. Some sub-fields of international law, such as international environmental law, international economic law and international criminal law, are commonly included in western law schools, but not beyond. International law is offered as a subject at all examined universities and in many law schools, it is a mandatory course. Broadly speaking, two trends can be discerned in the use of teaching and reading materials which roughly seem to be based on the common versus civil law divide: a heavy focus on the development of international rules through case law versus an emphasis on the theoretical structure of the system, as analysed in scholarly writings.

The present paper urgently calls for a re-evaluation of the teaching part of international law lectureships. Junior lecturers are, on average, involved in more courses and typically take on more groups within these courses, so worldwide, the least experienced often seem to be carrying the heaviest teaching load. However, this is a generalised finding, bearing in mind that there are differences between and within universities. In law schools which do not have a separate ‘international law department’, international law lecturers are linked to the public law department and have to teach a wide variety of courses. This makes it impossible for them to remain up-to-date with developments in each
of these fields—to the detriment of the academic quality of their lectures and, ultimately, the education of their students.

Additionally, if a course is taught by several lecturers, the course convener tends to be the most junior person on the list, although they do not yet have the experience senior lecturers have. It is rather counterintuitive to give them the bulk of additional work, bearing in mind that preparing their lectures properly already takes them more time than it would for a senior member of staff. In most universities, participation in skills courses is obligatory for junior staff members, while merely optional for senior members. This paper advocates the adoption of a system whereby all members of staff annually have to earn a number of ‘skills credits’.

The ‘academisation’ of the international law lectureship has seriously impoverished the capabilities of lecturers to link international law and practice in a meaningful manner. ‘International legal practice’ is far from limited to arguing cases before the ICJ or the ICC as most international law is debated before national courts. Obtaining practical experience is moreover, not limited to court work: it also includes working for NGOs, being part of expert committees drafting national statutes to implement international law, being an in-house counsel for a multinational, etc.

Students who have participated in international moot courts commonly remark that they have learned much more from them than from most taught courses—which also puts in perspective the effectiveness of the traditional ex cathedra style of lecturing. Luckily, law schools worldwide are starting to understand this, while funding agencies and academic and professional societies are increasingly seeing the relevance of moot courts as an indispensable part of students’ legal training and are supporting the travel and accommodation costs of teams. More can be done to support teams in terms of rewarding the time invested, by incorporating moot courts in the curriculum and offering course credit for participation. Internships and clerkships unfortunately still seem to be the privilege of students at universities in Western Europe, the UK and (to a lesser extent) the US. Efforts should be made in terms of offering places more widely as well as procuring funding for students to take up such positions.

In sum, there are some common obstacles to the communication of international legal knowledge to students in an applicable and globally sensitive manner. These are usually not region-specific but rather correspond to the common law or civil legal tradition: there is no Asian, as opposed to an African, European, Latin-American or North-American way of teaching international law—with the exception, perhaps of the reliance on the US Restatements at US law schools. This
analysis of teaching practices serves as a basis for the subsequent section, in which a number of best practices in relation to the research of international law are set out—as the essential foundation upon which university-level teaching is based.

3 Ensuring inclusion and diversity in international law research

3.1 Research questions and methodology

In this part of the paper, the authors focus on research trends and practices in international law. It proceeds based on the belief that for international law to be truly legitimate at a global level, it must generate knowledge that is truly representative and inclusive in nature. It must aim to transcend the boundaries set by geography, economics, culture or demography. We examine the state of international law research from three perspectives: access, capacity and collaboration. Specifically, we discuss the need to ensure accessibility of knowledge and research on international law, the need to address non-scientific research barriers and the need to facilitate the equal exchange of ideas between researchers.

This section adopts the following approach and methodology in addressing its questions of access, capacity and collaboration. To provide us with a snapshot of the type of international law research being conducted and where such research is being published, we examined lists of journal rankings compiled by a number of research organisations. As it is common practice among academics to consider a journal’s ranking when deciding which journal to submit their article for publication and as highly ranked journals thus have a larger pool of articles to choose from when deciding which articles to publish, it is reasonable to

27 Lists of ten journals each were constructed based on an across the board analysis of rankings by Washington & Lee, Google, Stirling and Siemslegal (a blog which made use of 2008 RAE data), bearing in mind the strong US focus of the list by Washington & Lee and the strong UK/Europe focus of RAE data. They were classified based on their editorial background and purported focus: general global journals, American journals, European journals, Asian journals, African journals and Latin American journals. We ruled out journals that were very new or did not focus much on international law. For the Asian and African list, we primarily relied on Washington & Lee’s listing of ‘Asian law’ and ‘African law’, identifying the journals dealing with international law. Many of these journals were assigned a low or no impact factor. The Latin American list was constructed based on the LATINEX database, which is a collaboration between various research institutions across Latin America, but also including Spain and Portugal. The Latin American list was compiled in no particular order.
conclude that the articles published in these journals will be of a higher quality and relevance. These highly ranked journals may be seen as a source of high quality international law knowledge.

Based on these global lists and additional research, we then compiled lists of regional journals based on the journal’s editorial composition and its stated regional emphasis. This enabled us to construct lists of well-reputed journals by region. We presumed that with their purported regional emphasis, these journals give special attention to region-specific topics and perspectives. They therefore serve as a high quality source of region-specific legal knowledge. In putting together these global and regional lists based on journal rankings as an indicator of research quality, we recognise that we are relying on the quality controls established by these journals’ peer-review system and reputation. We acknowledge, however, that these rankings can serve only as general benchmarks and that the quality of research should be judged by its content rather than the ranking of the journal in which it was published.

This section’s analysis of research trends in international law proceeds as follows: first, based on an analysis of our empirical data, we provide an overview of research practices in a particular area. Second, we evaluate the inclusivity and representativeness of these practices, highlighting some progressive developments. Last, we put forward suggestions to improve research access, capacity and collaboration. It making our proposals, we draw on some practices first developed within non-law disciplines, such as natural sciences and medicine. We do try, as much as possible, to refer to examples from the discipline of international law. Given the preliminary and ongoing nature of our research, the examples put forward in this paper are largely from the authors’ areas of expertise and are not intended as a complete survey of innovative exercises in the field of international law. As we hope for our paper to serve as a point of reference for those interested in such best practices, we would be happy to include other international law examples brought to our attention in future studies.

### 3.2 Equal access to resources and the open access movement

Access to existing research is necessary for the creation of new research findings and theories. Indeed, as observed by many scholars, research is never completely ‘new’ in nature. Rather, all research builds on and benefits from previous research done by others. Access to existing research is thus a precondition for further research. This research process has generally become a much more convenient affair today. By accessing online journal subscriptions, e-books and research
databases, many academics from developed countries are able to get all the information they need for their research without leaving their desks or offices. Rather than searching for information, they are inundated instead with too much information. Various software has been developed to assist researchers in the managing and organising of their research material and many universities in developed countries now run courses on the use of such software.28 Not all academics are in this fortunate position. These include those from institutions or societies that do not have the financial resources to pay the subscription fees charged by commercial publishers or database companies for access to such research. Most academic institutions in developing countries are unable to afford these subscription fees.29

Private publishers and database providers offer valuable services which have greatly contributed to improving research quality and speed. However, this does not justify the oftentimes excessive fees charged. Current practices are arguably too profit-oriented and not justified by the cost of the research and publishing process.30 Take journal publishing practices as an example. The researcher does not require any fee for turning over his or her research findings and article to the publisher. He or she considers him- or herself remunerated for the research through his or her salary from his or her academic institution. Research costs are usually covered by the researcher’s academic institution or external funding sources. Upon being submitted to the journal concerned, the research article is assessed and refined by peer-reviewers and editors who are academics and provide these services without charge. Upon the article’s acceptance and though the researcher does not receive any financial remuneration for the published article, he or she is required to sign over all copyright to the publisher concerned. By insisting on exclusive copyright and charging high subscription fees, the publisher limits access of the research article to those who can afford it.

Currently, this continues to be the publishing model subscribed to by most international law journals. Though there are an increasing number of journals, the CJICL included, that provide complete access to their articles at no cost on

28 Examples of such software include EndNote, Mendeley and Zotero. The latter two are free software.
29 See, for example, OUP’s policy on offering access at free or reduced prices for some articles and journals to developing countries: <http://www.oxfordjournals.org/access_purchase/develping_countries.html> [accessed 8 May 2013].
their websites, these continue to be exceptions to the rule. A number of journals on our global and regional lists provide complete or significant levels of open access to their articles.\(^{31}\) Others require authors to pay a certain fee for their articles to be published on an open access basis.\(^{32}\) But a substantial number continue to provide access only to fee-paying subscribers. As further explained below, there have been an increasing number of open access developments that, if properly implemented, can further facilitate access to international law research.

### 3.2.1 The development and dissemination of open access tools

The past decade has seen the rise and spread of the open access movement within academia.\(^ {33}\) A decade ago, researchers and institutions set up the Budapest Open Access Initiative to encourage open access efforts. It published a set of guidelines to which hundreds of institutions and universities have pledged their support.\(^ {34}\) Universities that have signed on to these guidelines include the European University Institute, Harvard University and Oxford University Libraries. Open access advocates argue that academic research should be made available to the general public on an unrestricted and free-of-charge basis. From a human rights perspective, open access plays an important role in fulfilling the human right 'to enjoy the benefits of scientific progress and its applications', which is recognised by Article 15(1)(b) of the International Covenant of Economic, Social and Cultural Rights (ICESCR).\(^ {35}\)

Researchers have long been able to self-archive their works-in-progress via various internet platforms, such as SSRN.\(^ {36}\) However, researchers are often

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31 Journals providing complete open access include the Harvard International Law Journal, the Michigan Journal of International Law and the German Law Journal. Some provide extensive though not complete open access. For example, the European Journal of International Law’s archive includes all published articles ‘until one year prior to the present’, see <http://www.ejil.org/archives.php> [accessed 15 October 2013].


33 For a comprehensive discussion of open access from a human rights perspective, see A B Skre & A Eide, ‘The human right to benefit from advances in science and promotion of openly accessible publications’ (2013) 31 NJHR 427.

34 <http://www.opensocietyfoundations.org/openaccess/read> [accessed 8 May 2013].

prevented from disseminating their research in its final published form because of the publisher’s requirement that authors sign over all author rights to a piece of work.\textsuperscript{37} Many researchers are not aware that this is not reasonable in light of the actual cost and nature of the publishing process and need to be educated about alternatives that will ensure that they are given due credit and recognition, while allowing them to widely disseminate their work. In reality, most researchers do not have the know-how or time to design licensing alternatives with which they can enter into negotiations with publishers. Recognising this, a non-profit company has developed a range of Creative Commons Licenses with which researchers can secure different levels of public access to their work.\textsuperscript{38} This still requires the researcher to be willing to take the time to negotiate with the publisher concerned and the publisher to be willing to make exceptions to the journal’s publishing practices.

A number of academic journals have adjusted their publishing practices to allow authors to choose different publishing routes. Some journals have moved to publishing on a complete open access basis or provide their authors with the option to do so. This, among open access advocates, is known as publishing via the ‘gold’ route.\textsuperscript{39} Some journals permit researchers to self-archive their articles. This is known as the ‘green’ route.\textsuperscript{40} Others allow authors to make a single article of theirs available on an open access basis by paying a particular fee. This is known in the open access world as the ‘hybrid’ route.\textsuperscript{41} The natural sciences lead in this open access development, while the humanities lag significantly behind.\textsuperscript{42} An example of an open access publisher in international law would be the Torkel Opsahl Academic EPublisher that provides full access to international law publications through its website.\textsuperscript{43} Another important development is the design

\textsuperscript{37} 2012 UNESCO Guidelines.
\textsuperscript{38} <http://creativecommons.org/licenses/> [accessed 8 May 2013].
\textsuperscript{39} 2012 UNESCO Guidelines, 22.
\textsuperscript{40} Ibid, 20.
\textsuperscript{41} Ibid, 22–23.
\textsuperscript{42} Ibid, 20, 26. Percentage of articles in open access journals/self-archived: Earth sciences (7/25.9); Mathematics (8.1/17.5); Social sciences (5.6/17.9); Physics (3/20.5). Distribution of open access repositories by region: Europe (47 per cent); North America (20 per cent); Asia (19 per cent); Africa (3 per cent).
\textsuperscript{43} The Torkel Opsahl Academic EPublisher (TOAEP) is the publishing arm of the Centre for International Law and Research and Policy (CILRAP), whose webpages are translated into different languages: English, Spanish, French, Japanese, Mandarin, Arabic, Portuguese, Bahasa Indonesia and Dutch. Its commitment to language diversity may explain the wide reach of the centre’s website. In April 2013, there were more than 25,000 hits to CILRAP webpages, with 17,947 to the FICHL/TOAEP site (by 2,290 unique visitors). One of this paper’s authors (Cheah
of online databases that house research publications on an open access basis. These databases come equipped with search engines that enable researchers to locate publications based on key words. For example, the International Criminal Court’s Legal Tools Database (LTD) contains a repository of academic articles deposited by authors on an open access basis. Such databases, when equipped with a search engine, allow researchers to locate research materials quickly.

### 3.2.2 Embedding open access into institutions

In 2012, UNESCO published a report in support of open access, based on its constitutional function to ‘maintain, increase and diffuse knowledge’. The development and widespread dissemination of open access tools, such as open access repositories where authors can deposit their work, has been crucial to the spread of the open access movement. For example, the Directory of Open Access Journals serves as a gateway to 9,035 open access journals from 120 countries and comes with a convenient search engine. Advocates of open access are tracking and promoting open access developments with the aim of educating researchers, institutions and funders. The innovative Open Access Map records and follows open access initiatives all over the world, demonstrating the open access movement’s global spread. Despite the development and spread of such open access tools, how realistic is it to expect academics, particularly early-career researchers, to voluntarily submit their research to open access journals or publishers? Lists of international journal rankings are widely used, formally or informally, by academic institutions and academics to assess the quality of publications. Most highly ranked academic journals or publishers still do not practice open access. Researchers are faced with the choice of publishing in an open access journal that is viewed as less prestigious or publishing in a highly

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44 [http://www.legal-tools.org/en/what-are-the-icc-legal-tools/](http://www.legal-tools.org/en/what-are-the-icc-legal-tools/) [accessed 8 May 2013]. The LTD also provides online access to over 61,000 documents, including national legislation, national cases of core international crimes, international cases and legislation, all preparatory works of the ICC, its Statute, rules, regulations, judgments, decisions and orders and relevant international and regional human rights decisions.


48 See, for example, the list released by the Australian Research Council: [http://www.arc.gov.au/era/era_2012/era_journal_list.htm](http://www.arc.gov.au/era/era_2012/era_journal_list.htm) [accessed 8 May 2013].
For early-career researchers, this choice will often affect their chances at tenure or promotion.

Institutional open access policies are therefore required to avoid disadvantaging those who choose to publish in open access journals. Institutions are gradually but slowly putting in place open access policies. A number of prestigious universities have lent their name to the open access movement by publicly adopting open access policies.\textsuperscript{49} Harvard has adopted an open access policy that requires academics of faculties that have signed on to this policy to provide the university with their scholarly articles that are then made publicly available via an online repository, called DASH.\textsuperscript{50} To facilitate such open access publication, Harvard University provides its academics with a convenient addendum generator that will enable them to propose publication agreement amendments to potential publishers.\textsuperscript{51} Other universities, such as Oxford University, have adopted more flexible policies that support but do not mandate open access. Researchers who wish to publish open access are provided with the guidance and tools enabling them to do so, such as online institutional depositories.\textsuperscript{52}

More importantly, public and private funders of research have started to require fund recipients to make their published research findings available on an open access basis. For example, in 2012, the UK Research Councils announced their new open access policy which makes it mandatory for peer reviewed papers resulting from research wholly or partially funded by such councils to be published in journals that at least offer a ‘pay to publish’ option or allow deposition in an open access repository after a maximum embargo period of one to two years, with the exact embargo period depending on the discipline.\textsuperscript{53} Since early 2013, the US Congress has been considering the Fair Access to Science and Technology Research Act (FASTR) which will require open access to publications that report on federally-funded research.\textsuperscript{54} At the EU level, open access is required of all scientific publications funded by Horizon 2020, an EU funding programme for research and innovation.\textsuperscript{55} Encouragingly, a 2013 study commissioned by the European Commission has announced that over 50 per cent

\begin{thebibliography}{99}
\bibitem{49} <http://osc.hul.harvard.edu/policies> [accessed 8 May 2013].
\bibitem{50} <http://dash.harvard.edu/> [accessed 8 May 2013].
\bibitem{51} <http://osc.hul.harvard.edu/authors/policy_guide> [accessed 8 May 2013].
\bibitem{52} <http://www.bodleian.ox.ac.uk/science/resources/open-access> [accessed 8 May 2013].
\bibitem{53} <http://www.rcuk.ac.uk/research/Pages/outputs.aspx> [accessed 8 May 2013].
\bibitem{54} <http://cyber.law.harvard.edu/hoap/Notes_on_the_Fair_Access_to_Science_and_Technology_Research_Act> [accessed 8 May 2013].
\end{thebibliography}
of research published in 2011 is currently available on an open access basis, though the same study also noted that the humanities and social sciences are among disciplines lagging behind in their open access practices.\textsuperscript{56}

3.3 Capacity-building through mentorship and editorship

Apart from access to existing research, academics need to master a mix of ‘scientific’ and ‘non-scientific’ skills to excel in their research fields. ‘Scientific’ skills refer to substantive knowledge about one’s research topic or area. As an example, for a scholar of international law, this may include knowledge about the sources of international law, treatises and relevant case law. ‘Non-scientific’ skills are often seen as incidental to academia, but these are in reality essential for a researcher to excel in the academic world. Examples of such skills include knowing how to draft grant proposals, how to network with other colleagues in one’s area and how to locate various funding opportunities. Having such skills is often as important as having substantive knowledge about the research topic when trying to get a research project off the ground. This similarly applies to the teaching of international law, where knowing how to design course syllabi, how to effectively engage students and how to utilise teaching technology, is often as important as knowing the substance of one’s course.

Some researchers, such as those in the early part of their research careers or those from developing countries, may not have had the opportunity to learn these skills, particularly those that are ‘non-scientific’ in nature. This may be due to factors unrelated to research ability, such as a lack of exposure to academic culture or a lack of specific linguistic ability. The latter is especially important. With one or two exceptions, the journals in our compiled European, African and Asian lists publish solely in the English language.\textsuperscript{57} Interestingly, on its website, the Asian Journal of International Law clarifies that its decision


\textsuperscript{57} The fact that we compiled our lists based on global rankings published by Anglophone research organisations, such as the Washington & Lee list, may affect our lists. An exception to this is our list of Latin American journals, three of which are Spanish. The European Journal of International Law used to be bilingual, but now publishes in English. On its website, the journal explains that it adheres to ‘a strong belief in the central importance of linguistic diversity to the continued flourishing of international law’ and that ‘the decision to publish exclusively in English is based on the fact that it enables us to reach the widest possible readership, in view of the ever—growing number of Europeans and others for whom English is the principal second language’. The journal however states that it ‘warmly welcome[s] submissions in French, Spanish, Italian and German’ and when ‘resources permit’ will endeavour to translate those accepted for publication into English: <http://www.ejil.org/about/index.php> [accessed 22 September...
to publish in English is due to ‘practical convenience’ rather than ‘political endorsement’.58 This disadvantages researchers who do not have English as their mother tongue. Such barriers of academic culture and language can be overcome through capacity-building. As used in this paper, capacity-building aims to empower their subjects with the knowledge and tools that will enable them to design and execute their own solutions to any identified problems. It recognises that we live in a world where resources are unequally distributed, that such resource inequalities need to be addressed and that having a certain level of resources is necessary for one to act effectively in any area.

### 3.3.1 Academic mentorship

Having the guidance and advice of a more experienced academic greatly facilitates the growth and development of a junior academic. Research demonstrates that junior academics who were given guidance by senior academics achieved more than those who did not have access to such guidance.59 Mentored junior academics out-performed their peers in terms of publications produced, publications accepted by highly ranked journals and successful funding applications. As most universities evaluate their academic staff based on such criteria, mentored academics would be in a stronger institutional position compared with their non-mentored peers. Research also shows that postgraduate researchers whose supervisors actively mentored them not only produced more publications, but also viewed their research experience in a more positive light.60

Recognising this, many universities have put in place formal or informal mentorship programmes that enable early career academics or aspiring researchers to work with a more senior colleague.61 Existing research notes that such mentorship practices are less developed in the faculties of social science and law where

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61 See, for example, Teaching Support Centre, University of Western Ontario, ‘Western guide to mentorship in academia’ (2008), <https://www.uwo.ca/tsc/resources/pdf/PG_2_mentor.pdf> [accessed 10 December 2013].
research is often conducted independently. Establishing such mentorship programmes requires careful planning. While too much rigidity or formality may be undesirable, mentorship programmes should clearly set out the scope and objectives of such mentorship, so mentors and mentees are aware of what is expected of them. Mentors should also be given due recognition for their participation in the programme. Some guidance on mentor-mentee interaction would also be useful. Given existing, if unspoken of, hierarchies in academia, the expectations and experiences of a senior academic may be very different from that of a junior academic. Mentors and mentees need to be educated about the perceptions, needs and expectations of the other party. For example, mentors should be encouraged to first approach their mentees as the latter may feel unwilling to ‘bother’ their mentors. Mentees, on the other hand, should be respectful of their mentors’ personal space and time.

Mentorship has been shown to benefits member of groups that are inadequately represented within academia, such as women and racial minorities. Just as in any workplace, minorities may find it more difficult to understand and navigate the practices and expectations established by the majority. This may be especially problematic in academia, where work processes are less formal and where much academic networking takes place on an unofficial basis. While mentors do not necessarily have to be from the same minority group, they need to be sensitive to the challenges faced by academics from such minority groups. One such mentorship programme targets all female scientists and was founded for the benefit of women (formerly) linked to Max Planck Institutes: Minerva FemmeNet. In the area of international law, the ASIL’s women interest group has most recently implemented a women’s mentorship programme.

Some mentorship programmes bring together researchers and educators from developed and developing countries. If designed properly, these programmes can facilitate skills transfer and build long term capacity. For example, from 2008–2012, the National University of Singapore (NUS), the University of Malaya, the Australian National University and Universitas Indonesia took part

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62 Scaffidi & Berman, above n 60, 688.
63 Teaching Support Centre, above n 61, 9.
66 This programme has just been initiated and has issued a widespread call for mentors and mentees. For example, see call issued at <http://ilg2.org/2013/04/03/please-attend-asil-mentoring-event-this-thursday/> [accessed 8 May 2013].
in an international law capacity building programme aimed at meeting the needs of the Faculty of Law of Syiah Kuala University in Indonesia. As part of this programme, lecturers from Syiah Kuala University were posted to NUS where they attended lectures and seminars in their areas of focus. They also had the opportunity to consult with NUS lecturers and work with them to develop their course syllabi. Most of the participants from Syiah Kuala University spoke very enthusiastically of their experience. While the mentee is undoubtedly the primary beneficiary of mentorship programmes, with proper planning and training, mentors can also benefit much from such programmes.

### 3.3.2 Overcoming language barriers

Language is an obvious, but seldom discussed, roadblock to participation in academic research at the international level. For various reasons, English has become the de facto lingua franca of the academic world, including that of international law. Anglophone writers usually have an advantage over non-Anglophone authors when articulating and arguing complex ideas in English. The widespread use of English at the international level is closely linked to Anglo-American dominance and results in discursive biases. Just as how the stylistic features of judicial decisions are influenced by the particular legal tradition from which they emanate, so too are the stylistic features of academic writing influenced by the cultural background of their authors.

A 2011 qualitative social science research project, focusing on the experience of Spanish researchers, highlights the difficulties experienced by non-Anglophone researchers when expressing their ideas in English. Among other things, these researchers report having particular difficulties in drafting the rhetorical or persuasive portions of academic articles, such as the article’s introduction. Interestingly, the majority of academics interviewed in this research project did not think that their linguistic disadvantage

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68 Information on file with authors.


71 C Pérez-Llantada, R Plo & G R Ferguson, “You don’t say what you know, only what you can”: The perceptions and practices of senior Spanish academics regarding research dissemination in English’ (2011) 30 *English for Specific Purposes* 18.

72 Ibid, 24.
resulted in the rejection of their work for publication. While research is inconclusive, some commentators argue that having the ability to present one’s arguments in a way that is familiar to one’s peer-reviewers and editors, many of whom will be native English speakers, does increase one’s chances of publication.

This language barrier can be overcome by employing highly skilled translation services, but such services are expensive and out of the reach of researchers from less developed countries. Another possibility is for journals and publishers to allow articles to be submitted and peer-reviewed in languages other than English. An example would be the German online journal, Zeitschrift für Internationale Strafrecht dogmatik (Review of International Criminal Law Doctrine). However, there are undeniable benefits to having one’s work published and disseminated in a globally understood language, such as English. Journals and publishers could offer English translation or editing services and this would require them to employ staff with the necessary linguistic skills. Such translation work brings with it dangers of its own. The translator will need to be generally familiar with the legal topic at hand. For such translation to be done well, there needs to be close cooperation between the author, translator and editor. The original non-English article could also be published alongside the translated end product to give readers access to the former as well. Though laborious, it is not impossible. The Torkel Opsahl Academic EPublisher has published a number of international law works in English as well as in the native language of the author or target society. In the long term, adopting such publishing practices may encourage more international law students, particularly those in Anglo-American institutions, to learn and master languages apart from English.

Such time and labour intensive processes do not fit well with the workload and schedules of today’s journal editors, peer-reviewers and publishers who are continuously harangued by submission backlogs. Advances in technology and communications have made the preparation and submission of articles much easier, at least, for those who have the means to do. Simultaneously, a tendency has developed on the part of journal editors and publishers to be more exacting in standards, including language standards. This may adversely impact assessments of work by non-Anglophone authors. Scholars from developing countries, although perhaps fluent in English, may not express themselves in

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74 Salager-Meyer, above n 69, 125–126.
75 <http://www.zis-online.com/?sektion=1&sektionsub=0&language=eng> [accessed 8 May 2013].
76 <http://www.fichl.org/publication-series/> [accessed 8 May 2013].
a manner comparable to native English speakers from developed countries. Some journals expressly request authors to consider sending their work to professional proof-readers before submitting it to the journal. For example, both the websites of Oxford and Cambridge University Press Journals advise authors who are non-native English speakers to consider having their articles ‘professionally edited’. This, it is explained, serves to ensure that the article’s content is fully understood by journal editors and reviewers. Just as the cost of professional translation services prevent many from using them, so too do the costs of professional editing services put them beyond the financial reach of most researchers from developing countries.

Researchers have highlighted how an author’s access to ‘language brokers’ enhances publication prospects, particularly in international English journals. This research also identified power imbalances between ‘language brokers’ and non-Anglophone authors, which may result in the unconscious if well-meaning distortion of the latter’s research by the former. The ability to access ‘language brokers’ who are academics and who provide substantive advice beyond the phrasing of ideas in technical English gives some non-Anglophone authors an advantage over others, particularly at the submission for publication stage. If we aim to publish the research of non-Anglophone authors that are worthy of dissemination, even if these are expressed in a manner that appears somewhat awkward to native English writers, we need to reconceptualise the role of editors.

When assessing submissions, editors could view themselves as ‘language brokers’ committed to cooperating with the author in preparing his or her work for publication. Such editors would need to be familiar with the subject matter on the submitted paper and be prepared to work closely with the author to improve the manner in which ideas are expressed. Editors should be aware of the

78 These websites provide a list of third-party commercial entities providing editing services, with a disclaimer that the publisher does not endorse or take responsibility for the work of these entities: <http://www.oxfordjournals.org/for_authors/language_services.html> [accessed 23 September 2013]; <http://journals.cambridge.org/action/stream?pageId=8728&level=2> [accessed 23 September 2013].
80 Salager-Meyer, above n 69.
81 Lillis & Curry, above n 79.
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Dangers highlighted by research on ‘language brokering’ and endeavour to respect the content and nuance of arguments put forward by non-Anglophone authors. Editing, thus conceptualised, is part mentoring and public service. Currently, there is little incentive or reward for academics to take on such an editorial role. Most academics are evaluated by their institutions on the basis of their published research, as opposed to their editing, mentoring or teaching duties. It will be hard for junior academics to take on such roles with the full support of their faculties, who will most likely advise them to focus on expanding their publication list.

3.4 Facilitating the exchange of ideas and research collaborations

While research access and capacity-building remove participation barriers and empower researchers, this part of the paper deals with collaboration for the mutual benefit of all involved. Using co-authorship as a ‘rough’ indicator, while recognising there are many other avenues for collaboration, legal research continues very much to be independently undertaken. A search from 2008 to 2013 of articles in the American Journal of International Law, the European Journal of International Law and the Chinese Journal of International Law, show that only 12 international law articles were co-authored.\(^{82}\) This paper however uses the term collaboration broadly, to refer to practices that facilitate the exchange of ideas, capture the ‘joint effort’ of the parties involved and bring their knowledge and expertise together in an equal manner.\(^{83}\) Thus defined, collaborative projects may include the publication of edited collections or anthologies, the design and deliver of co-taught courses or the organisation of co-hosted conferences.

There are many benefits to such collaboration: ideas can be sharpened and refined through discussion and more complicated research techniques can be used while preserving a subject’s time-sensitive relevancy. Collaboration between scholars from developing and developed countries may facilitate not only the exchange of ideas but also the mutual transfer of skills and knowledge. Such collaborations broaden the perspectives and skill-sets of all those involved. Also, as academia becomes increasingly specialised, researchers with different specialisations can be brought together through collaboration to address complex

\(^{82}\) Research data on file with authors.

\(^{83}\) ‘Opportunities, challenges and good practices in international research cooperation between developed and developing countries’ (2011) OECD Global Science Forum [hereinafter ‘OECD Good Practices’], 5.
problems. Similarly, collaboration can also advance inter-disciplinary studies by bringing together researchers from different disciplines.

Collaboration is not always beneficial or positive. Sometimes, researchers enter into collaboration as this enables them to fulfil publication quotas set by their university. This focus on publication numbers may compromise on the quality of publications. In collaborations between scholars from developed and developing countries, the former may unconsciously impose his or her views or standards on the latter as a result of unexpressed power dynamics. Yet, collaboration, if planned and structured thoughtfully, can bring together researchers with different strengths and knowledge. It exposes and familiarises scholars from different legal traditions to the views of their peers and can be a way of making international legal research more diverse and inclusive.

3.4.1 Enabling conference attendance

Conferences provide researchers with networking opportunities that may lead to future collaboration. Despite developments in technology, such in-person meetings remain crucial to the formation of collaborative partnerships. However, many academics are simply not able to participate in global conferences due to the registration, travel and accommodation costs involved. This is particularly so for academics from developing countries. Academics from the developed world generally receive a comfortable salary and are able to fund their own costs. Some of these academics, though not all, may even be so fortunate as to obtain a conference budget from their institutions.

To ensure access to conference presentations and enable world-wide debate, conference organisers are increasingly making podcasts or videos of conference presentations available on websites. Still, attending conferences enables a researcher to learn about new developments in his or her field and connect with colleagues from other countries and institutions. Recognising this, quite a number of conference organisers are raising funds to pay for the travel and accommodation costs of speakers from developing countries. Such funding arrangements are, however, not common. Based on an internet search of international law conferences held from 2008 to 2013, 33 conferences offered

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84 Ibid.
85 P A Schrodt, ‘If I ran the university’, <http://eventdata.psu.edu/7DS/7DS.University.chpt.pdf>, 31 [accessed 15 October 2013].
86 See for example the podcasts of conferences made available on the University of Oxford’s website: <http://podcasts.ox.ac.uk> [accessed 22 September 2013].
different levels of financial support to selected conference presenters.\textsuperscript{87} A number covered all conference-related costs; others offered reimbursement up to a certain amount; and others prioritised PhD students or participants from certain regions.\textsuperscript{88} Many of the conferences or workshops that provide such funding are recurring events and have long term goals, such as the development of young scholars.\textsuperscript{89} For some conferences, paper selection does not automatically entitle the presenter to funding or sponsorship. Selected presenters are required to make an additional application for a travel grant or a bursary.\textsuperscript{90}

Promoting such funding practices is necessary to ensure better representation at conferences. A more ‘no-frills’ model of conferences may be necessary, with funds channelled instead to ensuring representative participation. Even so, conference organisers may find it difficult to secure the necessary funding and some have already experimented with creative solutions. For example, conference registration costs may be used to fund travel and accommodation bursaries for participants in need of these. Funders also need to be educated about the importance of inclusive conference participation and how travel and accommodation bursaries can further this.

Apart from ensuring representative conference attendance, organisers of global conferences should take steps to enable the effective participation of conference attendees who may not have English as a mother tongue or working language. Research shows that non-Anglophone academics are often worried about the negative impact of their English skills on their conference presentations. Concerns range from fearing that they will be unable to answer questions from the audience in a prompt yet clear manner, to dreading that they might fail to capture the attention of the audience through jokes and the ‘smooth’ use of the language.\textsuperscript{91} Conference organisers can address this by providing simultane-

\textsuperscript{87} This ‘snapshot’ of conferences is based on information available on the internet as of July 2013. It should be noted that some conference organisers had removed details of funding once the conference had been concluded. For future research purposes, more detailed follow-up research beyond internet-based research is intended, in order to obtain a more comprehensive mapping of conference funding practices.

\textsuperscript{88} Detailed research data on file with authors.

\textsuperscript{89} Examples include the Biennial Conference of the European Society of International Law, the Biannual International Four Societies Conference, the Biannual Sean Maxwell & Isle Cohen Seminar in International Law, the annual NUS-Asian SIL Young Scholars Workshop and the Annual Comparative Law Works in Progress Workshop.

\textsuperscript{90} Examples include the Biennial Conference of the European Society of International Law or the IGLP Conference or Workshop series.

\textsuperscript{91} Pérez-Llantada, Plo & Ferguson, above n 71, 28.
ous translation services, particularly into the working or native language of the conference venue. Academic institutions could provide their non-Anglophone researchers with language support training. Such courses would be useful and, once developed, could be shared through the internet with other colleagues from developing countries. However, the most effective of such courses are those tailored to the native language of the target students. To illustrate, the difficulties encountered by Spanish-speakers in the study of English are very different from those experienced by Chinese-speakers. There is therefore less commercial incentive to develop such courses for researchers with a native language spoken by a relatively small number of people.

3.4.2 Maximising collaborative opportunities

Research collaboration may be implemented through various avenues, such as the publication of anthologies with contributions by researchers from different countries or continents. Such collaborative efforts could be further encouraged. For example, an observation made regarding a 2012 publication bringing together scholars from Europe and North America notes that ‘it is a rarity to see a volume that includes scholars from both sides of the Atlantic’. An objective standard which could serve as a measuring stick of diversity and representativeness in edited collections would be to aim for the inclusion of contributions of at least one-third women authors, one-third non-westerners and one-third authors under the age of 50. Evidently, a researcher can belong to several categories. Research shows that to obtain a balanced outcome, a ‘critical mass’ of representative participants is required, as opposed to having a ‘lone exception’. Such a standard could also be applied when setting up conference panels. Ideally, the researchers involved in such collections would have had the chance to present

92 Being mentored by senior colleagues familiar with academic language discourse has also been suggested. Ibid, 27–28.
94 An example of such a book is F Baetens (ed), Investment Law within International Law: Integrationist Perspectives (2013).
95 Such research has been conducted with regard to the influence of historically excluded minorities in society more in general, see e.g. K S Thorburn, ‘Comments on the Directive on improving the gender balance among non-executive directors of listed companies’, Discussion at the ECGI-European Commission Workshop, Brussels, 23 January 2013; D A Patel, ‘Once home to Kagan and Warren, HLS Faculty still only 20 percent female’, The Harvard Crimson, 6 May 2013; D A Patel, ‘Female HLS graduates enter a job market dominated by men’, The Harvard Crimson, 9 May 2013.
their contributions at a workshop or conference beforehand, where they would also have had the opportunity to ask each other follow-up questions. This would enable participants to discuss how their papers may be improved and how their ideas may be more clearly presented to audience from different legal traditions.

In addition to collaborative research, collaborative teaching has received substantial attention of late across all disciplines. It is believed that students benefit from being exposed to the different views and teaching approaches of various teachers. From a cross-cultural perspective, such exposure may raise the awareness and sensitivity of students to a panoply of legal cultures. In line with this, exchange programmes have become popular and some universities have embarked on collaborative teaching ventures that assemble lecturers from many countries. Academics also learn important skills in communication, understanding and empathy as they are required to design and deliver their lessons to non-native English speakers from different legal traditions.

Developments in communication have also enabled educators located in one continent to deliver lectures to students located in different continents. The widespread popularity of Massive Open Online Courses (MOOCs) show how online courses, if organised well, can be informative and engaging at the same time. Through video conferencing and other online platforms, lecturers from several institutions or countries could work together to co-teach a course in real time. Students from one class are able to pose questions to the lecturer and engage in discussions with students at another location. Further exchange between class participants and lecturers could be facilitated through a variety of online tools such as forums or blogs. However, to maximise the potential of these online tools, lecturers would need to be given sufficient training. The sheer variety of online platforms available to teachers and students may confuse and distract if they are not implemented well. Institutions would also need to provide their staff and students with facilities such as a good internet connection and functioning computers.

3.4.3 Designing equal partnerships

The design of collaborative projects is important. Collaboration aims to bring together individuals with different and complementary strengths. These individuals may also bring with them personal or cultural characteristics that undermine the collaborative project. Power imbalances between the parties may also

96 See, for example, <https://www.coursera.org/> [accessed 8 May 2013].
97 OECD Good Practices.
undermine the spirit of collaboration, especially when one of them is a minority or from a developing country. Clear planning can address these potential setbacks.\footnote{Ibid.} However, most funding opportunities and donors are located in developed countries. This means that the fund applicant will very often be an academic or researcher from an institution located in a developed country. The inclusion of other collaborative partners should be done at the planning or design stage and this is something that funders should require or strongly encourage. Funders, in other words, need to be educated on adopting an empowerment model when it comes to collaborative academic endeavours. Indeed, guidelines issued by the Organization for Economic Cooperation and Development (OECD) on collaborative research between researchers from developed and developing countries emphasise the need for careful planning right from the very beginning.\footnote{Ibid, 10.} These guidelines underscore the need to include researchers from developing countries in the project’s planning process, rather than later. The objective is to avoid asymmetry and to reflect a ‘true partnership’ characterised by ‘a balanced bi-directional flow of resources, efforts and benefits’.\footnote{Ibid, 5.}

To ensure this, collaborative projects need to outline, from their very inception, the expectations and goals of each party. The respective contributions of each party should also be identified. The OECD highlights the important contributions that researchers from developing countries can make, such as in-depth local or regional knowledge.\footnote{Ibid.} It is for collaborating researchers to set the scope and boundaries of the project together at the very beginning. For example: who are the intended beneficiaries of the project and how will success be measured? There is also the question of accountability and auditing. It is also good practice to submit collaborative projects to independent third parties for their review and assessment.\footnote{Ibid, 14.}

The final ‘output’ of the project should be determined early on, in a way that benefits both parties. This could be in a form of co-publication or co-presentation of the project’s findings. It is important that credit and benefits from the project be shared equally among collaborators and in a way that is meaningful to each of them. For example, apart from publication in an international Anglophone journal, it may be useful for project results to be disseminated in a local journal or in a different language. Many international law academics conduct field research

\footnotesize
\begin{itemize}
  \item \footnote{Ibid.}
  \item \footnote{Ibid, 10.}
  \item \footnote{Ibid, 5.}
  \item \footnote{Ibid.}
  \item \footnote{Ibid, 14.}
\end{itemize}
in foreign countries, including transitional societies. Such research does not by necessity require collaboration with local researchers. However, most need the help of local researchers to facilitate their access to certain actors or locations. Even at this level, the relationships formed between international researchers and their local contacts should ideally be well thought out and equitable. It should aim at benefiting both parties. A number of research-oriented organisations and fund providers have published ethical guidelines addressing the relationships formed by international researchers with local researchers and organisations. 103

4 Conclusion

Implementing the suggestions put forward in this paper will not be easy as they challenge existing ways of thinking and doing in legal academia. Institutional resistance or inertia is to be expected. Most academic institutions and, specifically, law faculties do not embrace change easily. The internationalisation of practices and standards might discourage some institutions or individuals from adopting changes as these may undermine their global standing among their peers. Many individuals and institutions have invested significant time and resources into crafting career and development plans based on existing practices and norms. What then can we do as individual academics? What is the balance to be struck between acting boldly and yet wisely? How can institutions support individual academic decisions or pave the way for bold action?

With respect to the teaching of international law, clear commonalities exist in the choice of international law topics in the examined course curricula, although the precise content and approach may differ. Broadly speaking, two trends can be discerned in the use of teaching and reading materials which roughly seem to be based on the common versus civil law divide: a heavy focus on the development of international rules through case law versus an emphasis on the theoretical structure of the system, as analysed in scholarly writings. The present paper urgently calls for a re-evaluation of the teaching part of international law lectureships whereby junior and senior lecturers share the course convening and teaching load. Teaching too much of a variety of courses makes it impossible for lecturers to remain up-to-date with developments in each of these fields—to the detriment of the academic quality of their lectures and, ultimately, the education

103 See, for example, <http://www.esrc.ac.uk/about-esrc/information/research-ethics.aspx> [accessed 8 May 2013].
of their students. This paper advocates the adoption of a system whereby all members of staff annually have to earn a number of ‘skills credits’.

The ‘academisation’ of the international law lectureship has seriously impoverished the capabilities of lecturers to link international law and practice in a meaningful manner, so lecturers should be allowed and encouraged to obtain practical experience, be it through litigation, NGO or in-house counsel work. Moot courts form excellent preparation for legal practice—a finding which is increasingly recognised by law schools, funding agencies and academic and professional societies. In addition to supporting the travel and accommodation costs of teams, students can be rewarded for the time invested, by incorporating moot courts in the curriculum and offering course credit for participation. Efforts should be made in terms of offering internship and clerkship opportunities more widely as well as procuring funding for students to take up such positions. This analysis of teaching practices served as a basis for the subsequent section, in which a number of best practices in relation to the research of international law are set out—as the essential foundation upon which university-level teaching is based.

In terms of international law research, it would not be wise for early career academics to solely publish in open access journals without considering the journal ranking system used by his or her institution. Rather, one could balance one’s commitment to open access and the demands of one’s institution by choosing an open access journal that is respectably ranked. Or one could choose to spread out one’s publications by publishing in open access journals as well as ‘ranked’ journals that do not practise open access. As for academic institutions, they may be hard pressed to ignore the global practice of ranking journals, but more attention could be paid to the content of publications when assessing staff performance instead of using journal rankings as primary or sole measures of research quality. Individual academics and institutions can explain their decisions to depart from existing practices, with the objective of further spreading their message. In other words, there are indeed steps that individual academics and institutions can take, small incremental ones that may contribute to wider cultural change.

We do not call for the immediate and indiscriminate extinction of all current practices. For example, it continues to make sense to organise the occasional high-cost conference aimed at bringing together high-ranking diplomats, donors and academics for fund-raising purposes. However, a commitment to inclusion and diversity would require more academic conferences to provide travel and accommodation bursaries. Also, while change does not happen overnight, this paper intends to start a critical discussion on how international law is
being taught and researched around the world. Based on the teaching trends ascertained in this paper, is there a detrimental regional ‘fragmentation’ of international law teaching? Are the voices of junior scholars and scholars from developing countries being sufficiently nurtured and included? Will the teaching and researching of international law become disconnected from practice or fail to be truly representative of diverse viewpoints? These are questions that need to be debated in an open-minded and transparent manner. The authors hope that the list of best practices outlined in this paper will form the foundation upon which more innovative practices from within the field of international law can be implemented and shared. If we subscribe to a vision of international law that is inclusive and diverse, we cannot but bring our teaching and research practices into alignment with our beliefs.
CONCLUDING REMARKS

Sir Elihu Lauterpacht, CBE QC LLD

Keywords
International law, legal tradition, British legal tradition, equity

I regret that I have not been able to attend all of the remarkable series of contributions that have been made in the past two days around the theme of tradition in international and comparative law. The many and diverse backgrounds of all who have spoken, and the unity of their commitment to the subject, enable me to say that we are now truly in the presence of a new wave of international lawyers on whose shoulders the future of the subject rests. You are to be congratulated on your evident commitment not only to the subject but also to the course to which it is dedicated—the furtherance of international peace.

My task now is a limited one: to offer a few concluding remarks. These will not attempt to summarise what has been said. Nor will I embark on a fresh analysis of the place of tradition in international law. Instead, I will limit myself to some personal insights and random reflections based on my involvement in the subject now stretching back more than 60 years.

I declare without shame that I belong to an old tradition of international law—the British tradition. Moreover, at my age I am unlikely now to change that commitment in any significant respect.

In the first place, it is the tradition of personal scholarship the range of which is reflected in Oppenheim’s two volumes on Peace, War and Neutrality.\(^1\) It was the tradition of his successors as Whewell Professor—Pearce Higgins, McNair, my father Hersch Lauterpacht, and his successors Robbie Jennings and Derek Bowett. Of course, the substantive scope of international law has been greatly enlarged over the past century. It now embraces, as you all well know—international criminal law, international trade, human rights, and environmental protection. But that enlargement does not alter the tradition. The subject remains one which requires an intense personal commitment to scrupulous scientific method and a detailed consideration of established case-law, treaties and state practice.

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At the same time, it is necessary to acknowledge that changing circumstances can lead to changing law. But the changes thus brought about in the law and, to some extent, in legal method, must not be condemned or rejected out of hand. A measure of balance must be maintained. When a court steps outside the limits of predictably established law, as may now increasingly happen on the basis of treaty prescription, doing so by recourse to ‘equity’ and ‘equitable principles’, it is essential that the ingredients of such a conclusion should be clearly set out. It is not enough for a tribunal to state a conclusion on a point that has been disputed between the parties simply by saying that it is ‘equitable’ without setting out what has gone into that equitable solution. It is here that traditional attitudes have a role to play.

Of course, there is much more to tradition. In my career I have attempted to be guided by the traditional standards of the English Bar—a truthful presentation of the facts, honest citation of authorities, respect for the tribunal and for the other party. These are what I see as among the principal features of the British tradition.

That is not to say that tradition prohibits counsel from seeking to pursue a tribunal that the established law needs to be adjusted to meet changed circumstances. But this can only be done in a rational, restrained and courteous manner.

Nowadays, one can perceive a certain move against this sort of tradition. It is felt by some to be old-fashioned, out of keeping with the times. Admittedly, adherence to tradition does not mean that there is no room for change—but my belief is that this can only be brought about by traditional methods. Let us not jettison standards of proven value by simply pretending to be modern, or by slipshod method and arrogant assertion.

I want to end on a positive note. We must be grateful to those who have contributed time and thought to the many issues that have been discussed during these two days. These have culminated in the fascinating exchange of views that we have heard from Professor Pellet and Professor Crawford. On your behalf I thank them all warmly, as I do all the organisers of this meeting. It has been an imaginative and thought-provoking exercise. I wish that I could have participated in it more fully.