

International Lawyers as Lawmakers



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"This thesis is the result of my own work and includes nothing which is the outcome of work done in collaboration except as declared in the Preface and specified in the text. I further state that no substantial part of my thesis has already been submitted, or, is being concurrently submitted for any such degree, diploma or other qualification at the University of Cambridge or any other University or similar institution except as declared in the Preface and specified in the text. It does not exceed the prescribed word limit for the relevant Degree Committee'.

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31/10/2022,

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Abstract

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International lawyers' participation in international lawmaking is understudied. This gap is especially poignant in the context of the discipline's obsession with discussing sources and lawmaking. This thesis employs an eclectic methodology that draws from doctrinal methods, critically inspired description, and empirical approaches to fill this gap, answering the question '*How do International Lawyers make international law?*' The thesis begins by investigating why the gap exists in the first place. It then maps out the international legal profession, finding patterns in international lawyers' career paths, and drawing connections between them, using obituaries published in the *British Yearbook of International Law*. This is followed by case studies that zoom into this professional map writ large. These case studies both demonstrate the existence of the phenomenon, and help illustrate its complexity. The case studies include (1) Roberto Ago and James Crawford's attempts to make State Responsibility more 'multilateral'; (2) Sir Elihu Lauterpacht's project to grant individual investors' access to international dispute settlement; (3) Antonio Cassese's push against sovereignty in favour of humanity through international criminal law; and finally (4) Michael Schmitt's regulation of Cyber War through the non-legislative expert codification, the Tallinn Manuals. The results presented indicate there are both dangers and emancipatory possibilities in international lawyers' lawmaking role. They further illustrate the limits of individual international lawyers' agency in light of the system's structural constraints.

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ANNEX - List of Revisions in light of Examiners' Reports

In accordance with the agreed revision requirements, the PhD candidate has undertaken the following revisions:

Section I

“The theoretical framework is too weak and not very critical as asserted by candidate. In this section a more theoretically informed stance should be taken on how the profession works, possibly not just using Koskenniemi as the only reference. To draw from other writings and possibly other disciplines might provide useful insights.”

- I have included the following sections in response to this:
 - What I talk about when I talk about lawmaking – a process-based approach to sources (pp. 2-7)
 - I. Part I - Literature review (...) – D. The profession beyond lawmaking (pp. 40-71)
 - 1. Sections of the profession
 - Insider Accounts
 - Critical scrutiny of insider accounts
 - 2. Critical work on the profession
 - Histories (Marti Koskenniemi; Beyond the ‘civilize(r/d)’ – peripheral international lawyers’ histories; Critique of Expertise – Kennedy’s *World of Struggle*; Jean d’Aspremont – a conservative crit or a crit conservative?)
 - 3. Internal interdisciplinary accounts (quanti, network analysis)
 - 4. External accounts – sociologists and anthropologists
 - Bourdieu, the Dezalays, Garth – reflexive sociology
 - Latour – Actor-Network Theory
 - Reflexive Sociology versus Actor-Network Theory
- In order to better situate the thesis in light of the new sections in the literature review, I have included the following section:
 - E. Conclusions – gaps to fill (pp. 70-71)

Section II

“However interesting the methodology and however original the idea, it is unclear what one is supposed to get from this section. Is this to say that the invisible college exists, that it is homogenous and self-reproductive? And that influence on lawmaking primarily occurs by role transition (international lawyers wearing different hats) and rubber stamping ideas with the seal of institutions? This section needs reframing to make it clear that it does not, as such, explain or justify the main claim. It simply attests to personal relationships in a relatively socially conservative and self-reproductive

environment with distinct underlying power structures. It does not say much about lawmaking. It says a bit about shifting roles.”

- I have reframed Section II to clarify how it supports claim: it is a description of how the professional landscape that allows for individuals to exert lawmaking role.
- I have clarified the map provided by the network suggests the avenues whereby ideas travel within the community, ‘zoomed in’ in Part III – International Lawyers making law in action.
- I have clarified that it is to be read as a chapter on the *avenues* whereby international lawyers can make law in a decentralised system, and in the context of broader literature on the composition of sections of the international legal profession. It is similar to how Latour uses the mapping of transition between membership to the *Conseil d’Etat* and practice in *The Making of Law*.
- I have clarified (1) this chapter must be read in tandem with other works mapping out the profession’s segments (C. Internal interdisciplinary accounts pp. 77-79); (2) the inherent limits of the data-set in terms of time (nature of obituaries) and space (British environment).

Sections III - IV

“The two illustrations are not the most convincing. Concerning Ago, we suggest taking Part I of the Articles as evidence of his influence. Other more convincing examples should also be considered, eg Pauwelyn on the WTO; Cassese, Meron and Abi Saab at the ICTY IHL, the investment ‘old boys’ network described by Dezalay and Garth; Behltem and the use of force.”

- I have broadened the analysis of Ago’s fundamental role in the development of Part I of the articles.
 - Roberto Ago (pp. 111-126)
 - On his innovative thinking on treaties, see pp. 115-116. On his engagement with theory, see pp. 113-114. On his pivotal contribution to the State Responsibility project, see especially pp. 111-112, where it is recognized how his differentiation between primary and secondary rules was a ‘masterful political move’ that enabled the project to move forward.
- Drafted new sections with to-the-point *vignettes* exploring instances in which international lawyers in different capacities developed or attempted to develop a

specific legal concepts/body of rules in light of their personal projects, to expand scope beyond State Responsibility and the ILC, and the British experience:

- Beyond ‘general’ International Law: Specialized regime *vignettes* (pp. 163-214)
- *Vignettes* address the roles of three particular individuals and distinct legal projects in specialised regimes:
 1. Sir Elihu Lauterpacht, umbrella clauses, and dispute resolution in investment disputes (pp. 165-177)
 2. Antonio Cassese as a ‘Realist utopian’: intertwining ‘pushy’ practice and scholarship (pp. 178-193)
 3. Michael Schmitt, the Tallinn Manuals, and the regulation of Cyberwar (pp. 194-207)
- These *vignettes* highlight the role of ‘informal’ lawmaking and the use of soft law beyond the ILC and ICJ, and the particularities of International Law’s specialised regimes.
- The conclusions to the vignettes address examiners’ concerns about individual biases, form (looking beyond ‘hard law’), the role of the community of lawyers (connecting it to Part II on networks), the role of states, the role of international institutions, and the description of individuals’ impact on lawmaking as a *process* (Vignettes conclusions - pp. 208-214)

Conclusions / Normative Implications

“Broaden the research. Do not limit yourself to binding law. A consideration of soft law would strengthen the main claim. Consider expanding the geographical and intellectual scope (not just UK, Cambridge academia). Take some of the neglected or just-only-hinted-at issues (ethics; transparency; visibility/invisibility; relationship between theory and practice) and decide what to do with them. Dropping hints at such fundamental questions is not enough.”

- I have further fleshed out implications in the realm of ethics of the profession, invisibility and transparency, and relationship between theory/academic work and practice in light of *vignettes* above. I have specifically analysed how Global Governance and Transparency literature provide a helpful framework. Specifically, see sections:
 - Part IV – Conclusions and Normative Implications - The power of unveiling (pp. 221-238), specifically sections:
 1. Transparency and Global Governance
 2. Implications for the periphery - the diversity of the profession and international law’s outsiders

3. The impact of (lack of) diversity – individual influence as an avenue for perpetuating biases
 4. Changes in the landscape and side-effects of a more ‘visible’ college
- I have highlighted collective/social aspect of successful attempts of individuals to shape the law in light of both extended case study and *vignettes* (occupying roles in prestigious institutions, doing the rounds between academic and practice circles, having good professional standing, catering to governments, etc.).
 - Part III – Zooming in: international lawyers making law in action - Vignettes’ Conclusions (pp. 208-214), more specifically the following sub-sections:
 - Individual Biases
 - Form
 - Community
 - States
 - Institutions
 - A process, not set in stone: change

In addition to these specific changes, the entirety of the thesis was substantially rewritten.

Introduction

Works on international lawmaking and sources centre the practice of states, but also accept the role of international organisations, courts and tribunals, and even non-governmental organisations, in this complex and decentralised process. The role of individual international lawyers in that process at the granular level, however, continues to be understudied, despite express inclusion of ‘teachings of the most highly qualified publicists’ under Article 38(1)(d) of the ICJ Statute. This thesis seeks to fill this gap, and understand the possibilities and limits individual international lawyers have – populating both sides of the bench in international courts and tribunals, international organisations’ high level panels, universities, research clusters, the bar, and helping negotiate and draft treaties – to carve the content of international law in their own image. The research question posed here is *How do International Lawyers make international law?*

Initially, I sought to do this conflating individuals’ power in lawmaking with the influence of ‘teachings of publicists’. Their degree of influence on the law was to be measured by the extent to which international courts cited scholarship.¹ For someone educated as a doctrinal lawyer, that method made sense: individuals imprint on the law was equal to how courts, making assertions about the law, used academic work. One looked at ‘teachings’ because they are the only ‘source’ in Article 38 that stems directly from individual lawyers. However, two problems arose: (1) part of the reason why individual influence remained veiled was because courts largely did *not* cite doctrine²; (2) even when Courts and tribunals did cite scholarship, academia is only one of many hats international lawyers wear, and thus looking at it through the medium of references in judicial decisions only tells part of the story. Understanding individuals’ influence on the law, which is my goal here, does not fully overlap with measuring the impact of doctrine in judicial deliberations and reasoning.³ Centering the individual international legal professional to tell stories of legal development, this thesis has devised an eclectic methodology that is critical, quantitative and qualitative (more on this

¹ Sondre Torp Helmersen, ‘Finding “the Most Highly Qualified Publicists”: Lessons from the International Court of Justice’ (2019) 30 *European Journal of International Law* 509; Sondre Torp Helmersen, ‘The Application of Teachings by the International Tribunal for the Law of the Sea’ (2020) 11 *Journal of International Dispute Settlement* 20; Some examples of exercises in citation analysis of teachings by courts are Sondre T Helmersen, ‘The Use of Scholarship by the WTO Appellate Body’ (2016) 7 *Goettingen J. Int’l L.* 309.

² Helmersen, ‘Finding “the Most Highly Qualified Publicists”: Lessons from the International Court of Justice’ (n 1); Although different courts and tribunals have differing practices on the issue, see Sandesh Sivakumaran, ‘The Influence of Teachings of Publicists on the Development of International Law’ (2017) 66 *ICLQ* 1.

³ On the privileged position judicial thinking plays in the discipline and its distributive implications, see Fuad Zarbiyev, ‘On the Judge Centredness of the International Legal Self’ (2021) *XX European Journal of International Law* 1.

below) in order to properly appraise whether and how members of the community of international lawyers make law in a system where lawmaking is informal and decentralized. This introduction is followed by three substantive parts, and a final section that joins the overall conclusions and normative implications of the project.

A. What I talk about when I talk about lawmaking⁴ – a process-based approach to sources

This thesis analyses the role individual members of the international legal profession have in making international law, and decants the complex processes of *how* they do so. When speaking of lawmaking, international lawyers largely speak the language of sources – in courts, in Ministries of Foreign Affairs, counsel drafting briefs, at the International Law Commission – is that of ‘sources’. A ‘source’, as the name suggests, denotes the origin of something, in this case where we go to find ‘law’. In domestic law, ‘finding the law’ is a relatively straightforward process (at least according to international lawyers)⁵: in very broad terms, looking at the particular constitutional arrangements, we seek a statute, or a court’s ruling, and we find the accepted standard. When looking at international law, the lack of a centralised legislature and compulsory adjudicative bodies, the substantive ‘anarchic’ development of regimes and regulations, and the maze of *ad hoc* consent-based undertakings makes the business of finding the law *less* straightforward.⁶ It puts the issue of ‘sources’ at the centre of academia and practice,⁷ where often the content of purported binding rules, as well as their applicability to a particular actor and the power of a certain body to pronounce itself on its content and application, is a central question.

1. Decentering and centering authority

Whereas the determinacy of law is up for debate,⁸ and thus the degree to which it is an exercise in fallacy when one speaks of ‘sources’, it is a fact that international lawyers every day are still required to find it when they practice law or when they write about law from a doctrinal

⁴ A reference to H. Murakami, *What I talk about when I talk about running* (2007).

⁵ Malcolm N Shaw, *International Law* (9th ed, CUP 2021) 59.

⁶ Higgins identifies this as “an uncertainty at the heart of the international legal system” the “how we identify norms” and not just the “uncertainties about what particular norms provide”. *Problems and Process: International Law and How We Use It* (OUP 1995) 17.

⁷ Shaw (n 5) 58; Samantha Besson and Jean D’Aspremont, *The Sources of International Law: An Introduction* (2018) 2. Samantha Besson and Jean d’Aspremont, ‘The Sources of International Law: An Introduction’ in Samantha Besson and Jean d’Aspremont (eds), *The Oxford Handbook on the Sources of International Law* (OUP 2017) 2.

⁸ Martti Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (Cambridge University Press 2009); Martti Koskenniemi, ‘The Politics of International Law - 20 Years Later’ (2009) 20 EJIL 7; Martti Koskenniemi, ‘Introduction’, *The Gentle Civilizer of Nations* (2001).

perspective.⁹ Due to tradition or methodological requirement, legal arguments are made using the language of sources. However, writings, incidents, and documents in many forms containing the legal grounds for argument are still picked and chosen *from*. Certain materials are more authoritative than others; certain statements hold more purchase than others – an ICJ decision will bear more weight than a decision from an investment tribunal, or a domestic court on an international law issue. The *building of some of the places* from which one picks and chooses, particularly the places constructed by particular individuals, is what this thesis scrutinises. I thus take a process-based approach to lawmaking:

The process-approach to lawmaking and sources means that I both *decentre* and *centre* the concept of ‘authority’. I *decentre* it in the sense that I am not looking at the ‘constitutional authorization’ for individual international lawyers to make international law – this is not an inquiry into international law’s Rule of Recognition,¹⁰ and whether it comports individuals as part of the lawmaking process. I attribute authority less to an inquiry into formal provenance,¹¹ and instead to the process of interaction between actors over time: usage, contestation, endorsement, and change of certain materials, rather than origin, as what builds normative force in international law. In other words, I am less concerned with the aspect of authority that pertains to the ‘Rule of Law’ *problematique* of individuals making law.¹²

How we construct authority *in practice*, rather than being blinded by seeking out the permissibility for authority, is what interests me. I thus also *centre* authority in another sense – scrutinising the process whereby individuals can be pivotal in conceptualising and ‘[producing] a set of provisions that could be plausibly invoked as *lex lata*’.¹³ In doing so, they often circumvent or appropriate rubberstamping mechanisms that grant documents ‘formal authority’ such as treaty-making, embedding their projects in international law over time. This

⁹ Besson and D’Aspremont (n 7) 1.

¹⁰ Namely ‘a rule which identifies the secondary rules and hence the sources of valid international law. It is the rule by reference to which the validity of the other rules in the system is assessed, and in virtue of which the rules constitute a single system.’ Samantha Besson, ‘Theorizing the Sources of International Law’, *The Philosophy of International Law* (OUP 2010) 180; HLA Hart, ‘International Law’, *The Concept of Law* (3rd edn, Oxford University Press 2012) 233.

¹¹ See the question of public authority of courts in particular, for example, in Armin Von Bogdandy and Ingo Venzke, ‘On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority’ (2013) 26 *Leiden Journal of International Law* 49.

¹² For a summary of these rule of law concerns, see Fernando Lusa Bordin, ‘Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law’ (2014) 63 *ICLQ* 535.

¹³ Fernando Lusa Bordin, ‘Still Going Strong: Twenty Years of the Articles on State Responsibility’s “Paradoxical” Relationship between Form and Authority’ (*EJIL Talk!*, 2021) 1 <<https://www.ejiltalk.org/still-going-strong-twenty-years-of-the-articles-on-state-responsibility-paradoxical-relationship-between-form-and-authority/>> accessed 20 August 2021.

thesis scrutinises the building of what others have named ‘stakeholder consensus’¹⁴ – or material regulatory authority outside state participation/consent – around individuals’ ideas about the law, to better understand what determines the success or failure of individuals’ lawmaking efforts in international law that sometimes ‘stick’ and sometimes do not.

I accept that international law operates every day, and thus functions in the absence of many of the traditional mechanisms such as those authorising actors to make law in domestic settings.¹⁵ In the absence of a constitutional system, and in what I conceive as a ‘process-based’ approach to lawmaking in the international sphere, international lawyers are involved in the process, and as I will demonstrate in Part I – Literature Review – ‘teachings of the most highly qualified publicists’ and beyond, the discipline has not scrutinised this enough. Treating the subject in this way does not amount to discounting questions of authority and Rule of Law. It only means they are not central to the present study.

2. Formal and material sources in international law – a false dichotomy?

I work under the presupposition that, in international law, the difference between formal and material sources is overstated, and that obsessing over this dichotomy often obfuscates the processes whereby international law is made, such as that unveiled here. As Besson explains, ‘[material sources] refer to all the moral or social processes by which the content of international law is developed (e.g. power play, cultural conflicts, ideological tensions), as opposed to the formal processes by which that content is then identified and usually modified to become law (e.g. legislative enactment).’¹⁶ Whereas in a domestic setting there is a structure that authorises certain organs, and not others, and places certain documents, and not others, as ‘legally binding’, this does not as such exist in international law¹⁷ – ‘[often] , distinguishing material and probatory sources from formal sources of international law becomes rather artificial’.¹⁸

Even if we take Article 38(1) of the ICJ Statute as a proxy for a Rule of Recognition,¹⁹ the binding nature of custom itself collapses the dichotomy between formal and material source.²⁰ By the very nature of lawmaking in a decentralised customary system, *evidence* of law and what *forms* law is often subsumed. For instance, General Assembly resolutions can both trigger law

¹⁴ Joost Pauwelyn, Ramses A Wessel and Jan Wouters, ‘When Structures Become Shackles: Dynamics in International Lawmaking’ (2014) 25 *European Journal of International Law* 733, 750.

¹⁵ James Crawford, ‘Chance, Order, Change: The Course of International Law’ (2013) 365 *Recueil des Cours*.

¹⁶ Besson, ‘Theorizing the Sources of International Law’ (n 10).

¹⁷ James Crawford, *Brownlie’s Principles of Public International Law* (8th ed, OUP 2012) 18.

¹⁸ Besson, ‘Theorizing the Sources of International Law’ (n 10) 170.

¹⁹ Besson and D’Aspremont (n 7) 3.

²⁰ Besson, ‘Theorizing the Sources of International Law’ (n 10) 170.

formation in a certain area, but also be adduced evidence of the content of a certain rule, a rule that can be opposed by one state against another. Doing away with the strict dichotomy between *formal* and *material* sources allows us to bridge the gap between what we think about what lawmaking and ascertainment *should* look like, and take seriously what it actually *is*.

It is not necessary to create a ‘new sources theory’ centring the profession to accept the premise of this thesis, it suffices to adopt a process-based approach to lawmaking. This entails looking at ‘*evidence* of a normative consensus amongst states and other relevant actors concerning particular rules or practices’, in the ‘process of interaction’ in which documents independently of their provenance as a formal source ‘stand as candidates for public reaction’ that may go on to create obligations.²¹

In adopting a process-based approach to international lawmaking, I highlight that in the same sense that one accepts and scrutinises the influence and role of ILC materials, treaties²², tribunal findings from many jurisdictions, and ‘soft law’ instruments such as General Assembly resolutions in the lawmaking process, there is no reason to exclude the role of individual members of the profession from the materials that ‘may be reflective of, or come to embody’²³ international law. In other words, I use a pre-existing frame (a process-based, rather than formalistic, approach to sources) to better understand the role of individuals in this complex process. I argue that, for historical and methodological reasons, the role of the profession has been overlooked, and this (a) has excluded an important avenue of law-formation from scrutiny; (b) with normative consequences such as lack of transparency in this process, lack of external accountability in relation to the process, and lack of responsibility by process participants.

My focus on ‘sources’ is not at odds with contributions to international lawmaking as argumentative practice²⁴ or as communicative practice²⁵, and thus stands as a contribution beyond the relatively narrow ‘sources’ discourse. Koskenniemi himself sees international legal

²¹ Crawford, *Brownlie’s Principles of Public International Law* (n 17) 19.

²² As part of the process of formation of obligations for parties extraneous to and independent from the treaty itself, rather than the source for obligations as such.

²³ Crawford, *Brownlie’s Principles of Public International Law* (n 17) 19.

²⁴ Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (n 8).

²⁵ Ingo Venzke, ‘In the Beginning Was the Deed’, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (OUP 2013); Ingo Venzke, ‘Contemporary Theories and International Lawmaking’ [2016] Research Handbook on the Theory and Practice of International Lawmaking 66; Ingo Venzke, ‘Sources in Interpretation Theories: The International Law-Making Process’ [2018] *The Oxford Handbook of the Sources of International Law* 401; Andrea Bianchi, ‘The Game of Interpretation in International Law’ [2015] *Interpretation in International Law* 34; Andrea Bianchi, ‘The International Regulation of the Use of Force: The Politics of Interpretive Method’ (2009) 22 *Leiden Journal of International Law* 651.

arguments as organised around the vocabulary of ‘sources’²⁶, though questioning the malleability of arguments themselves. Better understanding the role of individual lawyers in shaping what constitutes an acceptable argument over time amounts to shedding light on ‘the individual responsibilities of decision-makers’, centring ‘the ethical demands on individuals in positions of power’ as part of, and not extraneous to, international law’s practice, compatibly with the critical project.²⁷ The present inquiry is thus not inherently incompatible with Koskenniemi’s ‘culture of formalism’, at least as far as it centres individual professionals’ experience.

Those arguing for international law as a ‘communicative’ or ‘interpretive practice’ privilege what the *legal community* accepts as authoritative and ‘legal’ over arguments about origin to denote legal validity.²⁸ They shed light on actors that ‘remained hidden behind the overarching shadow of unitary states’ but that actually have an increasing influence on the making of international law²⁹. Framing lawmaking around *actors* and *processes* in which they are involved, those focused on ‘communicative practice’ open institutions to the scrutiny of global governance. There are three fundamental differences in emphasis, however, between my work and those approaching law as communication. The first is that, although believing that ‘authority rests on voluntary recognition and still constrains’,³⁰ I am not concerned with the ‘constitutional’ authorization for individuals to make law at the international level, as I expounded above. Coming from a process-based, rather than consent-based, approach to sources, I accept that they *have* authority in practice, and that is enough to require scrutiny.³¹ It so happens that I also do not think individual lawyers’ power to make law is a bad thing, if properly dissected. Secondly, the majority of work that takes the ‘communication approach’ focuses on the role of institutions³² and professional communities,³³ of which individuals are

²⁶ Martti Koskenniemi, ‘Methodology of International Law’ [2007] Max Planck Encyclopedia of Public International Law.

²⁷ Jan Klabbers, ‘Towards a Culture of Formalism? Martti Koskenniemi and the Virtues’ (2013) 27 Temple International and Comparative Law Journal 417, 420.

²⁸ Tanja Aalberts and Ingo Venzke, ‘Moving Beyond Interdisciplinary Turf Wars: Towards Understanding International Law as Practice’, *International Law as a Profession* (2017) 306.

²⁹ Venzke, ‘In the Beginning Was the Deed’ (n 25) 10.

³⁰ Ingo Venzke, ‘Between Power and Persuasion: On International Institutions’ Authority in Making Law’ (2013) 4 Transnational Legal Theory 354, 355.

³¹ For a similar approach, see Pauwelyn, Wessel and Wouters (n 14).

³² Venzke, ‘Between Power and Persuasion: On International Institutions’ Authority in Making Law’ (n 30); Venzke, ‘In the Beginning Was the Deed’ (n 25); Andrea Bianchi, ‘Choice and (The Awareness of) Its Consequences: The ICJ’s “Structural Bias” Strikes Again in the Marshall Islands Case’ (2017) 111 AJIL Unbound 81.

³³ Andrea Bianchi, ‘Epistemic Communities in International Law’ (*Lauterpacht Centre for International Law Seminar Series*, 2015) <<https://sms.cam.ac.uk/media/2181587>> accessed 11 May 2018; Andrea Bianchi, ‘Epistemic Communities’ (2018) 1 351; Andrea Bianchi, ‘Epistemic Communities in International Arbitration’ in Federico Ortino and Thomas Schultz (eds), *The Oxford Handbook of International Arbitration* (2020).

part of, rather than individuals at the ‘granular level’ of the community. That makes sense, insofar as the object bolstering authority is communication,³⁴ and one cannot communicate by oneself. The scrutiny of individuals as part of a community and institutions, but not the community itself, does not exclude the importance of communication. The difference is one of emphasis and framing.

B. The structure

This thesis is divided into four parts.

1. Part I - Literature review – ‘teachings of the most highly qualified publicists’ and beyond **Part I**, entitled ‘Part I – Literature review – ‘teachings of the most highly qualified publicists’ and beyond’, and is part critical literature review, part inquiry into international legal method.

Section 1 of Part I starts by looking at ‘teachings’, which are only part of the story about how international lawyers make law, but remain central to the question. Doctrine is more than one of the ‘limbs’ of the profession. International lawyers gravitate towards ‘teachings’ as a means of explaining the role of lawmaking by individual lawyers because they are the vocabulary available in the constrained remit of sources doctrine. Because mainstream positivist sources literature restricts its language to Article 38(1) of the ICJ Statute, and ‘teachings’ are the only ‘source’ therein coming from individuals, surveying the literature on ‘teachings’ reveals the mainstream’s view on individuals’ lawmaking role. This is how this thesis begins. Systematizing what is written about ‘teachings’, this thesis unpacks and highlights the dismissive view positivists have of the profession’s ability to influence the law’s substance.

Part of the reason the individual international lawyers’ lawmaking role remained uncharted is the state-centrism that still frames the rhetoric about sources, but this does not explain why courts, equally devoid of formal authority alongside ‘teachings’³⁵, are held in higher esteem.³⁶ With a specific focus on Oppenheim’s oeuvre, this thesis argues the remaining reasons for dismissing ‘teachings’ in particular and individual international lawyers’ lawmaking role in general can be traced back to the history of international law’s positivist method. International lawyers, attempting to prevent the discipline from being seen as fragile, sought and still seek to

³⁴ W Michael Reisman, ‘International Lawmaking: A Process of Communication: The Harold D . Lasswell Memorial Lecture’ (1981) 75 Proceedings of the Annual Meeting (American Society of International Law) 101.

³⁵ ‘Judicial decisions’ in Article 38(1)(d) encompass both international court and domestic court decisions, and the latter is both ‘subsidiary means for interpretation’ *and* state practice for the purposes of the formation of custom in the formalist view. See the treatment of ‘Decisions of Courts and Tribunals’ (Conclusion 13), and ‘Teachings (Conclusion 14) in the International Law Commission, ‘UN Doc A/73/10, Draft Conclusions on Identification of Customary International Law, With Commentaries’, *Yearbook of the International Law Commission* (2018).

³⁶ On the centrality of the judge and judgments in the discipline, see Zarbiyev (n 3).

make it and portray it as objective.³⁷ This is incompatible, in their view, with any role for subjectivity and the presence of personal imprints on the law. In other words, positivism presumes that individuals are always biased, and thus tries to purge international law from their influence in fear it will lose the ability to constrain states. Even those part of the mainstream who espouse a flexible view of sources, to which this thesis subscribes, do not properly engage with the personal aspects of the ‘dialectical process’ whereby international law is made.³⁸ James Crawford is a good example. Despite acknowledging that differences between formal and material source and between formation and identification of custom are not particularly relevant in international law, and admitting judgments of a plethora of courts, ILC documents and other materials are all part of the formation of custom,³⁹ he still dedicates himself to ‘demystifying’ a perceived excessive emphasis on individual influence at the systemic level.⁴⁰

Interestingly, this aversion to ‘teachings’ in particular and individual influence in general only exists in the mainstream’s *systemic* approach to sources. When looking at *particular* cases of individuals’ lawmaking role, and more broadly their role in the development of international law in particular ways, the same writers are surprisingly comfortable to disclose certain professionals’ impact on the law. Though couched as pushes for ‘legal development’, authors are in fact acknowledging instances of individuals partaking in the ‘process of interaction’⁴¹ whereby international law is made. Biographical accounts *stricto sensu* also reveal this⁴², but this thesis aggregates examples from obituaries in the *British Yearbook of International Law* to make this point. Their analysis here inaugurates a section that takes stock of works outside sources literature that purport to address the profession’s influence on the law. Multiple examples in these self-contained stories both confirm the existence of the latent phenomenon with which this thesis is concerned, and help illustrate its complexity. Through the lens of obituaries, the thesis starts unpacking some of the processes whereby members of the profession influence the law in practice, demonstrating that their power lies in the actions of the ‘invisible college’ that include but go well beyond ‘teachings’.

³⁷ Benedict Kingsbury, ‘Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim’s Positive International Law’ (2002) 13 EJIL 401.

³⁸ James Crawford, ‘The Identification and Development of Customary International Law’ [2014] Spring Conference of the ILA British Branch – Foundations and Futures of International Law 1.

³⁹ *Ibid.*

⁴⁰ James Crawford, ‘Public International Law in Twentieth-Century England’, *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth Century Britain* (2004).

⁴¹ Crawford, *Brownlie’s Principles of Public International Law* (n 17) 19.

⁴² E.g. Philippe Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (2016); Oona Anne Hathaway and Scott J Shapiro, *The Internationalists: How a Radical Plan to Outlaw War Remade the World* (Simon & Schuster 2017).

The absence of analysis of the role of individuals in lawmaking in international law can be contrasted with a literary ‘boom’ on the workings of the international legal profession. **Section 2 of Part I** scrutinises this. It begins with **‘Theory and practice or theory versus practice?’** that looks at different accounts of how the two poles of the profession (theory and legal practice) interact, or should interact. It follows with **‘Sections of the Profession’**, dissecting internal accounts of what practitioners themselves say about their jobs, and by scholars looking into practitioners’ work. The third section – **‘Critical work on the profession’** – analyses critical work (broadly construed) written about the international legal profession: histories of the international legal profession, literature criticising expertise, prominently David Kennedy’s *World of Struggle*,⁴³ and Jean d’Aspremont’s extensive works on the profession’s disciplinary imagination. This is followed by **‘Internal disciplinary accounts’**, analysing the burgeoning interdisciplinary literature on the profession and on citation analysis. Finally, **‘External accounts: sociologists and anthropologists’** dissects the work of sociologists and anthropologists on the legal profession in general and the international legal profession in particular. The conclusions to this literature review demonstrate that there are gaps to fill, and how some of these gaps will be filled by this thesis’ account of how individual members of the profession come to make international law.

Part I thus framed the project as a survey of the literature and a historical account of international law’s relationship with personalism. Its conclusions are four-fold. Firstly, (1) that there is insufficient work on how individual members of the profession contribute to lawmaking. (2) This gap exists partly because positivist methodology – that still dominates the literature on lawmaking – is historically uncomfortable with the idea that individuals can make international law. (3) This discomfort is partly due to a historical belief that international law is fragile, and needs to be portrayed as ‘real law’. (4) Beyond sources literature, albeit more visible this phenomenon is not properly accounted for. This thesis remediates this in its subsequent sections through two snapshots of the processes whereby members of the ‘invisible college’ make law, from which finally general conclusions will be drawn.

2. Part II – The community: individuals, careers, and networks

Part II of this thesis – **‘The community: individuals, careers, and networks’** – draws a rich and detailed picture of the profession across time through a quantitative study. It repurposes the obituaries in the *British Yearbook of International Law* (1920-present) used above

⁴³ David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

to understand how the community is organised. Employing Social Network Analysis, it sheds light on the relationship between members of the community and its close-knit family trees, mapping the paths whereby ideas can travel. It also demonstrates the lack of diversity (in gender, educational background, and geographical representation) in the profession. Finally and very importantly, this exercise maps career paths extensively, allowing anecdotal accounts about international lawyers' switching between roles – Schachter's *dedoublement fonctionnel*⁴⁴ – to be described more credibly and accurately. It is a mix of this close-knit nature of the community and the fluidity in career paths that allows for ideas to be pollinated amidst the system. Although it does not purport to map the entirety of the profession, this section of the thesis (especially if read in tandem with other studies dedicated to mapping sections of the profession) provides a novel account of how the community and its members operate at a social level. Although the *British Yearbook* privileges the British perspective, the lack of diversity (geographical and otherwise) found here should be read in tandem with studies that use a similar method to look at sections of the profession (arbitrators, judges, counsel before international courts), which yield similar results, but that lack the personal and social dimension the present study emphasises.

3. Part III - Zooming in: international lawyers making law in action

The community description of Part II lays the foundation for Part III, which 'zooms in' to provide a granular description of the processes whereby members of the profession – whose career paths and connections writ large are described in Part II – weave their personal projects into law. In other words, it is Part III describes the *consequences* of the features of the community of international lawyers outlined in Part II. It explores how the process of lawmaking by individuals can occur in 'general' international law (Part III, Section 1 -The case study for 'General International Law') and in its specialised regimes (Part III, Section II – Beyond 'general' International Law: Specialized regime *vignettes*).

a. Part III, Section I: The case study for 'General' International law: Crawford, Ago, and 'Multilateralising' State Responsibility

The section on 'general international law' describes how two individuals, Roberto Ago and James Crawford, attempt to make international law less contractual and more public-order-like through their actions as members of the 'invisible college', crafting and embedding legal

⁴⁴ Schachter's work is dissected in Part I, p. 40. Differently from Georges Scelle's *dedoublement fonctionnel* or role-splitting, which relates to the dual role of national organs that serve national and international functions. Antonio Cassese, 'Remarks on Scelle's Theory of 'Role Splitting' (Dédoulement Fonctionnel) in International Law' (1990) 1 *European Journal of International Law* 210.

concepts into the system with mixed success. Capturing the complexity of the process, which defies easy cause-and-effect narratives, this section narrates the failure of Ago's International Crimes of States and the purported success of Crawford's standing for non-injured states for breaches of obligations towards the international community as a whole. These individuals push their concepts into positive law through a mix of varied practice, primarily at the ILC and ICJ, and scholarship, whilst interacting with other members of the profession, states, and in light of their own vision of international legal method. This section also underlies the importance of refinement in debates about divisions within the profession – dividing the profession along national lines,⁴⁵ for example, is excessively simplistic, as lawyers' projects are crafted by a mix of factors such as nationality, educational background, and gender, but also personal sensibilities, and philosophical leanings. In adding depth and complexity to the debate, it explains the consequences of the individual characteristics and personal connections mapped out in Part II.

b. Part III, Section II – Beyond 'general' International Law: Specialized regime vignettes

Section IV explores in three *vignettes* about Sir Elihu Lauterpacht, Antonio Cassese, and Michael Schmitt, how the process of individuals partaking in international lawmaking happens within some of international law's specialised regimes, outside the echelons of general international law of the ILC and the ICJ. Drawing from primary and secondary sources on these individuals' legal contributions, a more complex picture emerges: one that accounts for the role of private non-legislative codifications, such as the *Tallinn Manuals* on cyberspace, the role of treaties (even those never in force such as the *Abs-Shawcross Draft Convention on Investments Abroad*), and of *ad hoc* tribunals.

4. Part IV – Conclusions and Normative Implications of this thesis

The final Section outlines the conclusions of this thesis and the normative implications of recognizing that members of the international legal profession often make law. It delineates the consequences of acknowledging this phenomenon, and argues in favour of transparency for better governance of these processes. Whereas members outside the community of influential lawyers can exert external control over this phenomenon, internally the members of the profession must take responsibility for their role as lawmakers.

It is concluded that bound by the structures with which international lawyers are presented and help shape, there are spaces for individual agency. In other words, lawyers face external

⁴⁵ Anthea Roberts, *Is International Law International?* (OUP 2017).

barriers to individual agency in making law – the opposition of states and other members of the community, considerations of political economy, the lack of institutional backing – but also internal barriers – such as one’s internalised structural biases will determine choices and perceived available solutions. Within those narrow margins, however, it is maintained that international lawyers’ lawmaking role remains one of the available ‘pockets of possibilities’⁴⁶ for transformation and emancipation.

C. Methodology – the advantage of a *juridical* method

This thesis borrows from critical histories of the profession to understand international law’s ambiguity towards personalism, quantitative methods (Social Network Analysis of obituaries) to describe the profession at large, and qualitative methods (case studies and *vignettes*) to describe the processes it is concerned with in a granular manner. It is also informed by sociologies of law concerned with unveiling similar processes,⁴⁷ works on epistemic authority,⁴⁸ and knowledge production.⁴⁹ Its ‘Normative Implications’ draw from global governance literature and critical approaches in arguing for transparency and responsibility.

Despite borrowing from different methods, this thesis chooses to speak of sources and lawmaking, and thus is informed by a juridical persuasion. The aim of this work is not only to unearth the community’s power in broader terms, but its *lawmaking* power. In other words, although cognizant of interdisciplinary literature on the legal profession, it asks doctrinal questions, ‘developing arguments about contemporary political problems that draw on inherited concepts with a history of legal meaning attached to them’.⁵⁰ This is not an exercise in epistemic purism, but a deliberate move based on the audience it seeks to captivate. The thesis seeks to inspire those who speak the ‘mainstream language’ of our discipline – both the periphery and the ‘invisible college’. To both groups, the process of individuals making law is either invisible or ubiquitous, and thus beyond scrutiny. This thesis’ contribution lies in understanding how a lawyer (and a woman from the Global South writing from ‘the centre’) speaking to lawyers can most advance the debate. This goes in tandem with the broader themes

⁴⁶ I Venzke and KJ Heller, ‘Contingency in International Law: On the Possibility of Different Legal Histories’ 24.

⁴⁷ Bruno Latour, *The Making of Law: An Ethnography of the Conseil d’Etat / by Bruno Latour*. (Polity 2009); The prime examples being Yves Dezalay and Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press 1996).

⁴⁸ Peter Haas, ‘Epistemic Communities’ in Daniel Bodansky, Jutta Brunnée and Ellen Hey (eds), *The Oxford Handbook of International Environmental Law* (OUP 2008); Bianchi, ‘Epistemic Communities in International Law’ (n 33); Bianchi, ‘Epistemic Communities’ (n 33).

⁴⁹ Lianne JM Boer, ‘The Greater Part of Jurisconsults?: On Consensus Claims and Their Footnotes in Legal Scholarship’ (2016) 8 *Leiden Journal of International Law* 1021; Lianne JM Boer and Tanja Aalberts, ‘Entering the Invisible College: Defeating Lawyers on Their Own Turf’ [2018] *BYIL* 1.

⁵⁰ Anne Orford, ‘International Law and the Limits of History’, *The Law of International Lawyers: Reading Martti Koskenniemi (Forthcoming)* (2015) 8.

of the project - the recognition that there is a politics to method, and that international law is a 'sentimental' project⁵¹, purportedly universal in application but often deeply personal in its development.

⁵¹ G Simpson, 'The Sentimental Life of International Law' (2015) 3 *London Review of International Law* 3.

I. Part I – Literature review – ‘teachings of the most highly qualified publicists’ and beyond

This literature review is divided into three parts: firstly, it analyses the literature on ‘teachings of publicists’ specifically. Secondly, it looks at the literature on lawmaking and the international legal profession beyond ‘teachings’, namely the ‘invisible college of international lawyers’. Finally, it surveys the literature on the international legal profession *beyond* lawmaking, and sociologies and anthropologies of the legal profession more broadly that are relevant here.

A. International law’s complex relationship with the ‘teachings of the most highly qualified publicists’

This section looks the role of individuals in making international law by looking at the (lack of) treatment of the ‘teachings of the most highly qualified publicists’ by the literature on the sources of international law. It is argued here that a state-centric view of the subject and the overlooking of ‘teachings’ are both expressions of the entrenched conviction that international law should be perceived as neutral, objective, detached, and a-political, and thus *scientific* and removed from personal bias, which does not correspond to the reality of international lawmaking. Looking at ‘teachings’ in particular provides a useful tool for understanding international law’s relationship with individuals’ role in lawmaking. This is because, due to its inclusion in the authoritative ‘list of sources’ in Article 38(1) of the ICJ Statute, ‘teachings’ are the embodiment of individual participation within traditional sources discourse. Looking at the literature’s treatment of the ‘teachings’ gives insight into mainstream scholarship’s view of ‘personalism’ more broadly. The term ‘personalism’ here is not a technical term, but the closest in spirit for the phenomenon of individuals influencing something – in this case, the law – in their own image.

Section A.1 takes stock of what contemporary traditional sources literature says about ‘teachings’. If it discusses ‘teachings’ at all, the literature (1) dismisses it as a 19th century relic or (2) acknowledges some role for ‘teachings’, especially for professional associations such as the IDI or the ILA, and authoritative bodies such as the ILC, but lessening the role of scholars to that of compilers of state practice. In summary, sources literature is uncomfortable with ‘teachings’ presence in the Statute, and does not properly tackle their role. This is especially relevant if contrasted with the friendlier view the mainstream has towards judgments, the other subsidiary source under Article 38(1)(d).

Parts III.A.2 and III.A.3 explore some of the reasons for the mainstream’s unease with ‘teachings’ in particular and personalism in general. It traces it back to the rise of positivism in

international law, exemplified in Lassa Oppenheim's 'The Science of International Law: Its Task and Method'⁵². Beyond Oppenheim, the mistrust of 'teachings' in particular and personalism in general are mirrored at the Advisory Committee of Jurists in 1920, and repeated in contemporaneous debates about 'teachings' in sources literature. It is thus argued that the literature's devaluing of 'teachings' is *not* related to their intrinsic value as a source, or their lack of power to influence the law. It is instead an inherent feature of positivist methodology, that saw the power of individuals as a threat to international law's cogency.

1. Contemporary 'teachings' about 'teachings' – discomfort with individuals making law
A review of the literature on sources has shown that it is dismissive of 'teachings of publicists' to varying degrees. One can divide these works into two main categories. The first one puts state consent at the centre of international lawmaking, and it thus rejects any role for teachings, which are produced by individuals and not states or institutions populated by states. This rejection can take two forms; the first one is not to address the source at all, which is a clear dismissal of its importance. This is done for instance by Danilenko⁵³ and by Degan⁵⁴ who in their books on sources fail to mention 'teachings' once. The second form of absolute rejection of 'teachings' is to expressly mention their role in order to dismiss it completely as a source of law due to the absence of state involvement in their making. This is the position of Van Hoof,⁵⁵ who understands that doctrine's lack of 'basis in consent'⁵⁶ not only justifies its subsidiarity, but *impedes* it from constituting a source of international law all together.⁵⁷ His voluntarist views are taken further, as he defends that doctrine should be placed in a lower position than (also subsidiary) caselaw, states consent to a tribunal's exercise of jurisdiction, but have no involvement in the development of doctrine.⁵⁸

A less radical approach to teachings is held by the majority of the literature, who although defending that scholarship should not be deemed completely irrelevant, still hold that ultimately individual lawyers do not make the law in their own right. Consequently, they relegate 'teachings' as subsidiary to the 'real' sources under Article 38. They argue that 'teachings' should be used as evidence of formal sources of law, compilations of state practice that could help a court in establishing the existence and/or content of a customary rule or the

⁵² 'The Science of International Law: Its Task and Method' (1908) 2 AJIL 313.

⁵³ Gennady M Danilenko, *Law-Making in the International Community* (Martinus Nijhoff 1993).

⁵⁴ Vladimir Đuro Degan, *Sources of International Law* (Martinus Nijhoff 1997).

⁵⁵ GJH van Hoof, *Rethinking the Sources of International Law* (Kluwer 1983) 177.

⁵⁶ *Ibid.*

⁵⁷ *Ibid* 176–177.

⁵⁸ *Ibid* 177. Whether this is sound from a formalist perspective, *vis-à-vis* the absence of a *stare decisis* doctrine in international law, is questionable.

correct interpretation of a treaty provision. Examples of those expressing this view are abound, and include Michael Wood,⁵⁹ Clive Parry,⁶⁰ Hugh Thirlway,⁶¹ and Manfred Lachs.⁶² Interestingly, authors belonging to this majority accompany this relatively conservative view of ‘teachings’ with the caveat that individual international lawyers had an impact in the modification or creation of discrete areas of the law, as well as in the furthering of the discipline as a whole. They remain careful in stating that they helped ‘develop’ the law, rather than ‘create’ it, and circumscribe these individuals’ importance to certain areas of law, generally without giving details in how the actual process of influence took place in each case.

The ambiguity of this relationship is exemplified in this passage, by Lachs:

Nevertheless, of none, not even my heroes, could I say: ‘this man made law’. For teachers are not legislators, nor lawmakers in international relations. The ‘teachings’ of the most highly qualified publicists of various nations are only ‘subsidiary means for the determination of rules of law’. Without them, however, the law would certainly not be what it is.⁶³

Similarly, Hugh Thirlway on the same breath argues that ‘[whatever] their position in the past’, teachings ‘only carry weight as far as they refer back to [principal sources]’, but also that ‘there are a number of scholarly publications in specialized fields that have obtained the status of being the book on that particular subject, cited by counsel and by tribunals *with almost the authority of one of the three sources of international law*; and *the major general treatises still carry weight* [emphasis added].⁶⁴

This is not a debate restricted to academic works on sources. The ILC’s Customary International Law study demonstrates the same discomfort with ‘teachings’ in particular and individual influence in general. Especially when confronted with individual influence in the form of its own output, the ILC was incapable of meaningfully engaging with the role of individuals and other documents produced by non-states that have a strong personal flavour:

The Commission decided not to include at this stage a separate conclusion in the output of the International Law Commission. Such output does, however, merit special consideration in the present context. As has been recognized by the

⁵⁹ Sir Michael Wood, ‘Teachings of the Most Highly Qualified Publicists (Art. 38(1) ICJ Statute)’, *MPEPIL* (2010).

⁶⁰ Clive Parry, *The Sources and Evidences of International Law* (Manchester University Press 1965) 103–108.

⁶¹ Hugh Thirlway, ‘Subsidiary Sources’, *The Sources of International Law* (OUP 2014) 126–128.

⁶² Manfred Lachs, ‘Teachings and Teaching of International Law’, *Recueil des Cours* (1976) 169.

⁶³ *Ibid.*

⁶⁴ Hugh Thirlway, *The Sources of International Law* (OUP 2014) 127.

International Court of Justice and other courts and tribunals, a determination by the Commission affirming the existence and content of a customary rule may have particular value; as may a conclusion by it that no such rule exists. This flows from the Commission's unique mandate from States to promote the progressive development of international law and its codification, the thoroughness of its procedures (including the consideration of extensive surveys of State practice), and its close relationship with States as a subsidiary organ of the General Assembly (including receiving oral and written comments as it proceeds with its work). The weight to be given to the Commission's determinations depends, however, on various factors, including sources relied upon by the Commission, the stage reached in its work and above all upon States' reception of its output.⁶⁵ [some footnotes omitted, emphasis added]

Notice how the Commission cannot but admit its own systemic lawmaking role, but seeks to attribute it to its relationship to states. On 'teachings' more specifically, the Commission reached similarly underwhelming conclusions,

There is need for caution when drawing upon writings, since their value for determining the existence of a rule of customary international law varies: this is reflected in the words 'may serve as'. First, writers sometimes seek not merely to record the state of the law as it is (*lex lata*) but to advocate its development (*lex ferenda*). In doing so, they do not always distinguish (or distinguish clearly) between the law as it is and the law as they would like it to be. Second, writings may reflect the national or other individual viewpoints of their authors. Third, they differ greatly in quality.⁶⁶

These passages show the inherent tension in the manner in which mainstream works on sources acknowledge some individuals' key role in legal development in discrete cases, but refuses to admit the systemic implications of this fact.

⁶⁵ Once the General Assembly has taken action in relation to a final draft of the Commission, such as by commending and annexing it to a resolution, the output of the Commission may also be considered under Draft Conclusion 12 (Resolutions of International Organizations and Intergovernmental Conferences). ILC, 'Draft conclusions on identification of customary international law, with commentaries' (2008) UN Doc A/73/10, Part Five, para (2).

⁶⁶ ILC, 'Draft conclusions on identification of customary international law, with commentaries' (2008) UN Doc A/73/10, Part Five, Conclusion 14, para (3).

2. A story of unease – positivist method, Oppenheim, and international law as ‘real law’ (1908)

This section investigates why sources literature is dismissive of ‘teachings’. Reading Oppenheim’s representative articulation of the positivist method⁶⁷ in historical light, it concludes the contemporary aversion to ‘teachings’ is symptomatic of the historical hesitance of international legal positivism regarding what I call ‘personalism’. Oppenheim’s work is used here as both illustrative and constitutive of positivist methodology.⁶⁸ His rejection of natural law as a foundation for international law in particular⁶⁹ although not unprecedented, was extremely influential. His work’s systematicity in approaching legal problems⁷⁰ was attractive to students and practitioners alike,⁷¹ bolstering its influence in universities and Ministries of Foreign Affairs. He was ‘instrumental’ in creating a view of law that can ‘[apolitically report]’ on the reality of the world,⁷² and pivotal in articulating a methodology⁷³ that required moving away from the (overt) authority of those such as Grotius, Bynkershoek, and Vattel. It is ironic that his treatise, alongside those whose influence he sought to eliminate, is one of the few books cited by the ICJ.⁷⁴

In ‘The Science of International Law: Its Task and Method’⁷⁵, Oppenheim outlines international lawyers’ goals: to promote ‘peace among nations and the governance of their intercourse by what makes for order and is right and just’, ‘peaceable settlement of international disputes’, and ‘the establishment of legal rules for the conduct of war and the relations between belligerents(sic.) and neutrals’.⁷⁶ After setting out the tasks of an international legal scientist – the exposition of existing legal rules, historical research, criticism of existing law, preparation of codification, distinction between old custom and new codifications, fostering arbitration and creating common rules of procedure for tribunals, and popularizing international law – Oppenheim begins to describe the ‘method’ by which one must ascertain legal norms in international law.

⁶⁷ Oppenheim (n 52).

⁶⁸ M Schmoeckel, ‘The Internationalist as a Scientist and Herald: Lassa Oppenheim’ (2000) 11 EJIL 699.

⁶⁹ Ibid.

⁷⁰ Ibid.

⁷¹ Ibid.

⁷² Miloš Vec, ‘The Project of Anti-Positivism in International Law’ 505 7.

⁷³ Ibid 113.

⁷⁴ Michael Peil, ‘Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice’ (2012) 136 Cambridge Journal of International and Comparative Law 1.

⁷⁵ Oppenheim (n 52).

⁷⁶ Ibid 314.

When describing said method, Oppenheim differentiates his preferred ‘positive’ methodology from that of natural law, a ‘hunt for phantasms’⁷⁷, and that of Austinian Positive Morality, which does not classify international law as ‘real law’.⁷⁸ He argues the best methodology, which is positive and ‘scientific’ in nature, must always start by discovering existing legal rules, ‘to be found in customary practice of the states or in lawmaking conventions’.⁷⁹ International law at the time was sparsely codified, but Oppenheim understood that positive customary rules ascertainable through assessment of state practice should be accepted as legally binding.⁸⁰ In undertaking this exercise, he expounded that writers must be honest, distinguishing clearly between their ‘opinions *de lege ferenda* and really recognized rules of law’, and not stepping into the place of either legislation/codification, nor of custom.⁸¹ His views on method explain his earlier distinctions between international lawyers’ ‘tasks’, and his concern with distinguishing between ‘[exposing] of the existing rules of law’, and the criticism of existing rules, or proposing codification.⁸²

On one hand, he advocates for scholarly proliferation and the ‘conscriptio’ of international lawyers to popularize the discipline and promote codification.⁸³ He also acknowledges the unparalleled importance of scholarship in international law, given the discipline’s nascent state and its decentralised nature. On the other hand, Oppenheim is weary of the authority of scholars in the discipline. He thought study of the discipline should be fostered, but scholarship’s importance as a *source of law* should give way to state practice.

Oppenheim understood international law was customary and sparse, and that this required someone to ascertain it. In the absence of international judges formally authorized to find international law, he recognizes writers were given ‘a much more influential position’ than enjoyed in municipal systems.⁸⁴

It is for this reason that text-books (sic.) of international law have so much more importance for the application of the law than text-books (sic.) of other branches of the law. Whereas the latter are only a means of preliminarily ascertaining the law, it being the

⁷⁷ Ibid 330.

⁷⁸ Ibid.

⁷⁹ Ibid 333.

⁸⁰ Ibid 335.

⁸¹ Ibid.

⁸² Ibid 314. The other tasks included historical research, criticism of existing law, preparation of codification, distinction between old custom and new codifications, fostering arbitration and creating common rules of procedure for tribunals, and popularizing international law.

⁸³ Ibid 356, 326.

⁸⁴ Ibid 345.

judge who ultimately will lay it down, the former are as yet and for some time to come the only means of ultimately ascertaining what the law is.⁸⁵

Despite being temporarily justifiable Oppenheim considered the prominent role for scholars of international law undesirable. The value of their scholarship is only as good as is their evidence of having correctly surveyed and evaluated the practice of states, since customary international law could only be said to arise from said practice.⁸⁶ For teachings to be considered reliable evidence of the existence custom, writers must follow a strict method of appreciation of state practice, since ‘even great authorities make mistakes, are influenced by their political fancies, take usages for customs, take the future for the present, confound their own opinion with that is generally recognized’.⁸⁷

Despite their best efforts of decanting state practice, Oppenheim sees individual writers as innately biased.⁸⁸ Their ‘bent of mind’ detracts them from being objective, and from undertaking a neutral assessment of state practice – they cannot escape to national, political, or even humanitarian inclinations⁸⁹. Ultimately, Oppenheim hoped, the science of international law would only be needed to interpret codes enacted by states, and judgments of pre-established international courts:

No one of the present generation of international jurists will live when the codification of international law will be taken in hand. And when codification becomes an actuality, all our present books will lose their value and will go mouldy on the shelves of the libraries through not being read. But our work is nevertheless done for the future, for it must needs help to educate that future generation whose happy lot it will be to take codification in hand.⁹⁰

Oppenheim’s ideas of method, neutrality and science must be seen in the context of 19th century scientism.⁹¹ However, animosity towards the prominence of scholarship in international law was not due to a passion for method for method’s sake. As he alludes to in ‘The Science’, the absence of a method, or the excessive reliance on scholars’ inherently biased ascertainment of law through the observation of the practice of states, was detrimental to international law being perceived as ‘real law’, and consequently for its ability to constrain states. This passage is illustrative of this argument, stating that flaws in method ‘[offer] a breach through which the deniers of the law of nations can easily come in and attack the very existence

⁸⁵ Ibid 315.

⁸⁶ Ibid 345.

⁸⁷ Ibid.

⁸⁸ Ibid 353.

⁸⁹ Ibid.

⁹⁰ Ibid 356.

⁹¹ Vec (n 72) 114.

of an international law.⁹² As observed by Kingsbury in a masterful article on Oppenheim's work,

[Oppenheim] was gravely concerned with the problem of how to ground and sustain authority in international law. Because of the peculiar importance of scholarly writings in international law — an importance Oppenheim hoped would recede — those engaged in this scholarship must adhere to relatively detached positivist legal method, or the already precarious authority of international law would be further undermined.⁹³

Oppenheim perceived excessive reliance on scholarship as an opening for criticism and delegitimization of his project as a whole, a compromise of the ability of international law to impose itself as 'real law' and thus properly constrain states. There is thus an interesting dichotomy – whilst requesting self-restraint by scholars and a strict adherence to method, he also shows himself a passionate devotee to a project of state restraint, which in a way is not at all neutral. There is also a tension between his rejection of personalism in the form of scholarship with his simultaneous call to arms for international law scholars to write *more* monographs and scientific pieces to help popularize the law and strengthen the discipline. He requests of international lawyers an 'endeavour to write in a truly inter-national and independent spirit, [extricating themselves from] individual ideas concerning politics, morality, humanity, and justice',⁹⁴ but also passionately advocates in a gospel-like manner that writers adopt his method of ascertainment in order to further the project of international law as a means of protecting humanity:

Ours is the faith that removes mountains, for our cause is that of humanity. The all-powerful force of the good which pushes mankind forward through the depths of history will in time unite all nations under the firm roof of a universally recognized and precisely codified law. And the words of the old prophets may after all in the end become true: 'They shall beat their swords into plowshares, and their spears into pruning-hooks; nation shall not lift up sword against nation, neither shall they learn war any more' (Isaiah, ii :4).⁹⁵

⁹² Oppenheim (n 52) 329.

⁹³ Kingsbury (n 37) 428. Kingsbury's reading of Oppenheim is in his own words more sympathetic than that of others such as García-Salmones Rovira's ('Oppenheim, Empire, and Method', *The Project of Positivism in International Law* (OUP 2013).) – whereas the latter sees Oppenheim's mission to further international law as a way of promoting economic liberalism, and attached thereto colonial capitalist interests and inequality, Kingsbury sees it as a way of ensuring political liberal values are preserved.

⁹⁴ Oppenheim (n 52) 355.

⁹⁵ *Ibid* 356.

This quote's devout tone suggests that Oppenheim's problem is less with international law's political or moral missions in themselves, and more with giving international legal rules the *appearance* of neutrality, so as to further a project in which he was personally invested – promoting international law as a means of constraining states' power.

This reading of Oppenheim demonstrated that the turn against scholarship is inherent to positivist methodology, which perceived individual scholars as personally biased and open reliance in their work as ultimately detrimental to the 'science' of international law. International law as science, in consonance with the general spirit of 19th century scientism in general, perceived involvement between the scientist/observer and the subject of study as detrimental to the assessment of the subject, compromising the outcome of the study in question.⁹⁶ Oppenheim's use of this scientism, however, can be seen as more than an attachment to method, but a way of promoting international law by portraying it as neutral, capable of being ascertained through a scientific method, and consequently more likely to persuade critics and be perceived as 'real law', rather than a set of non-binding moral obligations or just the result of disorderly politics. Especially if one considers the relative failure of the 'men of 1873' who embraced treaties embodying the 'consciousness/conscience of the civilized world' to convince those in charge of foreign policy to promote liberal ideals through international law,⁹⁷ Oppenheim's move away from doctrine seems all-together even more justified. Rejecting scholarship's role allowed him to promote a project that sought to utilize law to constrain states' actions, promoting peaceful settlement and other liberal ideals.⁹⁸ Of course the extent to which this was actually couched in pro-Imperialist interests and capitalist expansionism, is up for debate.⁹⁹

3. Oppenheim's ideas in action: The Advisory Committee of Jurists (1920)

As explained above, the positivist methodology promoted by Oppenheim argued that the ascertainment of custom was to be undertaken through neutral evaluation of state practice, seeing as the end goal of the discipline mass codification and the creation of international courts with compulsory jurisdiction and a doctrine of binding precedent. This objective is in tension with admitting a role for individual lawyers' participation in general, and for scholarly participation in particular. This move towards codes and courts came partially from a distrust in individual lawyers' ability to separate the 'real law' (distilled from the practice of states) from

⁹⁶ See generally Anne Orford, 'Scientific Reason and the Discipline of International Law' (2014) 25 EJIL 369.

⁹⁷ Martti Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (Cambridge University Press, 2002) 91–92.

⁹⁸ A reading of Oppenheim's positivism as part of a political project is supported by Kingsbury (n 37).

⁹⁹ García-Salmones Rovira (n 93).

their personal preferences and biases. This section will demonstrate how this tension between state-centric positivism and teachings/individual influence permeated the debate on sources and applicable law before the Advisory Committee of Jurists. The adoption of the ‘teachings’ provision in the PCIJ Statute, later incorporated almost verbatim in the ICJ Statute, was the result of a compromise between different members of the Committee, and proved polarising in the otherwise sparse discussions on the applicable law provision of the Statute. The views of the Committee’s members oscillated between a state-centric approach to international lawmaking, which privileged state practice and consensual sources such as treaties and custom, and a tacit understanding that international lawyers, through their ‘teachings’, played some role in the development of the law given the difficulty in ascertaining custom and the decentralized nature of the system.¹⁰⁰ The same tensions and positions found in Oppenheim and within the Advisory Committee are presently reproduced in mainstream literature on sources of international law, and in the current discussions on custom at the ILC. This shows the relevance of the debate on individual influence and international law methodology.¹⁰¹

The discussions on applicable law at the PCIJ before the Committee began in the 13th Session.¹⁰² Since the Root-Phillimore proposal drafted by the American and English representatives, which was the basis for the discussions in the Committee, contained no applicable law provision, the Chairman of the Committee, Baron Descamps proposed a list of sources to be applied in successive order by the Court. Descamps’ list included treaties, custom, rules recognized by ‘the legal conscience of civilized nations’, and international jurisprudence, but not ‘teachings’.¹⁰³ Despite the absence of ‘teachings’ in his proposal, Descamps later added that ‘[one] glance at international life as it really is suffices to show what a great part is played in it by obligations created, not by a mutual agreement between the two parties, but ... from some act of a third party etc.’, and stated that judges, when faced with a case about which the law was silent – where ‘no definite convention or custom [that] appeared’ – should first of all resort ‘concurrent teaching of the authors whose opinions have authority’.¹⁰⁴ In this sense he recorded the words of the ‘great Chancellor Kent’: ‘when a greater part of jurisconsults agrees upon a certain rule – the presumption in favour of that rule becomes so strong, that only a

¹⁰⁰ Sivakumaran (n 2) 2.

¹⁰¹ See for instance the unease with which the International Law Commission addresses ‘teachings of publicists’ in its current work on the identification of customary international law in ILC, ‘Report of the International Law Commission on the work of its Sixty-eight session’ (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10.

¹⁰² Permanent Court of International Justice Advisory Committee of Jurists, ‘Procès-Verbaux of the Proceedings of the Advisory Committee of Jurists June 16th-July 24th 1920’ (1920) 293 <http://www.icj-cij.org/pcij/serie_D/D_proceedings_of_committee_annexes_16june_24july_1920.pdf>.

¹⁰³ Ibid 306.

¹⁰⁴ Ibid 323.

person who makes a mock of justice would gainsay against it'.¹⁰⁵ In these cases, once the opinions of jurists were surveyed, he argued that judges faced with a gap could resort to the 'legal conscience of civilized nations', and 'the law of objective justice' if confirmed by the aforementioned 'teachings of jurisconsults' and 'public conscience of civilized nations'.¹⁰⁶

In the next meeting, after a request made by Hagerup and the discussions about Descamps' proposal, Phillimore and Root amended their initial proposal to include their own version of an applicable law provision. It read as follows:

The following rules are to be applied by the Court within the limits of its competence, as described above, for the settlement of international disputes; they will be considered in the undermentioned order:

Conventional international law, whether general or special, being rules expressly adopted by the States which are parties to a dispute;

International custom, being recognized and practiced between nations accepted by them as law;

The general principles of law recognized by civilised nations;

The authority of judicial decisions and the opinions of writers as a means for the application and development of the law. (emphasis added)¹⁰⁷

Unlike Descamps', the Root-Phillimore proposal on applicable law expressly mentioned 'opinions of writers'. More importantly, although it prescribed that the sources mentioned should be the last to be applied as per 'the undermentioned order', they did not otherwise differentiate between 'opinions of writers' and sources 1-3, or allude to their subsidiarity. This proved controversial. At the very beginning of the meeting, when faced with the proposal that gave prominence to writings, President Baron Descamps, who had initially suggested gaps should be filled by opinions of scholars, stated that they should only be applied 'as auxiliary and supplementary means'.¹⁰⁸

Phillimore pleaded that the project be adopted anyway despite Descamps' opposition, but the objections by Ricci-Busatti to the new proposal were immediate. He was strongly opposed

¹⁰⁵ Ibid.

¹⁰⁶ Ibid 324.

¹⁰⁷ Ibid 344.

¹⁰⁸ Ibid 332.

to the inclusion of ‘opinions of authors’ as a ‘*source of law*’ (emphasis on the original).¹⁰⁹ If the emphasis on the term ‘*source of law*’ in the original travaux was not sufficient to suggest his scoffing at the very thought of including writings in this provision in the first place, his expression of ‘[astonishment]’ when faced by Phillimore and Root’s proposal is revealing of his disapproving tone.¹¹⁰ Ricci Busatti proposed an amendment to the Root-Phillimore proposal as follows:

The rules to be applied by the Court for the settlement of any international dispute brought before it, arise from the following sources:

1. International conventions, either general or special, as constituting rules expressly adopted by the States which are parties to a dispute;
2. International custom as evidence of common practice among said States, accepted by them as law;
3. The general principles of law recognized by civilized nations.

The Court shall take into consideration the judicial decisions rendered by it in analogous cases, *and the opinions of the best qualified writers of the various countries, as a means for the application and development of the law.* (emphasis added).¹¹¹

Ricci-Busatti’s choice to exclude ‘opinions of ... writers’ from the enumerated sources was a conscious one – he was seeking to highlight how scholarship, unlike the materials listed under 1-3, is not a source of law at all, and should only be seen as evidence thereof. Lord Phillimore vehemently objected to Ricci-Busatti’s proposal of demoting ‘writings’. He expressed that, in his view, ‘it [was] universally recognized’ that doctrine was a source of international law, albeit conceding to the modification proposed by Descamps that recognized their auxiliary nature.¹¹²

Ricci-Busatti, not satisfied with Phillimore’s compromise, asked him whether England would be receptive to a judgment held against it based on the opinions of writers rather than ‘a rule of law’.¹¹³ Phillimore replied that his appointing state would accept said ruling, to which Ricci-Busatti expressed doubts; in his view, states would be reluctant to accept a rule that had been laid down by authors rather than by their own consent or usage. Phillimore’s response to

¹⁰⁹ Ibid.

¹¹⁰ Ibid.

¹¹¹ Ibid 351.

¹¹² Ibid 333.

¹¹³ Ibid.

Ricci-Busatti displayed even more clearly his systemic views on the role of doctrine in international law: ‘custom is formed by the usage in various public and formal documents, and from the works of writers who agree on a certain point’.¹¹⁴ President Descamps, probably conscious and weary of the impact of Phillimore’s statement that writers had a bearing in the formation of custom, ‘[emphasized] the auxiliary characters’¹¹⁵ of judicial decisions and doctrine.

After this convoluted and heated debate, Ricci-Busatti stated that he and Phillimore were finally in agreement¹¹⁶ – although doctrine and decisions should be taken into consideration, they should not be considered ‘positive rules of law’. Interestingly, a closer reading of their respective statements show that they did not actually find common ground as claimed by Ricci-Busatti. Whereas Phillimore maintained that doctrine helped make up customary international law (‘custom is formed by the usage... and from the works of writers’), Ricci-Busatti’s expressed the belief that the lack of state participation in its making excluded ‘teachings’ from the list of sources of law.

Perhaps in an attempt to move the debate forward, De Lapradelle adopted a conciliatory tone, defending that the ‘subsidiary’ nature alteration suggested by Descamps was sufficient to ensure that doctrine was not to be given undue weight by the Court.¹¹⁷ This, however, did not stop the Commissioners from going back to the ‘doctrine’ debate – De Lapradelle himself brought back the discussion, suggesting two modifications. Firstly, that jurisprudence should be reflected in the Statute as ‘more important than doctrine’, since judges’ opinions were given in the light of practical cases, whereas writers’ opinions were not. Secondly, that doctrine, if included at all, should be graded according to authoritative value – only that which was very widely accepted and produced by ‘qualified authors in the countries concerned in the case’ should count, and, to ensure authority, a classification would be necessary.¹¹⁸ He added that Resolutions of the Institute of International Law ‘would have to be taken into account to a considerable extent’, implying a gradation between different types of ‘teachings’.¹¹⁹

Upon yet more reservations on the part of Ricci-Busatti, despite his previous agreement with the proposal, President Descamps stated that he was surprised with his resistance, since

¹¹⁴ Ibid 334.

¹¹⁵ Ibid 333.

¹¹⁶ Ibid 334.

¹¹⁷ Ibid.

¹¹⁸ Ibid 336.

¹¹⁹ Ibid.

the draft now included doctrine as a subsidiary role as an ‘element of interpretation’.¹²⁰ Descamps also pleaded De Lapradelle not to insist on a radical alteration from the now agreed upon Root-Phillimore draft, which led the latter to finally agree to the following wording: ‘The authority of judicial decisions and the doctrines of the best qualified writers of the various nations’.¹²¹ Ricci-Busatti was still dissatisfied; he insisted once more that jurisprudence and doctrine could not be put at the same level as other sources, although agreeing that judges should take writers’ views into consideration.

Finally, in a subsequent meeting, the President announced that the new article should instead read ‘The Court shall take into consideration judicial decisions and the teachings of the most qualified publicists of the various nations as subsidiary means for the determination of the rules of law’,¹²² which was incorporated in the final version of the Permanent Court’s Statute to then be reproduced in the ICJ Statute. The adoption of the ‘teachings’ provision in the PCIJ Statute was the result of a compromise between different members of the Committee, and proved polarising in the otherwise sparse discussions on the applicable law provision of the Statute. The views of the Committee’s members oscillated between a state-centric approach to international lawmaking, which privileged state practice and consensual sources such as treaties and custom, and a tacit understanding that international lawyers, through their ‘teachings’, played some role in the development of the law given the difficulty in ascertaining custom and the decentralized nature of the system. The tensions in Oppenheim and within the Advisory Committee are still widely shared in mainstream literature on sources of international law, and in the current discussions on custom at the ILC, as can be seen in Section 1, ‘Contemporary ‘teachings’ about ‘teachings’ – discomfort with individuals making law’¹²³. This shows the relevance of the debate on individual influence and international law methodology.¹²⁴

4. Conclusions – ‘teachings’ now and then

The wariness of doctrine expressed by Lassa Oppenheim and, subsequently, by members of the Advisory Committee of Jurists is the same experienced by contemporary mainstream sources doctrine. This unease is reproduced in the discussions about the lawmaking power of ‘teachings’ recently undertaken at the ILC Identification of Customary

¹²⁰ Ibid.

¹²¹ Ibid 337.

¹²² Ibid 620.

¹²³ Above, 16.

¹²⁴ See for instance the unease with which the International Law Commission addresses ‘teachings of publicists’ in its current work on the identification of customary international law in ILC, ‘Report of the International Law Commission on the work of its Sixty-eight session’ (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10.

International Law Project.¹²⁵ I argue this is rooted in the difficulties experienced by positivist methodology to accept the often personal character of international law more broadly. Albert De Lapradelle while in the Committee of Jurists was extremely wary of the inclusion of ‘teachings’ as a source, but also wrote a book dedicated to the role of the international law masters and their doctrines in the development of international law.¹²⁶ His position is very similar to Michael Wood’s, who has a restrictive view of ‘teachings’¹²⁷ but openly admits individual influence in an *ad hoc* basis in obituaries such as Sir Ian Sinclair’s.¹²⁸ Ricci Busatti’s emphasis on the lack of state involvement as an objection to the inclusion of ‘teachings’ as a source all together during the Committee of Jurists’ discussions is comparable to Van Hoof’s approach addressed in the first section.¹²⁹ In turn, the ‘subsidiary means for the interpretation’ approach, adopted by Descamps, is similar to what permeates the majority of the literature - it is an ambiguous approach that recognizes doctrine has some importance while simultaneously appearing distrustful of it, due to the attachment by supporters of this view to the idea of the centrality of states in international lawmaking.¹³⁰ A third view sported by Phillimore in the Committee of Jurists’ debates, that seems to accept a role for non-state actors, including publicists, in the formation of custom, has not prevailed in contemporary literature. The reason behind the disregard of ‘teachings’ permeating the discourse on sources, it is proposed here, is the inheritance of Oppenheim’s method, also felt during the drafting of the PCIJ Statute’s provision thereon. I argue this comes (1) from a belief that individuals are biased and that international law should be neutral and thus purged from such bias, and (2) from a perception that international law needs to portray itself as neutral in order to be accepted and effective in restraining states.

¹²⁵ Its ambiguous stance on ‘teachings’ can be seen in ILC, ‘Report of the International Law Commission on the work of its Sixty-eight session’ (2 May-10 June and 4 July-12 August 2016) UN Doc A/71/10.

¹²⁶ Albert de la Pradelle, *Maitres et Doctrines Du Droit Des Gens* (2nd editio, Les Éditions Internationales 1950).

¹²⁷ Sir Michael Wood (n 59).

¹²⁸ As discussed below, **Erro! Indicador não definido.** F Berman and M Wood, ‘Sir Ian Sinclair, KCMG, QC 1926-2013’ (2013) 83 BYIL 1.

¹²⁹ van Hoof (n 55) 176–178.

¹³⁰ Lachs (n 62).

B. Biographical accounts – the mainstream forced to take stock

International lawyers who do traditional/doctrinal research on sources have an incongruous relationship with personalism; the same people who reject ‘teachings of the most highly qualified publicists’ as a ‘true source’ of international law at every opportunity, laud individuals’ lawmaking efforts in obituaries and biographies. Whereas Section III.A on ‘teachings’ tries to explain the ‘dismissal’ of personalism in this relationship, this section of the thesis partly discusses the attachment international lawyers have with prominent members of the profession. Although this could be done by looking at biographies more generally, this section will use as a sample of the *ad hoc* acknowledgement of individual influence the obituaries of international lawyers published in the *British Yearbook of International Law* (*British Yearbook*, *BYIL*, *The Yearbook*) throughout the publication’s history. Elsewhere in this thesis (‘Part II - The community: Individuals, careers, and networks’), these same obituaries will be used to draw conclusions about the composition and functioning of the professional network of international lawyers.¹³¹

I. The particular versus the systemic

A systematic analysis of the obituaries demonstrates that the influence lawyers have on the law is much widely recognized in an *ad hoc* basis, in stark contrast with the denial of this phenomenon at a systemic level in the works on sources of international law. Indeed, sometimes the same people that deny a role for teachings, for the ILC, or for the invisible college more broadly in lawmaking, accept the importance of key individuals in how the law developed in particular cases in obituaries or biographies.

Let us take the work of Sir Michael Wood as an example of this mismatch. As ILC Special Rapporteur on the Identification of Customary International Law Project (ILC Customary Law Project), he immersed himself in debates about the formation of custom at the Commission and in academia, participating in conferences and publishing on the subject. The dilemmas faced by Sir Michael are strikingly similar to those faced by Oppenheim, and by the Advisory Committee of Jurists. He falls under the section of the sources literature that addresses teachings, but considers them peripheral to ‘real sources’. When speaking of custom, specifically, he defends evidence of custom is found in the practice of states, bodies connected to states, or courts. In his ‘teachings’ entry in the Max Planck Encyclopaedia, Wood argues that ‘writings are not a (formal) source of the law’ but they may cite evidence of the law. Though international law ‘as a system, owes much to the most eminent writers on the subject’, there is

¹³¹ Section II – The community of international lawyers: a quantitative study, below.

no need to accord them ‘the authority of a source of law’.¹³² Elsewhere, citing d’Aspremont, Wood says ‘scholars... are not lawmakers’¹³³, because their writings (1) conflate *lex lata* and *lege ferenda*, (2) ‘reflect national and other personal perspectives’, and (3) ‘differ greatly in quality’.¹³⁴ Ironically, he reproduces these views in his work at the ILC on the identification of custom, carving his personal perspective into international law. In summary, at a *systemic* sources level Wood does not consider that ‘teachings’ contribute (or should contribute) to making law.

The *ad hoc* level is a different story. Snippets of incongruence can already be found in his general writings when he ventures into the particular. Citing Parry in agreement, he states that Hersch Lauterpacht, Manley O’Hudson and Edwin Borchard ‘very directly influenced the law’.¹³⁵ In Sir Ian Sinclair’s obituary, quoting Hazel Fox, he states

Ian Sinclair played a significant role in the recognition of the restrictive doctrine in international law which enabled the courts of western European countries, of the UK, and ultimately world-wide (sic.), to assume jurisdiction over proceedings relating to the commercial transactions of foreign States.¹³⁶

This contrast between the denial of significant systemic importance for individuals in lawmaking in the literature and how individual influence is acknowledged in an *ad hoc* basis in obituaries and biographies of international lawyers is telling. It was argued above that the reason for the rejection of a role of individuals is part of the project of portraying international law as neutral, deprived of personal biases, and thus ‘real’ law; this tendency pervades the literature on sources of international law. However, the reality of international law seems to be different – more than in domestic legal systems, international law is to a large extent a project of internationally-minded individuals who want to promote personal projects.¹³⁷ This internationally minded community is small, and thus its power is amplified: unlike national legal systems where institutions are numerous, with their respective extensive bureaucracies and checks and balances that divide power, those who work in international law are few (white men from the developed world, as it will be demonstrated below), and left relatively untethered due to the absence of overarching institutions regulating the profession.¹³⁸

¹³² Sir Michael Wood (n 59) 17–19.

¹³³ Sir Michael Wood, ‘Remarks on the Importance of ‘Teachings’ in International Law, with Particular Reference to the Melland Schill Lecture Series’, *Manchester International Law Centre* (2016) para 2.

¹³⁴ *Ibid* 5.

¹³⁵ Sir Michael Wood (n 59) 19.

¹³⁶ Berman and Wood (n 128) 19.

¹³⁷ See Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (n 97); Andrew Lang and Susan Marks, ‘People with Projects: Writing the Lives of International Lawyers’ [2013] *Temple International and Comparative Law Journal*; Vec (n 72).

¹³⁸ On the ‘international bar’, see James Crawford, ‘The International Law Bar: Essence before Existence?’ in Jean D’Aspremont, Wouter G Werner and Tarcisio Gazzini (eds), *International Law as a Profession*, vol 3 (2013).

II. A taxonomy of the profession's lawmaking power via obituaries

The obituaries scrutinized were divided into two categories: one of lawyers acting on behalf of a state, and one of lawyers acting in their individual capacity. The former includes counsel, who are hired to represent states in international courts, and government advisers/members of states' diplomatic corps. The latter encompass those elected to fill a 'state seat' but who are mandated to act independently; international civil servants, who owe allegiance to the organization that employs them rather than to their state of origin; and academics, who are at least in theory the ultimate independent individual actors in the international legal profession. As a preview of what will be further demonstrated below¹³⁹, very often the same individual may at different points in their careers (or even simultaneously), act in multiple capacities, some of them acting in personal capacities, and some of them connected to states.

(i) International lawyers representing governments – diplomats and counsel

Government representatives'/legal advisers' influence as individuals in lawmaking is generally ignored in the literature, as they are seen as merely issuing states' opinions rather than having individual agency. Although it is not disputed here that such persons are indeed expressing an opinion that has been endorsed by the country they represent, it must also be recognized that they are people with certain inclinations, who at times imprint their original mark in a states' legal positions by using ideas they develop in an individual capacity as, for instance, scholars.¹⁴⁰ This is clear, for example, in the debates about the Iraq war, where Elizabeth Wilmshurst's, Michael Wood's and Christopher Greenwood's positions were a source of contention in the formulation of the UK's policy.¹⁴¹ Profuse acknowledgement of the impact of an individual as part of the foreign affairs apparatus of a state can be seen in Ian Sinclair's obituary. In it, the authors Sir Michael Wood and Sir Franklin Berman talk about how Sinclair influenced the UK position on the Law of Treaties to the point of introducing 'some progressive development' into what is now the VCLT.¹⁴² Sinclair then went on to utilize his treaty law knowledge when acting as negotiator and counsel for the UK in the UK-France Continental Shelf dispute.¹⁴³

¹³⁹ Section II, 5.

¹⁴⁰ The reverse (advice influencing scholarship) also occurs. More on this in Section III.

¹⁴¹ Michael Wood, 'The Iraq Inquiry: Some Personal Reflections' (2017) 87 *British Yearbook of International Law* 149; Matthew Windsor, 'The Special Responsibility of Government Lawyers and the Iraq Inquiry' (2018) 0 *BYIL* 1.

¹⁴² Berman and Wood (n 128) 3.

¹⁴³ *Ibid* 5–6. *Delimitation of the Continental Shelf between the United Kingdom of Great Britain and Northern Ireland, and the French Republic (UK, France)* (1978) 3 *RIAA*.

Specifically in the field of immunities, Sinclair's personal influence was reported as fundamental.¹⁴⁴

Sinclair achieved this by utilizing his role at the FCO to influence UK legislation, introducing these developments into his work at the ILC on immunities, and further disseminating his ideas through scholarship in his Hague Academy course on the subject delivered in 1981.¹⁴⁵ Indeed, in quoting Sinclair's personal work about the profession, the authors allude to the fact that he viewed practice and scholarship as cross-fertilizing: '[T]he teaching and practice of international law is so closely inter- woven that [...] it is sometimes difficult to distinguish between scholar and practitioner.'¹⁴⁶

The role of advocates is analogous to that of legal advisers insofar as state involvement *versus* personal position goes.¹⁴⁷ It is acknowledged however in these obituaries that there are instances in which pleadings drafted by one individual may have a bearing in how the law develops; in the case of Ian Brownlie for instance, Vaughan Lowe puts it as follows:

[T]he rigour with which his pleading compelled courts to analyse the issue before them has made a major contribution to the development of international law, and to its increasing sophistication and robustness. [...] It is here that I think Ian's greatest contribution to international law lies. He brought to it the same standards of thorough and precise analysis, the same concern to see it develop as a coherent, practical, working system, that we take for granted in municipal legal systems.¹⁴⁸

Sir Ian Brownlie is a particularly noteworthy example of how an advocate can have a bearing in the development of the law; one of the most prominent practitioners in international law, he acted in essentially every major international law dispute during his 25 years at the Bar, having appeared in 'well over half the cases heard by the [ICJ]' during this time.¹⁴⁹ His impressive track record includes appearances in cases such as *Nicaragua* and *Bosnian Genocide* before the International Court of Justice, and the famous *Pinochet* cases in UK domestic courts. Such prolific participation in proceedings, especially if associated with Brownlie's influential treatise, *Principles of Public International Law*, would not seep into the content of the law international courts apply, as hinted by Vaughan Lowe.¹⁵⁰

¹⁴⁴ Ibid 4.

¹⁴⁵ Ibid 4–5. Sir Ian Sinclair, 'The Law of Sovereign Immunity. Recent Developments (Vol 167)' (*RdC*, 1980).

¹⁴⁶ Sir Franklin Berman, 'Sir Vincent Evans (1915-2007)' (2008) 78 BYIL 1, 1.

¹⁴⁷ See Sinclair's work as a negotiator of the VCLT and agent in the UK-France Continental Shelf dispute as an example. There are, however, potential ethical differences between the role of an advocate and a legal adviser. See Matthew Windsor, 'Government Legal Advisers through the Ethics Looking Glass' in David Feldman (ed), *Law in Politics, Politics in Law* (Bloomsbury Publishing 2013).

¹⁴⁸ Vaughan Lowe, 'Sir Ian Brownlie, KT, CBE, QC (1932-2010)' (2011) 81 BYIL 9, 12.

¹⁴⁹ Philippe Sands, 'Sir Ian Brownlie Obituary' *The Guardian* (2010).

¹⁵⁰ Lowe (n 148) 12.

(ii) Judges

The case of judges' invisibility and influence in international law is perhaps one of the most interesting. Judgments of international courts are some of the most influential documents in international law¹⁵¹ – the judgments of a court such as the ICJ have a definite authoritative lawmaking effect, and this is something most authors are prepared to agree with even if reluctantly or covertly.¹⁵² Simultaneously, judges' deliberations are kept secret, and unless one delves into the depths of individual opinions, which in themselves only provide a partial view of what was going on behind closed doors during the drafting of decisions, one can only speculate the degree to which one judge has inserted their individual ideas into a judgment. One relies on the ability of a collegiate body full of strong minded and knowledgeable individuals to keep excessive influence of one particular judge into check, and this is what textbooks will often say. However, the very decision-making process of collegiate bodies such as the ICJ with their small drafting committees of undisclosed composition may allow individuals to more or less easily insert their ideas into collective decisions. This leaves room for those who are especially persuasive to covertly influence collective judgments, which will ultimately bear the powerful ICJ 'seal'. One may raise questions about the possibility of empirically supporting a claim about measuring individual judges' influence on collective decisions. The response to this challenge is twofold. Firstly, it is not the aim of this section to describe the drafting of a decision 'as it actually was'¹⁵³, or to argue that individual judges always have a strong hold on the outcome of a decision. However, obituaries sometimes provide accounts of instances in which individual judges' voices can be discerned, putting into question certain international law dogmas, and demonstrating the dominance of certain individuals over collective judgments.

From these obituaries, one can distinguish three ways in which judges influence the work of international courts. The first and perhaps most problematic (and difficult to ascertain in practice due to the secrecy of deliberations) is the influence of a judge on the content of a particular legal ruling. A very interesting case is Lord McNair's account of Sir Cecil Hurst's work at the PCIJ. McNair highlights the importance of Sir Cecil's work particularly in the

¹⁵¹ Though judgments are obviously binding on the parties thereto, there is no doctrine of binding precedent in international law as per the theory of sources see Hugh Thirlway (n 61). Specifically before the ICJ, Article 59 of the Statute makes clear '[t]he decision of the Court has no binding force except between the parties and in respect of the particular case'. However, see Chester Brown, 'Article 59' in Andreas Zimmermann et al (eds), *The Statute of the International Court of Justice: A Commentary* (3rd edn, OUP 2019) 1587–90.

¹⁵² The most iconic being Sir Hersch Lauterpacht, *The Development of International Law by the International Court* (CUP 2010).

¹⁵³ In reference to 'the past as it actually was', Koskeniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (n 97) 10.

Austro-German Customs Union Advisory Opinion that analysed the compliance of the Customs Union with the scheme provided in the Treaty of Versailles in the following terms:

The Court was almost evenly divided, [...] The published records do not indicate the original language of this Opinion, but I have a strong feeling that it was English and think it probable that Hurst wrote it.¹⁵⁴

This is as good as one can get to a clear admission that an important judge such as Hurst has a tremendous pull inside a court, which can be relevant especially in cases in which the court is divided¹⁵⁵ and dealing with a particularly politically sensitive decision,¹⁵⁶ as was the case here. Hurst had also been strongly involved in the drafting of the Treaty of Versailles, which was the object of this decision, alongside Henri Fromageot, his French counterpart in negotiations, who happened to also sat as a judge in this case alongside Hurst.¹⁵⁷ Another example of an acknowledgement of the influence of a judge on the substantive content of a decision of a collegiate body is Sir Franklin Berman's account of Sir Vincent Evans' role at the ECHR in developing the law on the right to life and civil liberties, utilizing the 'living instrument' interpretive approach to the ECHR, 'nudging the Court from within towards a realistically liberal view of the development of Convention rights'.¹⁵⁸ An additional ECHR example is the joint obituary written by Sir Franklin Berman and Sir Michael Wood on Sir John Freeland,¹⁵⁹ where the authors state that some of the passages in the *McCann* case bore Freeland's mark, despite his inclination to not often make his voice heard individually. In a domestic setting, Sir Ian Brownlie's account of Lord Wilberforce's influence in the development of aerospace law – first by helping draft and then by interpreting the Warsaw Convention on International Carriage by Air as a judge in *Fothergill v Monarch Airlines*, is also relevant.¹⁶⁰

Other ways in which judges influence the law is by steering internal rules of procedure, building consensus, or guiding discussions in certain directions. The obituary of Sir Vincent Evans points out his role in the introduction of questions by the bench during oral hearings at the ECHR,¹⁶¹ whereas Lord Finlay's mentions his role in adding an Anglo-Saxon flavour to the PCIJ's procedure during his time there.¹⁶² The consensus-building role of certain judges and

¹⁵⁴ Lord McNair, 'Sir Cecil James Barrington Hurst, G.C.M.G., K.C.B., Q.C., L.L.D.' (1962) 38 BYIL 402.

¹⁵⁵ Ibid.

¹⁵⁶ Ibid.

¹⁵⁷ The drafting of the Treaty of Versailles, according to McNair, had been spearheaded by him and Fromageot; Ibid 401.

¹⁵⁸ Berman (n 146).

¹⁵⁹ Sir Franklin Berman and Sir Michael Wood, 'Sir John Freeland, KCMG, QC (1927-2014)' (2015) 85 BYIL 1.

¹⁶⁰ Ian Brownlie, 'Richard Orme Wilberforce' (2004) 74 BYIL 1.

¹⁶¹ Berman (n 146) 4.

¹⁶² Sir Cecil Hurst and Dionisio Anzilotti, 'Viscount Finlay of Nairn' (1929) 10 BYIL 190.

their ability to nudge their respective benches from the side-lines, avoiding the writing of dissenting opinions, is acknowledged in the obituaries of Sir Cecil Hurst,¹⁶³ Sir Robert Jennings,¹⁶⁴ as well as Sir John Freeland's.¹⁶⁵ This political influence and ability to please both colleagues as well as the parties before The Court is very important and often overlooked, especially because as mentioned above deliberations are secret and the only reports we have of this type of influence is anecdotal. See, for example, Jimenez de Aréchaga's account of Manfred Lachs' role in bringing developing states back to the International Court of Justice through inserting the *jus cogens dicta* in *Barcelona Traction* and his handling of the sensitive *Nuclear Tests* cases.¹⁶⁶

(iii) International civil servants

International civil servants, as judges, act in an individual capacity, and can also have an influential creative role, as admitted by Waldock and Jennings when speaking of Sir Clarence Wilfred Jenks. Jenks was an ILO civil servant since graduating from the Cambridge LLB and also published profusely. His influence was summarized in his *BYBIL* obituary as having pervaded both the ILO's structure and procedure,¹⁶⁷ affecting international labour law in particular and international law in general:

Jenks also dealt with a large variety of ancillary issues in a manner which enriched both the internal law of the Organization and, perhaps, international treaty laws in general.¹⁶⁸

More generally on the power of international civil servants, see Guy Fiti Sinclair:

Appearing prominently in each of the episodes examined in this book, the figure of the civil servant is presented as bridging national and international forms of government with an ideal combination of personal virtue, specialist knowledge, and fidelity to law. Offering

¹⁶³ Lord McNair (n 154) 402.

¹⁶⁴ Rosalyn Higgins, 'Sir Robert Yewdall Jennings' (2005) 74 BYIL 1, 3.

¹⁶⁵ Berman and Wood (n 159) 7.

¹⁶⁶ Antonio Cassese, *Five Masters of International Law: Conversations with R-J Dupuy, E. Jimenez de Arechaga, R. Jennings, L. Henkin, and O. Schachter* (Hart 2011).

¹⁶⁷ 'In the International Labour Conference, two important constitutional practices, in the evolution of which Jenks played an important part, may be referred to.' In addition, 'it is an open secret that Jenks was co-author of the Declaration concerning the aims and purposes of the I.L.O. which was adopted by the Conference at Philadelphia in 1944 and embodied in the Constitution of the I.L.O. by the Instrument of Amendment of 1946.' Finally, '[h]is memorandum, as Legal Adviser, on the reasons why Article 19 (5) of the Constitution of the I.L.O. - which requires Members to bring Conventions and Recommendations adopted by the Conference before 'the authority or authorities within whose competence the matter lies'-requires submission to the legislature, stated a principle which, in his own words, 'has been of decisive importance in the effectiveness of the legislative procedure of the I.L.O.'" Sir Humphrey Waldock, Sir Robert Yewdall Jennings and Felice Morgenstern, 'Clarence Wilfred Jenks' (1972) 46 BYIL xi.

¹⁶⁸ *Ibid.*

the possibility of moral, expert, and legal authority merged in a single point, this image has also proved enduringly attractive in the discipline of international law.¹⁶⁹

(iv) Academics

Finally, what is (or should be) the ultimate form of individual/independent work within the profession: academia. Scholarly work is tightly intertwined with the discipline's practice, possibly more than in any other legal field.¹⁷⁰ The majority of those practicing are also active to a degree in the scholarly arena, and vice-versa.¹⁷¹ As explored above in the section on 'teachings', the importance of scholarship in international law is such that it was included as a subsidiary means for interpretation of the law in the World Court's Statute. This role of 'teachings' as argued extensively above is not recognized in sources literature. Individual obituaries and biographies, however, openly admit the importance of individual scholarship in the development of the law. Examples of this are abound, but the most blatant are perhaps those articulated by Crawford when speaking of Brownlie and Bowett. On Brownlie:

The reputation of his text in the courts is exceptional. Legal academics have always been looked upon, rightly with suspicion by practitioners; and there was long a tradition in the English courts that no living legal writer should be cited. A comparable restraint is practised in international tribunals, as was emphasised in the instructions given to student lawyers some years ago by the organisers of an international law moot competition. 'Legal writers are not themselves sources of law and should be sparingly and cautiously cited', they were told. 'And only the most distinguished among them should be quoted, such as Grotius, Vattel, and Brownlie.'¹⁷²

And on Bowett:

But he had a real influence on the Court, not only through his advocacy but also through his teaching. 'Even today, despite the much greater diffusion of international law teaching around the world, five of the 15 current judges of the Court studied in Cambridge. He was influential in some of his criticisms of the Court's procedure, participating with Arthur Watts and others in a 1995 study which irritated some members of the Court but which (perhaps for that reason) helped pave the way for significant later reforms. [...] He was not at all a theorist—he referred to a long theoretical essay by a colleague as 'a sure cure for insomnia'. But on his own terrain he was a master, grasping the legal field as a whole and contributing to the development of many departments of it.'¹⁷³

¹⁶⁹ Guy Fiti Sinclair, *To Reform the World: International Organisations and the Making of Modern States* (OUP 2017) 19; Guy Fiti Sinclair, 'The International Civil Servant in Theory and Practice: Law, Morality, and Expertise' (2015) 26 747.

¹⁷⁰ Andre Oraison, 'Reflexions Sur La Doctrine Des Publicistes Les Plus Qualifies Des Differentes Nations' (1991) 21 *Revue Belge de Droit International* 507.

¹⁷¹ See Ian Sinclair, 'The Practitioner's View of International Law', *Contemporary Issues of International Law* (2002). This is confirmed by the analysis of these obituaries as well as anecdotal evidence in academic work such as Villalpando, 'The 'Invisible College of International Lawyers' Forty Years Later' (n 11).

¹⁷² Lowe (n 148) 10.

¹⁷³ James Crawford, 'Sir Derek Bowett (1927-2009)' (2010) 80 *BYIL* 1, 6.

The prominence of Brownlie's and Bowett's academic work was bolstered by their constant work as legal advisers in international courts; this interchange both creates room for their ideas to penetrate judicial decisions, maximizing their reach, and gives them higher standing as academics, in a sort of authoritative self-fulfilling prophecy. This occurs similarly to those occupying other professional roles while simultaneously writing profusely, such as Sir Clarence Wilfred Jenks:

His published writings were intimately associated with his work in the Organization; the unity of thought in one and the other helps to explain why he was able to publish so much while always giving more than a day's work to the Organization. Sometimes the writing inspired the practical result; in his early years in the Organization particularly, his clear-sighted analysis of problems' preceded the opportunity for action--opportunity which the times he lived in were to provide in ample measure. Sometimes the writing was the fruit of actual developments. Through his writing, as sometimes through more direct means, his influence on the development of international organization extended far beyond the I.L.O.¹⁷⁴

III. Conclusions – individuals in lawmaking: smaller than the sum of its parts?

In conclusion, compiling information in individual biographical accounts reveals systemic works about 'teachings', judges, ILC members, etc. are *smaller* than the sum of their parts. Much can be learned from reading obituaries. Firstly, they highlight the discrepancy between the mainstream view on 'teachings' and the reality about the profession's impact on the law. Secondly, they reveal many different forms of influence in individual *vignettes*. Although in isolation the individual pieces can be dismissed, when read collectively they paint a richer picture of the pervasiveness of the phenomenon uncovered by this thesis. Because they are written by and cater to the 'mainstream', who also writes about sources, obituaries and traditional biographies are particularly persuasive. They allow for a direct rebuttal of conclusions reached by traditional positivist works on sources outlined above.

Read conjointly, these biographical accounts support the argument of this thesis: the creation of law in this complex decentralized system by individuals happens in the weaving of personal ideas into the thin fabric of international law, in a game of light and shadow. At times, individuals launch their ideas as part of a true 'invisible college', acting in completely unofficial channels unconnected to states or institutions – this happens mainly through scholarship. Other times, influence is exerted through official channels; these require some differentiation between institutions where one acts in an individual capacity or as a state representative. In institutions where individuals are to fulfil their mandates in an individual capacity, such as

¹⁷⁴ Sir Humphrey Waldock, Sir Robert Yewdall Jennings and Morgenstern (n 167).

judgeships, the International Law Commission, or expert bodies in which individuals are appointed as Special Rapporteurs, individual influence is both overt and hidden. It is overt insofar these are official channels, public institutions in which these individuals' authority is acknowledged by virtue of their prestigious position, removing them from the 'ivory tower' and bringing them into practice. On the other hand, their influence becomes invisible in other ways. Firstly, there is still no space for their actions even as part of these select groups to be acknowledged in a sources-based approach to international lawmaking, which only recognizes state sponsored acts as worthy of consideration. Simultaneously, as it will be expounded upon below, belonging to a body such as the ICJ or the ILC both builds one's individual authority and eclipses it. The presence of certain strong individuals in collective bodies may give individual opinions the veneer of collective appearance, helping perpetuate it and shield it from scrutiny. International lawyers' ability to influence the law is never as overtly recognized in mainstream literature as in biographies and obituaries. The latter function as a window that shows us that there is an otherwise undisclosed 'love' of international lawyers with personalism and that all areas of the profession can more or less provide vehicles for the fertilization of international law with individual ideas. This also supports Koskeniemi's claim explored below¹⁷⁵ that international law *is* the international legal profession, if not wholly but at least substantially. The above analysis highlights the importance of works such as Klabbers',¹⁷⁶ who argues for an ethics of international expertise, since global governance's functioning hinges often on the people who make up international institutions and the self-imposed checks and balances of the professional guild.

C. Schachter's 'invisible college' – seminal but underdeveloped

Another strand of the literature that acknowledges the influence individuals may have in the development of the law is the one that identifies an 'invisible college of international lawyers' (invisible college, the college) dedicated to a 'common intellectual enterprise' which promotes the peaceful exchange or '*pénétration pacifique*' of ideas between the official and the non-official channels of international practice.¹⁷⁷ This term, first coined by Oscar Schachter in a 1973 piece

¹⁷⁵ Section I, B, 3.

¹⁷⁶ Jan Klabbbers, 'Law, Ethics and Global Governance: Accountability in Perspective' (2013) 1 New Zealand Journal of Public International Law 309; Jan Klabbbers, 'The Virtues of Expertise' in Monika Ambrus and others (eds), *The Role of 'Experts' in International and European Decision-Making Processes*, vol 45 (2013); Jan Klabbbers, 'Virtue Ethics Doing Justice? Bureaucracy, the Rule of Law and Virtue Ethics' (2017) I Rivista di filosofia del diritto 27. Koskeniemi phrases a similar sentiment under the guise of responsibility, see below, p. 64 and Klabbbers, 'Towards a Culture of Formalism? Martti Koskeniemi and the Virtues' (n 27).

¹⁷⁷ Oscar Schachter, 'The Invisible College of International Lawyers' (1977) 72 Northwestern University Law Review 217, 217.

commemorating the centenary of the *Institut de Droit International*¹⁷⁸ and later on expanded in a discrete journal article,¹⁷⁹ was described by Santiago de Villalpando as ‘one of the most popular descriptions of our profession’¹⁸⁰. This thesis supports some of Schachter’s ideas of the role of the college in his later 1977 piece, but advocates that his and subsequent works exploring the ‘college’ remain insufficient: despite the popularity of the term, the processes whereby international lawyers participate in lawmaking have never been properly expounded upon. In this sense, this thesis aims, amongst other objectives related to elucidating how international lawyers influence international law, to theorize about and elaborate upon Schachter’s model, revealing the forms in which the ‘active professional community’¹⁸¹ of scholars and practitioners under the right circumstances effectively makes law.

a. Schachter’s arguments and gaps

Schachter’s 1977 piece can be divided into four points: (1) the intertwining of the ‘scientific’ and ‘official’ roles in the international legal profession; (2) the conciliation of the impossibility of a ‘value-free’ international law with a need for standards in the discipline that go beyond mere ‘subjectivity’; (3) a plea against ‘specialization’ of the profession in favour of a ‘common language’ in international law; (4) a description of the ‘legislative role’ international lawyers play by participating in the ‘professional community’, and a proposal of a solution to problems that may arise from this phenomenon.

The first element in Schachter’s argument is that international lawyers, perhaps more than lawyers in other fields, navigate constantly between scholarly roles and legal practice. Schachter expounds how international lawyers participate in scholarly endeavours such as ‘journals and yearbooks, [...] movement of professors and students, and [...] numerous conferences, seminars, and colloquia’. This creates fertile ground for the aforementioned ‘*pénétration pacifique*’ of ideas – from unofficial (scholarship) to the official (treaty-making), and vice-versa. He calls this duality in the profession the *dedoublement fonctionnel* of international lawyers, which is not to be confused with George Scelle’s iteration of the term.¹⁸² This exchange between different sides of the profession, in Schachter’s view, creates a potential problem, which is the mingling of purportedly objective/‘scientific’ views of the scholar with the (state) ‘official’/partisan

¹⁷⁸ Oscar Schachter, ‘The Role of the Institute of International Law and Its Methods of Work - Today and Tomorrow’, *Livre du centenaire, 1873-1973 : évolution et perspectives du droit international* (S Karger, 1973).

¹⁷⁹ Schachter (n 177).

¹⁸⁰ Santiago Villalpando, ‘The ‘Invisible College of International Lawyers’ Forty Years Later’, *ESIL Conference Thesis Series* (2013) 2.

¹⁸¹ Schachter (n 177) 217.

¹⁸² Georges Scelle, ‘Règles Générales Du Droit de La Paix’, *Recueil des Cours* (1933); Cassese, ‘Remarks on Scelle’s Theory of “Role Splitting” (Dédoublément Fonctionnel) in International Law’ (n 44).

views of an advocate. Although it may be raised that the *dedoublement fonctionnel* is problematic from a standpoint of the ‘objectivity in international law’, Schachter argues that ‘international law [...] is not a scientific discipline in the same sense as physics and chemistry’ – it is ‘not value-free’¹⁸³. In this sense, no matter how technical the legal point, lawyers enjoy a degree of flexibility on the content of the answers provided. The factors that influence which answers lawyers will give may be ‘philosophical or cultural’,¹⁸⁴ but ultimately Schachter considers that nationality is an especially fundamental source of influence on one’s view of the world. This is due to the ‘general phenomenon of internalization of social values shared by those brought up and educated within the same national society’, which can permeate international decision-making bodies, hence the criteria of nationality in the election of the members of these organs in order to lessen national biases.¹⁸⁵

This takes him to his second argument concerning the possibility of the objectivity of international law. Schachter argues that, since as stated above international law is ‘not value-free’¹⁸⁶, one should not expect for *one* scientific/true answer to a legal question. Even if one looks for answers to legal questions in the purportedly value-free recognized ‘sources’ of international law, different conclusions may be reached. Legal judgments are made not by simply looking at sources, but by international lawyers’ reliance on ‘other principles’ – sovereignty, equality, territorial integrity, non-intervention, good faith, *pacta sunt servanda*, peaceful settlement obligations, and rules on state responsibility, to quote Schachter’s examples. Instead of arguing however that this may be read as a statement of international law’s absolute indeterminacy, Schachter still understands that the law should not be seen as purely ‘subjective’. In his view, if these principles are applied correctly and all factors taken into account, even though repelling all bias inherent to the human condition and one’s background is impossible, one can still reach a decision objectively acceptable to ‘the relevant community of states’.¹⁸⁷

His third argument revolves around how general international law needs to remain central even in an era of specialization in order to ‘avoid compartmentalization’¹⁸⁸. In 1977, Schachter believed that general international law would remain unified, immune to the movement towards specialization that had occurred in physical and social sciences. He defends that

¹⁸³ Schachter (n 177) 218.

¹⁸⁴ Ibid 219.

¹⁸⁵ Ibid.

¹⁸⁶ Ibid 218.

¹⁸⁷ Ibid 220.

¹⁸⁸ Ibid 221.

specialization in science is problematic because ‘the findings and judgments of the specialists [remain] virtually unchallenged’, not reaching other sub-fields of the discipline in question, destituting intellectual societies from their truly ‘collective endeavour’.¹⁸⁹ Schachter doubted that this process of specialization would happen in international law,¹⁹⁰ and stated that even in the ‘[unlikely]’¹⁹¹ event that it did, the homogeneity in the methodologies required for legal inquiries would allow all international lawyers to scrutinize the developments in each sub-field in order to keep them in check.¹⁹² Somewhat disconnected to the previous idea of (the need to avoid) specialization, Schachter makes an argument in this section about how pluralistic representation is key in ensuring that materials produced by the invisible college remain authoritative. In order to remain relevant in the face of internationally representative institutions, independent expert bodies such as the *Institut de Droit International* and the International Law Association should, in Schachter’s view, emulate the latter’s composition, widening international participation.¹⁹³ Representation matters, in his argument, because a plurality of views is required when ascertaining law at a global level, and ‘a more heterogeneous and representative body can be expected to balance out’ any national or political influences, attaining an overall more fair outcome despite the impossibility of a truly objective ideal¹⁹⁴ – ‘international law as a unified discipline must, of course, face up to the dominating influence of national interests and socio-historical factors on the functioning of the profession’.¹⁹⁵ In summary, Schachter was concerned with representation within expert bodies because, although objectivity is impossible, malicious national or political factors that may influence decision-making are more likely to be neutralized and questioned in a diverse environment.

The final, boldest, and least substantiated claim made by Schachter is that there is a ‘legislative’ role for international lawyers independent from states. They act as legislators not only in the obvious sense – as representatives of states while drafting international treaties – but also by participating in ‘the evolution of customary law, the use of general principles and the formative effect of resolutions of international bodies’.¹⁹⁶ He argues that certain areas of law ‘where little had existed previously’, such as outer space, the seabed, and the environment, have been largely developed by international lawyers.

¹⁸⁹ Ibid.

¹⁹⁰ Ibid.

¹⁹¹ Ibid.

¹⁹² Ibid 222.

¹⁹³ Ibid.

¹⁹⁴ Ibid 223.

¹⁹⁵ Ibid 222.

¹⁹⁶ Ibid 223.

This legislative role is exercised in two ways, according to Schachter; the first one is ‘pre-legislative’¹⁹⁷, undertaken by the *Institut de Droit International* and the International Law Association in preparing studies that will influence subsequent actions by states and other actors, creating law.

The second and most relevant and controversial way in which Schachter believes international lawyers ‘legislate’, is described as ‘a phenomenon [in which] jurists moving between the nonofficial and official roles and through this ‘*dedoublement fonctionnel*’ [contribute] to the mutual exchange and penetration of ideas’.¹⁹⁸ They do this by participating indirectly in legislative efforts and influencing governments to adopt legislative instruments, disseminating studies and proposals to build consensus, or finally by inserting a ‘*conscience juridique*’ or ‘sense of justice’ into the content of international law.¹⁹⁹ This insertion of a ‘sense of justice’ into international law, although seemingly ‘vague’ and sometimes referred to as ‘natural justice’, has practical effect, and is weaved into international law ‘largely through non-official channels’,²⁰⁰ such as non-legislative resolutions, reports and proposals made by authoritative bodies such as the *Institut* and the ILA. He however does not justify the need for the insertion of this ‘sense of justice’ into official documents via non-official channels, and abruptly finishes the article saying that although states are largely sceptical of said *conscience juridique*, international lawyers have adopted as their ‘noblest function’, as part of the invisible college, to give ‘specific meaning and effect’ to it.²⁰¹

There are four main points of criticism to Schachter’s article: (1) it does not directly engage with theoretical debates on lawmaking or sources – in fact, it only touches upon the subject twice; (2) it fails to describe in any detail the processes of *penetration pacifique* of invisible college ideas into the fields he uses as examples (outer space, the environment); (3) it only looks at specific areas of the profession, namely the role of advisers in treaty-making, scholarship, and the endeavours of the *Institut* and the ILA, neglecting others such as judicial activity; (4) its prediction that international law would not ‘specialize’ was wrong, which has implications for how individuals presently influence the law.

¹⁹⁷ Ibid 224.

¹⁹⁸ Ibid 225.

¹⁹⁹ Ibid.

²⁰⁰ Ibid.

²⁰¹ Ibid 226.

b. Schachter's contributions

Despite these gaps, this piece brings to the forefront many important questions which are used by and expanded upon in this thesis.

Firstly some thoughts on the claim to objectivity in international law. Schachter openly argues that international law is not value-free, and that even when trying to 'find the law' in the recognized sources one has freedom to determine the content of the law, though subjectivity is not absolute. The interpreter is restrained however by procedural and ethical limitations. The procedural limitation is that the invisible college must apply certain principles in order to legitimize its creativity, and these principles are ascertained by looking at values held by the international community. Implied in this idea is that these principles must be applied openly, so that this process can be evaluated by the relevant actors (other members of the invisible college and states, presumably). This suggests a preoccupation with the process of decision-making and transparency. The ethical limitation to subjectivity is related to *what* international lawyers insert in the content of the law according to Schachter, namely the '*conscience juridique*' or 'sense of justice'. Going beyond the consent of states does not give international lawyers *carte blanche* – what they insert into the law must be something 'just'. They cannot use their power to promote individual interests, and must abide by 'considerations of justice'.

When exploring the relationship between neutrality of the law and 'teachings', this thesis comes to conclusions similar to Schachter's. Although sources theory's claim to objectivity/neutrality is false, this does not mean international law is purely subjective, or that the 'invisible college's' lawmaking should be untethered. It is argued here that one must come to terms with the personal aspects of international law and the impossibility of a neutral and value-free international law, and seek to impose limits on a subjective process. This can be achieved through a combination of procedural and ethical checks. The procedural aspect is imposing an external check on individual members of the invisible college, setting aside traditional sources theory in favour of transparency. The ethical stream is a subscription by international lawyers to international law as a historically construed 'project' to keep state power into check, allied with self-reflexivity and a sense of responsibility over the system. These internal ethical checks would ensure that members of the invisible college yield their power responsibly. The personal nature of the system may lead to the creeping in of 'bad' reasons for decision-making²⁰², and only setting aside a state-centric narrative (and being open

²⁰² Such as decisions that unduly favour one's appointing state to ensure re-election in to an international court or body.

about individual power in making the law) allows for these personal decisions to be scrutinized by states and other members of the professional community.

Schachter raises concerns about what he calls the ‘specialization’ of international law, but which has become currently known as proliferation and ensuing fragmentation. Although his predictions on the immunity of international law to this phenomenon were inaccurate, two points he makes on the subject remain fundamental. Firstly, that specialization and the proliferation of expert knowledge contribute to further fragmentation, and secondly that the output of specialized expertise is both more influential and less likely to be scrutinized and challenged. Fragmentation is opportunistic in relation to specialization – specialization creates discrete pockets of expertise and intricate expert vocabulary. The more specialized and difficult the vocabulary, the less possibility for this vocabulary to be questioned. The less questioning, the less checks on expert power, and the less ability to assess which content (inherently embedded in these interpretive/creative human endeavours) is being incorporated into international law, which becomes in turn universal insofar as it binds all states. Schachter’s emphasis on the importance of a common methodology to preserve the integrity of the discipline is thought provoking; this thesis argues that generalists still have the responsibility of ‘keepers’ of international law, ensuring it remains capable of constraining states. If not in substance, language, or methodology, this argument can be related in sentiment to Koskenniemi’s thoughts on the rise of managerialism in international law.²⁰³ Managerialism and specialization are intimately related; more refined expert methodology and lack of a ‘bigger picture’ approach to international law leads to a separation from international law’s aspirational origins²⁰⁴ – if one is overly focused on a margin of appreciation test and its requirements, one loses sight of international law’s promise to provide protection against state power.²⁰⁵ A plea against ‘specialization’ can be read as a plea against managerialism.

Simultaneously, Schachter’s criticism of specialization is similar to generalists’ pleas for systematicity and coherence²⁰⁶. International law should be construed as a ‘system’ based on overarching principles, thus specialists must be well versed in general international law to avoid the collapse of said system through fragmentation. This thesis unites these threads; the argument made here is that that specialization hinders certain areas from the scrutiny of general

²⁰³ Martti Koskenniemi, ‘The Fate of Public International Law: Between ‘Technique and Politics’ (2007) 70 *Modern Law Review* 1.

²⁰⁴ On the liberal origins of international law, see Vec (n 72); Kingsbury (n 37).

²⁰⁵ Simultaneously, there is the danger that a lack of appreciation for formalistic aspects of international law will lead to a collapse of the system – it is like being caught between a rock and a hard place.

²⁰⁶ See Martti Koskenniemi, ‘Book Review Brownlie’s *Principles of Public International Law*’ (2014) 83 *BYIL* 137.

international law. Whilst bolstering individual influence, specialization reduces generalists' ability to keep subjectivism in check. In a way, the development of specialist institutions and the 'democratization'²⁰⁷ of the college makes it yet more 'invisible' – whereas you once had canonical texts ascribed to specific authors dictating the law on an otherwise murky proto-system, now there are complex institutional platforms permeable to the ideas of individuals that allow them to remain unnamed. Bureaucracy and collective decision-making can dilute personalism, but also help hide it, allowing significant decisions made with a heavy hand of international lawyers to go unchallenged. A classic example of this is the process of self-citation by judges at the ICC²⁰⁸ and by scholars in cyber-security,²⁰⁹ and the self-appointment process in arbitration.²¹⁰

Acknowledging that international law is made by incremental decentralized advances in the law, and thus admitting a legislative role for international lawyers forces us to acknowledge that those who participate in the process matter. Hence a third important point is hinted at by Schachter that requires further elaboration: we must look at *who* occupies these positions of power in international law. Questioning the composition of the invisible college is something we can only be truly committed to if the role of international lawyers in the development of the law is taken seriously. Power means we must make sure these informal networks are sufficiently diverse, so as to diminish/neutralize subjective factors in decision-making as much as possible, although acknowledging neutrality is impossible. Although Schachter mostly focuses on nationality as a source of unwanted bias, hinting at also culture and education as relevant factors, his concern with diversity should also be extended to gender, race, class, nationality, and legal system. Moreover, although he only expressly questions the diversity of the IDI and the ILA, this critique should be extrapolated to all authoritative bodies and institutions, from courts and tribunals to UN bodies, from universities to those appointed to act as counsel in international law cases. This is one of the main propellers of this thesis – problematizing the very invisibility of the college is fundamental to ensure that international law is not captured by the interests of dominant groups or the few, or that individuals do not exert unchecked influence over the content of rules that aspire to bind all states - questioning

²⁰⁷ Jose Alvarez, 'The Democratization of the Invisible College' (2009) 6 *Transnational Dispute Management*.

²⁰⁸ See the examples given of the ICC in Stewart Manley, 'Referencing Patterns at the International Criminal Court' (2016) 27 *EJIL* 191.

²⁰⁹ Boer, "'The Greater Part of Jurisconsults'": On Consensus Claims and Their Footnotes in Legal Scholarship' (n 49).

²¹⁰ Sergio Puig, 'Social Capital in the Arbitration Market' (2014) 25 *EJIL* 387; Malcolm Langford, Daniel Behn and Runar Hilleren Lie, 'The Revolving Door in International Investment Arbitration' (2017) 20 *Journal of International Economic Law* 301.

the composition of the ‘invisible college’ is fundamental in ensuring international law is more representative.²¹¹

Schachter’s point that international lawyers act as legislators by carrying ideas between institutions while performing in different areas of the profession is the most important for this thesis’ purposes. Alternating between official and unofficial roles, they weave a ‘sense of justice’ into international law informally, without the consent of states. This ‘sense of justice’, or ‘*conscience juridique*’, elements would presumably not be present if it were dependent only on states’ will. He mentions as vehicles for the insertion of the ‘*conscience juridique*’ into international law ‘non-legislative resolutions’ and ‘reports/proposals by non-binding authoritative bodies’, but other materials should be included: judgments, ILC documents, arguments made by advocates before international courts, and reports of International Organization expert bodies such as those issued by Special Rapporteurs and Commissioners in human rights organs²¹². By adding to this typology of relevant materials, this thesis refines and strengthens this last argument made by Schachter. International law is not only propelled by states, but also by members of the invisible college since (1) in the absence of a centralized legislature the system is highly decentralized and customary, and (2) the profession not only allows, but encourages individuals moving between different authoritative roles carrying with them experiences and ideas. Although similar to it in the questions that it raises, this thesis differs from Schachter’s work in that it documents the most common ways in which this process of individual influence occurs, scrutinizes the professional roles that these lawyers occupy, and trace how they make their mark in practice. It also provides concrete examples of what content is weaved into international law by these individuals and how far individuals can go in defying states by promoting ideas that are not necessarily palatable to them – ultimately, state disengagement or express protest against these legislative attempts is likely to compromise the acceptance and impact of individual ideas. It will be shown that there is a measure of the *conscience juridique* that lawyers can get away with inserting into international law; the price of missing the mark is compromising their ability to influence the system. There is a need to navigate politics and not ‘rub states the wrong way’ in order to promote certain individual ideas and personal values (or projects) – these personal values can be analogized with Schachter’s ‘sense of justice’. Schachter’s ‘sense of justice’ is arguably approximate to Koskenniemi’s concept of ‘sensibilities’, and the former’s plea against specialization is akin to the latter’s plea against

²¹¹ See Conclusions and normative implications of this thesis, below.

²¹² Villalpando makes that argument in relation to international court judgments, arguments made by counsel at these courts, and ILC materials.

managerialism. Both pleas represent calls for international law to be infused with ‘broader aspects of the political faith, image of self and society, as well as the structural constraints within which international law professionals live and work’.²¹³

c. The invisible college beyond Schachter - subsequent literature using the terminology

Although the term ‘invisible college of international lawyers’ has become ‘one of the most popular descriptions of our profession’²¹⁴, close inspection of its subsequent iterations in the literature demonstrates much further investigation is needed on its functioning and composition. The 2001 ASIL Annual Conference whose theme was the ‘invisible college of international lawyers’ illustrates how not much was accomplished in unpacking the concept since 1977. The papers either (1) look at [one specific individual’s] ‘invisible college’²¹⁵, or (2) look at an ‘invisible college’ of a [segment of the profession].²¹⁶ Whereas the first, like obituaries, are limited in scope, the second type of iteration – the college *of* arbitrators, or *of* scholars, or *of* government advisers – misses how the true power of the college lies in the *same* individuals transitioning between roles and disseminating concepts or ideas about the law in this way, what Schachter calls the *dedoublement fonctionnel*. Much of the literature on the ‘invisible college’ outside the 2001 ASIL suffers from the same deficiency.²¹⁷

Some inquiries into the ‘invisible college’ are more helpful. Gillian Triggs’ appraisal of the profession in *The Public International Lawyer and the Practice of International Law*²¹⁸ provides a helpful updated typology of the ‘limbs’ of the college. Triggs states that the profession has grown beyond the ‘objective scientist, government adviser, and professional lobbyist’, to incorporate ‘law reformers, members of government delegations to treaty-making conferences, counsel before the ITLOS, judges, advocates, prosecutors and legal researches for the *ad hoc* crimes tribunals, international commercial arbitrators, legal advisers to corporations, and government

²¹³ Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (n 97) 2.

²¹⁴ Villalpando, ‘The ‘Invisible College of International Lawyers’ Forty Years Later’ (n 11) 2.

²¹⁵ John R Crook, ‘Dan Acheson and International Law’, *Am. Soc’y Int’l L. Proc.* (ASIL 2001); Mary Ellen O’Connell, ‘Elihu Root and Crisis Prevention’, *Am. Soc’y Int’l L. Proc.* (2001); Jordan J Paust, ‘Dr. Francis Lieber and the Lieber Code’, *Am. Soc’y Int’l L. Proc.* (2001).

²¹⁶ Sean D Murphy, ‘The U.S. Lawyer-Statesman at Times of Crisis: A Look at Colonial America’, *Am. Soc’y Int’l L. Proc.* (ASIL 2001); William Slomanson, ‘The New Cyber College of International Lawyers - Remarks by William Slomanson’, *Am. Soc’y Int’l L. Proc.* (2001); Lori Fisler Damrosch, ‘Presidents, Secretaries of State, and Other Visible International Lawyers’, *Am. Soc’y Int’l L. Proc.* (ASIL 2001).

²¹⁷ Harold Hongju Koh and others, ‘The Invisible College of Thomas Franck’ (2009) 84 NYUL Rev. 1389; A van Aaken and others, ‘The Diversity Challenge: Exploring the “Invisible College” of International Arbitration’ (2015) 12 Transnational Dispute Management 429; Gleider Hernandez, ‘The Responsibility of the International Legal Academic: Situating the Grammarian within the “Invisible College”’ in Andre Nollkaemper and others (eds), *International Law as a Profession*.

²¹⁸ ‘Public International Lawyer and the Practice of International Law, The’ (2005) 24 Aust. YBIL 201.

and media commentators'.²¹⁹ She appoints as reasons for this expansion in legal practice the growth in substantive international law since the 70s, the creation of new international organizations, the growing docket of the ICJ and the increase in the number and complexity of cases before it, the creation of new procedures of dispute resolution²²⁰, and the presence of international law in domestic jurisdictions due to globalization.²²¹ She concludes her article with a lacklustre conclusion that though academic research is not cited by Courts, it remains an important role for international lawyers. This article is useful insofar as it attempts to provide a typology of the profession, but is not particularly refined in its arguments or illuminating in explaining the complex relationship between the different professional roles it appropriately identifies.

Schachter's interview with Edith Brown Weiss is also of interest. He begins by stating that what differentiates international lawyers is their sense of mission, and their identification with a cause that goes beyond the subjectmatter – the 'crusade' of international law. In his view, although the existence of the profession of 'international lawyer' has become more visible, their methods of work remain invisible. Schachter gives the example of the ILC conclusions about the existence of a rule and how they do not reveal the actual complete evidence that led it to get there. The community has diversified, according to Schachter, now that 190 states participate in the system, but despite the increased diversity and participation, which is psychologically important, 'power still counts', and 'new voices' continue to be marginalized. As for the expansion of the college, Schachter highlighted the importance of new members self-identifying as international lawyers. On the point of objectivity *versus* subjectivity, Schachter argues that although there is a strong connection between the nationality of lawyers and their opinion, one has 'a duty to seek to maintain an objectivity, or... a loyalty to the principles rather than to a particular partisan position', despite the impossibility of remaining completely objective in practice. In this sense he differentiates the duties of a government advisor, who acting for his or her client may take partisan positions, and the role of a judge or scholar, who '[has] a duty to make [his or herself] aware of the motivations' behind their decisions. Importantly, he changed his opinion on specialization, going so far as saying that some parts of international law should not be required to subscribe to general international law. He points out finally that whereas the 'old guard' of international lawyers was mostly concerned with the differences between method (positivism versus natural law), contemporary

²¹⁹ Ibid 201.

²²⁰On this point she states that there is a danger of fragmentation of counsel before this fora, which could stop the 'development of a truly international bar', Ibid 212.

²²¹ Ibid.

international lawyers are keen on looking beyond the law – the ‘underlying’ factors, such as politics, or affiliations, and their impact on the law. He finalizes by saying that he does not believe the college should be stifled by formalization of its relationships, ‘letting things grow’, in his view, is the way forward.²²²

By far the best reading of Schachter is Santiago de Villalpando’s *The Invisible College of International Lawyers: Forty Years later*.²²³ Part of ideas he also expressed in *Codification Light*²²⁴ and in *On the International Court of Justice and the Determination of the Rules of Law*²²⁵, this piece is an updated (and improved) interpretation of Schachter. It brilliantly summarizes Schachter’s description of the profession as ‘members of a sort of secret society, which from the shadows of scholarship, guides international affairs in the pursuit of noble goals of the peace and well-being of humankind’.²²⁶

Villalpando argues that international lawyers are flattered by Schachter’s glamorized description of their work, and thus it is no wonder the ‘invisible college’ metaphor has gained traction as ‘one of the most popular descriptions of our profession’.²²⁷ In light of current developments, however, he believes Schachter’s work needs to be updated – the developments of fragmentation, judicialization, and shift from treaty-making to non-legislative codification have changed the position of the invisible college. He follows this by a detailed summary of Schachter’s sometimes murky arguments,²²⁸ followed by a revision of said arguments in light of international law’s current developments of specialization and soft codification.²²⁹ In the realm of fragmentation, Villalpando appears to hold a middle-ground understanding that fragmentation was inevitable, and Bruno Simma/Pierre Jean Dupuy’s²³⁰: the ‘invisible college’ centre must hold,²³¹ and autonomous regimes must remain bound by general international law principles. In his view, although the profession has expanded beyond what Schachter had imagined with NGO officials, lawyers in private firms, judges/arbitrators, legal officers and registries at international courts, who were not necessarily submitted to the ‘rites of initiation’ of general international law (such as the exegesis of ICJ judgments, the reading of certain

²²² On this see Crawford, ‘The International Law Bar: Essence before Existence?’ (n 138).

²²³ Villalpando, ‘The ‘Invisible College of International Lawyers’ Forty Years Later’ (n 11).

²²⁴ Santiago Villalpando, ‘Codification Light: A New Trend in the Codification of International Law at the United Nations’ (2013) 8 *Brazilian Yearbook of International Law* 117.

²²⁵ Santiago Villalpando, ‘On the International Court of Justice and the Determination of Rules of Law’ (2013) 26 *Leiden Journal of International Law* 243.

²²⁶ Villalpando, ‘The ‘Invisible College of International Lawyers’ Forty Years Later’ (n 11) 2.

²²⁷ *Ibid.*

²²⁸ Somewhat overlapping with this thesis’ reading of Schachter above.

²²⁹ Villalpando, ‘The ‘Invisible College of International Lawyers’ Forty Years Later’ (n 11) 2–6.

²³⁰ Footnote 30 in article.

²³¹ To use the words of Crawford, ‘Chance, Order, Change: The Course of International Law’ (n 15) 228.

canons, or the discussion of certain materials), generalists will circulate in different roles and guarantee a degree of adherence to traditional conceptions of international law.

Villalpando addresses the implications of the multiplication of courts and tribunals to the invisible college; although Schachter focused on the role of professional associations rather than courts in his 1977 article, Villalpando rightfully states that judicial institutions are ‘one of the privileged arenas of activity for the ‘invisible college’’.²³² International lawyers exercise what Schachter called the *pénétration pacifique* of ideas through moving between these institutions, bolstering the dialogue between them; the role of individuals in this process according to him has been acknowledged for instance in the ILC Study Group report on the most-favoured-nation, where they considered the composition of tribunals in assessing how the concept was used.²³³ As for judges’ creativity, Villalpando holds that their power to innovate on the law remains controversial.²³⁴ Despite the existence of unofficial networks created to promote dialogue between international judges such as the Brandeis initiative, some argue courts should develop formal means of communication to avoid fragmentation and unveil processes of exchange. He suggests controversially that this be done through general appellate ICJ jurisdiction.²³⁵

Thirdly and most importantly for the purposes of this thesis, Villalpando approaches the ‘Shifting Away of Codification from Hard Law and the Role of the ‘Invisible College’ in International Lawmaking’.²³⁶ In his view, Schachter’s argument about ‘invisible college’ lawmaking envisaged only their participation in treaty-making, since he wrote the piece when codification was abundant.²³⁷ Since then multilateral treaty-making declined, and other mechanisms, such as ILC recommendations of which the General Assembly ‘takes note’, are on the rise.²³⁸ ILC Studies that clarify international law are also slowly taking over its traditional prescriptive documents.²³⁹ Villalpando argues this move towards ‘codification light’²⁴⁰ and the proliferation of international judicial fora increased the importance of the invisible college,

²³² Villalpando, ‘The ‘Invisible College of International Lawyers’ Forty Years Later’ (n 11) 8.

²³³ Ibid 9.

²³⁴ Ibid.

²³⁵ Ibid 10.

²³⁶ Ibid.

²³⁷ Ibid.

²³⁸ Ibid.

²³⁹ Ibid 11.

²⁴⁰ Villalpando, ‘Codification Light: A New Trend in the Codification of International Law at the United Nations’ (n 224).

bolstering prospects for informal lawmaking through what he calls an ‘auto-catalytic process’.²⁴¹

Today, it is indeed possible to identify the existence of an ‘auto-catalytic process’, by which the consolidation of legal regimes is achieved through informal channels, as a result of a dialogue between international lawyers in different roles (law-makers, counsel, arbitrators, judges), in the absence of any formal negotiation by government representatives and adoption of an international convention.²⁴²

The transition between of the ‘defence of necessity’ from controversial into widely accepted law through an interaction between the ILC, the ICJ, and investment tribunals is an example.²⁴³ The circulation of individuals within international institutions are what, according to Villalpando, leads to these informal convergences.²⁴⁴ He accurately argues that the personal factor is ‘not always appraised by practitioners and government representatives’.²⁴⁵ Simultaneously, states do not seem bothered by their lack of involvement in the creation of rules in certain areas. Their trust in this process stems from a belief in the ‘wisdom of the work of the ‘invisible college’.²⁴⁶

This ‘auto-catalytic process’ however lacks the checks and balances of traditional customary law development. To solve this problem, Villalpando suggests formalization of these processes of communication between international institutions and states, such as the increased exchanges between the ILC and states. Villalpando hoped that the ILC would address informal customary lawmaking in the ‘Formation and Evidence of Customary International Law’ project,²⁴⁷ since this process ‘[blurs] the boundaries between the formation of customary law and the evidence of customary rules’,²⁴⁸ which did not happen. He defends that states will have to address the workings of these processes. Issues such as the submission of silent states to rules in whose making they did not participate due to *faits accomplis*, for instance, are problematic. States have to either take back control of codification or acknowledge expressly the role of the invisible college.²⁴⁹ Villalpando’s conclusions are that the invisible college today is composed by a multitude of professional roles that go beyond the

²⁴¹ Villalpando, ‘The ‘Invisible College of International Lawyers’ Forty Years Later’ (n 11) 11.

²⁴² Ibid.

²⁴³ Ibid.

²⁴⁴ Ibid.

²⁴⁵ Ibid 12.

²⁴⁶ Ibid.

²⁴⁷ This has not happened. Sir Michael Wood’s work on the identification of customary international law adopts a traditional and state-centric approach in this respect.

²⁴⁸ Villalpando, ‘The ‘Invisible College of International Lawyers’ Forty Years Later’ (n 11) 13.

²⁴⁹ Ibid.

'scholar' and the 'adviser', and that its influence has increased. Although these are not necessarily negative developments, they can create unbalance in how law develops; these processes need to be checked more closely, and the 'invisible college' itself must critically assess its 'invisibility' due to issues of accountability, efficiency and transparency that arise.

In conclusion, the 'invisible college of international lawyers' remains a term both over utilized and undertheorized in the literature; exploring the ways in which individual international lawyers make law is the aim of this thesis.

D. The profession beyond lawmaking

To say that, beyond the three exceptions above²⁵⁰, the literature does not satisfactorily account for the role of individual international lawyers *in lawmaking* is not to say that the international legal profession writ large has not been written about. In fact, today, quite the opposite is true; since Martti Koskenniemi uttered that even if ‘international law is not only what international lawyers do and what they think ... it is at least that’,²⁵¹ there has been an expansion of literature on the subject beyond the previous anecdotal internal accounts. This section will divide works on the profession into five categories. The first explores works on the relationship between theory and practice. The second category includes literature on specific sections of the profession, by practitioners and scholars and their critics. The third section is dedicated to critical histories of the profession written by lawyers. Fourthly, interdisciplinary accounts by lawyers, empirical and qualitative, will be analysed. Finally, some key external accounts – sociological and ethnographic – of the legal profession in general and the international legal profession in particular will be dissected. Each of the sections will elaborate how this thesis both draws from and distinguishes itself from that body of literature.

Works on judicial lawmaking and lawmaking by international organizations will be deliberately excluded from this literature review.²⁵² This is because the literature on sources, even at its most formalist, embraces the role of institutions in lawmaking, unlike that of individual lawyers in the same context. The reasons for this have been explored in Part III.A – International law’s complex relationship with the ‘*teachings of the most highly qualified publicists*’, where it was argued that the problem of sources literature is methodological, and not new. Aside from the analysis of their obituaries above, more will be said on the role of judges in the individual case studies and *vignettes*²⁵³ in subsequent sections. Interesting work on international law’s hidden figures, such as scientific experts and members of courts and tribunals’ secretariats²⁵⁴ are beyond the scope of this chapter. Some relevant work on the erasure of

²⁵⁰ See III.A. Part I - Literature review – ‘teachings of the most highly qualified publicists’ and beyond.

²⁵¹ Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (n 97).

²⁵² Some of this literature is analysed in the context of the large case studies and vignettes in Section III of this thesis.

²⁵³ For example Antonio Cassese, ‘The Diffusion of Revolutionary Ideas and the Evolution of International Law’ in Antonio Cassese, Paola Gaeta and Salvatore Zappalà (eds), *The Human Dimension of International Law: Selected Papers* (OUP 2008); JHH Weiler, ‘Antonio Cassese: Head in the Clouds, Feet on the Ground’ (2012) 23 EJIL 1031; Marko Milanovic, ‘On Realistic Utopias and Other Oxymorons: An Essay on Antonio Cassese’s Last Book’ (2012) 23 European Journal of International Law 1033.

²⁵⁴ Joost Pauwelyn and Krzysztof J Pelc, ‘Who Writes the Rulings of the World Trade Organization? A Critical Assessment of the Role of the Secretariat in WTO Dispute Settlement’ (2019); Daniel Peat, ‘The Use of Court-

women and minorities²⁵⁵ from international law's records is not addressed specifically but remains an important addition to the literature on the profession and is used throughout the thesis.

a. Theory and practice, or theory *versus* practice?

Some of the literature on the profession focuses on the relationship between theory/academic work, and practice. This is relevant to this thesis insofar as it purports part of the power of individuals to make law lies in their straddling of academia and practice. Four positions are reproduced in a volume compiling the contributions to the 2013 ESIL Research Forum, *International Law as a Profession*,²⁵⁶ a useful repository of positions on the subject.

Jochen von Bernstorff²⁵⁷ advocates for the separation between theoreticians and practitioners. He argues theory and practice, although socially intertwined²⁵⁸ with scholarship exerting 'unforeseeable'²⁵⁹ influence on practice, should be kept separate in order to maintain 'reflexive distance vis-à-vis current international political and legal trends'.²⁶⁰ He argues that scholarship produced to '[provide] support' to practice is tainted by a 'pro-practice' bias.²⁶¹ 'Fragmentation' and 'Globalization' decreased the 'cooling off' period between when practice happens and scholarship is produced which, in his view, increases this problem.²⁶² Von Bernstorff argues that both the scholar who believes in the inner rationality of the system and scholars/practitioners 'guardians of progressive values' masquerade how diverse the interests of the community of international lawyers (with their respective biases) really are.²⁶³ Both positions, by advocating a close relationship between theory and practice due to pragmatic or humanitarian concerns, remove necessary scholarly distance.²⁶⁴ Von Bernstorff recognizes the dangers of his argument about scholarship unconcerned with practice – from not receiving

Appointed Experts by the International Court of Justice' (2015) 84 BYIL 271. Freya Baetens (ed), *Legitimacy of Unseen Actors in International Adjudication* (Cambridge University Press 2019).

²⁵⁵ Diane Amann, 'Portraits of Women at Nuremberg'; Immi Tallgren, 'Absent or Invisible?' [2020] *The Dawn of a Discipline* 381; CL Lim, 'Neither Sheep nor Peacocks: T. O. Elias and Post-Colonial International Law' (2008) 21 *Leiden Journal of International Law* 295; Victor Kattan, "'There Was an Elephant in the Court Room": Reflections on the Role of Judge Sir Percy Spender (1897–1985) in the South West Africa Cases (1960–1966) after Half a Century' (2018) 31 *Leiden Journal of International Law* 147.

²⁵⁶ Jean; D'Aspremont and others, *International Law as a Profession* (Jean D'Aspremont and others eds, Cambridge : Cambridge University Press, 2017 2017).

²⁵⁷ 'The Relationship Between Theory and Practice in International Law: Affirmation versus Reflexive Distance' 222.

²⁵⁸ 'From the sociological perspective, the inner operations of the international legal system are connected with international legal scholarship', *Ibid* 224.

²⁵⁹ *Ibid* 223.

²⁶⁰ *Ibid* 224.

²⁶¹ Von Bernstorff (n 257).

²⁶² *Ibid* 228.

²⁶³ *Ibid* 233–234.

²⁶⁴ *Ibid* 234–235.

research grants to being perceived as irrelevant – but still defends that scholarship should not be the ‘handmaiden’ of practice.²⁶⁵

A polar opposite view to von Bernstorff is that of Collins and Bohm²⁶⁶. They argue that in the absence of a centralized legislature and judiciary, practice and scholarship should be deeply intertwined - the ‘burden’ to systematize and ‘uphold the autonomy’ of international law as a system is on the international lawyer as an individual. Scholars have, in their view, a ‘responsibility ... to act as a guardian of the systemic edifice of the international legal order as a whole’.²⁶⁷ The problem lies on how far they take the ‘caretaker’ position of theoreticians: they must preserve ‘the ‘mythology’ of international law’s autonomy to avoid descent into ‘dangerous moral certainties’.²⁶⁸

Pierre d’Argent has a similar view about the benefits of uniting theory and practice of international law.²⁶⁹ Presenting a genealogy of their relationship in the discipline, he argues the classic ‘scholar-practitioner generalist international lawyer’ model was the result of international law’s niche status with few opportunities for practice. The expansion and specialization of international institutions – which he considers ‘very good news’²⁷⁰ – promotes greater separation between academia and practice. Although some see this drifting apart as a problem, d’Argent believes this is part of the progress of international law in fulfilling its promise to create ‘social order’.²⁷¹ He sees the new demand for international lawyers, that he admits takes power away from academics, as an opportunity to ‘renew the relationship between theory and practice’.²⁷²

Samantha Besson also believes international legal theory as inextricable from practice, but for different reasons. She makes a point that is both obvious and insightful: international legal theorists are *lawyers*.²⁷³ Their theory is not produced in a void, but as an integral part of international legal practice; that is where its value lies.²⁷⁴ Rather than focusing on external theorizing (which is not without merit, but is the role of sociologists or moral philosophers),

²⁶⁵ Ibid 243.

²⁶⁶ Richard Collins and Alexandra Bohm, ‘International Law as Professional Practice: Crafting the Autonomy of International Law’, *International Law as a Profession* (2017).

²⁶⁷ Ibid 80.

²⁶⁸ Ibid 92.

²⁶⁹ Pierre d’Argent, ‘Teachers of International Law’, *International Law as a Profession* (2017).

²⁷⁰ Ibid 426.

²⁷¹ Ibid 426–427.

²⁷² Ibid 427.

²⁷³ Samantha Besson, ‘International Legal Theory qua Practice of International Law’, *International Law as a Profession* (2017) 269.

²⁷⁴ Ibid 283.

international legal theorists can and should focus on normative practices, taking practice seriously. In her view, the relationship between theory and practice should not be one of opposition, but of support.²⁷⁵

Isabel Feichtner provides interesting insights into how to practice and preach international law with a critical utopian bend.²⁷⁶ She argues based on Antonio Cassese's work that international law can (and should) be *practiced* from a 'positivist critical' perspective, but that its *theorizing* cannot stop there. One's practice must be constrained by rules, but these rules are sufficiently malleable that they allow the practitioner 'to promote her Utopia', generating outcomes that more or less, depending on the constraints under which she is, mold to one's idea of a more just world.²⁷⁷ She defends theory is less constraining; international lawyers writing in their scholarly capacity can truly break the legal moulds that perpetuate injustice. When 'realising utopia' through scholarship, they can borrow from other disciplines (history, economics) and methods (law and society, private law) to produce meaningful critique.²⁷⁸ Feichtner's conclusions are however realistic: utopian scholarship is not enough. The critically minded international lawyer has a better chance 'realising utopia' if she is a practitioner and acts from within institutions rather than only outside them.²⁷⁹ Reflecting on her own practice, she believes that one can be both cognizant of structural biases and keep practicing law creatively. In an interesting move, she does not say she has the final answer, but that her way of practicing responsibly has been to '[join] forces with friends, ... experiment with institutions', hoping that these innovations improve political economy in the future.²⁸⁰

Part II of this thesis - Part II - 'The community: Individuals, careers, and networks' – demonstrates the ubiquity of the connection between theory and practice in international law, and this section demonstrates the varying views about its desirability. This thesis argues that international lawyers' connection to academia is a vehicle whereby they potentialise the emmeshing of their personal projects into positive law. It thus differs strongly from von Bernstorff. This is not however incompatible with critique, as Collins and Bohm seem to argue; *legal* theory should be connected to *legal* practice, as per Besson, and can be a place for critical

²⁷⁵ Ibid 294.

²⁷⁶ Isabel Feichtner, 'Critical Scholarship and Responsible Practice of International Law. How Can the Two Be Reconciled?' (2016) 29 *Leiden Journal of International Law* 979; Isabel Feichtner, 'Realizing Utopia through the Practice of International Law' (2012) 23 *EJIL* 1143.

²⁷⁷ Feichtner, 'Realizing Utopia through the Practice of International Law' (n 276) 1152.

²⁷⁸ Ibid 1153 et seq.

²⁷⁹ Ibid 1157.

²⁸⁰ Feichtner, 'Critical Scholarship and Responsible Practice of International Law. How Can the Two Be Reconciled?' (n 276).

reimagining of the system, as per Feichtner. Of course the access of progressives to these positions and the higher echelons of the profession, and their ability to influence the mainstream, is not a given.²⁸¹ It is desirable that progressive international lawyers do not disconnect from practice and continue to innovate and push the envelope within practice and outside it, exercising the responsibility that comes with their power.

1. Sections of the profession

a. Insider accounts

It is common to point out how insider accounts of international law as a profession – undertaken by prominent actors themselves – are problematic sources.²⁸² However, as experts in life-writing more generally observe, these insider accounts reveal interesting patterns if read critically. If the researcher is cognizant of their shortcomings, insider accounts provide a window into the thought processes, emotions, and arguments for self-justification – ‘the human dimension of political life’ – that happen amongst members of the community one is studying.²⁸³ Thus a brief survey of these accounts is warranted here.

Government legal advisers have produced anecdotal accounts of their experiences.²⁸⁴ Most of these pieces advocate for the need to understand ‘the delicate relationship between international law and policy’²⁸⁵, adopting a ‘you should have been there’ approach to repel criticism – a marginalization of external scrutiny. This marginalization is usually accompanied by a certain disdain for academics. Direct reproaches argue academics are out of the loop: ‘most articles are ‘unconnected to the practice’ and thus ‘policy irrelevant’²⁸⁶. Less direct reproaches allude to international law’s ‘secret life’ in government; because of the sensitive subject matter of advice, little information is made public, and only insiders can truly understand how legal

²⁸¹ See for instance the difficulties faced by Judge Zafrulla Khan documented by Kattan (n 255).

²⁸² Matthew Windsor, ‘Consigliere or Conscience?’ in Jean D’Aspremont and others (eds), *International Law as a Profession* (Cambridge University Press 2017).

²⁸³ ‘Regardless of whether or not a narrative is objectively ‘true’, reflections are nevertheless revealing in that they represent a vision of how the subject wishes to portray themselves and an image of how they seek to be remembered.’ Jack Corbett, ‘Practising Reflection: Empathy, Emotion and Intuition in Political Life Writing’ (2014) 11 *Life Writing* 349, 353.

²⁸⁴ Sinclair, ‘The Practitioner’s View of International Law’ (n 171); Wood (n 141); Sir Michael Wood, ‘The Role of Public International Lawyers in Government’ in David Feldman (ed), *Law in Politics, Politics in Law* (Hart 2013); Harold Hongju Koh, ‘The Legal Adviser’s Duty to Explain’, *Yale Journal of International Law*, vol 41 (2016); Harold Hongju Koh, ‘Speech, ASIL Midyear Meeting 2012’; Daniel Bethlehem, ‘The Secret Life of International Law’ (2012) 1 *Cambridge Journal of International and Comparative Law* 23. There are also government adviser, legal or otherwise, memoirs destined to the general public, and critiques thereto. Samantha Power, *The Education of an Idealist: A Memoir* (Dey Street 2019); Samuel Moyn, ‘The Road to Hell’ (*American Affairs*, 2020) <<https://americanaffairsjournal.org/2020/02/the-road-to-hell/>> accessed 22 October 2021.

²⁸⁵ Wood (n 284) 116.

²⁸⁶ Koh, ‘Speech, ASIL Midyear Meeting 2012’ (n 284).

decisions are made,²⁸⁷ or how power is brokered.²⁸⁸ With exceptions,²⁸⁹ there is reluctance to accept duties beyond that owed to the state client,²⁹⁰ such as a duty towards maintaining coherence and justice in the international legal system, or to the rule of law in international relations (whatever either of those might entail).

Whereas Koh, Bethlehem, and Wood seek to emphasize the differences between academia and government practice, Ian Sinclair's view stands out as one that tries to create a more nuanced picture that transcends the 'scholars as handmaidens to practice'²⁹¹ line. Sinclair argues how both 'patterns in careers' and 'personal predilections' influence one's position within the typological spectrum of scholar-practitioner/practitioner-scholar.²⁹² This nuance comes partly by his method. Rather than focusing on general impressions or 'war stories'²⁹³, he creates more detailed *vignettes* of the careers of real people – Sir Hersch Lauterpacht, Sir Humphrey Waldock, Sir Eric Beckett, and Sir Gerald Fitzmaurice – to convey the complex and intimate relationship between academia and government advice, and how different temperaments, experiences and opportunities lead to different approaches.

There are also noteworthy accounts from the '*international bar*', that highlight different aspects of the professional imagination of counsel. Albeit not concerned with counsel lawmaking power, these shed light on the self-perception this select group of lawyers has of their own role when performing as counsel, illuminating some of the case studies in Part III. Crawford discusses the differences between international jurisdictions' impact on the degree of professional scrutiny they require.²⁹⁴ Whereas welcoming the international criminal bar's progressive regulation by courts themselves, he regrets the lack of regulation at the investment bar: '[t]ribunals have been faced with counsel who have, for example, had connections with arbitrators, acted against former clients, lacked competence, solicited bribes, commenced futile proceedings and engaged in excessive delay.'²⁹⁵ He attributes the aforementioned propriety

²⁸⁷ Bethlehem (n 284).

²⁸⁸ Wood (n 141) 'To speak in terms of an "absence of structures of coordination" seems to overlook the existing flexible links between legal advisers in New York and London...'

²⁸⁹ Schachter (n 177); Elizabeth Wilmshurst and others, 'Disciplining the Discipline: Roles and Responsibilities International Lawyers', *ASIL Proceedings of the Annual Meeting* (2006).

²⁹⁰ '... you have a single client. ... You have to follow the party-line.' Wood (n 284). Unlike academics, who work independently, when you are a government lawyer 'you are not your own client'. Koh, 'Speech, ASIL Midyear Meeting 2012' (n 284).

²⁹¹ As well as the view in Collins and Alexandra Bohm (n 266).

²⁹² 'The teaching and practice of international law is so closely interwoven that, as I have already demonstrated, it is sometimes difficult to distinguish between scholar and practitioner.' Sir Ian Sinclair, 'The Practitioner's View of International Law' in D. Freestone et al. (ed), *Contemporary issues in international law: A collection of the Josephine Onoh memorial lectures* (Brill 1988).

²⁹³ Windsor, 'Consigliere or Conscience?' (n 282).

²⁹⁴ Crawford, 'The International Law Bar: Essence before Existence?' (n 138).

²⁹⁵ *Ibid* 351 footnotes omitted.

issues to the absence of a centralized entity with disciplinary power over counsel,²⁹⁶ and the absence of social cohesion amongst members of the ‘investment bar’ that could allow for self-regulation.²⁹⁷ The similar problem does not exist at the ‘inter-state bar’ in his view, that encompasses the ICJ and other tribunals of similar *ratione personae* jurisdiction. There, ‘[t]he small number of instances in which the conduct of counsel has been a cause for concern suggest that the de facto system of self-regulation is sufficient, at least so long as there continues to be an ‘invisible bar’.’²⁹⁸ Pellet, another member of the self-proclaimed ‘ICJ mafia’²⁹⁹, also complains about the ‘indiscipline’³⁰⁰ of law firms, with their extensive written memorials and interlocutory proceedings. Although not without merit, one should bear in mind how members of the ‘mafia’, such as Pellet and Crawford, are weary of losing the monopoly of the inter-state market outside that of American and Anglo-European law professors partly attributed to large lawfirms taking over public international law litigation through investment arbitration.³⁰¹ The lack of diversity of the self-regulated ‘mafia’ can also be questioned here.³⁰²

International civil servants in International Organisations’ legal divisions have also made their views heard on occasion. Although they are not all international lawyers, the examples used here fall under that category. Clarence Wilfred Jenks³⁰³ puts both trust and a very high burden on international civil servants such as himself. The key is dedication; the international lawyer in general and the international civil servant in particular must not only be technically minded and ensure internal coherence – they must observe how their individual actions contribute to the whole body of international law.³⁰⁴ ‘In whatever capacity he may serve, the good craftsman will be guided by the principle that his part is not to deliver occasional and shifting opinions to serve present purposes of particular national interest, but to build a solid foundation for the universal law upon the question.’³⁰⁵ The international civil servant represents the will of the

²⁹⁶ Ibid 353.

²⁹⁷ ‘This lack of formal regulation is not tempered by advocates being a small, identifiable group.’ Ibid 351.

²⁹⁸ Ibid 350.

²⁹⁹ Alain Pellet, ‘The Role of the International Lawyer in International Litigation’ in Chanaka Wickremasinghe (ed), *The International Lawyer as Practitioner* (BIICL 2000).

³⁰⁰ James Crawford, Alain Pellet and Catherine Redgwell, ‘Anglo-American and Continental Traditions in Advocacy before International Courts and Tribunals’ (2013) 2 Cambridge Journal of International and Comparative Law 715, 730.

³⁰¹ Sara Dezalay and Yves Dezalay (contributor), ‘Professionals of International Justice: From the Shadow of State Diplomacy to the Pull of the Market for Commercial Arbitration’, *International Law as a Profession* (2017).

³⁰² James Thuo Gathii, ‘How International Is the International Court of Justice?’, *Oxford Public International Law Discussion Group* (2021); Shashank P Kumar and Cecily Rose, ‘A Study of Lawyers Appearing before the International Court of Justice, 1999-2012’ (2014) 25 EJIL 893.

³⁰³ C Wilfred Jenks, ‘Craftsmanship in International Law’ [1956] AJIL 32.

³⁰⁴ Ibid 60.

³⁰⁵ Ibid footnotes omitted.

world community in juxtaposition to the will of states, and the leadership required of international civil servants must match this task.³⁰⁶ The magnitude of such task requires the ‘tranquil and steady dedication of a lifetime’.³⁰⁷ Santiago de Villalpando’s view is slightly less romanticized, but still demanding.³⁰⁸ He argues the expansion of international law’s discipline and practice allows for more room for international lawyers to influence the law outside the remit of governments, including through the international civil servant route.³⁰⁹ This creates more opportunities but also requires more self-inquiry on their part.

The role of the academic and international lawyers’ discomfort with that role has been explored both in Part I of this thesis - International law’s complex relationship with the ‘teachings of the most highly qualified publicists’ -, as well as Section a. Theory and practice, or theory *versus* practice? –, on the relationship between theory and practice in the literature. It thus suffices to say that international law academics have a variety of views about their own role; some consider the role to be one of assistance to practice,³¹⁰ others one of critique and scrutiny of practice,³¹¹ others of proposing utopian and ideal scenarios to guide the discipline,³¹² and others the ambiguous role of ‘grammarians’ and organizers in a decentralized system.³¹³ The role of scholarship in lawmaking, however, as demonstrated in *Part I, A.1. Contemporary ‘teachings’ about ‘teachings’*, remains insufficient.

b. Critical Scrutiny of insider accounts

The self-image represented by the above ‘insider accounts’ has not been left unscrutinised. To the pragmatic views of the legal adviser in particular and international lawyers in general, John Dugard raises fundamental points on the neglect of the human aspect of lawyering when addressing international law’s shortcomings. He gives examples of ‘the good and the bad’³¹⁴ international lawyers, demonstrating part of the argument of this thesis – international law is not only, but is partially, what international lawyers do with it. As ‘good’ he enlists Martens, Cassins, Higgins, Crawford, Lauterpacht and Cassese. The ‘bad’ are Percy Spender and Richard Goldstone.³¹⁵ Dugard argues part of the problem with the profession is international lawyers’

³⁰⁶ C Wilfred Jenks, ‘Some Problems of an International Civil Service’ (1932) 10 Public Administration 376.

³⁰⁷ Jenks, ‘Craftsmanship in International Law’ (n 303) 60.

³⁰⁸ Villalpando, ‘The “Invisible College of International Lawyers” Forty Years Later’ (n 171).

³⁰⁹ Ibid 14.

³¹⁰ Collins and Alexandra Bohm (n 266) See above section x.

³¹¹ Feichtner, ‘Critical Scholarship and Responsible Practice of International Law. How Can the Two Be Reconciled?’ (n 276).

³¹² Anne Peters, ‘Realizing Utopia as a Scholarly Endeavour’ (2013) 24 EJIL 533.

³¹³ Hernandez (n 217); Sivakumaran (n 2).

³¹⁴ John Dugard, ‘What’s Wrong with International Lawyers?’ in Cedric Ryngaert and Sarah Nouwen (eds), *Nova et Vetera Iuris Gentium: What’s Wrong With International Law? Liber Amicorum A.H.A. Soons* (Brill 2015) 470.

³¹⁵ Ibid 470–471.

connection to states, and how that hinders their ability to promote the rule of law in international relations³¹⁶ – ‘legal advisers find their governments the kind of legal advice they want’³¹⁷ instead of honouring their ‘responsibility *qua* lawyers to ensure that the Rule of Law is observed in the world public order’³¹⁸. Dugard’s abovementioned critique of international lawyers applies to legal advisers as well as independent experts and judges. Whereas legal advisers, in his view, mostly tell governments ‘what they want to hear’, judges and rapporteurs to expert bodies rely on appointments by states. This creates a client-like relationship and a pro-state bias.³¹⁹

Matthew Windsor deliberately creates an alternative narrative to the abovementioned insider accounts of the legal adviser.³²⁰ Trying to defy the ‘oracle of international law’ approach taken by legal advisers writing about their own role, Windsor argues government lawyers are often too quick to walk the party line rather than do ‘the hard work of international law’³²¹. Their work is ‘hard’ because it requires legal advisers to face the fear of marginalisation, or, like Elizabeth Wilshurst during the drafting of advice for the UK government on Iraq, the ultimate sacrifice of resignation.³²² Windsor uses the positions of Michael Wood and Wilshurst to make similar points on a more recent article about the Chilcot Inquiry.³²³ He argues the ‘special responsibility’ of the legal adviser should not be conflated in the absolute with ‘personal choice’, but should be seen as part of a collective moral code which the whole professional class builds, over time. Built collectively rather than individually, the ‘special responsibility’ of the legal adviser becomes a kind of socially imposed discipline and collective blanket against criticism – a ‘capacity to resist’.³²⁴

Charlotte Peevers looks at the history of the UK’s involvement on the use of force and the role of legal advisers therein. She compares the actions of legal advisers on the Suez crisis with those involved in the invasion of Iraq, and focuses respectively on the roles of Gerald Fitzmaurice and Michael Wood.³²⁵ Through archival work, she exposes the fraught dichotomy between ‘law’ as a straightforward opposition to ‘politics’ in constraining force. Whereas in

³¹⁶ Similar to a point made by Bianchi in ‘Choice and (The Awareness of) Its Consequences: The ICJ’s “Structural Bias” Strikes Again in the Marshall Islands Case’ (n 32).

³¹⁷ Dugard, ‘What’s Wrong with International Lawyers?’ (n 314) 472.

³¹⁸ *Ibid* 474.

³¹⁹ *Ibid* 474 et seq.

³²⁰ Windsor, ‘Consigliere or Conscience?’ (n 282).

³²¹ *Ibid*.

³²² *Ibid*.

³²³ Windsor, ‘The Special Responsibility of Government Lawyers and the Iraq Inquiry’ (n 141).

³²⁴ *Ibid*.

³²⁵ Charlotte Peevers, *The Politics of Justifying Force: The Suez Crisis, the Iraq War, and International Law* (Oxford University Press 2013).

Windsor's account of Iraq Wood appears as an ambiguous figure, Peevers portrays him in a more positive light – someone trying, albeit very much from the inside, to convince politicians about the illegality of the war.³²⁶ Observing legal advisers 'in the wild' in Whitehall rather than zooming into their relationships to each other – Wilmshurst versus Wood – gives Peevers a different vantage point from Windsor, and thus also enriches the critical accounts of government lawyers' work.

Some confront insider accounts by exposing the lack of diversity in the high echelons of the profession with quantitative data. Pellet's and Crawford's insider accounts highlight the advantages of having a small and tightknit community as counsel before the ICJ, criticizing the absence of such social bonds in other areas of international adjudication; studies such as Rose and Kumar's³²⁷, however, expose the worrying extent of the 'ICJ mafia's' lack of gender and national diversity. In the field of investment arbitration, the findings of Lie and Behn³²⁸ demonstrate the extent of the revolving-door phenomenon, as well as the more pernicious substantive effects of double-hatting that trickle into actual case outcomes.³²⁹ Puig, scrutinising ICSID tribunals, reaches similar conclusions about the heuristic biases involved in appointments.³³⁰

International law teachers and their publications are also subjected to critical scrutiny³³¹; Lianne Boer exposes the self-referentiality in the crystallisation of common narratives in international law.³³² Exposing the fraught way in which footnotes portray consensus when there is none, and how the depersonalisation of the writer to muddle the waters between *lex lata* and *lege ferenda* to build authority, Boer demonstrates the power of knowledge production in moulding international law's discourses.

Some of the best work that scrutinises internal accounts has been done in historical form.³³³ Despite their inherently situated nature, histories help us '[recover] responsible moral agency

³²⁶ Ibid 247.

³²⁷ Kumar and Rose (n 302).

³²⁸ Langford, Behn and Lie (n 210).

³²⁹ For an insider account criticizing 'double-hatting', see Philippe Sands, 'Interaction between Counsel and International Courts and Arbitral Tribunals: Ethical Standards for Counsel' in Rüdiger Wolfrum and Ina Gätzschmann (eds), *International Dispute Settlement: Room for Innovations?* (Springer 2013).

³³⁰ Puig (n 210).

³³¹ Beyond what was addressed above in Section I on 'teachings'.

³³² Lianne JM Boer, 'Narratives of Force: The Presence of the Writer in International Legal Scholarship' (2019) 66 *Netherlands International Law Review* 1; Boer, "'The Greater Part of Jurisconsults': On Consensus Claims and Their Footnotes in Legal Scholarship' (n 49); Lianne JM Boer, 'Lex Lata Comes With a Date; Or What Follows From Referring to the "Tallinn Rules"' (2019) 35 *AJIL Unbound* 76; Lianne JM Boer, 'International Law as We Know It: Cyberwar Discourse and the Construction of Knowledge in International Legal Scholarship' (Vrije Universiteit Amsterdam 2017).

³³³ See below 'Part I, a. Histories' for more international law histories and their methodological underpinnings.

in the practice and professional self-image of the contemporary international lawyer.³³⁴ Peevers' abovementioned historical account of Suez and Iraq and the role of government legal advisers is a prime example; another is Guy Fiti Sinclair's approach to the international civil servant in *To Reform the World*³³⁵. Fiti Sinclair explores the role of the international civil servant as one of the factors in the process of IO expansion and global governance;³³⁶ standing *between* and *within* agency and structure, the international civil servant creates and is created by an institutional mindset that seeks to transcend – but is also tethered to – domestic interests, and historical contingency.³³⁷ His work dwells on the role of lawyers who acted as international civil servants, such as Clarence Wilfred Jenks, who features in Part II of this thesis. States make and are made by IOs, and in turn IOs make³³⁸ and are made by international civil servants. Sinclair argues, in the context of understanding the role of UN Secretary General Dag Hammarskjold, that 'there is a consistent propensity among scholars to overstate [international civil servants] personal agency and influence, without due regard for the wider intellectual and institutional context or his interactions with other local, national and transnational actors'³³⁹. The aforementioned tension and complex interplay of agency and structure is present in all of Sinclair's work on the subject, where Hammarskjold at the UN, but also Wilfred Jenks at the ILO and James Wolfensohn at the World Bank, are key figures in the creation of IO expansion through substantive institutionally backed agendas.³⁴⁰

2. Critical work on the profession

a. Histories

Whereas works such as Peevers' and Fiti Sinclair's institutional histories privilege the role of certain individuals (lawyers, international civil servants, economists), others have explored the histories of individuals or groups of international lawyers in more detail. This section will dissect the works of Martti Koskenniemi as the propeller of this trend, and histories about peripheral and semi-peripheral lawyers written in the same spirit.

³³⁴ Andrew Lang and Susan Marks, 'Even the Dead Will Not Be Safe', *The Law of International Lawyers: Reading Martti Koskenniemi* (2017) 319.

³³⁵ Sinclair, *To Reform the World: International Organisations and the Making of Modern States* (n 169).

³³⁶ Guy Fiti Sinclair, 'To Reform the World: International Organizations and the Making of Modern States – An Introduction' (*EJIL Talk!*, 2019) <<https://www.ejiltalk.org/to-reform-the-world-international-organizations-and-the-making-of-modern-states-an-introduction/>> accessed 24 January 2019.

³³⁷ Sinclair, *To Reform the World: International Organisations and the Making of Modern States* (n 169) 290.

³³⁸ As in IOs train and create a particular mindset with specific biases.

³³⁹ Sinclair, 'The International Civil Servant in Theory and Practice: Law, Morality, and Expertise' (n 169) 754.

³⁴⁰ *Ibid* 764.

(a) Martti Koskenniemi - *Gentle Civilizer of Nations* and beyond

Koskenniemi's work on Lauterpacht³⁴¹ led to the much more ambitious project exploring the legacy of many other international lawyers between 1870-1960: *The Gentle Civilizer of Nations*³⁴² (*Gentle Civilizer*). The impact of the *Gentle Civilizer* cannot be overstated – it has been described in glowing terms³⁴³. It inspired a change in the landscape of international legal scholarship, bringing about a so-called 'turn to history'³⁴⁴ in the discipline. It also inaugurates a new genre of the history in international law, one that differs from traditional progressive histories,³⁴⁵ from epochal histories of diplomacy, power, and empire,³⁴⁶ from the history of international rules and institutions,³⁴⁷ and from descriptive biographies of famous international lawyers.³⁴⁸ Although it uses biographies and it does tell 'epochal' stories about international law's place in world history narratives, it is neither purely biographical nor epochal.³⁴⁹ Neither is it a history of specific norms, or a genealogy of concepts in the discipline, but a history of the idea of the international – a narrative created to explain the 'sensibilities' that materialized into the creation of a discipline separate from diplomacy and natural law to further liberal ideals. It is not concerned with providing a 'true' account of the history of the discipline *per se*, but awaken a sense of empathy in the reader.³⁵⁰

The book writes the lives³⁵¹ of specific international lawyers', exploring their professional environments, professional networks, career paths, geographic, political, historical, and cultural positionalities, and personal sensibilities. It is interesting not only because of the substance of what it reveals - insights about the lawyers in question and their work – but also for its impact in international law as a discipline. Firstly, it ignited the aforementioned 'turn to history'.³⁵² Although other critical histories preceded it³⁵³, the *Gentle Civilizer* brought the area to the

³⁴¹ Koskenniemi, *The Gentle Civilizer of Nations : The Rise and Fall of International Law, 1870-1960* (n 97) 357.

³⁴² Ibid 1.

³⁴³ Martti Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law' (1997) 8 EJIL 215. Koskenniemi, *The Gentle Civilizer of Nations : The Rise and Fall of International Law, 1870-1960* (n 97).

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³⁴⁵ Sir Robert Yewdall Jennings, 'The Progress of International Law' (1958) 34 BYIL 334.

³⁴⁶ Wilhelm Georg Grewe and Michael Byers, 'The Epochs of International Law' xxii.

³⁴⁷ Sands, *East West Street : On the Origins of Genocide and Crimes against Humanity* (n 42).

³⁴⁸ de la Pradelle (n 126).

³⁴⁹ Robert Cryer, 'Review Article: Deja vu in International Law' (2002) 2002 Modern Law Review 931, 947.

³⁵⁰ Anne Orford, 'International Law and the Limits of History', *The Law of International Lawyers: Reading Martti Koskenniemi* (2017); George Rodrigo Bandeira Galindo, 'Martti Koskenniemi and the Historiographical Turn in International Law' (2005) 16 EJIL 539.

³⁵¹ Lang and Marks (n 334).

³⁵² For more comprehensive insights on the impact of the book on the discipline, see Galindo (n 350); Liliana Obregón, 'Writing International Legal History: An Overview' [2015] MONDE(S). Histoire, Espaces, Relations 95.

³⁵³ Antony Anghie, 'Francisco de Vitoria and the Colonial Origins of International Law' (1996) 5 Social and Legal Studies 321; David Kennedy, 'International Law and the Nineteenth Century: History of an Illusion' (1997) 17 QLR 17.

forefront. It provoked international lawyers not only to produce (or re-produce?) histories of the discipline, but think about methods and what different kinds of history international legal scholarship allows us to narrate. It made lawyers question the implications to telling progressive histories, because of its consequences and inaccuracies. It provoked scholars to think about different *kinds* of histories – epochal histories that focus on states and diplomacy, biographies, intellectual histories, and genealogies of legal rules. It prompted international lawyers to engage meaningfully with debates going on in the discipline of history for decades, making us face that no history is an uncovering of ‘truth’, but instead a narrative built from fragments and incomplete information inherently polluted by the teller’s biases. If it did not mean that we incorporated these cross-disciplinary critiques as a whole – because after all there is a strong argument that when we tell legal histories we are doing more than just looking at the past, but trying to come to terms with the imperial past of our discipline, or reclaiming our discipline’s importance by questioning why we are here in the first place³⁵⁴ – it meant that we could no longer take these questions for granted. Secondly, it changed the landscape of Critical Legal Studies (CLS). Koskenniemi puts the reason for a turn to history as challenging the progressive histories of the discipline – ‘[the exponential rise in international institutions between the 1980s and 1990s had not resulted in ‘the rule of law’, and the pacific settlement of international disputes’ during the 2000s international law was not progressing]’.³⁵⁵ Looking at the past allowed CLS to re-invent itself. After having criticized the discipline extensively – trade law is too deeply connected to capitalism and furthers inequality,³⁵⁶ humanitarianism’s progressivism has failed in protecting humans,³⁵⁷ the institutional successes of international law lead to a managerialist mind-set that exhausts and empties the project’s big causes³⁵⁸ – a change of focus was to be welcomed by this school³⁵⁹. If the critical project hinges on explaining how international law has failed, and is doomed to continue to fail because it has become either a utopian project devoid of meaning or an apologist cloak to otherwise naked power, the only thing that is left is to look back at the discipline’s past.

³⁵⁴ See Orford, ‘International Law and the Limits of History’ (n 50).

³⁵⁵ Martti Koskenniemi, ‘Histories of International Law: Significance and Problems for a Critical View’ (2013) 27 Temple International and Comparative Law Journal 215, 216.

³⁵⁶ Feichtner, ‘Critical Scholarship and Responsible Practice of International Law. How Can the Two Be Reconciled?’ (n 276).

³⁵⁷ Robert Howse and Ruth Teitel, ‘Does Humanity-Law Require (or Imply) a Progressive Theory or History (And Other Questions for Martti Koskenniemi)’ (2013) 1 Temple International and Comparative Law Journal 377.

³⁵⁸ United Nations General Assembly, ‘Strengthening of the ICJ’, GA/Res/54/108 (1999).

³⁵⁹ Even though certain critical legal scholars would abhor the idea of being called a ‘school’ in the first place. See Martti Koskenniemi, ‘Letter to the Editors of the Symposium’ (1999) 93 AJIL 351.

The third way in which the *Gentle Civilizer of Nation's* turn to history has changed the landscape of international law is more fundamental. It flipped the narrative of our discipline from one that is directed at how state practice is justified by law, or how states make the law, or how far should the law bend to what is acceptable to states, to one that is directed at international lawyers, emphasizing the power of the members of the international legal profession. It opened our eyes to the fact that our object of study should not just be an abstract set of rules made by states – or, in Koskenniemi's views, a set of argumentative moves available to the professional – but also what we, as professionals, chose to do with these rules. In doing so, it empowered lawyers to make the change that they want to see in the system, it showed us that we are not at the mercy of an external force exerted by abstract entities, but we can help shape and constrain this force. Of course, the extent to which one's agency can have an impact changes depending on the position one occupies. More than a work of history, the *Gentle Civilizer* allowed for a turn in the epistemology of international law – it articulated more eloquently than ever before that the profession of international law *is* the discipline itself: 'although international law is not *only* what international lawyers do and what they think,' 'it is at least that'.³⁶⁰ Koskenniemi expounds that the transition in international law from erratic diplomatic practice until the early 19th century to a more or less cohesive body of practices and doctrines in the first half of the 20th century was 'an effect of lawyers' imagination'.³⁶¹ The book is a manifesto in favour of a return of international law to meaningful projects, in response to 'managerialism'.³⁶² It can be read as a call to arms to international lawyers to take responsibility for their discipline, a way of (re-?)instilling agency into its professionals to shape international society through our work. In Koskenniemi's own words, the *Gentle Civilizer* is 'a political act', in the sense that it seeks to 'make our present situation clearer to us and to sharpen our own ability to act in the professional contexts that are open to us as we engage in our practices and projects'.³⁶³ If we as international lawyers imagine ourselves as part of a system that we ourselves created, we have to at least partially blame ourselves for its failures – and always keep questioning where the discipline is going – is it promoting the right values, is it speaking truth to power, or is it being subverted as a means of imperialist goals? In other words, the book seeks to understand what is the role of agency in a discipline that is both completely

³⁶⁰ Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (n 97) 432.

³⁶¹ Ibid 7; Martti Koskenniemi, 'To Enable and Enchant – on the Power of Law', *The Law of International Lawyers: Reading Martti Koskenniemi* (2017).

³⁶² Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (n 97) 361. It is not obvious that Koskenniemi himself, however, would support this reading.

³⁶³ Koskenniemi, 'The Fate of Public International Law: Between Technique and Politics' (n 203).

unconstrained by form (international law as argumentative practice) but completely constrained by the structures in which one is making said arguments (structural bias).

The role of agency *today* is unclear from the book. We know Koskenniemi sees in the works of Lauterpacht and Scelle, for example, the merits of international lawyers working tirelessly for the fulfilment of their political ideals. But he also refuses, unlike others,³⁶⁴ to tell a ‘happy ending’ story where agency prevails over structure. In the words of Carty, the book remains ‘between parody and despair’³⁶⁵. It reluctantly proposes a return to technical pragmatism infused by leftist agendas, and declares the death of that possibility with (1) the rise of American realism, and (2) the path of the profession that entrenches structural biases away from its lofty goals of reforming the world.

(b) Beyond the ‘civilize(r/d)’ – peripheral international lawyers’ histories

The *Gentle Civilizer of Nations* has been praised for attuning lawyers to international law’s Eurocentric roots, but in building narratives that focus on the European experience, it also reinforces Eurocentrism.³⁶⁶ It neglects the complexity of the participation of international lawyers from the Global South in international law’s expansion and (re)imagination, something of which Koskenniemi is cognizant.³⁶⁷ Others have come in to fill that gap, and build a critical history of non-European international lawyers. This section brings a few examples of this genre.

Liliana Obregon has dedicated herself to studying Latin American international lawyers and their relationships to Europe and America over time. In an extensive body of work on the subject that covers both methodological inquiries into international legal history,³⁶⁸ as well as scrutiny of the works of key figures in the region, such as Carlos Calvo, Alejandro Alvarez, and Andres Bello,³⁶⁹ she provides accounts of the complex relationships between members of local

³⁶⁴ Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (n 42).

³⁶⁵ Anthony Carty, ‘Between Despair and Parody’ [2012] *Rechtsgeschichte*.

³⁶⁶ Liliana Obregón, ‘Martti Koskenniemi’s Critique of Eurocentrism in International Law’ in A Galan, M de Hoon and W Werner (eds), *The Law of International Lawyers: Reading Martti Koskenniemi* (CUP 2017).

³⁶⁷ ‘At the same time, he makes a call for the need for more histories coming from or about women and “non-Europeans” in international law. Koskenniemi is very conscious of where his major contribution will be and sticks to that role of meticulously (and respectfully) deconstructing the mainstream while inviting others to present histories from places and people that are not from the European centre of production of international legal thought.’ *Ibid* 376.

³⁶⁸ Obregón, ‘Writing International Legal History: An Overview’ (n 352); Obregón, ‘Martti Koskenniemi’s Critique of Eurocentrism in International Law’ (n 366); Liliana Obregón, ‘Peripheral Histories of International Law’ (2019) 15 *Annual Review of Law and Social Science* 437.

³⁶⁹ Liliana Obregón, ‘Construyendo La Región Americana: Andrés Bello y El Derecho Internacional’ (2010) 24 *Revista de Derecho Publico*; Liliana Obregón, *Noted for Dissent: The International Life of Alejandro Alvarez*, vol 19 (2006); Liliana Obregón, ‘Carlos Calvo y La Profesionalización Del Derecho Internacional’ (2015) 3 *Revista Latino Americana de Derecho Internacional*.

Latin American elites, and international lawyers in the Global North that takes into account local and international political alliances. She crafts the idea of a '*criollo*' international legal consciousness.³⁷⁰ The *criollo* conscience, in her argument, arises during the long period of Iberian rule of the Americas, whereby local economic, political, and cultural elites were formed. The *criollo* elite has a mixed relationship with the 'centre': they both desire to separate themselves from the 'masses' through belonging to a local elite – slaves and former slaves, indigenous peoples – and see themselves as needing independence from colonial subordination. They both want to be part of the 'civilized' world, and have a notion that they must espouse regional concerns. Narrating Latin American international lawyers' attempts to straddle these often conflicting identities, Obregon captures incredibly well the tension between the agency of individual members of these local elites and the structure (economic, political, and, in this case, of knowledge and legal power) of the international legal landscape.

Whereas Obregon emphasizes the lives of individual international lawyers *versus* the systemic pressures of the structures of law in Latin America, Juan Pablo Scarfi historicises the lives of these peripheral individuals and their professional networks in the Pan American context.³⁷¹ Adding another layer to these peripheral and semi-peripheral accounts of individual international lawyers' contributions, Scarfi demonstrates how professional networks such as the American Institute of International Law and the Organisation of American States are created under the auspices of the United States and North American lawyers, such as James Brown Scott and Elihu Root, to strengthen hegemony over the region by coopting local international lawyers. This is a successful mission to a large extent, as US sponsored liberal and individualistic views become ubiquitous amongst local international lawyers. He also demonstrates, however, that the relationship was not again a simple story of unilateral domination; within these spaces, local elites represented by Alejandro Alvarez, also created room for contestation by entrenching a belief in liberal multilateralism and non-intervention, against North American interests. This contestation leads to North America's partially pulling out from these Pan American networks.

Lauri Malksoo seeks to understand Russian international lawyers relationship to international law, and how it has contributed to Russia's current and past international law practice.³⁷² He argues for a comprehensive view of the discipline in Russia, that does not isolate pro-Western

³⁷⁰ Obregon, *Noted for Dissent: The International Life of Alejandro Alvarez* (n 369).

³⁷¹ Juan Pablo Scarfi, *The Hidden History of International Law in the Americas: Empire and Legal Networks* (OUP 2017).

³⁷² Lauri Mälksoo, 'The History of International Legal Scholarship in Russia', *Russian Approaches to International Law* (OUP 2015) 39.

cosmopolitans like F. F. Martens, or socialist international lawyers, such as Tunkin. In Malksoo's view, any Russian contribution must be understood in light of the continuities and discontinuities of how it constructed its position in relation to the West.³⁷³

Finally, Arnulf Becker Lorca's *Mestizo International Law* provides a refined self-described global history of how international lawyers in the peripheries and semi-peripheries constructed their discipline and attempted – with mixed success – to promote national or regional counter-hegemonic doctrines. One of the most balanced, complex, well-researched and written works on international law(yers)'s history, *Mestizo* argues that 'non-European practitioners' have 'strategically appropriated' international law to counter Western Imperialism, boldly claiming that not only classic Eurocentric histories, such as Grewe's *Epochs*³⁷⁴, but TWAIL scholarship itself ignores these contributions. Rather than purely European, in Becker Lorca's view of international law is better understood as a mixed – *mestizo* – practice, that should not erase the role of non-Europeans in the process of constitution of the discipline.³⁷⁵ That does not mean international law is 'truly universal', or benevolent, or that peripheral lawyers 'won' – actions such as the Montevideo convention explored by Lorca as part of this history 'did not transform the nature of the international order, and did not change the power dynamics between core and periphery'. It did, however, '[offer] semi-peripheral international lawyers new arguments to resist core states' power'.³⁷⁶

b. Critique of expertise – Kennedy's *World of Struggle*

David Kennedy, another of the most prominent critical voice in international law, has, similarly to Koskenniemi, treaded a path in his work from argumentative structure³⁷⁷ to agency. His work on expertise uses anecdotes about his own experiences as an expert³⁷⁸ – he has consulted in projects with private actors such as PricewaterhouseCoopers and Cleary, Gottlieb, Steen and Hamilton, as well as the UN and the EU³⁷⁹. Whereas Koskenniemi's take on legal expertise is

³⁷³ L Malksoo, 'The History of International Legal Theory in Russia: A Civilizational Dialogue with Europe' (2008) 19 *European Journal of International Law* 211.

³⁷⁴ Grewe and Byers (n 346).

³⁷⁵ Arnulf Becker Lorca, *Mestizo International Law: A Global Intellectual History 1842–1933* (Cambridge University Press 2015) 74–75.

³⁷⁶ *Ibid* 354.

³⁷⁷ David Kennedy, 'The Last Treatise: Project and Person. (Reflections on Martti Koskenniemi's From Apology to Utopia)' (2006) 7 *German Law Journal* 982; David Kennedy, 'Theses about International Law Discourse' (1980) 23 *German Yearbook of International Law* 353.

³⁷⁸ 'My thinking in each of these themes arose from my experiences in the fields of economic development, human rights, international law and warfare.' 'Introducing *A World of Struggle*' (2016) 4 *London Review of International Law* 443, 443.

³⁷⁹ Harvard Law School, 'Faculty Profile - David Kennedy' (2021) <<https://hls.harvard.edu/faculty/directory/10468/Kennedy/>> accessed 11 September 2020.

partly auto-biographical,³⁸⁰ Kennedy's is fully so. During his explorations of expertise through his career, he looked at the role of humanitarianism,³⁸¹ the laws of war³⁸², human rights,³⁸³ general foreign policy.³⁸⁴ His most recent and most extensive address of expertise is *A World of Struggle: How Power, Law, and Expertise Shape the Global Political Economy (World of Struggle)*.³⁸⁵ The book is divided into sections on political economy, expertise, and law. The last chapter focuses specifically on the use of law in war.

Kennedy argues that expertise in general and law, as a particular form of expertise, is powerful and political, although it *portrays itself* as inconsequential and subservient to higher echelons policymakers. Expertise is described as simultaneously just as powerful as political power, and unaccountable to the distributive outcomes that it engenders, because it is articulated as neutral. It portrays itself as displacing decision-making to politicians, but still dictates the rules of the game behind the scenes.³⁸⁶ Kennedy argues in the book one must avoid thinking like an expert, in terms of systemic coherence – instead embrace the thinking of strategic actors. One must not settle for institutional reform: reassessing the UN Security Council, or creating rules to ensure responsible business practices is a cop out.³⁸⁷ Instead of thinking of themselves as benevolent thinkers, experts in general and lawyers in particular should be ruthless and directly engage in struggle: thinking systemically is a bar for acting revolutionarily.³⁸⁸ Despite his reluctance to reference, Kennedy's emphasis on 'struggle' in the study of expertise is reminiscent of Bourdieusian ideas about dominance of a field through expertise.³⁸⁹ It demonstrates a desire to escape structural biases through strategic wielding of the power of said expertise.

Elsewhere, Kennedy argues (more eloquently) what he desires from exposing the power and politics of expertise: 'we should see ourselves as participants in [an unruly world], with our own

³⁸⁰ Lang and Marks (n 334).

³⁸¹ David Kennedy, 'The Politics of the Invisible College: International Governance and the Politics of Expertise' [2001] *European Human Rights Law Review* 463.

³⁸² David Kennedy, 'War and International Law: Distinguishing the Military and Humanitarian Professions' (2006) 82 *International Law Studies*; David Kennedy, 'Lawfare and Warfare' in James R Crawford, Martti Koskenniemi and Surabhi Ranganathan (eds), *Cambridge Companion to International Law* (CUP 2012).

³⁸³ David Kennedy, 'The Politics of the Invisible College: International Governance and the Politics of Expertise' (2001) 5 *European human rights law review* 463.

³⁸⁴ David Kennedy, 'Speaking Law to Power: International Law and Foreign Policy'.

³⁸⁵ Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (n 43).

³⁸⁶ *Ibid* 298 et seq.

³⁸⁷ *Ibid* 16.

³⁸⁸ *Ibid* 282.

³⁸⁹ Pierre Bourdieu, 'The Force of Law: Toward a Sociology of the Juridical Field' (1987) 38 *The Hastings Law Journal* 805; Yves Dezalay and Mikael Rask Madsen, 'The Force of Law and Lawyers: Pierre Bourdieu and the Reflexive Sociology of Law'. See more on Bourdieu's approach in 'Part I, D.aBourdieu, the Dezalays, Garth – reflexive sociology' below.

culture, power and authority, pursuing projects with consequences to ourselves and others'.³⁹⁰ That is certainly an appealing outcome from which this thesis draws – in exposing lawyers' power to create rules, exploring their discomfort with this power, and asking them to wield that power responsibly, works in the critical vein have taken advantage of Kennedy's tradition. However, it diverges from it. Firstly, it does not subscribe that responsibility must take the form of ruthless struggle, purely 'embracing the dark side'³⁹¹. As it becomes clear when one looks beyond anecdotal accounts, battles in expert language are more of a dance than a struggle, see at Alejandro Alvarez's movements towards and away from Pan Americanism,³⁹² or Lauterpacht's movements from legislative idealism to procedure and judicial activism.³⁹³ The second problem is that Kennedy's approach is insufficiently prescriptive – he defends international law should be wielded strategically and ruthlessly to promote *progressive* politics, but as pointed out by Bianchi, projects within the Newstream are wide and varied,³⁹⁴ so it is unclear what 'progressive' entails here. A similar point is made by Moyn in reviewing *World of Struggle*.³⁹⁵ Perhaps connected to this problem is the third and final difference between the underpinnings of this thesis and Kennedy's project on expertise: its general spirit of hopelessness. When confronted with practical examples of responsible, imaginative, and revolutionary use of legal expertise, it can only see it in moments of the past, such as in the 1698 peace of Westphalia.³⁹⁶ In that, it is similar to Koskenniemi's diagnose of the death of the 'culture of formalism' after the second half of Lauterpacht's career.³⁹⁷ This inability to see possibilities of enacting 'the right side of expertise' in the present is, in my argument, not compatible with the analysis of practical contemporary examples. Perhaps Kennedy in Harvard (and Koskenniemi in Finland) are too close to power, and lack the necessary distance to appreciate the triumphs, be they contingent, and sometimes almost Pyrrhic, of contemporary strategic 'leftist' international lawyers. The extended case studies and *vignettes* provided here³⁹⁸ will further emphasize this point.

³⁹⁰ Kennedy, 'The Politics of the Invisible College: International Governance and the Politics of Expertise' (n 383) 497.

³⁹¹ Ibid 496.

³⁹² Scarfi (n 371).

³⁹³ Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law' (n 343).

³⁹⁴ Andrea Bianchi, *International Law Theories* (OUP 2016) 152.

³⁹⁵ Samuel Moyn, 'Knowledge and Politics in International Law' (2016) 129 *Harvard Law Review* 2164, 2187–2188.

³⁹⁶ Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (n 43) 278.

³⁹⁷ See above 'Part I. B.a(a) Martti Koskenniemi - *Gentle Civilizer of Nations* and beyond' and 'Martti Koskenniemi - *Gentle Civilizer of Nations* and beyond'.

³⁹⁸ See below Part III - Zooming in: international lawyers making law in action.

c. Jean d'Aspremont – a conservative crit or a crit conservative?

Amongst those attempting to theorize international law as a profession, one of the most prolific has been Jean d'Aspremont. He followed his work on formalism and international law³⁹⁹ with a turn towards studying the profession through the lens of 'self-reflexivity' in a series of books and articles⁴⁰⁰ that indicate a move towards critique. His contribution to *International Law as a Profession* is an attempt to categorize aspects of the professionalization of international law⁴⁰¹ - moves towards the 'autonomisation' of the discipline, 'scientification' of its methods, the formation of a professional community, the pluralization of professional practices in the discipline, and the simultaneous creation of spaces/vocabularies/institutions/knowledge repositories that socialize lawyers into the discipline. He finishes the piece by arguing international lawyers' professional practices must be theorized and thought about with the aid of interdisciplinary techniques, but also saying that lawyers themselves should be doing this self-reflexive work.⁴⁰²

Since 2013 however it is clear that d'Aspremont's theorizing about the profession became a larger academic endeavor. In 2017 he publishes *International Law as a Belief System*⁴⁰³, in which he defends that international law's fundamental doctrines (he mentions sources, responsibility, statehood, personality, interpretation and *jus cogens*) are created through the manufacturing of genealogies that give them authority. In his argument, these doctrines and their respective histories, created by many actors over time, become embedded in the discipline's canon, and thus self-reproduce and constrain future action. D'Aspremont argues in the book not for a destruction of the system, but for a temporary 'suspension of belief' to allow room for self-reflection and creativity. Unshackling oneself from the tales of international law's form and embracing the fact that international law is made by people/institutions, in his view, allows international lawyers to 'situate themselves and their discourse, thereby reinforcing their capacity for political action'⁴⁰⁴. It is unclear however what the 'political' means for

sources, responsibility, statehood, personality, interpretation and *jus cogens*

³⁹⁹ Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (Oxford University Press 2011); Jean D'Aspremont and Jean Kammerhoffer, 'Introduction' in Jean D'Aspremont and H (eds), *International Legal Positivism in a Post-Modern World* (CUP 2014).

⁴⁰⁰ Jean D'Aspremont, 'The Professionalisation of International Law' in Jean D'Aspremont and others (eds), *International Law as a Profession* (CUP 2018); Jean D'Aspremont, 'Law, Critique, and the True Believer's Experience (Hommage à Pierre Schlag)', *A Day with Pierre Schlag at McGill University* (2019); Jean D'Aspremont, *International Law as a Belief System* (CUP 2018); Jean D'Aspremont, 'Three International Lawyers in a Hall of Mirrors' (2019) 32 *Leiden Journal of International Law* 367; Jean D'Aspremont, 'Jenks' Ethics of Responsibility for the Desillusioned International Lawyer' (2016).

⁴⁰¹ D'Aspremont, 'The Professionalisation of International Law' (n 400).

⁴⁰² Ibid.

⁴⁰³ D'Aspremont, *International Law as a Belief System* (n 400).

⁴⁰⁴ Ibid 119.

d'Aspremont. Critical international lawyers such as David Kennedy have long been calling out for 'making the invisible visible' in expertise so that international lawyers can overtly use it in pursuit of progressive ends.⁴⁰⁵ But unlike Kennedy, d'Aspremont is less prescriptive in which politics one should espouse after suspending their belief.

He makes an attempt to further the thesis of the book in a 2019 article, 'The International Lawyer in a Hall of Mirrors'⁴⁰⁶, in which he provides four 'images of the international lawyer' to explain what they can do if confronted by international law's structure of foundationless 'self-referential mechanisms'. In other words, what positions do international lawyers choose to take when confronted by the claim that they inhabit a 'belief system'. The 'invincible' international lawyer will accept the illusion that the discipline is subsumed in the self-referential doctrines of sources and interpretation, and will happily further perpetuate the narrative that one can remain in the hall of mirrors and still understand international law, unencumbered by the politics and distributive outcomes of her choices – she is the 'modern' international lawyer.⁴⁰⁷ The 'vulnerable' international lawyer, on the other hand, has unseen the illusion created by the hall of mirrors where sources, interpretation, and their genealogies, justify each other in a loop – the mirrors are shattered, the lights are off, her eyes are closed⁴⁰⁸. He or she is 'adrift', a victim of the 'postmodern condition' where there are no points of reference to why she 'does' international law anymore.⁴⁰⁹ The third possibility is that of an 'international lawyer with shattered spectacles', 'the self-reflective international lawyer who has experienced both the invincibility and the vulnerability but who does not want to be reduced to either of them'.⁴¹⁰ She '[grasps] the immanence of the political' inherent to reproducing the discourses of international law, and the histories and politics of their creation.⁴¹¹ With that awareness, she however still chooses to use the language of international law, because it is *a common language*. Doing that she may continue to be an international lawyer without '[veering] into utter pessimism and scepticism about the possibility of a common language and a unitary discipline.'⁴¹² This is a closer answer to that of Kennedy's mentioned above – that one should embrace the politics of expertise to advocate for progressive politics. Nonetheless, unlike

⁴⁰⁵ Kennedy, 'The Politics of the Invisible College: International Governance and the Politics of Expertise' (n 383) 472.

⁴⁰⁶ D'Aspremont, 'Three International Lawyers in a Hall of Mirrors' (n 400).

⁴⁰⁷ Ibid 321.

⁴⁰⁸ Ibid 373 et seq.

⁴⁰⁹ Ibid 376.

⁴¹⁰ Ibid.

⁴¹¹ Ibid 379.

⁴¹² Ibid.

Kennedy, d'Aspremont manages to mostly escape dictating that one should embrace politics, and which politics one should espouse: the hall of mirrors is lawfare *lite*.

There is much in common between d'Aspremont's conclusions, Kennedy's politics of expertise, and Koskenniemi's culture of formalism. But what is most flagrant are the two main differences between d'Aspremont and the others; firstly, the emphasis in d'Aspremont's work is less on unveiling power structures – the 'struggle'⁴¹³, the 'ambivalence'⁴¹⁴–, and more on showing the spuriousness of international law's doctrines themselves, i.e. 'sources' and 'interpretation', as two sides of a human-made coin. Secondly, whereas Kennedy and Koskenniemi have been accused of not articulating 'what is next' after the mirrors have been shattered in any real way, that seems to be at the forefront of d'Aspremont's work: what do international lawyers do once they realise their orderly genealogies are just foundations of authority?

3. Internal interdisciplinary accounts

Borrowing from social sciences, political science, and computation, lawyers have increasingly employed empirical methods to verify patterns of citation within and between judicial institutions, use of scholarly works, and tracing speech patterns.⁴¹⁵ Using quantitative methods, they develop rich networks of citations and observe writing patterns that allow them to better understand how authority of certain materials is built in international law.⁴¹⁶ Citation analysis demonstrates the pervasiveness of external judicial citations in investment arbitration tribunals and the WTO,⁴¹⁷ and the reluctance of others, such as the ICJ,⁴¹⁸ to use case law from external bodies. Similarly, empirical analysis differences in how judicial institutions engage with 'teachings' of publicists gives us some insight into the avenues open for individuals to engage

⁴¹³ Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (n 43).

⁴¹⁴ Martti Koskenniemi, 'Between Commitment and Cynicism', *International Law as a Profession* (2017).

⁴¹⁵ Wolfgang Alschner and Damien Charlotin, 'The Growing Complexity of the Self-Citation Network' (2018) 29 *Journal of International Economic Law* 83; Damien Charlotin, 'The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis' (2017) 20 *Journal of International Economic Law* 279; Damien Charlotin, 'A Data Analysis of the Iran-US Claims Tribunal's Jurisprudence-Lessons for International Dispute-Settlement Today' (2019) 10 *Journal of International Dispute Settlement* 443; Wolfgang Alschner and Damien Charlotin, 'The Growing Complexity of the International Court of Justice's Self-Citation Network' (2018) 29 *European Journal of International Law* 83; Niccolò Ridi, 'Approaches to External Precedent: Invocation of International Decisions in Investment Arbitration and WTO Dispute Settlement' in Daniel Behn, Malcolm Langford and S Gáspár-Szilágyi (eds), *Adjudicating Trade and Investment Law: Convergence or Divergence?* (CUP); Helmersen, 'The Application of Teachings by the International Tribunal for the Law of the Sea' (n 1); Helmersen, 'Finding "the Most Highly Qualified Publicists": Lessons from the International Court of Justice' (n 1); Pauwelyn and Pelc (n 254).

⁴¹⁶ Pauwelyn, Wessel and Wouters (n 14).

⁴¹⁷ Ridi (n 415); Charlotin, 'The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis' (n 415).

⁴¹⁸ Wolfgang Alschner and Damien Charlotin, 'The Growing Complexity of the International Court of Justice's Self-Citation Network: Institutional Achievement or Access-to-Justice Concern?' (2016) 29 *EJIL*.

in lawmaking in some institutions over others,⁴¹⁹ at least at a surface level. It is fascinating literature, and certainly demonstrates the complexity of authority-making in international law, filling gaps doctrinal analysis itself cannot account for, especially in breadth of cases scrutinised.

There are shortcomings to these strategies, however. In all those cases, the authors are constrained by what is cited. This means materials that are used, but not cited in the text, are largely absent from scrutiny. They are also restricted to looking at patterns of citations within or between *institutions*, excluding some of the external avenues in which international lawyers interact and law is made. Particularly in Charlotin's and Ridi's work on citations, the focus is exclusive on institutions rather than individuals – thus little light is shed on the object of study of this thesis. Some empirical work attempts to identify authorship of tribunal decisions from style patterns but also only captures part of the process this thesis unveils, tracing individual influence at particular institutions.⁴²⁰

Those taking an interest interdisciplinary beyond quantitative studies also take a special interest in dissecting the role of the profession in international law. In the literature on Epistemic Communities, Andrea Bianchi and Jean D'Aspremont borrow from sociology and international relations⁴²¹. They argue that a way in which the international legal profession holds power is by shaping policy through their monopoly of shared expert vocabularies, ultimately exerting power over decision-makers in technical contexts. Specific sections – arbitrators or adjudicators, for example⁴²² – form specialized subsets within the community of international lawyers, with their own particular beliefs and agendas. Their focus, however, is on the *communities* of lawyers building expert vocabularies, rather than zooming into individual members of the profession. They are more invested in scrutinizing communities' dynamics, rather than tracing the origins of discrete legal developments. One can see that the object may be similar – how do members of the international legal profession organize themselves and produce meaning within the discipline – but the emphasis is on the group rather than on the individual, although obviously both are intertwined. They are also not directly engaging with

⁴¹⁹ Helmersen, 'The Use of Scholarship by the WTO Appellate Body' (n 1); Helmersen, 'The Application of Teachings by the International Tribunal for the Law of the Sea' (n 1); Helmersen, 'Finding "the Most Highly Qualified Publicists": Lessons from the International Court of Justice' (n 1).

⁴²⁰ Malcolm Langford, Daniel Behn and Runar Lie, 'Computational Stylometry: Predicting the Authorship of Investment Arbitration Awards' [2020] *Computational Legal Studies* 53; Charlotin, 'A Data Analysis of the Iran-US Claims Tribunal's Jurisprudence-Lessons for International Dispute-Settlement Today' (n 415).

⁴²¹ Fabian Cardenas and Jean D'Aspremont, 'Epistemic Communities in International Adjudication' [2020] *Max Planck Encyclopedia of International Procedural Law*; Bianchi, 'Epistemic Communities in International Arbitration' (n 33); Bianchi, 'Epistemic Communities' (n 33); Bianchi, 'Epistemic Communities in International Law' (n 33). Similarly, Waibel draws on 'Interpretive communities' to explain a similar process, see Michael Waibel, 'Interpretive Communities in International Law' [2015] *Interpretation in International Law* 147.

⁴²² Bianchi, 'Epistemic Communities in International Arbitration' (n 33); Cardenas and D'Aspremont (n 421).

claims about sources and lawmaking in narrower terms. As pointed out by Bianchi, methods are lenses whereby one sees the world – this means that no method will provide a full picture, and all will leave blindspots that other types of analysis are better suited to illuminate. They ask different questions and provide different answers, even if looking at the same object.

4. External accounts – sociologists and anthropologists

The commonality between all the aforementioned accounts of the international legal profession are their crafters: even interdisciplinary forays that borrow from social sciences and history are written by lawyers themselves. This section deals with another pertinent set of the literature about the legal profession and its composition – that of sociologists and anthropologists ‘looking into’ the world of lawyers.

a. Bourdieu, the Dezalays, Garth – reflexive sociology

The first relevant author here is Pierre Bourdieu and his sociology of the legal field. Bourdieu’s idea of ‘field’ seeks to transcend ‘formalist ideology’ of internal accounts of what law is that focuses on the autonomy of the law from external factors, and ‘instrumentalist’ views that collapse law and the power structures it legitimizes.⁴²³ His notion of ‘field’ established the relevance not only of external power relations in the shaping of law, but the internal processes of socialization, power brokering, within the legal profession itself, somewhat independently (though deeply intertwined) with the power relations it harnesses. The focus of Bourdieu and those adopting a Bourdieusian approach is on the ‘competition within the social space’ of law and the legal profession⁴²⁴ – relevant actors struggle to ‘monopolize’ the ‘right to determine the law’.⁴²⁵ In doing so, Bourdieu’s sociology takes the law and its purported autonomy more seriously, allowing for greater complexity in the discussion of the internal layers of power that are also fundamental parts of the ‘story’ about how law functions transcending the dichotomies of, for example, Marxist accounts. In its turn away from instrumentalism, however, Bourdieusian reflexive sociology approaches are not apologists for law – they seek to peel away one neutral mask to reveal different power relations internal to it.⁴²⁶

Yves Dezalay and Bryant Garth in the widely celebrated *Dealing in Virtue* adopt Bourdieusian reflexive sociology to analyze a section of the juridical field that has its particularities – the

⁴²³ Bourdieu (n 389).

⁴²⁴ Ibid 852.

⁴²⁵ Ibid 815.

⁴²⁶ Dezalay and Madsen (n 389) 438.

international commercial arbitration market.⁴²⁷ Their account is of relevance here for at least three reasons. Firstly, and most obviously, because it describes a similar and often overlapping international social space, laying groundwork for a shorter directly relevant analysis to a study on public international law and lawyers by Dezalay and Dezalay.⁴²⁸ Secondly, it allows us to ask ‘more general theoretical questions about the role of law and lawyers’ beyond the commercial arbitration space.⁴²⁹ Thirdly, it provides context to the method and organization of this thesis; describing similar phenomenon that seeks to explain largely complex interactions between the social, the structural, and the individual, requires a flexible rather than a rigid framework.⁴³⁰ The zooming in and out ‘multilevelled approach’ of the book is fundamental to demonstrate ‘the number of connections and factors’ that are inherent to this kind of phenomenon.

Dealing in Virtue, describes the ‘complex process of social construction’⁴³¹ that forms the international commercial space. The book is divided into three parts. Part 1 introduces the characters, in a shorter description of the individuals behind international commercial arbitration, their careers, and how they acquire ‘social capital’.⁴³² Part 2 ‘turns from the people to the process’ – the building of the international commercial space through the development of institutions such as the International Chamber of Commerce, and the political transformations in north-south commercial relationships. Through a long case study that tells the story of a ‘trilateral arrangement’ between US law firms, European arbitrators, and Third World elites, they tell the story about the process of creating a market for private justice in practice that combines people, institutions, and structure.⁴³³ Part 3 describes the enacting of international commercial arbitration in national spaces, and the different dynamics in different locations of the international – England, the US, Sweden, Egypt, and Hong Kong.⁴³⁴ They characterize commercial arbitration in the US, France, and England as *delegated* justice, in Sweden as *parallel* justice, and in the third world responsible for the creation of ‘double agent’ lawyers, whom through commercial arbitration distance themselves from their domestic environment. Large law firms in the periphery attack the fragmented nature of local justice in favour of the ‘universality’ of arbitration, profiting in the process.⁴³⁵

⁴²⁷ Dezalay and Garth (n 47) 316.

⁴²⁸ Dezalay and Dezalay (contributor) (n 301).

⁴²⁹ Dezalay and Garth (n 47) 4.

⁴³⁰ Ibid 13.

⁴³¹ Ibid 5.

⁴³² Ibid 19–29.

⁴³³ Ibid 10–11, 33–114.

⁴³⁴ Ibid 11–13, 117–250.

⁴³⁵ Ibid 12–13, 281–310.

Subsequently to *Dealing in Virtue*, Sara Dezalay and Yves Dezalay dissect the interactions between commercial arbitration, investment law, and public international law. Using the reflexive sociology methodology, sourcing information from interviews, biographies, obituaries, and *Who's Who* style publications,⁴³⁶ they narrate how the interactions between members and institutions in both limbs of international justice, public and private, transformed each other, constructing a broader picture of the 'field' of international justice than Yves Dezalay's previous analysis of international commercial arbitration. Their conclusions are that, in the battle for more cases on the part of public international lawyers and public international law institutions, and for legitimacy on the part of private international commercial arbitration, the lines between the public and the private limbs of international justice become increasingly blurred as they combine in investment arbitration.⁴³⁷

In the Dezalays' genealogy, these public and private limbs of international litigation share a common past.⁴³⁸ The private and public sides of international justice go their separate ways after the 1970s/1980s. ICJ judges from the North went from individuals with ties to academia and diplomacy to *jurisconsultes* who are no longer defined by a scholarly form of capital and are much more distanced from national diplomacies'.⁴³⁹ The ILC and the IDI acquire a 'symbolic role of consecrating' one's membership to the group.⁴⁴⁰ ICJ judges from the South remain the 'gentlemen politicians of law' strongly connected to their states – that include 'political, economic, social, scholarly, and most often familial' ties –, combining national clout with with international prestige gained through membership of institutions and networks in the Global North located in the UK, France, The Hague, and Geneva.⁴⁴¹ This movement in opposing directions between national and international in the North and South combined to validate the ICJ as a 'bank of symbolic credit'.⁴⁴²

Counsel since the 1980s go from *jurisconsultes* tied to national diplomacies to 'learned practitioners', showing a movement of retreat away from national politics and into the ivory tower.⁴⁴³ The characteristics of ICJ counsel since the 1980s, in Dezalay and Dezalay's view, is a self-reproductive meritocratic elite, built on mentorships and sometimes family ties,

⁴³⁶ Dezalay and Dezalay (contributor) (n 301) 313.

⁴³⁷ Ibid 314.

⁴³⁸ Ibid 316, 324.

⁴³⁹ Ibid 318 some footnotes omitted.

⁴⁴⁰ Ibid.

⁴⁴¹ Ibid 319.

⁴⁴² Ibid.

⁴⁴³ Ibid.

perpetuate the ‘rules of the game’ amongst insiders.⁴⁴⁴ Mentorships also tie the learned practitioner counsel to the ‘gentlemen-politicians’ judges of the South – the latter’s membership of networks that include the IDI create bonds to the European members of the counsel ‘legal meritocracy’.⁴⁴⁵ Dezalay and Dezalay go as far as suggesting that it is this dynamic that explains the *Nicaragua* and *Burkina Faso/Mali* decisions which ‘reconciled the ICJ and the Third World’.⁴⁴⁶

Dezalay and Dezalay go on to describe how the proximity to public international law(yering) contributed to the boom of commercial arbitration. An inner-inner circle of European Professors and American top litigators are part of a cosmopolitan group of ‘super arbitrators’ that, alongside US law firms, promoted offshore litigation in the Third World through the aforementioned networking with and mentoring of local elites.⁴⁴⁷ The ensuing ‘crisis of legitimacy’ through litigation of core sovereign issues required the private side of international justice to stage a ‘rapprochement between the two poles of international justice’, profiting from the aforementioned symbolic capital of public international law litigation.⁴⁴⁸ This happened in different ways; institutionally, investment arbitration exponentially increased its use of the PCA as a site for dispute settlement. Personally, the election of arbitrators with a public international law background such as Georges Abi-Saab and Gilbert Guillaume also contributed to the approximation with public international justice.⁴⁴⁹ The penetration of ‘private’ into ‘public’ international justice, however, also happened in this process;⁴⁵⁰ examples include the entry into ICJ and other inter-state litigation of firms such as Freshfields through influence of Jan Paulsson, Foley Hoag through Paul Reichler, and Eversheds through Rodman Bundy.⁴⁵¹ Part of this bonding of the private and public sides of international justice, in their argument, is also happening in the investment by medium powers such as Brazil and India in training lawyers to create a national but cosmopolitan elite of experts.⁴⁵²

Dezalay and Dezalay conclude that public international law lends its legitimacy to commercial arbitration, in exchange for flexibility in adapting to changes in economic and political power relations. The outcome is the reinforcement of the US law firm model, and its

⁴⁴⁴ Ibid 319–320.

⁴⁴⁵ Ibid 321–322.

⁴⁴⁶ Ibid.

⁴⁴⁷ Ibid 324–325.

⁴⁴⁸ Ibid 325.

⁴⁴⁹ Ibid 326–327.

⁴⁵⁰ Which insiders of the international bar mentioned above are not particularly fond of Pellet, ‘The Role of the International Lawyer in International Litigation’ (n 299); Crawford, Pellet and Redgwell (n 300).

⁴⁵¹ Dezalay and Dezalay (contributor) (n 301) 331–332.

⁴⁵² Ibid 336.

extension to public international law disputes. More than the European professor/counsel, the law firm model better lends itself to the malleability required by international disputes, where 'legal capital between corporations, knowledge, and state power' intersect.⁴⁵³

b. Latour – Actor-Network Theory

Another relevant work of sociology to this thesis is Bruno Latour's ethnography of the *Conseil d'Etat* in *The Making of Law*. His methodology, entitled 'Actor Network Theory (ANT)', is deployed to understand how lawyers 'produce truth', or claims to truth. His study of law is part of a larger endeavor, where he conducts similar studies of other 'enunciation regimes'⁴⁵⁴, such as religion and science, to produce 'a positive anthropology of the moderns'.⁴⁵⁵ Through observation, ANT tries to capture an 'essence'; it does so through the description of a practice, that is 'situated and material', and multi-phenomenal, organised in a specific *way*.⁴⁵⁶ The methodology is deployed in relation to French administrative law, but it tells us (or purports to tell us) something about law in general – its '*passage* and *transit*'⁴⁵⁷ in both metaphorical and literal terms, through the words of the judge and counsel, through and towards a physical file, in a specific building.

Writing technique is not only the means, but the essence of Latour's method. By zooming into different aspects and moments of the functioning of the *Conseil d'Etat*, he describes 'morsel by morsel' how complex layers of reality combine to create law. There are descriptions about paintings and the counsellors' pigeonholes, the layering of paper that creates a file, the building in which the *Conseil* sits, how controversy about the law is brought before the court by the parties and settled, and how judges struggle to balance personal prejudice and legal precedent (or the other way round), to reach decisions. In opposition to Bourdieu, Latour embraces law's complexity as 'justified force', but as much more than that.⁴⁵⁸ There is 'force', and then there is the 'peculiar movement of law', which is encased in certain buildings populated by certain people who read certain books.⁴⁵⁹ Latour uses the example of an extradition case and a 'revolving door' case to counter realist and Bourdieusian ideas that he considers oversimplify the workings of law.⁴⁶⁰ Law is about the 'winding path', where one is pulled by 'prejudices', by

⁴⁵³ Ibid 337.

⁴⁵⁴ Bruno Latour, *The Making of Law : An Ethnography of the Conseil d'Etat / Bruno Latour ; Translated by Marina Brilman and Alain Pottage*. (Polity 2010) viii.

⁴⁵⁵ Ibid ix.

⁴⁵⁶ Ibid x.

⁴⁵⁷ Ibid viii.

⁴⁵⁸ Ibid 142.

⁴⁵⁹ Ibid 143.

⁴⁶⁰ Ibid 148–149.

‘text and precedents’, by procedural restraint and power to innovate, by common sense and ‘ordinary reasoning’⁴⁶¹, and by the ‘climate’ or ‘socio-political context’.⁴⁶² The law is both flexible and hard, a decision benefits from the joining of dismembered elements in the reasoning, as it must show it is neither ‘dependent’ or ‘totally independent’ from social context or from legal form.⁴⁶³ Latour ends the book in an almost reverent tone to the law and its ebb and flow – law is ‘discreet music’, and the rule of law is ‘a treasure to be cherished’.⁴⁶⁴ To those concerned about this interplay between law and people, he responds that there is dignity in ‘the way in which unquestionable truths are gradually constructed through human interactions’ rather than something fallen from the sky.⁴⁶⁵ To those concerned about the complacency of the book, and its downplaying of the Bourdieusian tropes about power, Latour responds that it is in the nature of his ethnography to be ‘critique-free’.⁴⁶⁶

c. Reflexive Sociology *versus* Actor-Network Theory

At the risk of over-simplifying, these two modes of socio-anthropological research are about ‘removing the dirt’, unveiling the inner workings of law beyond its narrative of neutrality and formality. To continue the ‘dirt’ analogy, however, the modes and goals of each method are very different. Whereas reflexive sociology is archeological, insofar as it chips away at the outer layers of law to reveal its politics and throws out the ‘dirt’, Actor Network Theory is geological; it narrates the layering of objects, places, people, interactions, narratives, and actions, to describe a process of creation – ‘a practice, a situated, material practice that ties a whole range of heterogeneous phenomena in a certain specific *way*’.⁴⁶⁷

Both approaches have kinship to what this thesis is trying to achieve, insofar as they shine light on the social and personal aspects of law that law itself tries to evade. There is certainly a reflexive sociology flavour to the present accounts of this thesis, as it seeks to understand the power of *lawyers* – that are formed by and tied to networks, countries, schools of thought – in shaping law, rather than attributing the content of law only to formal legal processes, or exclusively to economic or political structures. A fundamental difference, however, is that whereas the focus of Bourdieu and Dezalay and Garth is on *struggle* between power brokers within the legal field, the focus of this thesis is on the role of individual lawyers, imbued with sensibilities created by social connections, personal dispositions, interactions with institutions,

⁴⁶¹ Ibid 151–152.

⁴⁶² Ibid 161.

⁴⁶³ Ibid 168.

⁴⁶⁴ Ibid 277.

⁴⁶⁵ Ibid 198–197.

⁴⁶⁶ Ibid xi.

⁴⁶⁷ Ibid x.

and geopolitical contexts. That is not to say that struggle is not part of the process – the conflict of ideas between Ago and Crawford, between ‘The Third World’ and lawyers such as Eli Lauterpacht, between ‘formalist’ criminal lawyers and Antonio Cassese, or between Michael Schmitt and critical legal scholars, are an element of it – but the focus on individual figures over social context here will not prioritize the telling of stories of conflict. The stories weaved here are much more about collaboration, interchange of ideas, and building of connections that enable ideas to move from ‘project’ to ‘law’.

Equally, Latour and his Actor Network Theory—by its very overt use of *networks*—is similar to this thesis in which it tries to capture a process, the role of people and institutions in that process, and how law as something beyond mere naked power and formal text.⁴⁶⁸ In *The Making of Law*, he spends a considerable amount of time scrutinizing the backgrounds of Counsellors, for example.⁴⁶⁹ However, Latour is trying to find how factors such as professional background – but also the building of files, the organization of offices, the layout of courts, the language of counsel – contribute to the production of legal truth, or the *essence* of law⁴⁷⁰, rather than the building of legal concepts themselves. In other words, unlike this thesis, his inquiry in no way purport to be an inquiry into law’s substance.⁴⁷¹ As Latour recognizes, ‘there is a gap between speaking *about* law and speaking *legally*’⁴⁷², and whereas he masterfully does the former, this thesis is concerned with articulating its claim in terms of the latter. His focus on the material, in the form of the file, buildings, or objects, albeit extremely interesting and even relevant to better understanding international law,⁴⁷³ is also not part of the present inquiry. The study of individuals’ backgrounds, texts, language, and movement of individuals between institutions, however, is.

⁴⁶⁸ Ibid 142–143.

⁴⁶⁹ Ibid 125.

⁴⁷⁰ Ibid x.

⁴⁷¹ Ibid ix.

⁴⁷² Ibid.

⁴⁷³ Jessie Hohmann and Daniel Joyce, *International Law’s Objects* (First edit, Oxford : Oxford University Press, 2018 2018).

E. Conclusions – gaps to fill

The above sections have attempted to delineate how international law grapples with what this thesis calls ‘personalism’.

In exploring mainstream sources literature on ‘teachings of publicists’, ‘Part I – A. International law’s complex relationship with the ‘teachings of the most highly qualified publicists’” exposed international law’s rejection of personalism and the reasons behind it, rooted in positivist methodology’s desire to portray international law as ‘real law’ capable of constraining states’ actions. Albeit rejecting any role for individuals at a systemic sources level, the same mainstream widely acknowledges it in an *ad hoc* basis in individual biographical accounts. It is not suggested that ‘teachings’ alone are a source of international law, or even the most important path whereby individual members of the profession make international law. However, the presence of ‘teachings’ in Article 38(1) of the International Court of Justice (ICJ) Statute forces the mainstream to reluctantly take stock of the role of individuals in lawmaking, and the articulation of this reluctance is of interest here. Traditional obituaries of famous international lawyers surveyed here narrate individual instances in which individuals effectively made international law, inserting their individual ideas into the law through a mix of scholarship and multifaceted legal practice. The aggregate value of the obituaries’ *ad hoc* acknowledgements is undeniable – despite its absence from sources’ literature, the profession has a lawmaking role in international law.

Another vision of personalism is provided in the literature about an ‘invisible college of international lawyers’. Individual lawyers’ power to make law does not lie in isolated professional contributions – i.e. teachings – but in a *plethora* of contributions made whilst lawyers wear different professional hats. Oscar Schachter famously comes to this conclusion in his ‘The Invisible College of International Lawyers’⁴⁷⁴. His concept of the ‘invisible college’ is useful, but underdeveloped – his exploration of the subject is insufficient. Subsequent engagement of the literature describes the phenomenon of individual influence either anecdotally – citing one or two examples without detail – or by focusing on only one ‘hat’ – how scholars, arbitrators, or judges, influence the law. Neither of these options captures the complexity of the legislative role performed by individual international lawyers, or its pervasiveness. The characteristics of the profession and the ‘college’ will be sketched below.⁴⁷⁵

⁴⁷⁴ Schachter (n 177).

⁴⁷⁵ See ‘Part II - The community: Individuals, careers, and networks’.

Finally this section analysed burgeoning literature on the international legal profession beyond lawmaking. It surveyed what is written about the relationship between theory and practice, insider accounts of the profession and their critics, literature on the history of the profession and critiques of expertise, empirical studies, and interdisciplinary works. Moreover, sociologists and anthropologists' 'looking in' provide useful insights on how to map and write about the legal field.

This section established that (1) mainstream international law has difficulty in coming to terms with the fact that individual lawyers can influence the law, (2) because of positivism's belief that personalism is incompatible with international law being 'real law'. (3) The literature on sources is thus silent on the systemic consequences of individual's roles as lawmakers, although the same mainstream accepts this in *ad hoc* situations such as biographies and obituaries. Attempts outside sources literature to take stock of this phenomenon in the literature have either been (4) insufficiently thorough or (5) concerned with how individuals shaped the discipline more broadly. The literature on the profession beyond strictly lawmaking make significant contributions to understanding the tension within the field between practitioners and their critics, and socio-anthropology's understanding of the legal field is fundamentally relevant. They however are not concerned with lawmaking as such, which is the object of the present study.

This thesis fills these gaps in the subsequent sections by firstly describing the profession writ large, and how its porosity allows for individuals to be particularly influential (Part II). Secondly, it zooms into instances in which individuals made law to better explain the mechanisms whereby this occurs in general international law and some of its specialised regimes. The complexity of the phenomenon is illuminated through description of concrete processes whereby international lawyers succeeded and failed in making international law as members of the invisible college, thus the need for crafting an eclectic methodology that provides quantitative and qualitative snapshots of the profession and its lawmaking efforts.

II. Part II - The community: Individuals, careers, and networks

The second part of this thesis describes the community of international lawyers that influence the content of the law in ways the literature does not (adequately) account for, mapping the profession, its members, and the connections between them.⁴⁷⁶ Since, as social scientists have concluded, ‘measuring the patterns of communication one can uncover the origin of ideas...’⁴⁷⁷, better understanding the community of international lawyers was a necessary step here. This thesis does this by repurposing the obituaries of international lawyers published in the *British Yearbook of International Law (BYIL, The Yearbook)* already used above. It uses Social Network Analysis (SNA), which is used widely in social sciences to describe similar phenomena such as knowledge production in certain fields. The networks bring to light characteristics common to the community’s individual members, such as similarities in their career paths, its degree of gender diversity, educational background and nationality, but also illuminate how connected actors are, to whom they are connected, and the nature of their connections.

This section thus substantiates anecdotal accounts of the features of the community in a novel way. It verifies some assumptions about the invisible college:

- That it is overly representative of dominant groups (white, upper-class men from the Global North educated in the same universities);
- That it is close-knit (members of the ‘old boys club’ are very interlinked and form a small world);
- And that international lawyers move constantly between professional roles (counsel, scholar, arbitrator, UN expert, judge, government adviser, etc.).

These characteristics may seem obvious for those at international law’s centre and who witness the ‘invisible college’ in operation, but are often imperceptible to those at the periphery, for whom the college remains ‘invisible’, or suspected but intangible. Whereas characteristics 1⁴⁷⁸ and, to some extent, 2⁴⁷⁹, are important for the diversity critique underlying

⁴⁷⁶ A version of this chapter was published as Luiza Leao Soares Pereira and Niccolò Ridi, ‘Mapping the ‘Invisible College of International Lawyers’ through Obituaries’ *Leiden Journal of International Law* (Forthcoming). The author of this thesis is the first author of the article, having come up with the concept, collected all the data utilised, and written the majority of the piece (and the totality of the sections reproduced here). The graphs have been produced by the second author, Niccolò Ridi, who has given permission for them to be reproduced here.

⁴⁷⁷ Shalini R Urs and Monica Sharma, ‘Making the Invisible Visible through Social Network Analysis’ (IEEE 2010) 11.

⁴⁷⁸ Part II, 3.B.1. The composition – (lack of) diversity.

⁴⁷⁹ Part II, B.2.(d) Zooming in: close-knit nature of the community and lineages; Part II, B.2.(e) Dedoublement fonctionnel.

this thesis, characteristics 2 and especially 3⁴⁸⁰ are fundamental for the thesis' main argument. International lawyers' power to make law lies in the dissemination of ideas allowed by the coupling of a close-knit network creating a small world, and one's participation in a multitude of fora where individual projects are weaved in international law's fabric during one's career.

In other settings, information movement in social communities alters patterns of knowledge production, such as promoting paradigm shifting.⁴⁸¹ Here, more than changes to law as a field of *study*, these networks indicate the paths whereby the content of law itself changes. This section allows for the phenomenon in Section III of this thesis to be extrapolated beyond the cases of Roberto Ago, James Crawford, Eli Lauterpacht, Antonio Cassese and Mike Schmitt, and how their views, shaped by personal connections to certain predecessors, were disseminated via the 'invisible college' due to the fluidity of their professional paths, the structural constraints imposed by history, and their personal authority within the community. The general picture of the community and its members traced here demonstrates that this can happen across the board.

Part II should not be read in isolation, but in light of other studies that map out sections of the profession through more traditional datasets.⁴⁸²

A. The method – obituaries and networks

1. Obituaries

Obituaries are overlooked in international law scholarship beyond the odd biographical reference. However, much like the acknowledgements section of a book,⁴⁸³ the obituary departs from the detached language of academic work, allowing us to peer behind the veil of a seemingly expert science. The candid and heartfelt nature of these writings offers us a unique glimpse into the lives of international lawyers: who their mentors, successors, colleagues, and friends were,⁴⁸⁴ as well as which positions they occupied at which time and what the exact nature of their contributions were. Although similar information could be collected through interviews, obituaries provide distinct advantages: first, their sheer volume and historical span (1920 to the present day in the case of the *Yearbook*, amounting to 58 obituaries in total), far surpasses what could be realistically obtained with interviews with such diverse individuals and on such a diverse range of topics. Second, information provided in obituaries is possibly more

⁴⁸⁰ Part II, A.2. Social Network Analysis (SNA).

⁴⁸¹ Urs and Sharma (n 477) 13.

⁴⁸² Kumar and Rose (n 302); Aaken and others (n 217); Langford, Behn and Lie (n 210); Puig (n 210).

⁴⁸³ Simpson (n 51) 3.

⁴⁸⁴ And sometimes professional nemesis, see on the rivalry between Georg Schwarzenberger and Hersch Lauterpacht. Maurice Mendelson, 'Professor Georg Schwarzenberger (1908-1991)' [1992] BYBIL xxii, xxii.

reliable and less prone to confirmation bias than that which could be obtained in interviews: unlike an interviewee who responds to – or, evades – a question, here all the information is provided freely by the obituary’s author.⁴⁸⁵ Third, obituaries contain evidence concerning relationships of an official nature, which could be reconstructed from official records, but also provide a more colourful and detailed picture. Indeed, it is argued that it is often the more informal ties that are a fundamental feature of the invisible college. The modern rediscovery of the concept of ‘invisible college’ transposed by Schachter to International Law is to be ascribed to the American sociologist Diana Crane,⁴⁸⁶ who was in turn influenced by Derek de Solla Price’s work on networks of citations between scientists.⁴⁸⁷ Crane’s work was pioneering in that it sought to confirm the importance of connections and communication between scientists by looking at evidence far more informal than citations. An example of the type of informal ties systematically available in obituaries, for example, is the parallel development in the careers of Sir Ian Brownlie and Sir Derek Bowett,⁴⁸⁸ and Sir Francis Vallat’s ‘unconventional and progressive’ championing of the careers of women such as Eileen Denza and Joyce Gutteridge at the Foreign Office,⁴⁸⁹ or the friendship between the aforementioned Gutteridge and Gillian White.⁴⁹⁰

This thesis anticipates objections regarding the scope and size of the dataset, which may be deemed incomplete, either because not all important international lawyers have their obituaries published, or because the decision to publish one’s obituary may be due to personal proximity to the editors rather than merit or intellectual significance. In response, it is argued firstly that the data should be read in tandem with more traditional empirical analyses of the international legal profession, that reach similar results even if restricted to particular institutions or groups.⁴⁹¹ Secondly, this self-selectivity enriches this study in some ways. *Whose lives are worth memorialising* in itself speaks volumes as to how the group operates at a social level. Who these obituaries do not memorialise – here the focus is on women and scholars from the Global South – is indicative of whose lives matter enough within the community for their

⁴⁸⁵ Sometimes very candidly – see John Fischer Williams account of Lord Phillimore’s ‘from 1868 to 1897 he had a successful but not strikingly brilliant career at the Bar’ Sir John Fischer Williams, ‘Lord Phillimore’ (1929) 10 BYIL 197, 198.

⁴⁸⁶ Diana Crane, ‘Social Structure in a Group of Scientists: A Test of the ‘Invisible College’ Hypothesis’ (1969) 34 American Sociological Review 335.

⁴⁸⁷ Derek D Price and Derek John de Solla Price, *Little Science, Big Science-- and Beyond* (Columbia University Press 1963). See, in particular, Chapter 3. Price is generally considered the father of scientometric research.

⁴⁸⁸ J. Crawford, ‘Sir Derek Bowett (1927-2009)’, (2010) 80 BYBIL 1–9

⁴⁸⁹ M. Mendelson, ‘Sir Francis Vallat GBE, KCMG, QC (1912-2008)’, (2009) 79 BYBIL 3–6, at 4

⁴⁹⁰ I. Scobbie et al, ‘Professor Gillian White (1936–2016)’, (2017) 86 British Yearbook of International Law 1–5, at 4

⁴⁹¹ Langford, Behn and Lie (n 210); Puig (n 210); Kumar and Rose (n 302); Aaken and others (n 217).

deaths to be acknowledged,⁴⁹² and thus whose voices were likely to make an impact during substantive discussions. International law has a long history of individual contributions from the Global South in the highest echelons of scholarship and practice, yet these lawyers do not feature here – Alejandro Alvarez, Christopher Weeramantry, and Eduardo Jimenez de Aréchaga come to mind.⁴⁹³ Felice Morgenstern of the ILO and Suzanne Basdevant Bastid, the first female *ad hoc* judge at the ICJ and daughter of Jules Basdevant, are prominent women absent from this roll.

It is also recognized that using the *British Yearbook of International Law* as a source for obituaries may prompt the argument that scholars represented therein have some closer connection to the UK, and thus that it has fallen into a confirmation bias of its own. However, other studies of similar nature confirm many of these results. Kumar and Rose, Dezalay and Garth, Van Aaken, Puig, and Langford and others⁴⁹⁴ studies use information from rosters, interviews and techniques such as snowballing to describe the characteristics of and/or the relationships between members of the legal community. They reach similar conclusions on the diversity department – the make-up of arbitration and ICJ counsel appointments yields very similar results to this study in terms of gender and geographic representation. The *Yearbook* remains a strong choice, however, as it is an important publication worldwide, and crucially it is the only international law journal which has routinely published obituaries since its inception in 1920. Indeed, the first substantial pages of its first edition are occupied by an obituary of Lassa Oppenheim, one of the *Yearbook's* founders, although his premature death did not allow him to see it to fruition.⁴⁹⁵ This is in contrast with the longer-running *Revue Générale de Droit International Public et Comparé* (1894-present), which between 1894 and 1946 only published less than ten obituaries, three of them for one of its first editors the legal historian Paul Fauchille.⁴⁹⁶ The *BYIL* has published pieces on the lives of prominent international lawyers consistently

⁴⁹² See for example the project undertaken by the New York Times, when stating ‘who gets remembered — and how — inherently involves judgment. To look back at the obituary archives can, therefore, be a stark lesson in how society valued various achievements and achievers.’ Amisha Padnani and Jessica Bennett, ‘Overlooked’ (*New York Times*, 2018) <<https://www.nytimes.com/interactive/2018/obituaries/overlooked.html>> accessed 18 April 2018.

⁴⁹³ See on intellectual histories of international lawyers in the periphery Obregón, *Noted for Dissent: The International Life of Alejandro Álvarez* (n 369); Becker Lorca (n 375).

⁴⁹⁴ Kumar and Rose (n 302); Dezalay and Garth (n 47); Aaken and others (n 217); Puig (n 210); Langford, Behn and Lie (n 210).

⁴⁹⁵ EA Whittuck, ‘Professor Oppenheim’ (1920) 1 BYIL 1.

⁴⁹⁶ René Dollot, ‘Paul Fauchille, Historien’ RGDIP; Albéric Rolin, ‘Paul Fauchille et l’Institut de Droit International’ [1926] RGDIP; Albert Geouffre de Lapradelle, ‘Paul Fauchille (1858-1926) Sa Vie. - Son Oeuvre.’ [1926] RGDIP; JP Palewski, ‘Nécrologie: Joseph de Blociszewski’ [1929] RGDIP; J Duquesne, ‘Maurice Moncharville’ (1941) 111 RGDIP I; Nicolas Krawtchenko, ‘Un Précurseur Du Droit International Ouvrier - Daniel LeGrand (1783-1859)’ (1910) 111 RGDIP 737.

throughout its span of publication, amounting to a total of 58 shorter obituary notes and notices (between 1-12 pages) and 16 longer articles dealing with more substantive biographical aspects of deceased international lawyers. Second, spanning almost a century, the *BYIL* is one of the oldest international law journals in the world, and the oldest British journal focusing solely on international law.⁴⁹⁷ Alongside publications such as the *American Journal of International Law* (1907-present), the *Revue Générale de Droit International Public et Comparé* (1894-present), it is one of the longest running international law journals still in print,⁴⁹⁸ informing, being informed, and recounting the lives of several generations of international lawyers. Moreover, as other empirical studies have suggested, British institutions such as the universities of Cambridge and Oxford, and the University of London, are very well-represented in international institutions and the ‘international judiciary’ at large,⁴⁹⁹ and thus the British experience is especially relevant. Although the network sketched here does not purport to be the final word on the subject or provide a finite list of the ‘invisible college’, it presents an alternative means of unveiling connections between members of the international legal profession.

The reason for the choice of network analysis as a method for this project was its potential for mapping the invisible college of international lawyers, thereby demonstrating the inner mechanics of the profession. Conveying the sheer complexity of the relationships between the individual lawyers involved, the nature of their professional involvement, and each individual’s professional trajectories poses a seemingly impossible challenge. Narrating the ‘lineage’ of international lawyers by tracing the relationships within a segment of the group would not only consume the majority of this chapter, but would do nothing to render visible this invisible college as is the chapter’s main aspiration. Narration did not do the dataset justice – since this study comprises over 180 lawyers and their respective relationships, apprehended from careful examination of the 58 obituaries⁵⁰⁰ depicting only one snippet from this complex web would deprive readers from observing these connections for themselves. As detailed later, networks are appropriate tools here because they perfectly capture the fluidity of the profession as

⁴⁹⁷ Its publication was only interrupted between 1939 and 1944 during the Second World War, Sir Hersch Lauterpacht, ‘Resumption of the Publication of the BYBIL’ (1944) 21 BYIL iii.

⁴⁹⁸ *The Revue Générale de Droit International Public et Comparé* has published some obituaries, but neither consistently nor abundantly. On the history of international law journals, see I. de la Rasilla, ‘A Very Short History of International Law Journals (1869-2018)’, (2018) 29 *European Journal of International Law* 137–168

⁴⁹⁹ Mikael Rask Madsen, ‘Who Rules the World? The Educational Capital of the International Judiciary’ [2018] *University of California Journal of International, Transnational, and Comparative Law* (Forthcoming) 1, 20; Chester Brown, *A Common Law of International Adjudication* (OUP 2009) 230.

⁵⁰⁰ The dataset only comprises shorter obituaries, excluding larger biographical works such as the extensive works of Sir Gerald Fitzmaurice, ‘Hersch Lauterpacht - The Scholar as a Judge. Part I’ (1961) 37 BYIL 1; Sir Gerald Fitzmaurice, ‘Hersch Lauterpacht - The Scholar as a Judge. Part II’ (1962) 38 BYIL 1; Sir Gerald Fitzmaurice, ‘Hersch Lauterpacht - The Scholar as a Judge. Part III’ (1963) 39 BYIL 133; Sir Gerald Fitzmaurice, ‘Hersch Lauterpacht and His Attitude to the Judicial Function’ (1980) 50 BYIL 1.

described by Schachter.⁵⁰¹ They also reveal the degrees of interconnectedness between members of the profession and organise the picture accordingly, reinforcing an understanding of the college as a highly exclusive group whose members share common characteristics.

This having been said, empirical methods – like any method – have limits. They reveal some features of the profession but obscure others.⁵⁰² In a project such as this, however, it serves its purpose. One cannot here deny the power of good graphic representation in making a normative argument, or the usefulness of empirical method to substantiate critique.

2. Social Network Analysis (SNA)

Social Network Analysis ‘comprises a broad approach to sociological analysis and a set of methodological techniques that aim to describe and explore the patterns apparent in the social relationships that individuals and groups form with each other’.⁵⁰³ At the simplest possible level, it can be defined as a methodology for the study of relations between specific actors (e.g. individuals) or institutions. SNA is based on network theory, which may be defined as the study of graphs as the representation of relationships (generally, as in this case, dyadic) between discrete objects.

The use of SNA in the social sciences has a long history. Indeed, its potential for highlighting the prominence of certain actors, as well as—and most importantly—latent patterns in the relationships between them, has made it a popular tool for the study of a broad variety of social groups. This method has been employed to understand the functioning of terrorist groups, drug cartels, innovation networks, and scholarly communities. In law, it has been more prominently used to study case law,⁵⁰⁴ but recent studies have employed it to shed light on the social dimension of prominent but secretive groups of actors, especially in arbitration settings. Examples may be found in writings of Sergio Puig, who has employed this methodology to uncover the connections between arbitrators in ICSID cases gathering data on arbitral appointments,⁵⁰⁵ and Malcolm Langford, Daniel Behn, and Runar Lie, who have expanded Puig’s analysis to investigate double-hatting in international investment arbitration and draw normative conclusions on the implications of the ‘revolving door’ phenomenon.⁵⁰⁶

⁵⁰¹ Schachter (n 177) 218.

⁵⁰² Sally Engle Merry, *The Seductions of Quantification: Measuring Human Rights, Gender Violence, and Sex Trafficking* (Chicago: The University of Chicago Press, 2016 2016).

⁵⁰³ John Scott, *Social Network Analysis* (SAGE 2017).

⁵⁰⁴ Ridi (n 415); Alschner and Charlotin, ‘The Growing Complexity of the International Court of Justice’s Self-Citation Network: Institutional Achievement or Access-to-Justice Concern?’ (n 418); Charlotin, ‘The Place of Investment Awards and WTO Decisions in International Law: A Citation Analysis’ (n 415).

⁵⁰⁵ Puig (n 210).

⁵⁰⁶ Langford, Behn and Lie (n 210).

This study differs significantly from Puig's and Langford and others'. On the one hand, it explores a much lower number of connections within a smaller pool of individuals. On the other hand, it eschews reliance on official records and sources in favour of material more likely to yield relevant information on the informal connections between the subjects of investigation. These connections include mentorships, friendships, successions in international institutions and universities, and family ties. The mapping of 'invisible colleges' through the combined use of SNA and informal sources is not unprecedented. On the contrary, similar methodologies have been employed successfully outside law.⁵⁰⁷

There is a third more significant way in which this network-drawing exercise differs from the aforementioned. Rather than seeking to map all actors involved,⁵⁰⁸ or solely understand the social dynamics at play in the community,⁵⁰⁹ this thesis uses SNA to 'link the distribution of ideas and practices' to 'social communities' to show paths whereby ideas can move. As social scientists have observed, looking at networks of collaborators or journal editors demonstrates that the 'spread of ideas seems to follow some kind of circle of influences through a social network'. This study does not purport to be deterministic, in the sense that it does not suggest *a priori* that a certain group in the network necessarily shared the same conception of a given area of law, but although 'predicting the specific content of ideas is often not possible, we can link the shape of an idea space to the structure of the network'.⁵¹⁰ The network sketched here should instead be read as a suggested path whereby ideas can move and develop,⁵¹¹ in complex mode of the micro-cosmos described in Part III of this thesis.

3. Obituaries translated into a network

The data from the *British Yearbook* obituaries was first organised in a set of two spreadsheets. The first collects the data relating to the 'nodes' of the network, that is to say, international lawyers. Accordingly, it collects their names and relevant characteristics – professional

⁵⁰⁷ On 'invisible colleges' specifically: G Steven McMillan and Debra L Casey, 'Research Note: Identifying the Invisible Colleges of the British Journal of Industrial Relations: A Bibliometric and Social Network Approach' (2007) 45 *British Journal of Industrial Relations* 815; Urs and Sharma (n 477); Alesia Zuccala, 'Modeling the Invisible College' (2006) 57 *Journal of the Association for Information Science and Technology* 152. On SNA and professional networks more generally: Thomas A Lee, 'A Social Network Analysis of the Founders of Institutionalized Public Accountancy' (2000) 27 *Accounting Historians Journal* 1; Willie L McKether, 'Revealing Social Networks in Qualitative Data: An Approach for Increasing Analytic Firepower in Qualitative Data Analysis' (2008) 2 *Journal of ethnographic & qualitative research*; Amar Dhand, Jordan Harp and Stephen P Borgatti, 'Leadership in Neurology: A Social Network Analysis' (2014) 75 *Annals of Neurology* 342; Siobhan McAndrew and Martin Everett, 'Music as Collective Invention: A Social Network Analysis of Composers' (2015) 9 *Cultural Sociology* 56.

⁵⁰⁸ Langford, Behn and Lie (n 210) 328.

⁵⁰⁹ Puig (n 210).

⁵¹⁰ Urs and Sharma (n 477) 11.

⁵¹¹ '[W]hile predicting the specific content of ideas is often not possible, we can link the shape of an idea space to the structure of the network', Urs and Sharma (n 477).

positions they occupied, where they were educated, their affiliations with professional bodies or academic journals – organizing them in four columns. The first column lists the names of international lawyers, including those whose obituaries were written as well as those of the author(s) of each obituary and the names of people cited in it. An example would be Sir Derek Bowett's obituary: it was written by James Crawford and cited Sir Ian Brownlie as his opponent in many ICJ cases. All three, deceased jurist, obituary author, and relations mentioned in obituary (hence living jurists' presence in the list), were logged in the 'Nodes' spreadsheet. The second column lists the professional roles occupied by the person mentioned. Again for Sir Derek Bowett his roles were of ICJ counsel, Whewell Chair of International Law at Cambridge, barrister, UN Legal Adviser, ILC member, and Academic. A third column lists their year of death (where applicable), whereas the final one lists their membership of organisations if mentioned in their obituary – Derek Bowett was a member of the editorial board of the *British Yearbook of International Law* and of the British Institute of International and Comparative Law, and a Fellow of Queens' College, Cambridge.

While these data already provide a vast amount of information, SNA allows us to map the connections between international lawyers and to see this information in context. By taking advantage of the unique data structure on which SNA is based, one goes beyond information contained in the 'nodes' only, and store relevant information on, and relating to, the 'edges' of the network. Specifically, a second spreadsheet ('Edges') collects the connections between different individuals. However, instead of just containing a long list of binary connections, it also holds elements relating to the type of connection between the individuals at issue. This is accomplished by a data structure built around three columns: the first one, entitled 'Source', lists the person whose obituary it was, thus where the information about a certain relationship came from. The second column, entitled 'Target', lists the person who either wrote the obituary or whose name was mentioned therein, and the third and final column, entitled 'Relationship', lists the type of relationship between the person in the first column and the person in the second. To illustrate the advantages of SNA, Figure (1) presents the full network, and Figure (2) presents the individual 'case', which SNA appropriately calls an 'ego network', of Sir John Freeland, accompanied by the information of not only the relationship between him and people within his network, but the type of relationship the two individuals had.

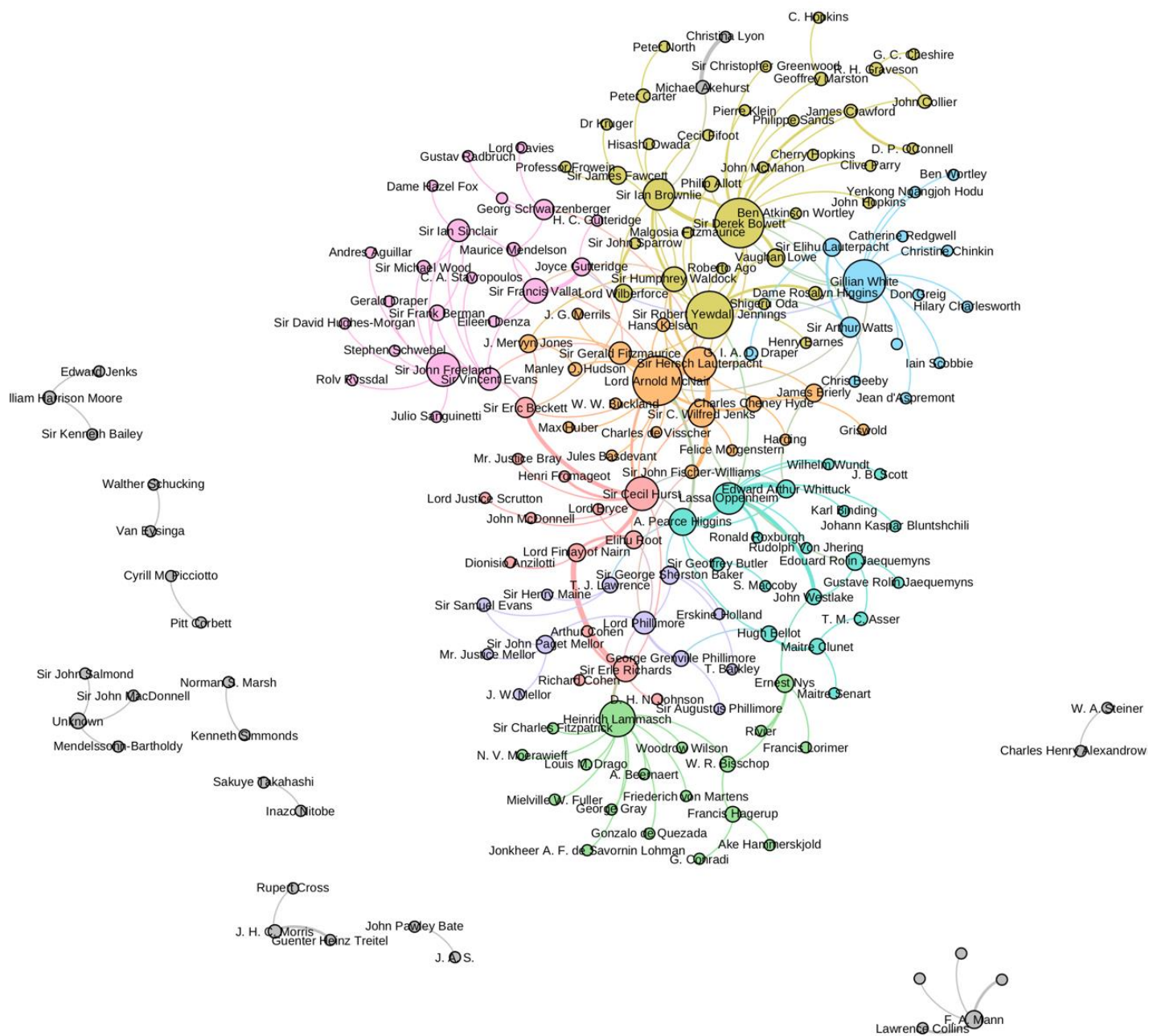


Figure 1: The full network⁵¹²

⁵¹² An interactive version of this graph is available here: <https://bit.ly/2WzW4IU>.

Id	Label	Characteristics
Sir John Freeland	Sir John Freeland	FCO Legal Adviser Barrister Bencher Lincolns Inn ECHR Judge IHL Lecturer Navy

Source	Target	Connection
Sir John Freeland	Andres Aguillar	Co-workers Letelier-Moffitt
Sir John Freeland	Gerald Draper	Co-workers 1977 Geneva Conventions
Sir John Freeland	Julio Sanguinetti	Co-workers Letelier-Moffitt
Sir John Freeland	Rolv Ryssdal	Colleague ECHR
Sir John Freeland	Sir David Hughes- Morgan	Co-workers 1977 Geneva Conventions
Sir John Freeland	Sir Eric Beckett	Mentor
Sir John Freeland	Sir Frank Berman	Obituary writer
Sir John Freeland	Sir Ian Sinclair	Predecessor FCO
Sir John Freeland	Sir Michael Wood	Obituary writer
Sir John Freeland	Sir Vincent Evans	ECHR Predecessor
Sir John Freeland	Stephen Schwebel	Co-workers UN



Figure 2, Sir John Freeland's ego network

Information on the type of connection also meant the same two people were often listed twice, if they had more than one 'Relationship' – for instance, the relationship between Lassa Oppenheim, in the first column 'Source', is listed next to A. Pearce-Higgins as his 'Target' twice: their 'Relationships' are both of 'LSE Successor' as well as 'Whewell Chair Successor'. Other 'Personal Connections' of Oppenheim include Ronald Roxburgh, under 'Mentor', and 'Co-authorship', and many others. This allows not only for the complexity of relationships to be conveyed to those exploring the spreadsheets in detail, but also visualised in the form of thicker 'edges' between more connected individuals depending on the number of connections they share. The thicker edges, representing stronger connections, suggest potentially stronger exchanges of ideas between two individuals:

ID	Label	Characteristics
Lassa Oppenheim	Lassa Oppenheim	Whewell Professor Cambridge LSE Lecturer Judge Clerk Extraordinary Professor Freiburg Professor Basle FCO Adviser Barrister War Office Manual author Expert

Source	Target	Type Of Relation
Lassa Oppenheim	A. Pearce Higgins	Succession LSE
Lassa Oppenheim	A. Pearce Higgins	Whewell Chair Cambridge Succession
Lassa Oppenheim	Edward Arthur Whittuck	Obituary Writer
Lassa Oppenheim	Edward Arthur Whittuck	Sponsorship
Lassa Oppenheim	J. B. Scott	Translator
Lassa Oppenheim	Johann Kaspar Bluntshchili	Professor
Lassa Oppenheim	John Westlake	Whewell Chair Cambridge Succession
Lassa Oppenheim	John Westlake	Obituary Writer
Lassa Oppenheim	John Westlake	Re-Edited Book
Lassa Oppenheim	Karl Binding	Professor
Lassa Oppenheim	Ronald Roxburgh	Co-authorship
Lassa Oppenheim	Ronald Roxburgh	Mentorship
Lassa Oppenheim	Rudolph Von Jhering	Professor
Lassa Oppenheim	Wilhelm Wundt	Professor

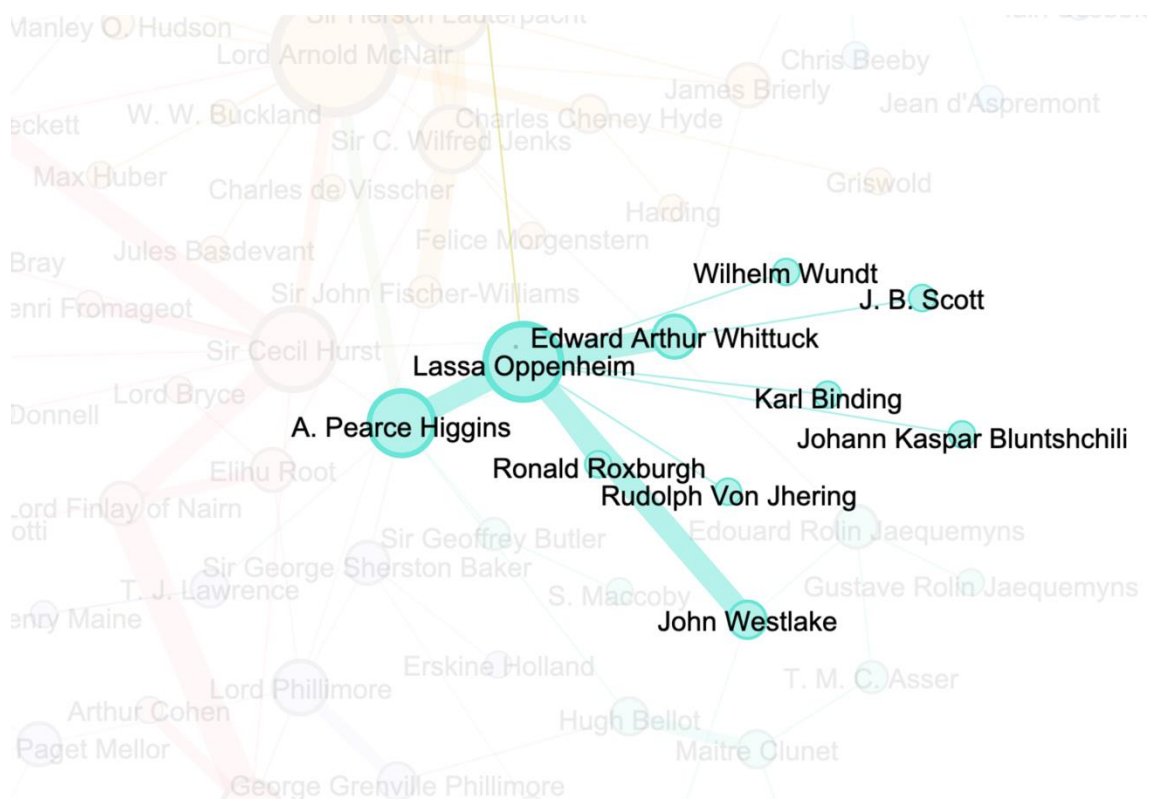


Figure 3: Oppenheim's ego network

B. Reading the network: the ‘invisible college’s’ composition and functioning

As mentioned above, the network drawn here allows this thesis to establish certain common features of the community of international lawyers and of its individual members – general conclusions about its composition and functioning. On the composition level, and thus apprehended from the observation of characteristics of each individual member of the network, it was substantiated that the community of international lawyers is far from diverse. On the functioning level, it was established that it is close-knit and that members are very interlinked, with some central clear lines of professional succession. Still on the functioning level, individuals’ careers are very porous, where practice at a variety of levels is mixed with long-standing scholarly production.

1. The composition – (lack of) diversity

Exploring the network allows this thesis to test hypotheses concerning diversity within the profession. While many of these conclusions can be guessed by those who are at the centre of the community, or experienced but left unproven to those at the community’s margins, the dataset turns these guesses into visible pictures for the first time. Under the columns ‘profession’ and ‘organization’, the characteristics of the members of the profession who had their lives recounted, who authored obituaries, or who were mentioned therein were logged. This allows filters to be used that further clarify the makeup of the community.

a. Educational background

By filtering the network using the term ‘Cambridge’, ‘Oxford’, or use additional operators to show results matching both ‘Oxford *and* ‘Cambridge’, we can see that almost all nodes continue to appear in the graph.

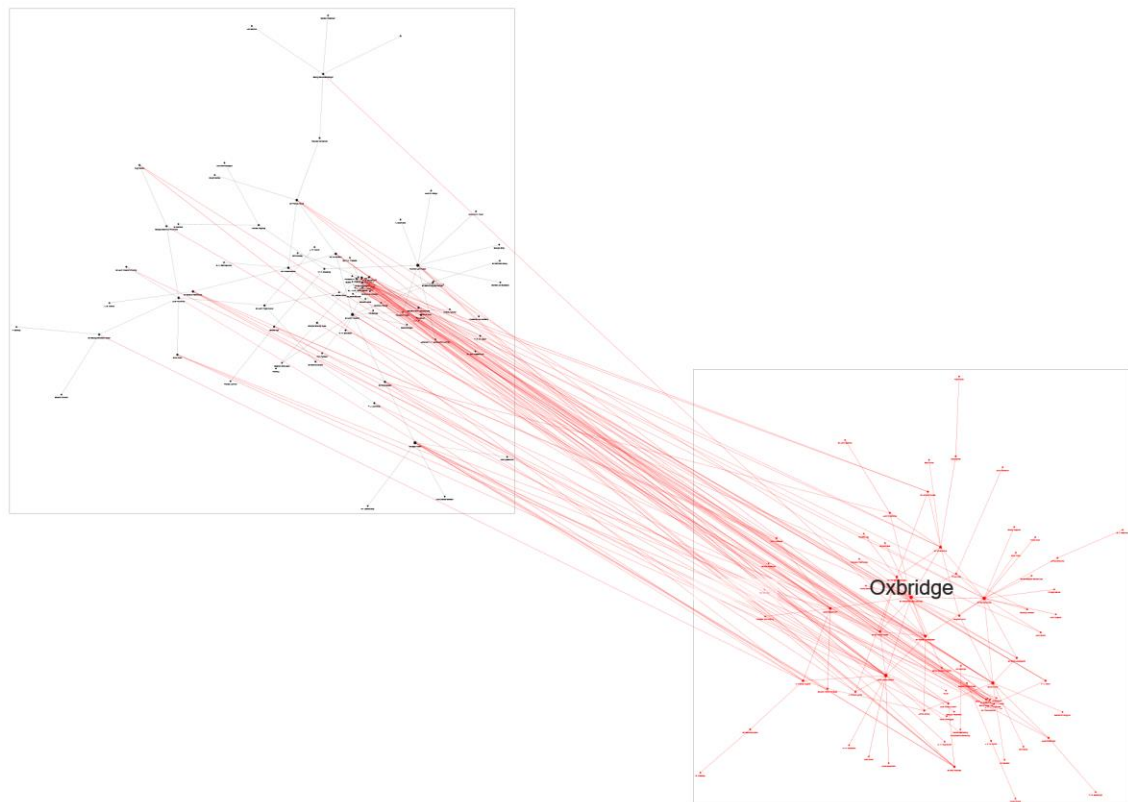


Figure 4: members of the network with connections to Oxford and/or Cambridge

This tells us that as far as education is concerned, the members of the profession whose lives were sufficiently important to be recounted in the *Yearbook*, and thus potentially had a high degree of influence within the community, are not at all diverse.⁵¹³

b. Gender

The second filter used here is that of ‘male’ and ‘female’. The most stunning characteristic is that out of 64 obituaries, only *one* of them was dedicated to a woman – Joyce Gutteridge – until the publication of Gillian White’s obituary in 2017. Although the male-dominated makeup of the community of international law professionals has been commented upon since the 1990s,⁵¹⁴ it is still shocking that, until 2017, those whose death is worthy of recounting are still so

⁵¹³ This is supported by the inquiry made into one specific professional role making up the ‘invisible college’ cited above Madsen (n 499).

⁵¹⁴ Hilary Charlesworth and Christine Chinkin have started the debate in what they have recently described as international law’s most glorified footnote, Hilary Charlesworth and Christine Chinkin, *The Boundaries of International Law: A Feminist Analysis* (Manchester University Press 2000).

predominantly male. The implications of the lack of gender diversity in the profession is increasingly explored by feminist scholars.⁵¹⁵

Francis Vallat, whose own obituary mentions his dedication to hiring women in the Foreign Office,⁵¹⁶ is the author of Joyce Gutteridge's *Yearbook* obituary. She was educated in Oxford and the daughter of Cambridge professor of comparative law, G. H. Gutteridge. Mentored by Sir Gerald Fitzmaurice with whom she came into contact at the legal department during the war years, she began 'her pioneer work as a woman lawyer'. She was the first woman to be appointed Assistant Legal Adviser at the Foreign Office in 1950, and at the time of her retirement, in 1966, she was 'the most senior woman member of the Diplomatic Service' in the UK. Gutteridge experienced difficulties being a woman in 'a man's world': had she '*been a man*'⁵¹⁷, Vallat says, she would have been awarded the more prestigious title of CMG rather than CBE for her work at the Foreign Office.

One more woman international lawyer graced the pages of the *Yearbook* in an *In memoriam* in its latest issue: Professor Gillian White. Having studied at King's College London (LL.B.) and having attained a doctorate in international law at the University of London, White then became a research assistant to Sir Elihu Lauterpacht in Cambridge, as well as a Fellow at now Murray Edwards College. She then transitioned into a lectureship at Manchester, where she stayed for the remainder of her career. While at Manchester, she became the first female Professor in Law in Mainland Britain. She published a book on the use of experts before international courts and tribunals, but her main focus was on international economic law, in which she was one of the pioneers. She maintained a longstanding friendship with aforementioned Joyce Gutteridge, who she often visited in Cambridge.

⁵¹⁵ On international judges, see Nienke Grossman, 'Sex on the Bench: Do Women Judges Matter to the Legitimacy of International Courts' (2012) 2 *Chicago Journal of International Law* 647; Dana Schmalz, 'Judgment and Diversity: Thinking with Hannah Arendt about the Composition of International Court Benches' 1. On the ICJ specifically, Jessica Lynn Corsi, 'Legal Justifications for Gender Parity on the Bench of the International Court of Justice: An Argument for Evolutive Interpretation of Article 9 of the ICJ Statute' [2021] *Leiden Journal of International Law* 1. On the European Court of Human Rights, see Stéphanie Hennette Vauchez, 'More Women - but Which Women? The Rule and the Politics of Gender Balance at the European Court of Human Rights' (2015) 26 *EJIL* 195. See on diversity of international practice inclusive of gender Aaken and others (n 217); Kumar and Rose (n 302) (discussing the composition and gender distribution in international arbitration and ICJ advocacy representation, respectively).

⁵¹⁶ Maurice Mendelson, 'Sir Francis Vallat GBE, KCMG, QC (1912-2008)' (2009) 79 *BYIL* 3.

⁵¹⁷ Francis Vallat, 'Miss Joyce Gutteridge, CBE (1906-1992)' [1992] *BYIL* xiv, emphasis added.

Two women have contributed by writing obituaries – Rosalyn Higgins, writing about Sir Robert Jennings, and Felice Morgenstern, writing alongside two other international lawyers about Sir Clarence Wilfred Jenks. In Sir Francis Vallat’s obituary written by Maurice Mendelson, two women are mentioned as having their careers duly fostered while at the FCO by Vallat, Joyce Gutteridge and Eileen Denza. In Sir Derek Bowett’s obituary, Cherry Hopkins is mentioned. Gillian White’s obituary mentions, as well as Joyce Gutteridge, Chichele Professor of International Law Catherine Redgwell, who was her research assistant,⁵¹⁸ and Professors Hilary Charlesworth and Christine Chinkin whose book *The Boundaries of International Law: A Feminist Analysis* was published under the auspices of the Melland Schill Studies in International Law organised by White.⁵¹⁹ Sir Robert Jennings’ obituary mentions Malgosia Fitzmaurice, who edited a book in his honour alongside Vaughan Lowe.⁵²⁰ Interestingly, and absent from this dataset, are some of Malgosia Fitzmaurice’s other connections: she is the daughter of late ICJ Judge Manfred Lachs and the wife of Sir Gerald Fitzmaurice’s son. The remaining women who are at all mentioned in obituaries are widows, ex-wives, and daughters whose husbands and fathers were eminent members of the profession.

c. Nationality

Additional information is unearthed by filtering the nodes according to nationality. To be sure, the *British Yearbook* is obviously British. Yet, it is possible to observe some variation in the nationalities of the international lawyers whose obituaries are published therein.⁵²¹ Non-British international lawyers who have made their careers in Britain, such as the towering figures of Lauterpacht⁵²² and Oppenheim,⁵²³ have been given space in the *Yearbook*, as have a

⁵¹⁸ Iain Scobbie, Jean D’Aspremont and Yenkong Ngangjoh Hodu, ‘Professor Gillian White (1936–2016)’ (2017) 86 BYIL 1.

⁵¹⁹ Ibid 2.

⁵²⁰ Higgins, ‘Sir Robert Yewdall Jennings’ (n 164) 4.

⁵²¹ The obituaries of non-British international lawyers amount to 13 in total: Whittuck (n 495); Hugh HL Bellot, ‘Obituary - Maître Clunet’ (1923) 4 BYIL 187; C Wilfred Jenks, ‘Obituary Notices - Elihu Root’ (1937) 18 BYIL 152; Cyrill M Picciotto, ‘Dr. Pitt Cobbett’ (1920) 1 BYIL 235; Inazo Nitobé, ‘Sakuyé Takahashi’ (1921) 2 BYIL 210; ‘Dr. Mendelssohn-Bartholdy’ (1937) 18 BYIL 158; Lord McNair, ‘Professor Manley Ottmer Hudson’ (1961) 37 BYIL 476; WA Steiner, ‘Charles Henry Alexandrowicz 1902-1975’ (1975) 47 BYIL 269; Van Eysinga, ‘Obituary - Walther Schucking’ (1937) 18 BYIL 155; WR Bisschop, ‘Ernest Nys’ (1921) 2 BYIL 205; WR Bisschop, ‘Georges Francis Hagerup’ (1921) 2 BYIL 207.

⁵²² Sir Humphrey Waldock, ‘Judge Lauterpacht’ (1959) 35 BYIL vii.

⁵²³ Whittuck (n 495).

few prominent non-British judges of the World Court⁵²⁴ and members of the *Institut de Droit International*, such as Édouard Rolin-Jaequemyns,⁵²⁵ Elihu Root,⁵²⁶ and Manley O. Hudson.⁵²⁷ Out of these fourteen non-British international lawyers, however, only four are non-European,⁵²⁸ and, out of these four, two are from the United States. This is unsurprising, and confirms longstanding claims for more national diversity: those who are sufficiently memorable to have their deaths reported widely, and thus those whose lives are deemed to have truly influenced the international legal world, are located, first and foremost, in Europe and North America. On this point, obituaries also provide an interesting window that complements – and is perhaps more illustrative than – research into the composition of international institutions. Whereas the ICJ or the ILC have to take geographical representation seriously, and are thus relatively representative in terms of nationality, this does not mean that all voices are heard equally in these spaces. Being part of the network of powerful international lawyers is connected to but takes more than membership of an international institution, and the characteristics of the people in the network drawn here may be more representative of that.

2. The functioning

SNA is used to ‘measure the patterns of interaction and communication among members of a network’ to ‘uncover the origins of ideas’.⁵²⁹ Aside from providing this thesis with a crafty way of demonstrating the lack of diversity in the profession as described above, this section of the thesis applies SNA to explore the connections between international lawyers, demonstrating how the organization of the international legal profession allows for and stimulates ‘the distribution of cultural ideas and practices’.⁵³⁰ Establishing how the community and its connections described here function to give rise to specific legal concepts – the description of how international lawyers as members of a community undertake lawmaking – is the object of Part III - Zooming in: international lawyers making law in action, below. This section does not purport to establish cause-and-effect relationships between connections

⁵²⁴ Bisschop, ‘Georges Francis Hagerup’ (n 521); Bisschop, ‘Ernest Nys’ (n 521); Eysinga (n 521).

⁵²⁵ C Wilfred Jenks, ‘Baron Édouard Rolin Jaequemyns’ (1937) 18 BYIL 156..

⁵²⁶ Jenks, ‘Obituary Notices - Elihu Root’ (n 521)..

⁵²⁷ Lord McNair (n 521)..

⁵²⁸ Two US citizens, one Australian, and one Japanese: Elihu Root, Manley O. Hudson, D. P. O’Connell, Sakuyé Takahashi.

⁵²⁹ Urs and Sharma (n 477) 11.

⁵³⁰ Ibid.

between two or a set of lawyers and the interchange of ideas amongst them, but demonstrates how these pathways for exchange exist, allowing for more informed and rigorous inquiries into these complex and multi-layered processes of dissemination of ideas that additionally, in this case, make law.

(a) The graph as a whole

Much can be grasped from looking at the graph as a whole, without zooming into any specific names or relationships. In SNA the proximity between areas of the graph is called ‘small world phenomenon’, and the smaller the number of ‘edges’ required to reach different actors, the smaller the world is. The smaller the world is, the easier the ‘[dissemination] of information’ within it.⁵³¹ The complexity of relationships and the interconnectedness of the community of international lawyers here stands out, with numerous edges uniting the different nodes from all areas of the graph. This bolsters the claim that the community of influential international lawyers part of the ‘invisible college’ is very close-knitted.

Secondly, we can observe that there are certain larger figures in this community of international lawyers. The simple degree centrality algorithm shows the number of connections (incoming and outgoing) of specific nodes. Accordingly, the largest in the graph are the most ‘connected’ – because they are the ones whose obituaries were richest with citations of relationships to others, and/or who were continuously cited in other obituaries. In addition, certain nodes are closer to the centre than others, what is called ‘betweenness centrality’. Centrality in the graph is a function of centrality in mathematical – and, specifically, network – terms. Greater interconnectedness in absolute terms (more connections) and in relative terms (more connections with inhabitants of different areas of the graph) means greater centrality, so that certain figures are not only larger, but gradually shift towards the centre of the graph. One can grasp the difference between ‘simple degree centrality’ and ‘betweenness centrality’ by comparing Lord McNair and Gillian White in Figure 1. The former was the mentor of many international lawyers from Sir Hersch Lauterpacht, to Sir Robert Jennings, to Sir Gerald Fitzmaurice, and was succeeded by Sir Humphrey Waldock at the European Court of Human

⁵³¹ This type of exercise that measures the degree of connectivity between actors is similar to the popular ‘six degrees of separation’ theory, that argues that any individual in the world is separated by a maximum of six ‘edges’. Ibid 14.

Rights. He straddled academia and practice, as did his mentees, and thus he is connected with many judges from generations past such as Sir Cecil Hurst, and future, such as Sir Hersch Lauterpacht and Sir Robert Jennings. Those three are also large nodes in the graph. Gillian White, on the other hand, had many connections in absolute terms, and thus is represented by a large 'node', but the people who she is connected to are less connected to others and come from less diverse parts of the profession. Thus, her 'betweenness centrality' is much smaller than McNair's.

'Betweenness' is connected with a third characteristic of the graph. The software automatically organizes clusters according to common characteristics, which here are related to professional field. Different colours nodes, according to their modularity class, parallel the similarity in career paths. FCO members are quite distinctively at the top left corner of the graph in pink colour, with predecessors, successors and lawyers who were their contemporaries organised around them. Another area densely populated and bunched together is that of academics/ICJ counsel/ICJ judges, in the central area (orange and yellow). Lord Arnold McNair and Hersch Lauterpacht, for instance, occupy the centre of that area due to their great connectedness. Sir Derek Bowett, Sir Ian Brownlie, and James Crawford are also in the central and most connected group. Crawford then became a judge at the Court, but him, Bowett and Brownlie all had a remarkably prolific ICJ advocacy practice. The bottom and bottom-right side of the graph is populated mainly by those involved in the setting up and functioning of the League of Nations. It is the only area of the graph that is mostly non-British; European figures such as Edouard Rolin-Jaquemyns are at its edges and important British and American figures of the time such as Lord Finlay or Elihu Root closer to the centre of the network.

A fourth and final finding is whom the graph shows as outliers – whose obituaries show no connections to the rest of the international lawyers in the main graph. There we have the early obituaries appear in very early editions of the *Yearbook*, which did not contain an author, and which are thus left floating in the bottom right hand-side of the figure. The same is true of members of the editorial board or academics that dealt with private rather than public international law, and indeed the only Asian members in the list of names, Sakuye Takahashi

and Inazo Nitobé.⁵³² Takahashi was an important Japanese international lawyer⁵³³ who collected and translated Japanese materials into English, and his obituary writer, Nitobé, was a Japanese intellectual and later important figure in the League of Nations. One may infer their lack of connectedness with other members of the profession in the main graph as lessening their prominence within the community. The comparative few number of outliers also strongly supports the ‘close-knitness’ conclusion above and below.

(b) Zooming in: close-knit nature of the community and lineages

These obituaries give us a unique glimpse into the inner life of international law, insofar as they tell us about personal relationships and liaisons between lawyers. These connections are not obvious for those studying international law at the periphery, to whom mainstream scholarship, judgments, or ILC documents are the available windows into the discipline. Much in the way Anthea Roberts’ book *Is International Law International?*⁵³⁴ made the familiar strange to those at the global ‘centre’ – i.e. those located in the West –, explaining that different places learn international law from different sources and in different ways, this dataset exposes, especially for people at the periphery, that the invisible college not only exists but is homogenous and self-perpetuating. Although looking at the list of attendants of an international conference, or the composition of the ILC or the ICJ, can give us clues about connections between international lawyers, obituaries provide us a richer, personal and first-hand account of the close-knit nature of the profession. They reveal professional and even blood-related ‘lineages’ of international lawyers, allowing us to trace how interconnected the ‘college’ is. They also show the ubiquity of informal networks, revealing the highways along which ideas travel within this community of lawyers. Although it is beyond the scope of this section of the thesis to extrapolate on how ideas travel within the community, sociological works referred to above show how the composition and connections between professionals can have a decisive role in the how the law develops.⁵³⁵ The subsequent section about Roberto Ago and James Crawford’s multilateralism ‘zooms into’ the phenomenon described here, and

⁵³² Nitobé (n 521).

⁵³³ See more on Takahashi in Becker Lorca (n 375) 69.

⁵³⁴ A. Roberts, *Is International Law International?* (2017)

⁵³⁵ See the connections between the composition of the community of arbitrators and the ‘business-like’ character of that area of law Dezalay and Garth (n 47).

demonstrates how their connections and interactions with other members of the ‘college’ – Ago and Anzilotti, Crawford and Sir Percy Spender, and then Crawford and Ago – shaped their views and, in consequence, the content of the law. How the substance of ideas in the form of legal concepts is formed and informed by personal and professional connections is explored in depth there. The subsequent paragraphs will narrate connections between certain particularly interconnected people in the graph, zooming into sections of the graph to illustrate them. The richness of information about connections here demonstrates how there are many avenues whereby similar processes to the one narrated in Section III take place.

Stories of personal relationships between members of the profession abound in these materials. In some instances, international law is the family business. Lord Phillimore, for instance, the UK representative in the Advisory Committee of Jurists which drafted the PCIJ Statute, was the son of a prominent judge at the Admiralty Court in the UK which, at that time, was responsible for the majority of the cases with international law elements.⁵³⁶ The UK considered nominating Phillimore for the PCIJ, but Lord Finlay prevailed. Similarly, Baron Édouard Rolin-Jaequemyns, described by Jenks as being ‘born in the purple’ due to his international law pedigree, was the son of Gustave Rolin-Jaequemyns. His father created the *RGDIP* and the *IDI* (his obituary reveals that he was present, as a child, at the founding meeting of the *IDI* in Ghent),⁵³⁷ and he followed his father as an editor of the former and member of the latter. Other examples of family lineages outside the dataset famously include the late Sir Elihu Lauterpacht, son of Sir Hersch Lauterpacht;⁵³⁸ Pierre-Marie Dupuy, Professor at Panthéon-Assas and son of Rene-Jean Dupuy, one of Cassese’s ‘Five Masters’⁵³⁹ of international law;⁵⁴⁰ Malgosia Fitzmaurice, who appears here in connection to Gillian White but not in connection with her father, former ICJ judge Manfred Lachs, or her father in law, Sir Gerald Fitzmaurice; Jules Basdevant, father of the first female *ad hoc* judge before the

⁵³⁶ On Admiralty Courts/Ecclesiastical Courts and international law practiced by civil lawyers in the UK, see Crawford, ‘Public International Law in Twentieth-Century England’ (n 40) 685–686.

⁵³⁷ Jenks, ‘Baron Édouard Rolin-Jaequemyns’ (n 525) 156.

⁵³⁸ See Elihu Lauterpacht, *The Life of Sir Hersch Lauterpacht, QC, FBA, LLD* (Cambridge University Press 2012).

⁵³⁹ See Cassese, *Five Masters of International Law: Conversations with R-J Dupuy, E. Jimenez de Arechaga, R. Jennings, L. Henkin, and O. Schachter* (n 166).

⁵⁴⁰ Rene-Jean and Pierre-Marie have also acted together as counsel, see for instance *Case Concerning the Frontier Dispute (Burkina Faso/ Republic of Mali)*. See *Frontier Dispute*, Judgment, 22 December 1986, ICJ Reports (1986) 554, at 556.

International Court of Justice, Suzanne Basdevant-Bastid⁵⁴¹ and grandfather of Professor Genevieve Basdevant-Bastid, international lawyer and former Secretary-General of the Hague Academy of International Law.

Added to these blood ties are professional ties, formed around prominent scholars or practitioners. A holistic appraisal of these connections paints an intricate but small community, with numerous links and cross-links. To reinforce the point, the following figure focuses in on certain prominent individuals.

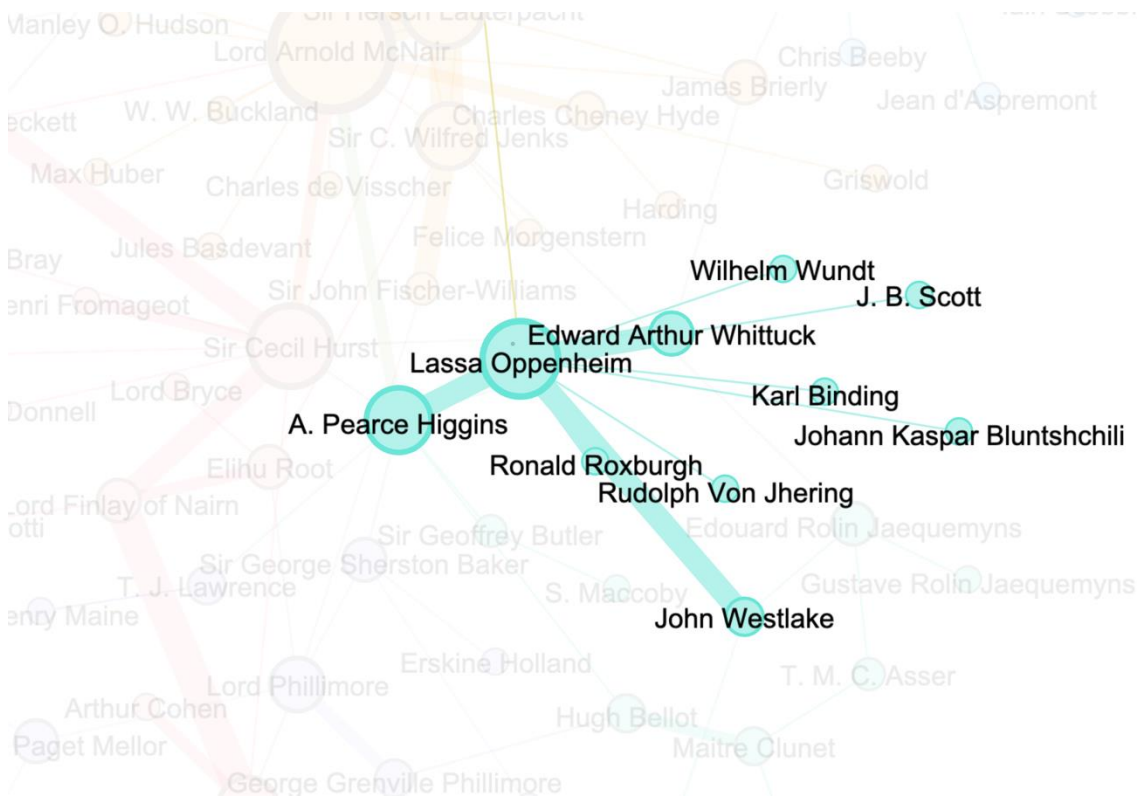


Figure 5: Oppenheim's ego network

⁵⁴¹ See Dapo Akande, 'Another Question on ICJ Judges - UPDATED' (*EJIL Talk!*, 2011) <<https://www.ejiltalk.org/another-question-on-icj-judges/comment-page-1/>> accessed 21 March 2019.

Oppenheim's obituary was published in the first edition of the *Yearbook* in 1920, written by Edward Arthur Whittuck, a Liberal philanthropist⁵⁴² who worked in university administration at the London School of Economics (LSE) and was keen on promoting the study of international law in the UK. He was one of the people responsible for bringing Oppenheim to the country and guaranteeing his first position there – a chair at the LSE.⁵⁴³ Thereafter, Oppenheim was personally invited by John Westlake to succeed him as the fourth Whewell Chair of International Law at the University Cambridge. During his tenure, he wrote prolifically on matters of international law and worked tirelessly for its dissemination; his seminal *International Law*⁵⁴⁴ manual was a game-changer in terms of textbooks in the discipline,⁵⁴⁵ and as argued in Part I,⁵⁴⁶ made a strong contribution to international law's positivist methodology. The book's clarity and organisation warranted the title of 'the outstanding and most frequently employed systematic treatise on the subject in English-speaking countries.'⁵⁴⁷ It was useful for both practitioners and students.⁵⁴⁸ Oppenheim's LSE position was then occupied by Alexander Pearce Higgins, who later went on to follow him as the fifth Whewell Chair in Cambridge.

The study of international law was popularized, fostered and bolstered in the UK by those such as Oppenheim, leading to an increase in the number of members of the profession and subsequent thickening of the ties between them. A good illustration of the phenomenon are the ties between Lord Arnold McNair, Sir Hersch Lauterpacht, Sir Gerald Fitzmaurice, Sir Humphrey Waldock, Sir Robert Jennings, Dame Rosalyn Higgins, Sir Derek Bowett, Sir Ian Brownlie, James Crawford, Vaughan Lowe, and Sir Christopher Greenwood. These individuals held or hold prestigious judgeships and teaching positions in the UK, and obituaries narrate how these positions change hands, often between mentor and mentee, and how close-knit these personal and professional relationships can be.

⁵⁴² A.P. Higgins & J.L. Brierly, 'Edward Arthur Whittuck', (1924) 1 BYBIL 1–3

⁵⁴³ A Pearce Higgins and J.L. Brierly, 'Edward Arthur Whittuck' (1924) 1 BYIL 1.

⁵⁴⁴ Lassa Oppenheim, *International Law: A Treatise* (Ronald F Roxburgh ed, 3rd ed., Longmans, Green, and Co 1920).

⁵⁴⁵ On his role in the development of the discipline, see Kingsbury (n 37); Vec (n 72); W Michael Reisman, 'Lassa Oppenheim's Nine Lives' (1994) 19 *Yale Journal of International Law*.

⁵⁴⁶ Part I – A.2. A story of unease – positivist method, Oppenheim, and international law as 'real law' (1908)

⁵⁴⁷ A Nussbaum, *The Concise History of the Law of Nations* (New York, 1950 1950) 277.

⁵⁴⁸ Crawford, 'Public International Law in Twentieth-Century England' (n 40) 697.

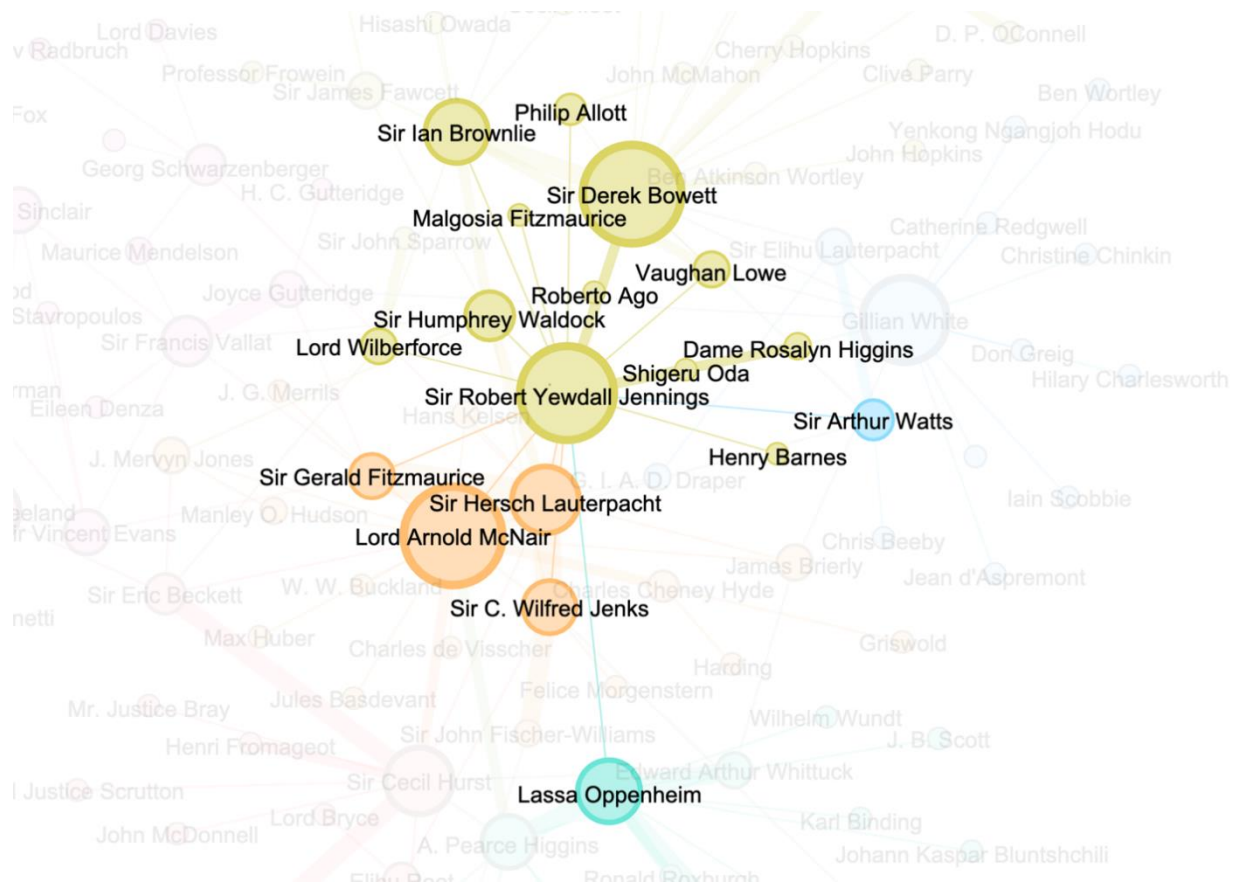


Figure 6: Robert Jennings's ego network

These individuals' careers and personal lives are deeply intertwined. Lord Arnold McNair was educated in Cambridge, and subsequently taught international law at the London School of Economics; during his time at the LSE he updated *Oppenheim's International Law* 4th edition. After publishing his famous *Law of Treaties*, he replaced Pearce-Higgins⁵⁴⁹ as the Whewell Chair of International Law in Cambridge, a post which he held for two years before taking up administrative duties at Liverpool. Following Liverpool, McNair was elected as the first UK ICJ judge,⁵⁵⁰ moving on to become later the first UK judge and first President of the

⁵⁴⁹ Who, in turn, had replaced Oppenheim.

⁵⁵⁰ The UK's last judge at the PCIJ was Sir Cecil Hurst, and Lord McNair wrote his *BYIL* obituary, see Lord McNair (n 154).

European Court of Human Rights. McNair became very close to Hersch Lauterpacht, and their relationship was a mix of friendship and professional mentorship.⁵⁵¹ According to Jennings, '(i)t is quite right to couple a recollection of Hersch Lauterpacht with Arnold McNair',⁵⁵² as '(t)hey became very close friends (...) until Lauterpacht's premature death', and '(Lauterpacht) would have never failed to do anything that Arnold McNair thought important for him to do'.⁵⁵³ They first became friends during the difficult period after Lauterpacht moved from Austria to the UK,⁵⁵⁴ and since then Lauterpacht's career mirrored that of McNair – he succeeded McNair at the LSE, in the Whewell Chair position, and finally at the ICJ, having even moved in with his wife and son to McNair's former home in Cambridge.⁵⁵⁵ Lauterpacht's successor at the ICJ was another of McNair's Cambridge pupils, Sir Gerald Fitzmaurice. Fitzmaurice held McNair in high regard,⁵⁵⁶ and was also close to Lauterpacht. It was Fitzmaurice in fact who wrote extensively on Lauterpacht's attitude towards the judicial function in pieces also published in the *British Yearbook*.⁵⁵⁷ Fitzmaurice, unlike McNair and Lauterpacht, became a government adviser to the Foreign Office instead of becoming an academic. During Lauterpacht's and Fitzmaurice's time at the ICJ, McNair was a judge at the ECHR, where he was appointed the Court's first president. Upon McNair leaving the ECHR, he was replaced by Sir Humphrey Waldock. Although Waldock's direct relationship with McNair cannot be distilled directly from the *Yearbook's* obituaries, it can be established that they were members of the same distinguished circle: Waldock held the prestigious Chichele Chair of International Law in Oxford before ascending to the European Court, and his obituary was written by Jennings, McNair's pupil. The absence of connection between these

⁵⁵¹ McNair also inspired the international law careers of Wilfred Jenks and published alongside Derek Bowett and Arthur Watts. See: Sir Humphrey Waldock, Sir Robert Yewdall Jennings and Morgenstern (n 167); Crawford, 'Sir Derek Bowett (1927-2009)' (n 173); Elihu Lauterpacht, 'Sir Arthur Watts (1931-2007)' (2008) 78 BYBIL 7.

⁵⁵² Sir Robert Yewdall Jennings, 'Hersch Lauterpacht: A Personal Recollection' (1997) 8 EJIL 301.

⁵⁵³ Ibid 301.

⁵⁵⁴ Ibid 301–304.

⁵⁵⁵ Sir Robert Yewdall Jennings (n 552).

⁵⁵⁶ See his obituary of McNair published in the *BYIL* Gerald Fitzmaurice, 'Arnold Duncan Lord McNair of Gleniffer' (1976) 47 BYIL xi; Sir Robert Yewdall Jennings (n 552) 302.

⁵⁵⁷ Gerald Fitzmaurice, 'Hersch Lauterpacht-The Scholar as Judge. Part I' (1961) 37 Brit. YB Int'l L. 1; Fitzmaurice, 'Hersch Lauterpacht - The Scholar as a Judge. Part II' (n 500); Fitzmaurice, 'Hersch Lauterpacht - The Scholar as a Judge. Part III' (n 500); Fitzmaurice, 'Hersch Lauterpacht and His Attitude to the Judicial Function' (n 500).

two personalities shows that, although uniquely rich with personal information, obituaries are not exhaustive and should be supplemented by other sources.

This picture of successions and relations of friendship and mentorship intensifies: Fitzmaurice and Waldock switch seats – Waldock succeeds Fitzmaurice at the ICJ, and Fitzmaurice replaces Waldock as the UK judge at the ECHR.⁵⁵⁸ All the while, Sir Robert Jennings takes over as the Whewell Chair at Cambridge, which he held for an impressive 21 years. As Jennings states in his heartfelt homage to Lauterpacht, he drew great inspiration from his two friends, mentors, and Whewell predecessors, McNair and Lauterpacht; he then followed his two mentors' career paths 'to the t'. First a lecturer at the LSE following Lauterpacht while also holding a fellowship at Cambridge, Jennings becomes somewhat unexpectedly⁵⁵⁹ Lauterpacht's Whewell Chair successor. After a long career in academia where he published extensively and on occasion practiced on matters of international law, Jennings is then nominated to the ICJ following Waldock's death, leading a long mandate and presidency at the Court until 1995, when he retired.

Jennings' retirement from the ICJ in turn led to the appointment of another pupil who led a similar life to the Court – the first female ICJ Judge, Dame Rosalyn Higgins. Higgins developed a close relationship with Jennings during her time as a student at Cambridge.⁵⁶⁰ She practiced at the Bar in international law cases and pleaded before the ICJ following her appointment to the LSE as international law chair, following Jennings. She also maintained very strong personal and intellectual ties to Myres S. McDougal at Yale.⁵⁶¹

⁵⁵⁸ This is not the only alternation in their careers – Waldock followed Fitzmaurice at the ILC, concluding his colleague's work on the Law of Treaties that led to the adoption of the VCLT.

⁵⁵⁹ See Sir Elihu Lauterpacht's recollection, Lesley Dingle, 'Sixth Interview (2 April 2008): Sir Eli's Recollections of Some Legal Personalities' (*Eminent Scholars Archive*, 2008) <<https://www.squire.law.cam.ac.uk/eminentscholars-archiveprofessor-sir-elihu-lauterpachtconversations-professor-sir-eli-lauterpacht-0>>.

⁵⁶⁰ Higgins, 'Sir Robert Yewdall Jennings' (n 164).

⁵⁶¹ See Lesley Dingle, 'Dame Rosalyn Higgins Interview (14 March 2014)' (*Eminent Scholars Archive*, 2014) <<https://www.squire.law.cam.ac.uk/eminentscholars-archivedame-roosalyn-higgins/conversation-dame-roosalyn-higgins>>.

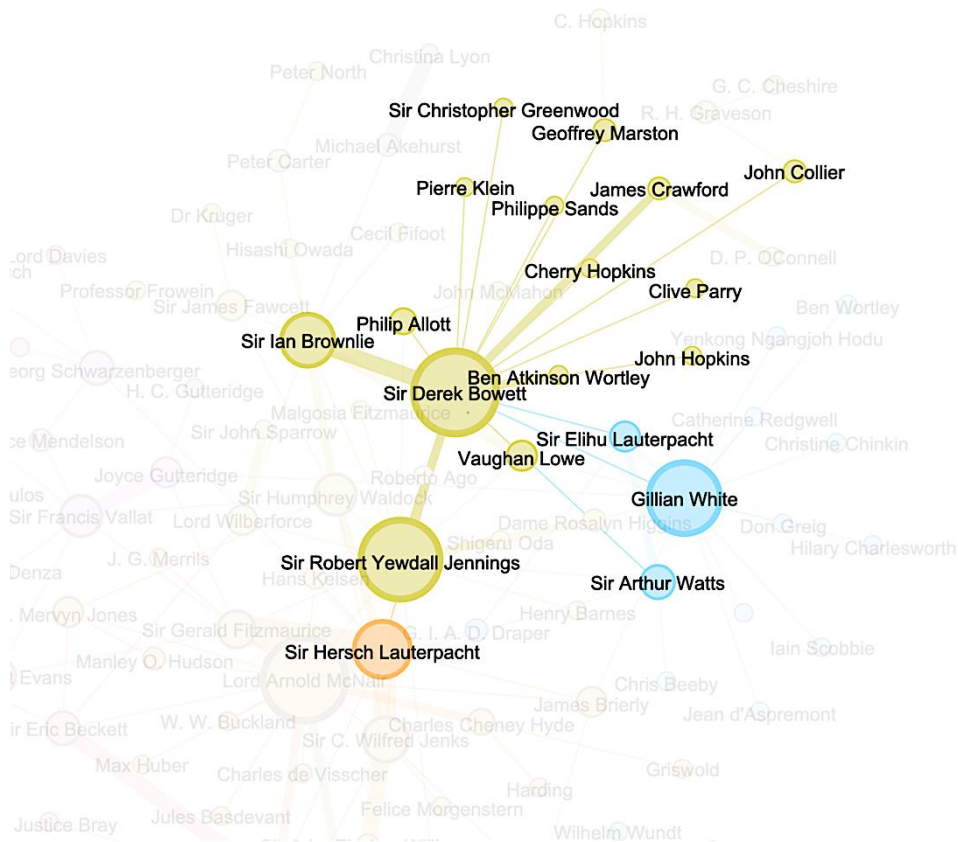


Figure 7: Sir Derek Bowett's ego network

Jennings' Whewell successor was Sir Derek Bowett. Bowett was encouraged by Sir Hersch Lauterpacht to take up a career in international law during his undergraduate degree at Cambridge, leading him to pursue the then LL.B. in international law, for which he received the prestigious Whewell Scholarship in International Law. He was both academic and practitioner, and his practice grew as international law developed into a more complex and institutionalized system.⁵⁶² His career was paralleled by Ian Brownlie's – they wrote and published seminal PhD theses reaching opposing conclusions on the law governing the use of force, often pleaded against each other at the ICJ and held the equally prestigious international law chairs in the rival institutions of Oxford and Cambridge.⁵⁶³ While Bowett and Brownlie

⁵⁶² Crawford, 'Sir Derek Bowett (1927-2009)' (n 173).

⁵⁶³ Crawford also mentions Bowett's professional Cambridge relationship with other academic/practitioners at the time he held the Whewell Chair, namely Clive Parry, Eli Lauterpacht, Philip Allott, Christopher Greenwood, Vaughan Lowe, John Collier, John and Cherry Hopkins, Geoffrey Marston.

were active as counsel for the Court, other younger generation prominent ICJ counsel began their own careers in practice, notably Sir Christopher Greenwood, Vaughan Lowe, and James Crawford. Lowe followed Brownlie as Chichele Chair, and appears extensively before the ICJ. Greenwood practiced and taught at Cambridge and then LSE, being one of the mentees of Sir Elihu Lauterpacht during his Cambridge LL.B.⁵⁶⁴ In turn, Crawford, who has had one of the most extensive international law practices in history,⁵⁶⁵ was Brownlie's supervisee in Oxford, and now, leaving the Whewell Chair after 21 years, also sat at the ICJ from 2014 as the Australian judge. Greenwood lost reelection after nine years as the UK ICJ judge in an unprecedented defeat of a P5 candidate.

This is a glimpse into the lives of international lawyers and is by no means exhaustive. Yet it provides a sense of the relationship between appointees for prominent teaching positions, legal advisers, and judgeships, as evidence of the professional and literal 'family trees' of international lawyers. The actual substantive role of relationships in shaping legislative efforts by international lawyers is explored in the case studies below – Ago and Anzilotti; Spender, Brownlie and Crawford; Hersch Lauterpacht, Shawcross, and Eli Lauterpacht; Schmitt and his Experts.

(c) Dedoublement fonctionnel

As mentioned before, the commonalities in career paths can be unearthed by filtering the information collected from obituaries, allowing this thesis to overcome the 'specific rosters' issue. Central to the argument of this thesis is that individual influence happens not because of the importance of one specific secondary 'source' (judgments, ILC documents, 'teachings' *stricto sensu*), or corresponding segment of the profession (judge, ILC member/UN expert,

⁵⁶⁴ See Sir Christopher Greenwood, 'Sir Christopher Greenwood's Memorial Service Address for Sir Elihu Lauterpacht, CBE, QC, LLD' (*Squire Law Library*, 2017) <https://www.squire.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/eli_memorial_service_addresschrisgreenwood.pdf> accessed 21 March 2019. He was also instructed by the UK in cases such as *Pinochet* (No. 1) (2000) 1 AC 147 and *Pinochet* (No. 3) (2000) 1 AC 147 (House of Lords) and *Jones v. Saudi Arabia* (2007) 1 AC 270 (House of Lords) before being elected to the ICJ. See 'Judge Christopher Greenwood's Biography' (*International Court of Justice*).

⁵⁶⁵International Court of Justice, 'Judge James Richard Crawford Biography' (2015) <http://www.icj-cij.org/files/members-of-the-court-biographies/crawford_en.pdf>.

scholar), but because the individuals that make up the profession transition between roles and pollinate their ideas amidst the system. The system's decentralised nature of (customary) lawmaking incorporates individual ideas in this way.

In order to verify the existence and extent of the *dedoublement fonctionnel* of international legal professionals, the network can be filtered by professional role, showing the commonalities in career paths of members. Applying the filter 'ICJ Judge AND ILC member', 5 records out of 180 remain. Applying the filter 'FCO adviser AND barrister', 15 records out of 180 remain. Applying the filter 'academic AND barrister', 30 records out of 180 remain. This is clear upon consulting the interactive network,⁵⁶⁶ where each individual takes the form of a 'node', that can be clicked on by the viewer, allowing for particular career paths to be examined with ease. Almost all nodes, that carry information about each individual, log more than one 'hat', demonstrating that international lawyers engage in the *dedoublement* Schachter talks about as a rule rather than as an exception.

For the purposes of illustration, these were the career paths of some of the most central (and thus some of the most connected in absolute and relative terms) figures in the network:

- Lord Arnold McNair: Barrister | ICJ Judge | ECHR Judge | Whewell Professor Cambridge | Admiralty Court Judge | Solicitor | Roman Law Lecturer | Contract Law Lecturer | Reader LSE | Vice-Chancellor University of Liverpool | Master of Gray's Inn | Counsel Arbitration
- Sir Robert Yewdall Jennings: ICJ Judge | ICJ President | Barrister | Whewell Chair Cambridge | LSE Lecturer | ICJ Counsel | Bencher Lincolns Inn
- Sir Cecil Hurst: PCIJ Judge | PCIJ President | FCO Legal Adviser | Barrister | Scholar
- Sir Arthur Watts: FCO Legal Adviser | Solicitor UK Law Officers Department | Adviser UK Permanent Representation to the EC | Barrister | QC | ICJ counsel | Arbitrator
- Lassa Oppenheim: Whewell Professor Cambridge | LSE Lecturer | Judge Clerk | Extraordinary Professor Freiburg | Professor Basle | FCO Expert | Barrister | War Office Manual author

⁵⁶⁶ See the interactive network in footnote 512, above.

- Sir Ian Brownlie: Chichele Professor Oxford | LSE Chair International Law | Barrister | Bencher Gray's Inn | ICJ Counsel | Arbitration Counsel | Lecturer Leeds | Lecturer Nottingham | Fellow Wadham College Oxford | ILC member
- Sir Hersch Lauterpacht: Judge ICJ | Professor (Cambridge) | Barrister

Although it was perhaps not surprising that some (especially the most central figures) of the network would engage in a mix of different types of practice and scholarship, the extent of the phenomenon is particularly striking. This supports Schachter's anecdotal *dedoublement fonctionnel* argument, and helps this thesis demonstrate how characteristics common to the members of the profession bolster individual influence. This is important because it potentializes the ground for a simultaneous building of authority and expertise of an individual in a field, and their ability to reproduce these ideas within the system, rubber-stamping personal ideas with the name of a given institution. On one hand, this increases the power of an individual, by their presence in many areas, and building expertise. On the other hand, it conceals their power: documenting an idea in an official or unofficial working group allows them to use that depersonalized document as authority by themselves and others subsequently. In a field such as international law, where custom is a prominent source and its processes of formation are decentralized, the reproduction of individual ideas in this way and the accretion of authority of an assertion about what the law is by repetition contribute to bolster the lawmaking role of individual lawyers.⁵⁶⁷

C. Conclusions – the 'invisible college' made visible

This study of obituaries of international lawyers mapped a section of the profession – the career paths of its members, and the relationships between them. Albeit looking at one specific journal's obituaries restricts somewhat the slice of the profession considered, it permits looking beyond professional divides of a specific institutional roster and across time, drawing a representative picture of the 'invisible college'. Using Social Network Analysis, this thesis quantitative snapshot substantiated claims both about the functioning of the community – its close-knit nature, the professional lineages that develop within it, and its porous nature that

⁵⁶⁷ On how patterns of citation in academia and the ICC are self-perpetuation and build authority in cross-citation, see respectively Boer, 'International Law as We Know It: Cyberwar Discourse and the Construction of Knowledge in International Legal Scholarship' (n 332); Manley (n 208).

stimulates changing of roles – and its composition – which is not diverse in educational background, gender, or geographic distribution. These illustrations of career paths and connections between members help us understand how the profession operates and the pathways whereby ideas about the law, method, and the exercise of professional roles can circulate. It allows this thesis to contextualise the detailed case study described in Section III below as a small part of a larger process – of how two individuals, Roberto Ago and James Crawford, sought to make international law more ‘multilateral’ and ‘public order-like’. They are not isolated stances of people who perform a multitude of roles, influencing and being influenced by other members of the community, but part of a larger picture of where this is reproduced. The common characteristic of transitioning between official and non-official roles (scholar to government counsel or ILC member, for example) allows for individual influence and authority to be propagated in a game of light and shadow: overt individual authority is built up by the amassing of titles, but also hidden by institutional rubber-stamping. In a sense, by becoming a member of the International Court of Justice one’s influence in the drafting committee with its secret deliberations can cloak the impact of one particular individual, giving personal views more authority and shielding them from scrutiny, again making one’s influence invisible to the rest of the international community. The same is true of the International Law Commission. Although meeting records are made available and sessions are open, the structure of the Special Rapporteurs allied with the practice of conflating ‘codification and progressive development’ elements blurs the lines between the institution and its members, obscuring creative personal influence. International lawyers’ ability to influence the law is never as overtly recognized in mainstream literature, but is flagrant in a cumulative reading of biographies and obituaries. These personalised accounts of international lawyers’ lives and careers confirm the profession’s fluidity (transition between official and unofficial channels, the *dedoublement fonctionnel*) speculated on by Schachter. They also confirm that all areas of the profession, from judgeships, to government advice, to scholarship, can provide vehicles for the fertilization of international law with individual ideas, which are in turn formed by one’s professional and personal experiences, theoretical leanings, and sensibilities.

III. Part III - Zooming in: international lawyers making law in action

Part II, above, provided a bird's eye view of the international legal profession and its members – how individuals' careers and their interactions with other members of the community provide *avenues* whereby their ideas about the law *can* move. Part III zooms into particular individuals, to showcase how the characteristics of the community and of individuals' career paths and personal connections seep into the law *in practice*.

Chris Krauss in her feminist classic *I Love Dick*, says about case studies: 'Don't you think that the only way to truly understanding things is thorough Case Studies? ... by understanding one simple thing – a strike – it's possible to understand everything about corporate capitalism in third world countries'.⁵⁶⁸ One simple thing in this case are four simple things – state responsibility for breaches of multilateral rights and obligations, the regulation of non-international armed conflicts and the criminalisation of terrorism, the protection of individual investors in the international realm, and the regulation of 'cyberwar' – that will lead us to 'understand everything about [how individual international lawyers make law]'. The *vignette* format was chosen as the most appropriate to capture complex social phenomena such as the present research question, '*How individuals make international law?*'. Stories informed by rigorous research of primary and secondary materials, capture a social phenomenon in all its complexity.

Although 'a case study will always be a case study'⁵⁶⁹, they uniquely allow one to capture '*passage* or *transit* of law', and thus the phenomenon one is trying to describe becomes clearer.⁵⁷⁰ '[Breaching] the usual methods of inquiry' and employing 'different writing [strategies]' is a known method to 'reach an elusive' goal⁵⁷¹: the making of law. As observed by Latour, part of the lawmaking process is less about causation, and more about capturing an *essence*, 'an essence does not lie in a definition but in a practice, a situated, material practice that ties a whole range of heterogenous phenomena in a certain specific *way*'.⁵⁷² In that sense, this section's use of *vignettes* follows partly on the tradition of ethnographies such as Bruno Latour's *Making of*

⁵⁶⁸ Chris Kraus, *I Love Dick* (2016) 37, 138.

⁵⁶⁹ Latour (n 47) viii.

⁵⁷⁰ *Ibid.*

⁵⁷¹ *Ibid* xi.

⁵⁷² *Ibid* x.

Law,⁵⁷³ and projects that employ Bourdieusian Reflexive Sociology, such as Dezalay and Garth's and Dezalay's⁵⁷⁴ studies into the international legal profession. In describing these processes, I seek to 'show that which is so close, which is so immediate, which is so intimately linked to us, that because of that we do not perceive it'.⁵⁷⁵

However informed by extra-legal techniques, these *vignettes* retain a deliberate 'primarily juridical ... method'⁵⁷⁶. I am interested in capturing a social phenomenon, but for distinctly *legal* purposes. Latour is seeking to '[provide] a 'social' explanation' for certain phenomena'.⁵⁷⁷ I draw 'upon juridical rather than historical and socio-logical methods'⁵⁷⁸ because I am interested in a question of legal authority, and I want to engage other lawyers writing about sources to think about centering individual lawyers and the profession, rather than only states or institutions, in how we describe lawmaking processes. This section leans in rather than shies away from 'metaphysical or theological accounts of authority' and is neither concerned with applying Actor Network Theory, per se, nor overly concerned with anachronism.⁵⁷⁹ I want to interrogate the processes whereby individuals make law in international law, how the porous, customary, decentralised 'system' allows for such a phenomenon to occur, and why although the phenomenon is widespread, it is not written about by people who write about sources of international law. This is done in the cognizance that 'the choice of what to include in such a description is always value-laden'.⁵⁸⁰ Though informed by analysis of primary and secondary materials, the *vignettes* crafted here are narratives that centre on individuals rather than structures, or institutions. Borrowing from Koskenniemi, this exercise does more than satisfy an 'Oedipal urge', but also serves as a reminder that legal practice is 'not only an abstract exercise in ideas but a continuum of political, moral and professional choices'.⁵⁸¹

⁵⁷³ Latour (n 47).

⁵⁷⁴ Bourdieu (n 389); Dezalay and Garth (n 47); Dezalay and Dezalay (contributor) (n 301).

⁵⁷⁵ Anne Orford, 'In Praise of Description' (2012) 25 *Leiden Journal of International Law* 609, 617, citing Michel Foucault.

⁵⁷⁶ Anne Orford, 'On International Legal Method' (2013) 1 166, 166.

⁵⁷⁷ Latour (n 47) viii.

⁵⁷⁸ Orford, 'On International Legal Method' (n 576) 170.

⁵⁷⁹ Orford, 'On International Legal Method' (n 576).

⁵⁸⁰ Orford, 'In Praise of Description' (n 575) 625.

⁵⁸¹ Koskenniemi, 'Lauterpacht: The Victorian Tradition in International Law' (n 343) 221.

In summary, these *vignettes* reflect the phenomenon captured by this thesis – how international lawmaking is undertaken by individual members of the international legal profession, within but partly extricated from state bureaucracies and international institutions. Their narrative style was chosen as it allows us to highlight the mix between cause, effect, and contingency, that defies simplification. They are written under the supposition that ‘[to] fix the boundaries of what [the use of force in cyberspace, or investment arbitration, or international criminal responsibility] is and to set the parameters for what is or is not an acceptable argument is no less than making the law. This is where the real stakes lie and what the questions are about.’⁵⁸²

A. ‘General’ International Law: Roberto Ago, James Crawford, and ‘multilateralising’ State Responsibility

This section expores *how* individual international lawyers make law at a granular level in ‘general’ international law. It describes the trajectories of two individuals and their interferences in different professional capacities to shape international law into something closer to their vision of how it should be. The individuals in question are Roberto Ago and James Crawford, and their vision, or project, is called here the ‘multilateral project’. In broad terms, the multilateral project sees a public order core in international law. In this view, more than a bundle of bilateral rights and obligations contracted through manifestations of will, international law is or should be a system which protects certain inalienable communitarian values.

Roberto Ago’s and James Crawford’s interventions to promote multilateral international law are the perfect qualitative case study for these purposes. Their work as ILC Special Rapporteurs on State Responsibility was instrumental to the field and beyond. Aside from clarifying and developing the once contentious field of state responsibility, their work was shaped by and helped shape broader debates on the multilateral character of international law.⁵⁸³ Ago and Crawford developed the area largely outside the grasp of states as ILC members, but also as scholars, counsel, judges, and experts in intergovernmental conferences – it is not in a single intervention, but in the transition between a multitude of professional roles that individuals influence international law. Their personal, theoretical and

⁵⁸² Bianchi, ‘Epistemic Communities in International Arbitration’ (n 33) 28.

⁵⁸³ Part III, A.1. Defining ‘the multilateral project’

methodological leanings – which make up their sensibilities – are reflected in the techniques they employed to further their version of the multilateral project.

This section will (a) establish the individuals' commitment to the project, (b) describe the techniques each individual employs in inserting the project into positive law, and (c) demonstrate how these techniques shape and are shaped by these individuals' personal positions on legal method, their career paths, and their connections to other members of the 'invisible college'. The techniques these individuals employ in making international law are extremely varied and do not lend themselves to strict typology. They include more obvious moves, such as scholarly publications and individual judicial opinions supporting a legal position, but also less obvious ones. The construction of histories supporting legal positions, choices regarding the adoption of soft or hard instruments, and stamping individually espoused concepts with institutional 'seals of approval' of collective bodies are examples. All of these moves require political savviness, and constant re-evaluation of strategies in light of what is palatable amongst state clients, colleagues, institutions. Personal leanings towards utopianism or pragmatism need to be calibrated in light of these ever-changing scenarios, and initiatives to change the law may both succeed and fail in this process. Ethical dilemmas are also abound in this process as one must juggle personal convictions and professional responsibilities. Although this section looks at two individuals in particular, this can be extrapolated to processes undertaken by other people in relation to their respective projects, with the aid of Part II above and its overview of the professional landscape.

1. Defining 'the multilateral project'

In order to explain how Roberto Ago and James Crawford sought to further the multilateral project, the project must first be defined. In broad terms, the multilateral project is a vision for international law. The articulations of this vision take many shapes and are pushed at varying degrees by different international actors. At their core, however, all of them share a multilateral *ethos*, a belief that international law possesses (or should possess) a public order flavour. There are varying degrees of multilateralism within the project – some go further, defending that this public order character has created a constitutional system, whereas others simply identify

certain obligations within the system that have acquired a central role over time.⁵⁸⁴ The adherents to the project broadly understand that, more than a bundle of bilateral rights and obligations contracted at will, international law is a system at whose core there are certain inalienable propositions of law that cannot be derogated from.

‘Multilateralism’ is a term defined in opposition. When juxtaposed to ‘unilateralism’, it refers to how ‘states [address international issues]’.⁵⁸⁵ ‘Multilateralism’ in that sense is the ‘approach in foreign relations that seeks cooperation with other states’,⁵⁸⁶ whereas unilateralism is the policy of acting on one’s own.⁵⁸⁷ When ‘multilateralism’ is defined in opposition to ‘bilateralism’, it refers to the number of sides in a legal relationship – this is the ‘multilateralism’ this thesis is concerned with. Most agree on the definition of ‘Bilateral’: it denotes legal relationships with two sides with individual legal interests, although each side may be composed by more than one party. ‘Multilateral’ conversely denotes a legal relationship with *more than two sides*. A proponent of the multilateral project believes that international law accommodates these kinds of relationships.

Different proponents of multilateralism have particular views about the extent of this proposition. This is what Benvenisti and Nolte refer to as ‘more’ and ‘less demanding’ versions of community interest approaches.⁵⁸⁸ Some proponents of the multilateral project take a teleological approach to the definition of ‘multilateral’ international law. Bruno Simma, for instance, highlights multilateral international law’s ‘communitarian values’ and ‘*ordre publique*’ character in order to define it. ‘Traditionally patterned’ international law is ‘bilateralist’⁵⁸⁹, but

⁵⁸⁴ Some examples of the differing views on this include Samantha Besson, ‘Community Interests in the Identification of International Law: With a Special Emphasis on Treaty Interpretation and Customary Law Identification’ in Eyal Benvenisti, Georg Nolte and Keren (Associate Editor) Yalin-Mor (eds), *Community interests across international law* (OUP 2018); Samantha Besson, ‘Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?’ in Eyal Benvenisti, Georg Nolte and Keren (Associate Editor) Yalin-Mor (eds), *Community interests across international law* (OUP 2018); Eyal Benvenisti and Georg Nolte, ‘Community Interests across International Law’ in Eyal Benvenisti, Georg Nolte and Keren Yalin-Mor (Associate Editor) (eds), *Community interests across international law* (2018); Bruno Simma, ‘Doctrinal Expressions of Community Interest in International Law’, *Recueil des Cours* (Brill; Nijhoff 1994); Christian J Tams, *Enforcing Obligations Erga Omnes in International Law* (OUP 2005).

⁵⁸⁵ André Nollkaemper, ‘Unilateralism / Multilateralism’ (2018) para 1.

⁵⁸⁶ *Ibid* 3.

⁵⁸⁷ *Ibid* 2.

⁵⁸⁸ Benvenisti and Nolte (n 584) 5.

⁵⁸⁹ Bruno Simma, ‘From Bilateralism to Community Interest in International Law’ in Hague Academy of International Law (ed), *Recueil des Cours* (Brill 1994) para 1.

‘contemporary international law has moved far beyond such minimal law’⁵⁹⁰ – there are now international obligations that require all states to conduct themselves in a certain way independently of that conduct *being owed* to other sovereign entities.⁵⁹¹ Whereas ‘old’ bilateral international law had ‘distinct ‘civil law’ [private law] characteristics’⁵⁹², multilateral international law is imbued with communitarian interests. There is a ‘consensus according to which the respect to certain fundamental values is not to be left’ to individual states.⁵⁹³ It thus surges as a means of reconceptualising international law into a system of ‘public law’, which seeks to address communitarian problems such as ‘human rights, the environment, the global commons, the spread of nuclear weapons, and economic interdependence’.⁵⁹⁴

Another version of the multilateral project focuses less on creating a narrative of progress – ‘from bilateralism to community interests’ in Simma’s words – and more on the strictly legal implications of multilateralism. Instead of exploring general communitarian trends in the discipline in abstract terms, it looks for a doctrinal typology of the legal consequences of multilateral norms. The protection of the ‘international community’ is at the margin of debates about who is injured when multilateral obligations are breached, or whether these breaches entitle non-injured states to impose countermeasures. This is the approach adopted by James Crawford in his first Hague Academy lectures,⁵⁹⁵ in which deeper philosophical debates about international law’s communitarian spirit give way to questions of attribution, procedure, and standing. A similar approach is adopted by Samantha Besson,⁵⁹⁶ Linos-Alexander Sicilianos,⁵⁹⁷ and Christian Tams.⁵⁹⁸ As it will be demonstrated below, how one frames the debate is not without consequences to positive law.

⁵⁹⁰ Ibid.

⁵⁹¹ Ibid 2.

⁵⁹² Ibid.

⁵⁹³ Ibid 6.

⁵⁹⁴ Ibid.

⁵⁹⁵ James Crawford, ‘Multilateral Rights and Obligations in International Law’ (2006) 319 *Recueil des Cours*.

⁵⁹⁶ Besson, ‘Community Interests in the Identification of International Law: With a Special Emphasis on Treaty Interpretation and Customary Law Identification’ (n 584); Besson, ‘Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?’ (n 584).

⁵⁹⁷ LA Sicilianos, ‘The Classification of Obligations and the Multilateral Dimension of the Relations of International Responsibility’ (2002) 13 *European Journal of International Law* 1127.

⁵⁹⁸ Tams (n 584).

Independently from the differences in framing the problem, certain buzzwords are common to the ‘multilateral project’. At the centre of bilateralism, we have the state, whereas in multilateralism we have the international community. Whereas the main protected good in bilateralism is sovereignty, or a state’s internal affairs, in multilateralism ‘community interests’ are protected. If we were to draw an analogy with a body of domestic law, bilateralism would be private law – contract/treaty and tort/customary responsibility – whereas multilateralism would have certain public law or constitutional law-like characteristics. Whereas bilateral international law protects the interests of an individual interested party, multilateral international law protects the interests of all states, of the many-times-mentioned international community. Whereas bilateral international law is undertaken mainly through the state organs individually, multilateral international law in its original conception was put in practice by collective entities such as international institutions.⁵⁹⁹ Whereas the epitome of bilateralism is *South West Africa*,⁶⁰⁰ the *obiter dicta* in *Barcelona Traction*⁶⁰¹ embodies multilateralism. If bilateral international law focuses on consent in lawmaking, multilateral international law focuses on the consensus. Of course, as explained by Besson, we cannot oversimplify what is a nuanced legal debate: states are not always ‘self-interested’ and averse to multilateralism, and what are true ‘community interests’ is sometimes unclear.⁶⁰²

The subsequent sections will explore Ago’s and Crawford’s relationships therewith. It will be demonstrated (a) that both Ago and Crawford subscribe to the project, and that (b) they have attempted to transform it from lofty project into positive international law (c) via their actions as individual members of the ‘invisible college of international lawyers’. This will be achieved through scrutiny of their scholarship materials written by them and about them, and primary sources such as ILC documents, and ICJ judgments and pleadings. Though the main focus is on Ago’s and Crawford’s work on state responsibility, their contribution to other sub-

⁵⁹⁹ That is a point of contention on the literature on responsibility – whereas Ago and others envisage these ‘multilateral’ obligations being claimed and enforced by international institutions, Crawford has privileged a system of claims being brought and countermeasures undertaken directly by individual states, in what Simma criticizes as a ‘system of community reactions [which does not really transcend] bilateralism’ Simma (n 589) 318.

⁶⁰⁰ *South West Africa cases (Ethiopia v South Africa) (Liberia v South Africa) (Second Phase) (Judgment)* [1966] ICJ Rep 6 hereafter *South West Africa* or *South West Africa (Second Phase)*.

⁶⁰¹ *Barcelona Traction, Light and Power Company Limited (Belgium v Spain) (Second Phase) (Judgment)* [1970] ICJ Rep 3 hereafter *Barcelona Traction*.

⁶⁰² Besson, ‘Community Interests in International Law: Whose Interests Are They and How Should We Best Identify Them?’ (n 584) 37.

areas of international law, their attachment to the ‘multilateral project’ more broadly, their personal strategies in furthering the project, and their views on the profession are necessary parts of this narrative.

2. Roberto Ago

a. The project: Ago’s commitment to the ‘multilateral project’ and personal motivation

Ago’s participation in the multilateral project is better understood through a holistic analysis of his work and career progression beyond his *oeuvre* on state responsibility and ‘international crimes of states’ (ICS).⁶⁰³ This thesis explores his positions on (1) positivism, sources and legal method, (2) international mechanisms such as codification efforts and the positions of IOs in the international system, and (3) his conception of an ‘international community’ of states. All of these will shed light on (1) the meaning he sought to give ICS, and (2) what means he utilised in attempting to weave ICS into the international legal vocabulary in order to make international law more ‘multilateral’. Ago originally envisaged ICS to be dealt with by non-adjudicative means in an institutional setting. It will be argued that that his notion of ICS and their multilateral enforcement was more in line with the vision of a truly multilateral international law than James Crawford’s pragmatic choice to ‘bilateralise’ multilateralism by broadening the rules of standing.⁶⁰⁴

Ago’s contribution was pivotal in getting the codification of state responsibility off the ground. Previously to Ago’s intervention at the ILC, debates about state responsibility privileged codifying primary rules on injury to aliens. In an era of Cold War bi-polarity and politicised debates about nationalisation, legal positions on alien property divided Socialist and Third World states on one hand, and developed states on the other.⁶⁰⁵ Ago’s predecessor’s reports were never discussed at the Commission in part due to its busy schedule, but mainly the knowledge that the topic, when framed around alien property, would be excessively polemic to yield fruitful debates. When Ago was appointed Special Rapporteur, he undertook a masterful political move: separating primary rules on alien property from ‘secondary roles on

⁶⁰³ Which will be done more carefully below.

⁶⁰⁴ Similarly to what is argued by Antonio Cassese, *International Law* (2nd edn, OUP 2005) 269.

⁶⁰⁵ Marina Spinedi, ‘From One Codification to Multilateralism in the Genesis of the Codification of the Law of Responsibility’ (2002) 13 *1099*, 1109.

state responsibility'. In doing this he steered the debate away from nationalisation, and the ILC was free to codify seemingly a-political rules on injury, compensation, attribution. Ago's interventions and attempts to codify secondary rules have resulted in Part I of the Articles, left largely unchanged in the present ARSIWA regime.⁶⁰⁶

Roberto Ago's academic work spoke less of 'multilateralism' in narrow terms, but explored in depth its theoretical underpinnings. He devoted himself to debates about 'consent' of states in custom,⁶⁰⁷ and the existence of a universal 'international community'⁶⁰⁸. Both issues are at the basis of his conception of ICS,⁶⁰⁹ a prime example of the 'multilateral project's' translation into positive law. Perhaps the lack of use of the term 'multilateral' in his work stems from his focus on 'the consequences of wrongful acts' over 'the subjects entitled to implement that responsibility'.⁶¹⁰

The *ethos* of multilateralism is certainly present in his work – although he was not one to overreach the role of 'humanity' in international law, or preach the end of sovereignty, his roamings about the existence of an international community, and an anti-consensualist/anti-voluntarist approach to custom are in line with the themes of the larger project.

b. The person: Ago's science and method – an alternative to positivism

Ago was a difficult man to pigeonhole into one particular methodological school.⁶¹¹ Although faithful to positive international law broadly construed, he kept away from 'exclusive voluntarism'; while holding views respected by Scelle, he did not subscribe to 'simplifying sociology'.⁶¹² His existence between methodological worlds can be perceived in two ways; under a perhaps less flattering light adopted by Valticos, it produced irreconcilable views. A less maniqueistic take sees Ago's straddling of positivism and sociology as the result of an inherent tension experienced by a committed international lawyer. Whereas he accepts

⁶⁰⁶ Robert Rosenstock, 'The ILC and State Responsibility' (2002) 96 AJIL 792, 792.

⁶⁰⁷ Roberto Ago, 'Positive Law and International Law' (1957) 51 AJIL 691.

⁶⁰⁸ Roberto Ago, 'Communauté Internationale et Organisation Internationale = The International Community and International Organisation' in René-Jean Dupuy (ed), *Manuel sur les organisations internationales = A handbook on international organizations* (Dordrecht ; London : Martinus Nijhoff, 1998 1988); Roberto Ago, 'Pluralism and the Origins of the International Community' (1977) 3 Italian Yearbook of International Law 3.

⁶⁰⁹ Explored in depth in d below.

⁶¹⁰ Spinedi (n 605) 1109.

⁶¹¹ Nicolas Valticos, 'Roberto Ago (1907-1995)' (1996) 89 AJIL 581.

⁶¹² Ibid 581.

positivism's historical role as giving legal bite to international law, he also understood, as a member of the 'invisible college' *tout court*, the practical complexities of international lawmaking and the scientific pitfalls of state-centric voluntarist positivism. He also could not accept full-on sociology; he argues that saying a certain rule is generated by a society is not the same as denoting its properly 'legal' nature, since many socially generated rules will not be 'legal'.⁶¹³

Unlike some of his colleagues,⁶¹⁴ throughout his career Ago made significant efforts to engage with the deep theoretical questions of international law. His theory is that (1) the term 'positive' to denote binding rules must be abandoned⁶¹⁵, (2) positivism was wrong to focus on 'laying down' processes (their sources) rather than their practical properly legal effects⁶¹⁶, and (3) any lawmaking process should be understood as comprising 'spontaneous law' whose binding nature can be observed in reality, independently of its sources.⁶¹⁷

Ago believed that, upon clarifying these misconceptions, one could see the redundancy of debates about the existence of international law, since reality demonstrates that, like in any other society, international legal rules possess the characteristics of binding norms.⁶¹⁸ He argued also that the organicity and systematicity of these legal rules was undeniable in practice. Questioning international law's existence despite its reality was thus, to him, unscientific.⁶¹⁹ Ago does not discount the importance of positivism, which he argues is responsible for a greater attempt to '[isolate] the sphere of law and distinguishing it from that of other orders of knowledge', separating law 'clearly from everything that is only aspiration'. His 'spontaneous law' and focus on 'empirical realities' is an attempt to get away from positivism whilst preserving international law's cogency and systematicity.

His disbelief in positivism's obsession with pedigree and sources is in harmony with how he sought to promote ICS. The evidence he adduces for international law's turn to communitarianism are 'based on empirical reality' but certainly not rigid, or overly concerned

⁶¹³ Roberto Ago, 'Science Juridique et Droit International', *Recueil des Cours* (Brill 1956) 907–908.

⁶¹⁴ Crawford, 'Sir Derek Bowett (1927-2009)' (n 173); Koskeniemi, 'Book Review Brownlie's Principles of Public International Law' (n 206); Higgins, 'Sir Robert Yewdall Jennings' (n 164).

⁶¹⁵ Ago, 'Science Juridique et Droit International' (n 613) 949.

⁶¹⁶ Ago, 'Positive Law and International Law' (n 607) 732.

⁶¹⁷ *Ibid* 729.

⁶¹⁸ Ago, 'Science Juridique et Droit International' (n 613) 951.

⁶¹⁹ *Ibid* 954.

with the state provenance of said practice. In his 1976 Report, he cites the following as evidence of a move towards multilateralism supporting ICS: the outcry about the ‘ravages’ of World War II,⁶²⁰ the rise of *jus cogens* under the VCLT,⁶²¹ Nuremberg’s prosecution of international crimes,⁶²² and UN sanctions.⁶²³ Ago’s choices of practice are telling – he was not concerned with pointing out traditional stances of state practice such as pronouncements of specific states on those matters, privileging instead on the practice of international bodies. This is in line with his observations about positivism’s obsession with the ‘pedigree’ of norms, his emphasis on ‘empirical realities’, and his attachment to international institutions.⁶²⁴

One can speculate about why Ago sought to remediate the ills of state-centric voluntarism and its partner-in-crime, bilateralism. Of course these were debates very pertinent to the time, but another reason may lie in his personal connection to Dionisio Anzilotti. Though it is not argued here that there is a direct cause-and-effect connection between Ago’s research agenda and Anzilotti’s, one can make an informed deduction. Anzilotti was a prominent member of the guild of international legal professionals and one of the architects of the Permanent Court of International Justice under the League of Nations scheme.⁶²⁵ An advocate of a voluntarist view of international law, Anzilotti was the author of the *SS Lotus* decision, which contains the (in)famous *dicta* ‘international law emanates from states’ own free will’⁶²⁶. He was also one of the most prominent experts in State Responsibility, having written one of the most influential treatises of its time on the subject – *Teoria generale della responsabilità dello stato nel diritto internazionale*.⁶²⁷ In this work, Anzilotti espoused a bilateral view of responsibility.

Ago acknowledges that Anzilotti’s work had a strong influence on his own research agenda, greater than any other mentor’s.⁶²⁸ In Ago’s own words:

⁶²⁰ ILC Yearbook, A/CN.4/291 (1976), para. 97.

⁶²¹ ILC Yearbook, A/CN.4/291 (1976), para. 99.

⁶²² ILC Yearbook, A/CN.4/291 (1976), para. 101.

⁶²³ ILC Yearbook, A/CN.4/291 (1976), para. 103-104.

⁶²⁴ See subsequent section.

⁶²⁵ Roberto Ago, ‘Rencontres Avec Anzilotti’ (1992) 3 EJIL 92, 97.

⁶²⁶ Crawford, ‘Chance, Order, Change: The Course of International Law’ (n 15) 68.

⁶²⁷ Georg Nolte, ‘From Dionisio Anzilotti to Roberto Ago: The Classical International Law of State Responsibility and the Bilateral Conception of Inter-State Relations’ (2002) 13 EJIL 1083, 1083.

⁶²⁸ Ago, ‘Rencontres Avec Anzilotti’ (n 625) 95.

Et c'est un fait aussi que, plus tard, et, plus encore, ce sont sa *Teoria generale della responsabilita dello Stato in diritto internazionale* et son écrit sur *La responsabilité internationale des Etats a raison des dommages soufferts par des étrangers*, qui m'ont poussé à faire de la responsabilité internationale dans toute son étendue l'objet principal peut-être de mon attention et de mes études.⁶²⁹

Ago partly attributed Anzilotti's illness to the failure of institutions designed by the master himself.⁶³⁰ It is thus not unlikely that Ago's works rejecting positivism⁶³¹ and attempting to articulate multilateralism via the international community⁶³² may also have been informed by and written with Anzilotti's sovereigntist views and failures in mind.

c. The means: codification, international organizations, and the concept of an 'international community'

Though positivism and codification are often seen as two sides of the same coin,⁶³³ Ago was both an advocate against positivist thought,⁶³⁴ and heavily involved in codification efforts throughout his career. He had an 'extended and preeminent'⁶³⁵ role in the ILC, and was chairman of the Vienna Conference that culminated with the adoption of the VCLT.⁶³⁶ During the late 60s, Ago argued in favour of treaty making to harmonize international law during decolonization.⁶³⁷ Ago proposed a number of quite radical reforms in this vein that involved United Nations lobbying newly independent states to ratify codification treaties and creating thematic committees to help progress the rule of international law amongst new states.⁶³⁸ In light of these personal positions, it is unsurprising that, as its Special Rapporteur (1963-1978), Ago referred to the culmination of the state responsibility project as being an 'international

⁶²⁹ Ibid.

⁶³⁰ Ibid 97.

⁶³¹ Ago, 'Science Juridique et Droit International' (n 613).

⁶³² Ago, 'Communauté Internationale et Organisation Internationale = The International Community and International Organisation' (n 608).

⁶³³ See Oppenheim (n 52); Sir Cecil Hurst, 'A Plea for the Codification of International Law on New Lines' (1946) 32 Transactions of the Grotius Society 135.

⁶³⁴ Ago, 'Science Juridique et Droit International' (n 613); Ago, 'Positive Law and International Law' (n 607).

⁶³⁵ Nicolas Valticos (n 611) 582–583.

⁶³⁶ Ibid 582; Spinedi (n 605) 1100.

⁶³⁷ '[...] [U]n effort de ce genre ne fait que répondre à une nécessité impérieuse et urgente.' Roberto Ago, 'La Codification Du Droit International et Les Problèmes de Sa Réalisation', *Recueil d'études de droit international en hommage à Paul Guggenheim* (Imprimerie de La Tribune de Genève 1968) 93.

⁶³⁸ Ibid 130–131.

codification convention'.⁶³⁹ In his dedication to multilateral conventions in general, and bringing about a binding State Responsibility convention in particular, Ago was a man of his time: the second half of the 20th century⁶⁴⁰ was a time in which multilateral codification was at its peak. This justifies his approach to the State Responsibility project, and his decision to create a binding convention rather than the 'soft' instrument for which James Crawford pushed so hard for.⁶⁴¹ Ago's enthusiasm for codification significantly diminished later on in his career, when the pitfalls of codification became more apparent due to the picking apart of ILC work by states during codification conventions,⁶⁴² and the slow process of ratifications of treaties such as the VCLT.⁶⁴³

Ago's views on the international community and international organisations (IOs) help us better understand how he envisaged that the ICS regime would be structured. His commitment to multilateral institutions is evidenced by his involvement therein: he was a member (1956-1979) and chairperson (1964-1965) of the International Law Commission, a Judge at the International Court of Justice (1979-1995) and an active member of the ILO, where he worked in several capacities for over 50 years.⁶⁴⁴ Although Ago did not see international institutions as a step in the progress towards a supra-state,⁶⁴⁵ he believed they were the closest structures to that of the international community⁶⁴⁶ to promote coordination amongst its members.

Similarly to how he devised innovative ways in which IOs would help promote codification post-decolonisation, he saw IOs at the centre of managing his International Crimes of States.⁶⁴⁷ As expounded by Spinedi,

However, at least as regards the Special Rapporteur one fact seems clear to me: Ago was opposed to providing the possibility for states not directly injured to take unilaterally

⁶³⁹ Para. 10 2nd Ago Report. Marina Spinedi when recapping the story about the ILC's work constantly mentions a 'future convention' on the subject, see Spinedi (n 605).

⁶⁴⁰ JHH Weiler, 'The Geology of International Law—Governance, Democracy and Legitimacy' (2004) 64 Heidelberg Journal of International Law 547, 549.

⁶⁴¹ See section (a) below.

⁶⁴² Roberto Ago, 'Some New Thoughts on the Codification of International Law' in Emmanuel G Bello and Bola A Ajibola (eds), *Essays in honour of judge Taslim Olawale Elias* (Martinus Nijhoff 1992) 46–47.

⁶⁴³ Ibid 51–52.

⁶⁴⁴ Nicolas Valticos (n 611) 582–583.

⁶⁴⁵ Ago, 'Communauté Internationale et Organisation Internationale = The International Community and International Organisation' (n 608) 12.

⁶⁴⁶ Ibid 4–6.

⁶⁴⁷ Ago, 'La Codification Du Droit International et Les Problèmes de Sa Réalisation' (n 637) 129–130.

decided measures (except in relation to self-defence measures). He envisaged a system of coordinated countermeasures (if possible in the context of an international organization), to be added to the one provided for by the Charter.⁶⁴⁸

In light of the fact that (1) ICS are seen by Ago as breaches that concern the international community, and that (2) he saw international organisations as, although not overlapping, a partial reflection of said international community, it makes sense that he envisaged a scheme that involved international organisations to administer said ICS. His proposals on codification, which involved innovative UN-based mechanisms, suggest that he foresaw ICS being administered under a similar scheme. His initial views of codification as a tool for coordination are in consonance with his early vision to develop a treaty on state responsibility, although his more recent work on codification was sceptical of treaty-making. This suggests he might not have been averse to Crawford's strategic move to keep the Articles as a 'soft' instrument endorsed by the General Assembly.

d. The law: Ago's International Crimes of States

(a) Definition of International Crimes of States and Ago's vision

'International Crimes of States' (ICS) was a mode of aggravated responsibility developed by the ILC during its discussions on codifying the Law of State Responsibility. It was an expression of the position that, under international law, there was a differentiated regime of responsibility depending on the seriousness of the breach and/or importance of the breached obligation. ICS were thus the nomenclature chosen within the Commission at the time to designate the most serious international wrongful acts – in contrast to 'crimes', ordinary wrongful acts were referred to as 'international delicts'. Seriousness, in the Commission's view, was measured by the degree to which certain wrongful acts offended the international community as a whole. Thus its definition on Article 19 of the 1976 Draft Articles:

Article 19. — International crimes and international delicts

1. An act of a State which constitutes a breach of an international obligation is an internationally wrongful act, regardless of the subject-matter of the obligation breached.

2. An internationally wrongful act which results from the breach by a State of *an international obligation so essential for the protection of fundamental interests of the international*

⁶⁴⁸ Spinedi (n 605) 1122.

community that its breach is recognized as a crime by that community as a whole, constitutes an international crime.

3. Subject to paragraph 2, and on the basis of the rules of international law in force, an international crime may result, *inter alia*, from:

(a) a serious breach of an international obligation of essential importance for the maintenance of international peace and security, such as that prohibiting aggression;

(b) a serious breach of an international obligation of essential importance for safeguarding the right of self-determination of peoples, such as that prohibiting the establishment or maintenance by force of colonial domination;

(c) a serious breach on a widespread scale of an international obligation of essential importance for safeguarding the human being, such as those prohibiting slavery, genocide and apartheid;

(d) a serious breach of an international obligation of essential importance for the safeguarding and preservation of the human environment, such as those prohibiting massive pollution of the atmosphere or of the seas.

4. Any internationally wrongful act which is not an international crime in accordance with paragraph 2, constitutes an international delict. [emphasis added]⁶⁴⁹

ICS are a category of internationally wrongful acts of greater gravity. This greater gravity in comparison to ordinary wrongful acts – ‘delicts’ – is measured on the basis of the collective interest – interest ‘of the international community as a whole’ – in their protection. At the core of the concept of ‘crime’ is the idea of sanction – thus the international community’s ability to demand more than ‘reparation’ *stricto sensu* when ICSs occur, but to impose sanctions on the offending state for violating a particularly important/especially protected obligation.

(b) The evolution of Ago’s crimes: ILC and beyond

a. Previously to the ILC

The ‘crimes’ nomenclature and the gradation of responsibility based on the importance of the breach debate was mainly espoused by Ago as Special Rapporteur – his role in introducing the concept of ICS was paramount. Although Ago’s predecessor García Amador had proposed a differentiation between ‘merely wrongful’ and ‘punishable’ acts, his proposal was swiftly

⁶⁴⁹ ILC, ‘Report of the International Law Commission on the Work of Its 28th Session’ (May - 23 July 1976) UN Doc A/31/10 95.

rejected by the Commission.⁶⁵⁰ Pierre-Marie Dupuy refers to ICS as one of ‘[Ago’s forward-looking suggestions]’⁶⁵¹, and Georg Nolte recognizes that the introduction of ICS as a concept was ‘[proposed by Ago]’⁶⁵².

Ago’s ideas about gradation of responsibility did not start at the ILC. Already in his 1939 Hague Academy Course entitled *Le délit international* he questions whether, under international law, there is a differentiation between those wrongful acts that entail responsibility of a civil nature, i.e. reparation, and others of a ‘penal’ nature, that ensue repressive action in the form of sanctions.⁶⁵³ He first concludes that there is no theoretical obstacle in applying the difference between civil and criminal responsibility to states,⁶⁵⁴ to then argue that international law at that time, with the exception of humanitarian law of reprisals, did not appear to differentiate between acts that only lead to a right to ask for reparations from those that lead to a right to impose sanctions.⁶⁵⁵ One must see Ago’s initial position in context – it was articulated just before the Second World War. In 1939, an argument for a multilateral international law was much more difficult to make. As argued by Georg Nolte, Ago’s position in his *Recueil* was relatively progressive and not widespread – accepting a multilateral system of obligations that went beyond the interest of a directly injured state in the area of responsibility⁶⁵⁶ was only espoused by him and Lauterpacht at the time.

⁶⁵⁰ Marina Spinedi, ‘International Crimes of State: The Legislative History’ in Antonio Cassese, Joseph Weiler and Marina Spinedi (eds), *International Crimes of State: A critical Analysis of the ILC’s Draft Article 19 on State Responsibility* (de Gruyter 1989) 11–12.

⁶⁵¹ Pierre-Marie Dupuy, ‘The Deficiencies of the Law of State Responsibility Relating to Breaches of ‘Obligations Owed to the International Community as a Whole’: Suggestions for Avoiding the Obsolescence of Aggravated Responsibility’ in Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012) 211.

⁶⁵² Nolte (n 627) 1097.

⁶⁵³ Roberto Ago, ‘Le délit international (Volume 068)’ in The Hague Academy of International Law (ed), *Collected Courses of the Hague Academy of International Law*, vol 68 (Brill 1939) 528–531.

⁶⁵⁴ Nolte (n 627) 1093–1094.

⁶⁵⁵ ‘[L]e droit des gens, tout en connaissant aussi bien des effets répressifs que des effets réparateurs des délits internationaux, ne présente pas, en ligne générale et sauf des exceptions éventuelles dans des domaines marginaux, une distinction entre délits civils et délits pénaux, ou plus exactement entre des délits auxquels seule une obligation de réparer est rattachée, et des délits frappés au contraire par l’octroi à autrui d’une faculté de sanction ainsi qu’il en est au contraire généralement dans le domaine des droits étatiques.’ Ago, ‘Le délit international (Volume 068)’ (n 653) 531.

⁶⁵⁶ Nolte (n 627).

b. At the ILC

Ago was an ILC member between 1957 and 1978, when he was elected to the International Court of Justice. He was the second Special Rapporteur on State Responsibility, elected after Francisco García Amador from Cuba who submitted his last Report in 1961. Ago submitted a total of 8 Reports between 1969 and 1980 – notice his last report was submitted after his election to the Court in 1978.

When revisiting the subject of state responsibility at the International Law Commission after World War II, Ago gradually introduces the view that, under current international law governing state responsibility, one must differentiate between ‘regular’ breaches (breaches of bilateral obligations) and breaches that offend the international community. Certainly aware that his views on crimes were not mainstream, he had to devise techniques to convince the Commission of ICS’s practical feasibility and embeddedness into international law. He did this by carefully escalating the tone of his propositions on Crimes – from cautious and sceptical in 1960s and early 1970s to extremely optimistic in 1976. Ago’s earlier Commission speeches before his election as Special Rapporteur revealed a degree of sympathy for the concept of an aggravated mode of responsibility akin to the 1939 *Recueil*. He did not, however, initially articulate a ‘crimes’ category. At the prompting of the Soviet member of the Commission, Tunkin, who argued that responsibility in the area of security had been elevated above other breaches,⁶⁵⁷ Ago adopted a careful tone, stating that

a clearer distinction would have to be drawn today between acts which called for reparation and torts which called for sanctions. The distinction might be in relation to the nature of the rule violated. There were probably rules whose breach would call only for reparation, but there were others whose breach called not only for reparation but also for sanctions.⁶⁵⁸

In 1973, he remains cautious; Ago begins by saying that at the time ‘it appears’ that an internationally wrongful act cannot ‘create a legal relationship between the guilty State and the international community as such’, since the international community is not a separate legal

⁶⁵⁷ Spinedi (n 650) 14. ILC, ‘Yearbook of the International Law Commission’ (24 April – 29 June 1962) UN Doc A/CN.4/Ser.A/1962 vol I pp. 29, 37.

⁶⁵⁸ ILC ‘Yearbook of the International Law Commission’ (24 April – 29 June 1962) UN Doc A/CN.4/Ser.A/1962 vol I pp. 29, 35.

person.⁶⁵⁹ However he also identifies that there is a ‘growing tendency’ amongst scholars to separate between ordinary and particularly grave wrongful acts.⁶⁶⁰ The latter would generate responsibility towards all, not only injured, states. Ago argues it is ‘particularly tempting’ to relate this development to *Barcelona Traction’s* obligations *erga omnes* but, at that time, restricts himself to saying ‘[i]deas of this kind may perhaps be worth studying in detail.’ Many questions remained, in his view, as to whether these obligations could arise from treaty as well as custom, and whether they generated relationships between the offending state and states *ut singuli* or as between the offending state and states part of a group/organization.⁶⁶¹ Although Ago flirted with an aggravated community-based type of responsibility since 1939, his language indicates that he saw it as a much more viable concept after *Barcelona Traction* – even if arguably only discourse in international law circles rather the state practice on the subject had changed since then.

One can already see in the above excerpts that Ago’s confidence on crimes grew between 1939 and the early 1970s, but his tone was still cautious. This changes quite dramatically in his Fifth Report of 1976 – Ago becomes then more invested in convincing other members of the Commission that international law supports an aggravated mode of responsibility. While Spinedi referred to the Report’s new tone as ‘[firm]’⁶⁶², the statements in the Fifth Report read more as unusually optimistic, almost utopian. Despite maintaining that ‘[it is not possible] to draw absolutely firm conclusions’ based on the extensive UN and state practice on the subject, Ago argues that ‘[it is possible] to conclude that such breaches, especially if they continue, are considered particularly serious and liable to entail legal consequences more severe than those attached to less serious internationally wrongful acts’.⁶⁶³ He goes so far as saying that ‘[it seems] undeniable that world opinion regards the acts in question as genuine ‘crimes’, i.e., wrongful acts which are more serious than others, and that they must therefore entail more serious legal consequences’, concluding that currently States

⁶⁵⁹ ILC ‘Third Report on State Responsibility by Mr. Roberto Ago, Special Rapporteur, the internationally wrongful act of the State, source of international responsibility’ (1973) UN Doc A/CN.4/246 para. 40.

⁶⁶⁰ Ibid para. 41.

⁶⁶¹ Ibid para. 41.

⁶⁶² Spinedi (n 650) 21.

⁶⁶³ ILC ‘Fifth report on State responsibility by Mr. Roberto Ago, Special Rapporteur – the internationally wrongful act of the State, source of international responsibility (continued)’ (1976) UN Doc A/CN.4/291 para 111.

are ‘quite definitely’ convinced that ‘there are grounds for recognizing the existence of a distinction between two fundamentally different categories of internationally wrongful acts based on the content of the obligation breached’.⁶⁶⁴ He follows the recipe book for those trying to persuade anyone of a more multilateral international law post-World War II: the shock over the Axis’ ‘unprecedented ravages’,⁶⁶⁵ the rise of *jus cogens* under the VCLT,⁶⁶⁶ the punishment of individuals for ‘crimes under international law’,⁶⁶⁷ and the special regime under Chapter VII of the Charter that allows for the UN to undertake enforcement measures.⁶⁶⁸ In giving meaning to the latter category, Ago goes through UN practice on sanctions, finding not only breaches to the prohibition on the use of force/aggression,⁶⁶⁹ but also racial discrimination,⁶⁷⁰ *apartheid*,⁶⁷¹ and colonial domination.⁶⁷² Although quite refined in, for instance, distinguishing the prosecution of international crimes from an aggravated mode of state responsibility, Ago still builds a traditional narrative of progress – ‘from bilateralism to community interest’⁶⁷³ – when describing these developments. That allows him to make a passionate but not untenable case for the adoption of a differentiated mode of responsibility for serious violations of international law, which he conceived as ‘International Crimes of States’, into the responsibility regime that he was in charge of helping build. Ago’s argument is one of accretion – it is impossible that such a move towards the interests of the international community in varied areas of international law would not seep into the law of state responsibility.⁶⁷⁴

c. Beyond the ILC: multilateralism and accretion

It is important to stress that Ago’s move towards multilateralism in the ILC was not an isolated stance. His participation in this dialogue of accretion towards a more multilateral international law is more than just restricted to his aforementioned sympathetic scholarship⁶⁷⁵ and his role

⁶⁶⁴ Ibid para 117.

⁶⁶⁵ Ibid para 97.

⁶⁶⁶ Ibid para 99.

⁶⁶⁷ Ibid para 101.

⁶⁶⁸ Ibid paras 103-104.

⁶⁶⁹ Ibid paras 106-107.

⁶⁷⁰ Ibid para 108.

⁶⁷¹ Ibid para 109.

⁶⁷² Ibid para 110.

⁶⁷³ Simma (n 589).

⁶⁷⁴ Spinedi (n 650) 22.

⁶⁷⁵ Ago, ‘Le délit international (Volume 068)’ (n 653).

at the Commission. He played a fundamental part *himself* in at least two of the Post-War innovations he cites at the ILC as practice supporting ICS. Firstly, in a more inchoate relationship to the development of a multilateral international law, Ago was counsel in the *Barcelona Traction* case, in which the Court's famous dicta about *erga omnes* obligations came about.⁶⁷⁶ Nothing can be found in Ago's pleadings that may lead us to believe that he had an influence on the Court's pronouncement in this respect, but the opposite is not such a stretch – one can assume that the case had a particularly big impact on his views on the subject, greater even than it did on the views of international lawyers not involved in the case.

Ago also participated in another major development he later relies upon to support the development of ICS – the insertion of a *jus cogens* provision in the VLCT. Pierre-Marie Dupuy indicates this self-referential move: the ILC, in adopting ICS, was 'obliged to follow in the footsteps of [this] inspiring [*jus cogens*] development', whilst 'the distinguished Special Rapporteur on state responsibility after 1969 was none other than Roberto Ago, the former President of the Vienna Conference on the Law of Treaties'.⁶⁷⁷ It is an interesting case of egg and chicken – Ago, who is sympathetic towards an incipient communitarian approach to international law in state responsibility since the late 1930s, cannot deny as Special Rapporteur on State Responsibility the importance of a development towards multilateralism heavily supported *by Ago himself* in the context of the Law of Treaties.

d. ICS via institutions: a truly multilateral paradigm

During Ago's term at the ILC before his election to the ICJ, it was decided that, while adopting the ICS concept under Article 19, and defining ordinary wrongful acts in opposition thereto, the consequences of this classification would not be dealt with in Part I, but only in Part II of the Articles on the content and forms of responsibility.⁶⁷⁸ Some of these issues however seeped into the Part I discussions under Ago. As reported by Spinedi, in a commentary to Article 30

⁶⁷⁶ Giorgio Gaja, 'Barcelona Traction, Light and Power Company (Belgium v Spain) (1970)' in Eirik Bjorge and Cameron Miles (eds), *Landmark Cases in Public International Law* (Bloomsbury Publishing 2017).

⁶⁷⁷ Dupuy (n 651) 211–212.

⁶⁷⁸ Spinedi (n 605) 1112.

in the Commission Report of 1979 which repeats ‘almost verbatim’ Ago’s Report of that year,⁶⁷⁹ the following is expressed:

[a] system which vests in international institutions other than States exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and, thereafter, for deciding what measures are to be taken in response and how they are to be implemented.

Under the Charter of the United Nations, these responsibilities are vested in the competent organs of the Organization. These organs are empowered [...] not simply to authorize but even to direct a Member State [...] a group of Member States, or at times all Member States, to apply certain sanctions [...] against a State which has committed an offence of a specified content and gravity.

At the time it appears that neither Ago nor the Commission envisaged a system where non-injured states could vindicate breaches of *erga omnes* obligations unilaterally. Ago only envisaged a communitarian system of enforcement in these cases, as is demonstrated in his Report of the same year:

It probably still subsists in general international law, even if, in abstraction some might find it logical to draw certain inferences from the progressive affirmation of the principle that some obligations – defined in this sense as obligations *erga omnes* – are of such broad sweep that the violation of one of them is to be deemed an offence committed against all members of the international community, and not simply against the State or States directly affected by the breach. In reality, *one cannot underestimate the risks that would be involved in pressing recognition of this principle* – the chief merit of which, in our view, is that it affirms the need for universal solidarity in dealing with the most serious assaults on international order – *to the point where any State would be held to be automatically authorized to react against the breach of certain obligations committed against another State and individually to take punitive measures against the State responsible for the breach.* It is understandable, therefore, that a community such as the international community, in seeking a more structured organization, even if only an incipient ‘institutionalization’, should have turned in another direction, namely towards a system vesting in international institutions other than States the exclusive responsibility, first, for determining the existence of a breach of an obligation of basic importance to the international community as a whole, and thereafter, for deciding what measures should be taken in response and how they should be implemented. [Emphasis added]

⁶⁷⁹ ILC ‘Eighth report on State responsibility by Mr. Roberto Ago, Special Rapporteur – the internationally wrongful act of the State, source of international responsibility’ (1979) UN Doc A/CN.4/318 43. See Spinedi (n 650) 41.

As explored above,⁶⁸⁰ Ago had a penchant for International Organisations. He saw IOs as pivotal to codification, and envisaged them as an integral part of the ICS regime.

Although Ago was elected to the ICJ and left the Commission before Parts II and III of the Articles were drafted, he was present in many of the subsequent ILC discussions about them. There is no doubt that he continued to influence the Commission while Riphagen was Special Rapporteur, and this may be why bilateral retorsion did not become part of ICS until later.

Inherent to the ‘crime’ terminology thus lies Ago’s idea that this multilateral set of obligations and its enforcement was to happen through *sanctions* imposed by *multilateral institutions* – namely the United Nations. It did not thus make sense for him to look thoroughly into ‘legal interest’ in ICS enforcement: ICS were not intended to work in a bilateral frame such as dispute resolution before the International Court. The very examples he draws on in his Fifth Report to justify the differentiation between types of wrongful acts are telling – sanctions under the Charter to condemn heinous conduct such as apartheid, colonial domination, or unlawful use of force. If one looks at it as an issue of conception (institution enforcing sanctions for breaches of community obligations), the crime terminology not only seems more palatable, but true to the multilateral project, within institutions, and not individual states, acting as guardians of these community obligations.

e. The frustration of the multilateral vision

Although ICS were defined under Ago, their consequences were only devised in 1993 under Gaetano Arangio-Ruiz. The results of it were underwhelming. Article 51, 52, and 53 of Chapter IV of the Draft Articles set out consequences very similar to those arising from ordinary internationally wrongful acts. They did not prescribe ‘punitive’ damages, nor sanctions. There was also no truly multilateral regime for handling them under the guise of the United Nations, as envisaged by Ago.

Ago’s micromanaging of state responsibility at the Commission even after his ICJ appointment, and his investment in concretising part of his multilateral project through ICS

⁶⁸⁰ See Section III, C, 3.

revealed in his reports and scholarship, could not prevent bilateralisation. This unsatisfactory outcome is not surprising; Arangio-Ruiz describes his own views as sceptical of an international community and of any law beyond state will.⁶⁸¹ Arangio-Ruiz's self-proclaimed status as a voluntarist indicates he would be unlikely to devise mechanisms that support the multilateral project.

Despite Ago's efforts, the regime that the subsequent Special Rapporteur James Crawford was presented with had already been bilateralised. The consequences of breaches of multilateral obligations embodied by ICS were no longer focused on multilateral UN-based sanctions, and had already adopted a bilateral language. The 'International Crimes of States' nomenclature was completely dropped once James Crawford took over as the Fifth Special Rapporteur on the subject, and the multilateral project in the area of State Responsibility became an issue of standing and procedure rather than sanctions.

⁶⁸¹ Gaetano Arangio Ruiz, 'Gaetano Arangio Ruiz About Section' (2017) <<http://www.gaetanoarangioruiz.it/about/>> accessed 7 August 2018.

3. James Crawford

This section demonstrates that James Crawford was committed to the multilateral project, and explores some personal reasons behind his interest in multilateralism. It also dissects his methodological leanings – namely his pragmatic approach and focus on giving ‘legal bite’ to the multilateral project through refinement of concepts. It shows how his personal views and his method influenced his strategy to make international law ‘more multilateral’ through his work as part of the ‘invisible college of international lawyers’ – at the ILC, in his extensive practice as counsel, and more recently until his passing,⁶⁸² as ICJ judge. His pragmatism and (perhaps excessive) focus on refining certain legal concepts, and readiness to make compromises with client states, however, did come at a price: it is also argued here that the current ARSIWA regime, despite praise amongst international lawyers, lost much of its multilateral promise in the process. Moreover, Crawford’s own arguments as counsel for Australia in the *East Timor* case were detrimental to the progress towards multilateralising international law through procedure, potentially reverberating beyond the narrow confines of the International Court of Justice’s practice.

a. The project: Crawford’s multilateralism

Crawford had a known ‘soft spot’ for the subject of community interests in international law.⁶⁸³ He conceptualized international law in true multilateral terms: as a system that transcends ‘a set of bilateral ideals with no supervening public interest’.⁶⁸⁴ He explored the subject in his first course at the Hague Academy in 1994 was entitled ‘Multilateral Rights and Obligations in International Law’,⁶⁸⁵ and many of his essays are either exclusively dedicated to multilateral rights and obligations,⁶⁸⁶ or touch upon multilateralism when speaking of state

⁶⁸² ‘In Memoriam: HE Judge James Crawford AC SC FBA’ (*Lauterpacht Centre for International Law*, 2021) <<https://www.lcil.cam.ac.uk/memoriam-he-judge-james-crawford-ac-sc-fba>> accessed 27 October 2021.

⁶⁸³ Koskenniemi, ‘Book Review Brownlie’s Principles of Public International Law’ (n 206) 141.

⁶⁸⁴ Lesley Dingle and Daniel Bates, ‘A Conversation with Emeritus Professor Judge James Richard Crawford Part 2: Scholarly Works’ (*Eminent Scholars Archive*, 2018) para 137 <[https://www.squire.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.squire.law.cam.ac.uk/legacy/Media/Eminent Scholars Archive Transcripts/james_crawford_interview_4_may_2018.pdf](https://www.squire.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.squire.law.cam.ac.uk/legacy/Media/Eminent%20Scholars%20Archive%20Transcripts/james_crawford_interview_4_may_2018.pdf)>.

⁶⁸⁵ Crawford, ‘Multilateral Rights and Obligations in International Law’ (n 595).

⁶⁸⁶ James Crawford, ‘Responsibility to the International Community as a Whole’, *International Law as an Open System: Selected Essays* (Cameron May 2002); James Crawford, ‘The Standing of States: A Critique of Article 40 of the ILC’s Draft Articles on State Responsibility’, *International Law as an Open System: Selected Essays* (Cameron May 2002); James Crawford, ‘Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts’, *From Bilateralism to Community Interest: Essays*

responsibility⁶⁸⁷ and procedure before international courts⁶⁸⁸. His commitment to multilateralism is further confirmed by his description of Article 48 of ARSIWA, giving standing for non-injured parties to bring claims for breaches to obligations owed to the international community as a whole, which he considered ‘the single most important contribution’ he ‘tried to make to international law’.⁶⁸⁹

He also focused on the tension between multilateralism and bilateralism in arguments put forward before courts and tribunals. He argues for the application and non-application, respectively, of the *Monetary Gold* principle⁶⁹⁰ in his two first cases before the International Court of Justice, *Certain Phosphate Lands in Nauru* and *East Timor*. In his first dissent as a Judge before the same Court in the *Marshall Islands* cases⁶⁹¹, he brings up the *Monetary Gold* principle as a more credible challenge to admissibility than that adopted by the majority.

One may correlate Crawford’s interest in the ‘multilateral project’ and the presence of Sir Percy Spender in his imaginary. Again, similarly to the argument about Ago and Anzilotti above,⁶⁹² it is important to stress that this is not a straightforward opposition between Crawford and Spender, or an argument attempting to establish a relationship of cause and effect between Spender’s work and Crawford’s backlash. This personal dimension demonstrated by evidence, however, highlights the personal path that moulds one’s conceptions of international law and the complexity of the process of individual influence. It illustrates the importance of analysing the interconnectedness amongst members of the ‘invisible college of international lawyers’ explored in ‘Part II - The community: Individuals, careers, and networks’ to trace how legal

in Honour of Bruno Simma, vol 1 (2011); James R Crawford, ‘International Crimes of States’ in James Crawford and others (eds), *The Law of International Responsibility* (OUP 2018).

⁶⁸⁷ J Crawford, ‘Revising the Draft Articles on State Responsibility’ (1999) 10 EJIL 435; James Crawford, *State Responsibility: The General Part* (CUP 2013).

⁶⁸⁸ James Crawford and Tom Grant, ‘International Court of Justice [Issue]’, *Oxford Handbook on the United Nations*, vol 8 (2007).

⁶⁸⁹ Dingle and Bates (n 684) 143.

⁶⁹⁰ The relationship between necessary third party admissibility challenge and multilateralism, and Crawford’s exploration of this argument, will be further explored below.

⁶⁹¹ Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v United Kingdom*) (Preliminary Objections) [2016] ICJ Rep 833; Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v Pakistan*) (Preliminary Objections) [2016] ICJ Rep 552; Obligations Concerning Negotiations Relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (*Marshall Islands v India*) (Preliminary Objections) [2016] ICJ Rep 255, hereafter *Marshall Islands cases*, *Marshall Islands*.

⁶⁹² Above, ‘The project: Evidence of his [Ago’s] commitment to the ‘multilateral project’ and personal motivation’.

concepts are shaped in international law by collaboration and reproduction, but also by antagonism. Thus, zooming into the trajectory of particular individuals, the relevance of the interaction between the individual and the community, and the individual and their career path, is further clarified.

If one may think of Crawford as the most celebrated Australian international lawyer, Spender, the only other Australian judge to be elected to the International Court of Justice, is likely the most infamous: as the President of the Court, he cast the notorious deciding vote in *South West Africa*. The decision was part of a series of cases before the Court dealing with the administration of South West Africa, now Namibia. A German colony until World War I, South West Africa became a League of Nations ‘C Mandate’, governed by the United Kingdom and administered by South Africa, under the Treaty of Versailles. During its administration, South Africa instituted policies of racial discrimination in the territory, which culminated in the extension of the *Apartheid* regime thereto. The General Assembly repeatedly condemned South Africa’s attitude towards South West Africa. Three Advisory Opinions⁶⁹³ from the Court stated that the League of Nations Mandate had now been converted into a UN Mandate, and that stricter UN standards and methods of assessment applied to the administration of the territory. South Africa, however, refused to implement these standards, arguing that the ICJ Advisory Opinions were non-binding. Liberia and Ethiopia then filed an application to the Court grounded on Article 7 of the Mandate, which gave the PCIJ compulsory jurisdiction to hear disputes between Members of the League. They requested the Court to (a) reaffirm in binding form that South Africa had to abide by the UN Mandate system’s rules, and (b) rule that the *Apartheid* regime in South West Africa was in violation of the obligation to promote the well-being of citizens under the Mandate. South Africa disputed the jurisdiction of the Court on six grounds in the first phase of proceedings; the Court rejected all preliminary objections and affirmed its jurisdiction in a tight 8-7 decision. In the second phase of the proceedings, however, and after both parties submitted substantive written and oral arguments, the Court refused to rule on the merits, deciding that Liberia and Ethiopia did not have legal interest to

⁶⁹³ International Status of South-West Africa (Advisory Opinion) [1950] ICJ Rep 128; South-West Africa-Voting Procedure (Advisory Opinion) [1955] ICJ Rep 67; Admissibility of hearings of petitioners by the Committee on South West Africa (Advisory Opinion) [1956] ICJ Rep 23.

bring a case before the Court, thus overturning its First Phase decision. The Second Phase decision was taken on 7x7, and Spender, as then President, cast the deciding vote in favour of South Africa.

On the political level, developing states reacted in a ‘bitter and hostile’ manner,⁶⁹⁴ and ‘certain African delegates’ stated ‘that the ICJ was a ‘white man’s’ tribunal dispensing justice according to a ‘white man’s’ law’⁶⁹⁵, in a climate of ‘angry political reaction within the U.N.’.⁶⁹⁶ In the positive law level, *South West Africa* represented a serious blow to the ‘multilateral project’. In denying standing to Ethiopia and Liberia due to lack of legal interest, this decision further distanced international law from a system that upholds public order, reaffirming its role as a mechanism designed merely to solve disputes that can be translated in the bilateral language of direct legal interest, injury, and compensation. Much work, as was demonstrated in the previous section, had to be done to somewhat reverse this.

One could argue Spender’s legal position should not be overstated – he was taking a stance on a procedural matter, and not orchestrating a masterplan to dissolve the multilateral project. Crawford describes Spender as ‘in some other respects quite a good judge’,⁶⁹⁷ and is somewhat apologist of Spender’s attitude – he describes Spender as having ‘every confidence in the judgment as an expression of the law’, and argues that Spender’s attempts to disqualify a potentially biased colleague, Judge Mohammed Zafrulla Khan from Pakistan, was permitted under ICJ Statute provisions.⁶⁹⁸ Victor Kattan, however, paints Spender and his role in *South West Africa* in a less flattering light. Through archival work, Kattan substantiates claims that the former Australian judge was invested in impeding a decision against South Africa by less than virtuous means: he applied immense pressure to disqualify judge Zafrulla Khan in order to alter the composition of the Court to guarantee results favourable to South Africa, as Zafrulla

⁶⁹⁴ Rosalyn Higgins, ‘The International Court and South West Africa : The Implications of the Judgment’ p. 573, 779.

⁶⁹⁵ James Crawford, ‘Dreamers of the Day: Australia and the International Court of Justice’ (2013) 14 Melbourne Journal of International Law 520, 530.

⁶⁹⁶ Edward McWhinney, *Judge Manfred Lachs and Judicial Law-Making: Opinions on the International Court of Justice, 1967-1993* (M Nijhoff 1995) 39.

⁶⁹⁷ Dingle and Bates (n 684) 86.

⁶⁹⁸ Crawford, ‘Dreamers of the Day: Australia and the International Court of Justice’ (n 695) 535–536.

Khan would have most likely voted in favour of the Applicant states.⁶⁹⁹ Kattan argues that Spender was motivated by a mix of personal concerns and national interests: a conservative, he sought to prevent the Court from ruling on issues of colonial administration to pre-empt litigation of Australia's abuses as administrator of Nauru and Papua New Guinea. Although there is no evidence that Spender orchestrated *South West Africa (Second Phase)* to the detriment of a larger multilateral project as such, it is fair to assume that he would have welcomed this side-effect – he held sovereignty-centred, anti-multilateral views, and a negative stance on the United Nations.⁷⁰⁰ Even if not actively promoting a sovereignty-based conception of international law more broadly, it is safe to say that Spender would not as a 'positivistic, conservative'⁷⁰¹ be averse to the systemic consequences of a judgment on the merits in *South West Africa (Second Phase)*.

The proposition that Spender's role in *South West Africa* influenced Crawford's dedication to promoting the multilateral project is based on more than speculation. Aside from Spender's frequent appearances in Crawford's scholarship⁷⁰², in a recent interview Crawford connects his interest, Spender's positions, and their common nationality:

Australia's last judge on the court and the only other Australian who was elected to the court was Sir Percy Spender. [He] was elected in 1957, served to 1966, and ...was President in his last three years, and cast the notorious casting vote in the second *South-West Africa* (sic.) case which it has been part of my academic endeavour to criticize.⁷⁰³

Spender's manipulation of the Court to ensure jurisdiction was declined in *South West Africa* was partly motivated by concerns that the case would open the floodgates for litigation of breaches in administered territories. The UK's preoccupation with this possibility is obvious, thus it is unsurprising that Sir Gerald Fitzmaurice, the British judge at the time, would press

⁶⁹⁹ Victor Kattan, 'Decolonizing the International Court of Justice: The Experience of Judge Sir Muhammad Zafrulla Khan in the South West Africa Cases' (2015) 5 *Asian Journal of International Law* 310.

⁷⁰⁰ Crawford, 'Dreamers of the Day: Australia and the International Court of Justice' (n 695) 530.

⁷⁰¹ McWhinney (n 696) 115.

⁷⁰² Crawford, 'Dreamers of the Day: Australia and the International Court of Justice' (n 695); Crawford, 'Chance, Order, Change: The Course of International Law' (n 15); Crawford, 'Multilateral Rights and Obligations in International Law' (n 595).

⁷⁰³ Lesley Dingle and Daniel Bates, 'A Conversation with Emeritus Professor Judge James Richard Crawford Part 1: Early Life and Career' (*Eminent Scholars Archive*, 2018) para 86 <[https://www.squire.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.squire.law.cam.ac.uk/legacy/Media/Eminent Scholars Archive Transcripts/james_crawford_interview_3_may_2018.pdf](https://www.squire.law.cam.ac.uk/sites/www.law.cam.ac.uk/files/images/www.squire.law.cam.ac.uk/legacy/Media/Eminent%20Scholars%20Archive%20Transcripts/james_crawford_interview_3_may_2018.pdf)>.

for lack of jurisdiction. Australia, however, would also be implicated in such cases as the administering authority of the Pacific Nations.⁷⁰⁴ This type of litigation exposed Australia to similar examination of its own mandate abuses. Some of the unsavoury policies Australia would not want questioned were adopted while Spender himself was Minister of External Territories before his election to the Court,⁷⁰⁵ including the exploitation of phosphates in Nauru, which caused environmental calamity. Thus, the South West Africa dispute ‘constituted the testing ground for the potential limits of international law in serving the interests and goals of the colonised world’.⁷⁰⁶

Crawford’s first case before the International Court of Justice did exactly what Spender tried to avoid.⁷⁰⁷ On behalf of Nauru, Crawford argued that Australia should pay compensation for the damage caused by the exploitation of phosphates in the island during Australian administration. The Administrative Authority was a condominium also composed by the UK and New Zealand. Nauru prevailed in the Preliminary Objections phase by arguing that, due to the multilateral character of the mandate, the case could be brought solely against Australia, and thus the necessary third party rule, also known as the *Monetary Gold* principle, did not apply. The Court ruled that the UK and New Zealand were not necessary third parties. This could be seen as another step away from *South West Africa (Second Phase)* bilateralism. In the argument put forward by Crawford, Nauru did not have to bring a case against each of the members of the Administering Authority, since the type of obligation was multilateral in nature, and the strict *Monetary Gold* principle was to be relaxed in public order-type claims. One could even argue that *Certain Phosphate Lands* indicates that, when it comes to issues such as colonial administration, excessive formalism in procedure should yield to public order.

It is thus concluded first that Crawford ‘has made part of [his] academic endeavour’ to reverse *South West Africa (Second Phase)* style bilateralism.⁷⁰⁸ His publications as an academic and his work as a practitioner/ILC member/judge have attempted to bring international law closer

⁷⁰⁴ Cait Storr, “Imperium in Imperio”: Sub-Imperialism and the Formation of Australia as a Subject of International Law’ (2018) 19 Melbourne Journal of International Law 335.

⁷⁰⁵ Kattan (n 699) 340.

⁷⁰⁶ Ntina Tzouvala, ‘The Standard of Civilisation in International Law’ [2020] *Capitalism As Civilisation* 1, 130.

⁷⁰⁷ Case Concerning Certain Phosphate Lands in Nauru (Nauru v Australia) (Preliminary Objections) [1992] ICJ Rep 240 hereafter *Certain Phosphate Lands in Nauru*.

⁷⁰⁸ Dingle and Bates (n 703) 86.

to an *ordre public* style system. This is true both in his positive law investigations into ‘multilateral international law’,⁷⁰⁹ as well as his theoretical roamings that portray international law as an ‘open system’, as opposed to a set of random web of consent-based rights and obligations.⁷¹⁰ Secondly, it is concluded that there is a strong connection between Crawford’s commitment to the multilateral project and the presence of Sir Percy Spender in his imaginary. It is clear that, at least in Crawford’s view, Spender’s presence colours Australia’s relationship with the International Court of Justice. Be it due to an interest awakened by Spender’s story and its relationship to Australia’s dark colonial past, or a conscious desire to dissociate himself from said Australian legacy to become a palatable future candidate before the Court, it is clear that Spender’s role in bilateralising international law influenced how Crawford formed his views and conceptualised his opinions on issues of multilateralism.

b. The law: ARSIWA’s serious breaches and bilateral solutions to multilateral problems

This section summarizes the structure of the Articles on State Responsibility for Internationally Wrongful Acts (ARSIWA)⁷¹¹ on ‘serious breaches’ ‘of an obligation arising under a peremptory norm of general international law’, followed by a critical appraisal of the scheme. The ‘serious breaches’ regime was designed mainly by Crawford.⁷¹² It will be argued that, despite the high rate of acceptability of ARSIWA, its ability to promote a more multilateral international law are compromised by an excessive focus on dispute settlement, which is inherently bilateral. This is what this thesis calls an attempt to solve multilateral problems via bilateral solutions. ARSIWA fails the multilateral project firstly in positive law standpoint by (a) overly focusing on invocation of responsibility, (b) dividing those entitled to invoke breaches between ‘injured’ and ‘non-injured’, (c) and enshrining *less serious* consequences to breaches of peremptory norms than the breaches of other obligations. This means that the current system, in attempting to solve multilateral problems through inherently bilateral mechanisms, loses the true public order flavour of ICS, and creates legal idiosyncrasies that are difficult if not impossible to overcome. A less pragmatic and consensus-focused approach that

⁷⁰⁹ Crawford, ‘Multilateral Rights and Obligations in International Law’ (n 595).

⁷¹⁰ James R Crawford, ‘International Law as an Open System’, *International Law as an Open System: Selected Essays* (Cameron May 2002).

⁷¹¹ UNGA Res 56/83 (28 January 2002) UN Doc A/Res/56/83. From now on the Articles on State Responsibility will be referred to as ARSIWA or The Articles.

⁷¹² Dingle and Bates (n 684) 158.

committed to the crafting of adequate innovative mechanisms which catered to breaches of obligations owed to the international community would have yielded better results. This section concludes by presenting personal and broader political reasons why Crawford might have chosen to turn to bilateral solutions.

(a) Articles on State Responsibility and serious breaches – the structure

Internationally wrongful acts under ARSIWA have been unified under a single category independent of gravity or substance. Part Two, Chapter 3, entitled ‘Serious Breaches of Obligations Under Peremptory Norms of General International Law’ (Serious Breaches), contains Article 40, on application and definition, and Article 41, on particular consequences of these breaches

Article 41

Particular consequences of a serious breach of an obligation under this chapter

1. States shall cooperate to bring to an end through lawful means any serious breach within the meaning of article 40.
2. No State shall recognize as lawful a situation created by a serious breach within the meaning of article 40, nor render aid or assistance in maintaining that situation.
3. This article is without prejudice to the other consequences referred to in this part and to such further consequences that a breach to which this chapter applies may entail under international law.

Part Three (‘Implementation of the International Responsibility of the State’) establishes two regimes for invocation of ‘serious breaches’. Invocation of serious breaches by *injured states* is governed by Article 42 (b):

Article 42

Invocation of responsibility by an *injured State*

A State is entitled *as an injured State* to invoke the responsibility of another State if the obligation breached is owed to:

- (i) that State individually; or
- (ii) a group of States including that State, or the international community as a whole, and the breach of the obligation:
 - (v) *especially affects* that State; or
 - (vi) *is of such a character as radically to change the position* of all the other States to which the obligation is owed with respect to the further performance of the obligation.
[emphasis added]

Invocation of serious breaches by non-injured states is governed by Article 48. Article 48(1) indicates the standing of non-injured states and Article 48(2) lists what these non-injured states may claim.

Article 48

Invocation of responsibility by a State other than an injured State

1. Any State *other than an injured State* is entitled to invoke the responsibility of another State in accordance with paragraph 2 if:

(a) *the obligation breached is owed to a group of States including that State*, and is established for the protection of a collective interest of the group; or

(b) *the obligation breached is owed to the international community* as a whole.

2. Any State entitled to invoke responsibility under paragraph 1 may claim from the responsible State:

(a) *cessation* of the internationally wrongful act, and *assurances and guarantees of non-repetition* in accordance with article 30; and

(b) *performance* of the obligation of reparation in accordance with the preceding articles, in the interest of the injured State or of the beneficiaries of the obligation breached.

3. The requirements for the invocation of responsibility by an injured State under articles 43, 44 and 45 apply to an invocation of responsibility by a State entitled to do so under paragraph 1. [emphasis added]

We must also look at where ‘serious breaches’ do *not* appear. Under Part 3 (‘Implementation’), there is no express provision for ‘Countermeasures’ for serious breaches. Although this does not prejudice countermeasures by states *injured* by a serious breach, it leaves open the adoption of countermeasures by non-injured parties, even when they are acting on behalf of the international community. A previous version of the Articles did regulate countermeasures by non-injured states, but the Special Rapporteur chose to exclude it due to disapproving comments by states.⁷¹³

This lack of an express provision for countermeasures for non-injured states in cases of serious breaches is coupled with their absence from Article 41 (consequences of serious breaches). Article 48(2) (invocation by a state other than an injured state) only expressly allows for non-injured states to claim cessation, guarantees of non-repetition, and performance. An article

⁷¹³ James Crawford, ‘Introduction’, *The International Law Commission’s Articles on State Responsibility: Introduction, Text and Commentaries* (CUP 2002) 55–56.

providing for damages commensurate to gravity of breach was deleted.⁷¹⁴ Crawford sought to remediate these absences of exclusion with a saving clause, under Article 54:

Article 54

Measures taken by States other than an injured State

This chapter does not prejudice the right of any State, entitled under Article 48, paragraph 1 to invoke the responsibility of another State, to take lawful measures against that State to ensure cessation of the breach and reparation in the interest of the injured State or of the beneficiaries of the obligation breached.

Notice the article's language of 'measures', rather than countermeasures.

(b) How does the 'serious breaches' regime compare to Ago's vision for 'International Crimes of States'?

Post-Ago, pre-Crawford interventions had already contributed to the bilateralisation of responsibility for breaches of communitarian norms. The comparison between current ARSIWA and 'crimes' is drawn based on how the system was originally envisaged under Ago. Ago's idea was never that crimes of states would be dealt with at the individual state level, but through multilateral institutions. Although he never elaborated upon how the institutional mechanisms would function, it is fair to assume they would be similar to UN Security Council sanctions, collective responses to international crimes.⁷¹⁵

The current regime described above created under Crawford differs from the originally envisaged ICS regime in the following ways: (1) the language of 'sanctions' has been substituted for that of 'invocation'. (2) The regime of invocation differentiates between 'injured' and 'non-injured states', even in cases when the obligation breached is owed to the 'international community as a whole'. (3) Remedies available for 'serious breaches' are neither sanctions nor punitive damages, but cessation, guarantees of non-repetition, and reparation. (4) In cases of claims where no state is 'injured', and there are no direct 'victims', there is no right to claim reparations. (5) Despite Article 54 being a saving clause, there is no express provision on non-

⁷¹⁴ Ibid 36.

⁷¹⁵ See above, 'd. ICS via institutions: a truly multilateral paradigm'.

injured states and countermeasures for serious breaches, even when the obligations in question are owed to the international community.

Although admitting that the consequences of the switch from crimes to serious breaches were ‘not just terminological’⁷¹⁶, Crawford describes the aforementioned changes as old wine, new bottles. In his version, crimes were merely ‘broken into distinct components more closely related to the twin concepts of peremptory norms and obligations towards the international community as a whole’, closer to its ‘legal (as distinct from rhetorical) underpinnings’.⁷¹⁷ It is argued here that the transition from crimes to serious breaches has had much greater consequences than Crawford leads on: it takes state responsibility further away from the original multilateral project. The current regime tries to solve *multilateral* problems using *bilateral* solutions. This creates many idiosyncrasies in positive law. Equally importantly, it stimulates the system as a whole to move towards bilateralism, and consequently away from multilateralism. If the multilateral project was built piecemeal at the peripheries of state consent through aggregative bold moves of members of the invisible college, the bilateralization of ARSIWA may have the same effect, in reverse.

Crawford’s system of responsibility hinges on ‘Invocation’, both for ‘injured’ and ‘states other than an injured state’. Breaches of multilateral norms, which offend the international community, are also remedied in a system of notifications and claims conducted by states themselves individually as members of the international community. ‘Invocation’ is defined in the commentaries as ‘taking measures of a relatively formal character’ through ‘the raising or presentation of a claim [...] or the commencement of proceedings before an international court or tribunal’, and deliberately distinguished from mere ‘protest’.⁷¹⁸ It is clear that the ARSIWA system is built with traditional bilateral dispute settlement in mind. Emphasizing traditional dispute settlement as the solution to multilateral disputes is problematic because is that the claims system is fundamentally bilateral⁷¹⁹. Crawford himself argues⁷²⁰ inter-state dispute

⁷¹⁶ Crawford, ‘Introduction’ (n 713) 36–37.

⁷¹⁷ Ibid 37.

⁷¹⁸ Ibid 256.

⁷¹⁹ Although, as it will be shown below, Section III, D, 3, he attempts to soften this through stimulating procedural flexibility in areas such as interventions or multi-party proceedings.

⁷²⁰ Crawford and Grant (n 688).

settlement mechanisms such as the ICJ or arbitration, are inherently adversarial, and thus force bilateralisation. But what are the alternatives? Ago, though unable to elaborate on this before the end of his tenure at the ILC, had a very different idea of how to operationalize ICS which did not involve bilateral invocation. His plan was to create a system in which multilateral institutions – the United Nations for instance – would have a role in addressing ICS. There is no trace of this in the current regime of ARSIWA. The requirement that invocation take place in a formal setting, excluding ‘protest’ undertaken at the international organisations level is further evidence of bilateralisation.

The second idiosyncrasy created by the ‘serious breaches’ regime is the differentiation between ‘injured state’ and ‘state other than an injured state’.⁷²¹ Previously, under the ‘extended definition of an injured state’⁷²², when states breached ‘obligations towards the international community’ all states were considered injured, and were in equal footing to take action. Under the current scheme, ‘injured states’ invoke responsibility under Article 42, and ‘states other than an injured state’ invoke it under Article 48 of ARSIWA. It is incongruous to refer to ‘states other than an injured state’ at all if one is talking about obligations owed to the international community. Surely all states are ‘injured’ if an obligation breached is owed to *all states*. In creating a division between ‘injured’ and ‘other’ states, Crawford creates a system in which all states are equal when it comes to avenging serious breaches, but some states are more equal than others. This division also brings to the fore the lines between codification and progressive development, potentially discouraging states to use Article 48. Since Article 48 has not yet been utilized, and it was overtly proposed as progressive development,⁷²³ there is technically still room for a second *South West Africa* to happen, which is exactly what a multilateral regime of responsibility was meant to avoid.

Similarly, the system currently available to *remediate* internationally wrongful acts, even when they are ‘serious breaches’ concerning the international community, relies on bilateral

⁷²¹ ARSIWA, Part Three (Implementation of the International Responsibility of the State), Chapter I (Invocation), Article 42 (Invocation of Responsibility by an Injured State), and Article 48 (Invocation of Responsibility by a State Other Than an Injured State).

⁷²² Crawford, ‘Introduction’ (n 713) 7.

⁷²³ ILC ‘Fourth report on State Responsibility, by Mr. James Crawford, Special Rapporteur’ (2001) UN Doc A/CN.4/517 para 52.

mechanisms to be put in practice. Upon invocation, internationally wrongful acts are remediated via reparations⁷²⁴. Even in cases of ‘serious breaches’ – by injured as well as non-injured states – reparation features as the principal remedy that can be sought by the applicant. Reparation, under ARSIWA Article 34 et seq, takes form of ‘restitution, compensation and satisfaction’. Although consequences of ICS as envisaged by Ago never materialized, one can observe how in remediating ICS, ‘sanctions’ played a key role. This is signalled by Ago’s use of UN sanctions against states involved in *Apartheid* and colonial domination as evidence of a move towards an acceptance of an aggravated regime of state responsibility. Sanctions by international institutions within the realm of responsibility are part of a move towards multilateralism, a means of remediating offences via organs that somewhat mirror the international community.⁷²⁵ The shift in language from ‘sanctions’ to ‘reparations’ signals yet another move away from the *ordre public* quality of ICS in favour of a bilateral, private law-type of regime. Even when the breaches are of obligations towards the whole international community, one speaks of mere reparation, not punishment. Attempts to modulate reparation on the basis of the seriousness of a breach, which could be seen as a way of somewhat ‘publicising’ reparation, were made in the previous version of Article 42 – ‘payment of damages reflecting the gravity of the breach’ –, but objections by governments led to its deletion, even when Crawford attempted to reassure states that the character of aggravated reparations was not ‘punitive’.⁷²⁶ More importantly, the articles deliberately exclude reparations in the absence of an identifiable injured party. This means that, in cases of breaches to ‘true’ multilateral norms such as an environmental disaster without direct victims or directly injured states, a state bringing a case under Article 48 ‘on behalf of the international community’ is restricted to asking for cessation and guarantees of non-repetition.⁷²⁷

The loss of the *ordre public* aspects of ICS could have been somewhat remediated by the possibility to impose countermeasures against states acting in violation to obligations towards the international community as a whole. Though still bilateral in character, as

⁷²⁴ Alongside, in cases of invocation by ‘injured states’ and ‘states other than an injured state’.

⁷²⁵ Ago, ‘Communauté Internationale et Organisation Internationale = The International Community and International Organisation’ (n 608).

⁷²⁶ Crawford, ‘Introduction’ (n 713) 36.

⁷²⁷ Ibid 45.

countermeasures are imposed by a state or a group of states *proprio motu* rather than by multilateral institutions, they would allow for some protection of community interests. There is no explicit provision, however, for countermeasures to be imposed when a state is acting on behalf of the international community – Article 52 deliberately only speaks of countermeasures taken by *an injured state*. Although a saving clause was included under Article 54,⁷²⁸ it specifically mentions that ‘measures’ taken under Article 48 must be in the interest of ‘the injured state or of the beneficiaries of the obligation breached’. It neither calls these measures *countermeasures*, nor allows for said ‘measures’ to be imposed expressly in the name of the *international community*.⁷²⁹ Crawford argues that through this saving clause ARSIWA allows for state practice to grow in the direction of permitting countermeasures in Article 48 cases,⁷³⁰ but this structure at worst completely excludes the practice, and at best certainly does not steer the law in that direction.

The result is that, paradoxically, in the absence of countermeasures, absent the possibility of bringing a claim for punitive damages, and excluded the possibility of asking for reparation in the absence of identifiable victims, the most ‘serious’ breaches of international obligations have less serious consequences than breaches of regular obligations.⁷³¹

It is thus concluded that the content of the law in the current ARSIWA regime structured under Crawford generates certain idiosyncrasies, because it attempts to fit a concept of multilateral rights and obligations owed to the international community into the moulds of inherently bilateral legal models. The defeats at Crawford’s attempts to further multilateralise his proposed scheme – the unilateral use of countermeasures by non-injured states or the abuse of reparations akin to punitive damages in cases of alleged violations of community obligations – arise out of understandable concerns over a system that leaves for individual states to provide solutions for multilateral problems. Issues of political economy (who will have the resources to invoke breaches and bring claims), perpetuation of subordination relations, and power

⁷²⁸ ‘This Chapter does not prejudice the right of any state, entitled under Article 48, paragraph 1 to invoke responsibility of another state, to take lawful measures against that state to ensure cessation of the breach and reparation in the interest of the injured state or of the beneficiaries of the obligation breached’, ARSIWA, Art. 54.

⁷²⁹ Crawford, ‘Introduction’ (n 713) 55–56.

⁷³⁰ *Ibid* 56.

⁷³¹ This is observed by Antonio Cassese as elaborated upon above.

struggles are exacerbated in this bilateral scheme. These punctual defeats, such as the absence of a provision on countermeasures or a system of aggravated damages, may indeed not only stall, but harm the multilateral project as a whole.

c. The person and the means: Crawford's method and techniques

Now that the structure of ARSIWA was set out, this section elaborates on *how* Crawford attempted to cement his version of multilateralism into international law. Ago's original ideal was to create a framework for state responsibility at the ILC which would then be transformed into a binding treaty through a State conference, similarly to how the VCLT came about. Crawford, on the other hand, was a proponent that the articles should *not* become a treaty, but remain 'soft'.⁷³² This section argues that what Crawford did instead was weave ARSIWA into the fabric of international law via practice and scholarship. This is consistent with his views on sources of international law and his pragmatism elaborated upon below. Aside from more obvious moves, such as utilising ARSIWA in his practice as counsel and as a Judge at the ICJ, and publishing scholarly work about the articles, this process also involved creating a 'narrative of failure' of ICS and a 'narrative of success' for Article 48, and blurring the boundaries between codification and progressive development.

What will be demonstrated is that to a large extent this process of 'weaving' ARSIWA into international law was successful, but that the most ambitious multilateral possibilities of the articles – namely Article 48(b) on standing of non-injured states to bring cases for 'serious breaches' of peremptory norms – have not yet materialised. This has not stopped Crawford from creating a narrative of success arguing the opposite in scholarship and, more recently, in his individual opinion as an ICJ Judge in the *Marshall Islands* cases.

(a) His method: 'Soft law for a hard world'

Crawford's approach to the 'science and method'⁷³³ of international law provides insight into why he sought to further the 'multilateral project' in the ways described above. Although not adverse to theory, Crawford's approach to international law is pragmatic. Couple with his

⁷³² James Crawford and Simon Olleson, 'The Continuing Debate on a UN Convention on State Responsibility' (2005) 54 ICLQ 959.

⁷³³ Borrowing the term used in Section I of this thesis based off Oppenheim (n 52).

pragmatism is generalism, a constant effort to counter a fragmented view of the discipline, which allowed him to both articulate and weave the language of ARSIWA in many areas of law through prolific practice. Though far from a utopian he is certainly an optimist about international law's ability to constrain state action, a view he describes as 'realist idealism'.⁷³⁴

(b) Sources: flexible aggregative approach to custom

Crawford's approach to sources reveals why he has sought to further the multilateral project through mixed practice.

Though a self-proclaimed positivist,⁷³⁵ Crawford's views on sources are neither traditional, nor completely state-centric⁷³⁶. His departure from mainstream positivist approaches to sources is most clear in his thoughts on the formation of custom.⁷³⁷, where he defends that it is impossible to see international law as a static force; one cannot capture custom in a snapshot, it develops by *accretion*, as part of a *process* - international custom is 'a conversation across time', which must be 'brewed' like 'good coffee'⁷³⁸. Throughout this process, norms slowly crystallize, and adapt, as statements on what the law is that get picked up by states, or people, or institutions, until it becomes law. 'Soft law' plays a big part in this process, in his conception: 'the work of the International Law Commission can't be fitted into 'the Sources of International Law', Article 38 as it stands, and yet it's (sic.) been extremely influential'⁷³⁹, 'UN General Assembly Resolutions may act as a precursor to a treaty or custom, or both'.⁷⁴⁰ 'Treaties may, in defiance of the Baxter (false) Paradox,⁷⁴¹ help articulate custom beyond *pacta sunt servanda*.⁷⁴² '[Special categories of multilateral norms] were born 'largely outside the realm of

⁷³⁴ Dingle and Bates (n 684).

⁷³⁵ 'If that makes me a positivist, I am a positivist' Ibid 119.

⁷³⁶ In contrast with for instance, Sir Michael Wood and Omri Sender, 'Identifying the Rules for Identifying Customary International Law: Response from Michael Wood and Omri Sender'. See also Olivier Corten, *Méthodologie Du Droit International Publique* (Editions de L'Université de Bruxelles 2009) 162.

⁷³⁷ James Crawford and Thomas Viles, 'International Law on a Given Day', *International Law as an Open System: Selected Essays* (Cameron May 2002); Crawford, 'Chance, Order, Change: The Course of International Law' (n 15); Crawford, 'The Identification and Development of Customary International Law' (n 38).

⁷³⁸ Crawford, 'Chance, Order, Change: The Course of International Law' (n 15) 143.

⁷³⁹ Dingle and Bates (n 684) 129.

⁷⁴⁰ Crawford, 'Chance, Order, Change: The Course of International Law' (n 15) 146.

⁷⁴¹ 'The Baxter paradox then, is not so much an insoluble paradox as a valid reflection on the distinct attributes of treaties and custom – something to be embraced and not avoided' Ibid.

⁷⁴² Ibid.

state practice – through actions and reactions by the International Court and the ILC and, to a lesser extent, scholars’.⁷⁴³

Crawford puts courts and legal practice at the centre of this process:

Even if the [ICJ’s] judgments have a binding effect only between the parties involved, and are merely ‘subsidiary means for the determination of rules of law’, in practice they are treated as ‘authoritative pronouncements of the current state of international law’.⁷⁴⁴

His emphasis on practice as a motor behind legal development becomes more clear if seen in opposition with his views on scholarship. He argues Lauterpacht’s greatest contributions, for example, came from his ‘opportunistic’ work as a practitioner,⁷⁴⁵ which Crawford’s considers more important than Lauterpacht’s excessively utopian scholarship.⁷⁴⁶ Crawford warns against overestimating the role of individual academics for the growth of the field.⁷⁴⁷ the “fight in the courtrooms”, outside universities, and the foundation of institutions such as IOs and permanent courts, was the most important factor in the advance of the discipline in the UK in his conception.

In summary, Crawford rejects ‘generic formulas’ of lawmaking in favour of a systemic view of (customary) international lawmaking. Focusing excessively on listing what counts as state practice *versus opinio juris*, and being overly concerned with state consent/participation is to over-simplify international law’s complexity.⁷⁴⁸ ‘[o]nly by focusing on the sequence through which institutions’, such as the ILC or international courts, ‘historically develop can we see customary international law for the praxis-based system that it is’.⁷⁴⁹ In this process, he gives special consideration to courts/judicial institutions, practitioners, and the ILC. His consciousness of the phenomena illuminates *why* he sought to conclude ARSIWA as a ‘soft’ instrument rather than a treaty, which he could control in personally weaving into international law in a series of praxis-based moves.

⁷⁴³ Ibid 261.

⁷⁴⁴ Crawford, ‘The Identification and Development of Customary International Law’ (n 38) 5 footnotes omitted.

⁷⁴⁵ Crawford, ‘Public International Law in Twentieth-Century England’ (n 40) 698.

⁷⁴⁶ Ibid.

⁷⁴⁷ Ibid 693 et seq.

⁷⁴⁸ Crawford, ‘Chance, Order, Change: The Course of International Law’ (n 15) 85.

⁷⁴⁹ Ibid 144.

(c) Pragmatism, generalism, optimistic realism

Crawford's pragmatist⁷⁵⁰ streak is evident in his work.⁷⁵¹ In that respect, he sometimes mirrors Brownlie⁷⁵² - his PhD supervisor, colleague, and friend.⁷⁵³ When questioned about international law's existence, Brownlie often responded 'If you do not believe international law exists, look at my bank balance'.⁷⁵⁴ Crawford's response is more polished, but similarly reality-bound: there is proof that international law exists 'whenever an international flight takes place, whenever a ship arrives in a foreign port, whenever an international tribunal issues a decision that purports to be a reflection of the law as it is'.⁷⁵⁵ Responding to International Law's critics, he paraphrases Louis Henkin: one can see that international law exists because 'almost all nations observe almost all principles of international law and almost all of their obligations almost all the time'.⁷⁵⁶ When facing the challenge of 'indeterminacy', Crawford's response is that '*ppur si muove*' – indeterminate or not, international law exists and functions: it still moves.⁷⁵⁷ When confronting the realist challenge of whether international law speaks truth to power or merely reproduces it, he tells us the story of how East Timor, despite the UN's inability to prevent conflict with Indonesia,⁷⁵⁸ was '[kept on the agenda]'⁷⁵⁹ and allowed for UN Administration through Portugal to address 'outstanding issues'⁷⁶⁰. Though some warn us of the dangers of fragmentation in an expanding and decentralized system, his response is that 'the centre holds'

⁷⁵⁰ 'Pragmatism' is defined as 'an approach that evaluates theories or beliefs in terms of the success of their practical application', or an attitude whereby one [deals] with things sensibly and realistically in a way that is based on practical rather than theoretical considerations' (Oxford Dictionary of Law (7th edn, OUP 2013)).

⁷⁵¹ In his response to the difficulties in differentiating codification and progressive development in ILC work is that 'Ultimately, the process of identifying progressive development could be a matter of knowing it when one sees it' (James Crawford, 'The Progressive Development of International Law: History, Theory and Practice', *Unity and Diversity in International Law: Essays in Honour of Jean-Marie Dupuy* (2014) 22). When speaking of the Jewish 'emigrés' role in the development of international law in Britain, he downplays their role as theorists and boosts the role of the FCO who developed 'international law in practice', haphazardly, 'pragmatically', 'as [issues] arose and by whoever had responsibility for them' (James Crawford, 'Public International Law in Twentieth-Century England', *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth Century Britain* (2004) 687–688).

⁷⁵² Hence the preservation of many aspects of the latter's original work the former's updated edition of Brownlie's *Principles*. Dingle and Bates (n 684) 119, 121.

⁷⁵³ Dingle and Bates (n 684); Lowe (n 148).

⁷⁵⁴ John Louth and Merel Alstein, 'Challenges for International Law' (*OUPblog*, 2012) <<https://blog.oup.com/2012/12/challenges-for-international-law/>> accessed 19 April 2018.

⁷⁵⁵ Crawford, 'Chance, Order, Change: The Course of International Law' (n 15) 178.

⁷⁵⁶ Louis Henkin, *How Nations Behave: Law and Foreign Policy*. (Council of Foreign Relations ed, Pall Mall 1968).

⁷⁵⁷ Crawford, 'Chance, Order, Change: The Course of International Law' (n 15) 177–179.

⁷⁵⁸ *Ibid* 52–53.

⁷⁵⁹ *Ibid* 53.

⁷⁶⁰ *Ibid*.

as the system develops its ways of dealing with fragmentation through practice: preferences of substance are allocated, comity in dispute settlement is introduced, and *lex specialis* solves issues of incongruence.⁷⁶¹

Crawford believes that the discipline as a whole was borne out of practice, out of international reality, not out of big theoretical projects. In his interview with Lesley Dingle:

I think that there's more history in international law than there is theory, in the sense that I think international law is more determined by its history than it is by any systematic body of a priori thinking.⁷⁶² 'The international law we have is different because certain people did things on certain days and you've got to acknowledge that, and it doesn't amount to a metaphysics of international law except to the extent that in any field of human endeavour if you do something you are implying a certain version of human life.'⁷⁶³

Crawford's work is also pervaded by a belief in international law as a generalist subject. This can be inferred by his wide-ranging practice⁷⁶⁴, but was also expressly articulated:

[W]e need international law as a whole, not a set of parts attracting differential affiliation or disrespect. Trade notoriously suffers in wars; children suffer from misrule; the environment suffers from misguided production because of subsidies. Things are connected. This is not to suggest that international law is a universal solvent or solution. But it is an indispensable method—the world being as it is—for exploring and implementing solutions.⁷⁶⁵

He defends to preserve international law's fragile systematicity, one must teach it, write about it, and practice it as a coherent whole, considering all of its parts. In Crawford's view, international law is not a set of isolated contract-like rules, but as a system, with a 'centre' that must 'hold'⁷⁶⁶:

[...] [I]nternational law has been and remains a system, based on and helping to structure a system of relations among states and other entities. Yet this systemic aspect is lost or obscured if one studies only the law of the sea, the law of the environment, the law of human rights. For these presume, and are configured by, the

⁷⁶¹ Ibid 309.

⁷⁶² Dingle and Bates (n 703) 94. This is also supported by his statements in Crawford, 'Public International Law in Twentieth-Century England' (n 40).

⁷⁶³ Dingle and Bates (n 684) 120.

⁷⁶⁴ International Court of Justice (n 565).

⁷⁶⁵ Crawford, *Brownlie's Principles of Public International Law* (n 17) Preface. He makes a similar point in

⁷⁶⁶ 'The Centre Holds', Crawford, 'Chance, Order, Change: The Course of International Law' (n 15) 308.

law of the land, the anthropocene environment, the powers of states. The sea, the environment would not be problems if not for ourselves and our associations.⁷⁶⁷

Crawford made attempts throughout his career to *teach* international law in general and international dispute settlement in particular as a unified whole. Teaching dispute settlement by international jurisdiction ‘seems to give rise to the kind of fragmentation at the educational level, which at the practical level is so often lamented’ – settlement of disputes perceived as a whole says something ‘about our still-general discipline’.⁷⁶⁸

The final characteristic of Crawford’s works’ *ethos* that illuminates his choices in furthering the ‘multilateral project’ was his ‘[idealist realism]’.⁷⁶⁹ He set himself apart from utopians who believed in a clear path of progress for international law towards a confederation by ‘[rejecting] Hersch Lauterpacht’s notion that international law is in a transitional stage and evolving towards something very different’⁷⁷⁰. Simultaneously, he refused to align himself with ‘crits’, such as Koskenniemi; though he considers the latter ‘the greatest theorist of international law of the 21st century’, they do not ‘always agree’.⁷⁷¹ He saw international law as a viable (though not exclusive) tool for coordination in solving world problems;⁷⁷² international law does not solve all the problems in the world, but it does determine something.⁷⁷³ ‘Things will never be perfect, but they can be improved and if that makes me a reformist, well, c’est la vie’.⁷⁷⁴

⁷⁶⁷ Crawford, *Brownlie’s Principles of Public International Law* (n 17) Preface. He makes a similar point in the Preface of ‘Chance, Order, Change: The Course of International Law’ (n 15): ‘[this book] reflects the general view of international law and covers a range of topics within the field. It’s not a conventional general course. It’s not a textbook. It’s an attempt to try and solve a number of problems, looking at international law as a system which is not preordained, which is not determined ultimately by any set of formulas or principles, which is extremely contingent, but nonetheless has an ordering force.’

⁷⁶⁸ James Crawford, ‘Continuity and Discontinuity in International Dispute Settlement’ (2009) 1 *International Investment Law for the 21st Century: Essays in Honour of Christoph Schreuer* 3, 3–5.

⁷⁶⁹ In his own words, he ‘wanted to come up with a vision of international law that is both realist and idealist’ Dingle and Bates (n 703) 153.

⁷⁷⁰ *Ibid* 154.

⁷⁷¹ *Ibid* 153.

⁷⁷² *Ibid* 156.

⁷⁷³ *Versus* nothing, in Crawford’s Reading of Koskenniemi’s view, Crawford, ‘Chance, Order, Change: The Course of International Law’ (n 15) 150.

⁷⁷⁴ Dingle, ‘Sixth Interview (2 April 2008): Sir Eli’s Recollections of Some Legal Personalities’ (n 559) 137.le

International law for him does not exist only between ‘apology’ or ‘utopia’,⁷⁷⁵ a pure extension of politics.⁷⁷⁶ One may theorize indeterminacy all one wants, but ‘still, [international law] moves’⁷⁷⁷, it *in practice* functions when courts issue decisions on the basis of the law. And while moving, international law does some good, though it is by no means perfect. Though it may not immediately bring self-determination to the East Timorese, it helps keep their claims ‘in the agenda’.⁷⁷⁸

It is argued that Crawford’s efforts to perpetuate – whilst simultaneously creating – a sense of generalism is imbued with a concern that international lawyers must have a sense of appreciation for the subject, and an understanding of the system’s intricacies, their nuances, and in a way infusing those studying or practicing international law with a sense of responsibility. This is encapsulated in his own words describing his approach to the profession:

underlying that the conception that it’s possible to have both a professional approach to particular problems of clients and to persons interested in particular situations, and a view which is conducive to world order. It’s combining those two which international law tries to do in my vision of it.⁷⁷⁹

(d) His techniques

- a. Wishing success into being: creating a narrative of success of Article 48 and an exaggeration of the failure of ICS

One of Crawford’s move to embed Article 48 of ARSIWA⁷⁸⁰ into international law, furthering the ‘multilateral project’, was through creating a narrative of success for the provision in scholarship and practice. This is consistent with his ‘aggregative’ approach to sources explored above. It also takes place in parallel to his crafting of a narrative of failure for International Crimes of States (ICS) under previous Article 19 of the previous reading of the Articles.⁷⁸¹

⁷⁷⁵ Crawford, ‘Chance, Order, Change: The Course of International Law’ (n 15) 162.

⁷⁷⁶ Ibid 169. Though Crawford’s reading of Koskenniemi is not that the latter sees international law as pointless, but that it empowers international lawyers to use indeterminacy to promote a different world through law instead of being constrained by it (Ibid 171.) This is in line with Koskenniemi’s later work Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (n 97).

⁷⁷⁷ Crawford, ‘Chance, Order, Change: The Course of International Law’ (n 15) 178.

⁷⁷⁸ Ibid 49.

⁷⁷⁹ Dingle, ‘Sixth Interview (2 April 2008): Sir Eli’s Recollections of Some Legal Personalities’ (n 559) 158.

⁷⁸⁰ The article gives standing to states ‘other than an injured state’ to bring a claim for violations of obligations owed to a group of states including that state, or owed to the international community as a whole as per section (a) above.

⁷⁸¹ See (b) above.

In Crawford's Fourth Report, he expressly recognizes the novel character of Article 48: 'In the Special Rapporteur's view, chapter III is indeed a framework for the progressive development, within a narrow compass, of a concept which is or ought to be broadly acceptable.'⁷⁸² It is clear – Article 48 at the time in which it was drafted was considered an innovation, albeit a self-proclaimed conservative one, in allowing standing in the absence of injury on behalf of a collectivity or the 'international community'. This is further evidenced in the same report, where Crawford states that the provision 'in general achieves a certain balance, *de lege ferenda*, between the collective interest in compliance with basic community values and the countervailing interest in not encouraging the proliferation of disputes'.⁷⁸³ Notice that he highlights the *de lege ferenda* character of Article 48.

His subsequent work is less clear about the *de lege ferenda*/progressive development character of Article 48. In a 2011 article,⁷⁸⁴ he gathers practice from different courts to adduce that ARSIWA '[gave] teeth to communitarian norms',⁷⁸⁵ without giving a clear stance as to what extent it has already become law. In *Chance, Order, Change*, he firstly highlights the 'criticism' to which Article 48 was submitted, to then cite *Obligations to Prosecute or Extradite* and *Whaling*,⁷⁸⁶ the latter which was then pending, as evidence of Article 48's success.⁷⁸⁷

The language changes from one of progressive development in the final report, to tentative development in subsequent scholarship, to crystallized positive law in Crawford's dissent in *Marshall Islands*. In his individual opinion, his first after being elected to the Court, Crawford portrays Article 48 as the law as it stands. What in 2001 was 'progressive development' and a statement '*de lege ferenda*' is now 'established' law:

It is now established — contrary to the inferences commonly drawn from the merits phase of *South West Africa* — that States can be parties to disputes about obligations in the performance of which they have no specific material interests. This much is clear

⁷⁸² ILC 'Fourth report on State Responsibility, by Mr. James Crawford, Special Rapporteur' (2001) UN Doc A/CN.4/517 para 52.

⁷⁸³ ILC 'Fourth report on State Responsibility, by Mr. James Crawford, Special Rapporteur' (2001) UN Doc A/CN.4/517 para 42.

⁷⁸⁴ Crawford, 'Responsibility for Breaches of Communitarian Norms: An Appraisal of Article 48 of the ILC Articles on Responsibility of States for Internationally Wrongful Acts' (n 686).

⁷⁸⁵ *Ibid* 240.

⁷⁸⁶ *Whaling in the Antarctic (Australia v Japan: New Zealand intervening) (Merits)* [2014] ICJ Rep 226 hereafter *Whaling*.

⁷⁸⁷ Crawford, 'Chance, Order, Change: The Course of International Law' (n 15) 271–273.

from Article 48 of the International Law Commission's Articles on the Responsibility of States for Internationally Wrongful Acts (ILC Articles).⁷⁸⁸ (*Marshall Islands Dissenting Opinion*) [Emphasis added]

He appears to credit the success of Article 48, or its full conversion from tentative to 'international law proper', to the International Court of Justice, specifically the Court's practice in *Belgium v Senegal* and *Whaling*. In his interview with Lesley Dingle:

[Y]ou might say that the legal interest of Belgium was because of their taking a specific procedural role under the Torture Convention in seeking trial or extradition. The Court didn't do that. The Court said that by virtue of the provisions of the Torture Convention the prohibition on torture is a collective interest, *erga omnes partes*, they used the phrase, and that's what Article 48 says.⁷⁸⁸

This phenomenon of building on the work of other bodies, which he calls 'international law by stealth'⁷⁸⁹, in *Belgium v Senegal* was reinforced in his view by the exercise of jurisdiction in *Whaling*.⁷⁹⁰

Upon closer scrutiny, however, neither *Belgium v Senegal* nor *Whaling* are within the truly controversial remit of Article 48. Article 48(1) deals with who has 'standing' to bring a claim other than an injured state, but it is divided into two provisions. Article 48(1)(a) gives standing to states belonging to a group to which the obligation is owed who have a 'collective interest' – the '*erga omnes partes*' provision; 48(1)(b) gives standing to non-injured states in truly public order-type cases, breaches of obligations 'owed to the international community as a whole'. Standing under Article 48(1)(a) has always been relatively uncontroversial; states belonging to a group to which obligations are owed may bring claims against one another independently of direct injury.

Both *Belgium v Senegal* and *Whaling* fall under the uncontroversial limb of Article 48, Article 48(1)(a) which essentially codifies the *Wimbledon* case.⁷⁹¹ Belgium is a party to the Convention

⁷⁸⁸ Lesley Dingle, 'International Litigation: Judge James Crawford' (*Eminent Scholars Archive*, 2018) <<https://www.squire.law.cam.ac.uk/eminent-scholars-archive/judge-james-crawford/international-litigation-judge-james-crawford>> accessed 4 October 2018.

⁷⁸⁹ Crawford, 'Chance, Order, Change: The Course of International Law' (n 15) 141.

⁷⁹⁰ 'Australia's claim against Japan in *Whaling in the Antarctic*, in which it invokes an obligation *erga omnes partes* under the International Convention for the Regulation of Whaling, may present it with another opportunity to consider the evolving law in this area'. *Ibid* 271–273.

⁷⁹¹ *Wimbledon*, 20.

Against Torture which creates an obligation to prosecute or extradite owed *erga omnes partes*⁷⁹²; the Whaling Convention to which both Australia and Japan are parties creates obligations to comply with whaling regulations that extend to all parties to the regime. In fact, the Court does not even mention the standing issue in its main opinion in *Whaling*.⁷⁹³ The truly controversial provision is Article 48(1)(b), which would allow any state to bring a claim when another state breaches *jus cogens*. Its applicability, reach, and acceptability remains open, as the Court has never pronounced itself on the subject since the *obiter* in *Barcelona Traction*.

In conclusion, Crawford has made progressively bolder statements as a scholar and as a judge about Article 48 of ARSIWA's embeddedness into positive international law, the provision which he considers his 'single most important contribution'⁷⁹⁴ to the field. He uses two ICJ cases to support the alleged widespread acceptance of Article 48, *Belgium v Senegal* and *Whaling*. However, neither case encompasses the limb of Article 48 that is truly controversial (Article 48(1)(b)). The majority opinion in *Whaling*, in which Crawford acted as counsel,⁷⁹⁵ does not discuss the issue of standing surrounding multilateral obligations. It is argued that this progressive change in Crawford's discourse is part of the construction of a self-fulfilling prophecy⁷⁹⁶ - a strategy of creating a progressive narrative of acceptance of Article 48 without much support of practice. The portrayal of Article 48 as successful, but also 'pragmatic' and rational, is further reinforced by a simultaneous account of International Crimes of States as doomed to fail – not embedded in state practice, legally problematic. The reinforcement of a dichotomy between Article 48 and ICS allows Crawford to distance himself from an excessively progressive and utopian view, which in turn strengthens the acceptability of Article 48, especially before more conservative audiences he has to cater to, such as the ICJ and state clients.

⁷⁹² And in fact as Crawford himself recognises, Belgium brings the case not under Article 48(1)(a), but as an injured state specially affected by a breach owed to it as part of a group of states under Article 42(b)(i), as it requested extradition and prosecution of Hissene Habré by Senegal, see Crawford, 'Chance, Order, Change: The Course of International Law' (n 15) 272.

⁷⁹³ See however Judge Owada's individual opinion in *Whaling*, 301.

⁷⁹⁴ Dingle and Bates (n 684) 143.

⁷⁹⁵ Dingle, 'International Litigation: Judge James Crawford' (n 788).

⁷⁹⁶ The process is also very similar to Ago's attempt to provide evidence of ICS's genealogy as part of positive international law above, Section II, C, 4.

A big part of Crawford's move to create a narrative of success for his 'serious breaches' occurred concomitantly to his creation of a narrative of failure for crimes of states. Crawford argues that support for ICS was weak amongst academics and that vehemently opposed by states. Pre-ARSIWA literature, however, is more receptive to ICS than he leads us to believe. Whereas Crawford's narrative describes the 'crimes of states' category as rejected by many,⁷⁹⁷ pre-ARSIWA literature presented a different picture.⁷⁹⁸ Post-ARSIWA Crawford creates a narrative of success for the articles he devised,⁷⁹⁹ though he admits his approach to 'obligations towards the international community as a whole' was not unanimously accepted. Whereas States were concerned with "opening the floodgates' of litigation", 'some scholars complained that it was too weak compared with the rejected notion of international crimes of states'.⁸⁰⁰

In a sea of praise of ARSIWA and its clever compromises,⁸⁰¹ some critiques to the project as indicated above⁸⁰² are compelling.⁸⁰³ It is counter-intuitive that (1) multilateral problems are solved bilaterally, by giving individual states standing to bring claims that are thus resolved in a bilateral adversarial procedure, and (2) that breaches of norms that offend the entire international community have a less strict treatment than breaches that only offend individual states.

b. Procedure as a means of multilateralising disputes beyond standing: necessary third parties, intervention, the meaning of a 'dispute'

In addition to the procedural access of non-injured parties to dispute settlement via the standing rules under Article 48 of ARSIWA, another means whereby Crawford attempted to multilateralise international law was by advocating differentiated rules of procedure to better

⁷⁹⁷ ILC 'First report on State Responsibility, by Mr. James Crawford, Special Rapporteur' (1998) UN Doc A/CN.4/490 5.

⁷⁹⁸ Alain Pellet, 'Can a State Commit a Crime? Definitely, Yes!' (1999) 10 EJIL 425; JHH Weiler, 'On Prophets and Judges Some Personal Reflections on State Responsibility and Crimes of State', *International Crimes of State: A critical Analysis of the ILC's Draft Article 19 on State Responsibility* (1989); Spinedi (n 650).

⁷⁹⁹ See below.

⁸⁰⁰ Crawford, 'Chance, Order, Change: The Course of International Law' (n 15) 271.

⁸⁰¹ Erik Wyler, 'Responsibility for Serious Breaches of Obligations Deriving from Peremptory Norms of International Law and United Nations Law' (2002) 13 EJIL 1241. On the praise for his treatise on State Responsibility launched after ARSIWA, see Dingle and Bates (n 684) 135–137.

⁸⁰² Part III, d. How does the 'serious breaches' regime compare to Ago's vision for 'International Crimes of States'.

⁸⁰³ Cassese, *International Law* (n 604); Dupuy (n 651); Alain Pellet, 'The New Draft Articles of the International Law Commission on the Responsibility of States for Internationally Wrongful Acts: A Requiem for States' Crime?' (2001) XXXII Netherlands Yearbook of International Law 55.

accommodate multilateral disputes. He has done this by utilizing his privileged and unique position as a member of the ‘invisible college of international lawyers’: firstly, as one of the most prolific members of the ‘international bar’ acting before the ICJ, secondly, as a well-respected ‘publicist’, and, thirdly, though more incipiently, as judge at the same International Court. This multilateralization through procedure has happened in at least three instances: (a) the flexibilisation of the ‘necessary third party’ admissibility challenge, (b) the expansion of ICJ practice allowing for third-party intervention, and, tentatively, (c) a more flexible definition of a ‘dispute’ in cases that involved multilateral interests. It will be concluded, however, that these attempts have enjoyed mixed success because (1) on a substantial level they continue to be a bilateral solutions to multilateral problems; and (2) counsel’s duties towards one’s clients takes precedence over systemic projects, leading to conflicting results. Thus, he has defended a more flexible approach to third-party consent in *Certain Phosphate Lands in Nauru*, but chose to distinguish, qualify, and to some extent betray the same development in the name of his client’s best interest in *East Timor*. Both problems are inherent to the process whereby the ‘invisible college’ functions: pushing for systemic change in the law via accretion, one benefits from the decentralized nature of the international legal system and the functioning of the ‘invisible college’. However, sometimes, piecemeal solutions to complex problems lead to idiosyncratic results; balancing a duty towards one’s conception of the system with a duty towards state clients may prove extremely difficult.

(a) The *Monetary Gold* Principle

The ‘necessary third-party’ rule is a challenge to the admissibility of cases before the International Court of Justice, which may stop the Court from ruling on the merits of a case. ICJ jurisdiction depends on consent of all parties to a case.⁸⁰⁴ When a plurality of states is involved in a dispute, and not all of them are parties to legal proceedings, the lack of consent of the absent states may pose a procedural hurdle. This challenge to admissibility is known as the *Monetary Gold* principle⁸⁰⁵. In that case, brought by Italy against France, the UK, and the

⁸⁰⁴ Be it via optional clause declaration (Article 36(2)), a treaty with a compromissory clause (Article 36(2)), an *ad hoc* special agreement between the parties (Article 36(1)), or consent to a dispute by appearing before the Court via *forum prorogatum*.

⁸⁰⁵ *Monetary Gold Removed from Rome in 1943* (Italy v. France, United Kingdom of Great Britain and Northern Ireland and United States of America) (Preliminary question) [1954] ICJ Rep 19.

US, the Court ruled that Albania's rights and obligations were 'the very subject matter' of the dispute, and thus it could not render a decision without Albania's consent.

Seemingly counter-intuitively, admissibility criteria that requires *more states to participate* in proceedings can reinforce bilateralism. ICJ consent-based jurisdiction system works on a bilateral basis, which reduces the means whereby multilateral problems may be tackled via adjudication: every potential applicant state wishing to bring a 'multilateral' case before the Court will have a multitude of jurisdictional relationships with the Court, depending on each of their jurisdictional relationships with each respondent state. These will vary depending on (1) whether the Applicant has an optional clause declaration and which reservations it appended to it, (2) whether the states against which they wish to bring cases also have such declarations, and *their* respective reservations thereto, and also (3) which treaties with which compromissory clause declarations these states have signed, and which reservations they have appended to that, etc. Multilateral claims will *always* be problematic from a jurisdictional standpoint, as it will be difficult for *all* potentially breaching states and the applicant state to have overlapping jurisdictional relationships between them and the Court. Thus, a more lenient approach to jurisdiction that allows for claims to be brought against *some* states (over which the Court has jurisdiction), and not others, is the only way in which practically these cases can be brought in the first place.

This is argued by Crawford as counsel for Nauru in *Certain Phosphate Lands in Nauru*. Nauru alleged that Australia acted in breach of its Trusteeship obligations by depleting Nauruan phosphate reserves during as part of an Administrative Authority to the territory. Australia argued that the Court could not hear the case in the absence of the other members of the Administrative Authority in trust of Nauru, UK and New Zealand. The Court in that case considered that the rights and obligations of the UK and New Zealand did not 'form the very subject matter of the dispute', and that it thus could rule on the merits. Had the Court decided to entertain Australia's necessary third party admissibility defence, a case in which breaches of a trusteeship agreement were at stake would not have been heard due to a procedural hurdle. In Crawford's words on behalf of Nauru:

'[It is the function of the Court], where possible consistent [sic.] with basic principles of jurisdiction, to do justice rather than to deny it. In the field of mandate and

trusteeship agreements and, with one regretted exception in 1966, the Court has always managed to achieve that, giving effect to the intentions of the founders of the system rather than the ambitions of the closet colonizers, the disguised annexationists, who have with their various subtleties - including legal subtleties - sought to prevail.⁸⁰⁶

The argument for a more lenient approach to the ‘necessary third party’ rule is that, when dealing with public order-type, multilateral claims, such as damage caused by alleged abuse of a trusteeship mandate, said claim should not yield in the name of less significant procedural hurdles. Given the aforementioned complications which creates a variety of jurisdictional relationships between different parties, relativizing the *Monetary Gold* principle is necessary to facilitate access of multilateral claims. The nod to *South West Africa* in Crawford’s pleading is no coincidence, given the relationship between multilateralism, procedural hurdles, and that case.⁸⁰⁷ Thus, bilateralising disputes in public order-type cases may, counterintuitively, move us closer to multilateralism, as it allows the Court to be seized of cases despite the absence of all parties whose interests are at stake.

(b) Meaning of ‘a dispute’ and procedural leniency

This procedural leniency in multilateral cases is elaborated upon by Crawford, now as judge, in the *Marshall Islands* cases. The cases were brought before the ICJ by the Marshall Islands against all nuclear weapons states – Non-Proliferation Treaty (NPT) parties and non-parties the UK, India, Pakistan, China, France, Israel, North Korea, Russia, and the United States. The Applicant argued that the states in question are in breach of their obligation, under the NPT and customary international law, to pursue nuclear disarmament. This is perhaps as *ordre publique* as a claim before the ICJ gets: although the Marshall Islands had suffered extensive damage from nuclear testing in the Pacific Ocean, they were attempting here to enforce an obligation against *all* nuclear weapon states, and on behalf of the international community – the Marshall Islands memorial speaks of the obligation to disarm as an ‘obligation *erga omnes*’ under Article 48 of ARSIWA.⁸⁰⁸ The Court by a narrow majority declared the case inadmissible

⁸⁰⁶ *Certain Phosphate Lands* (ICJ Pleadings) 1991 <https://www.google.com/url?sa=t&rct=j&q=&esrc=s&source=web&cd=1&cad=rja&uact=8&ved=2ahUK_EwjiP4TG5fXhAhVmRRUIHdb0C18QFjAAegQIAhAC&url=https%3A%2F%2Fwww.icj-cij.org%2Ffiles%2Fcase-related%2F80%2F080-19911122-ORA-01-00-BI.pdf&usg=AOvVaw1VJKMPB97pBdFykkag6fjx> accessed 29 04 2019 [34].

⁸⁰⁷ See a above.

⁸⁰⁸ *Marshall Islands* (Memorial for the Marshall Islands) <https://www.icj-cij.org/files/case-related/160/160-20150316-WRI-01-00-EN.pdf> accessed 19 April 2019 para. 103.

on the basis of a narrow conception of what constitutes a ‘dispute’, ruling that it denotes an ‘awareness’ by the parties against whom the case is brought that a legal dispute exists.⁸⁰⁹ This was a contentious decision.⁸¹⁰

Crawford argues in his dissent that the ‘dispute’ standard applied by the Court was not a requirement under ICJ practice,⁸¹¹ and that changes in that standard are especially detrimental in disputes of a multilateral character. He argues that discussion of such issues in multilateral *fora* may suffice to crystallize a ‘dispute’,⁸¹² and that the Court should not ‘deal with the underlying relations as bilateral *ab initio*’.⁸¹³ Leaping onto ARSIWA Article 48, he argues ‘contrary to the inferences commonly drawn from the merits phase of *South West Africa*’, ‘states can be parties to disputes about obligations in the performance of which they have no material interests’.⁸¹⁴ In essence: the law is now Article 48, and this entails that ‘a multilateral disagreement can crystallize for adjacent purposes as a series of individual disputes coming within the Statute’,⁸¹⁵ including, for instance, through multilateral negotiations on disarmament to which both the Applicant and Respondents to the case were parties. A *Monetary Gold* principle objection to admissibility would be, according to Crawford, more credible.⁸¹⁶

(c) Third-party intervention

Another area in which Crawford argues for adaptations in ICJ procedure to accommodate multilateral claims is third-party intervention. Under the ICJ Statute, third parties may appear as interveners when either they hold an ‘interest of a legal nature which may be affected by the decision in the case’ (Article 62 intervention), or when they are parties to a convention whose

⁸⁰⁹ *Marshall Islands India* decision, para 52: ‘On the basis of such statements, it cannot be said that India *was aware, or could not have been unaware*, that the Marshall Islands was making an allegation that India was in breach of its obligations. In this context, the conduct of India does not provide a basis for finding a dispute between the two States before the Court’ [emphasis added].

⁸¹⁰ George RB Galindo, ‘On Form, Substance, and Equality Between States’ [2017] AJIL Unbound 75; Christian Tams, ‘No Dispute About Nuclear Weapons?’ (*EJIL Talk!*, 2016) <<https://www.ejiltalk.org/no-dispute-about-nuclear-weapons/>> accessed 19 April 2019; Juliette McIntyre, ‘Put on Notice: The Role of the Dispute Requirement in Assessing Jurisdiction and Admissibility before the International Court’ (2018) 19 *Melbourne Journal of International Law* 1.

⁸¹¹ Crawford dissent paras. 7-19 <https://www.icj-cij.org/files/case-related/160/160-20161005-JUD-01-13-EN.pdf>.

⁸¹² *Ibid.*, para. 21.

⁸¹³ *Ibid.*, para. 21.

⁸¹⁴ *Ibid.*, para. 22.

⁸¹⁵ *Ibid.*, para. 22.

⁸¹⁶ *Ibid.*, para. 32-33.

‘construction’ is before the Court (Article 63 intervention). Crawford contends that when addressing the problem of adjudicating multilateral claims in a system that is inherently bilateral, ‘developments in the Court's approach to third-state intervention may help address the situation’⁸¹⁷. He welcomes collective interventions in cases such as that of Pacific States in the revived *Nuclear Tests* cases of 1995,⁸¹⁸ orchestrated by a team of counsel which included Crawford himself.⁸¹⁹ He also mentions *Land, Island, and Maritime Frontier Dispute*,⁸²⁰ and *Jurisdictional Immunities*⁸²¹ where the Court allowed for intervention on the basis of Article 62 of the Statute. These were not cases of public order interest as such. The first deals with delimitation, where the legal interests of a neighbouring state are affected in a very concrete way.⁸²² In the second, Greece’s interest stemmed from its attempt to enforce Greek judgments against Germany in Italy. The intervention of New Zealand in *Whaling*, on the other hand, was closer to a multilateral-style intervention through procedure. Again a case brought by a legal team spearheaded by Crawford, this case dealt with the ‘*erga omnes partes* [obligation of Japan] under the International Convention for the Regulation of Whaling’⁸²³. In the words of Malgosia Fitzmaurice, *Whaling* demonstrates the true multilateral character of certain treaties: ‘Their multilateral effect is reflected by the interest of Australia and New Zealand in mutual compliance irrespective of their ability to make claims to specific injury arising out of Japan’s violation.’⁸²⁴

⁸¹⁷ Crawford and Grant (n 688) 204.

⁸¹⁸ Request for an Examination of the Situation in Accordance with Paragraph 63 of the Court's Judgment of 20 December 1974 in *Nuclear Tests (New Zealand v France)* (Order) [1995] ICJ Rep 288.

⁸¹⁹ Counsel for Pacific Island States seeking to intervene: Samoa, Solomon Islands, Federated States of Micronesia, Marshall Islands. Lesley Dingle, Eminent Scholars Archive, International Litigation: Judge James Crawford, <https://www.squire.law.cam.ac.uk/eminant-scholars-archive/judge-james-crawford/international-litigation-judge-james-crawford>. Accessed 20/09/2018.

⁸²⁰ Case Concerning the Land, Island and Maritime Frontier Dispute (El Salvador/Honduras) (Judgment of Application of Nicaragua to Intervene) [1990] ICJ Rep 92.

⁸²¹ *Jurisdictional Immunities of the State (Germany v Italy)* (Order Application of the Hellenic Republic to Intervene) [2011] ICJ Rep 494.

⁸²² See Andreas Zimmermann and others, *The Statute of the International Court of Justice : A Commentary*. (2nd ed, OUP 2012) 1547 et seq. Especially in light of the still strict interpretation of 'legal interest' in *Sovereignty over Pulau Ligitan and Pulau Sipadan (Indonesia/Malaysia)* (Application for Permission to Intervene Philippines) [2001] ICJ Rep 575.

⁸²³ Crawford, ‘Chance, Order, Change: The Course of International Law’ (n 15) 343.

⁸²⁴ Malgosia Fitzmaurice, *Whaling and International Law* (Cambridge University Press 2018) paras 110–111. This does not mean, however, that that case was brought under Article 48(1)(b) of ARSIWA, see Wishing success into being: a premature narrative of success of Article 48...

(d) One step forward, two steps back – *Nauru* versus *East Timor*

What Simma characterised as a ‘step back’ for the multilateral project was also orchestrated by Crawford, in his second case before the Court after *Certain Phosphate Lands in Nauru*, the *East Timor* case. The case was brought before the Court by Portugal, which claimed that Australia had violated the right of self-determination of the people of East Timor by signing a treaty regarding the exploitation of the ‘Timor Gap’, an area of the Timor Sea between Australia and East Timor. East Timor had been previously under the administration of Portugal, but was annexed by Indonesia in 1975. If in *Certain Phosphate Lands in Nauru* Crawford argued for a flexible approach to the *Monetary Gold* in claims arising from ‘colonial domination’, in *East Timor* he contends the exact opposite. He argued successfully on behalf of Australia that Indonesia’s consent to ICJ jurisdiction is a ‘prerequisite’ for the determination of the validity of the Timor Gap treaty, even if the claim is formulated on the basis of a breach of self-determination.⁸²⁵ Subsequently, in his *Recueil des Cours* on multilateralism, he attempts to distinguish the ‘multilateral-friendly’ *Certain Phosphate Lands in Nauru*, for which he obviously has a penchant, over *East Timor*, by saying that in the latter Australia was not ‘itself responsible’ for Indonesia’s breach.⁸²⁶ Presumably this means that in *Certain Phosphate Lands in Nauru* Australia was just as responsible as the UK or New Zealand. The distinction is artificial.

It remains that, unlike in *Certain Phosphate Lands in Nauru*, by accepting Crawford’s argument in *East Timor* the Court ‘put the concept of obligations erga omnes into the procedural straitjacket of the doctrine of the ‘indispensable third party’ developed in the *Monetary Gold* case’⁸²⁷. In a harsh critique of the decision, John Dugard argues that *East Timor*, especially if compared with *Certain Phosphate Lands in Nauru*, highlights the vagueness of the *Monetary Gold* test for establishing whether a third states’ interest are merely ‘affected’ by the decision, or if they form the decision’s ‘subject-matter’.⁸²⁸ Dugard argues that, like in *South West Africa*, in *East Timor* the sovereign interests prevailed over values upheld by the international community: ‘[a]

⁸²⁵ *East Timor (Portugal v Australia)* ICJ Pleadings 16 February 1995 <<https://www.icj-cij.org/files/case-related/84/084-19950216-ORA-01-00-BI.pdf>> accessed 19 April 2019 44.

⁸²⁶ Crawford, ‘Multilateral Rights and Obligations in International Law’ (n 595) 348.

⁸²⁷ Simma (n 589) 298.

⁸²⁸ John Dugard, ‘1966 and All That. The South West Africa Judgement Revisited in the East Timor Case’ (1996) 8 *African Journal of International and Comparative Law* 549, 558.

strict regard for consent continues to trump competing legal claims, even when they belong to the category *jus cogens* or obligations *erga omnes*.⁸²⁹

It is thus concluded that Crawford utilized his privileged position as a member of the ‘invisible college’ to promote a more multilateral international law through pushing for innovative uses of procedure in inter-state litigation as both counsel and, more recently, as judge. In order to facilitate access of multilateral claims in the inherently bilateral judicial dispute settlement system (1) he pushed for a flexibilisation of the necessary third-party rule as counsel in *Certain Phosphate Lands in Nauru*, and (2) advocated for a less stringent view of what constitutes a ‘dispute’ in multilateral cases as a judge in *Marshall Islands*. Moreover, he sought to utilize third-party intervention to further reinforce the multilateral character of claims in revived *Nuclear Tests*, and subsequently in *Whaling*. He reinforced the importance of these moves for the multilateral project in his scholarship, also further enhancing the penetration of these ideas in international legal discourse, not always mentioning how these procedural moves were often orchestrated by himself as counsel, fortifying their authority and enhancing his influence in a game of light and shadow. In *East Timor*, however, in the interest of his client and country of origin, forces international law further away from the project for which he has a known ‘soft spot’.⁸³⁰ Although Crawford acknowledges that one must combine ‘a professional approach to particular problems of clients [...] and a view which is conducive to world order’⁸³¹, this is not always possible as demonstrated here. This is the downside of the ‘invisible college’s’ functioning – one must balance personal projects with the different ethical boundaries that each limb of the profession imposes.

⁸²⁹ Ibid 563.

⁸³⁰ Koskenniemi, ‘Book Review Brownlie’s Principles of Public International Law’ (n 206) 141.

⁸³¹ Dingle and Bates (n 684) 158.

4. 'Generalists' and the invisible college at work – conclusions

This section of the thesis described the processes whereby Roberto Ago and James Crawford associated themselves with the multilateral project and sought to promote it. The description of one specific project and the actions of two individuals in promoting it sheds light on the lawmaking role of the 'invisible college of international lawyers' that can be extrapolated beyond this case, if interpreted in the context of the ubiquity of the career paths and networks beyond Ago and Crawford, indicated in Part II of the thesis. It demonstrated simultaneously why international lawyers' power to make law defies simplification, and how it is pervasive. In a system where the making of law is decentralized and international lawyers constantly move between professional roles there is much room for individuals to influence the law. The techniques they employ to exert their influence are extremely varied. They depend on each individuals' theoretical conceptions of sources, their past professional experiences, and the spaces which they occupy in institutions ranging from universities to international organisations, to courts. The process is influenced by personal characteristics such as utopianism, pragmatism, political sensitivity, and professional networks, and contingent external factors such as historical era and states' political will. In this process, the individual international lawyers in question are faced with ethical dilemmas as they switch professional hats. States, institutions, and other members of the profession in the course of this process may either bolster or resist and compromise, sometimes fatally, their lawmaking efforts.

The first lawmaking effort furthering the multilateral project explored here is that of International Crimes of States (ICS) in state responsibility spearheaded by Roberto Ago. Ago's commitment to the multilateral project and how he sought to further it is influenced by many factors. His personal connection to Anzilotti led him to pursue State Responsibility as a scholar and practitioner as early as 1939. His work at international institutions such as the ILO and the UN, and the climate of greater trust in international institutions at the time of his efforts helps explain why he designed ICS as he did. Although adverse to positivism as a school, Ago was, at least until the 1980s, a proponent of codification. He was the chairperson of the Vienna Convention on the Law of Treaties, and envisaged that the ILC's State Responsibility project would culminate in a treaty. His skilful move as ILC Special Rapporteur to separate state responsibility into 'primary' and 'secondary rules' had fundamental effects on how we conceive

of this body of law today. His attempt however to make international law more ‘multilateral’ by introducing the concept of International Crimes of States (ICS) in the project is a prime example of a failed personal project. Ago sought to ground ICS into a greater scheme of developments that ‘multilateralised’ international law, such as the codification of *jus cogens* in the Vienna Convention on the Law of Treaties, and the famous *erga omnes dicta* of the International Court of Justice in *Barcelona Traction* - Ago incidentally played a big part in both the aforementioned developments. He managed to insert ICS in Article 19 of his version of the Articles on State Responsibility. Evidence suggests he envisaged ICS to be operationalized through a multilateral institution that would function similarly to or in tandem with UN multilateral sanctions. His appointment to the ICJ, however, meant he did not see the responsibility project through fruition. Under Special Rapporteurs Riphagen and Arangio-Ruiz, ICS was slowly bilateralised, and lost much of its original promise. The concept was finally eliminated by James Crawford, the next international lawyer prominent in this narrative.

James Crawford’s views on lawmaking, his pragmatism, his utopian realism and his effort to perpetuate generalism are all key in understanding why he went about furthering the ‘multilateral project’ the way he did – through bilateral means, and weaved into international law in scholarship, ILC work, and legal argument before courts and tribunals. In Crawford’s view international lawmaking is so complex that it cannot be apprehended by rigid methods, and something else is required for the system to function. In the ‘course of international law’⁸³² that is so decentralized, generalists, who are embedded in international law’s theory and practice, and who have a systemic view of the discipline, have a primary role. He performed this role very successfully in relation to ARSIWA, though his unwavering praise of the success of Article 48 was premature.

In this apparently random process where the law ‘changes’ by ‘chance’, the glue that binds international law together and ensures the incomprehensible ‘order’⁸³³ of said process, is the member of the ‘invisible college’⁸³⁴, imbued with a unique ‘sensitivity’⁸³⁵. This individual

⁸³² Crawford, ‘Chance, Order, Change: The Course of International Law’ (n 15).

⁸³³ Borrowing from the title of *Ibid.*

⁸³⁴ Crawford at times expressly downplays the role of the individual as such however, in favour of the practitioner. See Crawford, ‘Public International Law in Twentieth-Century England’ (n 40).

⁸³⁵ Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (n 97).

sensibility is informed but also transcends state power and consent, while being fully cognizant of states' central role. The system of socialization in developing this sensibility is key here; these lawyers who populate international conferences, organizations, courts (on the bench and at the bar), and universities, can agree beyond 'the state of the relations of their countries' to 'reach common ground'⁸³⁶ due to their common career paths, mentors, and shared doctrines,⁸³⁷ in this case, Anzilotti and Spender. These informal networks, which at the end of the day as demonstrated here design the 'course of international law' by disseminating ideas, are at the very heart of Crawford's approach to making international law more 'multilateral'. His investment in perpetuating a culture of generalism demonstrates a degree of perception of that.

These 'sensibilities' however are not pure utopianism and blind belief in international law as an ailment to all the world's problems. In Crawford's view, utopianism in itself is not to be applauded – one should at the end of the day be pragmatic and accept international law as what it is:

International Law is a way of telling the truth about the ought in international relations, or one of the oughts in international relations. I think it's a series of techniques, constrained, qualified, limited and no doubt defective that we have for doing that, and we don't have all that many.⁸³⁸

International law is *not* a proto-step in a narrative of progress towards an unattainable international federation, for instance:⁸³⁹ though it 'may require an 'internal attitude' it is 'surely not a leap of faith to the distant future'.⁸⁴⁰ Crawford is an 'optimistic realist', thus his rejection of Ago's plan to achieve multilateralism by crafting a new truly multilateral institution for processing state crimes. 'Obligations towards the international community as a whole' should be dealt with by operationalizing what we have, creating 'bilateral solutions' to 'multilateral problems'; they utilize institutions such as courts that are already in place, and articulate these solutions through the depoliticized language of procedure. Of course these positions generate idiosyncrasies, as they did in ARSIWA:⁸⁴¹ attempting to be an 'optimistic realist' requires

⁸³⁶ Martti Koskenniemi, 'Foreword' in Anthea Roberts (ed), *Is International Law International?* (OUP 2017) xiii.

⁸³⁷ D'Aspremont, *International Law as a Belief System* (n 400).

⁸³⁸ Dingle and Bates (n 703) 123.

⁸³⁹ Crawford, 'Public International Law in Twentieth-Century England' (n 40).

⁸⁴⁰ *Ibid* 698–699.

⁸⁴¹ The law: ARSIWA's serious breaches and bilateral solutions

reconciling the irreconcilable. In the process of attempting to make international law more ‘multilateral’ through interventions as a member of the ‘invisible college’, Crawford had to sometimes go against his own project— take for instance his intervention in favour of a strict application of the *Monetary Gold* principle in *East Timor*⁸⁴² in the interest of his client – not coincidentally his own state of nationality. Also often it will be impossible to discern a good from a bad move in furthering the project, or whether a pragmatic choice that sacrifices principle will pay off in the future, until much later – we still do not know whether Article 48(b) of ARSIWA will penetrate the fabric of international law as Crawford prematurely indicates.

⁸⁴² Procedure as a means of multilateralising disputes beyond standing: necessary third parties, intervention, the meaning of a ‘dispute’.

B. Beyond ‘general’ International Law: Specialized regime *vignettes*

This section will explore the processes whereby individual lawyers make international law ‘in their own image’ in three shorter vignettes: Sir Elihu Lauterpacht; Antonio Cassese; and Michael Schmitt. They are presented chronologically for organisational purposes, but are self-contained and can be read independently from each other.

These subjects were selected for three reasons. *Firstly*, they broaden the inquiry of this thesis into **specialised regimes** (international economic law/investment law; international criminal law/international humanitarian law; the regulation on the use of force/international humanitarian law). They shed light into the particularities of the process of individuals making law within different epistemic communities with their ‘collective shared beliefs and presuppositions that characterize the field [...], understood both as a scientific field of theoretical inquiry and as a practice.’⁸⁴³ For example, in Antonio Cassese’s case, there is a focus on the judicial function and UN fact-finding missions, particularly relevant to international criminal law and international humanitarian law. In international investment law, Elihu Lauterpacht’s vignette demonstrates the prominence of counsel in domestic and international litigation, as well as bilateral and multilateral treaty-making, in investment law. Michael Schmitt’s case sheds light into the formation of a very specialised sub-set of experts in ‘cyber’, with a particular security bend, and their efforts to craft non-legislative private codifications pervasive in international humanitarian law. *Secondly*, they reflect the workings of the ‘invisible college’ under **different professional ‘hats’** beyond the more well-known ILC/ICJ example (scholarship, expert report writing, the judicial function, and the role of independent government counsel). *Thirdly*, and connected to the previous two points, they allow for an inquiry into international legal **form** whereby projects can be weaved by individuals into international law. Going beyond ‘binding law’ in the strict form, traditional ILC codification, and ICJ litigation, these vignettes explore judgments of *ad hoc* international criminal tribunals, treaty drafting – both never in force and in force, domestic and international litigation, and private ‘non-legislative codification’/expert report. All of the above were accompanied by inquiries into the scholarly endeavours of each individual, which further demonstrate the

⁸⁴³ Bianchi, ‘Epistemic Communities in International Arbitration’ (n 33) 10.

importance of scholarship in the process of individuals' lawmaking, and allow for stronger connections between individuals, ideas, and law to be traced.

The structure of each vignette is four-partite. They trace a profile of *'the person'*, outline *'their project'*, and describe *'the means'* by which they sought to further their project. Finally *'the law'* describes the changes elicited, more or less successfully, by these particular individuals in the fabric of international law, according to their individual projects.

Sir Elihu Lauterpacht's vignette demonstrates his role in creating legal mechanisms protecting individual investors away from the 'domestic', and outside the shackles of diplomatic protection, namely the creation of 'dispute settlement' and 'umbrella' clauses in investment treaties. It sheds light on the intellectual origins of individual investors' access to the international, the processes whereby they became ubiquitous, and the role of privileged professional networks in enabling Sir Elihu's wide-ranging professional practice as counsel, ad hoc judge, and arbitrator.

Antonio Cassese's vignette demonstrates how he sought to protect 'human beings' through regulating non-international armed conflict and criminalising terrorism in the international plane. He believed judicial or quasi-judicial international criminal mechanisms manned by 'pushy' father figures, in Cassese's own wording, were the best way to further this project. As a self-proclaimed realist utopian, he used his position as a President and Judge of two international(ized) international criminal tribunals, and prolific scholarship, to further his 'humanity project'. His work demonstrates both how one can do this extremely successfully under the right circumstances, but also how one's success as a norm entrepreneur may lead to scrutiny and subsequent failure of similar endeavours.

Michael Schmitt's vignette shows an ongoing process of regulating cyberspace through networks that mix 'independent' expertise and relationships to governments, through an international security lens. His work as expert and Project Director of the *Tallinn Manuals* facilitated the shaping of the discourse around 'cyber' as one pertaining to international use of force and security, and arguably contributes to the controversial realm of use of force regulation *beyond* 'cyber'. Whereas the *Manuals* might not have yet had the effect of individual access to investment dispute settlement or the regulation of non-international armed conflict,

they are powerful documents issued about an unregulated area, potentially shaping future state practice where very little exists. They also shed further light on the potential role of ‘soft law’ instruments into international lawmaking by individuals.

1. Sir Elihu Lauterpacht, umbrella clauses, and dispute resolution in investment disputes

This vignette will demonstrate that Sir Elihu Lauterpacht was a key figure in developing two particular legal mechanisms that underpin contemporary investment disputes: individual-state dispute resolution clauses and umbrella clauses.⁸⁴⁴ Sir Eli was able to ‘make law’ in these two areas through a diverse professional practice that started with the Anglo-Iranian Oil Company, which included international and domestic litigation, the drafting of the (never in force) Abs-Shawcross convention, and scholarship. In doing so, he was intellectually inspired and professionally supported by two other key figures, Sir Hartley Shawcross, and his father, Sir Hersch Lauterpacht. Shawcross, previously UK Attorney General, worked with the British government in the Nuremberg trials, and upon going to private practice became one of the lead counsel for the Anglo-Iranian Oil Company.⁸⁴⁵ Lauterpacht Senior, was not only himself involved in the advice to the British Government and the Anglo-Iranian Company⁸⁴⁶, but provided inspiration in granting individuals standing in investment disputes.⁸⁴⁷

Sir Eli’s sensibilities were moulded by a mix of *ad hoc* problem solving inherent to international legal practice, and personal and professional connections of mentorship and kinship, that shaped the content and form of projects he espoused. The links between Sir Eli, his father, and Hartley Shawcross were influential in the shaping of the substantive ideas, and the creation of opportunities to put these ideas in practice. His connection to peers such as

⁸⁴⁴ Taylor St John, *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* (2018); Yuliya Chernykh, ‘The Gust of Wind: The Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention’ [2018] *International Investment Law and History* 241; Yuliya Chernykh, ‘The Gust of Wind: Revisiting the Origin of the Abs-Shawcross Draft Convention’, *Trade Investment Forum PluriCourts* (2016); Anthony C Sinclair, ‘The Origins of the Umbrella Clause in the International Law of Investment Protection’ (2004) 20 *Arbitration International* 411; Dingle, ‘Sixth Interview (2 April 2008): Sir Eli’s Recollections of Some Legal Personalities’ (n 559).

⁸⁴⁵ Dingle, ‘Sixth Interview (2 April 2008): Sir Eli’s Recollections of Some Legal Personalities’ (n 559) 6.

⁸⁴⁶ Doreen Lustig, *Veiled Power*, vol 53 (2020) 167.

⁸⁴⁷ Chernykh, ‘The Gust of Wind: The Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention’ (n 844).

Aron Broches facilitated this.⁸⁴⁸ The legal developments in question – direct access by investors to arbitration and elevation of contractual claims to the international plane through umbrella clauses – surround moving from a regime of diplomatic protection that did not always protect nationals of capital exporting countries, to one of investment protection that arguably favours them.⁸⁴⁹ Whereas umbrella clauses have somewhat fallen in disfavour and were interpreted down from what was arguably their original intent to elevate contractual claims to the international,⁸⁵⁰ dispute settlement clauses remain the backbone of the international investment system. Equally, dispute settlement is at the core of the current process of reconceptualization of investment protection.⁸⁵¹

a. The project– investment protection and international dispute settlement

Investment disputes in international law are those arising ‘from investments made by foreigners, i.e. nationals of States other than the host State’.⁸⁵² Failing negotiation, these disputes can be settled in *ad hoc* international arbitration, depending on the nationalities of the host state and of the investor in question and where this is provided in a relevant treaty, often in the form of a Bilateral Investment Treaty (BIT). The now ubiquitous – some would say infamous⁸⁵³ – access of foreign investors to international arbitration against host states is, however, a relatively new phenomenon; some argue ‘the most remarkable extensions of international law in the post-World War II period’.⁸⁵⁴ Eli Lauterpacht was one of the earliest exponents in investment protection.

⁸⁴⁸ Taylor St John, ‘The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences’ [2018] *The Rise of Investor-State Arbitration: Politics, Law, and Unintended Consequences* 1.

⁸⁴⁹ Although some argue there is no evidence of a pro-investor bias in investment arbitration, the disproportionate effect of the strategic internationalisation of investment and business regulation is well documented. In the words of Lustig (n 846) 14, ‘[a]mid the menace of the old international legal vocabulary in the service of new states, capital-exporting countries would seek other means and eventually hold sway by introducing an alternative international legal framework— the new regime of international investment law’. See also St John (n 848).

⁸⁵⁰ James Crawford, ‘Treaty and Contract in Investment Arbitration’ (2008) 24 *Arbitration International* 351; Sinclair, ‘The Origins of the Umbrella Clause in the International Law of Investment Protection’ (n 844).

⁸⁵¹ Malcolm Langford and Daniel Behn, ‘Managing Backlash: The Evolving Investment Treaty Arbitrator?’ (2018) 29 *European Journal of International Law* 551; Malcolm Langford, Daniel Behn and Ole Kristian Fauchald, ‘Backlash and State Strategies in International Investment Law’ [2018] *The Changing Practices of International Law* 70; Geraldo Vidigal and Beatriz Stevens, ‘Brazil’s New Model of Dispute Settlement for Investment: Return to the Past or Alternative for the Future?’ (2018) 19 *Journal of World Investment and Trade* 475.

⁸⁵² Christoph Schreuer, ‘Investment Disputes’, *MPEPIL* (OUP 2013).

⁸⁵³ On the backlash against investment arbitration, see Langford, Behn and Fauchald (n 851); Langford and Behn (n 851).

⁸⁵⁴ Langford and Behn (n 851) 551; St John (n 848) 6.

Previously to the rise and expansion of investor-state arbitration, individuals and companies had no direct rights to claim compensation for expropriation and property damage in the international plane. They had to rely on their state of nationality to advocate on their behalf, either through ad hoc agreements creating collective compensation schemes and mixed claims commissions,⁸⁵⁵ or diplomatic protection. Diplomatic protection⁸⁵⁶ is not a right of individuals (in this case, individual investors) to engage state responsibility, but a *faculty* of their state of nationality (in the case of foreign investment protection, of largely capital exporting states), to espouse their nationals' claims in international fora. This *right of the state* is also qualified through secondary rules on diplomatic protection: before accessing international fora, two hoops need to be jumped – the protected person⁸⁵⁷ must meet certain nationality requirements, and local remedies need to be exhausted.⁸⁵⁸ Investment protection in most BITs cuts the middlemen – the state – and removes some of the hoops⁸⁵⁹ – exhaustion of local remedies –, granting investors direct rights to resort to international dispute settlement. Investors' right of direct access to arbitral tribunals is thus a radical shift from these other modes of seeking compensation for sovereign decisions about alien property.

Umbrella clauses refer to clauses in bilateral investment treaties granting investment tribunals the power to settle contractual claims.⁸⁶⁰ As investment protection is fragmented into different legal instruments, there is no singular wording of the umbrella clause. Their scope is subject to considerable diversions in doctrine and practice⁸⁶¹. The intricacies of the jurisprudence on their scope is not relevant for present purposes, but some specific legal issues

⁸⁵⁵ Dolzer Rudolf, 'Mixed Claims Commissions', *Max Planck Encyclopedia of Public International Law* (2011). Examples include the arbitrations between the UK and the US under the Jay Treaties following the US independence, AND the German-Polish Arbitral Tribunal in the cases surrounding Polish Upper Silesia before the PCIJ. International organisations can also create compensation schemes to deal with injuries arising from disputes between states such as the United Nations Compensation Commission (UNCC) that settles disputes arising from the Iraq-Kuwait War (1990-1991).

⁸⁵⁶ Art. 1, ILC Draft Articles on Diplomatic Protection (2006).

⁸⁵⁷ Natural persons, corporations, or shareholders.

⁸⁵⁸ There is rich ICJ and arbitral jurisprudence on these matters, codified in the ILC Draft Articles on Diplomatic Protection (2006). The rules on nationality are codified in articles 4-13, and on exhaustion of local remedies on 14-15.

⁸⁵⁹ The nationality of the investor is still relevant as the investor's state of nationality determines their degree of protection. García Olmedo Javier, 'Nationality of Claim: Investment Arbitration', *Max Planck Encyclopedia of International Procedural Law* (2019).

⁸⁶⁰ Jean Ho, 'Contract Claims: Investment Arbitration', *Max Planck Encyclopedia of Public International Law* (OUP 2020).

⁸⁶¹ *Ibid*; Crawford, 'Treaty and Contract in Investment Arbitration' (n 850).

merit consideration. The several substantive and procedural doctrinal issues surrounding umbrella clauses include: (1) whether an umbrella clause would automatically overrule contractual dispute settlement provisions, such as those setting as the mandatory forum certain national courts or commercial arbitration; (2) whether umbrella clauses elevate contractual claims governed by domestic law to treaty claims governed by treaty law; and finally (3) whether their presence in investment treaties opens the floodgates to any contractual dispute arising from foreign investments. Although the current general agreement is that ‘an investment treaty tribunal is empowered to hear contract claims because the arbitration clause is sufficiently broadly-worded to accommodate such claims, and not because the treaty contains an umbrella clause’⁸⁶², and that they are falling in disuse, for a time they were common and their interpretation was uncertain.⁸⁶³ A historical analysis of the origins of the umbrella clause suggests its original intention was to elevate contract claims to the level of treaty claims. The origins of this particular instrument can be traced back to the Anglo-Iranian Oil dispute.⁸⁶⁴

b. The means - The Anglo-Iranian Oil Company disputes and the seed of investor protection
It is easy to dismiss the *Anglo-Iranian Oil Company (AIOC)* as a dry procedural dispute before the ICJ, aside from its fame as one of the great motivators behind the development of the current investment regime.⁸⁶⁵ A closer look, however, shows how AIOC was the source of a long struggle between the UK and Iran that involved negotiations, judicial proceedings in different fora, outright threats of force, and a *coup* against the Iranian government.⁸⁶⁶ Even more broadly than a dispute between the UK and Iran, it is also a symbol of international law’s ability to both soften and entrench⁸⁶⁷ the struggle between the Third World and imperial

⁸⁶² Ho (n 860).

⁸⁶³ For the many combinations of doctrinal possibilities on umbrella clauses, see Crawford, ‘Treaty and Contract in Investment Arbitration’ (n 850).

⁸⁶⁴ Sinclair, ‘The Origins of the Umbrella Clause in the International Law of Investment Protection’ (n 844).

⁸⁶⁵ Lustig (n 846) 5.

⁸⁶⁶ Sundhya Pahuja and Cait Storr, ‘Rethinking Iran and International Law: The Anglo-Iranian Oil Company Case Revisited’ in James R Crawford, Abdul Koroma and Alain Pellet (eds), *The International Legal Order: Current Needs and Possible Responses, Essays in Honour of Djamchid Momtaz* (Brill 2017).

⁸⁶⁷ There is ‘something particular about the capacity of law to be both appropriated to imperial ends and used as a force for liberation’, Sundhya Pahuja, ‘The Postcoloniality of International Law’ (2005) 46 *Harvard International Law Journal* 459.

powers over national resources and political independence.⁸⁶⁸ Eli Lauterpacht was involved in AIOC litigation, and in setting up the regime for investment treaty protection.⁸⁶⁹

Upon the discovery of viable oil exploration, the Anglo-Persian Oil Company, as it was then, was created in close association to the British government to explore the oil under the D'Arcy concession.⁸⁷⁰ The relationship between the company and the British government was 'symbiotic from the time of its formation'.⁸⁷¹ The AIOC was, at the time of its nationalisation, the largest British overseas asset,⁸⁷² although the concession itself had been negotiated as a private contract between D'Arcy and the Iranian Qajar Shahs.

Nationalisation happened in 1951, when Iran passed the Oil Nationalisation Acts⁸⁷³. Though investors were to be compensated at market rates for expropriation, there was dispute about quantum. The British government initiated proceedings under the guise of diplomatic protection of AIOC before the ICJ in 1951.⁸⁷⁴ The UK won a request for interim measures, but lost on preliminary objections.⁸⁷⁵ The Court considered that the 1932 Iranian optional clause Declaration only gave the Court jurisdiction over disputes over treaties signed after that date, which included all treaties signed by the UK and Iran. The ICJ also ruled that the new concession agreement of 1933 between the Iranian government and the AIOC was a private contract, and not a treaty. This meant the Court did not have jurisdiction to hear the dispute under Iran's Optional Clause declaration.⁸⁷⁶ Indirectly, the host states' ability to dispose of its own natural resources was upheld.⁸⁷⁷ In other words, the ICJ held Iran's national laws, and not international law, would be the site for resolving the legality of the nationalisation of AIOC.⁸⁷⁸

⁸⁶⁸ This dispute should be read in the context of how international law's claim to universality both engenders imperialism and creates opportunities for its challenge. See *Ibid.*

⁸⁶⁹ Lesley Dingle, 'Eminent Scholars Archive - Conversations with Sir Elihu Lauterpacht - Second Interview: USA (1940-44) and Career to 1962' (*Eminent Scholars Archive*, 2008) 1 para 23 <<https://www.squire.law.cam.ac.uk/eminentscholarsarchive/professor-sir-elihu-lauterpachtconversations-professor-sir-eli-lauterpacht-3>> accessed 17 November 2020.

⁸⁷⁰ Pahuja and Storr (n 866).

⁸⁷¹ *Ibid.*

⁸⁷² Ofer Israeli, 'Twilight of Colonialism: Mossadegh and the Suez Crisis' (2013) XX Middle Eastern Policy 147.

⁸⁷³ Pahuja and Storr (n 866).

⁸⁷⁴ *Ibid.*

⁸⁷⁵ Alexander Orakhelashvili, 'Anglo-Iranian Oil Company Case', *MPEPIL* (OUP 2015).

⁸⁷⁶ *Ibid.*

⁸⁷⁷ Lustig (n 846) 146.

⁸⁷⁸ Pahuja and Storr (n 866).

What was a victory for the Third World at the ICJ, ‘the end of the era in which the major powers dictated international law’⁸⁷⁹, became a site for displays of power through gunboat diplomacy and political *coups*. The loss at the international law level led to a blockade and sanctions against Iran, which made it very difficult for Iran to explore and export the now nationalised oil. Threats to Iran that included entry of Royal Navy ‘gunboats’ in Iranian waters and plans to secure the Abadan refinery by force, which never came to fruition, ensued. The AIOC made a point of litigating the sale of oil to third parties. One of such disputes was that of *The Rose Mary* oil tanker,⁸⁸⁰ adjudicated in the courts of the then British colony of Aden, in Yemen. The circumstances of *The Rose Mary*’s entry into Aden were disputed; in interviews, Sir Eli Lauterpacht stated the tanker ‘broke down’ and ‘was taken into Aden with the aid of a tug’.⁸⁸¹ During the proceedings, evidence was given that the master of the ship had entered the port under coercion, namely fear of bombardment by a circling RAF plane.⁸⁸² To the alleged coercion, the Aden court stated that ‘no reasonable man could think it likely that H. M. Government in the year 1952 would try to resolve a commercial dispute by what would be little short of an act of war’.⁸⁸³ The court ruled that the nationalisation of Iranian oil was illegal under international law.⁸⁸⁴ The AIOC lost similar cases brought against the selling of Iranian oil in Italian and Japanese domestic courts.⁸⁸⁵ Domestically, the UK and the US put significant pressure on Prime Minister Mohammad Mossadegh, responsible for the nationalisation of AIOC, culminating in a violent *coup* entitled Operation Ajax orchestrated by the CIA and the MI-6 that removed him from power in 1953.⁸⁸⁶

⁸⁷⁹ Georges Abi-Saab, ‘The International Law of Multinational Corporations: A Critique of American Legal Doctrines’ (1971) 97 *Annales d’études internationales* 102.

⁸⁸⁰ William W Bishop, ‘Anglo-Iranian Oil Co. v. Jaffrate et Al.’ (1953) 47 *American Journal of International Law* 325; DP O’Connell, ‘A Critique of the Iranian Oil Litigation’ (1955) 4 *ICLQ* 267.

⁸⁸¹ Dingle, ‘Eminent Scholars Archive - Conversations with Sir Elihu Lauterpacht - Second Interview: USA (1940-44) and Career to 1962’ (n 869) 10.

⁸⁸² Bishop (n 880) 356.

⁸⁸³ *Ibid.*

⁸⁸⁴ Bishop (n 880).

⁸⁸⁵ For a doctrinal analysis of those as well as the Aden case, see O’Connell (n 880). A documentary with illuminating interviews of key figures in the coup addresses the policy of bringing cases against countries that bought oil from Iran at the time, see ‘End of Empire - Iran’ (*Granada Productions*, 1985) <<https://www.youtube.com/watch?v=xhCgJElpQEQ>>.

⁸⁸⁶ Pahuja and Storr (n 866).

This background is a key element of the history behind the creation of the current investment regime. Sovereignty over national resources *versus* the property rights of aliens – essentially the spoils of colonial and imperial exploration – were the site of great animosity between the First and Third Worlds in the international arena, the AIOC being one of its most emblematic examples. What the *Anglo-Iranian Oil Co.* case attempted to do at the ICJ (and failed) was to elevate the concession contract to the level of international law, whereby a contract between a private party and a third-world country would be more difficult to alter. The tension here is one between the ability to rule one’s own country *versus* the protection of economic interest of developed nations’ nationals. The politics of elevating contracts to the realm of treaties has two main implications: firstly, reducing the ability of capital importing states to self-regulate; secondly, bringing these disputes away from their site of political struggle. It is part of what Anghie describes as ‘the management of the non-European world by international law and institutions’.⁸⁸⁷ This elevation from the national to the international with all its implications is exactly what the current investment regime triumphs in doing.⁸⁸⁸ Two specific legal mechanisms that perform this elevation from contractual to international are the dispute settlement provisions and the umbrella clause. It will be argued below that Sir Elihu Lauterpacht had a key role in the development of both mechanisms.

- c. The person – Eli Lauterpacht’s connections to Hartley Shawcross, Lauterpacht Senior, and Aron Broches

Sir Elihu Lauterpacht was born in 1928. He read law at Cambridge, receiving the Whewell Prize in 1950 for his performance in the international law LLM.⁸⁸⁹ One of his first appointments after university was as Secretary to the UK government’s Somervell Committee on State Immunity, to which his father, Sir Hersch Lauterpacht, was a member. Very shortly he began his career at the bar, securing pupillage, again, in the same Chambers as his father, 3

⁸⁸⁷ Antony Anghie, *Imperialism, Sovereignty and the Making of International Law*, vol 37 (Cambridge University Press, 2005).

⁸⁸⁸ See Sundhya Pahuja, ‘The Changing Place of the Corporation in International Law’, *Lauterpacht Memorial Lectures* (2018); Sundhya Pahuja and Anna Saunders, ‘Rival Worlds and the Place of the Corporation in International Law’ in Jochen Von Bernstorff and Philipp Dann (eds), *Rival Worlds and the Place of the Corporation in International Law In: The Battle for International Law: South-North Perspectives on the Decolonization Era* (2019).

⁸⁸⁹ Dingle, ‘Eminent Scholars Archive - Conversations with Sir Elihu Lauterpacht - Second Interview: USA (1940-44) and Career to 1962’ (n 869) 19.

Essex Court.⁸⁹⁰ From the start of his tenancy, he was being briefed by Linklaters & Paines on issues surrounding the Anglo-Iranian Oil Co.⁸⁹¹ AIOC's principal lawyer was Sir Hartley Shawcross, who had been UK Attorney General and then went into private practice. As Attorney General, Shawcross worked closely with Lauterpacht Senior in the Nuremberg trials – in the drafting of the Nuremberg charter, where Sands attributes to Lauterpacht the creation of the category of 'crimes against humanity',⁸⁹² and much assistance in handling the trial.⁸⁹³ Shawcross recruited both Lauterpachts to advise on AIOC matters – Lauterpacht senior was counsel in the *Anglo-Iranian Oil Company* case before the ICJ,⁸⁹⁴ and the newly qualified Eli Lauterpacht, as he then was, was also briefed by Shawcross on matters pertaining to the nationalization of Iranian oil. One of Eli Lauterpacht's first cases was *The Rose Mary*, one of the abovementioned domestic proceedings instituted so as not to allow 'the Iranians get away with', in Eli's words, nationalizing Iranian oil.⁸⁹⁵

After the 1953 *coup* in Iran, 26-year-old Eli was part of the team led by Shawcross advising Western oil companies in drafting a new consortium agreement. He was in charge of dispute resolution, and assigned the task of finding 'methods which would ensure that the anticipated consortium agreement would be honoured by Iran and that any attempt to breach it would be regarded as a breach of international law.'⁸⁹⁶ His solutions were the creation of an 'umbrella treaty', that ensured breaches of the consortium – a private contract – would have international protection, referring disputes arising from it to the ICJ. This was done deliberately 'to remedy the jurisdictional failures of the Anglo-Iranian Oil Company case before the ICJ in 1952 by providing for mandatory parallel jurisdiction of the ICJ based on an inter-state agreement that

⁸⁹⁰ 3 Essex Court is now 20 Essex Street, and was the original chambers of Lord McNair and Sir Hersch Lauterpacht: 'Twenty Essex Street - Our Journey' <<https://twentyessex.com/about-us/our-journey/>> accessed 25 November 2020.

⁸⁹¹ Dingle, 'Eminent Scholars Archive - Conversations with Sir Elihu Lauterpacht - Second Interview: USA (1940-44) and Career to 1962' (n 869) 19.

⁸⁹² Sands, *East West Street: On the Origins of Genocide and Crimes against Humanity* (n 42) 112–114.

⁸⁹³ Sands appoints the similarities between a draft written by Lauterpacht Senior and Hartley Shawcross' final speech at Nuremberg Philippe Sands, 'Twin Peaks: The Hersch Lauterpacht Draft Nuremberg Speeches' (2012) 1 Cambridge Journal of International and Comparative Law 37, 37.

⁸⁹⁴ Chernykh, 'The Gust of Wind: The Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention' (n 844).

⁸⁹⁵ Dingle, 'Eminent Scholars Archive - Conversations with Sir Elihu Lauterpacht - Second Interview: USA (1940-44) and Career to 1962' (n 869) 23.

⁸⁹⁶ Chernykh, 'The Gust of Wind: The Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention' (n 844).

would accompany the contractual relationship between the consortium and Iran.⁸⁹⁷ He considered his work in the agreement successful – as ‘those articles, particularly the one on Dispute Settlement, have been adopted very widely in the oil industry in its relations with host countries.’⁸⁹⁸ Although the Consortium itself did not provide for direct right of investors to seek arbitration, its dispute settlement clause was ‘close to that of the ISDS mechanism that was later included in BITs, namely to ensure international remedies for the protection of state undertakings given to private investors.’⁸⁹⁹

Shawcross continued to advise oil companies. In addition to the former AIOC, now British Petroleum, he also worked for Shell. St John, who identifies Shawcross as one of the key players in the development of investment arbitration, argues he was part of a ‘transnational elite’ attempting to develop an international convention protecting foreign investment, their ideas coloured by previous experiences of expropriation, such as that of AIOC.⁹⁰⁰ His German counterpart in these efforts was Hermann Abs,⁹⁰¹ deeply connected to banking elites and with strong ties to the World Bank.⁹⁰² Abs’ own expropriation experience was that of German economic elites – ‘every German investor and official working in the 1950s had witnessed livelihoods and lives torn asunder by expropriations’, thus his efforts to draft a “Magna Carta for Investment Protection”.⁹⁰³ Abs and Shawcross thus came together in drafting said Magna Carta, that later became known as the Abs-Shawcross Draft Convention.

d. The law: protecting the rights of individual foreign investors

Shawcross’ efforts were specifically ‘an openly acknowledged attempt to remedy the failures reflected in cases such as Anglo-Iranian Oil Company.’⁹⁰⁴ In 1959 he contacted Eli, who shared Shawcross’ history in AIOC litigation, to work with him in drafting said convention. Again,

⁸⁹⁷ Ibid.

⁸⁹⁸ Dingle, ‘Eminent Scholars Archive - Conversations with Sir Elihu Lauterpacht - Second Interview: USA (1940-44) and Career to 1962’ (n 869) 21.

⁸⁹⁹ Chernykh, ‘The Gust of Wind: The Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention’ (n 844).

⁹⁰⁰ St John (n 848) 84–85.

⁹⁰¹ St John (n 844) 69–70.

⁹⁰² Ibid 112–113.

⁹⁰³ Ibid 70.

⁹⁰⁴ Sinclair, ‘The Origins of the Umbrella Clause in the International Law of Investment Protection’ (n 844) 420.

like in the drafting of the consortium, Eli was in charge of dispute settlement provisions, in which he included the novel direct access of individual investors to arbitration. In the Draft Convention's commentary to the investment arbitration access provision, almost identical to Sir Eli's own proposal to the drafting committee,⁹⁰⁵ compares this novel feature to that provided in human rights treaties, such as the ECHR. An inter-state dispute settlement mechanism was also provided, centered around the ICJ.⁹⁰⁶ The ability of individuals to access international dispute mechanisms was being proposed within the ICJ itself by Sir Hersch Lauterpacht recently elected judge,⁹⁰⁷ which is congruent with Sir Hersch's positions to centre the individual as a subject of international law, and his support for (compulsory) international dispute settlement.⁹⁰⁸ The creation of a 'watertight' settlement system to resolve investment disputes was also the target of Sir Eli's scholarly contributions.⁹⁰⁹ The Abs-Shawcross Draft convention also included an umbrella clause-style provision, to ensure contractual claims could be heard in an international setting.⁹¹⁰

The Abs-Shawcross Draft officially became an intergovernmental Draft Convention on the Protection of Foreign Property when it was presented to the OECD Council in November 1962. It included both an umbrella clause (Article 2 – Observance of Undertakings) and direct investor access to arbitration (Article 7 – Disputes).⁹¹¹ Resistance by governments to have a unified multilateral investment treaty – even governments from capital exporting countries – was too great.⁹¹² The path towards bilateral investment treaties drew from but eventually

⁹⁰⁵ As shown in the side-by-side comparison by Chernykh, 'The Gust of Wind: The Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention' (n 844).

⁹⁰⁶ Ibid.

⁹⁰⁷ Ibid.

⁹⁰⁸ On the centrality of both themes to Hersch Lauterpacht's writings, see C Wilfred Jenks, 'Hersch Lauterpacht: The Scholar as a Prophet' [1954] BYIL 1. See also Martti Koskenniemi, 'Hersch Lauterpacht (1897–1960)', *Jurists Uprooted: German-Speaking Emigré Lawyers in Twentieth Century Britain* (2004). A similar point drawing on the similarities of granting individuals international standing in human rights and investment disputes is made by Chernykh, 'The Gust of Wind: The Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention' (n 844).

⁹⁰⁹ Eli Lauterpacht, 'The Drafting of PF Treaties for the Protection of Investment' (1962) 18 ICLQ Supp. Pub. 18, 20.

⁹¹⁰ James Crawford, 'Elihu Lauterpacht, LCIL and the Lauterpacht Tradition', *Sir Elihu Lauterpacht. A Celebration of his life and work* (2017); Sinclair, 'The Origins of the Umbrella Clause in the International Law of Investment Protection' (n 844).

⁹¹¹ St John (n 844) 88–89.

⁹¹² Ibid 88 et seq.

supplanted the Convention.⁹¹³ The Abs-Shawcross turned OECD Draft was ultimately unsuccessful as a multilateral treaty, but as described in 1967 the OECD Secretary General, it also provided the model for bilateral treaties.⁹¹⁴

The move towards bilateralism could be seen as part of a delicate dance not to derail the development of a customary law on investment protection performed by elite Europeans, such as Abs and Shawcross, American businessmen, and experts at international institutions such as the OECD and the World Bank.⁹¹⁵ Lawyers such as Eli Lauterpacht were a key part of this act – he was in close proximity to both Shawcross, governments whom he advised in the first and third worlds, and institutions such as the World Bank, whose Administrative Tribunal he both founded and presided over.⁹¹⁶ Neither capital exporting States nor the World Bank supported the multilateral route for investment protection because they did not want issues of nationalization and sovereignty over national resources to be discussed in multilateral fora, where the increased acceptance of investor rights was more likely to be compromised in block articulations of capital-importing countries. Even within the relatively homogenous environment of the OECD there were stark differences in the positions of capital importing and exporting groups of states,⁹¹⁷ discouraging traditional multilateral treaty making in the area.

Aron Broches, the main drafter of the Convention and founding Secretary-General of ICSID, believed doing so would ‘end up having everybody mad at us, or, possibly even worse, coming out with a meaningless document.’⁹¹⁸ Eli’s idea of direct access to arbitration embedded in the Abs-Shawcross and later OECD Draft was particularly appealing to World Bank officials such as Broches, who sought to stimulate foreign investment and protect investors from expropriations via nationalisation.⁹¹⁹ Broches worked with Eli in mediating the Abadan dispute on behalf of the World Bank, and later in the drafting of the ICSID Convention, which forms a large part of contemporary investment arbitration.⁹²⁰ They shared a legal background and a

⁹¹³ Ibid 90–91.

⁹¹⁴ Ibid 93.

⁹¹⁵ As described by St John, ‘how could they end their discussions on this Draft without weakening customary international law regarding investment protection?’ St John (n 848) 95.

⁹¹⁶ Crawford, ‘Elihu Lauterpacht, LCIL and the Lauterpacht Tradition’ (n 910) 11.

⁹¹⁷ St John (n 848) 96.

⁹¹⁸ St John (n 844) 114.

⁹¹⁹ St John (n 848) 126.

⁹²⁰ St John (n 844) 65, 72.

likeness for the aesthetics of arbitration.⁹²¹ Eli was then alongside Broches part of the select group of people in charge of drafting the ICSID convention under the auspices of the World Bank, and was responsible once more for the drafting of the dispute settlement provisions.

e. Conclusions – ‘a gust of wind’⁹²² or a perfect storm?

Eli Lauterpacht was a key figure in the development of two important features of the current investment system – the access of individual investors to international fora, and the adjudication by these fora of contractual claims via umbrella clauses. Chernykh describes his influence as a ‘gust of wind’⁹²³ blowing international investment law towards progressive investor protection. Perhaps Sir Eli’s influence better understood as a ‘perfect storm’: a combination of numerous factors allowed him to help craft some of the key notorious provisions motivating the backlash against the investment regime in the last two decades.

The towering presence of his father, Sir Hersch Lauterpacht, was a key element in the success of his enterprise. From a practical standpoint, his father’s eminence opened the doors to high level practice. It was through his fathers’ connections to Sir Hartley Shawcross, former Prosecutor at Nuremberg, that Sir Hersch and later Sir Eli became involved in the Anglo-Iranian Oil disputes, a key moment in the development of investment protection, all at the age of 23. The dispute gave rise to multilateral efforts of investment protection that internationalized investors’ claims through the umbrella clause and individual investors’ access to international dispute settlement. From a substantive standpoint, both legal developments espoused by Sir Eli drew inspiration from his father’s authoritative work on compulsory international dispute settlement and individual legal personality.⁹²⁴ Under a favourable post-War environment for broadening the scope of investment protection, liberal individualism that supported the creation of benevolent human rights institutions was easily (and probably more efficiently) repurposed to protect investors’ property rights.⁹²⁵

⁹²¹ ‘As someone who had written a doctorate in international law at the University of Amsterdam in the 1930s, Broches was steeped in the interstate peacebuilding lineage of arbitration.’ Ibid 116–117.

⁹²² Chernykh, ‘The Gust of Wind: The Unknown Role of Sir Elihu Lauterpacht in the Drafting of the Abs-Shawcross Draft Convention’ (n 844).

⁹²³ Ibid.

⁹²⁴ Ibid.

⁹²⁵ Kate Parlett, *The Individual in the International Legal System: Continuity and Change in International Law* (Cambridge University Press 2011).

Sir Eli Lauterpacht's standing allied with his entrepreneurial attitude allowed him to become one of the most prolific practitioners and *tout court* members of the 'invisible college', giving him unique ability to help internationalize investment claims through the weaving into the law of individual investors' access to arbitration and umbrella clauses. He provided advice in the Anglo-Iranian Oil Co. disputes, but also in subsequent developments that helped enshrine these two mechanisms, namely the Abs-Shawcross Draft Convention on Foreign Investment, the OECD Draft Convention on Foreign Property, and later on the ICSID Convention. Both instruments buttressed the development of the contemporary international investment protection regime. He was also later on involved in the implementation of investment protection and the flourishing thereof beyond the crafting of these treaties, through his work as an investment arbitrator and counsel in investment disputes, all whilst deeply embedded in international institutions such as the World Bank and NAFTA.⁹²⁶ This further weaved investment protection of a particular kind in the fabric of international law, that which protects individual investors through international standing, and promotes the international over the domestic in investment disputes. Of course his was not a practice existing in isolation – the structures allowing for the liberalization of trade and the promotion of 'the international' by states and institutions are well-documented structural factors that enabled this system to flourish. It is however important to remain cognizant of the role of individual lawyers, with specific projects and conceptions of politics and law and standing within a community, are part of this process, and thus have power and responsibility over the course of international law.

⁹²⁶ Lesley Dingle, 'Sir Eli Lauterpacht -International Litigation' (*Eminent Scholars Archive*, 2008) <<https://www.squire.law.cam.ac.uk/eminentscholarsarchive/professor-sir-elihu-lauterpacht/international-litigation>> accessed 27 November 2020.

2. Antonio Cassese as a ‘Realist utopian’: intertwining ‘pushy’ practice and scholarship

a. The person – Antonio Cassese

Antonio Cassese is often referred to as ‘one of the most outstanding figures in the history of international law’⁹²⁷, one of the ‘founding fathers’ of international criminal justice.⁹²⁸ Similarly to the other figures in this project, his success was attained by mixing scholarship and practice. He was a professor in Italy (1960s-1970s) and at the EUI (1970s-1990s); as an ‘[institution-builder]’ and practitioner, part of the Italian delegation drafting the Additional Protocol to the Geneva Conventions in 1977⁹²⁹, a member of the at the European Committee on the Prevention of Torture (1989-1992), a President and judge at the ICTY (1993-2000), head of the UN Commission of inquiry in Darfur (2004-2005), reviewer of the SCSL (2006), and finally President of the STL (2009-2011). Cassese’s practice was not only extensive, but, in his own words, ‘pushy’:⁹³⁰ he worked tirelessly to make his vision of international law come to life. He brought Argentinean forced disappearances before the UN Sub-Commission on Human Rights, turning ‘an innocuous resolution’ by the Sub-Commission into ‘a mighty river of international indignation and action against forced disappearances’.⁹³¹ On torture prevention, ‘Nino’s awareness raising undoubtedly played a role’ in recognizing torture as a *ius cogens* violation⁹³². In his work in Sudan,⁹³³ he sought to bolster the protection of individuals.⁹³⁴ At the ICTY, he ‘pushed’ for legal regulation of non-international armed conflicts.⁹³⁵

His ‘pushy’ practice was in symbiotic relationship with scholarship;⁹³⁶ he sought to unite academia and the ‘dirty job’ of international law’s reality, with a view of improving and expanding the system.⁹³⁷ Cassese was an ‘intellectual entrepreneur’ who put his colleagues ‘to

⁹²⁷ Guido Acquaviva and Giulia Pinzauti, ‘Walking the Road He Paved - A Tribute to Antonio Cassese’ (2012) 10 *Journal of International Criminal Justice* 1419, 1419.

⁹²⁸ Salvatore Zappala, ‘Personal Remarks on Antonio Cassese and His Vision of International Law and International Criminal Justice along the Road He Walked’ (2012) 25 *Leiden Journal of International Law* 503, 509.

⁹²⁹ Acquaviva and Pinzauti (n 927) 1432.

⁹³⁰ Heikelina Verriijn Stuart and Marlise Simons, *The Prosecutor and the Judge: Benjamin Ferencz and Antonio Cassese, Interviews and Writings* (Pallas Publications, Amsterdam University Press 2009) 52.

⁹³¹ Acquaviva and Pinzauti (n 927) 1423.

⁹³² *Ibid.*

⁹³³ *Ibid.*

⁹³⁴ *Ibid.*

⁹³⁵ *Ibid.* 1435.

⁹³⁶ *Ibid.* 1422.

⁹³⁷ Zappala (n 928) 505.

task to produce books on the current developments as soon as they take place⁹³⁸: he wrote an ICL textbook, edited a commentary to the ICC statute, wrote about the history of ICL institutions, edited a Companion to International Criminal Justice, a case law ICL book, and created the *Journal of International Criminal Justice*,⁹³⁹ as well as numerous academic articles. As well as a scholar, Cassese was a mentor, seeking to create community and a disciplinary subset: ‘by fostering academic reflection, by encouraging constructive criticism of the case law of international criminal tribunals, ultimately by taking an active role in the building of a community of scholars in ICL’.⁹⁴⁰ The symposium organised in his honour by the STL after his death included mentees in academia and practice, such as John Jones, Paola Gaeta, and Guido Acquaviva. Friends included Georges Abi-Saab, and Abdulqawi A. Yusuf.⁹⁴¹ There was something openly deliberate in how Cassese united practice and academia: realising utopia, in his view, came from building community, reflecting and disseminating utopian ideas with a pragmatic bend, and furthering those ideas through institutions, being both suspicious and cognizant of states’ interests.

A self-proclaimed ‘Dr Jekyll and Mr Hyde’⁹⁴², he strived to harmonize conflicting concepts – realist utopias⁹⁴³, critical positivism⁹⁴⁴, anti-sovereignty stances promoted by state-sponsored international institutions⁹⁴⁵. His last book, a collection of essays released posthumously, sought to harmonize utopianism and pragmatism⁹⁴⁶ – *Realizing Utopia: The Future of International Law*⁹⁴⁷ identified problems in international law, and prescribed creative legal solutions to solve them. This duality extended to his approach to legal methodology; as described by Robert Cryer on one hand his ‘concern to ground his positions on solid legal arguments, following well-known reasoning techniques recognized by lawyers’; on the other, looking ‘beyond law and beyond

⁹³⁸ Acquaviva and Pinzauti (n 927) 1434.

⁹³⁹ Ibid 1429.

⁹⁴⁰ Ibid.

⁹⁴¹ Acquaviva and Pinzauti (n 927).

⁹⁴² Guido Acquaviva, ‘A Conversation with Antonio Cassese’ (2012) 25 *Leiden Journal of International Law* 815, 818.

⁹⁴³ Antonio Cassese (ed), *Realizing Utopia: The Future of International Law* (OUP 2012).

⁹⁴⁴ Cassese, *Five Masters of International Law: Conversations with R-J Dupuy, E. Jimenez de Arechaga, R. Jennings, L. Henkin, and O. Schachter* (n 166) 258.

⁹⁴⁵ See the many suggestions for improving international law proposed by Cassese in Cassese, *Realiz. Utop. Futur. Int. Law* (n 943).

⁹⁴⁶ Milanovic (n 253).

⁹⁴⁷ Cassese, *Realiz. Utop. Futur. Int. Law* (n 943).

any legalistic approach to institutional and normative realities, to build something valuable for the future.⁹⁴⁸ Cryer argues Cassese was a ‘presentational positivist’, insofar as he ‘sought to move the law forward and render it more humane, but broadly within a positivist framework or vocabulary’⁹⁴⁹, aiming for a ‘realizable utopia’⁹⁵⁰ – ‘his extra-curial avowal of progressive interpretation rather than ‘black-letter’ lawyering’ ‘rendered his approach complex and not easily reduced to generalizations’.⁹⁵¹

This eagerness to use his work to ‘push’ a self-proclaimed humanity agenda was not without critics, and not without shortcomings. Albeit revered by some, he was also heavily criticised by those espousing more formalistic approaches, governments, and critical scholars. The first saw his pushes for changes in the law via judgments an affront to the legal method, leading to ‘fatally incorrect decision[s]’ that undermine ‘human rights’ and ‘public confidence in international criminal justice’.⁹⁵² State representatives drafting the ICC Statute wanted to restrict the possibilities for judges to adopt a ‘Cassese approach’.⁹⁵³ Cassese’s expansionist view of international criminal law, disregard for domestic proceedings, and attachment to progressive narratives are at the core of challenges to the International weaved by critical scholars.⁹⁵⁴ ‘Progressive’ albeit traditional international lawyers also criticise Cassese’s unwillingness to engage with the shortcomings of his legal propositions,⁹⁵⁵ and Cassese’s general Anglo-European bias⁹⁵⁶. In summary, Cassese’s sometimes often laudable emphasis on individual agency to push progressive causes into the law also reveals some of the processes’ greatest shortcomings, namely the intractable reality that individuals are both constricted by

⁹⁴⁸ Zappala (n 928) 506.

⁹⁴⁹ Robert Cryer, ‘International Criminal Tribunals and the Sources of International Law: Antonio Cassese’s Contribution to the Canon’ (2012) 10 *Journal of International Criminal Justice* 1045, 1048.

⁹⁵⁰ Cryer, ‘International Criminal Tribunals and the Sources of International Law: Antonio Cassese’s Contribution to the Canon’ (n 949); Feichtner, ‘Realizing Utopia through the Practice of International Law’ (n 276); ‘Realizing Utopia: Reflections on Antonio Cassese’s Vision of International Law’ (2012) 23 *European Journal of International Law* 1029; Milanovic (n 253); Peters (n 312).

⁹⁵¹ Cryer, ‘International Criminal Tribunals and the Sources of International Law: Antonio Cassese’s Contribution to the Canon’ (n 949) 1061.

⁹⁵² Ben Saul, ‘Legislating from a Radical Hague: The United Nations Special Tribunal for Lebanon Invents an International Crime of Transnational Terrorism’ (2011) 24 *Leiden Journal of International Law* 677, 678–679.

⁹⁵³ Stuart and Simons (n 930) 52.

⁹⁵⁴ Martti Koskeniemi, ‘Projects of World Community’ [2012] *Realizing Utopia: The Future of International Law* 3.

⁹⁵⁵ John Dugard, ‘Book Review: Realizing Utopia: The Future of International Law’ (2013) 113 *American Journal of International Law* 212, 481.

⁹⁵⁶ *Ibid* 482.

the system's checks and balances, and are themselves shaped by their experiences and internal biases that seep into those projects.

b. The project – anti-sovereignty and pro-humanity

Under Cassese's 'pushy' practice, was his project to humanise international law, diminishing the room states have to exert violence over individuals. It was no secret that the desire to protect humanity infused his work. In memorialising Cassese, his colleagues often referred to this goal. Cassese's goal was 'fighting inhumanity'⁹⁵⁷, campaigned for 'human dignity'⁹⁵⁸, and his doctrinal contributions sought to protect individuals.⁹⁵⁹ He believed 'any rule of law is ultimately made on account of human beings' and that 'only those problems that dramatically affect the daily life of human beings are worth studying'⁹⁶⁰.

Inextricable from his pro-humanity project was a belief that states stood in the way through imposing sovereignty to freely exercise power over individuals within their jurisdiction. His anti-sovereignty rhetoric was equally overt, stating explicitly that international law lies '[i]n the ongoing struggle between the needs of sovereign states and human rights'⁹⁶¹. Cassese believed '[states] cannot be trusted with making a better international law, and a better world' – 'they are the enemy, the problem that needs fixing', and the fixing is to be done by international lawyers that, like Cassese, don't take no for an answer.⁹⁶²

In pragmatic fashion, however, Cassese understood working with states was key for pushing the law towards humanity. Like a parasite that feeds of the body of its host, international lawyers should work from within states with the ultimate goal of eroding their sovereignty to protect human beings: '[i]n the ongoing struggle between the needs of sovereign states and human rights, one must often resort to tricks: accepting a compromise without giving up too much of the humanitarian needs'.⁹⁶³ Knowing the enemy (the state, a 'monster') was part of pushing forward the pro-humanity project: 'limiting its traditional prerogatives and, if possible,

⁹⁵⁷ Acquaviva and Pinzauti (n 927) 1422.

⁹⁵⁸ Ibid 1420.

⁹⁵⁹ Cryer, 'International Criminal Tribunals and the Sources of International Law: Antonio Cassese's Contribution to the Canon' (n 949); Zappala (n 928); Acquaviva and Pinzauti (n 927).

⁹⁶⁰ Acquaviva (n 942) 821.

⁹⁶¹ Ibid.

⁹⁶² Milanovic (n 253).

⁹⁶³ Acquaviva (n 942) 822.

even towards self-mutilation'.⁹⁶⁴ Sovereignty stands in the way of international lawyers and supra-national legal institutions more effective.⁹⁶⁵

Pro-humanity developments were pushed by Cassese in many forms – they included creating awareness around the forced disappearances in Argentina, investigating torture in governmental institutions such as prisons, or revealing the extent of the human rights abuses happening in Sudan. All of them saw the international as a remedy against sovereignty and for the protection of individuals.

c. The means – international (judicial/quasi-judicial) institutions, criminal accountability, and 'pushy' 'father figures'

As exposed above, Cassese firmly believed states and their sovereignty stood in the way of protecting individuals, and was thus a bar to law's ultimate goal. The best way in his view to counter-act sovereignty was the international, more specifically judicial (or quasi-judicial) international institutions.

In the chapters written by him in *Realising Utopia*,⁹⁶⁶ the centrality of judicial or quasi-judicial institutions is clear. Expanding human rights is a good in itself, and needs to be done by enshrining 'core' norms, enforced by individual criminal responsibility at the ICC, in domestic prosecutions via UJ and outlawing of amnesties, and creating commissions of inquiry.⁹⁶⁷ When inquiring into how to put *jus cogens* in practice, again judicial institutions come to the fore: defining norms of *jus cogens* must be done by courts, as '*politics* cannot be entrusted with establishing the existence of *jus cogens*'⁹⁶⁸. Judges have a 'better position than states' to assess what constitutes a norm of *jus cogens*⁹⁶⁹, and their compliance should be scrutinized by ICJ compulsory jurisdiction, as 'states should not be allowed to rely on their sovereign prerogatives

⁹⁶⁴ Ibid.

⁹⁶⁵ Ibid 824.

⁹⁶⁶ Cassese, *Realizing Utopia. Futur. Int. Law* (n 943).

⁹⁶⁷ Milanovic (n 253).

⁹⁶⁸ Ibid.

⁹⁶⁹ Ibid.

and refuse to submit to the ICJ' when '[controversies] over fundamental values of the whole world society' is concerned.⁹⁷⁰

In the relationship between the domestic and the international, he privileges the international plane: he prescribes a series of institutional safeguards to ensure states internalise international treaties that includes compulsory international adjudication, monitoring bodies, and constitutional mechanisms that invalidate domestic law that conflicts with their international obligations under that treaty, in a model reminiscent of European integration.⁹⁷¹ The ICJ's problem, in his view, is narrow jurisdiction; the solution is to expand its jurisdictional scope, from 'a standing arbitral tribunal to a true court of law of the new global community'⁹⁷², dispensing with judges *ad hoc*, allowing for third party intervention and *amici curiae*, opening of contentious jurisdiction to IOs, opening advisory jurisdiction to other actors and making them binding, and allowing national courts to submit cases to the Court.⁹⁷³ In his fifth essay in *Realising Utopia*, he argues again for further judicialisation at the international level through increase of fact-finding and monitoring for compliance with multilateral treaties, and at the UN level.⁹⁷⁴ Cassese's recommendation is based on his previous experience of Darfur, and commissions of inquiry as 'the next best thing to centralised or compulsory adjudication'.⁹⁷⁵

One does not need a crystal ball to identify some themes in Cassese's pro-humanity scholarly project: lawyers should be at the centre of pushing policy closer to humanity and further from sovereignty. Judicial activism that does so should be encouraged, and individual criminal liability is the preferred method to deter further atrocities. In Cassese's view, there was a direct link between piercing sovereignty and holding powerful state officials into account: international criminal prosecutions 'strike at the very heart of the problem' – holding states accountable through HR bodies in his view is not enough, and individual punishment is required.⁹⁷⁶

⁹⁷⁰ Ibid.

⁹⁷¹ Ibid.

⁹⁷² Ibid.

⁹⁷³ Ibid.

⁹⁷⁴ Ibid.

⁹⁷⁵ Ibid.

⁹⁷⁶ Stuart and Simons (n 930) 60.

Intermingling reparations to victims and the role of deterrence, Cassese supports that '[i]ndividual criminal liability is more effective than state responsibility.'⁹⁷⁷ 'The existing international bodies are important, but they don't achieve much'. Despite its 'many limitations', criminal law 'sends a strong message' that promotes deterrence: 'even Mr. Rumsfeld can be brought to court'.⁹⁷⁸ He considered International Criminal Tribunals it 'one of the few major achievements of the world community we may observe in the past twenty years.'⁹⁷⁹ Skipping the need to consult states in punishing perpetrators was more 'direct and effective', 'the most efficacious manner of ensuring respect for human rights'.⁹⁸⁰ This was a 'dream for centuries', achieved in 1945 with Nuremberg, 'then halted, but resumed in the early 1990s'.⁹⁸¹ It 'brought about a revolutionary innovation in this community: a seismic shift in thinking about sovereignty' that limited the power of the ruler in relation to the citizens.⁹⁸² 'with the establishment of international criminal tribunals, international bodies penetrated that powerful and historically impervious fortress – state sovereignty – for the first time, to reach out to all those who live within the fortress'.

The 'fortress' that are international criminal institutions, are still built on top of the 'volcano' that is sovereignty, and thus still 'entangled in, and fettered by' its intricacies. Sovereignty again is the problem with the international – it stands in the way of 'making international criminal courts fully autonomous and effective' with independent and unfettered investigative powers.⁹⁸³ Cassese thinks the 'imaginative scholar missed an opportunity' to consider the setting up of *international* criminal tribunals to '[dispense] even-handed justice ... in the exclusive interest of the world community in the realization of the rule of law and the full implementation of the principle of accountability', set up by 'impartial persons without any links to the parties to a conflict and therefore unfettered by any national prejudice or bias'.⁹⁸⁴

⁹⁷⁷ Acquaviva (n 942).

⁹⁷⁸ Stuart and Simons (n 930) 60.

⁹⁷⁹ Acquaviva (n 942) 822.

⁹⁸⁰ Ibid.

⁹⁸¹ Ibid.

⁹⁸² Ibid 823.

⁹⁸³ Ibid 824.

⁹⁸⁴ Antonio Cassese, 'B.V.A. Röling - a Personal Recollection and Appraisal' (2010) 8 *Journal of International Criminal Justice* 1141, 1149.

In order to mediate between states and the leading figures in international institutions, Cassese believed these criminal tribunals needed empowered international lawyers, unwavering, and ‘pushy’. He saw ‘how important single individuals may be in pushing tenaciously and relentlessly in favour of a major international initiative and how governments can then come to agree on the need to create an international control mechanism.’⁹⁸⁵ The Tribunal President, specially, had a central role in Cassese’s approach⁹⁸⁶, as he should be a ‘father figure’, ‘a driving force’, a ‘a leader’, and someone deeply invested in the future of the institution⁹⁸⁷. He goes so far as attributing the relative failures of the SCSL and the ICC to that lack of that father figure.⁹⁸⁸ He saw himself as that person: interviews with Cassese often bring up his tirelessness, and his criticism of colleagues who did not pull their weight by taking long holidays or undertaking other professional commitments⁹⁸⁹: for the institution to work ‘you have to be there! Everybody must see you working there every day and being concerned and preoccupied, talking to the diplomats, going to see ambassadors, going to the UN’.⁹⁹⁰

d. The Law – regulating Non-International Armed Conflicts and prosecuting Terrorism

Cassese’s varied experiences as a practitioner and his role as an academic – as a writer, mentor, and fosterer of academic environments, especially in the areas of ICL and Human Rights – allowed him to exert a huge degree of influence in shaping the law and the legal community around him according to his ‘humanising’ vision in different areas. In the STL symposium honouring his life, colleagues highlighted his role in bringing Argentinian forced disappearances before the UN Sub-Commission on Human Rights, leading to ‘a mighty river of international indignation and action against forced disappearances’⁹⁹¹, and in lobbying for the prohibition of torture achieving the status of a *jus cogens* norm.⁹⁹² This vignette will however focus on two specific legal developments widely recognised as championed by Cassese – the first, the broadening of the customary rules applying in Non-International Armed Conflict (NIAC); and the second the push for a definition and criminalisation of terrorism in times of

⁹⁸⁵ Acquaviva (n 942) 822.

⁹⁸⁶ Acquaviva and Pinzauti (n 927) 1429–1430.

⁹⁸⁷ Acquaviva (n 942) 825.

⁹⁸⁸ Stuart and Simons (n 930) 55.

⁹⁸⁹ Ibid.

⁹⁹⁰ Acquaviva (n 942) 825.

⁹⁹¹ Acquaviva and Pinzauti (n 927) 1422.

⁹⁹² Ibid 1423.

peace under International Law. They were both ‘examples of this striving towards individual criminal accountability’⁹⁹³ to further a larger pro-humanity project.

(a) Broadening the regulation of NIAC

Today, the rules regulating International and Non-International Armed Conflicts (IACs and NIACs respectively) largely overlap.⁹⁹⁴ This was not always the case; until the mid-1990s, NIACs were regulated sparsely, and violations thereof widely held as not criminalised. This change in the law was triggered by the seminal ICTY Jurisdictional Appeal decision in *Tadić*⁹⁹⁵, largely conceived by Antonio Cassese who sat as a judge in that case.

Until the mid-90s, NIACs were widely held to be governed by Common Article 3 to the Geneva Conventions (hereinafter CA3) and the narrowly applicable Additional Protocol II to the Geneva Conventions (hereinafter APII). States were reluctant to go beyond this, ‘and the existence of a body of customary norms pertaining to internal conflicts was generally held to be unlikely’ by most states and the Red Cross.⁹⁹⁶ As a consequence of their narrower scope of regulation, it was widely held that war crimes did not exist as an offence in NIACs, and that prosecutions for IHL violations were restricted to IACs. Since before the ICTY’s advent, Cassese held the minority view that NIACs were regulated by customary international law beyond Common Article 3 and APII. In 1975, he put forward an argument in favour of this view, using the practice of the Spanish Civil War as an example.⁹⁹⁷

In *Tadić* (Jurisdiction), in line with the majority view pre-ICTY, the defence argued that crimes committed under Article 3 of the ICTY Statute did not extend to non-international armed conflict in the absence of an express provision to that effect.⁹⁹⁸ Despite the absence of

⁹⁹³ Ibid 1430.

⁹⁹⁴ JM Henckaerts, ‘Annex. List of Customary Rules of International Humanitarian Law’ (2005) 87 *International Review of the Red Cross* 198.

⁹⁹⁵ Prosecutor v Tadić (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995).

⁹⁹⁶ Tamas Hoffmann, ‘The Gentle Humanizer of Humanitarian Law – Antonio Cassese and the Creation of the Customary Law of Non-International Armed Conflicts’ in Larissa van den Herik and Carsten Stahn (eds), *Future Perspectives on International Criminal Justice* (TMC Asser/CUP 2004) 2.

⁹⁹⁷ Cassese, ‘The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts’, *The Human Dimension of International Law: Selected Papers of Antonio Cassese* (2008). On the connection between Cassese’s scholarship and his view in *Tadić* on this issue, see Tamas Hoffmann (n 996).

⁹⁹⁸ Prosecutor v Tadić (Decision on Defence Motion for Interlocutory Appeal on Jurisdiction) IT-94-1-AR72 (2 October 1995), para. 71. In the merits of the case, there was controversy about the classification of conflicts in the former Yugoslavia, and said classification’s effect on the material jurisdiction of the Court. The defendant’s

a regime demanding criminal prosecution, and albeit admitting that not all IHL NIAC violations resulted in grounds for criminal prosecution, the Appeals Chamber found NIAC IHL violations were still prosecutable under customary international law. It grounded its decision on, again, a mix of state practice in military manuals and domestic law, ‘common sense’, and morality.⁹⁹⁹ *Tadic*’s subsequent success in extending the regulation of NIACs is well documented. Meron argues that, ‘largely under the impact of *Tadic*, there has been a broadening of international humanitarian law applicable to non-international armed conflicts, often through the elimination of distinctions between international and non-international armed conflicts’ that was adopted, for instance, in the ICRC CIL study, state practice, and UN peacekeeping practice.¹⁰⁰⁰

The judges could have taken ‘the easy way out’ of internationalising the conflict and applying the much more widely accepted law on war crimes in international armed conflicts, but ‘overdriven’ Cassese sought to ‘push’ for legal development¹⁰⁰¹ in line with his extra-curial position. Although arguing on the basis of customary international law, many argue the Appeals Chamber did not indeed ‘find’ customary international law, but ‘push international law in a new direction’.¹⁰⁰² Unlike other international judges, whose influence in specific decisions can be elusive, Cassese’s protagonism in the drafting of *Tadic*, and specifically the push for regulation and criminalisation of violations of IHL in NIAC, is ubiquitous; Meron refers to the decision as ‘Cassese’s *Tadic*’,¹⁰⁰³ and Cryer essentially conflates Cassese’s approach to the Court’s¹⁰⁰⁴. Cassese was instrumental in setting up the tribunal itself, and his opinions infused many of the *Tadic dicta*. There is a direct relationship between the state practice used to justify the stretching of the regulation of NIACs under IHL, and the criminalisation of

case was that the Court only had jurisdiction over international armed conflicts, and that the conflict in which the defendant was involved was of non-international character; see *Prosecutor v Tadić* (Judgment) ICTY-41-1-A, A Ch (15 July 1999).

⁹⁹⁹ Sarah MH Nouwen and Michael A Becker, ‘Tadić v Prosecutor (1995)’ (2020) 72 *Landmark Cases in Public International Law* 399–400.

¹⁰⁰⁰ Theodor Meron, ‘Cassese’s Tadic and the Law of Non-International Armed Conflict’ in LC Vorah et Al. (ed), *Man’s Inhumanity to Man: Essays in Honour of Antonio Cassese* (Brill 2003) 536.

¹⁰⁰¹ Acquaviva and Pinzauti (n 927) 1435.

¹⁰⁰² MH Nouwen and A Becker (n 999) 399.

¹⁰⁰³ Meron (n 1000).

¹⁰⁰⁴ Cryer, ‘International Criminal Tribunals and the Sources of International Law: Antonio Cassese’s Contribution to the Canon’ (n 949) 1048.

violations thereof, and Cassese's previous work on the subject¹⁰⁰⁵ – for instance, relying on state practice from the Spanish Civil War, which was equally central to his scholarship on the subject.¹⁰⁰⁶ Cassese himself admits to the creativity of the tribunal on this point, and his leadership in pushing for this particular legal development. Firstly accepting the absence of international crimes in NIAC, saying that '[t]he doctrine that had been upheld by everybody [...] that if you kill civilians, you rape women, you murder wounded POWs in an internal armed conflict – this is not a war crime. It is simply a violation [...]'.¹⁰⁰⁷ Secondly, he opens how it was his idea to push the law in a new direction through *Tadic*:

So I said 'why don't we jettison this stupid distinction?' My colleagues said 'yes we agree with what you are saying, [...] Nino, if you can show that there is some custom in international law supporting your views, we will go along with it. But try to find some sort of evidence.' So I took six months, and set up a team. One of the best members of our team was an American girl, Betsy Andersen, [...] she helped me go through state practice and we came up with a lot of evidence ... well some evidence. [laughter]¹⁰⁰⁸

The widely held view is that the Appeal's Chamber, and Cassese's, push to broaden not only the regulation of NIACs, but possibilities for prosecution for violations thereof, has been successfully incorporated as law. It was subsequently embedded in states' military manuals, and endorsed by the ICRC.¹⁰⁰⁹

(b) The crime of 'terrorism' under international law

Antonio Cassese has undertaken one of the most successful and overt instances of individual lawmaking through *Tadic*.¹⁰¹⁰ He was also the protagonist of what some consider a similar but

¹⁰⁰⁵ Antonio Cassese, 'La Guerre Civile et Le Droit International' (1986) 90 *Revue Generale de Droit International Public* 553.

¹⁰⁰⁶ Cassese, 'The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts' (n 997); Jean Marie Henckaerts, 'Civil War, Custom and Cassese' (2012) 10 *Journal of International Criminal Justice* 1095.

¹⁰⁰⁷ JHH Weiler, 'Nino – In His Own Words, The Last Page, Roaming Charges' (2011) 22 931, 942.

¹⁰⁰⁸ *Ibid.*

¹⁰⁰⁹ Tamas Hoffmann (n 996) 14–16.

¹⁰¹⁰ Dugard, 'Book Review: Realizing Utopia: The Future of International Law' (n 955) 482.

failed enterprise¹⁰¹¹: ruling that there was an international crime of terrorism in peacetime under customary international law. His ‘last attempt’ at shifting custom before his death in 2011,¹⁰¹² the Interlocutory Decision at the Special Tribunal for Lebanon was the target of immediate criticism amongst experts.¹⁰¹³ This section will dissect the decision’s position on defining a crime of terrorism in peacetime, and appoint the similarities and differences that may have led to its comparable failure in relation to *Tadic*’s contribution to NIAC regulation.

The already ill Antonio Cassese accepted the presidency of the newly open Special Tribunal for Lebanon in 2011. He was forthright about his motivations: finding the truth about Hariri’s assassination for the Lebanese people; because he had not completed his mission after seven years at the ICTY for international justice; his desire for ‘hubbub’ and ‘human contact with colleagues and friends’.¹⁰¹⁴ But above all, Cassese was openly interested in ‘the unique opportunity’ the Tribunal had to ‘test new ideas for the fight against terrorism’¹⁰¹⁵, which he saw as ‘[a] dream to be realized’.¹⁰¹⁶ Cassese’s investment in the definition and prosecution of terrorism as an international crime pre-existed his appointment to the STL. Bianchi traces a genealogy of Cassese’s position¹⁰¹⁷ back to at least 1989, with the publication of an ICLQ article on international responses thereto¹⁰¹⁸. In 2002, ‘he presented and articulated his vision of the *criminalization* of terrorism as a distinct crime under customary international law’ in a conference organised by Bianchi in Geneva.¹⁰¹⁹ In Cassese’s presentation, that ‘trespassed the time allotted to speakers and the ensuing debate was monopolized by his intervention’, he articulated the ideas later on solidified in a celebrated EJIL piece¹⁰²⁰ - namely that there was a customary rule

¹⁰¹¹ Milanovic (n 253) 1047.

¹⁰¹² Cryer, ‘International Criminal Tribunals and the Sources of International Law: Antonio Cassese’s Contribution to the Canon’ (n 949) 1055.

¹⁰¹³ Elies Van Sliedregt and Larissa Van Den Herik, ‘Introduction: The STL Interlocutory Decision on the Definition of Terrorism - Judicial Ingenuity or Radicalism?’ (2011) 24 Leiden Journal of International Law 651; Saul (n 952); See the immediate criticism in the Leiden Journal symposium about the decision, Kai Ambos, ‘Judicial Creativity at the Special Tribunal for Lebanon: Is There a Crime of Terrorism under International Law?’ (2011) 24 Leiden Journal of International Law 655.

¹⁰¹⁴ Acquaviva (n 942) 827.

¹⁰¹⁵ Ibid.

¹⁰¹⁶ Ibid.

¹⁰¹⁷ Acquaviva and Pinzauti (n 927) 1437.

¹⁰¹⁸ Antonio Cassese, ‘The International Community’s “Legal” Response to Terrorism’ (1989) 38 ICLQ 589.

¹⁰¹⁹ Acquaviva and Pinzauti (n 927) 1437.

¹⁰²⁰ A Cassese, ‘Terrorism Is Also Disrupting Some Crucial Legal Categories of International Law’ (2001) 12 European Journal of International Law 993.

criminalising terrorism under international law. The definition was later on refined, in an article published in '[Cassese's] journal'¹⁰²¹ – *The Journal of International Criminal Justice* – and his International Criminal Law textbook.¹⁰²²

Whereas there are substantive differences between Cassese's extra-curial position on the definition of terrorism,¹⁰²³ the STL decision honoured the spirit of those contributions, insofar as it recognized 'the importance of the criminalization of terrorist conduct at the level of customary international law'¹⁰²⁴ motivated by his seeing 'wanton destruction, indiscriminate violence' as 'the very negation of humanity'.¹⁰²⁵ Although the STL had jurisdiction over the crime of terrorism under domestic law,¹⁰²⁶ the Appeals Chamber chose to use international law to interpret it '[semiotically]',¹⁰²⁷ in the absence of gaps in Lebanese Law defining terrorism. The Chamber decided that Lebanese law should be presumed to encompass its international obligations unless otherwise stated, taking a monist view,¹⁰²⁸ and put forward a customary international law definition of a crime of terrorism in peacetime by analysing international treaties, domestic legislative and judicial practice, and practice of international organisations. It reached the following definition:

the following three key elements: (i) the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; (ii) the intent to spread fear among the population (which would generally entail the creation of public danger) or directly or indirectly coerce a national or international authority to

¹⁰²¹ Antonio Cassese, 'The Multifaceted Criminal Notion of Terrorism in International Law' (2006) 4 *Journal of International Criminal Justice* 933.

¹⁰²² Antonio Cassese and Paola Gaeta, 'Cassese's International Criminal Law' [2013] *Cassese's International Criminal Law* 1.

¹⁰²³ Such as the specific *mens rea* element Cassese argued for according to Bianchi, Acquaviva and Pinzauti (n 927) 1438.

¹⁰²⁴ *Ibid* 1439.

¹⁰²⁵ *Ibid* 1440.

¹⁰²⁶

¹⁰²⁷ Michael P Scharf, 'Introductory Note to the Decision of the Appeals Chamber of the Special Tribunal for Lebanon on the Definition of Terrorism and Modes of Participation' (2011) 50 *International Legal Materials* 509, 509.

¹⁰²⁸ Saul (n 952) 680–681.

take some action, or to refrain from taking it; (iii) when the act involves a transnational element.¹⁰²⁹

The Applicable Law decision has, as previously stated, generated controversy, one of the reasons being states longstanding divisions over the definition of terrorism amongst states,¹⁰³⁰ but also its approach to custom,¹⁰³¹ its use of international law to interpret domestic Lebanese Law applicable according to the STL Statute¹⁰³² and its (lack of) compliance with the *nullum crimen sine lege* principle.¹⁰³³ Unlike the ICTY, the STL is a tribunal applying domestic law in an international setting, and with a very narrow jurisdictional scope, namely Lebanon's former Prime Minister Rafik Hariri's assassination in 2005. The wide disapproval of the Chamber's approach to customary international law,¹⁰³⁴ for example, represents a wider problem with deriving customary international law from intricate domestic legislation and case law, especially in criminal law. Saul's criticism of the decision mentions crudeness and lack of nuance in the approach,¹⁰³⁵ but the degree of nuance he seems to require – one that analyses territoriality, or whether the relevant piece of domestic legislation is internalising a treaty – seems overly cumbersome, and not an effort through which the majority of international tribunals would be able to go through in finding custom. It is apparent from the literature, however, that Cassese's positionality and tendency to judicially innovate created the animosity towards the decision.

e. Conclusions

Cassese's project was to 'protect humanity' through international law. He believed this was a job for law, as an antidote to politics, and the international, as an antidote to the domestic. International judicial and quasi-judicial institutions were at their best if applying international criminal law to individuals, as opposed to the problematic regime of state responsibility, which

¹⁰²⁹ Interlocutory Decision on the Applicable Law: Terrorism, Conspiracy, Homicide, Perpetration, Cumulative Charging, Case No. STL-11-01/I (Feb. 16, 2011), available at http://www.stl-tsl.org/x/file/TheRegistry/Library/CaseFiles/chambers/20110216_STL-11-01_R176bis_F0010_AC_Interlocutory_D... [hereinafter Interlocutory Decision], para. 85.

¹⁰³⁰ Cryer, 'International Criminal Tribunals and the Sources of International Law: Antonio Cassese's Contribution to the Canon' (n 949) 1057.

¹⁰³¹ Robert Cryer, 'International Criminal Tribunals and the Sources of International Law' (2012) 10 1045; Saul (n 952); Milanovic (n 253).

¹⁰³² Saul (n 952).

¹⁰³³ Ambos (n 1013).

¹⁰³⁴ Saul (n 952); Milanovic (n 253); Ambos (n 1013); Cryer, 'International Criminal Tribunals and the Sources of International Law' (n 1031).

¹⁰³⁵ Saul (n 952) 681.

he saw as problematic.¹⁰³⁶ In order to do so effectively, these institutions had to be manned by ‘pushy’ ‘father figures’, who took it upon themselves to fight *realpolitik* to push international law closer to humanization. In pursuing this *pro-hominen* utopia, however, international lawyers had to be ‘realistic’, and provide a veneer of positive law to their pro-humanity bias. This is not an enterprise that always succeeds. As illustrated by the two normative enterprises espoused by Cassese dissected above, the agency of individual lawyers such as Cassese is important but remains tethered to external factors that defy simple cause and effect narratives.

Cassese’s arguably noble enterprise of protecting humanity was also not without its negative externalities, or immune to criticism. It came with a logic of improvement through law¹⁰³⁷, of history as progress,¹⁰³⁸ and anachronistic analogies between past state practice and current law,¹⁰³⁹ all characteristics scrutinised by critics. The goodness of the ‘international’, and of the ‘international criminal’ in particular, in contrast to the ‘domestic’,¹⁰⁴⁰ is also not without problems. His ideas of ‘international criminal tribunals ‘[dispensing] even-handed justice ... in the exclusive interest of the world community in the realization of the rule of law and the full implementation of the principle of accountability’, set up by ‘impartial persons without any links to the parties to a conflict and therefore unfettered by any national prejudice or bias’,¹⁰⁴¹ seems trite in 2021 in the wake of widespread critique of the ICC in particular as *another* site for political struggle,¹⁰⁴² and broader critiques on carceralism used to uphold human rights.

The processes whereby Cassese sought to further the two aforementioned enterprises bear striking resemblance: a sustained extra-curial position on the subject; Cassese’s presidency of an international(ized) tribunal with narrow jurisdiction; a presentational approach to the customary nature of a ruling, and the development itself a push towards what (he perceived as) a more humane version of international law. But the idiosyncratic nature of the process this

¹⁰³⁶ Antonio Cassese, ‘The Role of International The International Court of Justice: It Is High Time to Restyle the Respected Old Lady’, *Realizing Utopia: The Future of International Law* (OUP 2012).

¹⁰³⁷ Acquaviva and Pinzauti (n 927) 1447.

¹⁰³⁸ Cassese, ‘The Diffusion of Revolutionary Ideas and the Evolution of International Law’ (n 253).

¹⁰³⁹ Cassese, ‘The Spanish Civil War and the Development of Customary Law Concerning Internal Armed Conflicts’ (n 997); See two examples, drawing from practice in the Spanish Civil War and the French and Russian Revolutions Cassese, ‘The Diffusion of Revolutionary Ideas and the Evolution of International Law’ (n 253).

¹⁰⁴⁰ Acquaviva (n 942) 824.

¹⁰⁴¹ Cassese, ‘B.V.A. Röling - a Personal Recollection and Appraisal’ (n 984) 1149.

¹⁰⁴² See for instance the excellent Sarah MH Nouwen and Wouter G Werner, ‘Doing Justice to the Political: The International Criminal Court in Uganda and Sudan’ (2010) 21 *European Journal of International Law* 941.

thesis describes means contingency should not be underestimated: a tribunal with much narrower jurisdictional scope, a more politically sensitive subject matter, an increasing cynicism about international criminal tribunals, and quite simply limited time on Earth, can be fundamental ingredients that determine the success of said enterprises. The comparison between two of Cassese's legislative initiatives allows us to see the role of contingency and the complexity of the object of study of this thesis, and why it defies oversimplification and cause and effect narratives.

Another feature of the process that is in the background of this vignette is the 'victim of one's own success' aspect of individual lawmaking. Although individually powered, it is still a multi-player game, where the community of lawyers must promote, enable, or at least allow, certain ideas to 'stick'. In this case, being an overt successful judicial innovator, tireless and 'pushy', had an initially positive, but perhaps later on negative impact on Cassese's ability to shape the content of international law. If Cassese's every move was being scrutinised, his ideas on terrorism defended as both judge and academic could not quietly brew and steep themselves into international law, to use James Crawford's coffee analogy.¹⁰⁴³ This gives us some clues as to why, when writing about lawmaking outside perhaps the constrained private realm of obituaries and perhaps *Festschrift*, international lawyers prefer not to disclose individuals' lawmaking capabilities.

¹⁰⁴³ Crawford and Viles (n 737) 68.

3. Michael Schmitt, the Tallinn Manuals, and the regulation of Cyberwar

Cyberwar regulation has been part of the security discourse since the 90s. The ubiquity of digital technologies in fueling the everyday – from airplanes to electricity grids – has been painted as the perfect scenario for catastrophe.¹⁰⁴⁴ Disastrous scenarios, however, have been potential rather than actual – there has been little (if any) state practice of cyber force. Large scale cyber attacks amounting to the use of force have remained in the realm of speculation.¹⁰⁴⁵ Nonetheless, the area has remained a source of interest, and in 2013 and 2017, subsequently, an ‘International Group of Experts’ led by international lawyer and Professor of the US Naval College and the University of Exeter, Michael Schmitt, issued the *Tallinn Manuals* on international law governing cyber operations. This vignette will analyze the authority of the *Manuals*, the process whereby Schmitt and his selected ‘International Group of Experts’ drafted these instruments, and the content of some of the Rules in the manual, namely those that surround the contentious definition of ‘force’ in a cyber context. It will be argued Schmitt and the Experts’ views, due to the composition of the Expert panel and the nature of a rule-based ‘Manual’, both shape the subsequent practice of states where little practice is available on cyber, and potentially influence the general law on the use of force by ironing out important divergences in the literature. In an area in which the ‘societal consensus’ is particularly fraught and in constant flux,¹⁰⁴⁶ constructions such as Schmitt’s may be of particular consequence.

a. The Means and the project: Tallinn Manuals – between an expert report and a rulebook?

The Tallinn Manual on Cyberwarfare and its 2.0 iteration (the Manuals) purport to be ‘expert-driven non-binding document applying existing law to cyber warfare’¹⁰⁴⁷ and ‘cyber operations’¹⁰⁴⁸, respectively. They were the outcome of work undertaken since 2008. The first outcome of this project was the Tallinn Manual,¹⁰⁴⁹ published by CUP in 2013, which is

¹⁰⁴⁴ Thomas Rid, ‘The Argument’, *Cyber War Will Not Take Place* (OUP 2013) xii.

¹⁰⁴⁵ Lianne JM Boer and Arno R Lodder, ‘Cyberwar’ in Leukfeld and Stol (eds), *Cyber Safety: An Introduction* (1978) 1. Cyber attacks in Iran in 2010, Georgia in 2008, and Estonia in 2007 caused considerable disturbance, but neither incident caused ‘physical damage’ as such to fulfil Schmitt’s ‘physical damage’ test.

¹⁰⁴⁶ Bianchi, ‘The International Regulation of the Use of Force: The Politics of Interpretive Method’ (n 25) 675.

¹⁰⁴⁷ Michael N Schmitt, ‘Introduction’ in Michael N Schmitt (ed), *Tallinn Manual on International Law Applicable to Cyber Operations* (CUP 2013) 1.

¹⁰⁴⁸ Michael N Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (Second edn, Cambridge University Press 2017).

¹⁰⁴⁹ Michael N Schmitt, *Tallinn Manual on the International Law Applicable to Cyber Warfare* (Michael N Schmitt ed, Cambridge University Press 2013).

dedicated exclusively to codifying international law governing cyber operations that cross the warfare threshold. The second manual, Tallinn 2.0, was published by CUP in 2017, includes the previous rules, and adds to them additional ‘key aspects of the public international law governing “cyber operations” during peacetime’.¹⁰⁵⁰ They will be referred to mostly in tandem as ‘*the Manuals*’.

Tallinn 1.0 addresses exclusively cyber warfare, and is divided between Part I, ‘International Cyber Security Law’, expounding on general regulation of cyberspace by states and the *jus ad bellum*, and Part II, ‘The law of cyber armed conflict’, that looks at *jus in bello* aspects of cyber. *Tallinn 2.0* addresses cyber operations in war as well as peacetime. Part I, ‘General international law and cyberspace’,¹⁰⁵¹ addresses ‘Sovereignty’, ‘Due Diligence’, ‘Jurisdiction’, ‘Law of international responsibility’, and ‘Cyber operations not *per se* regulated by international law’. Part II deals with ‘Specialised regimes of international law and cyberspace’¹⁰⁵². Part III and IV, entitled respectively ‘International peace and security and cyber activities’ and ‘The law of cyber armed conflict’, has the previous *Manual* as its backbone.¹⁰⁵³

The *Manuals* status as a source of international law is ambiguous. It is placed by Schmitt, speaking as Project Director in the introduction to *Tallinn 2.0*, as neither ‘a “best practices” guide’, nor ‘progressive development of the law’, but ‘an objective restatement of the *lex lata*’ that is ‘policy and politics-neutral.’¹⁰⁵⁴ Elsewhere, in his private capacity, Schmitt places the manuals within the ‘*teachings*’ category, attributing to their experts the pedigree of ‘highly qualified publicists of the various nations’.¹⁰⁵⁵ Schmitt also immediately places the *Manuals* amongst private codification efforts, ‘applying existing law’¹⁰⁵⁶ in the lineage of the *San Remo Manual of International Law Applicable to Armed Conflicts at Sea* and the *Manual on International Law Applicable to Air and Missile Warfare*¹⁰⁵⁷, a lineage that Schmitt builds on to increase the authority

¹⁰⁵⁰ Michael Schmitt, ‘Introduction’ in Michael Schmitt (ed), *Tallinn Manual 2.0 on International Law Applicable to Cyber Operations* (CUP 2017) 1.

¹⁰⁵¹ Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (n 1048) 9.

¹⁰⁵² *Ibid* 177.

¹⁰⁵³ Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (n 1048).

¹⁰⁵⁴ Schmitt, ‘Introduction’ (n 1050) 3.

¹⁰⁵⁵ Michael N Schmitt, ‘International Law in Cyberspace: The Koh Speech and the Tallinn Manual Juxtaposed’ (2012) 54 *Harvard International Law Journal* 15.

¹⁰⁵⁶ Schmitt, *Tallinn Manual 2.0 on the International Law Applicable to Cyber Operations* (n 1048).

¹⁰⁵⁷ Schmitt, ‘Introduction’ (n 1047) 1.

of the Manuals.¹⁰⁵⁸ They are referred to in scholarship as something between an expert report¹⁰⁵⁹ and a rulebook¹⁰⁶⁰, and their legacy has been appraised in specific and general international law fora. Similarly to commentary that has been made about the International Law Commission, with the added bonus of a murkier production line to be expounded below, the Manuals straddle a strange dichotomy of describing itself as an instrument conjuring ‘the law as it stands’, but also having its purchase dependent and success measured by subsequent state acceptance.¹⁰⁶¹

Unlike the other cases analysed here – namely state responsibility, regulation of non-international armed conflicts and terrorism, and the protection of investments abroad – state practice and *opinio juris* in cyberwar are largely lacking. In other words, as Boer argues, state practice is “playing catch-up” with academic writing on cyberwar¹⁰⁶². From a formalist lawmaking perspective, this is particularly problematic: if one is to accept that binding law arises from ‘extensive and virtually uniform’ state practice and *opinio juris*, and no such practice exists, how can a text that precedes practice do nothing but codify existing law? Schmitt, in acknowledging this logical difficulty, does nothing to resolve it: he both admits ‘it is difficult to definitively identify any cyber-specific customary international law’, and that ‘as formulated, [the *Tallinn* rules] reflect customary international law ... as applied in the cyber context.’¹⁰⁶³

Their form, that of ‘Rules’ attached to a commentary, poses further interesting conundrums. Being ‘non-legislative codification’, they ‘portray novel rules as existing law’.¹⁰⁶⁴ In other words, the codification form is another feature that gives the *Manuals* authority, ‘despite the fact that they have not been enacted by the official law-making entities established by the political

¹⁰⁵⁸ Boer, ‘International Law as We Know It: Cyberwar Discourse and the Construction of Knowledge in International Legal Scholarship’ (n 332) 122.

¹⁰⁵⁹ Schmitt, ‘Introduction’ (n 1047).

¹⁰⁶⁰ Dan Efrony and Yuval Shany, ‘A Rule Book on the Shelf? Tallinn Manual 2.0 on Cyberoperations and Subsequent State Practice’ (2018) 112 AJIL 583.

¹⁰⁶¹ Boer, ‘Lex Lata Comes With a Date; Or What Follows From Referring to the “Tallinn Rules”’ (n 332) 77–78.

¹⁰⁶² Lianne JM Boer, “‘Restating the Law ‘As It Is’”: On the Tallinn Manual and the Use of Force in Cyberspace’ (2013) 5 Amsterdam Law Forum 4, 5, fn 7.

¹⁰⁶³ Schmitt, ‘Introduction’ (n 1050) 4.

¹⁰⁶⁴ Fernando Lusa Bordin, ‘Procedural Developments at the International Court of Justice’ (2013) 12 The Law & Practice of International Courts and Tribunals 81; Boer, ‘Lex Lata Comes With a Date; Or What Follows From Referring to the “Tallinn Rules”’ (n 332) 78.

community.¹⁰⁶⁵ Beyond his leadership of the *Manuals*, Schmitt has published widely subsequently on state practice supporting the positions articulated therein, consolidating and reinforcing their authority after publication.¹⁰⁶⁶

b. The person (and their community) - Schmitt, the International Group of Experts, and NATO CCDCOE

Speaking of entities responsible for this ‘non-legislative codification’, we now turn to those responsible for drafting the *Manuals*. The *San Remo Manual on International Law Applicable to Armed Conflicts at Sea*, and the Harvard Program on Humanitarian Policy and Conflict Research’s 2009 *Manual on International Law Applicable to Air and Missile Warfare*, similar publications *Tallinn* associates itself with, were organised respectively by an independent NGO and an academic centre in Harvard. The *Tallinn Manuals*, however, were produced under the auspices of NATO’s Cooperative Cyber Defence Centre of Excellence (NATO CCDCOE).

The Introduction to *Tallinn 2.0* takes an unclear approach towards its affiliation to NATO. It first openly states the NATO CCDCOE, a ‘renowned research and training institution’, ‘invited an independent group of experts to produce a manual on the international law governing cyber warfare’¹⁰⁶⁷. Immediately after, it distances itself from the Organization, placing the manuals as ‘not an official document, but rather the product of two separate endeavours undertaken by groups of independent experts acting in solely in their personal capacity’, not reflecting ‘the views of the NATO CCDCOE, its sponsoring nations, or NATO ... [or] any organization or State represented by observers’.¹⁰⁶⁸ The Centre’s publicity also oscillates awkwardly between affiliating itself to NATO, and affirming its self-sufficiency in relation to the organization in expounding its authority. According to the *Tallinn Manual 1.0* ‘[t]he NATO CCDCOE is neither part of NATO’s command or force structure, nor funded by NATO ... it is part of a wider framework supporting NATO Command Arrangements’¹⁰⁶⁹.

¹⁰⁶⁵ Bordin, ‘Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law’ (n 12) 536.

¹⁰⁶⁶ Michael N Schmitt, ‘Taming the Lawless Void: Tracking the Evolution of International Law Rules for Cyberspace’ (2020) 3 *Texas National Security Review* 86; Schmitt, ‘International Law in Cyberspace: The Koh Speech and the Tallinn Manual Juxtaposed’ (n 1055).

¹⁰⁶⁷ Schmitt, ‘Introduction’ (n 1050) 1.

¹⁰⁶⁸ *Ibid* 2.

¹⁰⁶⁹ Schmitt, ‘Introduction’ (n 1047).

The website for the organization describes it as ‘the NATO-accredited cyber defence hub we support our member nations and NATO with cyber defence expertise.’¹⁰⁷⁰ The manual recognises NATO CCDCOE has funded the project, hosted the sessions in Tallinn, and provided staff to organise the ‘complex logistical challenges associated with convening the meetings’, and Schmitt thanks them for ‘the freedom afforded’ by NATO CCDCOE which did not ‘attempt to influence the groups’ conclusions’¹⁰⁷¹. US and Estonian universities were involved in the process, providing funding and research assistance drafting the *Manuals*.¹⁰⁷² *Tallinn 2.0* was also discussed with support from the Netherlands Ministry of Foreign Affairs in what is called ‘The Hague Process’ which, according to Schmitt, ‘helped ensure the Manual is grounded in State understandings of the law and that it addresses the practical challenges States face’.¹⁰⁷³

The ‘International Group of Experts’, in capital letters, were two sets of individuals responsible for the first and second iterations of the *Manuals*. The first experts were not involved in the drafting of the provisions about peacetime international law governing cyber operations, but approved the re-drafting of the rules on the use of force’s portion of *Tallinn 2.0*.¹⁰⁷⁴ Any rule in the *Manuals* had to be approved unanimously by all Experts.¹⁰⁷⁵ The Experts included diverging positions in the Commentary to each rule.¹⁰⁷⁶ Both sets of experts responsible for *Tallinn* and *Tallinn 2.0* is said they were ‘carefully selected to include legal practitioners, academics, and technical experts’¹⁰⁷⁷, but little in *Tallinn 2.0* addresses the selection process of these Experts.

The experts convened on numerous occasions for the drafting and approval of the *Manuals*’ contents, and ‘in addition to formal meetings’ NATO CCDCOE organised (and presumably funded, in whole or in part¹⁰⁷⁸) a series of conferences and workshops on the subject.¹⁰⁷⁹ The

¹⁰⁷⁰ ‘NATO CCDCOE’ (*About us*) <<https://ccdcoe.org/about-us/>> accessed 2 March 2020.

¹⁰⁷¹ Schmitt, ‘Introduction’ (n 1050) 7.

¹⁰⁷² *Ibid.*

¹⁰⁷³ *Ibid.*

¹⁰⁷⁴ *Ibid.* 2.

¹⁰⁷⁵ *Ibid.* 4.

¹⁰⁷⁶ *Ibid.*

¹⁰⁷⁷ *Ibid.* 5.

¹⁰⁷⁸ Oliver Kessler and Wouter G Werner, ‘Expertise, Uncertainty, and International Law: A Study of the Tallinn Manual on Cyberwarfare’ (2013) 26 *Leiden Journal of International Law* 793, 805.

¹⁰⁷⁹ Schmitt, ‘Introduction’ (n 1050) 6.

Group of Experts responsible for the first Manual was exclusively North-American, European, and Australasian.¹⁰⁸⁰ *Tallinn 2.0* added participants from Asia (China, Japan, South Korea, India), and one from Chile.¹⁰⁸¹ The Experts' selection is not broached in the Manuals themselves, but Kessler and Werner describe the process as starting with Michael Schmitt, who was invited by the NATO CCDCOE, and then tasked with '[putting] together a group of experts that could start answering the questions regarding the applicability of international law to matters of cyberspace'.¹⁰⁸² They argue Schmitt was a rational choice for NATO CCDCOE since he has previously sat as an expert in IHL committees, had published widely on cyber, held the view that 'international law has to be just as applicable to online weapons as conventional weapons', and, most importantly, is deferential to states' interests of 'conducting warfare efficiently'.¹⁰⁸³ Having been given 'as much money as he needed and complete freedom to design his group of experts', Schmitt selects these 'professionals, technical experts and world class academics' but does not reveal the criteria whereby he does so, and has been criticized in his selection due to geographical bias and the absence of critics of his positions on the subject.¹⁰⁸⁴

Schmitt is at the centre of the works of the 'International Group of Experts' in capital letters¹⁰⁸⁵ as 'Project Director'. My work here is not the first to study the connection between Schmitt's scholarly work on Cyber and the rules on the use of force in the *Tallinn Manuals* purported as 'objective statement of *lex lata*'¹⁰⁸⁶. Lianne Boer has dissected this relationship in her thesis and publications on the subject,¹⁰⁸⁷ expounding upon Schmitt's power in the 'cyber'

¹⁰⁸⁰ Michael N Schmitt (ed), 'Tallinn Manual 1.0 International Group of Experts and Other Participatns', *Tallinn Manual 2.0 on International Law Applicable to Cyber Operations* (2nd ed, CUP 2017).

¹⁰⁸¹ Michael N Schmitt (ed), 'Group of Experts and Other Participants', *Tallinn Manual 2.0 on International Law Applicable to Cyber Operations* (CUP 2017).

¹⁰⁸² Kessler and Werner (n 1078) 804.

¹⁰⁸³ *Ibid* 805.

¹⁰⁸⁴ *Ibid*.

¹⁰⁸⁵ Kessler and Werner (n 1078).

¹⁰⁸⁶ Schmitt, 'Introduction' (n 1050) 3.

¹⁰⁸⁷ Boer, 'International Law as We Know It: Cyberwar Discourse and the Construction of Knowledge in International Legal Scholarship' (n 332); Boer, "'The Greater Part of Jurisconsults': On Consensus Claims and Their Footnotes in Legal Scholarship' (n 49); Boer, 'Narratives of Force: The Presence of the Writer in International Legal Scholarship' (n 332); Boer, 'Lex Lata Comes With a Date; Or What Follows From Referring to the "Tallinn Rules"' (n 332); Boer and Lodder (n 1045); Lianne JM Boer and Sofia Stolk, *Backstage Practices of Transnational Law* (2019); Boer and Aalberts (n 49); Boer, "'Restating the Law 'As It Is'": On the Tallinn Manual and the Use of Force in Cyberspace' (n 1062).

community. She presents Schmitt as ‘the central figure in the cyberwar debate’¹⁰⁸⁸. One can infer his centrality to the project from his editorship of the Manuals, as well as the reverence with which he is referred to by colleagues when introduced in lectures: as someone who ‘literally wrote the book’¹⁰⁸⁹ on International Law and Cyber, or someone they want to [be when they grow up].¹⁰⁹⁰ Boer argues Schmitt is not only *seen*, but *positions* himself as someone ‘at the heart of this debate’ and at the centre ‘of the group of experts with whom he drafted the Manual’¹⁰⁹¹.

Now a Professor at the University of Reading, in the UK, and Scholar in both the Lieber Institute of the United States Military Academy (West Point) and the US Naval War College, Schmitt was born in the United States, studied at Texas State University, Yale University, University of Durham, and the US Naval College. He acted for 20 years as a United States Air Force judge advocate specializing in operational and international law,¹⁰⁹² and participated as an expert in similar efforts such as the ICRC’s Study on Direct Participation in Hostilities, though he requested his name be deleted from the list of experts, since he disagreed with the group’s balancing between military necessity and humanity.¹⁰⁹³ He thus combines work as an IHL expert, a widely published academic affiliated to multiple institutions, and someone who works in close contact with, and often for, the US Government on use of force and humanitarian law matters. He pays close attention to subsequent state practice to the *Manuals* on ‘cyber’, making ample use of journal articles and blog posts to comment on the topic,¹⁰⁹⁴ and argues the US’ position on cyber has largely adopted the *Manuals*¹⁰⁹⁵. It is not unfair to say

¹⁰⁸⁸ Boer, ‘International Law as We Know It: Cyberwar Discourse and the Construction of Knowledge in International Legal Scholarship’ (n 332) 115.

¹⁰⁸⁹ For example giving a talk in Harvard, Michael N Schmitt, ‘PILAC Lecture on Cyber Operations and IHL: Fault Lines and Vectors’ (*PILAC Lecture on Cyber Operations and IHL*, 2015) 1 6:20 <<https://www.youtube.com/watch?v=ZWwrVAMSOT4>> accessed 27 February 2020. There are many other instances in which he does so – see the wonderful Boer, ‘International Law as We Know It: Cyberwar Discourse and the Construction of Knowledge in International Legal Scholarship’ (n 332) 5.

¹⁰⁹⁰ Michael Schmitt, ‘Tallinn Manual 2.0 Approach to State Responsibility’ (*NATO CCDCOE*) <<https://www.youtube.com/watch?v=1o8uuZsPvms>> accessed 27 February 2020.

¹⁰⁹¹ Boer, ‘International Law as We Know It: Cyberwar Discourse and the Construction of Knowledge in International Legal Scholarship’ (n 332) 116.

¹⁰⁹² University of Reading, ‘Professor Michael Schmitt - Law’ (*Our Staff*, 2021) 1 <<https://www.reading.ac.uk/en/law/our-staff/michael-schmitt>> accessed 18 July 2021.

¹⁰⁹³ Kessler and Werner (n 1078) 804.

¹⁰⁹⁴ See his list of publications on all major international law blogs, such as Just Security, Lawfare, AJIL Unbound, and EJIL Talk!

¹⁰⁹⁵ Schmitt, ‘International Law in Cyberspace: The Koh Speech and the Tallinn Manual Juxtaposed’ (n 1055).

he is sensitive to views held by the military, the US military in particular, and to governments' interests in general. His background in security suggests the lens through which he observes objects such as 'cyber' will be tinged with securitisation,¹⁰⁹⁶ determining to some extent how he views the area should be governed. Schmitt has been interested in 'cyber' since the 90s, having published one of the earliest academic legal articles on the subject, that Boer attributes to catapulting the debate into the mainstream.¹⁰⁹⁷

c. The Law – Uses of Force and Armed Attacks in Cyber War (and beyond?)

This section dissects the different ways in which the *Manuals* have positioned themselves in the use of force debate in general and on cyberwar in particular. The law on cyber war exists within, and thus both draws from and contributes to, 'one of the most controversial areas of international law' – the regulation of the use of force.¹⁰⁹⁸ The *Manuals'* experts were 'called to apply that undetermined, yet pivotal, provision of international law to the field of cyberspace' although 'the precise meaning and scope of Article 2(4) remains unclear and subject to much controversy'.¹⁰⁹⁹ In pushing the boundaries on the law on cyber in a certain direction, it is argued here the *Manuals* also help push the contentious area of law on the use of force *beyond* cyber alongside it.

(a) Definition of 'cyber uses of force'

Schmitt's aforementioned 1999 article that led to the '[taking off]' of cyberwar debates in the security community¹¹⁰⁰ articulates an expansive, four-tier criteria for what constitutes a cyber attack amounting to force. His approach is 'expansive', insofar as it looks at 'nature and consequences', but beyond 'physical damage to tangible objects or injury to human beings'¹¹⁰¹, to define cyber attacks amounting to uses of force. Under his criteria, even '[if] it is not *armed* force', computer network attacks may be 'a use of force as contemplated in the U.N. Charter] ... if the nature of its *consequences* track those consequence commonalities which characterize

¹⁰⁹⁶ As suggested in Kessler and Werner (n 1078) 796.

¹⁰⁹⁷ Boer, "Restating the Law 'As It Is'": On the Tallinn Manual and the Use of Force in Cyberspace' (n 1062) 6.

¹⁰⁹⁸ Christine Gray, *International Law and the Use of Force* (OUP 2008) 7.

¹⁰⁹⁹ Kessler and Werner (n 1078) 807.

¹¹⁰⁰ Michael N Schmitt, 'Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework' (1999) 37 *Columbia Journal of Transnational Law*.

¹¹⁰¹ *Ibid* 934, emphasis added.

armed force'.¹¹⁰² The criteria blends policy and law, and assesses severity, immediacy, directness, invasiveness, measurability, and presumptive legitimacy to establish whether, even in the absence of 'physical damage...' a cyber attack amounts to force in violation of Article 2(4).¹¹⁰³ By arguing for 'force' to be construed in this context beyond 'physical damage', Schmitt implicitly argues for a liberal interpretation of the prohibition of the use of force in Article 2(4) of the Charter, that '[advances] shared world order values'¹¹⁰⁴ and that uses context to determine legality.¹¹⁰⁵

His criteria were transplanted into Rule 11 in the first *Tallinn Manual*,¹¹⁰⁶ and Rule 69 in *Tallinn 2.0*. When making the assessment of whether acts *short of* '[acts] that injure or kill persons or damage or destroy objects', the Experts are said to 'take notice of an approach' in line with 'what States are likely to consider' when addressing the topic, footnoting said approach as that proposed by Schmitt in 1999.¹¹⁰⁷ Although in principle the distinction in the Manuals between cyber 'armed attacks' and cyber 'uses of force', only the first allowing for response in self-defence, there are still implications to this expansion of 'cyber force' beyond 'physical damage'. It permits cyber attacks to fall under the purview of the UN Security Council, has implications on state of necessity pleas, gives right to countermeasures,¹¹⁰⁸ and even, if one applies the 'accumulation of events' doctrine as the Experts suggest, may impact the definition of an armed attack allowing for use of force to be used in self-defence¹¹⁰⁹, as observed below.

(b) Pushing the boundaries around the definition of 'armed attack'

In order to properly engage with the regulation of cyberwar, the *Manuals* define different types of cyber 'force', and what are the lawful responses thereto. They engage with highly contentious legal points, such as the definition of an 'armed attack', that allows for force to be used by a

¹¹⁰² Ibid 935, emphasis added.

¹¹⁰³ Ibid 914–915.

¹¹⁰⁴ Ibid 903.

¹¹⁰⁵ Ibid.

¹¹⁰⁶ Boer, "Restating the Law 'As It Is'": On the Tallinn Manual and the Use of Force in Cyberspace' (n 1062) 6.

¹¹⁰⁷ Michael N Schmitt (ed), 'The Use of Force', *Tallinn Manual on International Law Applicable to Cyber Operations* (CUP 2013) 48.

¹¹⁰⁸ Michael N (ed) Schmitt, 'The Use of Force', *Tallinn Manual 2.0 on International Law Applicable to Cyber Operations* (CUP 2017) 337.

¹¹⁰⁹ Schmitt, 'The Use of Force' (n 1107) 56 Rule 13, para. 8.

state lawfully in self-defence. This section dissects what the *Manuals* say about *what* constitutes an armed attack, *who* can undertake an armed attack, and *when* in relation to an armed attack self-defence is triggered. In furthering these positions in the form of ‘Rules’, in the absence of widespread state practice on cyber and levelling out considerable disagreement on the use of force in general, the *Manuals* impact what we know in international law on the use of force,¹¹¹⁰ and in this thesis’ argument, what international law *may become*.

a. What constitutes an armed attack:

i. Cyber as weapons:

The first and second *Manuals* argue the ‘armed’ in ‘armed attack’ does not ‘necessarily [involve] the employment of ‘weapons’’, and that ‘scale and effects’ ‘analogous to those that would result from an action otherwise qualifying as a kinetic armed attack’ are an adequate test.¹¹¹¹ It thus broadens, in the absence of concrete state practice on the matter, the meaning of ‘armed’ in armed attack.¹¹¹²

ii. Accumulation of Events doctrine

The first and second *Manuals* defend the accumulation of events doctrine; when actions ‘result in injury, death, damage, or destruction’, the Experts were unanimous in ‘treating the incidents as a composite armed attack’.¹¹¹³ The second Manual qualifies ‘there must be convincing evidence’ the ‘smaller-scale incidents that are related and that taken together meet the requisite scale and effects’.¹¹¹⁴ When ‘actions do not result in injury, death, damage, or destruction’, the experts were divided: some were willing to consider small incidents put together amounted to an ‘armed attack’ despite the absence of destruction if consequences were sufficiently deleterious, whereas others believed physical damage was required.¹¹¹⁵ Despite possible endorsement by the International Court of Justice of such a doctrine in *Nicaragua* and *Oil Platforms*, some still consider this doctrine ‘controversial’¹¹¹⁶, as it narrows the general

¹¹¹⁰ Boer, “‘The Greater Part of Jurisconsults’”: On Consensus Claims and Their Footnotes in Legal Scholarship’ (n 49) 1021.

¹¹¹¹ Schmitt, ‘The Use of Force’ (n 1107) 55; Schmitt, ‘The Use of Force’ (n 1108) 340–341.

¹¹¹² Christine Gray, ‘Self-Defence: The Framework’, *International Law and the Use of Force* (4th ed., OUP 2018) 135–136.

¹¹¹³ Schmitt, ‘The Use of Force’ (n 1107) 56; Schmitt, ‘The Use of Force’ (n 1108) 342.

¹¹¹⁴ Schmitt, ‘The Use of Force’ (n 1107) 56; Schmitt, ‘The Use of Force’ (n 1108) 342.

¹¹¹⁵ Schmitt, ‘The Use of Force’ (n 1107) 56; Schmitt, ‘The Use of Force’ (n 1108) 342.

¹¹¹⁶ Gray, ‘Self-Defence: The Framework’ (n 1112) 164.

prohibition of force in Article 2(4) of the UN Charter and leads to potentially disproportionate responses.¹¹¹⁷

(c) *Who* can commit an armed attack

i. Non-state actors – attribution

Despite acknowledging that ‘the International Court of Justice [majority’s reluctance] to adopt this approach’¹¹¹⁸, and the ‘controversial’ nature of this premise,¹¹¹⁹ ‘[the] majority of the International Group of Experts concluded that State practice established a right of self-defence in the face of armed attacks by non-State actors, such as terrorist or rebel groups’, independently of the group’s affiliation with a state.¹¹²⁰ They attribute this evolution from the traditional interpretation of Article 51 – in which armed attacks giving rise to a right to self-defence emanate from states – to the international community’s reaction to 9/11. A minority of the Experts diverged, ‘suggesting that ... only states, or non-State actors conducting operations on behalf of States, can mount an armed attack as a matter of law’.¹¹²¹

This is perhaps the trickiest aspect in the extremely contentious area of self-defence, which Gray characterises as ‘intractable’¹¹²². This is true even when dealing with physical force, where physical evidence connecting states and non-state actors may be collected. In cyberspace, the relationship between a state and those responsible for a computer network attack is arguably even more inchoate – there is no ‘supply of arms’ and ‘training’, that will likely take place, and even ‘financing’ by a state, in the advent of cryptocurrency, may be difficult to prove. As pointed out by Kessler and Werner, ‘[if] cyberspace allows for new ways to hide or even erase origins, then this makes any simple ‘translation’ into the legal vocabulary of ‘attribution’ virtually impossible.’¹¹²³

(b) Non-state actors – the *unwilling or unable* third state

¹¹¹⁷ Ibid 164–165.

¹¹¹⁸ Schmitt, ‘The Use of Force’ (n 1108) 345.

¹¹¹⁹ Schmitt, ‘Group of Experts and Other Participants’ (n 1081) 345.

¹¹²⁰ Schmitt, ‘The Use of Force’ (n 1107) 58–59; Schmitt, ‘The Use of Force’ (n 1108) 345–346.

¹¹²¹ Schmitt, ‘The Use of Force’ (n 1108) 345.

¹¹²² Gray, ‘Self-Defence: The Framework’ (n 1112) 139.

¹¹²³ Kessler and Werner (n 1078) 800.

The majority of Experts adopts the conclusion that in case of responding to attacks initiated from ‘a State to which the attack cannot be attributed’, ‘when the territorial State is unable (e.g., because it lacks the expertise or technology) or unwilling to take effective actions to repress the relevant elements of the cyber armed attack’ the use of armed force in self-defence is permissible. This is a clear adoption of the ‘unwilling or unable’ doctrine, which has been the source of controversy amongst states and commentators at least since its articulation by Ashley Deeks in 2012,¹¹²⁴ and its employment by the US and the UK since.¹¹²⁵ Albeit ‘a minority of the Group’ did not consider this lawful, this is tempered in the Manual stating ‘other responses, such as an action based on the plea of necessity, might be appropriate’. The manual brings forth certain ‘procedural safeguards’ for this type of action (demanding the state in question put a stop to the activity, and affording the opportunity for response), but asserts certain ‘exceptional situations’ allow for immediate action.

(d) *When* can self-defence be deployed in relation to an armed attack

Both *Manuals* support anticipatory self-defence is permissible under international law. Quoting the *Caroline* correspondence, they defend use of force can be used in self-defence before an armed attack takes place. This leaves open the degree of imminence required; *Tallinn 2.0* expressly rejects the view that an armed attack must ‘be about to be launched’ for anticipatory self-defence to be lawful.¹¹²⁶ The majority of Experts instead support what they call the ‘last window of opportunity’ standard of pre-emption. The window ‘may present itself immediately before the attack in question, or, in some cases, long before it occurs’, and is thus more stringent than absolute pre-emption of the *Bush Doctrine*, but much less stringent than the one ‘[requiring] the attack be about to be launched’.¹¹²⁷ This position was also endorsed in Schmitt’s 1999 article.¹¹²⁸ The *Manuals*, by endorsing this position through its majority of Experts, paper over the extent of controversy in state practice and commentary on the subject.

¹¹²⁴ Ashley S Deeks, ‘“Unwilling or Unable”: Toward a Normative Framework for Extraterritorial Self-Defense’ 52 *Virginia Journal of International Law* 483.

¹¹²⁵ Ntina Tzouvala, ‘TWAAIL and the “Unwilling or Unable” Doctrine: Continuities and Ruptures’ (2017) 109 *AJIL Unbound* 266; Christine Gray, ‘The Use of Force against Self-Defense: A New War for a New Century?’ (2018) 1 *International Law and the Use of Force* 193, 244.

¹¹²⁶ Schmitt, ‘The Use of Force’ (n 1108) 351.

¹¹²⁷ Schmitt, ‘The Use of Force’ (n 1107) 63–64; Schmitt, ‘The Use of Force’ (n 1108) 351–352.

¹¹²⁸ Schmitt, ‘Computer Network Attack and the Use of Force in International Law: Thoughts on a Normative Framework’ (n 1100) 930.

d. Conclusion – Cyber as Force, and Force beyond Cyber?

The *Tallinn Manuals* are riddled with contradictions. They purport to be both ‘an objective restatement of the *lex lata*’, and ‘[only] an expression of the opinions of the two International Groups of Experts as to the state of the law’. They were written at the invitation of NATO, but disclaimed ‘not [to] represent the views of the NATO CCDCOE, its sponsoring nations, or NATO’.¹¹²⁹ Their rule-based format and lack of transparency about ‘voting patterns’, associated with a list of experts and their affiliations, both depersonalise the efforts into objective expertise, and draw from individual expertise to build authority.¹¹³⁰ In their second iteration, they expound rules that purport to govern cyber operations in peace and war, but start from and privilege a securitized perspective¹¹³¹.

Even more dramatically than in other vignettes in this series, the *Manuals* demonstrate the role one individual expert may have in leading a community to shape, in the near-absence of state practice, international law on the use of force in a specialised field. Schmitt’s selection process of experts – ‘the group reflects a geographical bias and does not include critics of the positions earlier adopted by the chair’¹¹³² – ensures the authority of his opinions is not only preserved, but *validated* by other members of the community. It was demonstrated, for example, how his earlier scholarly position on the definition of ‘force’ in a cyber context, had direct effect on the *Manuals*,¹¹³³ ironing out divergent scholarly opinion and coating personal scholarship with a veneer of acceptability. The collective nature of the *Manuals*, the mystique of the carefully selected International Group of Experts, the construction of a pedigree of non-legislative codifications, and the label of codification itself, all come together to weave Schmitt’s project of governing cyber through the prism of force closer to the acceptable core of international law.

The *Manuals* do not only contribute to the understanding of the law governing cyberspace. Incidentally, they support positions on the use of force that go beyond the narrow realm of cyber. Some of these positions are controversial. The majority of Experts defend the right to

¹¹²⁹ Schmitt, ‘Introduction’ (n 1050) 2.

¹¹³⁰ A point made in Kessler and Werner (n 1078).

¹¹³¹ Ibid 796.

¹¹³² Ibid 805.

¹¹³³ Boer, “‘Restating the Law ‘As It Is’”: On the Tallinn Manual and the Use of Force in Cyberspace’ (n 1062).

use of force in self-defence against Non-State Actors, the right to intervene in states ‘unwilling or unable’ to tackle cyber attacks, independently of that state’s involvement, the ‘accumulation of events’ doctrine of armed attack, and a right to anticipatory self-defence.

As pointed out by Boer, the way in which scholarship, and especially non-legislative codification instruments such as the *Tallinn Manual*, express legal opinions as *lex lata*, have an impact on ‘what we know about international law’,¹¹³⁴ and, in this thesis’ argument, what international law eventually *becomes*. One must also not ignore the rippling effects the regulation of ‘cyberwar’ will have on ‘war’. In an area where ‘societal consensus’ are especially fraught¹¹³⁵ as on the use of force, individuals influencing related but marginal regimes may ripple into the mainstream in ways that, even if one’s position finds it normatively desirable, deserve scrutiny.

¹¹³⁴ Boer, “‘The Greater Part of Jurisconsults’”: On Consensus Claims and Their Footnotes in Legal Scholarship’ (n 49) 1021.

¹¹³⁵ Bianchi, ‘The International Regulation of the Use of Force: The Politics of Interpretive Method’ (n 25) 676.

C. Vignettes' Conclusions

These *vignettes* shed further light on the processes whereby international lawyers make international law, this time outside 'general' international law, and in specialised regimes, with their own particularities.

Sir Eli Lauterpacht's vignette explored the realm of international investment law, and in particular the role of counsel, in shaping that area of law. His project, to protect investments through international dispute settlement, took shape in the form of 'dispute settlement clauses', and 'umbrella clauses' that percolated into many bilateral investment treaties. In the process of advising the Anglo-Iranian Oil Company in a series of disputes following nationalisation, and later on drafting one of the first (multilateral) treaties protecting investors in the Abs-Shawcross Convention, Sir Eli's work was the bequest of his father, Hersch Lauterpacht, in more ways than one. Intellectually, Sir Eli was most likely influenced by his ideas about protecting individuals in the international plane and granting them access to *international* dispute settlement mechanisms. Materially, he inherited the AIOC as a client, as well as access to Sir Hartley Shawcross and other figures with whom he devised to protect investors' rights outside cumbersome diplomatic protection and domestic litigation hostile to foreign investment.

Antonio Cassese's 'pro-humanity' project was epitomised here by his efforts in International Criminal and Humanitarian Law to regulate Non-International Armed Conflicts and criminalise terrorism in the international plane. He sought to carve these legal concepts into international law as a scholar and judge in two international(ized) criminal tribunals, the International Tribunal for the Former Yugoslavia, and the Special Tribunal for Lebanon. Cassese spoke openly of his motivations, his approach as a 'realist utopian' to change the law, and his mistrust of states. Whereas his ICTY leadership did bring about the regulation of Non-International Armed Conflicts through judicial lawmaking that is now ubiquitous, his work on terrorism at the STL just before his death was less successful. The comparative failure of his effort to criminalise terrorism demonstrates the role of contingency in the process of individuals making international law. A tribunal with narrower jurisdiction and stronger connection to the 'domestic', less rigorous 'presentational positivism' in the Tribunal's reasoning, and an untimely death leaving no time for lobbying in favour of the customary crime

of terrorism, culminated in a less favourable outcome. The openness with which Cassese sought to ‘legislate’ outside state practice is speculated to have also contributed to this result.

Michael Schmitt’s project was (is) to regulate ‘cyberwar’. He has undertaken this through a mix of prolific scholarship, which he pioneered in the 90s, and directing private codification efforts: the *Tallinn Manuals*. He received funding from NATO and *carte blanche* to select the ‘International Group of Experts’ responsible for drafting these *Manuals*. Though he presents the content of the manuals as neutral and objective *lex lata*, lack of state practice on the subject and the use of Schmitt’s own scholarship to craft key definitions in the *Manuals* put this neutrality narrative in check. His role was particularly prominent in defining ‘force’ in the cyber context, in which the *Manuals* rely on Schmitt’s scholarship to broaden the concept beyond *stricto sensu* physical damage. The *Manuals* also pronounce themselves on issues adjacent to, but broader than, ‘cyberwar’. The very contested definition of armed attack is broached at different points; the ‘majority of Experts’ in the *Manuals’* commentary espouse doctrines such as preemptive self-defence, self-defence against non-state actors, and most controversially the ‘unwilling or unable’ doctrine. Schmitt himself defends such views in his individual private scholarship. The rippling effect of the *Manuals* in a contentious area such as the use of force beyond ‘cyber’ should not be underestimated.

These vignettes illustrate the role of individual positionalities/biases in the shaping of their ideas about the law, the ‘package’ or form whereby individuals deploy their legislative projects, the role of the community in furthering (or hindering) projects’ successes, the role of States and international institutions in the process hereby described. They will be elaborated upon below.

1. Individual Biases

These individuals’ ‘projects’ that seep into international law are moulded by certain biases. These biases are shaped by individuals’ positionalities, and carried into the purportedly impersonal legal provisions crafted by these individuals when making international law ‘in their own image’. The connections between these individuals’ biases and international law’s structural biases are intertwined.¹¹³⁶ Biases ‘makes [international law] prefer certain normative

¹¹³⁶ Machiko Kanetake, ‘Blind Spots in International Law’ (2018) 31 *Leiden Journal of International Law* 209.

outcomes or distributive choices to others¹¹³⁷ – this means one’s experiences shape their world view, informing how they will choose to interpret the law, or craft it, and how international law will be shaped over time.¹¹³⁸

Elihu Lauterpacht’s experiences of protecting British investments in the Iranian oil nationalisation, his father’s work on individual rights, and beliefs in the international dispute settlement’s ‘neutrality’ (read superiority) in relation to domestic interests of capital-importing states, shaped his contributions to investment law. The professional networks partaken by him (i.e. those defending the interest of oil companies, connecting him to Hartley Shawcross) both shaped these views, and enabled him to exert lawmaking power through legal advice.

Cassese’s ‘anti-state and pro-humanity’ bias, his presentational positivism, and maverick approach to judging and institution building, were the features that led him to seek regulation of NIACs and criminalisation of international terrorism through international judicial institutions. His mistrust of positivism and conflation of that with fascism certainly collaborated for his comfort in judicial innovation to further the ‘humanity’ project. His distrust of ‘the domestic’ as too close to power, also shaped by his early experiences of fascism and subsequent practice judging atrocities at the international level, led him to believe in the goodness of international institutions, and overlook their own biases and shortcomings.

Schmitt’s ‘security’ bias, and flexible approach to the use of force prohibition, shaped by his military background in the US and connections to NATO, coloured his approach to ‘cyber space’ regulation. One can speculate about the alternatives to a securitised approach to ‘cyber’,¹¹³⁹ but it is safe to assume starting from force excludes certain peaceful alternatives. Securitisation bias crept into his approach to the *Tallinn Manuals*, manuals which are now considered a fundamental part of the discourse around cyberspace regulation, by for example decreasing the threshold for what constitutes ‘force’ in a cyber context below physical damage.

¹¹³⁷ Bianchi, ‘Choice and (The Awareness of) Its Consequences: The ICJ’s “Structural Bias” Strikes Again in the Marshall Islands Case’ (n 32) 84.

¹¹³⁸ Bianchi, ‘Epistemic Communities in International Arbitration’ (n 33) 28.

¹¹³⁹ On contingency, see below Part IV, A. Normative implications. Susan Marks, ‘False Contingency’ (2009) 62 *Current Legal Problems* 1; Venzke and Heller (n 46).

All of these examples demonstrate how individual biases are formed and then transferred onto international law, shedding light not only on ‘why individual lawyers [come] to endorse particular positions or arguments in distinct periods or places’¹¹⁴⁰, but how individuals’ positionalities translate into particular conceptions of international law that is purportedly neutral and devoid of personal origin. Rather, however, than painting these personal proclivities as ‘irresistible force of prejudice’¹¹⁴¹, the use of vignettes allows us to see law in the intersection of ‘necessity’ and ‘contingency’,¹¹⁴² agency and structure.

2. Form

These processes illuminate how form (and forum) in a legal intervention varies dramatically. There are more traditional vehicles such as ILC outputs, ICJ judgments, and scholarship; but there are also ‘softer’ instruments that are pivotal to lawmaking, by individuals and beyond.

Cassese’s example illustrates the use of decisions in *ad hoc* tribunals; Eli Lauterpacht’s reveals the role of counsel in the development of treaties (in force, not in force, multilateral, bilateral) and their ripple effect. Mike Schmitt’s use of non-legislative codifications – soft law – in a private setting illustrates how form and process can lend authority to personal scholarly positions, and coat them in a veneer of expertise.

These examples further illustrate the fraught dichotomy between formal and material sources and between soft and hard law in the formation of international law, and how this benefits individuals’ power to make law.

3. Community

Although the emphasis here is on the individual rather than the community, these case studies also demonstrate how the community both shapes individuals’ ideas, and helps determine their reception, as they did in the case of Ago and Crawford. Eli Lauterpacht’s relationship of kinship with Hersch Lauterpacht was pivotal in the development of his substantive ideas (individual access to international dispute settlement) and for the development of his own networks that allowed them to spread. Antonio Cassese’s purchase in the ICL community,

¹¹⁴⁰ Koskenniemi, ‘Introduction’ (n 8) 1.

¹¹⁴¹ Latour (n 47) 141.

¹¹⁴² Marks (n 1139).

which he helped form, bolstered by his position as a judge, allowed him to shape collective court decisions such as *Tadić*, and build an audience to take these ideas forward. However the same community was less receptive of his attempt to define terrorism as an international crime. Schmitt's position as Chairman of the International Group of Experts responsible for the *Tallinn Manuals* highlights the role of a (less than diverse) community in bolstering one's individual authority, and lending legitimacy to individual ideas by collective decision-making.

4. States

It stands to reason that States (though some more so than others¹¹⁴³) are pivotal in making international law; their presence looms large in the backdrop of these case studies. They hire Eli Lauterpacht as counsel, nominate Antonio Cassese as a judge, employ Schmitt as military legal adviser. States' interests remain paramount and can 'make or break' individuals' lawmaking efforts. There is a delicate dance between serving states' interests and going against them, a *pas de deux* between individual lawyers and states. Individuals can also themselves act as proxies for states interests: Schmitt's case is an example of NATO sponsoring someone with a history of military advice to states, and arguably a pro-state bias to enable legislative efforts treading on the veneer of independent expertise.

5. Institutions

The format of *vignettes* sheds light on the role of institutions in the process of individual lawmaking. The work of the World Bank to regulate investment protection through Aron Broches' leadership allowed some of the Abs-Shawcross provisions suggested by Lauterpacht to make their way into international law through bilateral treaty-making. The creation of International Criminal Tribunals in the 1990s facilitated Cassese's project to regulate Non-International Armed Conflicts in a way that would offer further protection to individuals in those settings. The cyber attacks against Estonia by allegedly Russian hackers led NATO to procure Schmitt's expertise to regulate cyberspace. Thus, these individuals' projects are not furthered in a vacuum, but in negotiation with states, other members of the 'invisible college', and international institutions. This does not detract, in my argument, from the power individuals do have, in those settings, to shape the law 'in their own image', and their general

¹¹⁴³ BS Chimni, 'Customary International Law: A Third World Perspective' (2018) 112 AJIL 1.

absence from lawmaking narratives. We should not overlook how they are constrained by these institutions, but also help shape and them. Cassese's Presidency is reported to have pushed the ICTY from potential failure into respected institution; Elihu Lauterpacht was involved in the building of international financial institutions in his relationship with Broches et al.; and Schmitt selected the relevant Experts to the *Tallinn Manuals* and tirelessly created academic space to push the project onto states and other experts in the field.

6. A process, not set in stone: change

These *vignettes* also illustrate how all of these legal developments pushed by individuals are, by definition, not set in stone. In the same way that particular legal provisions were shaped by individuals at particular times, they can be modified and reinterpreted over time by different actors with their own sets of biases furthering their own projects – state representatives, international institutions, civil society, and the community of lawyers. The 'reading down' of umbrella clauses, the pushback against the investment regime, and the relative failure of Cassese's definition of an international crime of terrorism – are part of the 'course of international law'¹¹⁴⁴. Schmitt's work in the *Manuals* is currently being disputed in other authoritative settings, such as the *The Oxford Statement on International Law Protections in Cyberspace*,¹¹⁴⁵ signed by experts such as Schmitt himself.

These ebbs and flows happen between the agency of individuals such as Eli Lauterpacht and Cassese, but also conflicting power structures – the interests of developing countries or general pushback against the 'old boys network' of international arbitration, concerns about the 'principle of legality' in international criminal law settings or closer scrutiny of international criminal tribunals, or questioning of the *Tallinn Manuals'* drafting process. This is however not a privilege of individual lawyers' legislation in international law, but of the system as a whole. It would be misguided to exclude or downplay the importance of individual members of the profession in the process. Various actors – States, international organizations, courts, NGOs, and individuals – are part of the process whereby interaction over time determines the success

¹¹⁴⁴ Crawford, 'Chance, Order, Change: The Course of International Law' (n 15).

¹¹⁴⁵ Dapo Akande and others, 'The Oxford Statement on International Law Protections in Cyberspace: The Regulation of Information Operations and Activities' (*EJIL Talk!*, 2021) 1 <<https://www.ejiltalk.org/the-oxford-statement-on-international-law-protections-in-cyberspace-the-regulation-of-information-operations-and-activities/>> accessed 4 August 2021.

of legal enterprises. Just because the process is often ‘grey’ rather than black and white should not mean the ‘individual’ factor is irrelevant and not worthy of scrutiny and recognition.

These vignettes have demonstrated the ways in which individuals may use their position as members of different limbs of the ‘invisible college’ to further personal projects and embed them into international law’s legal fabric. It explores this process specifically in specialised regimes. Building expertise and networks in specialised settings – international investment law, international criminal law, and international security law broadly construed – using a mix of scholarship and different types of practice – counsel and arbitrator, judge, and legal expert – , and employing legal forms beyond what we conceive as universally ‘binding law’ – multilateral treaties that did not come into force such as the Abs-Shawcross convention, judgments, and non-legislative private codifications/soft law – these *vignettes* capture the elusive ‘movement of law’ in the hands of its professionals. They further support that ‘[to] fix the boundaries of what [the use of force in cyberspace, or investment arbitration, or international criminal responsibility] is and to set the parameters for what is or is not an acceptable argument is no less than making the law. This is where the real stakes lie and what the questions are about.’¹¹⁴⁶

¹¹⁴⁶ Bianchi, ‘Epistemic Communities in International Arbitration’ (n 33) 28.

IV. Part IV - Conclusions and normative implications of this thesis

A. The background

Martti Koskenniemi's *Gentle Civilizer of Nations* problematized state-centric histories of international law – as far as history goes, 1873 supplemented, if not supplanted, 1648 as the critical date for the birth of our discipline. The importance of the profession, made up with 'people with projects', has not however penetrated debates about lawmaking and sources, which to a large extent remain state-centric. The literature about sources of international law (sources literature) remains impregnable to acknowledging that individuals *qua* individuals – through the 'teachings of publicists' or other limbs of the 'invisible college' – contribute to the making of international law.

The invisibility of the lawmaking role of the profession is not without consequence. Firstly, from an external standpoint, it impedes lawyers *at the periphery* from seeing that universally binding international law, particularly customary law, is made not only by the practice of states and state-controlled international institutions, but also by the international legal profession. Alternatively, for those who despite their peripheral origins are privy to some of these spaces, it is often hard to substantiate the power certain individuals hold in those spaces. This halts them from objecting to the 'invisible college's' lack of diversity given its true lawmaking power beyond loftier arguments about the need for representation. Secondly, from an *internal* standpoint, blindness to this phenomenon inhibits responsible wielding of power by members of the profession themselves. How one chooses to behave may change based on their understanding that their acts as counsel at the ICJ, or as investment arbitrator, may push international law, under the right circumstances, towards a specific direction. Of course, this is a benevolent reading of the phenomenon – it may be that drawing attention away from individual agency is not accidental, and that these individuals have no desire to enact their power responsibly. If that is the case, revealing the phenomenon to ensure *external* accountability becomes even more important.

More traditional doctrinal techniques do not capture the complexity and pervasiveness of the processes whereby individual members of the 'invisible college' make international law. Counting citations of 'teachings' in international court decisions does not suffice: Courts rarely

cite scholarship, and scholarship is but one ‘limb’ of the profession.¹¹⁴⁷ Moreover, courts are only one site where international lawyers operate. Focus on the lawmaking role of one specific roster (judges, scholars, arbitrators, counsel, government advisors), therefore, usually yields ambiguous results in which individual lawmaking role is muted.¹¹⁴⁸ Anecdotal accounts of individuals’ lawmaking role are more inclusive but not sufficiently robust.¹¹⁴⁹ This thesis engages other ways of recounting how individuals members of the profession make international law, and takes stock of this phenomenon.

This section of the thesis harnesses the conclusions reached in the previous four substantive sections, and fleshes out the main normative implications of the project. The process of unveiling is a valid exercise on its own insofar as it helps us better comprehend our discipline, question it, and improve it. But, the normative implications of the process of unveiling became apparent during the carrying out of the project. They are three-fold; firstly, *for those outside centres of power*, making the ‘college visible’ bolsters general claims for diversity. Secondly, showing the lawmaking power of a non-diverse community exposes avenues whereby some choices prevail over others, contributing to those undertaking *critical work* (feminist scholars, TWAILers, etc.). By inserting an element of individual responsibility into narratives about power, however, this thesis also complicates structural claims. Narrow *realpolitik* arguments such as Anthea Roberts’ claims about a ‘college’ divided along ‘national lines’¹¹⁵⁰ is only part of the story. Thirdly, this project bolsters claims about the need for *those inside the centres of power* to wield their power responsibly. In its broad normative implications, this thesis positions itself against the backdrop of larger debates about transparency in international law. Finally, this thesis responds to possible negative side-effects of unveiling the power of the ‘invisible college’ and democratizing the profession.

B. A summary

This thesis has concluded that (1) international law is practiced and taught by *individual members* of an ‘invisible college of international lawyers’, and that (2) the individual members of this

¹¹⁴⁷ See the insufficiency of Peil (n 74).

¹¹⁴⁸ Hernandez (n 217); 1979- Gleider I. (Gleider Ignacio) Hernandez, *International Court of Justice and the Judicial Function* (First edit, Oxford University Press 2014).

¹¹⁴⁹ Villalpando, ‘The ‘Invisible College of International Lawyers’ Forty Years Later’ (n 11).

¹¹⁵⁰ Roberts (n 45).

college have lawmaking power. It has also illustrated that (3) this community is far from diverse. Providing evidence of the lack of diversity on one hand and of unchecked power to make universally binding law on the other is unique. Previously, either claims were made about lack of diversity in a roster of the profession, or anecdotal/*ad hoc* accounts were given about the power of individual lawyers to influence the law. Confirming these other accounts of the lack of diversity of the profession, the quantitative study of obituaries in this thesis helps paint a more detailed and nuanced picture of the community of international lawyers.

Beyond mere organisation of the discipline¹¹⁵¹ or participation in an epistemic community that constructs knowledge,¹¹⁵² this thesis also demonstrates that international lawyers legislate. They do so as scholars, government advisors, counsel, judges, members of IO bodies, arbitrators and in other roles. This is due to the conflation of a customary, decentralized system of lawmaking¹¹⁵³ and the multifaceted character of the small community that makes up the international legal profession.¹¹⁵⁴ Although small communities of lawyers with power to shape the law also exist in domestic systems, this phenomenon is particularly relevant in the context of international law for three reasons. Firstly, sovereign equality is associated with a narrative about the need for *consent* in order to be bound – international law is portrayed as horizontal rather than vertical when it comes to lawmaking, unlike in domestic systems. This means the impact of individuals is not considered in mainstream sources narratives. Secondly, international law is still largely *customary*, and its substantive development is comparatively slow in relation to domestic systems with centralized legislative and judicial bodies. This leaves much more room for innovation in the face of uncertainty. Thirdly, the decentralized nature of international lawmaking, especially custom, associated with the absence of overarching checks and balances in the international system, leaves the power of international lawyers to influence the law unchecked. However, it is also argued here that a

¹¹⁵¹ Hernandez (n 217).

¹¹⁵² Bianchi, ‘Epistemic Communities’ (n 33).

¹¹⁵³ ‘The content of customary rules is the product of the dialectical process of international actors over time. It is identified by reference to non-formal criteria, despite the formalism of the evidence used to establish its existence.’ Crawford, ‘The Identification and Development of Customary International Law’ (n 38).

¹¹⁵⁴ Schachter (n 1); Villalpando, ‘The ‘Invisible College of International Lawyers’ Forty Years Later’ (n 11).

process-centred approach to sources of international law does not inherently exclude the role of the profession in lawmaking.

Part I of this thesis demonstrates that sources literature dismisses the role of individuals members of the profession in the making of international law, and defends that this dismissal is grounded on the history of international legal method. Positivists saw the importance of scholars for the discipline in the 19th century as detrimental to the projection of international law as ‘real law’ capable of constraining state action. Other attempts, as already mentioned above, to grapple with this phenomenon in the literature have been inadequate because they look at single professional rosters (judge, arbitrator, scholar) rather than the changing of professional hats, because they are anecdotal, or because they are not concerned with lawmaking but with the creation of the discipline (or a project within it). It also explores the burgeoning literature on the profession systematically, drawing important insights and distinguishing this contribution therefrom. This thesis overcomes these problems in the literature by (a) looking at the profession as a whole rather than specific rosters and communities, and (b) engaging in thick exemplary description of how individual members of the ‘invisible college’ operate and thus legislate.

Part II provides a description of the profession by using quantitative analysis. It creates networks of lawyers using the obituaries published in the *British Yearbook of International Law* to demonstrate in a large scale (1) that international lawyers constantly transition between professional roles, and (2) that they are a small and tight-knit community (3) composed of white men from the developed world. Characteristics (1) and (2) confirm how individuals build authority within the community and pollinize the system with their ideas and projects about the law. Characteristic (3) is relevant for bolstering critiques for diversity in the profession. Part II also helps illuminate the intersectionality of characteristics of lawyers (gender, race, class, nationality, educational background, etc.) that shape the biases which these individuals carry when making law ‘in their own image’. The ways in which the interactions with other members of the community, one’s career path, and intersectional identities, shape ideas and lawmaking efforts is explored subsequently.

Part III zooms into particular individuals' interventions to demonstrate how the characteristics of the profession and of its individual members fleshed out in Part II, allow international lawyers to make law. They do this not in simple cause-and-effect terms, but in a complex and dialectical process, where their attempts to shape the law may succeed but also fail. This multifaceted process comes through in the dissection of case studies of the process in general international law and in specific regimes.

Firstly, Roberto Ago's and James Crawford's attempts to make international law less contract-like and more public law-like are dissected. Connections to other lawyers (Ago and Dionisio Anzilotti, Crawford and Sir Percy Spender, and interactions with other ILC members such as García Amador, Riphagen and Arangio-Ruiz), personal characteristics, opinions on theoretical issues, and positions they occupied, overlap to generate more or less successful developments in positive law. Albeit a study that provides insights into how epistemic authority functions in international law, or how knowledge production *stricto sensu* in the form of 'teachings' influences lawmaking, this section was ultimately concerned with how this process of accretion results in *law* binding on states.

Part III, Section II looks at 'specialised regimes', expanding the case studies beyond the realm of 'general international law', the echelons of the ICJ and the ILC, and 'harder' legal materials. The role of individuals in making law in specialised regimes, with their idiosyncrasies and particular vocabularies and sites for power, is explored in three *vignettes* about Elihu Lauterpacht, Antonio Cassese, and Michael Schmitt. Elihu Lauterpacht's vignette looks at his role in promoting remedies at the international level for individual investors to protect their investments. This was motivated and enabled by his work as counsel in international and domestic disputes concerning the Anglo-Iranian Oil Company, nationalised by Iran. He later incorporated what he learned in the AIOC disputes in the Abs-Shawcross draft convention that inspired many subsequent bilateral investment treaties. Antonio Cassese sought to promote humanity protection by regulating non-international armed conflicts and criminalising international terrorism through international criminal law. His *vignette* sheds light on the particularities of international criminal law's lawmaking processes, but also the important role of contingency in determining the success or failure of a similarly orchestrated legislative enterprise, and the complexity of the processes captured here. Finally, Michael Schmitt's *vignette*

explores the role of the *Tallinn Manuals* in regulating cyberspace. It sheds light on the use of non-legislative private codifications, Schmitt's pro-security bias, and the attempt to regulate an area of law on which there is virtually no state practice.

C. Normative implications

Individual international lawyers' lawmaking power is not *'per se'* negative from the perspective of accountability and legitimacy of the decision-takers.¹¹⁵⁵ Scrutiny, internal and external to the professional community, rather than suppression of the process, are the proposed way to keep this process in check. Suppression of the process may be in any event fruitless, given the structure of the profession that privileges switching between roles.¹¹⁵⁶ Finally, I explore how this work contributes to the literature on agency and contingency in international law. Similarly to what is concluded by Susan Marks, it is argued that 'men and women make their own history, but they do not do so just as they please in circumstances they choose for themselves; they do so in present circumstances, given and inherited ... And what is revealed about necessity and contingency is that neither will do.'¹¹⁵⁷ Both aspects are fundamental if we are to take seriously inquiries into the 'emancipatory possibilities' of international lawmaking.

D. The power of unveiling

For those studying or practicing international law in the 'the Global South', debates about international lawmaking can only be penetrated via the literature on sources of international law (sources literature). Even at its most conservative, said literature accounts for power imbalances between nations and its implications for lawmaking. Issues surrounding the ability to access state practice, the ability to 'practice' itself through participation in international affairs, issues of access to materials due to language limitations, are all visible from the periphery. The role of international organisations in lawmaking and the power imbalances within those is also acknowledged: the United Nations Security Council's ability to shape states' behaviour despite problems of representation within it, and the struggle of developing nations to bolster the power of the General Assembly to generate custom, are openly discussed.¹¹⁵⁸ Similarly, the power of courts in making law is widely acknowledged – although usually referred

¹¹⁵⁵ The authors consider this in relation to the move from formal international lawmaking to what they call 'thick stakeholder consensus', see Pauwelyn, Wessel and Wouters (n 14) 750.

¹¹⁵⁶ Part II – The community: individuals, careers, and networks.

¹¹⁵⁷ Marks (n 1139) 13.

¹¹⁵⁸ See, for example, Rosalyn Higgins, 'The United Nations at 70 Years: The Impact upon International Law' (2015) 65 *International and Comparative Law Quarterly* 1.

to as ‘developing the law’ rather than ‘making law’, courts and tribunals such as the ICJ, the WTO Appellate Body, or the ICTY are visibly important.

Only once one begins to travel from the periphery and enter international law’s ‘centre(s)’, however – The Hague, European and North-American universities, Geneva, New York – it becomes clear that repeat individual members of the profession inhabit these environments, and that they form a community. As articulated by Koskenniemi,

At conferences it is easy to testify to the thickness of the sociological reality of the ‘invisible college’. Access to the college opens as soon as one is able to engage in small talk about the eccentricities of teachers or about the experiences of student life one shares with those already on the inside. [...] And yet, international law is taught at hundreds of law schools to thousands upon thousands of students most of whom will never have access, and may not even desire to access, to that college.¹¹⁵⁹

The ‘invisible college’s’ existence is not without consequences. As demonstrated by this thesis, the way in which the profession is organized associated with a decentralized system of lawmaking makes room for individuals to effectively make international law. Unlike the role of power politics and international institutions in lawmaking, this is not described in sources literature. It is neither apparent for those at the periphery (1) the existence of a community of international lawyers that make up the profession, nor (2) the power they hold to make law ‘in their own image’ in a decentralized system. The desire to address how individual members of the profession make international law began from a desire to uncover a phenomenon observed in practice that found no adequate account in theory. As the project progressed, it became easier to articulate what it was about: this desire to unveil did not stem from mere academic curiosity, but a belief that one needs to expose power structures. Disclosing the existence of the community itself and describing its functioning for outsiders is thus already a worthy exercise. Unveiling itself has *inherent value*. As aptly put by Andrea Bianchi in a broader context of method

Unmasking or unveiling – or simply identifying – these theoretical assumptions and presuppositions helps us better comprehend the nature of our understanding of international law, and the biases that may accompany our own or others’ vision of it. This venture is not merely academic. The way in which these theoretical presuppositions shape

¹¹⁵⁹ Koskenniemi, ‘Foreword’ (n 836) xiii–xiv.

our understanding of the power structures and systems of authority that we know as international law is far from neutral.¹¹⁶⁰

A parallel can be made between this project and *Is International Law International?*¹¹⁶¹, a study on how international law portrays itself as universal, although it is practiced, taught, and thought about differently in different places. In '[showing] international law's particularity', Anthea Roberts hopes to disclose these processes, and stimulate self-reflection about the effects of particularity in hope of mitigating them.¹¹⁶² Whereas Roberts confronts lawyers with the reality of particularism and their narratives of universalism, this project confronts lawyers with the reality of individuals' lawmaking power juxtaposed with mainstream sources narratives of state-centrism. Differently from Roberts' emphasis on the differences between national approaches, however, this work seeks to find but also complicate the relationship between one's biases and their image of the law. It explores agency and structure in demonstrating how international lawyers must balance pragmatism and utopianism, *realpolitik* concerns and their vision for international law, in ways that are influenced but not determined by national allegiances.

1. Transparency and Global Governance

Attached to a project that seeks to unveil structures is the concept of transparency. It is argued in this section that international lawyers, and international scholarship, need to be more transparent about the ways in which they contribute to the content of the law so that (a) they can be held accountable for their exercise of public power by the relevant constituents and (b) those holding power are *confronted* with said power and thus persuaded to act dutifully.

a. External accountability – 'stakeholder consensus' and transparency for 'public authority'
The absence and present impossibility of formal checks and balances for the international legal profession broadly construed at the international level¹¹⁶³ reinforces the need for

¹¹⁶⁰ Bianchi, *International Law Theories* (n 394) 1–2.

¹¹⁶¹ Roberts (n 45).

¹¹⁶² Koskenniemi, 'Foreword' (n 836) xvi.

¹¹⁶³ Crawford, 'The International Law Bar: Essence before Existence?' (n 138); Windsor, 'Government Legal Advisers through the Ethics Looking Glass' (n 147); Klabbers, 'Law, Ethics and Global Governance: Accountability in Perspective' (n 176).

transparent engagement with international lawyers' informal lawmaking power. Although 'transparency [...] is only a necessary, and not a sufficient condition for bringing about accountability'¹¹⁶⁴, the two are intimately intertwined. The power of transparency to increase accountability is expounded upon by Benvenisti in the context of international institutions and the response of courts,¹¹⁶⁵ Chinkin and Boyle in the context of multilateral treaty-making,¹¹⁶⁶ it is also the underlying goal of works on arbitrators undertaken by van Aaken and others¹¹⁶⁷.

When similarly confronted with the decrease of traditional forms of lawmaking in favour of informal norm-setting, Pauwelyn and others suggest 'thick stakeholder consensus' to replace 'thin state consent' as a form of governance of these processes.¹¹⁶⁸ Stakeholder consensus, that involves transparency and scrutiny about these processes, is similar to what is suggested here. The constituents to hold international lawyers accountable include their peers, representatives of states (especially those states less well-represented in the international legal profession), international law academics (especially those writing at the periphery without access to the workings of the 'invisible college'¹¹⁶⁹), and those directly affected by international lawyers' legislative endeavours. Despite the lack of formal institutions to keep the legislative role of international lawyers in check, Klabbers reminds us of the responsibility of constituents to hold the powerful accountable, 'that we evaluate them and correct them if and when necessary'.¹¹⁷⁰ Efforts such as the letter written by Professors of International Law in the wake of the Iraq War¹¹⁷¹, John Dugard's reflections on the profession¹¹⁷², Victor

¹¹⁶⁴ Anne Peters, 'The Transparency Turn of International Law' (2015) 1 *The Chinese Journal of Global Governance* 3, 15.

¹¹⁶⁵ Eyal Benvenisti and George W Downs, 'Toward Global Checks and Balances' [2009] *Constitutional Political Economy* 366; Eyal Benvenisti, 'The Law of Global Governance', *RdC* (Brill 2013).

¹¹⁶⁶ Alan Boyle and Kasey McCall-Smith, 'Transparency in International Law-Making' in Andrea Bianchi and Anne Peters (eds), *Transparency in International Law* (CUP 2013).

¹¹⁶⁷ Aaken and others (n 217) 433.

¹¹⁶⁸ Pauwelyn, Wessel and Wouters (n 14) 762.

¹¹⁶⁹ Schachter (n 177). Though this could arguably create more imbalances due to the intensity of labour required of those at the margins, and further ostracise them as 'critics'.

¹¹⁷⁰ Klabbers, 'Law, Ethics and Global Governance: Accountability in Perspective' (n 176) 321.

¹¹⁷¹ Matthew Craven and others, 'We Are Teachers of International Law' (2004) 17 *Leiden Journal of International Law* 363.

¹¹⁷² Dugard, 'What's Wrong with International Lawyers?' (n 314).

Kattan's and Charlotte Peever's archival work,¹¹⁷³ and scholarship criticizing the Bethlehem Principles¹¹⁷⁴ are all examples of the profession holding relevant actors accountable. States play an important role in keeping check of this process, as expounded by Bordin.¹¹⁷⁵

Examples of external checks were explored here. Whereas Roberto Ago's 'International Crimes of States' were generally rejected by states and other members of the profession, such as James Crawford as his successor in drafting ARSIWA, Cassese's attempt to criminalise terrorism at the international level was stalled by states and other members of the ICL community, such as Saul. Michael Schmitt's attempt to regulate cyberspace are part of an ongoing debate between him, his 'International Group of Experts', and those criticising his methodologies, and providing alternatives, in Foreign Ministries and academic fora.¹¹⁷⁶ This thesis argues the same mechanisms could be better utilised if scrutinising (criticizing or praising) individuals' lawmaking efforts in those terms. Overtly acknowledging individuals' role in lawmaking aids in this process.

b. Internal responsibility – self-reflexivity

Rather than perpetuating a culture that sees open scrutiny of professional conduct as bad taste or scientifically 'light'¹¹⁷⁷, this thesis argues that this type of work is powerful, as hope for accountability in this sphere would take place largely in an academic setting.

If accountability is the external check to the lawmaking power of international lawyers, the taking of responsibility is its internal counterpart. Responsibility refers to how international

¹¹⁷³ Kattan (n 699); Kattan (n 255); Charlotte Peever, 'Conducting International Authority : Hammarskjold, the Great Powers, and the Suez Crisis' (2013) 1 *London Review of International Law* 131.

¹¹⁷⁴ Daniel Bethlehem, 'Self-Defense Against an Imminent or Actual Armed Attack by Nonstate Actors' (2012) 106 *The American Journal of International Law* 769; Dire Tladi, 'The Nonconsenting Innocent State: The Problem with Bethlehem's Principle 12' (2013) 107 *The American Journal of International Law* 570; Mary Ellen O'Connell, 'Dangerous Departures' (2013) 107 *AJIL* 380; Elizabeth Wilmshurst and Michael Wood, 'Self-Defense against Nonstate Actors: Reflections on the "Bethlehem Principles"' (2013) 107 *American journal of international law* 390.

¹¹⁷⁵ Bordin, 'Reflections of Customary International Law: The Authority of Codification Conventions and ILC Draft Articles in International Law' (n 12); Bordin, 'Still Going Strong : Twenty Years of the Articles on State Responsibility's "Paradoxical" Relationship between Form and Authority' (n 13).

¹¹⁷⁶ Akande and others (n 1145); Boer, "'The Greater Part of Jurisconsults": On Consensus Claims and Their Footnotes in Legal Scholarship' (n 49); Boer, "'Restating the Law 'As It Is'": On the Tallinn Manual and the Use of Force in Cyberspace' (n 1062); Kessler and Werner (n 1078).

¹¹⁷⁷ Andrea Bianchi, 'The Unbearable Lightness of International Law' (2019) 6 335.

lawyers should appraise the consequences of their own actions. Often, accountability and the taking of responsibility walk hand in hand – pieces such as Dugard’s both reflect on past actions within the community of international lawyers and present a framework or a theory for self-appraising.¹¹⁷⁸ Similarly, Koskenniemi’s *Gentle Civilizer of Nations*¹¹⁷⁹ is both a meditation on the merits and shortfalls of international lawyers past and, in its Epilogue on the ‘culture of formalism’, an articulation of a framework for future action, though not specifically dedicated to lawmaking in particular. Jean d’Aspremont’s extensive work on self-reflection¹¹⁸⁰ would also be encompassed within self-reflexive literature. What these works do not articulate is a responsibility for the *content of the law* as such, which is the innovation of this thesis. From an internal standpoint, negating lawyers’ role in developing the law allows them to justify the indefensible as an ‘isolated act’ that will not compromise the system, or that does not deserve scrutiny. The language of responsibility of international lawyers for the rippling effects of their professional undertakings on the content of law itself is the second normative implication of this exercise.¹¹⁸¹

2. Implications for the periphery - the diversity of the profession and international law’s outsiders

In tandem with literature on transparency in international law, this thesis seeks to ‘empower the outsider by equipping them with information and thereby creating a precondition for holding power-holders into account’, if they so desire.¹¹⁸² It presupposes that recounting this otherwise untold phenomenon will help ‘[levelling] the playing field for battle for marginalized groups’¹¹⁸³ by providing them with relevant information. By (1) demonstrating how the profession is organized, and (2) describing its lawmaking power, and (3) quantifying the lack

¹¹⁷⁸ Dugard, ‘What’s Wrong with International Lawyers?’ (n 314).

¹¹⁷⁹ Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (n 97).

¹¹⁸⁰ Jean D’Aspremont, ‘Martti Koskenniemi, the Mainstream, and Self-Reflectivity’ (2016) 29 *Leiden Journal of International Law* 625; Jean D’Aspremont, ‘International Lawyers and Legal Forms: Transatlantic Denials’ in Chiara Giorgetti and Guglielmo Verdirame (eds), *Concepts on International Law in Europe and the United States (Forthcoming)* (CUP 2018); D’Aspremont, *International Law as a Belief System* (n 400); D’Aspremont, ‘Jenks’ Ethics of Responsibility for the Desillusioned International Lawyer’ (n 400).

¹¹⁸¹ Klabbers, ‘Law, Ethics and Global Governance: Accountability in Perspective’ (n 176); Klabbers, ‘Virtue Ethics Doing Justice? Bureaucracy, the Rule of Law and Virtue Ethics’ (n 176).

¹¹⁸² Andrea Bianchi and Anne Peters, *Transparency in International Law* (Andrea Bianchi and Anne Peters eds, CUP 2013) 555.

¹¹⁸³ *Ibid.*

of diversity in its composition, this thesis further empowers marginalized groups' longstanding claims for more diversity in international organizations, international courts, national and 'international' bars, and senior posts at universities.

Providing confirmation of the power of the community on one hand and its lack of diversity on the other bolsters claims by 'outsiders' that the profession is not and must become more inclusive. The need for participation is not only tokenistic – people that make up the profession make law, thereby carrying into it their projects and preconceptions, thus strengthening the case for why marginalized groups need to be represented. It goes beyond claims for diversity based on institutional legitimacy. Presence however is not enough; as this thesis demonstrates, true membership to 'the invisible college' and access to the lawmaking power attached thereto requires more than formal membership.

Much like transparency, diversity does not exist in a vacuum, and subordination of one group by another is always relational.¹¹⁸⁴ Broader discussions about diversity within and beyond international law require a holistic intersectional approach, because relationships of subordination always exist in context.¹¹⁸⁵ Exclusion exists in the intersection between 'race, ethnicity, and gender',¹¹⁸⁶ nationality, and class, all of these identities embedded in a capitalist structure that perpetuates economic inequality between individuals and nations.¹¹⁸⁷ This thesis cannot purport to cover the implications of the lack of diversity in all spheres, and it will use *geographical representation* and *gender representation* in particular as illustrations in light of Section II's empirical findings about the (lack of) diversity of the 'invisible college' in the *British Yearbook's* obituaries. Similarly to what is argued by Charlesworth and Chinkin, however, it is '[hoped] that these methods will be of value to other groups outside the boundaries of international law'.¹¹⁸⁸

a. Gender representation

Despite its almost 20 years of age, Charlesworth and Chinkin's *Boundaries of International Law: a feminist analysis* remains the canon on the intersections between gender and international law.

¹¹⁸⁴ Ibid 553.

¹¹⁸⁵ Charlesworth and Chinkin (n 514) 19.

¹¹⁸⁶ Ibid.

¹¹⁸⁷ Chimni (n 1143).

¹¹⁸⁸ Charlesworth and Chinkin (n 514) 19.

The first reason for the book's long shelf life is its immaculate style, comprehensive nature, and balanced and fierce critiques. The second reason is less fortunate – international law has *not* come a long way since 2000, and the book's assessments remain pressing. This is particularly true of Chapter 6, that surveys the participation of women in international institutions.¹¹⁸⁹ The last United Nations Report on the status of women in the UN system came to the conclusion that the progress in the area is 'slow and uneven', as 'plateauing and regression' occurs in the increase of women's participation in professional and other categories.¹¹⁹⁰

At the International Law Commission and the International Court of Justice, institutions whose lawmaking authority became particularly evident in this thesis, the gender parity record is appalling. Dame Rosalyn Higgins was the first woman elected to the ICJ in 1995. She was followed by Judges Joan Donoghue (United States) and Xue Hanqin (China) only in 2010. Julia Sebutinde (Uganda) was elected in 2012; the last three are all current female members. The first woman to be appointed *ad hoc* judge was Suzanne Basdevant-Bastid, in 1982¹¹⁹¹. Three other women have been appointed as judges *ad hoc* - Louise Arbour (Canada),¹¹⁹² Hilary Charlesworth (Australia),¹¹⁹³ and Christine van den Wyngaert (Belgium).¹¹⁹⁴ Studies demonstrate that the diversity of counsel before the court is also staggering.¹¹⁹⁵

At the ILC the situation is even more outrageous – 'Seven Women in Seventy Years'¹¹⁹⁶ have been elected to the ILC as reported in the commemoration of its 70th year anniversary this year. The first two women were elected in 2001 – Xue Hanqin (China), Paula Escarameia (Portugal). Marie Jacobsson (Sweden) was a member between 2007 and 2016. Currently,

¹¹⁸⁹ Ibid 171 et seq Although the relationship between the absence of women in international law and the perpetuation of gender biases permeates the whole book as explored below, Section B.

¹¹⁹⁰ UNGA 'Report of the Secretary-General on the Improvement in the status of women in the United Nations System' (27 July 2017) 72nd Session (2017) UN Doc (A/72/220).

¹¹⁹¹ For Tunisia, Application for Revision and Interpretation of the Judgment of 24 February 1923 in the Case Concerning The Continental Shelf (Tunisia/Libyan Arab Jamahiriya) (Tunisia v Libyan Arab Jamahiriya) (Judgment) [1985] ICJ Rep 192.

¹¹⁹² For Chile, Obligation to Negotiate Access to the Pacific Ocean (Bolivia v Chile) (Judgment) [2015] ICJ Rep 592.

¹¹⁹³ For Australia, *Whaling*.

¹¹⁹⁴ For Belgium, Case Concerning the Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo v Belgium) [2002] ICJ Rep 3.

¹¹⁹⁵ Undertaken between 1999 and 2012, Kumar and Rose (n 302).

¹¹⁹⁶ International Law Commission, 'Seven Women in Seventy Years: A Roundtable Discussion on Achieving Gender Parity at the International Law Commission On', *70th Anniversary of the International Law Commission* (2018).

Concepción Escobar Hernández (Spain), Patrícia Galvão Telles (Portugal), Marja Lehto (Finland) and Nilufer Oral (Turkey) are members.¹¹⁹⁷ Other rosters' statistics are far from hope-inducing.¹¹⁹⁸

This thesis demonstrates how different perspectives infuse the law in a very real way, and how gender biases can be infused into international law's content through the individuals that practice it. This bolsters existing critiques favouring gender representation across the profession.

b. Geographic representation

Unlike gender, geographic representation in international institutions is taken more seriously since the inception of international organisations such as the UN, and voting blocks are taken sufficiently seriously so that numerical representation is not an issue. Both the ICJ and the ILC are good examples – judges and members are relatively geographically diverse, by for example ensuring no two members representing the same state can be elected to these fora. However, representation in individual rosters of institutions paints only part of the picture. Presence only partly overlaps with voice and impact.

As established by this thesis, the ability for individual members of the profession to make an impact in the content of the law lies in, amongst other factors, the ability to transition between roles, and to be part of a community of lawyers. In the case of women, insufficient progress has been made on all fronts, so women's voices are literally near absent from high-level discussions. Geographical representation on the other hand is taken seriously by international institutions, but this does not equal saying that this proportionally makes the 'invisible college' more diverse.

Surveying obituaries allows us to measure diversity beyond presence, and it reveals that the 'invisible college' is not diverse in either category: obituaries contain evidence concerning relationships of an official nature, which could be reconstructed from official records, but also provide a more colourful and detailed picture. Indeed, it is often the more informal ties that

¹¹⁹⁷ Out of 34 members.

¹¹⁹⁸ See Priya Pillai, 'Women in International Law: A Vanishing Act?' (*Opinio Juris*, 3 December 2018) <<http://opiniojuris.org/2018/12/03/women-in-international-law-a-vanishing-act/>> accessed 26 February 2019.

demonstrate social capital within the ‘college’. Self-selectivity in obituaries allows us to see whose lives are worth memorializing, which in itself speaks volumes as to how the group operates at a social level. Who these obituaries do not memorialise – women and lawyers from the Global South – provides a strong indication of the lesser ‘social capital’ of these individuals, and potentially proportionately lesser impact of their voices in substantive discussions. This study thus enriches other quantitative studies that seek to map out the profession by looking at rosters, such as ICJ counsel or the international arbitration community.

This thesis thus contributes to debates about representation of marginalized groups in the international arena, but forcing critiques to think beyond presence of said groups in the narrow sense. It shows that the international legal profession is even less diverse if one looks at the most influential core, and that efforts to diversify need to be associated with more complex discussions about voice, and consequently about power structures in all their complexity, and how these are reproduced at the level of the international legal profession.

3. The impact of (lack of) diversity – individual influence as an avenue for perpetuating biases

By verifying lack of diversity in and lawmaking power of the international legal profession, this thesis provides further grounding for those seeking to uncover the perpetuation of international law’s biases – for instance in the context of economic, geographical, gender and race subordination. Even if the structure of legal argument is radically indeterminate¹¹⁹⁹, or if, in this thesis’ argument, sources are better understood as a process over time where one can take ‘snapshots’ to verify the status of the law, how does international law continue to reproduce patterns of structural inequality over ‘progressive’ causes?

The unique contribution of this thesis does *not* lie in making substantive claims about international law’s multiple structural biases. Uncovering said biases has been the work of critical international legal scholars, Marxists scholars, TWAIL scholars, feminists, and scholars ‘Queering International Law’.¹²⁰⁰ What this thesis *does* is, by demonstrating lack of diversity on

¹¹⁹⁹ Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (n 8); Koskenniemi, ‘The Politics of International Law - 20 Years Later’ (n 8); Anghie (n 887); Pahuja (n 888); Samuel Moyn, *Not Enough: Human Rights in an Unequal World* (Harvard University Press 2018).

¹²⁰⁰ Anghie (n 887); Pahuja (n 888); Emily Jones, ‘Dianne Otto (Ed): Queering International Law: Possibilities, Alliances, Complicities, Risks’ (2019) 27 *Feminist Legal Studies* 115; Vasuki Nesiah, ‘Decolonial CIL: TWAIL,

one hand and power to determine the law on the other, uncover one of the vehicles whereby these biases perpetuate themselves. Individual case studies illuminate how this happens in practice in singular instances, but also complicate structural accounts by demonstrating how one's multiple identities and experiences shape one's views and normative undertakings. If international lawyers make international law, and the community of influential professionals will struggle to escape the structures of which they are part, one can reinforce the argument that people as well as institutions¹²⁰¹ are part of this picture.

When perpetuating their own image of 'justice', individuals mirror the complex intersecting identities that shape their biases. A mix of what they learned from their mentors, previous experiences in practice, their appreciation for a certain concept, what they are allowed to push for in a certain forum, all inform and are informed by their biases. It is beyond the scope of this thesis to make general claims about how biases in general shape one's worldview and legal practice, but what these case studies demonstrate is that the relationship between one's intersectional identities and experiences and how they shape one's views on the law defies oversimplification.

This thesis demonstrates that there is room beyond narrow understandings of what these biases are, where individual actions can have consequences, and can be used to further progressive causes. James Crawford's intervention in favour of Australia in *East Timor* comes to mind, as does Michael Schmitt working closely from within the US Government and NATO to regulate cyberspace through a use of force lens. However, the same James Crawford acted against Australia in *Certain Phosphate Lands in Nauru*, which is arguably a case where international law furthered a progressive interpretation of standing, favouring the claims of former colonies. Equally, whereas Eli Lauterpacht's push for protecting individual investors may have generally reflected the UK's interests as a capital exporting state, Antonio Cassese's vision of international criminal law seemed much more connected to personal understandings of the desirability of criminal law as a deterrent to international crimes than a particular policy approach by Italy. In other words, for interventions such as Percy Spender's in *South West Africa*

Feminism, and an Insurgent Jurisprudence' (2018) 644 AJIL 313; Gathii (n 302); James T Gathii, 'Africa and the History of International Law'.

¹²⁰¹ Sinclair, *To Reform the World: International Organisations and the Making of Modern States* (n 169).

extensively discussed above, there are also opinions such as Giorgio Gaja's in *Jurisdictional Immunities of State* against his state of appointment and nationality. In this sense, the conclusions here complicate work that closely connects characteristics such as nationality to an espoused legal position, such as Anthea Roberts¹²⁰², to counter international law claims to universality. Looking at the granular level of instances in which individuals sought to 'make law' in their own image, nationality is often a factor determining their choices, but the picture is much more complicated.

This is not to say whenever international lawyers are not pushing a 'national' agenda they are operating outside biases. International lawyers' biases include our inclination to construct arguments in state-centric terms,¹²⁰³ but as Kimberle Crenshaw's¹²⁰⁴ work on intersectionality illuminates, identity is complex and not monolithic. The relationship between different identities (in her case, gender, race, and class,¹²⁰⁵ but extensible to nationality, sexuality, educational background) influences one's experience of the world. Crenshaw uses anti-discrimination law to demonstrate how the intersectionality between gender, race, and class excludes certain marginalised identities from the purview of the law, creating gaps in protection. Whereas usually this frame is used to explain how intersecting identities influence how one experiences power, and oppression more specifically, it can also be used to understand the many ways in which identities intersect to inform how one *inflicts* power upon others. The influence of intersectionality in feminist approaches to law in particular, and the feminist movement in general has been pivotal, but little about it has been written on the impact of intersectional identities in the formation of the biases of international law professionals.¹²⁰⁶

¹²⁰² Roberts (n 45).

¹²⁰³ Bianchi, 'Choice and (The Awareness of) Its Consequences: The ICJ's "Structural Bias" Strikes Again in the Marshall Islands Case' (n 32).

¹²⁰⁴ Kimberle Crenshaw, 'Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics' (1989) 1989 University of Chicago Legal Forum 271.

¹²⁰⁵ Angela Davis, *Women, Race & Class* (Penguin 1981).

¹²⁰⁶ With the exception of Makau Mutua: Makau Mutua, 'Critical Race Theory and International Law: Convergence and Divergence' (2000) 45 Villanova Law Review 827, 843. See also Ksenia Polonskaya, 'Diversity in the Investor-State Arbitration: Intersectionality Must Be a Part of the Conversation' (2018) 19 Melbourne Journal of International Law 259.

Whereas it may seem odd to use intersectionality as a frame to analyse the work of five (or more, depending on how one counts) white men from the Global North influence on international law, a look at granular level individual experiences enriches our observation of how biases are formed and restrains us from both dismissing *and* overplaying the role of identities in the process. Focusing on people's lawmaking power both strengthens *and complicates* structural debates. It is true that one cannot escape the pervasiveness of national agendas, imperial histories, economic and gender-based subordination. But looking at how the community of international lawyers develops a unique 'cosmopolitan sensibility' to create a discipline¹²⁰⁷ and to make law that at times challenges sovereignty in radical ways, as Antonio Cassese did, and Roberto Ago attempted, demonstrates that there is something unique individual members of the profession bring to the table. Individuals perpetuate structure, but they also challenge it. They sometimes, intentionally or not, further the agendas of their country of origin, their gender, their class whilst making law. But many other times they try to make the law be more 'just'. In doing so, however rejecting national agendas, they may perpetuate *other* biases – a pro-force outlook, in Schmitt's case, or a pro-carceral outlook, in Cassese's case.

4. Changes in the landscape and side-effects of a more 'visible' college

Unveiling the workings of the 'invisible college', and specifically its lawmaking role, challenges narratives about the centrality of states in lawmaking, and bolsters claims for diversity in the profession. However, exercises of unveiling such as this and the expansion of the 'college' beyond a small group of usual suspects is not without consequence is not without potential side-effects.

As for unveiling, part of the very power of the college lies on its symbiotic relationship with states – the members of the 'invisible college' constantly interact and often represent states; states provide them with the fora in which to act and practice to draw from. But states and members of the college are ultimately separate beings, different 'species' that interact as much as it is convenient. Their interests may, but also may not, coincide, and that is where the

¹²⁰⁷ Koskenniemi's argument, Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law, 1870-1960* (n 97).

college can be most beneficial to the international law ecosystem – whereas states are likely to defend their interests, the members of the college imbued with their ‘cosmopolitan sensibilities’ season international law with the ‘*conscience juridique*’,¹²⁰⁸ challenging naked power from within but also from outside the state, as the case studies above prominently indicate. Although individuals are part of power structures, and thus may perpetuate interests of their country or origin, or of their gender, they also challenge these structures from the inside; revealing their power to go against states’ self-interest may lead to the curtailing said power, and the loss of the benefits of their relative secrecy. There may also be fear that, exposing personalism will compromise international law’s position as ‘real law’; the power of publicists, was, after all, feared by those who created and popularised the discipline for that reason.

Opening the profession and expanding its ranks, also has potential negative consequences. Some of the pitfalls of the expansion of the ‘invisible college’ are already observable today, since there are indications that its makeup is already changing. The ‘old boys’ memorialized in the obituaries scrutinized here are perhaps no longer its only members. Although they are arguably still the community’s major players,¹²⁰⁹ there are factors that may be facilitating the entry of external actors into the ‘mafia’¹²¹⁰. This thesis indicates at least four changes to how the profession is organised, each ensuing potential problems.

The first change in the current international law landscape is specialization; whereas until the 80s international law practice was restricted to the International Court of Justice, sparse arbitrations, and formal government advice, the 90s saw a boom in judicial fora and discrete areas of substantive international law.¹²¹¹ The old school generalists so prominent in our narrative can no longer hold on to *all* practice, or remain on top of *all* areas. Certain fields such as WTO law, investment law or human rights have become intricate, and navigating each sub-system requires particular expertise.

¹²⁰⁸ Schachter (n 177).

¹²⁰⁹ Above, ‘Part II - The community: Individuals, careers, and networks’; Kumar and Rose (n 302); Puig (n 210); Langford, Behn and Lie (n 210).

¹²¹⁰ A self-proclaimed mafia by those practicing at the ICJ, Crawford, ‘The International Law Bar: Essence before Existence?’ (n 138); Crawford, Pellet and Redgwell (n 300). Similarly, those working in arbitration also refer to themselves as such, see Dezalay and Garth (n 47) 10.

¹²¹¹ As appointed eloquently by Villalpando, ‘The ‘Invisible College of International Lawyers’ Forty Years Later’ (n 11).

The second change is the increased presence of law firms interested in taking over international practice. Crawford and Pellet, two of the archetypal practitioner/academics members of the invisible college, identify this trend (and wallow over it): the pressures of publishing and increased administrative loads in academic life, the increased complexity of international cases, and the lack of resources of professors further facilitate law firms' entering the market.¹²¹² Dezalay and Garth indicate a similar trend in arbitration.¹²¹³

Further to this and connected to some of the aspects of the latter, are two changes in the academic landscape that could be seen as expanding and changing the college. The first is on the growth of academic publications in the field – what was once mainly restricted to the *British Yearbook*, the *Revue*, or *AJIL* is now the object of many specialized journals¹²¹⁴ and blogs.¹²¹⁵ The second is the fragmentation of international legal *method* in academia – whereas methodological debates under Roberto Ago, for example, were restricted to positivism *versus* natural law or sociologism, current international legal method is much more diverse. As demonstrated by Andrea Bianchi's book on method, and by Jan Klabbbers' recent keynote speech at the European Society of International Law, doctrinal research does not dominate the landscape anymore – there are also 'crits', policy/New Haven school members, the 'rationalists', and many other schools and sub-schools in between.¹²¹⁶ Arguably, thesis such as this further unveiling the power of individuals will further contribute to the expansion of the group it describes, and its democratization.

These changes expanding the profession (specialization, entry of law firms, increase in publications, and fragmentation of method) potentially leave less room for the processes whereby individuals make law 'in their own image'. Arguably, projects of 'unveiling' such as this thesis also contribute for a decline in the power of the invisible college. Specialization leaves less space for traditional international law 'rites of passage' to take place, potentially decreasing the penetration of substantive general international law and its sensibilities into each

¹²¹² Crawford, Pellet and Redgwell (n 300).

¹²¹³ Dezalay and Garth (n 47).

¹²¹⁴ Bianchi, *International Law Theories* (n 394); Jan Klabbbers, 'On Epistemic Universalism and the Melancholy of International Law' (2019) 29 EJIL 1057, para 1063.

¹²¹⁵ Alvarez (n 207).

¹²¹⁶ Bianchi, *International Law Theories* (n 394); Klabbbers, 'On Epistemic Universalism and the Melancholy of International Law' (n 1214).

sub-field. This, associated with measures to avoid double-hatting, such as the ICJ's clamping down on judges acting as arbitrators, may lead to further fragmentation of the college and of the law. On the abstract level, there is the potential for external players to be less cognizant or less concerned with the systemic implications of individual legal moves in which they are involved, and how they may reverberate across the system.¹²¹⁷ This is aggravated by the entry of law firms into the 'college', which may be more reluctant to accept that their lawyers owe anything to the international legal system, rather than just their client.

As for the democratization of academia, the increased number of publications also increases the *pressure to publish*; there is a danger that academics can no longer act as practitioners, and vice-versa.¹²¹⁸ As expounded upon above, intertwining academia and practice has always been a strong feature of the international legal profession,¹²¹⁹ stimulating international lawyers to think and theorize about the law and its purpose. Arguably curtailing the *dedoublement* will stimulate practitioners' technocratic tendencies. Another danger of impeding the straddling of academia and practice whilst simultaneously fragmenting method is that practitioners and academics will no longer speak the same language. If academics no longer guide practitioners on how to best interpret the law, or clarify esoteric legal points, the quality of ILC documents, pleadings, and judgments potentially decreases.

It would be dishonest to say that all these concerns about opening up the college did not cross my mind. However, the belief here is that the benefits of unveiling and democratising the college outweigh its costs. To all concerns, Bruno Latour, provides some solace:

It is by turning fabrications into closely guarded secrets that the public is prevented from understanding the capacity of humans to utter truths that exceed and escape them from all sides. *In believing that they are protecting the public from revelations that it would find disturbing, scientists and jurists ultimately prevent the public from having any confidence in the*

¹²¹⁷ This is hinted at by Koskenniemi, see discussion above Section I, B, 3. See also Callum Musto, 'New Restrictions on Arbitral Appointments for Sitting ICJ Judges' (*EJIL Talk!*, 2018) 1 <<https://www.ejiltalk.org/new-restrictions-on-arbitral-appointments-for-sitting-icj-judges/>> accessed 28 October 2021.

¹²¹⁸ James Crawford: 'I am not so sure that the professors will retain the dominant status that they have enjoyed in the past. [...] 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.' Crawford, Pellet and Redgwell (n 300) 723.

¹²¹⁹ Section II, B, 5.

extraordinary capacity that we have to change small worlds and texts with realities that are more solid and more enduring than themselves. What is the origin of the kind of defeatism that compels us to believe that if a human speaks he inevitably and quite pitifully lapses into error and illusion, and a thundering voice must always emerge from nowhere – the voice of nature or the voice of Law – to dictate his behaviour and his convictions? Are we poor earthlings so impoverished (sic.)? *The way in which unquestionable truths are gradually constructed through human interactions has always seemed to me more interesting, more enduring, and more dignified.*¹²²⁰

Projects such as this presuppose that unveiling empowers individuals to act dutifully, rather than destroys the sanctity of the human edifice that is international law, contributing to projects that seek to infuse the profession with a sense of purpose, and bolster calls for an ethics for international lawyers. It is hoped that works such as this will not destroy the college's power; although there are inherent dangers to international law's permeability to personalism, increasing the role of state practice in a turn to the domestic and to sovereign self-interest will not yield better results. The hope here is that instead of destroyed, personalism be indeed *fostered*, as long as it is kept in check. There are upsides to individuals taking a central role in lawmaking in an overt manner in international law.

Faced with a similar conundrum – the tension between proposing individual agentic solutions to structural problems in the context of the politics of identity and sexuality, Amia Srinivasan an eloquent response:

‘Is my talk of transforming desire moralising in a different sense, in that it focuses too much on personal responsibility? Racism, ableism, heteronormativity: these are structural problems and – as we have learned to say – they demand structural solutions. That is surely right. It is also surely right that a myopic focus on individual action is characteristic of a bourgeois morality whose ideological function is to distract from the broader systems of injustice in which we participate. (To use Chu’s phrase, individualistic morality can be a shell corporation for systemic injustice.) But to say that a problem is structural does not absolve us from thinking about how we, as individuals, are implicated in it, or what we should do about it.

[...] And how do we do so without turning inwards, without replacing a political project with a personal one? The answer to the question, I take it, is a practical one – a matter, as philosophers like to say, not of knowing-*that* but of knowing-*how*. Know-how is to be found not through theoretical investigation but through experiments of living.¹²²¹

¹²²⁰ Emphasis added, Latour (n 454) 196–197.

¹²²¹ Amia Srinivasan, *The Right to Sex* (Bloomsbury Publishing 2021) 102.

Biases inherent to international law's structural problems will always permeate the process, but choosing to bury one's head in the sand will not eradicate them. It is also hoped that this project is interpreted as a call for enlightened *practice* by all members of the profession – Srinivasan's knowing-*how* applied to international lawyers. 'Enlightened', however, does not mean practice that is conservative or static – but permeable to constant fine-tuning in response to critique. Its practitioners must have the humility to perform said fine-tuning, and the awareness that, while constantly striving for improvement, they will never fully achieve a perfect version of international law.

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