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On academic production and the politics of inclusion

Sara Kendall

Before the 2015 annual meeting of the European Society of International Law, participants were notified of a ‘women in international law’ happy hour for exchanging ideas on ‘the improvement of representation of women’.¹ At the convivial and well-attended event in Oslo, organisers thanked the men who were present, remarking that their support was not only welcomed but also necessary. This theme of inclusion resurfaced in side conversations about past conference panels on gender that noted the supportive role of senior male academics in audiences comprised primarily of women. Gender was mainly discussed along a single axis of male/female rather than intersectionally.² Other categories of identity, such as ethnicity and nationality, remained to the side of this event, which focused on the role of women within the field.³

These themes of gender and inclusion appeared familiar, in part because they spoke to an earlier era of concerns around academic knowledge-production. Work across multiple fields throughout the 1990s and the new millennium – including ethnic studies, women’s studies, queer theory, postcolonial theory and critical legal studies – has advanced rich critiques of scholarship as a site of ideological reproduction. For over two decades, scholars approaching international law from feminist perspectives have argued for greater representation of women within the field.⁴ More recent work has noted that mainstream scholarship has insufficiently engaged with feminist approaches, with the risk that they remain islanded within the broader field or that they are co-opted and stripped of emancipatory potential.⁵ If representation within

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¹ <<http://www.jus.uio.no/pluricourts/english/news-and-events/events/2015/2015-09-11-women-il.html>>.

² For a pioneering account of intersectionality, defined as the ‘intersection of race and gender’, see K. Crenshaw, ‘Demarginalizing the Intersection of Race and Sex: A Black Feminist Critique of Antidiscrimination Doctrine, Feminist Theory and Antiracist Politics’, 140 *The University of Chicago Legal Forum* (1989) 139. On the perils of ‘uncritical, liberal, feminist positioning with little capacity to recognize its own hegemony and privilege’, see F. Ni Aoláin, ‘Advancing Feminist Positioning in the Field of Transitional Justice’, (2012) 6 *IJTJ* 205, at 206.

³ I use the term ‘field’ rather than ‘discipline’, following Martti Koskenniemi’s observation that international law is more accurately viewed as an argumentative practice rather than as ‘a set of theoretical or technical propositions’; M. Koskenniemi, ‘Law, Teleology, and International Relations: An Essay in Counterdisciplinarity’, (2011) 26 *International Relations* 3.

⁴ See for example H. Charlesworth, C. Chinkin and S. Wright, ‘Feminist Approaches to International Law’, (1991) 84 *AJIL* 613; D. Dallmeyer (ed.), *Reconceiving Reality: Women in International Law* (1993).

⁵ D. Otto, ‘The Exile of Inclusion: Reflections on Gender Issues in International Law over the Last Decade’, (2009) 10 *MJIL* 11. See also H. Charlesworth, ‘Talking to Ourselves: Should International Lawyers Take a Break from Feminism?’ in S. Kouyo and Z. Pearson (eds.) *Between Resistance and Compliance? Feminist perspectives on international law in era of anxiety and terror* (2011); H. Charlesworth, ‘Feminist Ambivalence About International Law’, (2005) 11 *International Legal Theory* 1. For a novel attempt at redressing the ‘absence of a feminist narrative’ from contemporary

international law has remained an issue for women, as the Oslo event suggests, what might be said of other categories of identity, and of scholars based outside central geographical spaces of scholarly production? In this sense the event prompts broader reflections on the composition of the community producing international legal scholarship. It marks the shifting state of the field in some European contexts, characterised by desires for greater inclusion and anxieties about embedded *passé* structures.

Yet these concerns with inclusion beg further questions about the frame where inclusion is sought. If contemporary European scholars of international law reflect upon the representation of women, welcoming the necessary support of male counterparts long after two decades of feminist critique, what might this reveal about enduring structures and presumptions within international law? Are they so entrenched that they may not be adequately unsettled and rethought through a politics of inclusion? As a political project, the push to extend the field may re-inscribe and shore up existing hierarchies in international law, as the ‘necessity’ of male academic support in the above example appears to suggest. Inclusion takes arrival within the frame as its objective without questioning the ontology of the frame itself, which harbours traditions of knowledge-production and dominant approaches that may accompany membership within it.

Here inclusion not only considers matters of identity and participation. It may also refer to subject matter and scholarly approach, such as the disciplinary orientations and sites that form part of international legal scholarship. In past decades a growing body of work has paid greater attention to the field in historical context, and insights from the sub-field of international legal historiography carry implications for how international law is evaluated and practiced. Important work over the past two decades has pointed out the inheritance of colonial structures within the international legal order as well as the dominance of Western epistemologies.⁶ Interpretive schools such as Third World Approaches to International Law (TWAIL) now have multiple generations of associated scholars and established spaces of academic production.

Contributors to LJIL have taken up some of these research agendas, illustrating how international law was imbricated with colonial logics that informed ideas of sovereignty, statehood, territoriality, and the formation of the current international economic order.⁷ Such insights raise questions about how the contemporary field of

international legal scholarship on the Treaty of Westphalia, see Y. Otomo, ‘Her proper name: a revisionist account of international law’, (2014) 2 *London Review of International Law* 149.

⁶ A. Anghie, *Imperialism, Sovereignty, and the Making of International Law* (2005); B. S. Chimni, *International Law and World Order* (1993); M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (2004). See also Upendra Baxi’s review of Anghie’s text and Gerry Simpson’s *Great Powers and Outlaw States: Unequal Sovereigns in the International Legal Order* (2004): U. Baxi, ‘New Approaches to the History of International Law’, (2006) 19 LJIL 555.

⁷ For some examples, see U. Natarajan, ‘Creating and Recreating Iraq: Legacies of the Mandate System in Contemporary Understandings of Third World Sovereignty’, (2011) 24 LJIL 799; R. Parfitt, ‘*Empire des Nègres Blancs*: The Hybridity of International Personality and the Abyssinia Crisis of 1935-36’, (2011) 24 LJIL 849; M. Burgis, ‘Transforming (Private) Rights through (Public) International Law: Readings on a “Strange and Painful Odyssey” in the PCIJ *Mavrommatis* Case’ (2011) 24 LJIL 873; M. Fahkri, ‘The 1937 International Sugar Agreement: Neo-Colonial Cuba and Economic Aspects of the League of Nations’, (2011) 24 LJIL 899; U. Özsü, ‘De-territorializing and Re-territorializing *Lotus*: Sovereignty and Systematicity as Dialectical Nation-Building in Early

international law is produced and disseminated: by whom, through what conduits of power, and toward what ends. Yet alternate approaches could remain peripheral unless the broader field is recast in light of their contributions, with shifts in how international law is conceptualised and interpreted in central sites of scholarly production.

LJIL continues to offer a space for critical perspectives and other disciplinary methods in exploring the boundaries of international legal scholarship. The journal enjoys a plural identity, taking up doctrinal developments within the field and its institutions as well as theoretical debates.⁸ It also builds upon a history, pioneered by past editors, of recognising the importance of critical approaches.⁹ Through a series of special issues of its Articles section on the theme of ‘International Law and the Periphery’, for example, the journal explored the work of two scholars ‘from regions conventionally cast as “peripheral” to the discipline’s metropolitan “centre”’;¹⁰ the role of scholars on the Indian subcontinent in shaping international law; and the (re)constitution of the periphery through the work of the League of Nations. LJIL has featured work that draws upon approaches from history, political theory, and international relations; schools of thought such as post-structuralism, postcolonial theory and actor-network theory; and thinkers including Foucault, Girard, Gramsci, Levinas, and Marx, among many others.

How is this work perceived in relation to traditional international legal scholarship? Critical scholars may be viewed by more doctrinal members of the scholarly community as ‘sitting on the wall, looking in’, as one LJIL editor recently argued.¹¹ Yet the idea of a wall itself begs further questions about the field’s ontology and its limits. What is its material form: the constellation of leading journals, conferences, and spaces of institutional practice? How might alternate sites of production contribute to further walling the field; for example, could the rise of blog-based commentary shore up the authoritativeness of certain locations and individual scholars?¹² Who polices the terrain of international legal scholarship, and who remains outside its borders?

‘Sitting on the wall’ in this doctrinally oriented account, the non-doctrinal scholar is compared to a patient of a mental institution unable to recognise his institutional

Republican Turkey’, (2009) 22 LJIL 29; V. Nesiha, ‘Placing International Law: White Spaces on a Map’, (2003) 16 LJIL 1.

⁸ See T. Aalberts, ‘The Politics of International Law and the Perils and Promises of Interdisciplinarity’, (2013) 26 LJIL 503.

⁹ See for example T. Skouteris, ‘Fin de NAIL: New Approaches to International Law and its Impact on Contemporary International Legal Scholarship’, (1997) 10 LJIL 415.

¹⁰ F. Johns, T. Skouteris and W. Werner, ‘Editors’ Introduction: India and International Law in the Periphery Series’, (2010) 23 LJIL 1; F. Johns, T. Skouteris and W. Werner, ‘The League of Nations and the Construction of the Periphery’, (2011) 24 LJIL 797.

¹¹ D. Jacobs, ‘Sitting on the Wall, Looking in: Some Reflections on the Critique of International Criminal Law’, (2015) 28 LJIL 1. Many scholars would not self-identify as engaging in the work of critique, and here I use the term broadly to refer to non-doctrinal international legal scholarship, though it is also possible to engage critically *with* doctrine. The former may interrogate the assumptions embedded in the field, whereas the latter is concerned with improving international law within its own terms.

¹² LJIL’s own editorial practice could be subjected to similar criticism; like blog-based commentary, it does not rely upon vetting through anonymous peer review.

position, thus blurring ‘the boundaries of the internal and external’.¹³ This metaphor of the mental patient, located at the boundaries of the field, appears to illustrate positioning in relation to positive law, which re-inscribes the centrality of the doctrinal legal form as an ordering principle or norm.¹⁴ Here ‘deviance’ appears in relation to doctrinal analysis. Yet one might imagine the international legal field differently: as a conception of social order, for example, or as a conception of justice, where a different type of analysis – whether sociolegal or philosophical – would set the normative terms of scholarly engagement from which doctrinal analysis itself would then deviate. This account of the wall reveals particular presumptions about the centrality of doctrinal analysis in contemporary international legal scholarship, which new participants or approaches must then address themselves to: as critical or alternate epistemologies deviating from the normative pull of doctrine.¹⁵

Rather than focusing on the ambivalent positioning of critical scholars, one might turn this around, as Maria Aristodemou does in a provocative article in the *European Journal of International Law*, where the field of international law itself becomes the object of an analytic – indeed psychoanalytic – gaze.¹⁶ Why, Aristodemou asks, does the field compulsively look outward beyond itself? What anxieties does it continue to harbour, and what might we learn from them?

Aristodemou’s account also begins from a patient, but one who sits on an analyst’s couch rather than on a wall bounding a field of scholarly production. Drawing upon the work of psychoanalyst Jacques Lacan, Aristodemou applies Lacan’s own analysis of a clinical case regarding an academic unable to publish his own work for fear of plagiarising the work of others.¹⁷ The patient perennially sought ‘fresh brains’ – sources of inspiration outside himself – much like international law seeks inspiration from new or different domains of knowledge. Aristodemou argues that international law appears as ‘the neurotic patient hankering after “fresh brains” that she believes she will find in other disciplines, be they religion, economics, history, politics, literature or, now, psychoanalysis.’¹⁸

The turn to other fields of knowledge has preoccupied international law for some time, offering a counterpoint to doctrinal analysis. As an LJIL editorial recently observed, ‘the disenchanting belief in the determinacy of legal rules has opened legal inquires up towards perspectives and insights from other disciplines.’¹⁹ Such a framing suggests that international law was previously enchanted by determinacy, and the field’s neurotic desire for ‘fresh brains’ may mark its failure to come to terms with its own unsettling *indeterminacy*: of rule-application, of premises that may prove contradictory, and of the role of the interpreting subject. The neutrality of doctrinal

¹³ Jacobs, *supra* note 11, at 3.

¹⁴ On normalisation, see M. Foucault, *Discipline and Punish: the Birth of the Prison* (1977).

¹⁵ For an alternate (non-doctrinal) account of international law, see A. Carty, *Philosophy of International Law* (2007).

¹⁶ M. Aristodemou, ‘A Constant Craving for Fresh Brains and a Taste for Decaffeinated Neighbours’, (2014) 25 EJIL 35.

¹⁷ The patient was not Lacan’s own, but rather that of ego psychologist Ernst Kris, who Lacan felt had fundamentally misunderstood the patient’s case. For a description of the case and Aristodemou’s argument more broadly, see *supra* note 16 at 36-38.

¹⁸ *Supra* note 16 at 37.

¹⁹ I. Venzke, ‘International Law and its Methodology: Introducing a New *Leiden Journal of International Law Series*’, (2015) 28 LJIL 186.

analysis has been contested, and legal method appears not as a science but rather as an argumentative practice.²⁰ The Socratic concern with truth has been displaced by the sophistic interest in argumentation, moving from the determinate realm of fixed forms to a contingent art of rhetoric.²¹

Here the loss of determinacy appears much like Friedrich Nietzsche's account of the loss of the metaphysical realm, the so-called 'death of god', where international law moved from a belief in the 'real world, attainable to the wise', to an unattained and also unknown (or unknowable) 'real world', with 'no consolation, no redemption, no duty'.²² Put another way, the internal tensions harboured within modern law itself – between autonomy/social contingency and stability/historical responsiveness – pose a fundamental challenge to the belief in the determinacy of legal rules.²³ One might read international law's turn to other disciplines as a neurotic search for a new universal value or method to stand in for this loss.

What can fill the void left in the wake of such a loss? In her work on the rise of empiricism in twentieth-century scholarship, legal theorist Marianne Constable has argued that some scholars sought to fill modern law's post-foundational void by turning to 'social reality' and its 'scientific' forms, such as sociology and political science.²⁴ There may be some comfort in believing that law can be rendered scientific and calculable, a discipline drawing upon established methodologies rather than shifting context-bound approaches. It would seem that the turn to Science and Method in international law suggests a desire for certainty: for re-crafting a narrative that can compensate for the crumpled mythology of the field's pacific origins, now seen as Eurocentric and harbouring undue faith in progressive potential and universalist conceits.²⁵ If some core principles remain too important to abandon, such as sovereign equality, the field requires some ground upon which to reconstruct and retain them lest they persist as foundational myths. It would seem that the prospect of a 'neutral' scientific approach offers consolation to a field adrift in a post-foundational era characterised by indeterminacy and fragmentation.²⁶

Here Aristodemou's account offers a diagnosis. International law, she writes, must be lead 'to finding out the bloody histories that constituted it as a subject' so that it may ultimately "get over itself".²⁷ Many critiques of the field fall within these two forms: first, those that illustrate its 'bloody history', its Eurocentrism, and its continuing

²⁰ M. Koskenniemi, *From Apology to Utopia: The Structure of International Legal Argument* (1989).

²¹ See generally Plato, *Gorgias* (trans. Jowett, 2009), where Socrates deplors the Sophists for teaching argumentation as a 'knack' rather than an art, privileging persuasive skills over the philosophical search for truth. See also Aristotle, *The Art of Rhetoric* (trans. Lawson-Tancred, 1992). As Koskenniemi observes, as an argumentative practice, international law offers a plurality of responses to circumstances and must ultimately draw upon extra-legal forms for their resolution; the resolution is not internal to international law itself. See *supra* note 20.

²² F. Nietzsche, *Twilight of the Idols and the Anti-Christ* (trans. Hollingdale, 1968), 40-41.

²³ For an account of these tensions, see generally P. Fitzpatrick, *The Mythology of Modern Law* (1992), preface.

²⁴ M. Constable, 'Genealogy and Jurisprudence: Nietzsche, Nihilism, and the Social Scientification of Law', (1994) 19 *Law and Social Inquiry* 551. See also R. Berkowitz, *The Gift of Science: Leibniz and the Modern Legal Tradition* (2005).

²⁵ T. Skouteris, *The Notion of Progress in International Law Discourse* (2009).

²⁶ On the fragmentation debates in international legal scholarship, see A. C. Martineau, 'The Rhetoric of Fragmentation: Fear and Faith in International Law', (2009) 22 *LJIL* 1.

²⁷ Aristodemou, *supra* note 16, at 37.

‘dynamic of difference’,²⁸ and second, those seeking to show how it is not a panacea for global problems, whether by proliferating juridical frameworks or through advancing paradigms of international criminal accountability.²⁹ The answer to indeterminacy is not to be found in greater refinement of legal science and an elevation of Method – by seeking ‘fresh brains’ from elsewhere, such as social scientific empiricism and the rise of indicators and metrics.³⁰ Yet forms of response may emerge through more critical reflection on international law’s origins and limits, which does require it to look outside itself: to history, to critical and postcolonial theory, to philosophy, and to alternate conceptions of justice. The former approach would craft a new deity, such as scientific rigour, to replace the lost idol of determinacy. The latter suspends the search for a singular resolution, and instead draws upon other approaches to help bring to light the field’s constitutive violence and contemporary presumptions, which aid in diagnosing the field rather than offering a cure.

Instead of seeking ‘fresh brains’ from elsewhere, one might read this turn to other approaches as essential to thinking through the field’s constitutive violence. International law is neither ahistorical nor purely doctrinal. Certain philosophical and ethical presumptions have accompanied it from its emergence, and in this sense historical and philosophical accounts are not foreign, but instead form part of the field’s internal development. Rather than ‘sitting on the wall’, then, the critical scholar who draws upon historical material to critique the field’s troubled origins and contemporary limits is retrieving an alternate conception of a field that cannot be restricted to doctrine or the lure of empirical certainty.

Many international legal scholars and practitioners acknowledge that international law cannot resolve complex global problems, and they are well aware of the political constraints that it faces. Few would argue that resource disputes in African states could be definitively resolved through international arbitration, for example, or that the main political architects of the 2003 invasion of Iraq will be brought before an international court or tribunal. Meanwhile, critical scholars face claims that they produce caricatures of mainstream positions. The boundaries of critical scholarship are porous and contested, and there is a risk, as Immi Tallgren observes, that self-described critical scholars perform the very things that they fault elsewhere: ‘constructing blind alleys of expertise and ownership’ and elevating new universal truths and false idols in place of those they have unsettled.³¹

Furthermore, it may be that the chasm between orthodox and critical international legal scholarship is not as wide and deep as it may appear, and shifts within the field are leading to an integration of some critical approaches into scholarship and

²⁸ Anghie, *supra* note 6. Anghie’s account of the present manifestations of international law’s colonial history still appears to allow the possibility of a redemptive role for the field; see S. Kendall, ‘Book Review: *Imperialism, Sovereignty, and the Making of International Law*’, (2008) 4 *Law, Culture and the Humanities* 119.

²⁹ See the *Journal of International Criminal Justice* Symposium on ‘Global Justice’, edited by Sarah Nouwen and Wouter Werner, (2015) 13 *JICJ* 73.

³⁰ S. E. Merry, ‘Measuring the World: Indicators, Human Rights and Global Governance’, (2011) 52 *Current Anthropology* 83.

³¹ I. Tallgren, ‘Who are “we” in international criminal law? On critics and membership’, in C. Schwöbel, *Critical Approaches to International Criminal Law: An Introduction* (2014), 71.

pedagogy through the changing content of handbooks and textbooks.³² The field has already taken up many insights from outside doctrinal legal analysis. It will certainly benefit from continued reflection on its privileged views and approaches, and on ways of navigating the tension between desires for internal coherence and the political call for greater inclusion.

Part of this work requires considering how the international legal community is composed and a critical account of its warring practices. The importance of broader representation in legal scholarship is revealed through how international law bears upon everyday life, from the effects of international development regimes at the local level to responses to International Criminal Court interventions in conflict-affected communities.³³ In practice, the international legal field is not exclusively a matter of concern to those participating in the production of ‘expert knowledge’ in locations such as The Hague, Geneva, and New York as well as in Anglophone and Francophone scholarly communities based primarily in the global North. It also informs the terms through which responses to global problems are articulated, received and contested. Greater engagement with the work of scholars who can offer a more varied set of views is important for epistemological as well as ethical reasons: epistemologically, in order to better understand how international law refracts and is received in different contexts, and ethically, to address the privileging of certain accounts to the exclusion of others.

Gaining admission to the conversation has been traditionally tied to demonstrating a grasp of international legal doctrine, and this remains an influential way of reinforcing the boundaries of the field. Doctrinal analysis continues to make substantial contributions by identifying interpretive gaps and innovations internal to international legal jurisprudence, but observers have increasingly noted the limits of treating law in isolation from social contexts. Doctrinal analysis alone cannot answer questions about the historical and political conditions of international law’s production, yet supplementing doctrine with an empirical research agenda will not render the field more ‘scientific’, value-free, or methodologically unified. This is in part because international law has multiple identities: as a technical discourse or form of argumentation, as a field of power operating upon bodies and territories, as an emancipatory ideal (and practice), as a community of scholarly production.

Orthodox international legal scholarship often neglects or disavows the aggressions and exclusions that have accompanied the field since its emergence. Greater inclusion of alternative accounts may contribute to producing a more informed and reflexive field of knowledge. Yet a politics of inclusion harbours its own risks, such as shoring up dominant legal forms through extending the frame of international law to what was previously excluded or marginalised. To what extent can this international legal frame, whether read as a wall of doctrinal orthodoxy or as a Eurocentric field tied to a colonial past, adapt to alternate modes of understanding what international law is and does?

³² See for example B. Fassbender and A. Peters (eds.) *The Oxford Handbook of the History of International Law* (2012), particularly chapters by M. Craven and L. Obregón; see also the introduction of J. Crawford, *Brownlie’s Principles of Public International Law* (2012), which updates a previous edition of the text to include a discussion of Eurocentrism and colonial history.

³³ L. Eslava, *Local Space, Global Life* (2015) and C. De Vos, S. Kendall and C. Stahn (eds.), *Contested Justice: the Politics and Practice of International Criminal Court Interventions* (2015).

As new critical sites emerge in international legal scholarship, LJIL's role in cultivating widened participation and openness to novel approaches will face challenges as the journal seeks to maintain its identity as a space for developing innovative lines of inquiry as well as rigorous doctrinal analysis. To this end, the journal continues to welcome contributions that prompt rethinking and renewed engagement with issues of power, identity, and representation. More fundamentally, it may offer a space for reconceptualising the international legal order, and for exploring strategic decisions about whether to engage in critical projects from within or outside the frame.