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# SYMPOSIUM ON 150 YEARS OF THE INSTITUT DE DROIT INTERNATIONAL AND THE INTERNATIONAL LAW ASSOCIATION

## LEGAL KNOWLEDGE AS SOCIAL AND POLITICAL CAPITAL

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The 150th anniversary of the Institut de Droit International (IDI) and the International Law Association (ILA) provides an opportunity to assess the role of legal scholarship in the codification and institutionalization of international law. This essay argues that academic expertise is a form of social and political capital that is at once individual, institutional, and structural. Empirically focused on international dispute settlement mechanisms (interstate adjudication and arbitration), this essay underscores that academic expertise shapes the professional status of international lawyers, and influences the clout of international institutions as codifiers of international law.

The typical profile of international lawyers is characterized by their multi-positionality as politicians and law professors. Historically, this multi-positionality enabled the institutions operated by international lawyers, including the IDI and the ILA, to be close to state power while fostering their professional autonomy. This semi-autonomy from political power granted them authority in undertaking codification projects. Today, however, much of the work of international law codification is produced by corporate lawyers involved in contract negotiation and judges in international arbitral proceedings who generally hail from large multinational law firms. This essay suggests that the shift from scholar-codifier to practitioner-codifier reflects a change in professional status that echoes the vulnerability of international legal institutions to geopolitical forces and the gravitational pull exerted by business interests under the clout of U.S. hegemony.

### *The Structural Role of Academic Expertise*

The institutionalization of the international legal scene in the past decades has been driven by concurrent patterns of codification of international law. The multiplication of supra-national tribunals, combined with the expansion of international arbitration, is fostering the fragmentation of international law along distinct normative and geographical areas of public and private international law. The parallel expansion of bilateral and multilateral trade agreements since the early 1980s has promoted contracts between states and multinationals as the dominant mode of governance in the global economy.[1]

These two phenomena have seldom been approached together. Yet, academic expertise constitutes a common denominator. Data on the profiles of international lawyers underscores that academic expertise continues to be one of their key characteristics. Typically, since the turn of the twentieth century, international judges tend to hold dual roles as law professors and legal practitioners, and often act as jurisconsultes for national governments or

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[1] *See* THE POLITICS OF TRANSNATIONAL GOVERNANCE BY CONTRACT (A. Claire Cutler & Thomas Dietz eds., 2017).

international organizations.[2] Likewise, elite arbitrators reinforce their professional status through scholarly affiliations.[3]

The profiles of lawyers appointed by states to the list of arbitrators of the Permanent Court of Arbitration (PCA) are emblematic as they constitute a *Who's Who* of international legal elites.[4] In the past decades, there has been a notable diversification in these profiles. An increasing number of PCA arbitrators work for multinational corporate law firms. Yet, they largely remain affiliated to either or both the IDI and the ILA.

Structural sociology can help understand the role of academic expertise in these transformations as it channels attention toward the power of law as both a symbolic and a structural phenomenon. Approaching international legal institutions as both professional *and* political markets for "symbolic" legal goods[5] underscores that scholarly affiliations are a marker of professional status. This also draws attention to the fact that international law's authority depends on its relative valuation by states, corporations, and individuals.

This approach requires considering the internal characteristics of international legal fields qua professional spaces, along with their dynamic relationship with wider geopolitical forces. Examining academic expertise as an *internal* feature of professional markets of international law is crucial to understand its role in structuring professional hierarchies. It also proves essential to understand the *structural* characteristics of the relationship between international legal institutions and external stakeholders.

### *From the Scholar-Codifier to the Practitioner-Codifier*

The transformation of the professional profiles of judges and counsels at the International Court of Justice (ICJ) provides an emblematic example as it shows that academic credentials play a variable role according to status both within interstate adjudication as a professional market, and in relation to external stakeholders.

While current ICJ judges from Europe and the United States generally start their careers within the legal services of foreign affairs ministries, judges from former colonies continue to be multi-positioned as political elites and high magistrates in their respective countries, with academic credentials acquired at core European institutions.[6]

In contrast, since the mid-1980s, the small cluster of counsels appearing before the ICJ have gained entry to this marketplace essentially based on academic credentials and professor-pupil relationships.[7] Yet, these counsels increasingly tend to appear not just qua academics, but also as attorneys or partners within law firms. This could indicate the entry into play of a new generation of contenders, who approach international adjudication from the side of the "profession"[8]—namely, multinational corporate law firms.

### *The Structural Value of Academic Expertise: Shifting Institutional Locations of Codification Efforts*

The prominence taken by the Wall Street model of the multinational corporate law firm seems to be correlated with the relative devaluation of scholarly capital as the main channel of (re)production of professional status within

[2] *See* THE INTERNATIONAL JUDGE: AN INTRODUCTION TO THE MEN AND WOMEN WHO DECIDE THE WORLD'S CASES (Daniel Terris, Cesare P.R. Romano & Leigh Swigart eds., 2007).

[3] Bryant G. Garth, *Transnational Arbitral Community*, MAX PLANCK ENCYCLOPAEDIA INT'L PROC. L. (2018).

[4] See the PCA's website, available here (accessed June 28, 2023).

[5] Pierre Bourdieu, *Le marché des biens symboliques*, 22 L'ANNEE SOCIOLOGIQUE 49 (1971).

[6] Sara Dezalay & Yves Dezalay, *Professionals of International Justice: From the Shadow of State Diplomacy to the Pull of the Market of Arbitration*, *in* INTERNATIONAL LAW AS A PROFESSION (Jean d'Aspremont, Tarcisio Gazzini, André Nollkaemper & Wouter Werner eds., 2017).

[7] *Id.*

[8] James Crawford, Alain Pellet & Catherine Redgwell, *Anglo-American and Continental Traditions in Advocacy Before International Courts and Tribunals*, 2 CAMB. J. INT'L & COMP. L. 9 (2013).

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international legal marketplaces.[9] Assessing how this shift in professional status is reflected in the dynamic relationship between international dispute settlement mechanisms and users of these forms of justice requires repositioning the ICJ, as an institution, in its wider geopolitical environment.

The ICJ regained prominence as the "world" court following the Nicaragua decisions of 1984–1986 and the Frontier Dispute between Burkina Faso and Mali in 1986, which brokered the "reconciliation of the ICJ with the Third World."[10] Beyond the substantive outcome of these decisions, the profile of the court's judges at the time was also instrumental. Thus, Judge Mohammed Bedjaoui, who joined the Court in 1982, was a proponent of a New International Economic Order. He was also one of the few well-known commercial arbitrators from a former African colony. While his access to the ICJ was partly facilitated by his relations with prominent counsels of the ICJ, his profile indicates that from the 1980s, the symbolic resources acquired through these relations started being capitalized in international arbitration rather than exclusively in interstate adjudication and codification institutions of the UN, like the International Law Commission.

The parallel expansion of international commercial arbitration was linked to wider economic changes. The 1970s oil crisis and the move toward North-South economic relations fostered the demand by multinational corporations for flexible forms of conflict resolution, away from national courts. The emergence of a new generation of contenders within this professional marketplace also played a key role. Multinational corporate law firms from the United States combined substantial resources (including proximity to businesses in the North) and the capacity to wage multi-level legal wars.[11]

The expansion of high stakes disputes between corporations and states, including over traditionally sovereign areas such as access to vital services like water, has put the limelight on the discrete operations of international arbitrators away from democratic oversight. Certainly, the prominence taken by the "club" of international arbitrators[12] or the "international bar" of the ICJ[13] contributes to the wider cartelization of international legal practices. But what does the concurrent diffusion of the Wall street model of the law firm mean for the codification of international law?

*Doctrinal Battles: Between Law, Political Power, and Capitalist Expansion*

The protracted fragmentation of the international legal scene underscores the concurrent operations of competing sites for the codification of international law—be they conducted through the negotiation of multilateral treaties, contractual relations between states and businesses, or the case law of supranational courts and tribunals. Thus, the shift, noted above, from scholar-codifier to practitioner-codifier, does not correlate with a linear shift from one site of codification to another. What it does underscore is the importance of considering the nexus, over time, between political power, capitalist expansion, and international law as this can help track, structurally, the

[9] Sara Dezalay, *Law Firms and International Adjudication*, Max Planck Encyclopaedia Int'l Proc. L. (2021).

[10] Alain Pellet, *Remarques cursives sur les contentieux "Africains" devant la CIJ*, *in* Liber amicorum en l'honneur de Raymond Ranjeva: L'Afrique et le droit international: Variations sur l'organisation internationale (Maurice Kamga & Makane Moïse Mbengue eds., 2013).

[11] *See* Yves Dezalay & Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order 10 (1996).

[12] The word "mafia" is also used by detractors as much as by members of the inner circle of the relatively small and tight-knit arbitration community.

[13] *See* Shashank Kumar & Cecily Rose, *A Study of Lawyers Appearing Before the International Court of Justice, 1999–2012*, 25 Eur. J. Int'l L. 893 (2014).

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position of institutions of codification in relation to political power and business interests, and their symbolic authority.

As mentioned above, multi-positionality remains a key characteristic of international lawyers. While a systematic examination of the structural relationship between international lawyers' multi-positionality and wider geopolitical and economic transformations falls outside the remit of this essay, key episodes in the transformation of the international order, respectively in the late 1800s context of inter-imperial contests and against the backdrop of the 1960s' wave of decolonization, offer some insights.

Studies on the roles played by the "men of 1873"[14] who founded the IDI and the ILA underscore that their position as much as their professional strategies contributed to uneven, if not contradictory, patterns of codification of international law. The resulting haphazard process of institutionalization of international law also reflected the geopolitical and economic structure of an international order then shaped by the British hegemon and colonialism as well as the imperial ambitions of emerging European contenders along with that of the United States.

The profile of Gustav Rolin-Jaequemyns, a key architect of the IDI, is emblematic. As a politician and law professor, Rolin-Jaequemyns contributed to the consolidation of Belgium as a nation state. Meanwhile, this multi-positionality enabled him to champion international law's "civilizing" mission in the context of inter-imperial rivalries in the Scramble for Africa. His success in positioning the IDI as an incubator for the codification of the laws of war reflected the proximity of this select group of law professors to European political elites, as much as the necessary distance they had to maintain with "the virtuous utopians that wanted the immediate abolition of war,"[15] in order to bolster the autonomy of international law from politics.

On the other hand, in the context of the 1960s wave of decolonization, the highly politicized debates of the UN General Assembly contributed to discrediting this institution as a central site for the codification of international law. The appointment of individuals from former colonies to UN institutions, including the ICJ, was also perceived as a threat for the political and economic interests of the U.S. and former European *métropoles*. Academic status loomed large in these political and doctrinal battles. "[T]he old Institute of International Law was alarmed at the politicization of elections to the [ICJ]; what really alarmed it was the sharp decrease in the number of European judges."[16] In order to maintain the position of the IDI as an incubator of international legal elites, the then president of the IDI in 1961–1963, Henri Rolin, engineered a modification of the IDI's statutes to enable the election of lawyers from the Third World.

This move fostered the appointment of the judges from newly independent Sub-Saharan African states to the ICJ who were first coopted by IDI members. However, controversial decisions taken by the ICJ over the question of self-determination in the mid-1960s,[17] resulted in the shunning of the Court by newly independent states.

Legal knowledge was also a core component of the so-called "cultural" Cold War waged by the United States against the U.S.S.R. The legal reform projects promoted by the United States sought to foster the emergence of a new generation of U.S.-oriented lawyers in the Third World. The failure of these endeavors reverberated at the international level. The Hague Academy of International Law had attracted the support of the Ford Foundation since the 1960s as a site to train international legal elites from former colonies.[18] This support waned from the 1970s against the backdrop of military coups and underdevelopment in Sub-Saharan Africa, along with the perceived failure of this institution to serve as a "beachhead" promoting U.S. interests. The Academy returned to

[14] Mark Mazower, Governing the World: The History of an Idea, ch. 3 (2012).

[15] *Id.* at 69.

[16] *Id.* at 257.

[17] In particular, the Court's advisory opinions on the *International Status of South West Africa* in 1966.

[18] Giles Scott-Smith, *Attempting to Secure an "Orderly Evolution": American Foundations, the Hague Academy of International Law and the Third World*, 41 J. Am. Stud. 509 (2007).

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being an "old world consortium"[19] where professional status reflected mentor-pupil relations between European professors and their mentees from Sub-Saharan Africa. The subsequent disinvestment of the United States in international law institutions, including the ICJ, further contributed to side-lining interstate adjudication as a dispute settlement mechanism to solve political and economic conflicts between states in the North and newly independent states in the Global South.

While important strides were made in the codification of human rights and humanitarian law during the Cold War, international law largely remained a sideshow in political and economic disputes. Both the United States and former imperial European powers favored gun-boat diplomacy and strategic alliances with local strongmen. This does not mean that there was no codification of international economic law. Rather, the arbitration clauses included in contracts between U.S. and European multinationals and former colonies were not activated. This suggests that the boom of commercial (and later, investment) arbitration from the 1980s was a *revival*, rather than a new dynamic of codification of international law.[20]

The gradual prominence taken by the United States as world hegemon over the course of the twentieth century is key to understanding the structural effects of the revival of international arbitration. The movement for peace through arbitration promoted by the United States at the turn of the twentieth century was intimately linked to U.S. capitalist expansion while befitting both the U.S. domestic model of judge-made law and the U.S. "anti-imperial" ideological stance on the international stage.

While U.S. establishment lawyers closely associated with business interests contributed to the creation of the PCA in The Hague, during the same period "[t]he United States made a strategic choice for arbitration, imposed by (threats of) force on unfair terms, rather than outright invasion or occupation, to try and oust its European rivals and assert its interests"[21] in Latin America. Mixed-claims commissions were set up under coercion to settle disputes between the recently independent states of Mexico and Venezuela, and U.S., Spanish, British, or French investors. The haphazard legacy of these commissions' case law spurred doctrinal battles within the IDI and the ILA over the next sixty years.

These doctrinal battles centered on the basis (national or international) of the standard of protection owed to foreign investors by states in case of negligence. When the general principle of non-responsibility of the state for injuries to aliens by rebels was finally codified in a 2001 resolution of the UN General Assembly, due diligence was already firmly entrenched as the exception to non-responsibility that ended up being more important than the rule. Meanwhile, the parallel explosion, since the 1980s, of bilateral investment treaties including an arbitration clause, along with the expansion of investment arbitration as the privileged platform to solve disputes between multinationals and states, contributed to fostering the shift from scholar-codifier to practitioner-codifier.

## *Concluding Remarks*

What is the function of academic expertise in the codification of international law? Responding to this question is not straightforward. This is not only due to the lack of systematic data, over time, on the influence of the IDI and the ILA as prominent international scholarly associations, in the codification of international law. The characteristic of international law at once as a symbolic and a structural phenomenon also requires correlating the value of academic expertise to professional status, and to wider geopolitical and economic transformations.

[19] *Id.* at 532.

[20] *See* Dezalay & Garth, *supra* note 11.

[21] Kathryn Greenman, State Responsibility and Rebels: The History and Legacy of Protecting Investment Against Revolution 8 (2021).

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Since the 1980s, the expansion of contracts as a tool of transnational governance, along with the diffusion of the model of the Wall Street law firm as a vehicle of (re)production of professional status, have fostered two concurrent dynamics: the emergence of the practitioner-codifier—rather than the scholar-codifier—as the ideal-type of the international lawyer; and international arbitration as a privileged site for the codification of relations between political and business interests. But the prominence taken by private contracts in transnational governance is not correlated with a linear shift in the institutional sites of codification of international law, from multilateral codification to judge-made codification. Certainly, together these two concurrent dynamics contribute to shifting international law's gravitational pull toward business interests, under the clout of U.S. hegemony. But they also continue to foster the fragmentation of international law through the haphazard and often contradictory codification of relations between political and business interests.

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