HOW "SUBSIDIARY" IS THE ICJ ARTICLE 38(1)(D) ON THE SOURCES OF INTERNATIONAL LAW FOR DEVELOPING COUNTRIES?

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DECLARATION

I hereby declare that this thesis is my original work and it has been written by me in its entirety. I have duly acknowledged all the sources of information which have been used in the thesis.

This thesis has also not been submitted for any degree in any university previously.

Prabhakar Singh
12 May 2016

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***

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SUMMARY

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The central argument of the thesis is not that international law's core is colonial, for that is the fundamental argument with which Anghie has established a new school in international law. Sornarajah has further magnified that argument to contend that, ontologically, private norm entrepreneurs, mostly Western scholars, have while using legal hermeneutics manufactured international economic laws, investment law in particular . As such, public international law principles have originated from colonialism and private and commercial arbitrations. The PCIJ Statute, 1920, listed writings of publicists and judicial decisions as subsidiary means for the determination of rules of law. During the interwar period, a claim was made about the substantive completeness of international law; Lauterpacht, for instance, argued for the legalization of political dispute saying no *non-liquet* existed in international law. In support of the alleged normative completeness of international law, Lauterpacht argued that cases from domestic courts, British prize court for example, could be used to complete international law. Norms, procedural and substantive, are the building blocks of any law.

The book argues that—contrary to the usual assumption—subsidiary sources have identified and developed primary sources of international law by the process of colonial norm entrepreneurialism of private actors. The thesis discursively brings to the fore norm entrepreneurialism's colonial ontology and the various possible motivations animating the project. The two components of the subsidiary sources, judicial decisions and publicists of the various nations respectively, for the thesis, are the norms and actors that by conducting juridical lawgiving yielded primary sources of international law suitable to certain nations and classes.

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LIST OF FREQUENTLY USED ABBREVIATIONS

Report of International Arbitrations Awards	RIAA
Permanent Court of International Justice	PCIJ
League of Nations Treaty Series	LNTS
United Nations Treaty Series	UNTS
International Court of Justice	ICJ
United Nations	UN
International Law Commission	ILC
International Tribunal for the Law of the Sea	ITLOS
Permanent Court of Arbitration	PCA
European Union	EU
The Court of Justice of the European Union	ECJ
Inter American Court of Human Rights	InterAmCtHR
European Court of Human Rights	ECtHR
International Courts and Tribunals	ICTs
World Trade Organisation	WTO
International Centre for Settlement of Investment Disputes	ICSID
Vienna Convention on the Law of Treaties	VCLT
General Agreement on Tariff and Trade	GATT
Trade Related Intellectual Property Rights	TRIPS
General Agreement on Trade in Services	GATS
United Nations Commission on International Trade Law	UNCITRAL

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I. Introduction

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> [F]orcing, adjusting, abbreviating, omitting, padding, inventing, falsifying and whatever else is of the *essence* of interpreting [law].[1]

> If [the lawyers and arbitrators] promote directly or indirectly the spread of internationalism in law, it is because their specific careers, ambitions, and interests lead them to make personal investment at a particular time and place. The abstraction of international law is therefore closely tied to the activities of individuals and groups, who therefore give concrete meaning to the abstraction.[2]

The key argument of my thesis is that private norms make public international law. I use Kelsen's definition of a private norm as a half-power norm. To Kelsen's private norm I add the distinction that Foucault made between a "juridical" and a "legal" function. While a legal function is about law and its application, a juridical function is about a network of power that mimics and competes with the legal function in a society. Foucault suggests that we study the techniques and tactics of domination to understand power and the network that generates it. The ontology of the power of writers and their techniques of colonial domination through legal argumentations forms the core of my arguments.

I argue that since the start of the nineteenth century, a network of power and capital relations has created international law. Aiming at the protection of private property—mostly colonially acquired—in the interwar period jurists aided the coupling of the European

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[1] Friedrich Nietzsche, On the Genealogy of Morals, III, 24, *quoted in*, JH Miller, *Introduction to Charles Dickens, Bleak House* (Penguin Books, 1971) 11.
[2] Yves Dezalay & Bryant Garth, *Dealing in Virtue: International Commercial Arbitration and the construction of a transnational legal order* (Univ of Chicago Press, London/Chicago, 1996). 3

bourgeois class and the interpretation of international law. This resulted in a contractual approach to international law.

Indeed, private capital is central to accounts of colonialism and international law. Foucault has commented upon the longstanding relationship of private capital with legal institutions in Europe.[3] As such international law is a European capital-juridical relationship internationalised that could be unpacked using, in good measure, Kelsen's definition of private norm.

In 1920 the birth of the League of Nations and the Permanent Court of International Justice (the PCIJ) was a watershed moment. The PCIJ Statute article 38(1)(d) wrote into the text of the law both private individuals as scholars and judicial decisions—both domestic and international law—as sources for the determination of the rules of law. The text reads thus:

> [S]ubject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.[4]

This early nineteenth century text, one that originated in 1920, cast in stone writings and judicial decisions as subsidiary sources of international law. Subsequently, in the interwar period, writers wrote for private capital and *pacta sunt servanda*, first, against the new post-Tsar Russian state. As discussed in various chapters, hybrid arbitral awards would use domestic law as well as a moralist vocabulary to decide against the State. That states,

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[3] M Foucault, *The Archaeology of Knowledge and the discourse on Language* (Pantheon Books, New York, 1972) 45.
[4] The ICJ Statute < http://www.icj-cij.org/documents/?p1=4&p2=2>

particularly the postcolonial ones, do not make international law became palpably visible after decolonization. To ensure the continuity of colonial international law, a network of scholars termed the new resolutions by developing nations in the UN as political and non-normative. In such ways they continued to produce international law suitable to a global bourgeois class by identifying international law's primary sources. In other words, international law is a product of private juristic writings and judicial decisions–both national and international.

II. On Methodology

A. On Norm Typology and Norm Production

Any law is made up of a number of norms. The nature of norms defines the character of the law that it makes. During the interwar period, in 1934, Hans Kelsen identified four kinds of norms: basic, general, individual or private. For Kelsen, the very distinction between public law and private law reflected "an opposition between law and power". He called a private norm at best a "non-legal or only half-legal power" norm.[5] In Kelsen's analytical jurisprudence, any law is a combination of norms; norms that are homogeneously basic and general and those that are a hybrid—a mixture of any two or more types of norms. Borrowing the definition of a private norm from Kelsen, I argue that private norm, a power norm, is the core norm of international law.

Furthermore, during the Cold War, Foucault implored thinkers to abandon the view that power is solely contained in "juridical sovereignty and State institution". He suggested that we look into the networks of individuals that employ "the techniques and tactics of

[5] Hans Kelsen, *Introduction to the Problems of Legal Theory* (OUP, Oxford, 1934) 70, 92.

domination" and thereby generate knowledge as power.[6] Foucault's reference to "juridical" refers to the conception of power relations.[7] At the same time, Foucault further called for an examination of the relation "between the bourgeois family and the functioning of judicial authorities and categories in the nineteenth century".[8] Overall, law in Foucault's analysis is about a network of power and European capital; the bourgeoisie and the judicial authorities were in a relationship of procreating capital. It is hardly surprising then that international law too was about a network of powerful individuals—the writers of the so-called law of nations that became textually recognized sources of international law in the twentieth century.

Habermas adds further nuance to the issue of power in legal theory. "Sociologists, lawyers, and philosophers, Habermas observes, "disagree over the appropriate characterization of the relation between facticity and validity".[9] The question that he raises is about the convertible currency of the fact and the law. Foucault might offer an illuminating potential for Habermas' fact-law dichotomy; that a network of power relations, a set of individuals, can covert a fact into a valid norm and vice versa. Indeed, the positivist lawyers of the long nineteenth century constructed the validity of international law by ignoring the fact of an equal existence of the non-European peoples.

A good example is the validity of unequal treaty regimes, which dictated that consent is not essential to international law's sources. Coercion would not vitiate a treaty if validly applied. Additionally, the positivist lawyers rejected as non-law what the anthropologists and the sociologist thought were valid law of the natives. Anghie's characterization of the fact of

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[6] M Foucault, *Power/Knowledge: Selected interviews and other writings 1972-1977* (Pantheon Book, New York, 1980) 102.
[7] Victor Tadro, Between Governance and Discipline: The Law and Michel Foucault, 18 *Oxford J Legal Studies* (1998) 75, 76.
[8] Foucault, *Archeology of Knowledge*, *supra* note 3, 45.
[9] J Habermas, *Between Facts and Norms* (Polity Press, Cambridge, 1996) 8.

colonialism as central to the validity of international law, a seminal contribution to our understanding of sovereignty, proves the point. [10] I read Anghie's work as illuminating the role of jurists in the making of international law.[11]

Indeed, the classic positivists overlooked the fact of colonialism when assessing, even extending the validity, of international law. In a class-based examination of the global order and law, Chimni has argued that international law is a law made suitably by and for the capitalist class within nations.[12] Anghie has helped us understand better the extent to which the doctrines of international law have been created through colonial encounters. I examine the writers of international law as lawmakers. It is ironical that while giving states the lawmaking powers, behind the scene, individual writers determined the sources of law. Writers, positivists or otherwise, thus produce a juridical intrigue; while a sovereign alone could make law, effectively the writers explained the law. Behind the veil of the nineteenth century sovereignty stood individual writers, connected by a network of power, supplying, as and when needed, private norms as public international law.

> If common law did not come from God, where did it come from? It was one thing to speak of "natural law" when nature was conceived to be the expression of divine lover or order, and quite another to find universal legal norms in Darwinian nature, red in tooth and claw. The natural law project has never recovered what Nietzsche called the death of God (at the hands of Darwin). If not God or nature, where could the common law have come but from judges themselves? That would make them legislators – unelected ones, to boot.[13]

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[10] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, NY, 2004).
[11] Ibid, chaps 2 and 4.
[12] BS Chimni, Prolegomena to a Class Approach to International Law, 21 *EJIL* (2010) 57.
[13] Richard Posner, *Problems of Jurisprudence* (Harvard University Press, 1993) 14.

Judge Posner's eloquent expression of the problems with precedents is worth pondering: "But the challenge remained of explaining just how the creation of legal principles as by-products of judicial decision making could confer on them a political legitimacy equivalent to that of legislative rules."[14] Posner talks of the need for an explanation that would offer judicial decisions "political legitimacy equivalent to that of legislative rules" in a domestic set up. The problem is deepened when we try to evaluate the role of precedents in international law. Although, to a large extent, imparting political legitimacy to domestic judicial decisions equivalent to that of domestic legislative rules is solved by the common law theory of precedents; in international law the thorny issue of legitimacy persists, despite the text of the law – the PCIJ Statute Article 38(1)(d) – that regards judicial decisions and writings "subsidiary means for the determination of the rules of law". Besides, writers are often imbedded in judicial decisions, as seen in the British and North American cases (see chap 1 and 5) in the process legitimising the presence of each other to lay a claim to the sources of international law.

Nevertheless, the examination of the role of writers as sources of international law by reading two domestic cases is instructive. Decisions from an American and a British court, respectively, stamp the stellar role of judicial writings as sources of international law during the colonial times. In the United States in the *Paquete Habana* case, what Grey J. wrote emphasizes the evidentiary function of jurists.[15] In *Re Piracy Jure Gentium*, the Privy Council based solely on juristic writings decided that robbery was not an essential element in

[14] Posner, Ibid15. A van Mulligen, Framing deformalisation in public international law, 6 *Transnational Legal Theory* (2005) 635, 655 "precedents and authoritative interpretations often impose reference points which actors cannot easily escape".

[15] [T]he works of jurists and commentators who by years of labour, research, and experience have made themselves peculiarly well acquainted with the subjects of which they treat. Such works are resorted to by judicial tribunals, not for the speculations of their authors concerning what the law ought to be, but for trustworthy evidence of what the law really is. *The Paquete Habana* 175 US 677 (1900), 700.

piracy *jure gentium*.[16] More recently, authors have spoken about the role jurists should—and indeed play—in the making of international law.[17] International law's leading text writers have recorded that juristic opinion indeed 'lead to the formation of international law'.[18] Most recently, in *The Philippines v PR China* dispute, the Philippines 'suggested that the Tribunal … review the academic literature.'[19]

B. Statement, Description and Coherence as a Methodology

When supplying a description or a set of descriptions, international law, like history, often draws upon a totalizing world-view. To the extent international law embodies the totalising and methodologically Universalist view, the critique of history is also applicable to international law. It is a truism today that globalisation, and its predecessor colonialism, were a product of the totalising view of the industrial societies. For acknowledging the world's normative diversity we need to apply, at least in spirit, the space of dispersion to recognize the norms, rules and laws that to the industrial societies appeared non-law of only customs. Foucault challenges the pre-determined industrial and universalist teleology of historians:

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[16] *Re Piracy Jure Gentium*, [1934] AC 586 at 588-9.

[17] Heller for example writes, 'the US government has released the notorious memorandum … I'm a bit disappointed not to get a mention in the memo; people in the know have suggested that a post I wrote in April 2010 led the OLC to substantially rewrite it.' See, KJ Heller, 'Let's Call Killing al-Awlaki What It Still Is—Murder', *Opinio Juris* (23 Jun 2014). One of the earliest articles on sources is Gordon E. Sherman, The Nature and Sources of International Law, 15 *American J Intl L* (1921) 349-360; M Virally, The Sources of International Law, in M Sørensen (ed), *Manual of Public International Law* (London: Macmillan, 1968) 144–5; PK Menon, Primary, Subsidiary and other Possible Sources of International Law, 1 *Sri Lanka J Intl L* (1989) 113-150; K Nicolaïdis & J Tong, Diversity or Cacophony? The Continuing Debate over Sources of International Law, 24 *Michigan J Intl L* (2004) 1349-1375. T Skouteris, The Force of a Doctrine Art. 38 of the PCIJ Statute and the Sources of International Law, in, F Johns, R Joyce & S Pahuja, (eds) *Events The Force of International Law* (NY: Routledge, 2011) 70. G Boas, *Public International Law: Contemporary Principles and Perspectives* (Edward Elgar, 2012). See, AH Qureshi, Editorial Control and the Development of International Law, 61 *Political Q* (1990) 328–339.

[18] IA Shearer (ed) *Starke's International Law*, 11th edn (Oxford: OUP, 1994) (original edition 1947) 44.

[19] *The Philippines v PR China*, Award on Jurisdiction and Admissibility, PCA Case no 2013-09 (29 October 2015) para 13.

> A total description draws all phenomena around a single center—a principle, a meaning, a spirit, a world-view, an overall shape; a general history, on the contrary, would deploy the space of dispersion.[20]

I deploy in some measure Foucault's critique of history. As a result, the thesis takes a discursive approach to norms, law formation and application. A discursive approach to law is not majorly concerned with the unity of global law; on the contrary, as a methodology, it deconstructs international law to lay threadbare the nature and conduct of norms constituting international law. Hence the discursive legal project is not one of lasting foundations of international law, but one of rebuilding foundations by acknowledging disruptions and diversity in the history of legal ideas. Postcolonial nations, I argue, are agents of that disruption as they represent diversity.

Admittedly, however, the notion of such a discursive discontinuity is paradoxical: it is both an instrument and an object of research. For my thesis, the discursive legal formations are an instrument of research. Although a methodology of study purports to offer objectivity to that study, Descartes has in the past emphasized ideological motivations that typically undercut methodological choices: "[T]here are few people who are willing to express everything they themselves believe; [f]or the act of thinking by which we believe something is different from the act by which we know what we believe, and one often occurs without the other".[21]

I borrow Foucault's general methodology as consolidated by him in *The Archaeology of Knowledge*.[22] The history of ideas, Foucault says, usually credits discourse with the duty to

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[20] Foucault, *supra* note 3, 10.
[21] R Descartes, *Discourse on Method and Related Writings* (Penguin Book, London, 1999) 19.
[22] Foucault, *supra* note 3, 149.

establish coherence.[23] If the narrative of the history of ideas, or more particularly, that of the history of international legal ideas, notices an irregularity or "incompatible propositions" it becomes imperative to then find "a principle of cohesion that organizes the discourse and restores to it its hidden unity".[24]

Foucault says that a "law of coherence is a heuristic rule" asking writers "to admit that if they speak, and if they speak among themselves, it is rather to overcome these contradictions, and to find the point from which they will be able to be mastered."[25] Not just that, a writer has to then prove that the artificial coherence just achieved is the result of a research and a methodology applied therein. Thus while challenging the building of an artificial cohesion in an even more contrived history of the alleged unity of legal ideas, Foucault, almost unintentionally, introduces "contradiction" as a methodology to research law.

A reading of Foucault not only problematizes research methodology, but it also offers non-coherence, dispersion and discontinuity as a method of enquiry of the law. Contradiction as a lens, if deployed, thus allows readers to see the sources of international law—particularly the subsidiary sources—critically. I seek to bring the private norms of public international law to the fore. To achieve this, I deploy contradictions and non-coherence in the grand nineteenth century arguments about law as methods.

As a methodology, I do not try to overcome the contradictions for that is a contrived reality. I argue instead that it is not the coherence but the contradiction implicit in the universalism of international law that best explains the sources of international law. The private life of public

[23] Ibid.
[24] Ibid.
[25] Ibid 149 (italics supplied).

international law, it is argued, has been lived through a kind of norm entrepreneurialism. And to describe the private life of public international law, more than coherence, contradiction as a methodology has critical purchase.

As noted earlier, the statement of the ICJ article 38(1)(d) is the object of the analysis here. A typical deconstruction of a "statement", as Foucault says, exposes its element that can "reappear, dissociate, recompose, gain in extension or determination, be taken up into new logical structures, acquire, on the other hand, new semantic contents, and constitute partial organisations among themselves."[26] Foucault further remarks that "[t]hese schemata make it possible to describe—not the laws of the internal construction of concepts, not their progressive and individual genesis in the mind of man—but their anonymous dispersion through texts, books, and *œuvre*."[27] A space of dispersion, as against the unity of a world-view implicit in the very existence of international law borrows Foucault's deployment of "incompatibility, intersection, substitution, exclusion, mutual alteration, [and] displacement".[28]

The lens of incompatibility, I argue, allows us to magnify the inconsistency in the teleology of the classic international law; that while this law is called the law of the nations, yet its doctrine imparts law-making powers to certain individuals of the nations so identified as "the highly qualified publicists". Thus the sources of international law equate nations and its publicists by offering lawmaking powers to them both at the high noon of colonialism; a European corporate enterprise by which many Asian and African nations were robbed of their sovereignty. Colonialism ensured that western scholars, aided by the doctrine of the law,

[26] Ibid. 60.
[27] Ibid.
[28] Ibid.

enjoyed power equal to states in determining the applicable law. It is argued that discourse and system, here a system of norms that constitute international law, produce each other.[29] For the purposes of methodological rigour, it is important to address the possibility of incoherence implicit in a discursive analysis of norms formed during the colonial enterprise of European companies.

And the classical scholars, so elevated as to become equivalent to states, deploy cosmopolitanism as a tool to explain and analyse international law. Foucault attacks the notion of progress and a European view of civilization as soiled with the teleology of a world-view. He challenges the implicit assumptions that historians make in describing sporadic events as total history. His methodological approach frees, as it were, the small spaces of law's alternative analysis from the tyranny of a cosmopolitan view.[30] In other words, sometimes, as Barber puts it, a departure from a "common understanding" of a principle is essential to produce successful interpretations.[31] The common understanding of the sources of international law, the thesis contends, is an apt candidate for the departure.

III. PRESENTATION OF THE THESIS OUTLINE

> The frontiers of a book [or a thesis] are never clear-cut: beyond the title, the first line, and the last full stop, beyond its internal configuration and its autonomous form, it is caught up in a

[29] Foucault, *The Archaeology of Knowledge*, *supra* note 3, 76.
[30] Ibid, 10. Inspired by later writings of Foucault, Orford has recently called for description as a method for writing about law. Anne Orford, In Praise of Description, 25 *Leiden J Intl L* (2012) 609–625.
[31] NW Barber, The Significance of the Common Understanding in Legal Theory, 35 *Oxford Journal of Legal Studies* (2015) 799–823.

> system of reference to other books, other texts, other sentences: it is a node within a network … The problems raised by the *œuvre* are even more difficult. [32]

That said, this book is divided into three time-blocks; the years before the League of Nations (nineteenth century), the interwar period (1920-1945) and the decades after decolonization (1946 onwards). The five chapters of the book are connected by the coverage of that time period. Chapter 1 examines the scope of writers in domestic decisions and its impact on the PCIJ Stature negotiating history. Chapter 2 discusses the interwar period and the role of writers in shaping international law. Chapters 3 and 4 discusses the after the post-UN world and decolonization. Chapter 5 looks at the phenomena of the contractual approach to international law and, post-decolonisation, internationalisation of contracts and the role of scholarly innovation before the thesis is concluded in chapter 6.

While, aspiring to the conditions of a colonial legal theory, my book is a node within the network of the TWAIL's *œuvre*. The legitimacy of law depends upon its sources. Domestic law, for example, gathers its legitimacy from legislative lawmaking. An ontological survey of international lawmaking however reveals that even private individuals can make public international law although arbitral tribunals have, during the decades after decolonisation, shot down General Assembly resolutions by states as lacking enough normative force.[33] That makes clear today the power of writers as individual actors whose texts can generate international law. Since the early days of colonisation, public international law has lived an out and out private normative life. The empire of the private law continues to exist today too.

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[32] Foucault, *The Archeology of Knowledge, supra* note 3, 23.
[33] Anghie, *supra* note 10, 231.

A. Before the League (1800-1920)

Whichever camp one lives in, positivism or naturalism, none can deny the purported quality of law's omnipresence. Yet, historically, the nineteenth century text writers saw laws of certain lands as customs bereft of normative quality, and lands peopled by lawless others. Such a patronising view of law can only be a political project. In other words, whatever the nature of law in the European societies, when faced with the diversity of legal systems due to colonial encounters, European writers saw the laws of Asia and Africa as primitive, customs that could ripen into law. They were faced with two choices: either respect the diversity and speed with which such societies want their customs to ripen into law, or simply impose European law, one that had strong bias of industrial society, on the natives under the shadow of threat and use of force. Since the European polities adopted a variegated approach to their imposition in the East, unequal treaties as well as full colonialism, their writers drafted international law to mean a law that would exclude some of the privileges, even the sense of individual will and autonomy, given to Europeans. Having hunted down the native legal system, to use Judge Posner's eloquent words, naturalists were red in tooth and claw.

For example, in the eyes of the nineteenth century writers, an unequal treaty, made by the use of force and therefore lacked consent, was still legal. This position of international law would hold true even when in Europe private law would put supreme premium on consent in contract and protection of private property within the law of corporations. The Law of Nations was essentially the law of the European Nations. In fact as O'Connell wrote, while approaching the question of the existence or otherwise of a "doctrine in English law", one must go further than Britain "and recognize the essential unity of all European legal

structures, a unity founded on the moral concord of Western peoples." "This", he thought, "is one of the primary uses of comparative law".[34]

However, if colonialism is generously read as an exercise in comparative law, given the purported lack of law in native societies, there wont be any comparative business to do. In fact the PCIJ Statutes article 38(1)(c) makes is rather clear: general principles of law recognized by civilised nations. In the minds of western lawyers, only a land moving fast towards urbanisation and industrialisation with an appetite for raw materials and finished products could be "civilised". At this point western scholars divided societies into civilized, semi-civilized and native (therefore ought to be subjected to the full force of colonialism). *Lex mercatoria* in such ways parented natural international law. After the Treaty of Westphalia, *lex mercatoria* would be handed down as the positive law of the state. Positivism and naturalism within international law, it is argued, are then a chimera of form and content.

That said, the dissection of international law's doctrine on sources reveals its common law and civil law parentage. Given the Statute of the PCIJ was drafted at the high noon of colonialism, is it any surprise that the teleology of international law was colonial. Yet it took about a century since for Third World scholars to initiate an archaeology of international legal norms. The reasons are fairly obvious; after the mayhem of World War II, international law of human rights finally seemed to fulfil the cosmopolitan promise of international law. The structure of international legal arguments, oscillating between naturalism and positivism, stood clear of the colonial question. As Anghie argues, for the western writers, colonies and colonialism "constituted a separate and distinctive set of issues which were principally of a

[34] O'Connell, *supra* note 42, 4.

political character".[35] They were not the issues that "generally impinge in any significant way on the core theoretical concerns of the discipline." [36]

A typical catalogue of international legal texts tell those books which develop rules for the protection of capital from those defending states' sovereignty. The problem however is that both kinds of texts lend claim to the benevolent production of a language of law for universal consumption. Such claims often overlooks an otherwise simple fact that an advocacy for the transnational bourgeoisie, often from capital exporting countries, is presented as public international law for even the subaltern classes.[37] A text is thus presented as an innocent and enabling register of norms although the disabling potential of this very text is palpably implicit.

In the sixteenth century England, the Parliamentary called for an oversight over corporate activities on British companies. The growing volume of colonial enterprise, of the East India Company for example, called for the judicial review of legislative ordinances. Interestingly, British law required that legislative ordinances not be repugnant to the laws of the nation as understood in England.[38] And actors—writers of the law of nations—determined the norms of this law in England, followed almost *verbatim* in North America. In such way, the law of nations internationalized corporate law. Since corporate law is a progeny of civil law and common law intercourse in Europe, it is hardly surprising that a small incision in the body of the law of nations exposes its corporate bones. So provincialized, international law and its sources thus become a story of private capital and bourgeois legal norms.

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[35] Ibid. 35.
[36] Ibid.
[37] Chimni, *supra* note 12, 70 ff.
[38] MS Bilder, The Corporate Origins of Judicial Review, 116 *Yale L J* (2006) 502.

B. The Interwar Period (1914-1945)

After the first World War, much of what passed off as public international law were opinions furnished by "the most highly qualified publicists of the various nations" drawing upon judicial decisions. The end of the World War I, *mutatis mutandis*, entrenched in the first definitive text on the sources of international law, the PCIJ, an European-North American practice of using writers of international law as sources in domestic courts. Article 38(1)(d) of the Statute listed "judicial decisions" and private writings as subsidiary means for the determination of the rules of international law. By so doing it acknowledged the long-established role of private power-privileging norms in the making of lawmaking. Besides, the appearance of both judicial decisions and writers as subsidiary sources cast in stone a compromise between common law and civil law jurisdictions.

How do the public and the private appear in the colonial registers of law? A study of nineteenth century cases between native investors and kings and the East India Company is instructive. Forever divided between the private and the public actions of the Company, the British courts too became agents of colonialism. For example, in *Ex-Rajah of Coorg v East India Company*, while condoning the confiscation of the promissory notes belonging to the native king, a British court refused a remedy because the Company's taking possession of the notes was not of "mercantile character …but … in the exercise of their sovereign and political power."[39] The nineteenth century British courts ratified those acts of the British Companies that brought land territory to the Crown, but did not accept, on the logic of the public and private division of the acts of such companies, the encumbrances attached to the

[39] *Ex-Rajah of Coorg v East India Company* (1860) 54 E.R. 642, 646-47.

land captured.[40]

The dawn of the League of Nations buried under its civilizational vocabulary non-European norms and values; all for an instrumental formulation of the law of diplomatic protection of aliens and subsequently, as some argue, international investment law.[41] Much earlier, arbitral tribunals had catalogued the doctrine of unjust enrichment; its American equivalent being restitution, within international law after the common law jurists had invented it by a reference to ethical-juridical principles.[42] Irony practically wrote itself into the common law then, as ethical dimension of this contractual law were used later to defend unethically acquired colonial properties. Yet jurists argued for the use of private law against State to keep investors in good humour. The empirical work, by Garth and Dezalay, on international commercial arbitration that takes a sociological approach points to both the invention of *lex mercatoria* and the internationalisation of private law as the characteristic of the 1960s and 1970s:

> The legal importance of the great petroleum conflicts depended on the fact that they coincided with a dramatic increase in international commerce and the emergence of of new states insisting on their legal sovereignty. As long as the economic exchange between North and South proceeded essentially under a more or less colonial regime, the issue of the applicable law was hardly posed.[43]

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[40] *Tulloch v Hartley* (1841) 62 ER 814. In this case the court gave judgment, without mentioning any doubt as to the jurisdiction like in *Doss v Secretary of State for India in Council Equity* (1874–75) LR 19 Eq. 509, 516.
[41] D Schneiderman, The Global Regime of Investor Rights: Return to the Standards of Civilised Justice? 5 *Transnational Legal Theory* (2015) 62.
[42] DP O'Connell, Unjust Enrichment, 5 *American J Comparative Law* (1956) 2.
[43] Bryant G Garth & Yves Dezalay, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996) 85–86. Cf. "Over the next decade and a half, opposition to arbitration developed, predominantly from leftist academics, anti-globalization groups, and States that found themselves as respondents in investment treaty arbitrations." Charles Brower & Sadie Blanchard, From "Dealing in Virtue" to "Profiting from Injustice": The Case Against "Re-Statification" of Investment Dispute Settlement, 55 *Harv J Intl L online* (2014) 45 <http://www.harvardilj.org/wp-content/uploads/2014/01/Brower_Blanchard_to_Publish.pdf>.

Both extravagant naturalism and parsimonious positivism, the two dominant schools of international law, have failed to capture the normative intrigue that colonialism and its spin offs after decolonization have created. Moreover, the natural law approach of the British judges ran parallel to the naturalism, *jus gentium*, of Vitoria who, although recognized the cultural autonomy of the native Indians, argued that a natural law, against the Papal law, "naturalizes and legitimates a system of commerce and Spanish penetration".[44] Vitoria's technique of using natural law, more in the nature of the *lex mercatoria*, allowed "the particular cultural practices of the Spanish" to become universal.[45]

Similarly, believing restitutionary remedies had their genesis in natural law, scholars propounded a natural law doctrine of unjust enrichment: "[E]ssentially a restitutionary remedy founded on the broadest of moral principles was brought by the fiction of implied undertaking within the province of contract".[46] The common law method of implications allowed British jurisprudence to impregnate the private law of contracts with a moral vocabulary. The British private law and international law scholars have worked overtime to develop such arguments for European investors, a story discussed in various chapters of the thesis.

Building on older arbitral decisions, Lauterpahct, in 1927, drew a robust private law analogy of public international law. Three years later, in the *Lena Goldfield arbitration* the tribunal decided to wrap a simple contractual breach in the vocabulary of moralism. It also

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[44] Anghie, *supra* note 10, 20-21

[45] Ibid. "The quest for a third legal order stems from many jurists' conviction that neither municipal law nor international law is appropriate or suitable for dealing with international commercial disputes when parties from different countries are involved." AFM Manriruzzaman, The *Lex Mercatoria* and International Contracts: A challenge for International Commercial Arbitration? 14(3) *American Univ Intl L Rev* (1999) 657-734.

[46] O'Connell, *supra* note 42, 4.

represented the elevation of a private law principle to international law. The interwar *Lena Goldfields* arbitration against the Soviet Russia simply picked the overeager claimant's argument to inject into the Award a general vocabulary of justice and morality in an otherwise pure and simple contractual breach.[47] Around 1930s, as a parallel, mixed Arbitral Tribunals repeatedly applied restitutionary techniques based on considerations of unjustified enrichment in deciding cases involving uncompleted business dealings, which had lost their contractual basis through the provisions of the Peace Treaties. Such attitudes had begun to nourish a prototype of a transnational law, corporate law internationalized.

In England private scholars collated judicial techniques developed over the centuries and internationalized it to develop rights for the Western bourgeoisie. To a corporate lawyer, international law was a seamless extension of the contractual project that went around the world finding cheap labour and raw materials. Colonialism was thus corporate law transnationalised. The contract, through moralist *pacta sunt servanda*, went on to represent the basic unit of a cosmopolitan order. The grand norm of international law, I argue, is a contract and its vehicle a corporation.

C. After the World War II (1945- to this day)

After mass decolonization, pro-investment lawyers continued to argue that the New International Economic Order (the NIEO) does not amount to a successful lawmaking, although extravagant writings and arbitral awards, for them, do act as sources. That a handful of academicians and arbitrators can make international law, but not a population of countries causes a juridical intrigue. My thesis examines and explains that intrigue.

[47] C Schreuer, Unjustified Enrichment in International Law, 22 *American J comp L* (1974) 289.

Professor O'Connell was of the opinion that the civil law or the common law traditions are a product of the "essential unity of all European legal structures, a unity founded on the moral concord of Western peoples".[48] It is no less true that international law too is a projection of the colonial concord of Western peoples. This originary revelation aside, the extent of the role played by private norm entrepreneurialism in the colonial ontology of international lawmaking remains an under-researched area of legal sciences. The sources of international law are both a story of private entrepreneurs and an elevation of the private norm into the category of public international law. Curiously enough, in sharp contrast with domestic laws, publishing books, commentaries and articles determine international law, almost akin to a legislative exercise by private individuals and judges.

Such a privileged lawmaking is exclusionary as an invisible college of the Western lawyers, all the same constituting a class, made laws for investors first against the Soviets during the interwar period. Subsequently, in investor-state disputes, such awards, amalgam of factual data as well as constitutive of European values**,** were used as precedent against newly decolonized countries. The panoply of actors, norms and processes of international lawmaking has presented an enigma to the majority of decolonized nations that, during 1960s, believed that "will" of the nations, as said in the *Lotus* case, alone makes international law.

A naïve view of the newly decolonized states was sustained by the received statist view of international law and its processes. For a very long time now, the aforementioned statist myopia ignored the role of private norm-makers in the making of international legal

[48] O'Connell, *supra* note 42, 4.

arguments. Both in spirit and ontology, the scheme of colonial governance, for example the redistribution of colonial territories at the time of the establishment of the League of Nations and its appended Covenants, was transnational in character. Subsequently, the interwar bourgeoisie funded the ghostwriting of apathetic legal methods and capitalist norms in transnational tongues for the protection of aliens, mostly Western, investors.[49] The cause of private actors, here investors, was taken up in the vocabulary of public law that sought to international law-*ize* the continuity of colonial law for an protection, ironically, of colonial properties. The artificial divide between public and private law would now acquire a colonial hue.

The Second World War only made the corporate-colonial project of international law obvious. Both permanent courts and the ever-present *ad hoc* tribunals failed to acknowledge colonialism as international law's Achilles heel. Post-1945, the colonial continuity of the structure of legal arguments stood in the way of interrogating its essentialist ontology and capitalist teleology. As such, initially, the ICJ stood indifferent to the colonial question. In disputes arising due to the breach of colonial concession contracts, investment tribunals, as if taxing newly independent countries for its political liberation, billed the costs of producing legal norms to them in the process defeating political liberation by extending uncritical colonial legality. Western scholars came up with innovative re-conceptualizations of international law, for example, Jessup's *Transnational law*. Scholars argued that Western law should be the applicable law in disputes between Western investors and Asian and African states arising from colonially concluded contracts.[50] This amounted to a contractual approach

[49] SN Guha Roy, Is The Law of Responsibility Of States For Injuries To Aliens A part of universal international law? 55 *American J Intl L* (1961) 863-879.
[50] *Abu Dhabi Arbitration* 1 ICLQ (1950) 144.

to international law obscuring international law's imperial and colonial timber. As Anghie elegantly puts it:

> The old international law conquest creates the inequities that the new international law of contracts perpetuates, legalises and substantiates when it 'neutrally' enforces the agreement, however one-sided, entered into by sovereign Third World states. It is in this way that the 'old' international law of imperialism, based on conquest, is connects with the new international law of imperialism, based on contract.[51]

Analytical jurisprudence attempts to overcome the enigma of the deployment of moralist vocabulary for investors. As an example, it does so by exposing the pervasive existence of unjust enrichment in both Civil and Common law systems. Its first ever use against a state, Russia after revolution, was done by in the *Lena Goldfield* arbitration. Only a few years before, in 1920, the PCIJ statue on the sources had occasioned the division of all sources into two systems; common and civil. After decolonisation, jurists followed the trail to deposit contracts into the orbit of treaties, the technique that Sornarajah terms as the theory of internationalization of contracts.[52] At the same time, attempts were made to suffocate the New International Economic Order, a project by developing counties in the UN general assembly, to ensure a colonial continuity of international law.

That is not all. Today, those who do not find any merit in the value of the NIEO as useful and accurate legal principles, go on to import the bulk of human rights, a law for

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[51] Anghie, *supra* note 10, 241. The "turn to contracts" occurs, as Zumbansen says, "in the context of a richly structured filed of public, and private modes of governance". In Peer Zumbansen, Law, Economics and More: The Genius of Contract Governance, in, Stefan Grundmann et al (ed) *Contract Governance: Dimensions in Law & Interdisciplinary Research* (OUP, NY, 2015) 72, 86.

[52] M Sornarajah, *The International Law on Foreign Investment* 3rd edn. (New York: Cambridge University Press, 2011) 227.

human persons, to attempt an analogy for developing compensation for investors, corporate persons. The deployment of human rights analogies as a methodology for the development of investment protection amounts to accepting normative equality of human persons and corporate persons. In other words, scholars as lawmakers argue for human rights of corporate persons even as they question the lawmaking by countries, the NIEO, in the General Assembly.[53]

Although pregnant with intuition on colonial nature of international legal norms for decades, third World jurists miscarried due to start-up nationalism in Asia and Africa as well as the Cold War geopolitics. The grammar of international law, colonial as it was, sustained colonial vocabulary and private hermeneutics. Another factor that delayed the archaeology of colonial norms was mimicking of international law by semi-peripheral states like Japan, Turkey and Siam and some others in Africa. To the decolonized countries, international law offered the promise of sovereignty; a kind of reversal, as it were, to a precolonial position and non-interference. However, decolonization presented an enigma to Western states and its bourgeois class. With the growing influence of Communist ideology in such countries, legal doctrines had to be deployed in the defence of private property acquired during centuries of colonialism. International law does embody *pacta sunt servanda*; however, an enquiry into the means and methods of securing such *pacta* reveal civilizational bias in the grammar and vocabulary of international law.

[53] M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford: OUP, 2013) 7-8.

IV. Conclusion

The point is writers have argued for a particular private law norm as a general and public law norm, and subsequently, a public international law norm. More particularly, a contract that embodies the ethical principle of *pacta sunt servanda* in relation to other private parties in the same jurisdiction has been in international law deployed against sovereigns. A relationship between two private parties is constitutive of the norms, which is different from norms that constitute the principle of sovereignty. To then uncritically extend a law between two private individuals onto the state that embodies and represents a collectivity of population needs more jurisprudential analysis than ever provided by the nineteenth century jurists.

Unfortunately, such contractual norms when applied, ironically, to fetter sovereigns that had freed themselves from colonial rule, created a travesty of law and legal procedure. What is even more arresting is the fact that once decided that way, the decision itself becomes the new law under the theory of precedents. Thus an uncritical and doctrinally problematic application of law legitimizes a previous wrong by a structural process of international law making.

The book first argues that the juridical nature of judicial decisions and writings of publicists created a blueprint of a bourgeoisie international law. Unsurprisingly, political decolonisation did not accompany legal decolonization. Rather it witnessed an oxymoronic making of primary international law, not by political process, but by an invisible college of the most qualified Western publicists instead. This led to the creation of an uncritical international law by a clique at a time the number of the developing and the least developed

countries in the UN General Assembly swelled. Such a misapplication of law was facilitated by international law's inherent structural bias in favour of erstwhile colonial powers.

This has forever damaged international law's credibility in the eyes of many developing countries. Countries are regularly withdrawing from international legal regimes since 2000s. There is a new trend among countries, developing and developed, to include a *Calvo* clause in their investment treaty regimes.

Although subsidiary sources hardly replace the will of states – primary sources – the process of identification of primary sources has been comparative and transnational; methodologies that entailed a circulation, if somewhat insulated from non-European values, of intra-Western norms, actors and processes. Highly privileged actors, mostly Western jurists, juggled norms from common law and civil law jurisdictions in hybrid arbitrations conducted before the League of Nations. Small surprise, then, that the Statute of the PCIJ was methodologically comparative and ontologically transnational.

So long as international law has grown on the fertile grounds of precedents, a British legal method, it already inherits an essential unity of all European legal structures. Add to this the civil law and common law invention of treating writings as sources of law. What is more, in relation to international legal arguments scholars have permitted themselves the luxury of law making, arguing at the same time against that legitimate right to developing states. International law then appears an out and out European law.

That is not all; international legal process even tried preventing non-Western nations from contributing to the law of nations lest the latter edit out its bourgeoisie spirit. That after

decolonization international lawmaking would exclude developing states and include individual Western writers speaks of international law's colonial ontologies. Standing between doctrinaire formalism and instrumental realism, my thesis attempts to unpack the ontology and the politics of the subsidiary sources of international law. Seen along with Foucault's view on the role of power and tactics of domination, Kelsen's norm typology is an important analytical tool for my project. The book dissects the body of public international laws to find private norms and processes that make international law. It discursively challenges the private making of public international law.[54]

What often goes unappreciated is the fact that the Third World, on account of colonialism, only had training in Western conceptions of law; the defence of their sovereignty occasioned re-learning of the law. Such an approach was indeed supported by Western "turncoats" law firms and lawyers in an effort to build a new clientele. And in that sense too international law remained a heuristic construction of the sociology of l*ex mercatoria* and a network of lawyers and jurists with high social capital.

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[54] Cf. Gilles Cuniberti, The merchant who would not be king: Unreasoned Fears about Private Lawmaking, in, HM Watt & DP Arroyo (ed), *Private International Law and Global Governance* (OUP, NY, 1014) 141.

Chap. I: Mixed Arbitrations, Permanent Courts and Norm Entrepreneurialism

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Introduction argues that power norms are the core norms of international law. Taking that argument further, Chapter 1 argues that after the PCIJ Statute wrote the publicists and judicial decisions into international law, private actors and norms became even more entrenched in the making of public international law. Notably, however, since the beginning of the 19th century – effectively a century before the birth of the League of Nations – North American and British domestic courts had been invoking writers as sources of the law of nations extensively. Since the 1920 Drafting Committee, comprising members of civil and common law countries, introduced the principles of law recognised by civilized nations as sources of law, the writers of such civilized nations ensured that international law remained, in essence, a European law with a bourgeois core marshalled in the service of the imperial project. Chapter 1 explains international law's structural borrowings of its sources. The chapter looks into the reasons behind the normative discomfort that have accompanied the acceptance of international law and its sources by developing countries.

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I. Introduction

'[T]he Arbitrator's decision should be [seen] only as a subsidiary means, to the general principles of the law of nations and of maritime law'[1] The [PCIJ] … has not confined itself to a consideration of the arguments put forward, but has included in its researches all precedents, teachings and facts to which it had access and which might possibly have revealed the existence of one of the principles of international law contemplated

[1] *Dispute Between the United States of America and Great Britain about the Interpretation of the First Article of the Treaty of Ghent of 24 December 1814—Award of the Emperor of Russia of 22 April 1822*, reprinted in, 29 RIAA (2011) 1, 5. In 1910, the PCA noted the role of arbitrations in keeping the peace among nations. 'Whereas it is assuredly in the interest of peace and the development of the institution of International Arbitration, so essential to the well-being of nations, that on principle, such a decision be accepted, respected and carried out by the Parties without any reservation'. *Award of the Tribunal of Arbitration, Constituted Under An Agreement Signed At Caracas February 13th 1909* (*US v Venezuela*) 25 October 1910, 11 RIAA (1911) 237, 238.

in the special agreement.[2]

Nineteenth century cases—American, British and Canadian—decided before the drafting of the PCIJ Statue in 1920 abundantly use writers of international law as authentic sources of the law of nations.[3] For the 1920 drafting committee, this chapter argues, the North American and the British domestic cases presented the primary materials to arrive at the wording of the auxiliary sources of international law. The chapter first argues that writers of the law of nations embedded in these case, though subsidiary, determined the existing law of nations when Western states extended their rule to new colonies with concepts such as *terra nullius*,[4] capitulations and discriminatory treaties[5] or by simply extending sovereign loans to colonial companies.[6] Vattel, for example, proposed that the amount of land a small group might claim be limited, lest a single person claimed an entire continent.[7]

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[2] S.S. Lotus (Fr. v. Turk.), 1927 PCIJ (Ser. A) No. 10 (Sept. 7) at p. 31. MM Whiteman & GH Hackworth, (eds) 1 *Digest of International Law* (U.S. Department of State, 1963) 97.

[3] JG Starke, The Contribution of the League of Nations to International Law, 13(2) *Indian Yrbk Intl L* (1964) 207-209.

[4] *The Case St. Catharines Milling and Lumber Company and the Queen, on the Information of the Attorney General for the Province of Ontario*, 13 SCR 577, 580, 596 (1887) citing Sir Travers Twiss and Vattel. S Banner, Why *Terra Nullius*? Anthropology and Property Law in Early Australia, 23 *L & History Rev* (2005) 95, 99-100. *Downes v. Bidwell*, 182 U.S. 244, 373 (1901). *In the Matter of Jurisdiction over Provincial Fisheries*, 26 SCR 444, 549 (1897) discussing Puffendorf and Grotius. *The Schooner "John J. Fallon" and His Majesty the King*, 55 SCR 348, 349 (1918) discussing Ferguson, Twiss, Wheaton and Halleck. However *terra nullius* has generated a polarized debate. Cf. E Cavanagh, Possession and Dispossession in Corporate New France, 1600-1663: Debunking A "Juridical History" and Revisiting *Terra Nullius*, 32 *L & History Rev* (2014) 97, 99.

[5] CH Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies: 16th, 17th and 18th Centuries* (Oxford: Clarendon Press, 1967) 97.

[6] For instance, soon after the takeover of Bengal, Bihar and Orissa, a terrible famine fell upon Greater Bengal—now Bangladesh and Indian provinces of West Bengal, Bihar, Odisha, and Jharkhand—in the year 1770. The East India Company's revenue plunged sharply and in 1772 the Company applied for the King government's loan to save them from insolvency. The lone was granted with a condition appended in the Covenant, which made a promise to pay a sum of £400,000 annually to the British exchequer. An appointed select committee would look into Indian matters with a parliamentary oversight. In such ways 'the ship of the state was launched in India.' Henry G. Keene, *History of India*, *vol. I*, 2nd edn., (Edinburgh: John Grant, 1906, first edn. 1889) 182.

[7] E de Vattel, *The Law of Nations* (1758), ed. Edward D. Ingraham (Philadelphia: T&J W Johnson, 1853) 36.

Secondly, the chapter argues that later such colonial acquisitions had to be defended within the legal epithet of the protection of private property using writers of the law of nations.[8] About the Mandate System of the League of Nations, Anghie has powerfully argued that these 'nineteenth-century jurists built racial discriminations into their conceptualization of sovereignty.' [9] Indeed, at the PCIJ many judges would unwittingly expose their European bias to construe a limited meaning of "civilized nations" that would correspond to the redistribution of colonial territory and justify three tier mandates under the League of Nations.[10] The kind of Normative discomfort associated with sources of law is perhaps understandable then.

Much later, initiated by the Indian judge to the ICJ, Nagendra Singh, the Indian Society of International law organized the Indo-Soviet Seminars in 1977-78 on sources.[11] Both Indian and Soviet publicists exhibited normative discomfort with

[8] *John J MacDonald and The Georgian Bay Lumber Company*, 2 SCR 364, 370 (1879). As early as 1856, Pratt noted the "difference of opinion" that existed 'amongst the most distinguished jurists and writers on international law on this subject'. FT Pratt, *Law of Contraband of War* (London: William G. Benning & Co., 1856), xix. For a reference to Lord Chief Justice Russell on 'the subject of international law and arbitration' see Report of the Committee on International Law, in 22 *Annual Report of the American Bar Association* (Philadelphia: Dando Printing & Publishing Co. 1899) 418. Most importantly, see, Hersch Lauterpacht, *Private Law Sources And Analogies of International Law* (Connecticut: Archon Books, 1970, originally published 1927); I Porras, Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations, 27 *Leiden J Intl L* (2014), 641–660, 643. For a very comprehensive study of international law's early scholars see D Kennedy, Primitive Legal Scholarship, 27 *Harvard Intl L J* (1986) 1–98. A Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge: Cambridge University Press, 2004); M Koskenniemi, Empire and International Law: The Real Spanish Contribution, 61 *Univ Toronto L J* (2011) 1-36, § 1 'The Empire of Private Law'.

[9] Antony Anghie, Colonialism And The Birth Of International Institutions: Sovereignty, Economy, And The Mandate System of The League of Nations, 34 *NYU J Intl L & Politic*s (2002) 513, 632.

[10] See, G Schwarzenberger, The Standard of Civilisation in International Law, 8 *Current Legal Problems* (1955) 212-234; S Mathias**,** Structural Challenges Facing International Organizations Re-assessing the League of Nations, 17 *Intl Community L Rev* (2015) 127–137.

[11] N Singh, Indo-Soviet Seminars of 1977 and 1978, 19 *Indian J Intl L* (1979) 471. In the seminar, both Soviet and Indian publicists challenged the general theory of sources, see, GI Tunkin, General Theory of Sources of International Law, 19 *Indian J Intl L* (1979) 474; RS Pathak, The General Theory of the Sources of Contemporary International Law, 19 *Indian J Intl L* (1979) 483.

main sources, let alone the auxiliary sources.[12] In 2006 Upendra Baxi asked, 'how may anyone ever fully offer an impact analysis of the role of the 'publicists' in the shaping of the normativity' of international law?[13] Though such a quantitative impact analysis is tough to conduct, it is important to critically unpack the structural process and method that helped the drafting of subsidiary sources of international law in 1920.

Historically, colonial companies invoked the law of nations propounded by European writers to defend their private capital and investments. Furthermore, before 1920, when Latin American states expropriated private properties, writings of publicists would determine the public international law of investors-state arbitrations.[14] It is therefore not wrong to say that public international law, historically speaking, is a product of writings and arbitral rulings often penned in the defence of private investment. After the Tsar era, the Soviet scholars thus developed a pathological apprehension with sources of international law in general.

Professor Sornarajah has for long argued that on many occasions private power is used to create public international law, more so when new capital importing developing countries did not have means to become persistent objectors, a legally recognized method, to the development of some rules.[15] Sornarajah's proposition now

[12] MK Nawaz, Other Sources of International Law: Are Judicial Decisions of the International Court of Justice A Source of International Law, 19 *Indian J Intl L* (1979) 526, T Starzina, Auxiliary Sources of International Law, 19 *Indian J Intl L* (1979) 522.
[13] U Baxi, New Approaches to the History of International Law, 19 *Leiden Journal of International Law* (2006) 555-566, 559 (deitalicized).
[14] JB Moore, *History and Digest of the International Arbitrations to Which the United States Has Been a Party* (Washington: Government Printing Office, 1898). *Central and South American Telegraph Co. v. Chile*, U.S.-Chilean Claims Commission under Convention of August 7, 1892, Ibid 1477 (1898).
[15] It also subjects many respected academics to a charge of an absence of neutrality, admittedly a "strong claim". M. Sornarajah, *The International Law on Foreign Investment* 3rd edn. (New York: Cambridge University Press, 2011) 279. Professor Jennings has argued for the promotion of contracts into the realm of international Law. RY Jennings, State Contracts in International Law, 37 *British Yrbk Intl L* (1961), 156. Professor Sornarajah has identified this phenomenon as the 'theory of

seems to have taken deeper roots as Tushnet recently opined that academics are indeed lawmakers.[16] To cut through this reality's obscurity, Tushnet turns to customary law, a primary rather subsidiary source of international law.[17] Tushnet says many take state practice to have been engaged in out of a sense of legal obligation rather than national self-interest. This is what makes customary international law. Note what publicists can do:

> International lawyers know that nations that would be disadvantaged by finding some rule to be established as customary international law can find lawyers who will examine the practices said to establish the rule as customary international law, and present arguments saying that this practice should not count because it arose in these (different) circumstances, that this other practice does not count because it arose in yet other circumstances, and on and on until the lawyers have shown that the practice said to constitute the customary rule is not widespread enough to qualify.[18]

Usually, the publicists claim to offer characterizations of state practice that are neutral with respect to specific disputes. In such ways 'publicists make international law by providing it with the characterization needed to transform state practices into customary international law.'[19] Thus very ironically subsidiary sources help in the making of primary sources. Since the PCIJ Statute of 1920 was a result of a compromise between two dominant legal systems of the time, civil law and common

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internationalization of contracts'. What is notable is that the internationalization of contacts theory is rooted in arbitral awards and writings of the publicist, the "subsidiary means" within ICJ Article 38(1)(d). Sornarajah, Ibid., at 289. Here is a case of the "subsidiary means" becoming a primary source of international law. The PCIJ discussed contracts and international law in *Serbian Loans Case (Fr. v. Yugo.)*, 1929 P.C.I.J. (Ser. A) No. 20 (July 12), at 41.

[16] M Tushnet, Academics as Law Makers, 29 *Univ of Queensland L J* (2010) 19.

[17] Ibid.

[18] Ibid.

[19] Ibid.

law, it put down in the foremost text on international law both judicial decisions and publicists as sources.

The fact that common law courts had always used writers in their decisions made reaching of this compromise easier. The chapter concludes with a new archival finding about the *Case Concerning Right of Passage over Indian Territory*[20] between an erstwhile colonial power and a newly decolonized state and the normative discomfort with the auxiliary sources of international law.[21]

II. From Domestic Courts to the World Courts: The Imperial Voyage of Writers

A. Writers As Sources Before 1920

By the nineteenth century, James Jaffe writes, life and work in England had been penetrated by arbitration as form of dispute resolution.[22] Arbitration in America also started early.[23] Arbitrations in the nineteenth century thus ran almost parallel to regular court systems in Britain and America. In 1906, Moore's *Digest of International Law* compiled both domestic decisions and writings of jurists in eight volumes, fourteen years before the committee of Jurist sat to draft the Statute for the

[20] *Case Concerning the Right of Passage over Indian Territories (Portugal v. India) (Merits)*, [1960] I.C.J. Rep 6.
[21] Letter of Sir C. Stirling, on April 30, 1960), No. 51 (1012/5/60, Portuguese Right of Passage Over Indian Territory: Judgement of the International Court of The Hague FO 371/152541, in *Foreign Office Files for India, Pakistan and Afghanistan 1947-64 Documents* (1960) para. 6.
[22] JA Jaffe, Industrial Arbitration, Equity, and Authority in England, 1800-1850, 18 *L & History Rev* (2000) 525-558.
[23] J Oldham & SJ Kim, Arbitration in America: The Early History, 31 *L & History Rev* 31 (2013) 241-266.

PCIJ.[24] It was preceded by Moore' 1898 work in six volumes titled *History and Digest of the International Arbitrations to Which the United States Has Been a Party*.[25] Notably, in 1886, Francis Wharton produced in three volumes *A Digest of the International law of the United States* that among things listed decisions of the United States Federal Court and opinions of the Attorneys-General.[26] In 1956, Clifford J. Hynning wrote:

> In earlier times in the United States, when case precedents were largely lacking and treaty law was in its primitive stage, great weight was given by American judges to the opinions of Grotius, Vattel and others. In particular, Justice Story and Chancellor Kent made great use of the writings of these foreign jurists in their commentaries and also in their opinions.[27]

Thus in the nineteenth century, North American and British Court regarded writers of international law as a means to resolve disputes about the law of the nations.[28] In fact some of the text writers of international law became famous and gathered reputation when these domestic courts referred to them. In *Regina v. Serva* a British bench noted a principle of international law 'laid down by the best writers on the law of nations' as "Grotius says" so.[29] In *re Tivnan*, a British bench in 1864 discussed whether 'the government of a civilised country' recognized "writers on the law of nations" as

[24] Moore, *A Digest of International Law, vol. I—vol. VIII*, *infra* note 50.
[25] Moore, *supra* note 14.
[26] F Wharton (ed) *A Digest of the International law of the United States*: *Vol. I—III* (Washington: Government Printing Office, 1886); D Schneiderman, The Global Regime of Investor Rights: Return to the Standards of Civilised Justice? 5 Transnational Legal Theory (2015) 60-80.
[27] CJ Hynning, Sources of International Law, 34 *Chicago–Kent L Rev* (1956), 116, 129; T Skouteris, *The Notion of Progress in International Law Discourse* (TMC Asser Press: The Hague, 2009).
[28] For a historical account see, Oldham & Kim, Ibid., 241-266. Also see, JT Morse, Jr. *The Law of Arbitration and Award* (Boston: Little Brown & Co., 1872). Koskenniemi, *supra* note 8, at § 1 'The Empire of Private Law'.
[29] *Regina v. Serva* and Nine Others, 175 Eng. Rep. 22 Nisi Prius (1845) 28.

sources of law.[30] In *Bay Lumber Co.* case decided in 1879, the Canadian Supreme Court discussed Wheaton to maintain, 'that by comity real estate in a foreign country can be reached.'[31] As such, there are many cases where writers have been referred to discuss the "law of the nations".[32] Again, a British court in a 1858 ruling, *Regina v. Lopez*, said: 'The same principle governs the law of America and France, and is to be found in all the great text writers on international law.'[33] Structurally, it would have been difficult for the North American and British courts applying international law to avoid the aid of scholarship, which in effect blurred the line dividing actual law in the text and law from scholarly analysis.

In *Attorney General v. Kent* of 1862, a British Exchequer court thought the 'argument is founded upon language used for a different purpose by writers on international law.'[34] *Magdalena v. Martin* went a step further to discuss Vattel 'express[ing] the law of nations' as 'stated by Vattel and all the great text writers on that law.'[35] Similarly in *Ship North case*, the Supreme Court of Canada ruled on the "doctrine of pursuit" with the force of opinion of 'Hall and other writers on international law'.[36] In *re "The William Hamilton*" the British ecclesiastical court thought that the 'true principles of international law have been laid down by some of our best text writers'.[37] In *Attorney General v. Sillim*, a British Court said: 'For it is held by all writers on the law of nature and of nations, that the right of making war, which by nature subsisted in every individual, is given up by all private persons that enter into

[30] *Re Tivian*, 122 Eng. Rep. 971, King's Bench (1864) 975, 977.
[31] *John J. MacDonald and The Georgian Bay Lumber Company*, 2 S.C.R. 364 (1879), at 370; *Andrew Mercer and The Attorney General for the Province of Ontario*, 5 S.C.R. 538 (1882), 559, 623.
[32] *Birtwhistle v. Vardill*, Eng. Rep. 1308—House of Lords (1839).
[33] *Regina v. Lopez*, 169 Eng. Rep. 1105, Crown Cases (1858) 1110.
[34] 158 Eng. Rep. 782 - Exchequer (1862) 784.
[35] *Magdalena Steam Navigation Co. v. Martin*, 121 Eng. Rep. 36, King's Bench (1859) at 40.
[36] *The Ship North and His Majesty the King, ex. rel. the Attorney General for the Dominion of Canada*, 37 S.C.R. 385 (1906) 387.
[37] 166 Eng. Rep. 368 (1834) Ecclesiastical 374.

society, and is vested in the sovereign power.'[38] An ecclesiastical court in *Simonin v. Mallac* dared one of the parties to repudiate the works of learned writers: 'for they would hardly have repudiated the doctrine of several learned writers, whose works are always received as worthy of great attention'.[39] Fikfak maintains, 'Blackstone claimed that international law forms part of domestic law to the full extent, with the domestic system accepting international law as part of the same legal order.'[40]

> [Blackstone's] view appears to have been adopted by Justice Gray in *The Paquete Habana*, "[i]nternational law is part of our law". It was also explicitly referred to by Lord Denning in *Trendtex*: ''it follows to my mind inexorably that the rules of international law, as existing from time to time, do form part of our English law''; and Justice Shaw: "[w]hat *is* immutable is the principle of English law that the law of nations must be applied in the courts of England".[41]

'Yet a closer look reveals' as Fikfak says, 'whilst Blackstone might not have imposed any limitations on international law forming "part" of domestic law, others did not agree.'[42] Lord Denning thought that when Blackstone talked of incorporation, he was referring to rules that had been 'universally accepted and known', and that 'the rules of international law only become part of our law in so far as they are accepted and adopted by us'.[43] Similarly in the case of *Walley v. Schooner Liberty*, Supreme Court of Louisiana in 1838 while talking about a 'settled principle of international law'

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[38] *Attorney General v. Sillim*, 176 Eng. Rep. 295 (1863), English Reports Full Reprint Vol. 176—Nisi Prius (1688-1867) 297.
[39] *Simonin v. Mallac*, 164 Eng. Rep. 917 (Ecclesiastical) (1860) 921.
[40] V Fikfak, International Law Before English and Asian Courts: Finding the Judicial Role in the Separation of Powers, 3 *Asian J Intl L* (2013) 277 (Footnotes Omitted).
[41] Ibid.
[42] Ibid. (Footnotes Omitted).
[43] Ibid. (deitalicized).

consulted the teachings 'by elementary writers'.[44] There is indeed a long list American cases from late 19th century to early 20th century that discuss writers of the law of nations while deciding cases.[45]

Much later, In *Toronto Corp. case* of 1918, the Canadian Supreme Court had to discuss mortgage on land within international law. While taking the view that in international law 'a mortgage debt secured by land is to be regarded, not as a movable but as an immovable' the Canadian Court noted the "authority of text-writers" being "strongly in favour of this view."[46] One of the most full-blown discussions on the law of the nations by an American Court was in the *Ambrose Light* case where Elihu Root appeared for the State.[47] In fact, the North American domestic courts till the Second World War continued to bank upon and borrow from the writers of international law. This trend continued after the formation of the League of Nations and indeed the

[44] *Walley v. Schooner Liberty*, 12 Louisiana 98, at 115. The Court noted the federal ruling in *Schooner Exchange v. McFaddon*, 7 Cranch 16.

[45] They are: *Reynolds v. Cook,* 5 Am. St. Rep. 317, 555 (Va., 1887)*, Johnson v. Merithew,* 6 Am. St. Rep. 162, 180 (Me., 1888), *Young v. Keller*, 4 Am. St. Rep. 405, 413 (Mo., 1888), *Hersey v. Walsh,* 8 Am. St. Rep. 689, 745 (Minn., 1888), *Forepaugh v. Delaware, L. & W. R. Co.*, 15 Am. St. Rep. 672, 674 (Pa., 1889), *State v. Reeves*, 10 Am. St. Rep. 349, 359 (Mo., 1889), *Currie v. Waverly & N. Y. B. R. Co*., 19 Am. St. Rep. 452, 464 (N.J., 1890), *St. Louis, I. M. & S. Ry. Co. v. Ramsey*, 22 Am. St. Rep. 195, 200 (Ark., 1890), *Morse v. Moore*, 23 Am. St. Rep. 783, 826, 836, 840 (Me., 1891), *King v. Rhew*, 23 Am. St. Rep. 76, 110 (N.C., 1891), *Hardy v. Galloway*, 32 Am. St. Rep. 828, 839 (N.C., 1892), *Gist v. Western Union Tel. Co.*, 55 Am. St. Rep. 763, 774 (S.C., 1895), *Mccreery v. Davis*, 51 Am. St. Rep. 794, 805 (S.C., 1895), *State v. Shattuck*, 60 Am. St. Rep. 936, 942 (Vt., 1897), *St. Louis, I. M. & S. Ry. Co. v. Paul*, 62 Am. St. Rep. 154, 305-6 (Ark., 1897), *Kearney v. State*, 65 Am. St. Rep. 344, 421 (Ga., 1897), *Albright v. Cortright*, 81 Am. St. Rep. 504, 629 (N.J., 1900), *Holler v. P. Sanford Ross*, 96 Am. St. Rep. 546, 632 (N.J., 1902), *Thomas v. Thomas*, 90 Am. St. Rep. 342, 368 (Me., 1902)*, Graham v. Walker*, 112 Am. St. Rep. 93, 107 (Conn., 1905), *Equitable Bldg. & Loan Ass\n v. Corley*, 110 Am. St. Rep. 615, 617 (S.C., 1905), *Emerson v. Pacific Coast & Norway Packing Co*., 113 Am. St. Rep. 603, 614 (Minn., 1905), *Cox v. Smith*, 137 Am. St. Rep. 89, 145 (Ark., 1910).

[46] *The Toronto General Trusts Corporation and his Majesty the King*, 56 S.C.R. 26 (1918), at 26, 39.

[47] *United States v. The Ambrose Light*, (September 30, 1885), 25 F. 408 (1885-1886). Talking in 1943 about levying penalty for electricity consumption on the premises of the High Commissioners, a matter of extraterritoriality and diplomatic immunity, the Canadian Supreme Court in *Levy Rates on Foreign Legations case* discussed, among others, such text-writers of international law as Hall, Vattel and Wheaton. *The Powers of the Corporation of the City of Ottawa et. al. to Levy Rates on Foreign Legations and High Commissioners' Residences*, 1943 SCR 208, 219.

United Nations.[48] Be that as it may, it becomes clear that there has been a long history in Europe and North America of treating writers of international law as a source. Naturally the debate within the drafting committee in 1920 on the sources of law was done with this wealth of experience before the drafting committee of 1920.

It is all the more notable that much of the international law invoked by domestic courts was in relation to commercial disputes along with certain disputes of diplomatic nature. Indeed the Law of the Nations was in part a law that facilitated the commercial interest and monopoly of trading ports for European powers. Even the formation of the PCIJ was preceded by arbitrations of commercial nature between great powers. Thus the internationalization of justice, or international justice, comes rather counterintuitively from, as Baron Descamps' speech of June 16th 1920 reveals, settling commercial disputes and from the desire to bring peace and security in the "European" world.[49] Perhaps because the 1920 Committee of Jurists settled for a wording that did not qualify "judicial decisions" with the prefix national or international, it offers scholars the space to argue for the role of even domestic rulings as source of international law.

B. Attempts at Making World Courts Before and After the PCIJ

[48] During the World War II in a case dealing with criminal immunity of the Naval officers of the United States, the Canadian Supreme Court maintained that the matter 'raises many questions of public international law, on which many distinguished text-writers in the leading countries of the world have expressed opinions, which have not always been unanimous.' *In the Matter of a Reference as to Whether Members of the Military or Naval Forces of the United States of America are Exempt from Criminal Proceedings in Canadian Criminal Courts*, 1943 S. C. R. 483 (1943) 511.

[49] Descamps said: 'The honour of having created for the first time an international Court of Justice based on arbitration belongs to the Peace Conference of 1899.' Descamps, *infra* 139, 12.

Indeed, before the first Hague Peace Conference in 1889, investment gave the first set of opportunities to arbitral tribunals, often for disputes between Latin American or East European States and European investors, to discuss and indeed elevate domestic rules to the status of international legal arguments.[50] It is therefore only natural to assert, as Gray and Kingsbury pointed out, public international law is in part a product of private arbitral decisions.[51] Many tender the opinion that arbitral awards should not be seen a subsidiary sources even if hierarchically below the decisions of the PCIJ and the ICJ. While the PCIJ began functioning in 1920, the ICJ was established in 1945.[52]

However, before these "World Courts" were established, primarily due to experiences of two World Wars and in the quest for a peaceful settlement of disputes among nations, there existed at least two legal institutions of international standing: the 1908 Central American Court of Justice[53] and the Permanent Court of Arbitration based in the Hague established by treaty in 1899.[54] None of these institutions were permanent

[50] See generally, JB Moore, *A Digest of International Law, vol. I—vol. VIII* (Washington: Government Printing Office, 1906); *Aboilard (France) v. Haiti*, Award of July 26, 1905, 12 *Rev Gen de Droit Int Public, Documents* (1905), 12-17. *Landreau v. Peru*, Award of Oct. 26, 1922, 17 *American J Intl L* (1923) 157.

[51] C Gray & B Kingsbury, Developments in Dispute Settlement: Inter-State Arbitration Since 1945, 63 *British Yrbk Intl L* (1992), 97, 120. O Spiermann, *International Legal Argument in the Permanent Court of International Justice: The Rise of the International Judiciary* (Cambridge: Cambridge University Press, 2005), 3. Tai-Heng Cheng, Precedent and Control in Investment Treaty Arbitration, 30 *Fordham Intl L J* (2006), 1014, 1017–1021; Christine Gray, International law 1908–1983, 3(3) *Legal Studies* (1983), 267–282; K Miles, *The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital* (New York: Cambridge University Press, 2013) 17-55.

[52] A de La Pradelle, La Place de L'homme dans la Construction du Droit International, 1 *Current Legal Problems* (1948) 140-151.

[53] Convention For The Establishment of A Central American Court of Justice, Concluded At Central American Peace Conference, December 20, 1907, 2 *Malloy* (1910) 2399. See, X Fuentes, Latin American States and International Court of Justice, in, Natlie Klein (ed) *Litigating International Law Disputes: Weighing the Options* (New York: Cambridge University Press, 2014), 79, S Katzenstein, In the Shadow of Crisis: The Creation of International Courts in the Twentieth Century, 55 *Harv Intl L J* (2014), 151. JG Starke, The Contribution of the League of Nations to the Evolution of International Law, 13(2) *Indian Yrbk Intl Aff* (1964) 207.

[54] 115 states have acceded to one or both of the Permanent Court of Arbitration's founding conventions, see, The Permanent Court of Arbitration, About Us <http://www.pca-

though. While the Central American Court of Justice lasted only for 10 years, the Permanent Court of Arbitration, a strategically chosen circumstantial nomenclature, is not a permanent court but a club of arbitrators from which nations could choose in case of international disputes.

Clearly, international law, as far as its practice before 1920 is concerned, emerged from arbitrations where works of publicists were used to build arguments. The ICJ Statute 38(1)(d) reads as: 'subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.'[55]

The article 38(1)(d) of the ICJ Statue has noted *travaux préparatoires*.[56] First the PCIJ and then the Article 38(1)(d) of the ICJ Statute firmly established the doctrinal outpourings of qualified publicists as "subsidiary means". The writings of the publicist as "subsidiary means" have two components, (a) "judicial decisions" and (b) 'teachings of the most highly qualified publicists of the various nations'.[57] But by discussing writers of the law of nations the rulings of the Euro-American domestic courts embedded doctrinal writings in domestic law. Notably, some of the most celebrated texts of international law were written in the defense of national interests of European Kingdoms against the claim of other European states. For instance, as Tuck reminds, Grotius wrote a major apology for the whole Dutch commercial

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cpa.org/showpage.asp?pag_id=1027>. See, Kenneth Keith, 100 Years of International Arbitration And Adjudication, 15 *Melbourne J Intl L* (2014) 1.

[55] Statute of the International Court of Justice, 26 June 1945, 3 Bevans 1179, Article 38(1)(d).

[56] M Wood, Teachings of the Most Highly Qualified Publicists (Art. 38 (1) ICJ Statute), 9 *Max Planck Encyclopedia of Public International Law* (Oxford University Press, 2010) 783.

[57] M Peil, Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice, 1 *Cambridge J Intl & Comp L* (2012) 136, 158.

expansion into the Indies.[58] Besides, Thirlway has recently called the ICJ Statute article 38(1)(d) 'material sources having a special degree of authority'.[59] But in 1956 Schwarzenberger thought, while 'attempting to establish the place of doctrine in relation to the World Court' its is 'advisable to dispense altogether with the term *source*.' For him it was 'merely a metaphor', and that this image by then had 'acquired so many meanings and made necessary such artificial distinctions, as between formal and material sources, that it had better be discarded.'[60]

III. Subsidiary Sources at the Two World Courts

A. Subsidiary Source At the PCIJ

As pointed out before, the PCIJ Statute did not specify whether "subsidiary means" were limited to international judicial decisions alone, although that, as judge *ad hoc* Guggenheim noted, national law is a question of fact and not of law is an established principle of international law.[61] Moreover, in the 15th Meeting on July 3rd, 1920, of the League of Nations' Committee of Jurists, the Italian representative Ricci-Busatti 'denied most emphatically that the opinions of authors could be considered as a source of law to be applied by the Court.'[62]

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[58] R Tuck, *The Rights of War and Peace* (New York: Oxford University Press, 1999) 79.
[59] H Thirlway, *The Sources of International Law* (Oxford: Oxford University Press, 2014), 117; I Venzke, *How Interpretation Makes International Law: On Semantic Change and Normative Twists* (Oxford: Oxford University Press, 2012) 69.
[60] G Schwarzenberger, The Province of the Doctrine of International Law, 9 *Current Legal Problems* (1956) 235, 236.
[61] 'Dissenting Opinion of Guggenheim'*, Nottebohm Case (Second Phase),* (1955) I.C.J. Rep. 4 at 50, 52; 'Bangalore Principles adopted by the Judicial Colloquium on the Domestic Application of International Human Rights Norms, India, 24–26 February 1988,' 1 *African J Intl & Comp L* (1989), 345; K Wolfke, International Law-Making Factors—An Attempt at Systematization, 15 *Polish Yrbk Intl L* (1983) 246.
[62] In the 15th Meeting (Private), held at the Peace Palace, the Hague, on July 3rd, 1920, in, *Procès - Verbaux of the Proceedings of the Committee 16th–July 24th 1920 with Annexes* vol. 1 (The Hague:

Since domestic courts in North America and the Great Britain—both common law jurisdictions—and civil law countries in continental Europe were already using previous judicial decisions and writers respectively as sources of international law, the 1920 draft of the PCIJ, in a way, occasioned the demotion of publicists and previous decisions to a "subsidiary source". Quite notably, Ricci-Busatti expressed his astonishment at Elihu Root, the American member, agreeing to 'a formula containing this idea'. The President of the Committee, Baron Descamps, repeatedly clarified saying 'the judge must use the authority of judicial decisions, and the coinciding doctrines of jurists, as auxiliary and supplementary means only.[63]' The agreed text of the PCIJ was carried over to the ICJ Statute as article 38(1).[64] Both at the PCIJ and at the ICJ, judges felt ineluctably compelled to pen opinions, separate and dissenting, while taking note of the 'writers on international law'.[65] Besides, judge Hudson in 1944 wrote:

> The formulation in Article 38 of the Court's Statute has had a wide influence. In substance it was adopted by the American-German Mixed Claims Commission in 1923, and by a German-Portuguese tribunal in 1928. It was also incorporated in the 1928 Geneva General Act, and with some variations in numerous bipartite [*sic*] treaies.[66]

Van Langerhuysen Bros., 1920), 332 (*Procès–Verbaux*). T Skouteris, The Force of a Doctrine Art. 38 of the PCIJ Statute and the Sources of International Law, in, F Johns, R Joyce & S Pahuja, eds., *Events The Force of International Law* (NY: Routledge, 2011) 70.

[63] *Procès–Verbaux*, Ibid., 332.

[64] Statute of the International Court of Justice, 26 June 1945, 59 Stat. 1031 (entered into force on 24 October 1945).

[65] For instance in the *Wimbledon* Dissenting Opinion, Schücking said, 'at the present time the subject of controversy amongst writers on international law.' Dissenting Opinion of M. Schücking, *Case of the S.S. "Wimbledon"*, (U.K. v. Japan), 1923 P.C.I.J. (Ser. A) No. 1 (Aug. 17) 43.

[66] Manley O. Hudson, *International Tribunals Past and Future* (Washington: Carnegie Endowment for International Peace & Brookings Institute, 1944), 102. *See*, Sunday Babalola Ajulo, Sources of the Law

Even so, there are those who further subordinate the views of scholars to the other subsidiary means of determining the law, judicial decisions. This is so because the form of a decisions and the use of previous decisions by parties to international litigation make them of greater weight than the writings.[67] Even then the publicists have been documenting and developing international law through the force of their opinion even before the League of Nations began the intergovernmental "codification of international law."[68] In 1944, in a 'Statement of a Community of Views by North Americans' postulating about the international law of the future talked of the subsidiary means as '[l]aw cannot exist in a vacuum'.[69]

B. Subsidiary Sources from the Time of the ICJ, 1945

Bruno Simma—former judge of the ICJ—makes a very practical observation saying scholars of international law 'typically have an unjustified modesty about their own influence.'[70] Indeed, '[f]oreign offices are under time pressure and rely on scholars as shortcuts: They turn to the American Law Institute's *Restatement* or the publications of the American Society of International Law or the Max Planck Institute for valuable

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of the Economic Community of West African States (ECOWAS), 45 *Journal of African Law* (2001) 73, 78, 89-90.

[67] *North Sea Continental Shelf (Federal Republic of Germany/Netherlands)*, Judgement [1969] ICJ Rep p 3.

[68] Shabtai Rosenne, Codification Revisited after 50 Years, 2 *Max Planck Yearbook of United Nations Law* (1998), 2. See, Second Meeting, 15 (11) *League of Nations Official Journal* (1934), 1441; Counterfeiting Currency, 10(2) *League of Nations Official Journal* (1929) 275, 294 saying 'publicists have unanimously demanded that judges should be allowed to take such previous convictions into consideration and pass a heavier sentence.' Alexander P Fachiri, *The Permanent Court of International Justice: Its Constitution, Procedure and Work* (London: Oxford University Press, 1925) 90-93. General Review of the Legal Activities of the United Nations and Related Intergovernmental Organizations, *United Nations Juridical Yearbook* (2001), 75, 126. See, B. Cheng, General Principles of Law as a Subject for International Codification, 4 *Current Legal Problems* (1951) 35-53.

[69] *Preparatory Note*, Postulates for the International Law of the Future, 22 *Intl Conciliation* (1944) 253, 278.

[70] B Simma, Scholars in the Construction and Critique of International Law, 94 *ASIL* (2000) 317, 319.

and authoritative guidance.'[71] Furthermore, noting the arguments about a typically Latin American international law, Judge Alvarez in his dissenting opinion to *Asylum case*, noted "[c]ertain jurists" who called the 'complex of principles, conventions, customs, practices, institutions and doctrines which are peculiar to the Republics of the New World' the 'peculiarities of international law in America'.[72]

Again, while arguing for the Portuguese right of passage with "arms and ammunitions" as a local customary law Judge Koo, a Chinese member of the Court, invoked Professor Max Rheinstein and van Bynkershoek.[73] An attempt to problematize the phenomenon of such customary citation of Western text writers by, for instance judge Koo, leads us to a nuanced assertion that judges, Western or otherwise, often invoked classical scholars to legitimize their own opinions. Professor R.P. Anand, doyen of the third world approaches to international law, in his swan song, opined 'Although international law is presumed to be applicable among all states, east or west, north or south, big or small, it is only a recent phenomenon, not older than the United Nations itself.'[74]

> Before the Second World War, international law was supposed to be not only a product of the European states and based on their customs and treaties, but applicable only among them—that is, European states or states of European origin. It was only in 1856 that an extra-European country, Turkey, was admitted into the family of civilized states and later, at the beginning of the twentieth century, that Japan forcefully entered the so-

[71] Ibid.
[72] Dissenting Opinion of Judge Alvarez, *Colombian-Peruvian Asylum Case*, [1950] ICJ Rep. 266, 293.
[73] Separate Opinion of Judge V. K. Wellington Koo, *Case Concerning the Right of Passage over Indian Territories (Portugal v. India) (Merits)*, [1960] I.C.J. Rep 6, 66-67.
[74] RP Anand, The Formation of International Organizations and India: A Historical Study, 23 *Leiden Journal of International Law* (2010), 5–21, 5. See, A Becker Lorca, Sovereignty beyond the West: The End of Classical International Law, 13 *J History Intl L* (2011) 7-73.

called exclusive European club after defeating China and Russia.[75]

This finding is also supported by the new scholarship on the history of international law which, while classifying nations into Western, semi-peripheral—Turkey and Japan for instance—and non Western, assert that much of international law was taken to Japan and Turkey by scholars from these countries educated in the West.[76] Of course then, Western scholars had a more tangible role to play in the making as well as universalization of international law. Lorca thus argues 'that international law universalized when jurists from semi-peripheral polities, such as Japan, the Ottoman Empire, and Latin American states, appropriated European international legal thought.'[77] As such '[c]lassical international law only recognized equality between states belonging to the 'family of civilized nations,' while sovereign autonomy and equality was denied beyond the West.'[78]

Özsu supports Lorca's thesis saying, '[c]lose enough to dominant centers of economic and intellectual production to come under their influence, but with national traditions and state institutions resilient enough to resist formal colonization, the semi-periphery was a natural home for informed engagement with the international legal rules that facilitated colonialism and imperialism.'[79] Koh thinks, 'It is the very nature of state practice that it is influenced by the practices and criticism of other nations and legal publicists.'[80] After all, in *Paquete Habana case*, the United States Supreme Court not

[75] Ibid.
[76] AB Lorca, Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation, 51 *Harv Intl L J* (2010) 475.
[77] Ibid.
[78] Ibid.
[79] U Özsu, Agency, Universality, and the Politics of International Legal History, 52 *Harv Intl L J Online* (2010) 58, 59 <http://www.harvardilj.org/2010/10/online_52_ozsu/>.
[80] HH Koh, Introduction, in, ER Wilcox, (ed) *Digest of United States Practice in International Law* (International Law Institute: Oxford University Press, 2009) xxxi.

only expressly recognized Japan as 'the last state admitted into the rank of civilized nations', it also mentioned a Japanese writer of international law.

> Since the English orders in council of 1806 and 1810, before quoted, in favor of fishing vessels employed in catching and bringing to market fresh fish, no instance has been found in which the exemption from capture of private coast fishing vessels honestly pursuing their peaceful industry has been denied by England or by any other nation. And the Empire of Japan (the last state admitted into the rank of civilized nations), … Takahashi, International Law 11, 178.[81]

Be that as it may, in a more modern context, Goldsmith thinks legal scholars are biased and their writings should not be taken as source of law, subsidiary or otherwise: International law scholars 'lack a democratic pedigree, and they usually lack scholarly detachment on these issues.' They are, he says, 'among the most biased when it comes to the content of the customary international law of human rights, and thus deserve little, if any, deference on these issues.'[82]

Besides, Lorca's assertion again reinforces the power of publicists in not only making international law but in bringing States in the fold of international law.[83] Should scholarly writings and judicial decisions be treated as main sources of international

[81] *The Paquete Habana*, 175 U.S. 677, 700 (1900). The British and Japanese lawyers have tried to present the Sino-Japanese war of 1894-1895 as a "civilized war". D Howland, Japan's Civilized War: International Law as Diplomacy in the Sino-Japanese War (1894-1895), 9 *J History Intl L* (2007) 179, 182. D Howland, Sovereignty and the Laws of War: International Consequences of Japan's 1905 Victory over Russia, 29 *L & History Rev* (2011) 53, 60-61.

[82] J Goldsmith, ASIL Proceedings, supra note 70, 318. Cf. G Guillaume, The Use of Precedent by International Judges and Arbitrators, 2 *J Intl Dispute Settlement* (2011) 5–23; M Shahabuddeen, *Precedent in the World Court* (New York: CUP, 1996) 180; K Wolfke, Materials Used in the UN Practice of International Law-Making, 7 *Polish Yrbk Intl L* (1975) 255, 256, 266–273.

[83] Lorca, *supra* note 76, at 477; Özsu, *supra* note 79, 58.

law?[84] In fact recently German scholars have argued in favor of treating judicial precedents not as "subsidiary means" but main "source of law".[85] But for obvious reasons, developing country scholars have expressed their reservation to such an approach.[86]

The political principle of self-determination is another example of how writers made international law since the formation of the League of Nations. Thus, while the Paris Peace conference, in Woodrow Wilson, witnessed the rhetoric of self-determination as a political carrot dangled to protectorates and colonized peoples, after the second World War, it became the main argument for western intellectuals and lawyers to advance their opinion to small princely states seeking independence not from colonial masters but from nation building based on nationalism and anti-colonialism.[87] For example, in 1948, the princely state of Hyderabad sought a representation at the Security Council.[88] As Adviser to the Representative of Hyderabad, Eagleton wrote, Hyderabad's formal complaint forwarded an argument 'which apparently derives from the writings of Professor Lauterpacht.'[89]

IV. The PCIJ, 1920 Drafting History: A Compromise Between Common Law 'Jurisprudence' and Civil Law 'Doctrine'

[84] See, Tushnet, *supra* note 16, 19; A O'Donoghue, Agents of Change: Academics and the Spirit of Debate at International Conferences, 1 *Cambridge J Intl & Comp L* (2012) 275.
[85] Scholars lament that under 'the doctrinal ordering of things in light of Article 38(1)(d) of the ICJ Statute … decisions are pictured as a source for recognizing the law but not a source of law.' See, A von Bogdandy & I Venzke, *In Whose Name*? An Investigation of International Courts' Public Authority and Its Democratic Justification, 23 *European J Intl L* (2012) 7-41, 19.
[86] DP Verma, Rethinking About the International Law Making Process, 29 *Indian J Intl L* (1989) 38, 50.
[87] A Cassese, *Self-Determination of Peoples: A Legal Appraisal* (New York: CUP, 1995) 11-19.
[88] The Question of Hyderabad, 2 *UN Yrbk* (1947-48) 458.
[89] C Eagleton, The Case Of Hyderabad Before The Security Council, 44 *American J Intl L* (1950) 277, 285, fn 24.

The 1920 Advisory Committee of Jurists' President Baron Descamps proposed the wording 'international jurisprudence as a means for the application and development of law' which later became ICJ Article 38(1)(d).[90] Needless to say, Descamps' proposed text was extremely vague and imprecise. British member of the Committee, Lord Phillimore, did not attach much importance to the successive order in which the sources were to be used.[91] The formulae adopted had simply been taken from Descamp's draft and 'in his opinion the order simply represented the logical order in which these sources would occur to the mind of the judge.' Ricci-Busatti expressed the desire to have "the principles of equity" included in no 3 (now ICJ Article 38(1)(c)).[92]

Lord Phillimore first recalled the meaning of "equity" in English jurisprudence. The adoption of "equity" as a source of law, the Committee thought, would result in giving too much liberty to the judge, unless the technical meaning just mentioned were adopted.[93] Throughout the meetings however Descamps emphasised the 'auxiliary character of the elements in No. 4 as elements of interpretation.[94]' De Lapradelle, however, thought it to be appropriate to mention that the results of the agreements reached by the Committee should be above criticism; 'the actual wording did not give him complete satisfaction from a practical and logical point of view.'[95] The amendments of M. Ricci-Busatti were to a great extent justified, 'but they also contained points which, if introduced in the plan, would not improve it, but would do

[90] Statute of the International Court of Justice, *supra* note 64, at Art 38(1)(d).
[91] *Procès–Verbaux*, *supra* note 62 at 333. See, M Koskennimei, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (New York: CUP, 2009) 11-97.
[92] *Procès–Verbaux*, Ibid.
[93] Ibid.
[94] Ibid., at 334.
[95] Ibid.

quite the contrary.'[96]

To the use of the phrase "civilised nations" there was an interesting debate and when questioned by Lapradelle, Lord Phillimore stated that Ricci-Busatti's scheme used the same phrase.[97] For Lapradelle, it was superfluous because he thought, "law implies civilisation."[98] Above all, Lapradelle was of the view that jurisprudence was of higher importance than doctrines. Lapradelle's use of the limited terms "general principles of law" actually came up as the formulae 'without indicating exactly the sources from which these principles should be derived.'[99] Descamps satisfied Ricci-Busatti's query on 'general principles of law' by arguing that it was necessary to avoid *non-liquet*.[100] The doctrine of *non liquet* i.e. the situation where the court declares an absence of law to be applied in the matter before it, is rather important in legitimizing the presence of "subsidiary sources" in the text of the PCIJ and the ICJ Statute. Thus if a court could find some discussion or arguments in a text of international law, they can always allude to it to avoid *non-liquet*.

This results into depositing writers of texts on international law in the orbit of sources. Of course the choice of "civilized" in the epithet "civilized nations" was a standard adjective in the very definition of international textbooks well into the twentieth century.[101] However, as historian Duara reminds '[a]rising in the context of European

[96] Ibid.
[97] Ibid., at 335.
[98] Ibid.
[99] Ibid., at 336.
[100] Ibid.
[101] So it might be worth referring to some of the major texts of international law e.g., MJ van Ittersum (ed & trans) *Hugo Grotius*, *Commentary on the Law of Prize and Booty* (Indianapolis: Liberty Fund, 2006, Originally Published 1603); Alberico Gentili, *De Iure Belli Libri Tres Vol. I* trans. John C. Rolfe (New York: OUP, 1933, reproducing 1612 edition); Vattel, *supra* note 7, Henry Wheaton, *Elements of International Law* (Boston: Little, Brown & Co., 1866), Ernest Nys, *Les Origines Du Droit International* (Paris: Hachette Livre, 1894), RY Jennings & Arthur Watts, eds. *Oppenheim's*

domination of the non-Western world,' the newly reinforced standard of civilization 'could be specifically found in the legal language of various "unequal treaties" and its interpretation by the international lawyers of the time.'[102]

While debating in 1920s a discussion followed between de Lapradelle, President Descamps and Lord Phillimore as a result of which point 4 was worded as follows: 'The authority of judicial decisions and the doctrines of the best qualified writers of the various nations'.[103] Root wanted the text to be drafted as 'the authority of judicial decisions and the opinions of writers as a means for the application and development of law.[104]' In the subsequent proposal presented by President Baron Descamps and Lord Phillimore, and as amended by Ricci-Busatti, the auxiliary means appeared as: '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 means for the application and development of law.'[105]

This text clearly points to the compromise between common law and civil law members for while the former treated judicial decisions and the latter doctrinal writings as sources in domestic law.[106] The text, as a compromise, had both 'judicial decisions rendered by it in analogous cases' embodying jurisprudence while 'best

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International Law, *vol. I*, (Oxford: OUP, 2008, Originally Published 1905), James L. Brierly, *Law of Nations*, Andrew Clapham ed., 7th edn. (Oxford: OUP, 2012, originally published by Clarendon Press, 1928). Thomas Baty, *The Canons of International Law* (London: John Murray, 1930). For a summary of the classical scholarship see Kennedy, *supra* note 8, 13-85; Koskenniemi, *supra* note 8, § VI.

[102] P Duara, *Sovereignty and Authenticity: Manchukuo and the East Asian Modern* (Maryland: Rowman & Littlefield Publishers, 2003) 91.

[103] *Procès–Verbaux*, *supra* note 62, 337.

[104] Ibid., 344.

[105] Ibid., 351.

[106] CB Picker, International Law's Mixed Heritage: A Common/Civil Law Jurisdiction, 41 *Vanderbilt J Transnl L* (2008) 1083, 1116. J Crawford & A Pellet, Anglo Saxon and Continental Approaches to Pleading Before the ICJ, in, I Buffard, J Crawford, A Pellet & S Wittich (eds) *International Law between Universalism and Fragmentation—Festschrift in Honour of Gerhard Hafner* (2008) 831, 867

qualified writers of the various countries' identified the applicable doctrine of law. Scholars observed that the 'final text of this sub-paragraph, therefore, not only removed all mention of judicial decisions as a means for the development of the law; there was also an explicit agreement amongst the drafters that judicial decisions were not, in any sense, envisaged as primary sources of law.'[107]

Eventually, while President Descamps' initial text referred to "international" jurisprudence, the final sub-paragraph did not qualify the type of judicial decisions intended and, in particular, did not distinguish between "international" and "national" decisions.[108] In the 15th Meeting of July 3rd, 1920, President Descamps lauded the draft submitted by the American representative Elihu Root where Root 'explained the delicate task of an international judge: 'First of all the judges had to decide whether an act was included under one of the classifications of international law; then proceed to appreciate the fact in conformity with the said law.'[109]

A. Lawmaking By Writing: The PCIJ, the ICJ and Lauterpacht

In his opinion in the *Mavrommatis Palestine Concessions* case Judge Moore—the compiler of arbitral decisions in 1896 and 1906—was cautious and calculated while discussing the jurisdiction of tribunals accepting *non liquet* rejecting Lauterpacht consequently: 'The international judicial Tribunals so far created have been tribunals of limited powers. Therefore, no presumption in favour of their jurisdiction may be indulged. Their jurisdiction must always affirmatively appear on the face of the

[107] AZ Borda, A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals, 24 *European J Intl L* (2013) 649, 652.
[108] Ibid.
[109] *Procès–Verbaux*, *supra* note 62, 331.

record.'[110] Later, while seeing the PCIJ to be the court of only the most important disputes between states, Judge Ehrlich in *Factory at Chorzów* case sagaciously dissented in the following words quoting Judge Moore's dissent:

> For the Parties might purposely have conferred on a court—and most of all on this Court—the competence to settle the most important disputes, without wishing to burden the Court with disputes of less importance, particularly since, by deciding on the interpretation of a treaty stipulation or on the correctness of its application, the Court could probably point the way for the solution, or prevention, of a number of disputes, while the question of reparation might have to be considered in each individual case.[111]

Subsequently, in international law's signature *Lotus* case of 1927, the PCIJ had to deliberate on the "judicial competence" and admissibility of the case as Turkey argued in favour of the jurisdiction of the domestic courts.[112] In fact Judge Moore referring to Article 38(4) of the Statute of the PCIJ noted that 'while giving to such judgments the weight due to judicial expressions of the view taken in the particular country,' the PCIJ should 'follow them as authority only so far as they may be found to be in harmony with international law, the law common to all countries.' [113] On the other hand, Judge Altamira on the same occasion offered an opinion 'that the

[110] Dissenting Opinion by M. Moore, *Mavrommatis Palestine Concessions (Greece v. U.K.)*, 1924 P.C.I.J. (Ser. B) No. 3 (Aug. 30), 60. In his Dissenting Opinion in *German Interests in Polish Upper Silesia* (Germ. v. Pol.), 1925 P.C.I.J. (ser. A) No. 6 (Aug. 25), 31, 33, Count Rostworowski cited Judge Moore.

[111] Dissenting Opinion by M. Ehrlich, in *Factory at Chorzow (Germ. v. Pol.)*, 1927 P.C.I.J. (ser. A) No. 9 (July 26), 35, 38.

[112] *S.S. Lotus (Fr. v. Turk.)*, 1927 PCIJ (ser. A) No. 10 (Sept. 7), at p. 6. In his dissent, Judge Moore cited domestic cases and writers such a Wheaton and Hall. Some of those cases are; *Schooner Exchange v. McFaddon* (1812), 7 Cranch 116, 136; *Murray v. Schooner Charming Betsey* (1804) 2 Cranch, 64, 118; *Sir William Scott, Le Louis* (1817), 2 Dodson, 210, 239. Dissenting Opinion by M. Moore, Ibid., 68-72. Cf. note 'the rule of international law under which international proceedings can only be instituted after the exhaustion of local remedies.' As reminded by the ICJ in the *Case of Certain Norwegian Loans*, (France v. Norway) Judgment of July 6th 1957 [1957] ICJ Rep. p. 9 at 20.

[113] Dissenting Opinion by M. Moore, Ibid., at 74.

municipal legislation of different countries, as it does not by its nature belong to the domain of international law, is not capable of creating an international custom, still less a law'.[114] How are we to reconcile these two observations emanating from a classic case of international law?

For Lauterpacht, a young publicist in 1927, expanding the jurisdiction for the PCIJ—World Court of the time—and advocating for municipal decisions as sources of international law were the two sole most important duties to undertake as a law professor.[115] Arguably, Lauterpacht was a major exponent of this doctrine that said there are no gaps in what can be decided by an international court because of the breadth of "sources" which included text writers and judicial decisions.[116] Living in the time of the great dissenter Judge Anzilotti[117] and in wake of the regular dissents produced by the PCIJ against jurisdiction of the Court, Hersch Lauterpacht in 1928 ploughed the filed of international law to raise a crop of arguments in favour of legalizing political disputes—indeed a very sound example of the attempt to make

[114] Dissenting Opinion by M. Altamira, Ibid., at 96.

[115] However, in *Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections*, Judgment of 2 December [1963] ICJ Rep. p. 15 at p 29 the ICJ recalled the 'inherent limitations on the exercise of the judicial function which the Court, as a court of justice, can never ignore' referring to precedents from the PCIJ as well. Cf. Dissenting Opinion of Vice-President Weeramantry, *Fisheries Jurisdiction (Spain v. Canada)*, Jurisdiction of the Court, Judgment, [1998] ICJ Rep. 432 496. In this opinion Weeramantry engages with various publicists.

[116] H. Lauterpacht, Some Observations on the Prohibition of "Non Liquet" and the Completeness of the Law, in *Symbole Verzijl* (The Hague: Martinus Nijhoff Publisher, 1958) 196, 206. More recently, Declaration Of Judge Vereshchetin, *Legality of the Threat or Use of Nuclear Weapons*, Advisory Opinion of 8 July 1996, [1996] ICJ Rep. 226, 279 where he cited Julius Stone, *Non Liquet* and the Function of Law in the International Community, *British Yrbk Intl L* (1959) 145. I Scobbie, The Theorist as Judge: Hersch Lauterpacht's Concept of the International Judicial Function, 2 *European J Intl L* (1997) 264, 266.

[117] Dissenting Opinion by M Anzilotti, *Interpretation of Statute of Memel Territory (U.K. v. Lith.)*, 1932 PCIJ (Ser. A/B) No. 49 (Aug. 11), 349; Dissenting Opinion by M. Anzilotti, *Interpretation of Convention of 1919 concerning Employment of Women during Night*, Advisory Opinion, 1932 PCIJ (ser. A/B) No. 50 (Nov. 15), 383; Dissenting Opinion by M. Anzilotti, *Legal Status of Eastern Greenland (Den. v. Nor.)*, 1933 PCIJ (ser. A/B) No. 53 (Apr. 5), 76. Dissenting Opinion by M. Anzilotti, *Polish Agrarian Reform and German Minority (Germ. v. Pol.)*, 1933 PCIJ (ser. A/B) No. 58 (Order of July 29),181.

laws by teaching and publishing.[118] Subsequently, only a year later in 1929, Lauterpacht made a powerful case for the inclusion of municipal decisions as source of international law.[119] He astutely pointed out the stigma, of four factors behind treating domestic judicial decisions as sources of international law. The domestic decisions he thought are stigmatized:

> [1] [B]y the current preoccupation with decisions of prize courts and their identification with decisions of municipal courts in general; [2] by the rigid predominance of the positivist doctrine; [3] by the so-called dualistic conception of the relation between international law and municipal law; and [4] by the confusion enveloping the conception of sources of international law on the one hand, and the nature of the function of municipal judges on the other.[120]

Lauterpacht was of the view that the prize court decision, even though they dispense international law on behalf of the territorial sovereign and that such laws come from national legislature, should not constitute a bar on the value of such rulings creating "general international law."[121] Lauterpacht's opinion that such decisions are made based on laws that represent national priority, if not bias, should go on to become "general international law" is perplexing.[122] What is notable is that Lauterpacht does not even consider prize court decisions "subsidiary means" but as constituting general international law. Positivism and dualism of international law were two impediments

[118] H Lauterpacht, The Doctrine of Non-Justiciable Disputes in International Law, 8 *Economica* (1928) 277–317.
[119] H Lauterpacht, Decisions of Municipal Courts As A Source Of International Law, 10 *British Yrbk Intl L* (1929) 65. Writing in 1940, Borchard wrote that 'without support in theory or practice … Oppenheim maintained … international law and municipal law are in fact two totally and essentially different bodies of law.' EM Borchard, Relation between international law and municipal law, 27 *Virginia L Rev* (1940) 137, 139.
[120] Ibid.
[121] Ibid.
[122] Ibid.

that Lauterpacht thought constrained the implication of consent and as such he disliked 'the rigid separation of the judicial from the legislative functions in the direction of totally divorcing the work of judges from law-making proper.'[123] Thus even where domestic courts have the opportunity to inquire into the existence and content of, for example, international jurisdictional rules, the rules at issue are often axiomatic so that any judicial statement on point is a commonplace and as such of little international legal interest.[124]

> The role of domestic courts as agents of development of the international law of jurisdiction is by no means negligible. But it is more unwitting and more mediated than might be imagined. In the end, it is largely in how other states react to domestic judicial proceedings and decisions, whether by way of protest or litigation in international courts, and in how other domestic courts deploy such decisions that their influence lies.[125]

Lauterpacht was indeed a very prescriptive writer. In the early days of the ICJ, many believed Lauterpacht to be reasonable in expressing 'the wish that the decisions of the

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[123] Ibid., at 66.

[124] Roger O'keefe, Domestic Courts as Agents of Development of the International Law of Jurisdiction, 26 *Leiden J Intl L* (2013) 541–55, 549.

[125] Ibid., 558. '[It] can no more realistically be expected that all domestic judges, most of whose study and professional experience of public international law is somewhere between limited and non-existent, will be infallible with regard to international rules on jurisdiction than that all public international lawyers should have a deep and nuanced knowledge of their national law of intestacy.' O'keefe, Ibid. at 551. O'keefe's this conclusion is debatable as two judges of the Calcutta High Court, Judge Pal who wrote the dissent in Tokyo Tribunal and Guha Roy who published in leading journals exhibited a substantive and procedural understanding of international law. cf. BA Wortley, The Judges of the World Court: The National Element, 26 *Indian J Intl L* (1986) 448. Two of the four Indian judges to the ICJ—Sir Benegal Rau, Nagendra Singh, Justice Pathak and Justice Bhandari— latter two came from Supreme Court. See, *The International Tribunal of the Far East, Dissenting Opinion of Justice Pal* (Tokyo: Kokushu-Kankokai, 1999) and SN Guha Roy, Is the Law of Responsibility of States For Injuries to Aliens A Part of Universal International Law? 55 *American J Intl L* (1961) 863. Also many think domestic courts are 'are particularly well placed to address access to court concerns raised by immunity rules and may play a prominent role in the development of international law in this field in the years to come.' R Van Alebeek, Domestic Courts as Agents of Development of International Immunity Rules, 26 *Leiden J Intl L* (2013) 559–578. The point still remains whether domestic decisions are auxiliary sources of international law.

Court should be long' as it should also be 'fully and closely argued in order to carry conviction and in order to develop international law.'[126] As a judge at the ICJ he astutely argued for the value in international law of the municipal decisions merely five years after the 1920 Commission of Jurists hotly deliberated on the meaning, scope and limits of judicial decisions and writings of the publicists.[127]

Furthermore, at the 1920 deliberations to form the League of Nations no more than forty-four nations were present.[128] Out of which only a handful of European nations, the British, the Spanish, the Dutch and so on, occasioned the dispensing of prize court decisions; the rulings that Lauterpacht sought to elevate into the realm of general international law. For him municipal judicial decisions evidenced *opinio juris* as such rulings are delivered 'in a spirit of detachment and impartiality free from considerations of immediate and important interests of states'.[129] In fact, more recently, in the 2002 *Arrest Warrant* case the ICJ addressed Belgium's argument where Belgium referred in its Counter-Memorial to, inter alia, 'examples from national legislation, and to the jurisprudence of national and international courts.'[130] The ICJ noted:

> Belgium also places emphasis on certain decisions of national courts, and in particular on the judgments rendered on 24 March 1999 by the House of Lords in the United

[126] E Hambro, The Reasons Behind the Decisions of the International Court of Justice, 7 *Current Legal Problems* (1954) 212, 226.
[127] S Rosenne, Sir Hersch Lauterpacht's Concept of the Task of the International Judge, 55 *American J Intl L* (1961), 825-862. For an insider's perspective and anecdotes see, E Lauterpacht, *The Life of Hersch Lauterpacht* (Cambridge: Cambridge University Press, 2012).
[128] JB Scott, *The Court of Arbitral Justice Approved by the Second Hague Peace Conference (1907) and by the Institute of International Law (1912), No. 10* (Baltimore: American Society for Judicial Settlement of International Disputes, 1912) 3.
[129] Lauterpacht, *supra* note 119, at 82-83.
[130] *Arrest Warrant of 11 April 2000 (Democratic Republic of the Congo* v. *Belgium),* Judgment, [2002] ICJ Rep 2002, 3, 23.

> Kingdom and on 13 March 2001 by the Court of Cassation in France in the *Pinochet* and *Qadaffi* cases respectively, in which it contends that an exception to the immunity rule was accepted in the case of serious crimes under international law.[131]

On its part, Congo disputed the law creating function of cases from international criminal tribunals for domestic courts, here Belgian, on a matter of international law.[132] However it would have pleased Lauterpacht that the ICJ 'carefully examined State practice, including national legislation and those few decisions of national higher courts, such as the House of Lords or the French Court of Cassation.'[133] Furthermore, in the 2012 *Jurisdictional Immunities of the State* case the ICJ devoted a paragraph to note, 'practice is particularly evident in the judgments of national courts.'[134] What is more, the ICJ took note of the cases from sister international court—the ECtHR—a practice that took time to develop.[135] However, much before in the *Lotus* case at the PCIJ, the parties did cite as the Court took note of many domestic decisions on collision of vessels.[136] It is notable that in the year 1886, the Supreme Court of Canada in the case of *Ship Frederic Gerring Jr.*, had extensively borrowed the wisdom of *Regina v Keyn* upon which the Agent for the French Government in the *Lotus* case heavily relied upon. The Canadian Court quoted *Regina v Keyn* as using 'foreign writers on international law'.[137] However, today scholars maintain that as a manifestation of the practice and *opinio juris* of the forum state, domestic judicial decisions take a back seat to legislation and, like legislation,

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[131] Ibid.
[132] Ibid. 24.
[133] Ibid. para. 58.
[134] *Jurisdictional Immunities of the State* (Germany *v.* Italy: Greece intervening), Judgment, [2012] ICJ Rep. p. 99, 137, para. 85. See, Thirlway, *supra* note 59, 124-25.
[135] Ibid. 139.
[136] *S.S. Lotus (Fr. v. Turk.),* 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7) at p. 29 (*Lotus Case*). For instance, Agent for the French Government particularly relied on *Franconia case* (*Regina v. Keyn*, 1877, L. R. 2 Ex. Div. 63).
[137] *The Ship "Frederick Gerring Jr." v. Her Majesty The Queen*, 27 S.C.R. 271 (1897) 294.

represent the position of a single state alone.[138]

B. The PCIJ *Lotus* Case and Turkey: Civilization and the Source of Law

The Council of the League of Nations established a Committee of Jurists to formulate and submit to it for adoption a plan for the establishment of the PCIJ, provided for in Article 14 of the Treaty of Versailles dated June 28th, 1919. In the words of Baron Descamps, the President of the Committee, the Committee's first task was 'clearly to ascertain the present state of international law.'[139] However, the first set of cases at the PCIJ, for example the *Lotus* case between France and Turkey, to critical international law scholars represented the classic meeting of the East (Turkey) with the West (France). Deconstructing the *Lotus* case, Özsu unearths, explicates, and contextualizes the techniques on which Esat, Turkey's agent before the PCIJ in the *Lotus* case, drew in order to narrate a fresh understanding of Turkish 'nationhood' during a period of intense vulnerability for the newly established Republic.[140]

> [A] close reading of Turkey's pleadings reveals that it was inclined to oscillate between a variety of universalistic and particularistic approaches, Esat litigating the Lotus with an eye to exploiting the schism that lies at the heart of the concept of 'civilization' so as to submit Turkey to the normative authority of the international legal system while bolstering its positive power as an independent sovereign state. More specifically, it was by merging two modes of reasoning—the one prizing systematicity, the other prioritizing sovereignty—that Esat sought to construct a new, robustly reconciliatory identity for the 'Turkish nation', one that would enable it to embrace its commitment to

[138] O'keefe, *supra* note 124, 541–55.
[139] Speech Delivered by Baron Descamps, Annex No. 3, in, *Procès–Verbaux*, *supra* note 62, 12.
[140] U Özsu, De-territorializing and Re-territorializing *Lotus*: Sovereignty and Systematicity as Dialectical Nation-Building in Early Republican Turkey, 22 *Leiden J Intl L* (2009) 29-49.

international order by securing its place in '*la civilisation contemporaine*' while amplifying the ambit of its autonomy as '*un état civilisé*'.[141]

Nevertheless, it is actually hard to miss the eagerness of the members of the PCIJ in legalizing the relationship between the East and the West in the *Lotus* case. Little wonder then, the Peace Treaty signed at Lausanne on 24 July 1923 between Turkey and the Allied Powers for Judge Weiss in the *Lotus* case reorganized the 'the legal and judicial relations between the Ottoman Empire and Christendom.' [142] Consequently, for judge Weiss, the 'new Turkey therefore finds herself freed from the hampering servitudes which for so long had placed her in a situation apart, in an inferior position amongst the nations; she now becomes their equal, having like them no other sovereign than international law.'[143]

Thus what Weiss said of Turkey's graduation to civilized ways in the *Lotus* case gave civilization a "legal" meaning turning it into tool of interpretation. As Prasenjit Duara notes, 'By the late nineteenth century, international law and its standard of civilization became increasingly positivist, and reflected the social Darwinist conception that certain races were more civilized than others.'[144] 'While a hierarchy of races with different capacities to achieve civilization seemed natural,' as Duara continues, 'the notion of Civilization did not theoretically preclude the ability of a "race" to become civilized.'[145] However, Ethiopia did not have such luck as Turkey in becoming civilized. Though brought into the fold of the League of Nations, Ethiopia was denied

[141] Ibid.
[142] Dissenting Opinion by M. Weiss, *Lotus Case*, *supra* note 112, 40.
[143] Ibid.
[144] Duara, *supra* note 102, 91.
[145] Ibid.

true recognition as a part of the family of civilized nations.[146] The European concerns had trumped the Covenant as Italy was allowed to once more take on the "savages" who previously—at the Battle of Adwa in 1896—had defeated it. Precisely because of such historical meaning attached to being civilized the Japanese, after 1905, claimed to have inherited the leadership of Asian civilization given its success in mastering Western Civilization.

Justice Radhabinod Pal used Japan's this parallel with the West in competing for civilization to dissent at the Tokyo Military Tribunal constituted after the World War II. [147] Justice Pal noted the prosecution's emphasis on change in Japanese education policy to create a sense of "racial superiority", 'a failing common to all the nations'.[148] What is more, in his dissent Justice Pal made an effort to address most of the views of the leading publicists of time, indeed a source of law. Developing countries often make an assumption that international law is a law made up of the will of the states. At least this is the classic perception of international law that the PCIJ established in the *Lotus* case.[149]

> International law governs relations between independent States. The rules of law binding upon States therefore emanate from their own free will as expressed in conventions or by usages generally accepted as expressing principles of law and established in order to regulate the relations between these co-existing independent

[146] Jean Allain, Slavery and the League of Nations: Ethiopia as a Civilised Nation, 8 *J History Intl L* (2006) 214.
[147] Dissenting Opinion of Justice Pal, *supra* note 125, 315-20.
[148] Ibid., 315.
[149] *S.S. Lotus (Fr. v. Turk.)*, 1927 P.C.I.J. (ser. A) No. 10 (Sept. 7).

communities or with a view to the achievement of common aims. Restrictions upon the independence of States cannot therefore be presumed.[150]

The *Lotus* case is an important judicial decision for declaring that will of the states alone makes international law. This case moreover stands testimony to the civilizational discourses of international law; after all ICJ Article 38(1)(c) talks about the civilized states. The ICJ statue of 1945 is a continuation of the PCIJ Statute. The PCIJ Statute was settled in 1920; at a time when just about forty odd nations made up the world. Barring a few kingdoms, all of Asia, Africa and the Middle East were colonized by European powers. Therefore even if one were to believe that the PCIJ's *Lotus* position situates states at the centre of international law formation, these states needed to be "civilized" and thus essentially European.[151]

V. The 1920 Committee of Jurists and 'Civilized Nations'

A. 'Civilized Nations' and Subsidiary Sources at the PCIJ

The PCIJ Statute was drafted in 1920. As discussed before there was much debate during the drafting sessions. It is worth noting that 38(1)(d) uses the term "various nations" at the high noon of colonial capture. With Britain in the lead, Spain, Belgium, France, Germany, Italy and the Netherlands distributed all of Africa and Asia between them. Since the PCIJ Statute refers to the "highly qualified publicists" from "various nations", the true meaning a scope of "nations" merits debate. It was clear before the 1920 Committee of Jurists that the nations considered civilized for the

[150] *Lotus Case*, *Ibid*. at para. 44.
[151] See, GW Gong, *The Standard of Civilization in International Society* (Oxford: OUP, 1984).

purposes of recognition were only Christian.

Member of the Council of the League of Nations, a French Statesman, Léon Bourgeios addressed the first public meeting of 1920 Committee of Jurists on June 16th, 1920: 'It took three centuries for Christianity to establish its empire in the world, and no one could have imagined that an international convention, however solemn, could suffice to what must be nothing less than a universal revolution.'[152] This accurately captures the atmosphere of the occasion and the mandate of the Committee regarding the meaning and scope of "civilized nations" of the time.[153] Mr Bourgeios was clear in his vision about the establishment of the Christian conquest and empire formation as the legitimate way to form an organic international order. Clearly to him international law and order meant peace through arbitrations between Great powers as he said: 'It is not here, in the Peace Palace of The Hague, that we should forget the arbitrations and the inquiries which, notably in the affairs of the Dogger 'Bank of Casablanca, of the 'Carthage' and of the 'Manouba' on several occasions warded of serious conflicts and perhaps even of serious wars between several great powers.'[154]

As late as the First World War, as Professor Anand reminds, the position of Persia (now Iran), Siam (renamed Thailand in 1935), China, Turkey, Abyssinia (now Ethiopia), and the like was to some extent anomalous.[155] There was considerable commercial intercourse between these states and states of Western civilization—treaties had been concluded, full diplomatic relations had been established; China,

[152] Speech Delivered M. Léon Bourgeois, Annex No. 2, in *Procès–Verbaux*, *supra* note 62, 5.
[153] Anghie, *supra* note 8, at 19. Georg Cavallar, Vitoria, Grotius, Pufendorf, Wolff and Vattel: Accomplices of European Colonialism and Exploitation or True Cosmopolitans, 10 *J History Intl L* (2008) 181, 191.
[154] Bourgeois, *Procès–Verbaux*, *supra* note 152, 6.
[155] Anand, *supra* note 74, 5.

Japan, Persia, and Siam had even taken part in the Hague Peace Conferences in 1899 and 1907.[156] However, since they belonged to ancient but different civilizations there was a question how far relations with their governments could usefully be based upon the rules of international society.[157] In his public address M. Bourgeios talked of the "soldiers of civilization" and "freeing of nations from servitude". With only forty-four nations present and rest of the world colonized by European powers, Bourgeios maintained nevertheless:

> The victory of the soldiers of civilization and of liberty enabled reparation to be made for some of the serious injustices of history and abolition of some of the must cruel servitudes of the past. The conquered peoples have been freed and the rights of nations to constitute themselves have been recognised. It is now possible contemplate the hour when the world *de facto* will not be contrary to the world *de jure*.[158]

For a third worlder, it is almost impossible to understand how in 1920 the French statesman could speak about the 'abolition of some of the must cruel servitudes of the past' that 'conquered peoples have been freed' and 'the rights of nations to constitute themselves have been recognized' when France and other European powers had distributed much of the world between them.[159] If Judge Weiss saw Turkey being a sovereign equal to France in the *Lotus* dispute, it was because, among other things, Turkey argued her case 'with the aid of numerous quotations from authors and

[156] Abi-Saab reminds that the First Hague Peace Conference of 1899 was attended by 26 states and the Second Hague Peace Conference of 1907 by 44 states. Of these there were only five Asian states (China, Japan, Persia, Siam and Turkey). No African state was represented. The League of Nations had 45 original members out of which five were Asians (China, Japan, Siam, Persia and India although it was still a part of the British Empire), and two African states (Liberia and South Africa). Subsequently, five Afro-Asian states joined the League (Ethiopia, Turkey, Irak, Afghanistan and Egypt). See, Georges Abi-Saab, The Newly Independent States And the Rules of International Law: An Outline, 8 *Howard L J* (1962) 95, 98.
[157] Anand, *supra* note 74, at 5.
[158] Ibid., 6.
[159] Anghie, *supra* note 8, at 123. See, Koskenniemi, *supra* note 91, 99-110.

judicial decisions, taken from the theory and practice of many countries'—the subsidiary sources of international law as seen by other European "civilized" states.[160]

Judge Nyholm while voluntarily explaining the method of custom formation—one of the main sources of international law—affirms the kinds of States whose custom will make international law; those 'which have adopted the European system of civilization'.[161] Ironically in 1927 when Nyholm penned such an opinion the only way countries could 'adopt[] the European system of civilization' was through colonial capture as seen in the case of India. For countries such as Siam or Turkey that were never colonized, only a ticket of "civilization" from European nations could elevate them.

In their opinions, the World Court judges inadvertently produced an apology for colonialism. After all, from the Ottoman Empire and German possessions, the League of Nations created tiered mandates as class A, Class B and class C in terms of their perceived relative development.[162] Therefore international law and its sources, as Anghie has argued many times, could never be seen without the history of colonialism.[163] Even so, given the position of German minority in Poland and that the language of instruction for the minority children was at question in *German Minority Schools case*, any unique and secular meaning of the "European system of

[160] Dissenting Opinion by Mr. Weiss, *Lotus case*, *supra* note 136 at 43. See for a detailed discussion, Özsu, *supra* note 140, 29-49.
[161] Dissenting Opinion by M. Nyholm, *Lotus case*, *supra* note 136, 60.
[162] Separate Opinion of Judge Jessup, *South West Africa (Ethiopia/Liberia v. South Africa)*, Judgment of 21 December 1962, [1962] I.C.J. Rep. 319 at 387. For a discussion on the powers of Mandates see, Lauterpacht, *supra* note 8, 194, § 85.
[163] A Anghie, Finding the Peripheries: Sovereignty and Colonialism in Nineteenth Century International Law, 40 *Harvard Intl L J* (1999) 1-80.

civilization" for legal purposes remained in dispute.[164] Similarly in *Oscar Chinn* case Sir Cecil 'assumed that, when it is alleged that the Belgian measures rendered it impossible or commercially impossible for Chinn to carry on business, reference is made to Chinn merely because he was the only British subject involved'.[165] Thus even in purely commercial matters we see the isolation of the nationality of Europeans. It is thus impossible to understand a common 'European system of civilization' for custom formation that Judge Nyholm talked about.

One of the ways to unpack the *Lotus* saga is to see it as an opportunity by Members of the PCIJ as offering Turkey a ticket to the "European system of civilization". The point is, while teachings of the publicists were seen as a "subsidiary means" within the sources of international law, the number of "various nations" before 1920 were quite small, in fact forty four. Besides, all these nations were fighting among themselves for capturing territories and their resources. In other words, while the "subsidiary means" were exclusionary, the "civilized nations" were only a handful. Japan, as the American Supreme Court declared at the turn of the 19th century in *Paquete Habana* case, was the last member admitted to the club of "civilized nations".

B. Scholarly Innovation at the ICJ

Much later the ICJ talked of the role of equity even for "juristic persons" in *Barcelona Traction* on the basis that investments add to the host states welfare: 'a theory has

[164] *Access to German Minority Schools in Upper Silesia*, *Advisory Opinion*, 1931 P.C.I.J. (ser. A/B) No. 40 (May 15).
[165] Dissenting Opinion of Sir Cecil Hurst, *Oscar Chinn (U.K. v. Belg.)*, 1934 P.C.I.J. (ser. A/B) No. 63 (Dec. 12) 116.

been developed to the effect that the State of the shareholders has a right of diplomatic protection when the State whose responsibility is invoked is the national State of the company.'[166] The ICJ in this case acknowledged theory building to protect investments of companies as "juristic persons" when much of the rights on property in erstwhile colonies, oil contracts for example, came from wars, conquests and colonization.

Seeing the ICJ accepting a theory about the "injury" to juristic persons such as corporations even through "equity", what is one to make of the ICJ's lack of theory building in *South West Africa case* (second phase)?[167] In this case the ICJ noted the suggestions made that humanitarian considerations are sufficient in themselves to generate legal rights and obligations to which it disagreed in the clearest terms possible.[168] The Court however subsequently reminded the petitioners that it was "a court of law" and that could take account of 'moral principles only in so far as these are given a sufficient expression in legal form.'[169] Quite surprisingly, the ICJ conspicuously recalled the 'limits of its own discipline' ignoring "humanitarian considerations" only to recognize the role of equity for corporate persons four years later in *Barcelona Traction case*.[170]

In 2013 however 'bridging the temporal gap between the cessation of the Claims Commissions model of dispute settlement at the end of the 1930s and the rise of

[166] *Barcelona Traction, Light and Power Company, Limited,* [1970] ICJ Rep. 3, 48, para. 92. For Chen however the PCIJ used the terms law, justice and equity almost synonymously, see, Bin Cheng, Justice and Equity in International law, 8 *Current Legal Problems* (1955) 185-211.
[167] For an excellent scholarly comparison of the two cases see, Bin Cheng, The 1966 South-West Africa Judgment of the World Court, 20 *Current Legal Problems* (1967) 181-212.
[168] *South West Africa (Ethiopia/Liberia v. South Africa), (Second Phase)*, [1966] ICJ Rep. p. 6 at p. 34, para. 49.
[169] Ibid.
[170] Cf. *Barcelona Traction*, *supra* note 166, para. 92 with *South W*est Africa, Ibid. at para. 34.

investor-State arbitration at the end of 1990s' for some publicist 'would be to rely *mutatis mutandis* on State practice and judicial decisions regarding the most similar regime of international law during the time: international human rights.'[171] Not that comparing investor-State claims with human rights regime of protection is unthinkable. The problem lies in clubbing two classes of people, capitalist investors and victims of human rights abuses, on the same side. It amounts to the obliteration of material reality and the use of law to obfuscate an otherwise "class" reality of international law.[172]

Thus from Chimni's class perspective, *Barcelona Traction*—a case that envisages investor protection as human rights using equity—is even ironic given this case speaks of the concept of obligation *erga omnes* and the human rights of investors in the same breath. Nonetheless, *Barcelona Traction* disfavored investment protection within the facts of the case.[173] In fact the invocation of equity for cases involving corporate issues led even Judge Lauterpacht in *Norwegian Loan case* to opine that '[t]he judicial character of the Court may become endangered if it were to assume the task of interpreting and applying texts which, being devoid of the element of effective legal obligation, are essentially no more than a declaration of political purpose.'[174]

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[171] M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford OUP 2013) 7.
[172] Although some 'criticisms of the use of the category of 'class' have a degree of validity', Chimni argues, they 'can be adequately addressed from within a Marxist approach.' BS Chimni, Prolegomena To A Class Approach To International Law, 21 *European J Intl L* (2010) 57, 60.
[173] M Paparinskis, Barcelona Traction: A Friend of Investment Protection Law, 8, *Baltic Yrbk Intl L* (2008) 105, 112.
[174] Separate Opinion of Judge Sir Hersch Lauterpacht, *in Norwegian Loan*, *supra* note 112 at 66. *Case Concerning the Northern Cameroons (Cameroon v. United Kingdom)*, Preliminary Objections, Judgment of 2 December [1963] ICJ Rep., p. 15. However, the Court in *Tehran Hostage Case* also opined that both the existence of wider political dispute constitute no bar to legal proceedings and that Security Council proceedings no restriction on functioning of the Court. *United States Diplomatic and Consular Staff in Tehran*, Judgment, [1980] ICJ Rep. p. 3.

The lack of democratic legitimacy and the absence of non-Western nations in international law formation was certainly an issue to recon with. Even then, developing country members to the International Law Commission have not only noted but also asserted the role of publicists. For instance, Abdul Hakim Tabibi, ILC member from Afghanistan, while discussing the *Preliminary Report on the Content, Form and Degrees of International Responsibility* noted: 'the report did not cite the teachings of publicists …, future reports should include appropriate references, since Article 38, paragraph 1 (d), of the Statute of the ICJ recognized the importance of those teachings, as did the General Assembly.'[175] This inspired the acceptance of subsidiary sources in other regions as well. For instance, Article 20 of the 'Protocol of the Court of Justice of the African Union' copies ICJ Statute 38 verbatim.[176]

VI. Conclusion

The new turn to archives by Third World writers of international law to retrieve information around a particular international case has yielded information that confirm the anxieties of developing countries in accepting judicial decisions and writings of publicists as the source of international law.[177] There are quite a few

[175] 1600th Meeting, 30 May 1980, State Responsibility (*Continued*) A/CN.4/330, Preliminary Report on the Content, Form and Degrees of International Responsibility (Part 2 of the Draft Article), 1 ILC *Yrbk Int* (1980) 85-90, 88.
[176] Protocol of the Court of Justice of the African Union, 13 *African J Intl & Comp L* (2005) 115, 120.
[177] For the role Judge Sir Percy Spenser in suppressing the voice of a developing county judge in a pro-imperial stance see, V Kattan, Decolonizing the International Court of Justice: The Experience of Judge Sir Muhammad Zafrulla Khan in the *South West Africa* Cases, 5 *Asian J Intl L* (2015) 310-355. The ICJ's internal struggle paralleled a larger political struggle outside the Court. Kattan revisits the controversy of Judge Zafrulla Khan's recusal from the *South West Africa* cases using new information from the National Archives in Australia, India, South Africa, and the United Kingdom, including an unpublished manuscript written by the Australian judge Sir Percy. P Singh, India Before and After the *Right of Passage* Case, 5 *Asian J Intl L* (2015) fn 148. However, d'Aspremont discredits the proneness of international lawyers to stretch the limit of their study by 'seizing materials outside the realm of

examples where, for instance, the British Foreign office has relied on the work of jurists, mostly western, for establishing the British *opinio juris*. In relation to India's invasion of Goa, on 6 May 1968, Vincent Evans's letter, written on behalf of F. A. Vallat of the British Foreign Office, proffers a tangible example of law determination by publicists. He wrote:

> During the present century the rules of international law, as generally accepted, have almost certainly changed. At the beginning of the century it was accepted that a State could acquire title to the territory of another State by conquest. But since the General Treaty for the Renunciation of War and the Charter of the United Nation I think that the position now is that a State cannot acquire a good title to territory by such means. Amongst the works of the text book writers a useful summary of the position is to be found in Oppenheim's International Law Vol. 1 8th Edition at page 574, and a fuller exposition is to be found in Chapter IV of Professor Jennings' book 'The Acquisition of Territory in International Law' which is published in the Melland Schill series. … In speaking on this point we could draw on pages 61 to 64 of Jennings' book.[178]

Interestingly Sir Francis was a powerful supporter of writers as sources of international law. Delivering a talk on *the Northern Cameroons case*,[179] he approved of the ICJ's 'considerable reliance … on the work by the distinguished American

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international law'. Jean d'Aspremont, Softness in International Law: A Self-Serving Quest for New Legal Materials, 19 *European J Intl L* (2008) 1075–1093. Cf. R Bierzanek, Some Remarks on Soft International Law, 17 *Polish Yrbk Intl L* (1998) 40. Even so, against this admittedly Anglo-Saxon versus French legal debate the archival turn both critiques and adds to this discourse on softness (political) of international law and *non liquet* (legal).

[178] However the letter also said '[w]hile these works give us useful general guidance on this subject I think we should be reluctant to quote them in public as having the full approbation of HMQ' See Goa, CP.4/1, 6 May 1968, Internal Political Affairs of Goa, Daman and Diu, FCO 37/266, in *Foreign Office Files for India, Pakistan and Afghanistan, 1965-1971* (1967-1968) para 2. Interestingly Schwarzenberger thinks international lawyer are 'highly susceptible to current fashions in the realm of political ideology' in comparison to lawyers in 'legal departments of Foreign Offices'. G Schwarzenberger, Trends in the Practice of the World Court, 4 *Current Legal Problems* (1951) 1-34.

[179] *Case concerning the Northern Cameroons (Cameroon v. United Kingdom), Preliminary Objections*, [1963] ICJ Rep p. 15.

scholar, E. M. Borchard'.[180] Notably, Vallat's communiqué quoted above is a follow up from India's capture of Goa after the ICJ ruled in the *Right of Passage* case. Just as the East met the West at the PCIJ in the *Lotus* case, India's meeting with Portugal in the *Right to Passage* case at the ICJ precipitated a similar situation. What is more, a look at the diplomatic communiqué between London and Lisbon after the 1960 ICJ ruling in the *Right of Passage* case serves as smoking gun on the realty and integrity of international adjudication and the rulings that it produces.[181] Sir Charles Stirling, the then ambassador of Britain to Lisbon recorded the Portuguese Foreign Minister's conversation that Portugal did not get a completely favorable ruling from the ICJ 'due only to the illness of the British Judge and the death of one of the Latin American Judges committed to the Portuguese cause'.[182]

This particular archive has been declassified in 1991. It then becomes important to look into the change in constitution of the bench between 1958, the year of preliminary judgment and 1960 when the merits' judgment came out. While the British member of the Court who sat in the preliminary rulings but to have fallen ill subsequently was Judge Lauterpacht. The Latin American judge implicated in the conversation of the Portuguese Minister was José Gustavo Guerrero, a diplomat from El Salvador, who served as the last president of the PCIJ from 1937 to 1945 as well as the first president of the ICJ from 1946 to 1949. He remained member of the Court till his death in 1958.

[180] F Vallat, Declaratory Judgments, 17 *Current Legal Problems* (1964) 1, 2.
[181] Scholars think nationality or geography inevitably constitute overriding influences on international judges. See, GI Hernández, Impartiality and Bias at the International Court of Justice, 1 *Cambridge J Intl & Comp L* (2012), 183–207. Cf M Markovic, International Criminal Trials and the Disqualification of Judges on the Basis of Nationality, 13 *Washington Univ Global Studies L Rev* (2014) 1-48.
[182] Letter of Sir C. Stirling, on April 30, 1960), *supra* note 21, para. 6.

Be that as it may, the expectation that these two judges would rule in favor of Portugal might only be an expectation of the Portuguese minister without the two judges having actually colluded. Besides, such expectations shape litigation strategies of parties. In fact India's third preliminary objection throws light upon Portugal's litigation strategy based perhaps on expectations of the Portuguese Foreign minister as recorded by the British Ambassador to Lisbon. Judge *ad hoc* Chagla's dissenting opinion noted, 'India's third objection is that the present dispute was brought before this Court without preliminary diplomatic negotiations and without the negotiations reaching a deadlock.'[183]

> It is urged by India that the jurisdiction of the Court is confined to deciding legal disputes, and before there can be a dispute, it must be clear that the controversy cannot be settled by negotiations. It is pointed out that before a State is brought before the bar of the International Court, every attempt should first be made to see whether the controversy in question could not be amicably settled.[184]

Perhaps Portugal had expected the ICJ to be more decisive in its favour and any time spent in diplomatic negotiations would have been futile. In early decolonial period, Western states expected international courts to decide legally what would be heretical diplomatically. As such a micro study of Lisbon's litigation strategy and New Delhi's response might reveal more about this case. This also plants seeds of doubts as far as the status of judicial decisions as sources of international law is concerned. That the Portuguese minister referred to Lauterpacht, the doyen of the discipline, precipitates a critique that Western writers have either not found—this assumption is untenable

[183] Dissenting Opinion of Judge Chagla, *Case concerning right of Passage over Indian territory* (Preliminary Objections) Judgment of November 26th, 1957, ICJ Rep. 125, 172.
[184] Ibid. Even in his merits dissent, Chagla referred to Lauterpacht, see, Dissenting Opinion of Judge Chagla, in, *Case Concerning Right of Passage over Indian Territory* (Merits), *supra* note 20, 120.

given the Western institutions lead research, legal or otherwise—or overlooked or, even worse, not cared to speak about. What is more, the weight of Lauterpacht's view in deciding questions of international law can simply be gauged from Judge *ad hoc* Chagla's reference in his preliminary dissent to Lauterpacht even as Lauterpacht shared the preliminary bench with Chagla. This is rare, as, customarily, a bench at the World Court seldom cites authors sharing the bench in that case.

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Chap. II: The Normative Completeness of International Law: Cataloguing the actors and the norms

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The 1920 drafting committee talked of subsidiary sources and avoiding the blind alley of *non liquet* in the same breath. For Lauterpacht subsidiary sources meant belief in doctrinal and jurisprudential completeness of law. Roughly at the time that the ICJ ruled on the merits of the *Right of Passage* case, Western publicists, aided by the *non-liquet* rule, began to internationalize colonial contracts. This view was supported perhaps also by Portugal's unsuccessful arguments that the 1779 revenue tenure agreement with the *Marathas*, local Indian rulers, be seen as a treaty since it related to the question of "cession of sovereignty". This became a very profitable line of arguments in disputes arising due to commercial contracts: international law—with *laissez faire* as its grand norm—could be invoked to treat colonial contract as a treaties. The power of individual scholars can be judged from the fact that in 1948, Hyderabad, a princely state, had before the Security Council used Lauterpacht's book, a subsidiary source, as the sole source while claiming statehood. Subsequently, when Malta applied for intervention in the *Continental Shelf* case the politics of subsidiary sources became explicit. The ICJ noted that the Maltese request to intervene contained an implicit desire to argue points of general law so that the resulting judgment might form an important precedent to be used subsequently. This chapter argues that a theory of the artificial completeness of law has allowed scholars to sustain an uncritical, even opportunistic, bourgeois normativity.

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I. Introduction

The cult of the precedent is … as dangerous as the rejection of precedent. Judge Gilbert Guillaume [1] [T]he case-law is generally recognized as the third formal source of

[1] G Guillaume, The Use of Precedent by International Judges and Arbitrators, 2 *J Intl Dispute Settlement* (2011) 5–23 at 23. M Akehurst, The Hierarchy of the Sources of International Law, 47 *British Yrbk Intl L* (1975) 273-285. L Gross, *Sources of Universal International Law*, in RP Anand (ed) Asian States and the Development of Universal International Law (Delhi/London: Vikas Publications, 1972) 189.

international law. *Maktouf & Anr v Bosnia & Herzegovina*.[2]

Due to the cleavage of opinion between the publicists of powerful and powerless countries on their role and place, the subsidiary sources of law are a perfect candidates for politico-legal analysis.[3] After much debate between civil law and common law members of the 1920 drafting committee, the committee settled for the wording 'judicial decisions and the writings of the most highly qualified publicists of the various nations.'[4] The negotiating history of the Statute reveals that it was a compromise—a kind of workable formulae—between common law's idea of "jurisprudence" and the civil law tradition's liking for "doctrinal" writings.[5] However, already at the time of the creation of the Permanent Court of Arbitration the precedential value of prior judgments had come up in the discourse.[6] Nevertheless, "judicial decisions" and 'teaching of the highly qualified publicists of the various

[2] *Maktouf & Anr. v Bosnia & Herzegovina*, ECtHR (Grand Chamber), [2013] ECtHR 2312/08, para. 74. Recently in *Kiobel* case a U.S. lower Court found 'indisputable that the works of the publicists on which we have relied accurately describe the primary sources of the relevant customary international law—the relevant customs and practices of States.' *Kiobel v Royal Dutch Petroleum Co*., 2d Cir., 49 ILM. 1510, at n 47. Similarly, in *Zdanoka v. Latvia*, ECtHR, Judge Zupancic in his dissenting opinion discussed publicists and philosophers in great details. *Zdanoka v Latvia,* 16 March 2005, [2006] ECHR 58278/00.

[3] The situation is even more acute today as publicists from America talk of withdrawal from customary law, thereby, making or unmaking international law. CA Bradley & M Gulati, Withdrawing from International Custom, 120 *Yale L J* (2010) 202, 275.

[4] *In the 15th Meeting (Private), held at the Peace Palace, the Hague, on July 3rd, 1920*, Procès - Verbaux of the Proceedings of the Committee 16th–July 24th 1920 with Annexes, vol. I (The Hague: Van Langerhuysen Bros., 1920), 332.

[5] Peil has established that the Court has cited publicists in only 22 of its 139 Judgments and Advisory Opinions. M Peil, Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice, (1)3 *Cambridge J Intl & Comp L* (2012) 136, 143. It is notable that Peil has taken an exacting criterion in 'for including or excluding a source'. Though scientific, it is also too positivistic in measuring the impact doctrinal writings had on pronouncing judgments. Writers are careful in crediting others in doctrinal writings, let alone Judges who have to cloak them in the blanket of legality. As such they would not cite doctrinal authors lightly. If the ICJ judges have cited doctrinal works, as Peil painstakingly demonstrates, they surely meant to cite it knowing too well the jurisprudential value of such judgments.

[6] Guillaume, *supra* note 1, at 7. J d'Aspremont, The International Court of Justice and tacit conventionality, 18 *Questions of Intl L* (2015) 3-17. Judges often speak of rules using the vocabulary of case pointing to how embedded judicial decisions as law are. See, Joint Declaration of Judges Caminos, Yamamoto, Park, Akl, Marsit, Eiriksson and Jesus, in *The MOX Plant Case (Ireland* v. *United Kingdom), Provisional* Measures, Case no 10, para 2. < https://www.itlos.org/fileadmin/itlos/documents/cases/case_no_10/joint.decl.E.orig.pdf>.

nations' became "subsidiary means" eventually in 1920. Sir Judge Humphrey has observed:

> The way in which individual judges quite often make use of' doctrinal writings of the publicists 'in their separate opinions indicates that they have played a part in the internal deliberations of the Court and in shaping opinion.[7]

In the early days of the PCIJ, judge Moore noted 'that Anglo-saxon jurists have long been in the habit of carrying this practice into the domain of international justice.'[8] In the merits phase of the *Nicaragua* case, Judge Lachs, while rebutting American accusations of bias leveled against him, cited Judge Jessup in support of his defense.[9] Most recently, in the arbitration proceedings against India under the *Indus Waters Treaty* of 1960 instituted by Pakistan, the interim order of 6 June 2011[10] institutionalized the ruling of the ICJ in *Passage Through the Great Belt* order.[11] Even when Judge Nagendra Singh in the *Fisheries Jurisdiction* case said that '[t]he adjudicatory function of the Court must necessarily be confined to the case before it'

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[7] H Waldock, (1962/II) 106 Hague Recueil 1, at 96 *quoted in* Peil, Ibid., 137.

[8] Dissenting Opinion by M Moore, *Mavrommatis Palestine Concessions* (Greece v. U.K.), 1924 P.C.I.J. (Ser. B) No. 3 (Aug. 30) 57.

[9] *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v United States),* Merits, Judgment, [1986] ICJ Rep 14, 159. See, GI Hernández, Impartiality and Bias at the International Court of Justice, (1)3 *Cambridge J Intl & Comp L* (2012) 183–207; F Zarbiyev, Judicial Activism in International Law—A Conceptual Framework for Analysis, 3 *J Intl Dispute Settlement* (2012) 247-278. Today as international arbitration expands, many raise legitimate questions: how do arbitrators decide? Do they tend to favour certain classes of parties? S Brekoulakis, Systemic Bias and the Institution of International Arbitration: A New Approach to Arbitral Decision-Making, 4 *J Intl Dispute Settlement* (2013) 553-585; WW Park, Arbitrators and Accuracy, 1 *J Intl Dispute Settlement* (2010) 25-53.

[10] *Indus Waters Kishenganga Arbitration (Pak. v. India), Interim Protection Order*, PCA (June 6, 2011) para. 6, <http://www.pca-cpa.org/showfile.asp?fil_id=1726>. This has been pointed out by S Bhattacharya, Proceeding at Your Own Risk: Evaluating a New Principle of International Law for Provisional Measures, 38 *Yale J Intl L* (2013) 512.

[11] *Passage Through the Great Belt (Fin. v. Den.)*, Provisional Measures Order, 1991 I.C.J. 12, para. 17 (July 29). Further, Wohlwend notes the role of the teachings of the most highly qualified publicists as subsidiary source of international water resource law. BJ Wohlwend, *The Teaching of the Most Highly Qualified Publicists as a Subsidiary Source of International Water Resources Law*, Proceedings of Regional Conference on the Legal Aspects of Sustainable Water Resources Management, Teslic, Bosnia-Herzegovina (14-18 May 2001) 73-92 <http://www.bjwconsult.com/05.pdf>.

he did not rule out the possibility of looking into previous cases to adjudicate the cases at hand.[12] In 2014, President of the Special Tribunal for Lebanon, Sir David Baragwanath wrote more explicitly:

> [I]f no settled custom or other source of existing law is ascertainable, to decide the case the judges must somehow secure a law to apply. And if no law is to be found—in legal vernacular, if *non liquet* is not an option—law simply must be created. So in my view, it must be recognised that a measure of law creation is simply inherent in the judicial function: those who create judicial decision-makers perforce create law-makers, and must be aware of this.[13]

The role and force of ICJ article 38(1)(d) is thus evident from the early days of permanent courts. Moreover, while writing separate and dissenting opinions at international courts and tribunals (ICTs), judges engage with publicists' opinions. Indeed, the separate opinions of judges constitute a particularly strong subsidiary source under ICJ Statute Article 38(1)(d) 'because they are written by the most highly qualified jurists sitting as judges in cases that have been carefully argued and presented by expert counsel.'[14] As such, Judge Shahabuddin while in agreement with the ICJ ruling in *Transborder Armed Actions* took efforts to explain his approach in relation to 'the views of the publicists.'[15] In the *LaGrand Case*, the United States, in

[12] Declaration by Judge Nagendra Singh, in *Fisheries Jurisdiction* (U.K. v. Iceland), Merits, Judgment, [1974] ICJ Rep 3, 43.
[13] Sir David Baragwanath, The Interpretative Challenges Of International Adjudication Across The Common Law/Civil Law Divide, (3)1 *Cambridge J Intl & Comp L* (2014) 450, 453.
[14] CH Brower II, International Immunities: Some Dissident Views on the Role of Municipal Courts, 41 *Virginia J Intl L* (2000) 1, 55, fn. 280.
[15] Separate Opinion of Judge Shahabuddeen, in *Border and Transborder Armed Actions (Nicaragua v Honduras), Jurisdiction and Admissibility* [1998] ICJ Rep 69, 144. At the ICJ, in his Dissenting Opinion Judge *ad hoc* Kateka also discussed publicists' view. *Armed Activities on the Territory of the Congo (Congo* v *Uganda),* [2005] ICJ Rep168 at 360-361. M Shahabuddeen, *Precedent in the World Court* (CUP, New York, 1996).

support of a view, *inter alia*, 'develop[ed] arguments concerning the "weight of publicists" commentary.'[16]

In effect, article 38(1)(d) launches the publicists of the various nations into the orbit, depositing them alongside the members of various ICTs right away. This is a remarkable situation.[17] Kennedy however is of the view that the 'consent' central to the sources and, the sources in ICJ article 38(1)(d) are least convincing because they are least consensual.[18] On the contrary, Brunnee and Toope argue that:

> [T]he rhetoric of "sources" in international law has been a limiting factor on its progressive development. However, the theory of epistemic communities confirms the role of international lawyers in the formulation of principles that, when promoted through various regimes, may ultimately harden into binding norms of international law.[19]

[16] *LaGrand (Germany v USA),* [2001] ICJ Rep 466, 500. In its rejoinder, the Republic of Nicaragua in Dispute Regarding Navigational and Related Rights cited a Chilean publicist. Rejoinder of Nicaragua of 15 July 2008, 50 <http://www.icj-cij.org/docket/files/133/15090.pdf>. The Counter-Memorial of the United States of America in *Avena And Other Mexican Nationals*, (*Mexico v US*) mentions ICJ Statute Article 38(1)(d) 61<http://www.icj-cij.org/docket/files/128/10837.pdf>.

[17] Published in 2012, a study based upon a survey of more than 600 Judgments, Advisory Opinions and Orders, where the ICJ uses these sources and analyzes the individual scholars and writings that have been most useful to the Court. Peil, *supra* note 5, 136–161.

[18] D Kennedy, The Sources of International Law, 2 *American Univ J Intl L & Policy* (1987) 1, 29.

[19] J Brunnée & SJ Toope, Environmental Security and Freshwater Resources: Ecosystem Regime Building, 91 *American J Intl L* (1997) 26, 42, fn 96. For the impact of scholars on international law see, DG Mejía-Lemos, Some considerations regarding "'Instant' International Customary Law", fifty years later, 55 *Indian J Intl L* (2015) DOI <10.1007/s40901-015-0003-2>. Conclusions of 'international scientific legal conferences' can be accepted as being 'teachings of the most highly qualified publicists' and therefore closer to higher consensus. JE McWhinney, The New Countries and the New International Law: The United Nations' Special Conference on Friendly Relations and Co-Operation among States, 60 *American J Intl L* (1996)1 , 31; D Palmeter & Petros Mavroidis, The WTO Legal System: Sources of Law, 92 *American J Intl L* (1998) 398, 400-401.

Given its text's openness and generality, article 31(3)(c) of the *Vienna Convention on the Law of the Treaties* is often invoked to support the force of 38(1)(d).[20] Because it came in 1969, years later, its presence arguably validates the role of 'generality' in the sources doctrine. Since judges are often assumed to be immune to politics, Anand in 1965 was of the view that 'the degree of caution or boldness used' by the ICJ 'in the development of international law depends on the individual judge's philosophy on the nature of the judicial function in the international field.'[21] Recently, in his dissenting opinion in the *Pedra Branca* case, Judge *ad hoc* Dugard said the ICJ 'is not bound, in reaching its decision, by the submissions of counsel representing parties before the Court.'[22] It may 'invoke reasons of its own, *proprio motu,* when it considers that there is a sounder basis for decision than that advanced by parties.'[23] Judge Lauterpacht is known to have actually never relied exclusively on the material laid before the Court by the parties, but he undertook his own researches.[24] Former ICJ President Judge Guillaume notes:

> Interstate arbitration is most frequently entrusted to members of international tribunals (particularly from the [ICJ]) or to academics who are familiar with these institutions. The decisions are always published. Thus, they are more frequently imprinted with jurisprudence from the International Court of Justice and arbitration tribunals on which they rely. They can at times distance themselves from this jurisprudence in an attempt to complete it or add nuances to it. Yet they are essentially faithful to the

[20] T Voon, China-Measures Affecting Trading Rights and Distribution Services for Certain Publications and Audiovisual Entertainment Products, 103 *American J Intl L* (2009) 710, 714, fn 15.
[21] RP Anand, The International Court of Justice and the Development of International Law, 7 *Intl Studies* (1965) 228, 244. T Ginsburg, Bounded Discretion in International Judicial Lawmaking, 45 *Virginia J Intl L* (2011) 1; JK Cogan, *Competition and Control in International Adjudication*, 48 *Virginia J Intl L* (2008) 411. Cf. Zarbiyev, *supra* note 9.
[22] Dissenting opinion of Judge *ad hoc* Dugard, *Sovereignty over Pedra Branca/Pulau Batu Puteh, Middle Rocks and South Ledge (Malaysia/Singapore),* [2008] I.C.J. Rep 12, 152.
[23] *Ibid.*
[24] S Rosenne, Sir Hersch Lauterpacht's Concept of the Task of the International Judge, 55 *American J Intl L* (1961) 825, 835.

precedent that they cite abundantly.[25]

An invisible college of arbitrators of the Court of Arbitration for Sport systematically refers to 'decisions previously taken by their colleagues.'[26] Similarly, Internet Corporation for Assigned Names and Numbers awards refer to precedents.[27] Arguably then, judges, in the name of finding one, end up making international law though Article 59 of the ICJ Statute attempts at constraining this practice.[28] Anand suggests, 'the limiting terms of Article 59 refer to the actual "decisions" of the Court, i.e., the operative part, as distinguished from the reasoning underlying the decision and containing the legal principles on which it is based.'[29] Anand wrote in 1965, nearly 50 years ago. Today European scholars have become even more vocal about the power of ICJ Article 38(1)(d).[30] The actual potential of the ICJ Statute Article 38(1)(d)[31]—aided by Article 31(3)(c) of the VCLT[32]—to unsettle the doctrinal ordering of sources based on consent is immense.[33] While there is nothing to show conclusively that the enumeration of sources in ICJ 38(1)(d) constitutes "a rigid hierarchical order",[34] Professor Sornarajah however sees them as "low-order sources."[35]

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[25] Guillaume, *supra* note 1, 15 (footnotes Omitted).
[26] Ibid.
[27] Ibid.
[28] See in details the writings of former international judges: Guillaume, Ibid., 5-23; M Shahabuddeen, *Precedent in the World Court* (CUP, New York, 2007); T Treves, *Judicial Lawmaking in an Era of "Proliferation" of International Courts and Tribunals: Development or Fragmentation of International Law*? in, R Wolfrum & V Röben (eds) *Developments of International Law in Treaty Making* (Springer, 2005) 587-620.
[29] Anand, *supra* note 21, 245.
[30] A von Bogdandy & I Venzke, *In Whose Name*? An Investigation of International Courts' Public Authority and Its Democratic Justification, 23 *European J Intl L* (2012) 7, 19.
[31] 1945 Statute of the International Court of Justice, 1055, 33 UNTS 993. (1945), Art. 38(1)(d).
[32] '[A]ny relevant rules of international law applicable in the relations between the parties.' 1969 Vienna Convention on the Law of Treaties, 1155 UNTS 331 (1969) at (Art. 31(3)(c). Also see, A Gourgourinis, The Distinction between Interpretation and Application of Norms in International Adjudication, 2 *J Intl Dispute Settlement* (2011) 37–39.
[33] Kennedy, *supra* note 18, 60.
[34] Ibid. 230. Also see, D Shelton, Normative Hierarchy In International Law, 100 *American J Intl L* (2006) 291.
[35] M Sornarajah, *The International Law on Foreign Investment*, 3rd edn., (NY: CUP, 2010) 277.

Recently, Michael Byers has noted the role of the publicists of developed states in the formation of customs.[36] Today, while European scholars take a liberal view and support the force of ICJ article 38(1)(d), the structural constraints and procedural practice in international adjudication leave little room for an approach that is more textual i.e. treating judicial decisions and writings as simply subsidiary sources. In the 2826th ILC meeting, Chairperson Teodor Melescanu found it was "true that the Commission had no tradition of referring to the writings of publicists in the commentaries."[37] Member Pellet did not agree to the Chairman's view. In his opinion, 'the codification and progressive development of international law required the Commission to apply the teachings of publicists, which were an element of the determination of the rules of law, as indeed provided in Article 38 *(d)* of the Statute' of the ICJ.[38]

While assessing such arguments, Teitel looks at the rise of international adjudication 'along with the increasing attention to the problem of weak and failed states.'[39] 'The decisions of international adjudicators in international criminal law and human rights law,' she thinks, 'often respond directly to political and legal institutional failures or gaps at the level of the state.'[40] The argument is that the possibility of international courts to discover and apply laws is greater when a weak country is a party.

[36] Michael Byers, Power, Obligation, And Customary, International Law, 11 *Duke J Comp & Intl L* (2001) 81, 82.
[37] '2826th Meeting, Draft report of the Commission on the work of its fifty-sixth session (*continued*), Chapter IV. *Diplomatic protection* (continued) (A/CN.4/L.653 and Corr.1 and Add.1)', 1 *UN Yrbk ILC* (2004) 218.
[38] Ibid. Furthermore, publicists allege that the ICJ has relied on 'actual practice to determine the content of customary rules surprisingly rarely, instead frequently basing its conclusions instead on non-binding actions by international bodies or on its own decisions' i.e. the help of Article 38(1)(d). M Weisburd, The International Court of Justice And the Concept of State Practice, 31 *Univ Pennsylvania J Intl L* (2010) 295.
[39] Ruti Teitel, LJIL Symposium: A Consideration of 'On the Functions of International Courts: An Appraisal in Light of Their Burgeoning Public Authority, *Opinio Juris* (Apr. 9, 2013) para. 4
[40] Anand, *supra* note 21, 246.

Qualitatively speaking, chances are that developing countries hire foreign firms to represent them at international disputes due to issues of the lack of capacity.[41] Most times, these foreign firms or scholars write memorials for the developing country parties.[42] Such citations in memorials to previous cases as precedents are fairly common.

The fact is, unhampered by any specific limits laid down in the Article 59 of the ICJ Statute, 'but within the bounds of judicial caution,' the ICJ has been applying international law in a spirit of "progressive realism" and has become one of the chief agencies for the gradual development and growth of international law.'[43] R.P. Anand, again, says that any attempt to clarify and re-formulate the principles of international law, whether by private juristic re-statement themselves must be welcomed.[44] On the same line but further down, Schachter, while writing about a theory of "international obligations", maintains that the 'international lawyers need not be unduly modest as

[41] See for the who's who of international law on both the sides of the case for two of world's most poor countries, *Kasikilil/Sedudu Island (Botswana/Namibia)*, ICJ Rep. 1999, p. 1045; *Frontier Dispute, Judgment*, ICJ Rep. 1986, p. 554; *Territorial Dispute (Libyan Arab Jamahiriya/Chad), Judgment*, ICJ Rep. 1994, at p. 6. There is a long list of such cases with some of the poorest African countries. Mihaela Papa, Emerging Powers in International Dispute Settlement: From Legal Capacity Building to a Level Playing Field? 4 *J Intl Dispute Settlement* (2013) 83-109, 88. What is notable is that even the two junior counsel representing India in *Bay of Bengal Maritime Boundary Arbitration Between Bangladesh and India* were not Indians. Thus, even today, the Indian government does not have and is not training a younger crop of local counsel for future international disputes. In *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, apart from Shankardass, foreign counsel in the case included Alain Pellet, Sir Michael Wood, and M. Reisman. Ironically, Bangladesh did not even have a single local counsel. See *Bay of Bengal Maritime Boundary Arbitration between Bangladesh and India*, 8 October 2009, PCA <http://www.pca-cpa.org/showpage.asp?pag_id=1376>. A similar trend is seen in other cases between Bangladesh and Myanmar. Even junior counsels and advocates for these cases are doctoral candidates working under senior counsels, who are mostly Western nationals. Naturally, there is no development of the valuable expertise in developing counties. Developing countries continue to ignore the need to cultivate homegrown experts. See the list of counsels in the following cases; *Dispute Concerning Delimitation of The Maritime Boundary Between Bangladesh And Myanmar in the Bay of Bengal (Bangladesh/Myanmar)*, 2012 ITLOS Rep. 1, 5-8; *Indus Waters Kishenganga Arbitration (Pakistan v. India)*, Final Award, 20 December 2013, PCA <http://www.pca-cpa.org/showpage.asp?pag_id=1392>.

[42] This explains for example the mention of judicial decisions and publicists, the *Right of Passage* case and writer Thirlway, in the Memorial of Namibia in *Kasikili/Sedudu Island* proceedings. Memorial of the Republic of Namibia in the *Case Concerning Kasikili/Sedudu Island* (Botswana/Namibia), Vol. 1, 28 February 1997, para. 173 <http://www.icj-cij.org/docket/files/98/8574.pdf>.

[43] Anand, *supra* note 21, 246.

[44] Ibid. 258.

to his contribution.'[45] In fact, as early as 1927, Hersch Lauterpacht was quite vocal about international law recruiting private rules of different countries to expand its sources.[46] More recently, Sornarajah, however, has taken a more cautious position. From a theoretical perspective, he says:

> [I]t is important to show that multilateral corporations, though essentially private actors denied personality in international law, nevertheless had sufficient power to manipulate the low-order sources of international law, such as judicial decisions, the writings of highly qualified publicists and the general principles of law, to construct a system of protection they desired.[47]

Indeed today the debate on the role of judicial decisions and the writings of highly qualified publicists as sources of international law is impregnated with realpolitik, an avowed enemy of legality.[48] Noting the increase in democratic process in custom formation, Judge Tanaka in his dissenting opinion in the *South West Africa Cases* said the 'method of the generation of customary international law is in the stage of transformation from being an individualistic process to being a collectivistic process.'[49]

II. Jurists and Litigating Parties as Lawmakers

As evidenced by Sir Michael Wood's Report of March 2015, views of the publicists empowered by ICJ 38(1)(d) have been central even in settling the jurisprudence on

[45] O Schachter, Towards a Theory of International Obligations, 8 *Virginia J Intl L* (1968) 300, 317.
[46] H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green & Co., 1927).
[47] Sornarajah, *supra* note 35, 277. J Arato, Corporations as Lawmakers, 56 *Harv International Law J* (2015) 229 makes similar arguments.
[48] See generally for an informed exposition, J D'Aspremont, *Formalism and Sources of International Law* (OUP, Oxford, 2011) 63-77.
[49] Dissenting Opinion of Judge Tanaka, in, *South West Africa Cases (Second Phase),* Judgment of 18 July 1965, [1965] ICJ. Rep. 6 at 294. Paulo Borba Casella, Contemporary Trends on *Opinio Juris* and the Material Evidence of International Customary Law, the Gilberto Amado Memorial Lecture (17 July 2013) <http://legal.un.org/ilc/sessions/65/2013AmadoLecture-Casella.pdf>.

customary law.[50] The participants in customary law prescription include 'pressure groups, private associations and indeed even individuals.'[51] Therefore we should focus 'not only on the question of who has the legal competence to participate, but also of whose behavior is in fact leading to the formation of customary prescriptions.'[52] By inventing legal analogies, such as the one between a treaty, a contract and a constitution, and then crystalizing it further by publishing these views, western publicists have created another source that legitimized their action. It was indeed, to use Villalpando's words, a "normative ponzi scheme" in relation to the ICJ and the ILC.[53]

> Now, if the [ILC] relies so heavily on the [ICJ's] jurisprudence to determine the rules of law and the Court invokes so indisputably the Commission's work for the same purpose, are we not the victims of a normative Ponzi scheme? In other words, what remains of the investigation on 'evidence of a general practice accepted as law' and of the role of governments in the codification of customary international law? The interaction between expert bodies and judicial organs does indeed appear to result in an autocatalytic process in which the crystallization of *opinio juris* may occur by the mutual reaffirmation of the existence of a norm, without any external practice.[54]

Here, it would be useful to note that the Rapporteurs of the more important works of

[50] *Third Report on identification of customary international law* by Michael Wood, Special Rapporteur, UN Doc A/CN.4/682, 27 March 2015, para 67.
[51] K Venkata Raman, The Role of the International Court of Justice in the development of International customary law, 59 *ASIL Proceedings* (1965) 169, 171.
[52] Ibid.
[53] S Villalpando, On the International Court of Justice and the Determination of Rules of Law, 26 *Leiden Journal of International Law* (2013) 243, 248. J Seifi, Procedural and Evidentiary Innovations in the Judgment of the International Court of Justice in the *Oil Platforms Case* (November 2003), in J-H. Paik, S-W. Lee, KYL Tan (eds) *Asian Approaches to International Law and the Legacy of Colonialism: The Law of the Sea, Territorial Disputes And International Dispute Settlement* (Routledge, London, 2012) 25-63.
[54] *Ibid.* at 247-48 (Footnote Omitted).

the ILC were mostly developed country lawyers. The truth is, the members of the ILC from the developing world are usually elected to pay off public servants or reward politicians.

A. The Case of Clyde Eagleton vis-à-vis Hyderabad at the Security Council

The function of a doctrinal analysis is tell to international legal rules really are, as opposed to what writers could make of them should they adopt a particular ideological or political point of view. Yet international law is very political and writers find themselves in one or the other ideological camp.

During the 1960s, a right of self-determination supported decolonization from bluewater colonialism. In 1952 Clyde Eagleton wrote that the colonial powers 'thought of colonies as, for the most part, unable to stand alone in the strenuous conditions of modern civilization and therefore in need of a period of tutelage before being considered for independence.'[55] But the Soviet Union's resolution in the United Nations, differentiated between the non-self-governing territories within the UN Charter Article 73, which were to be assisted toward "national self-determination", and national minorities, which should have only the right to use their native tongues and cultures. Naturally newly decolonized nations viewed Russia's definition to be more suitable to their reality. Eagleton among other things was 'Adviser to the Representative of Hyderabad'.[56] On August 21, 1948, Hyderabad complained to the President of the Security Council though a cablegram:

[55] C Eagleton, Excesses of Self-Determination, 31(4) *Foreign Affairs* (1953) 592, 596.
[56] C Eagleton, The Case Of Hyderabad Before The Security Council, 44 *American J Intl L* (1950) 277.

> The Government of Hyderabad, in reliance on Article 35, paragraph 2, of the Charter of the United Nations, requests you to bring to the attention of the Security Council the grave dispute which has arisen between Hyderabad and India, and which, unless settled in accordance with international law and justice, is likely to endanger the maintenance of international peace and security. Hyderabad has been exposed in recent months to violent intimidation, to threats of invasion, and to crippling economic blockade which has inflicted cruel hardship upon the people of Hyderabad and which is intended to coerce it into a renunciation of its independence. The frontiers have been forcibly violated and Hyderabad villages have been occupied by Indian troops. The action of India threatens the existence of Hyderabad, the peace of the Indian and entire Asiatic Continent, and the principles of the United Nations. The Government of Hyderabad is collecting and will shortly present to the Security Council abundant documentary evidence substantiating the present complaint. Hyderabad, a State not a Member of the United Nations, accepts for the purposes of the dispute the obligations of pacific settlement provided in the Charter of the United Nations.[57]

On September 12, 1948, the Government of Hyderabad, in view of the India's 'officially proclaimed intention' as 'announced by its Prime Minister to invade Hyderabad,' implored the UN Secretary General to put the complaint upon the agenda at 'the earliest possible date'.[58] On September 13, 1948 a cablegram informed the Secretary General that Hyderabad had been invaded. The Secretary General was, as Eagleton reports, doubtless uncertain as to the status of Hyderabad within international law, introduced the text of Hyderabad's complaints with the words: 'The Secretary General, not being in a position to determine whether he is required by the rules of procedure to circulate this communication, brings it to the attention of the

[57] Security Council, Official Records, U.N. Doc. S/986 (3rd September 1948) 5.
[58] U.N. Docs. S/998 and S/1000, ibid., 6, 7.

Security Council, for such action as the Council may desire to take.'[59]

There are two observations that merit a thorough discussion. Eagleton was not only an advisor to Hyderabad; he was on the editorial board of the *American Journal of International Law* at the time. The luxury of presenting his case in the journal, by no means a small privilege given not many in 1950s could do so, is indeed important to the process of law making by writing.[60] He starts making his case for Hyderabad with a presumption: 'Assuming for the moment that Hyderabad was a state, it had a right, though not a Member of the United Nations, to bring before the Security Council a dispute to which it was a party, provided it accepted in advance the obligations of pacific settlement in the Charter, for the purposes of that dispute.'[61] He opines further:

> As to this point of recognition, several things may be said. Britain did authorize independence for these States, if they chose to take it under the Indian Independence Act, but she could not well extend formal recognition to them until she knew what their choice would be. Nothing in Sir Hartley's words would prevent later recognition; indeed, recognition should logically flow from the British position, in due course, for such States as might wish to remain independent. No Member of the United Nations could with propriety recognize a state whose status was at the moment before the Security Council for decision. Whether recognized or not, Hyderabad was an independent state, fully organized, of size and resources sufficient to entitle it to recognition according to usual standards of stability and willingness to meet

[59] Ibid. Much later in 1970 the Indian Supreme Court in *Scindia v India* said that, 'formerly Rulers of territories in India brought within the fold of the Constitution [are] [t]hough not sovereign within the meaning of that expression in [i]nternational [l]aw, these former Rulers had certain attributes of sovereignty during the days preceding the independence of India.' *Madhav Rao Jivaji Rao Scindia & Ors. v. Union of India & Anr.*, 15.12.1970, MANU/SC/0050/1970, para. 157.
[60] See for a discussion, AH Qureshi, Editorial Control And The Development of International Law, 61 *Political Q* (1990) 328–339.
[61] Eagleton, *supra* note 56, at 278.

international obligations.[62]

However, explaining the position of the Indian States, in his letter of March 27, 1926, to the Nizam (King) of Hyderabad, Lord Reading had written: 'The sovereignty of the British Crown is supreme in India, and therefore no Ruler of an Indian State can justifiably claim to negotiate with the British Government on an equal footing.'[63]

Nonetheless, having made this claim Eagleton makes an arresting claim meriting a postcolonial analysis on state practice and making of law by scholars. 'The formal document embodying the Complaint of Hyderabad puts forward an argument' Eagleton writes, 'that recognition is merely declaratory of the existing fact of statehood, which apparently derives from the writings of Professor Lauterpacht.'[64]

In 1950, Eagleton, having advised in 1948 the representative of Hyderabad in the Security Council, published an article in the American Journal of International Law in support of Hyderabad's status for a sovereign state. Eagleton, quoting from Hyderabad's complaint that he himself had helped in drafting, revealed the basis of the Hyderabad's main source of argument: Lauterpacht's classic treatise of 1947, *Recognition in International Law*.[65]

In 1948, not only did Eagleton argue with the force of subsidiary sources, writings of Lauterpacht, two years later in the pages of the American Journal of International Law he argued the same point, in effect creating another source supporting the first.

[62] *Ibid*.
[63] P Diwan, Kashmir And The Indian Union: The Legal Position, 2 *ICLQ* (1953) 333, 335.
[64] Eagleton, *supra* note, at 56, fn 24.
[65] H Lauterpacht, *Recognition In International Law* (Cambridge: Cambridge University Press, 1947).

There can't be more direct case of the subsidiary means shaping the source of international law by complainant states within international law. Hyderabad's central claim for independent entity within international law were based on the writings of publicists and not on any customary law, treaty, or general principles of law, the main sources of international law.[66]

However later the government of Hyderabad after the successful conclusion of the Indian Army's "punitive expedition", as Professor Taraknath Das put it, "petitioned the United Nations to withdraw the case."[67] In fact Das explicitly wrote that much before 1948 Indian and British lawyers, as hired guns of the princely states, wrote articles "in support of the claim that the Princely States of India had special relations with the British Crown and thus could maintain their relations directly with the British Crown without being in any way responsible to the Government of India.'[68] No wonder, postcolonial publicists identified certain features of international law as 'an imaginative creation of some international jurists".[69]

B. Case Concerning the Continental Shelf (Tunisia/Libyan Arab Jamahiriya)

In 1981 the request by Malta before the ICJ to intervene in a case between Tunsia and Libyan Arab Jamahiriya raises a significant question of the politics of sources doctrine and the tactics of law formation. On 14 April 1981 regarding the application

[66] Eagleton, *supra* note 56, 288.
[67] T Das, The Status of Hyderabad during and after British Rule in India, 43 *American J Intl L* (1949) 57.
[68] *Ibid*., 57.
[69] SN Guha-Roy, Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law? 55 *American J Intl L* (1961) 863, 879.

by Malta for permission to intervene in *Case Concerning the Continental Shelf*, the ICJ, *inter alia*, noted Tunisia's following observations:

> [O]n the basis of the object of the intervention as explained by Malta, the Application amounted to a request to intervene in a case in order to argue points of general law, simply because the resulting judgment might form an important precedent as a subsidiary means for the ascertainment of the law; and this Tunisia considers to be inadmissible, the more so if Malta, as seemed to be its intention, does not propose to be bound in any way by the precedent.[70]

Tunisia's observations are indeed of high importance, and in many ways, present a Third World critique of the sources doctrine. Tunisia maintained that it saw Malta's application 'amount[ing] to a request to intervene in a case in order to argue points of general law'.[71] This is all fine; the point made next is of higher interest. Tunisia thought Malta did this for strategic purpose of playing the politics of law sources. For Tunisia, Malta requested to intervene 'to argue points of general law' so that 'the resulting judgment might form an important precedent as a subsidiary means for the ascertainment of the law.[72]' The politics is indeed sharp one as Tunisia considered Malta's request 'inadmissible, the more so if Malta, as seemed to be its intention, does not propose to be bound in any way by the precedent.'[73] Indeed like individuals, governments advance contentions to suit a particular case that might not be its actual

[70] Application to Intervene by Malta*, Continental Shelf (Tunisia/Libyan Arab Jamahiriya),* Judgment, [1981] ICJ Rep. p. 3, 12, para. 16. In its counter-memorial to ICJ's *Avena* proceedings the United States submitted that "[t]he Court's decisions are only binding on the parties to the case before it, and the decision in one case has no necessarily determinative function in later cases involving different parties." Counter-Memorial of the United States of America, *in, Avena and Other Mexican Nationals, (Mexico v USA)* 2003 ICJ Lexis 17, 88.
[71] *Ibid.* See Kaiyan Homi Kaikobad, Nullity and Validity: Challenges to Territorial and Boundary Judgments and Awards, in, Jin-Hyun Paik, Seok-Woo Lee and Kevin Y. L. Tan (eds.) *Asian Approaches To International Law And the Legacy of Colonialism* (London: Routledge, 2012) 37.
[72] Ibid.
[73] Ibid.

settled and impartial opinion; one has to fish for it while shifting through the volumes of official stationary of the state.

The point that Tunisia was attempting to make was that, while requesting to intervene, Malta wanted to expand the sources of law using the points of general law which, Tunisia had reasons to believe, could be used against it by Malta or any other party'.[74] Conclusively, it can be argued that Malta wanted a law made by the ICJ using 38(1)(d). However, the ICJ in *the Land, Island and Maritime Frontier Dispute* said:

> [T]he Chamber should take the 1917 Judgement [*sic*] into account as a relevant precedent decision of a competent court, and as, in the words of Article 38 of the Court's Statute, "a subsidiary means for the determination of rules of law". In short, the Chamber must make up its own mind on the status of the waters of the Gulf, taking such account of the 1917 decision as it appears to the Chamber to merit.[75]

Deducing from facts, cases and commentaries by publicists, it appears that publicists from developing countries, given the lack of support for research and other structural handicaps, are although publicists, but as minority or dissenting voices.

III. International Law and Publicists in the *Opinio Juris* of States

A. The ICJ's *Kosovo* Advisory Opinion, *Opinio Juris* and Developing Countries

[74] Application to Intervene by Malta, in *Continental Shelf*, *supra* note 70, 12.
[75] *The Land, Island and Maritime Frontier Dispute, (El Salvador/Honduras: Nicaragua Intervening)*, Judgment of 11 Sept [1992] ICJ Rep. 351, 601 para. 403.

Within the time limits fixed by the ICJ in the *Kosovo Advisory Opinion*, over thirty-five UN Member states—from the United States to Sierra Leone—filed written submissions. Written statements by the UN Member states are the most direct examples of *opinio juris*. However, 'the shared view of the Parties' the ICJ ruled in *Military and Paramilitary Activities*, 'as to the content of what they regard as the rule is not enough.'[76] The Court 'must satisfy itself that the existence of the rule in the *opinio juris* of States is confirmed by practice.'[77] More recently after the *Kosovo opinion* of the ICJ, the role of publicists in self-determination has led to a debate again about the publicists building up subsidiary law in furtherance of a particular ideology. Pointing this out Alexander Orakhelashvili writes:

> The Kosovo situation is a clear illustration that writers, when motivated by political or ideological considerations, run the risk of presenting the international legal position the way they would like to see it, as opposed to what that legal position is in terms of consent and agreement of States, and of pointing only to that part of the evidence that suits their position, to the exclusion of evidence that does not suit that position.[78]

To this Hipold retorted: 'One could, in principle, agree with this position if there were not the suspicion that Orakhelashvili is asserting that he knows in advance, for sure, what international law is and that other writers are not allowed to look for different solutions.' [79] One notable aspect of the *Kosovo* affair in particular is that while

[76] *Military And Paramilitary Activities In And Against Nicaragua (Nicar. v. US*), Merits, Judgment of 27 June 1986 [1986] ICJ Rep 13, 98 para. 184.
[77] Ibid.
[78] A Orakhelashvili, The Kosovo UDI between Agreed Law and Subjective Perception: A Response to Hilpold, 8 *Chinese J Intl L* (2009) 285, 287.
[79] P Hilpold, What Role for Academic Writers in Interpreting International Law?—A Rejoinder to Orakhelashvili, 8 *Chinese J Intl L* (2009) 291, 294. Before that Hilpond had said: 'A right to "remedial secession", i.e. a right to secede when grave human rights abuses, endangering the prospects of survival of the respective group, occurs, has not yet materialized, even though there is a considerable

Western Member states cites publicists, the African and Latin American states usually did not.[80] In its submission of well over hundred pages, similar to that of the United Kingdom, the United States supported the Kosovo's declaration for independence in six chapters, drafted almost like a North American law review manuscript citing publicists and previous international judicial decisions.[81]

Why? One wonders if this is simply a matter of resources and staff capacity of states. While the submissions by the United States, the United Kingdom and other East European countries in the *Kosovo* case cited publicists, the submissions from Asian and Latin American countries observed restraint in citing, let alone subscribing to the views of the publicists. The emerging power China chose to anchor its argument in the ruling of a municipal court of Canada[82] while India had nothing to say. As expected, Japan categorically stated that the advisory opinion should not be seen as establishing "precedent", of course, without citing any publicist.[83]

B. Authors in the Aid of 38(1)(d)

International law scholarship today is characterized by a Clarion call to reject monism-dualism distinction alongside the call to rescue 38(1)(d) from the misery of being "subsidiary". Armin von Bogdany and Ingo Venzke, German scholars, for example argue that the 'effect of judicial precedents is concealed by the doctrinal

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support in academic writing for such a concept.' P Hilpold, The Kosovo Case and International Law: Looking for Applicable Theories, 8 *Chinese J Intl L* (2009) 47, 56.

[80] *Written Statement of Venezuela*, Apr. 17, 2009 <http://www.icj-cij.org/docket/files/141/15676.pdf>.

[81] *Written Statement of the United States of America*, Apr. 17, 2007, 52 <http://www.icj-cij.org/docket/files/141/15640.pdf>. *Written Statement of the United Kingdom of Great Britain and Northern Ireland* <http://www.icj-cij.org/docket/files/141/15638.pdf>.

[82] China said self-determination, though an accepted feature of international law, applies only to colonial rule and foreign occupation, interestingly, citing a Canadian Court ruling on Québec. *Written Statement of China*, at 3,6 <http://www.icj-cij.org/docket/files/141/15611.pdf>.

[83] Written Statement of Japan, 8 <http://www.icj-cij.org/docket/files/141/15658.pdf>.

ordering of things in light of Article 38(1)(d) of the ICJ Statute which classifies international judicial decisions as 'subsidiary means for the determination of rules of law.'[84] They lament that the decisions are 'pictured as a source for recognizing the law but not a source of law.'[85]

In the past American and Indian scholars, Freidmann and Anand for instance, have penned in support of the proposition that judges should make law. Freidmann wrote '[t]hree of the four sources enumerated in Article 38 are reasonably well defined: treaties, custom and judicial decisions are in fact the three *principal sources* of legal authority in the international community.'[86] But judicial decision is not a primary source. Besides, Anand thought, 'there is no reason why society should be deprived of a conscientious, slow, but effective law-making by a few wise jurists who are representatives of the international community.'[87] Furthermore, Anand has pointed out, citing the *Lotus* case and the dissents of Lauterpacht, the role of both previous decisions and individual opinions in the subsequent making of international law.[88]

Opinions such as these have fertilized the view that publicist make laws with the power and force of their studied opinion when in 2013 even so called "emerging powers", let alone small and powerless countries, struggle, as empirical studies reveal, to garner resources to participate in international proceedings.[89] In international

[84] von Bogdandy and Venzke, *supra note* 30, 19.
[85] Ibid.
[86] W Friedmann, Uses of "General Principles" In the Development of International Law, 57 *American J Intl L* (1963) 279.
[87] Anand, *supra* note 21, 261.
[88] RP Anand, The Role of Individual and Dissenting Opinions in International Adjudication, 14 *ICLQ* (1965) 788, 803. J José Quintana, Litigation at the International Court of Justice: Practice and Procedure (Martinus Nihoff, 2015) 558.
[89] Papa, *supra* note 41, 88.

criminal law, the role of precedents has been spectacular.[90] The fact is, publicists of powerful countries outnumber the legal department of small countries in both quality and quantity. Thus in effect 38(1)(d), with all its noble intentions, does ensure that writings of a few experts create law but the actual political law-making process by weaker countries is jeopardized by powerful countries through persistent objection, though limited only to customary law. The game of sources continues to exacerbate the weakness of weaker countries, therefore their insecurity and the lack of confidence in international law generally.[91]

It is notable that the 1920 commission of drafters included 38(1)(d) to avoid *non liquet*.[92] And since then scholars have created this atmosphere of completeness of the international legal order that sustains the non-declaration of *non liquet*.[93] For a long time constitutional limitation of the treaty making powers has been seen as a method to protect the sovereignty of states.[94] Imposing domestic limitations on treaty making powers through constitution, it is argued, are mechanisms to control the non-consensual growth of sources of law. Just as the formation of secular states in the West watered down the legitimacy of older treaties made by monarchs, doctrinally speaking, decolonization, another anti-imperial moment, one would imagine should impact the doctrine of sources in the same way. In line with such a view, India's first Prime Minister, Nehru, representing the political mandate of the time pointed to the absurdity of "ancient treaties" saying, "independent India" was 'in no way bound by

[90] AZ Borda, The Use of Precedent as Subsidiary Means and Sources of International Criminal Law, 18 *Tilburg L Rev* (2013) 65, 67.
[91] D Shelton, Form, Function, and the Powers of International Courts, 9 *Chicago J Intl L* (2009) 537–571.
[92] *Procès–Verbaux*, *supra* note 4, 332.
[93] AO Enabulele, The Avoidance of Non Liquet by the International Court of Justice, the Completeness of the Sources of International Law in Article 38(1) of the Statute of the Court and the Role of Judicial Decisions in Article 38(1)(d), 38 *Commonwealth Law Bulletin* (2012) 617, 626.
[94] JM Jones, Constitutional Limitations on the Treaty-Making Power, 35 *American J Intl L* (1941) 462, 463.

any old or modern treaty between other countries to which not subscribed'.[95] But in reality India did accept colonials treaties as Nehru's views was for political consumption.

If not more, such sources should at least not fall within 31(3)(c) that together with ICJ 38(1)(d) complete the sources of international law. What is notable is the fact that works of publicists supports a certain view of treaty, subsidiary sources clothed as primary sources.[96]

Small wonder then, developing country publicists identify only treaties as the most important source. For instance, almost all major Chinese publicists, Chiu observes, 'place custom after treaties in their discussions on principal sources of international law.'[97] Furthermore, the Soviet theory of treaties toed similar lines.[98] Communist theory always insisted on consent as the basis of international law and accepted only treaties and custom as sources.[99] As such, today, the developing countries take an

[95] J Nehru, Reply to Debate on Goa in Lok Sabha, July 26, 1955, in, J Nehru, *India's Foreign Policy: Selected Speeches, September 1946—April 1961* (New Delhi: The Publications Division, Ministry of Information and Broadcasting, Government of India, 1983)113.

[96] Thus Aust discredits Klabber's view that a 'Memorandum of Understanding' is same as a "Treaty" which Klabber bases on 'judicial decisions and philosophical argument'. A Aust, *Modern Treaty Law and Practice* (Cambridge University Press, NY, 2000) 42.

[97] Hungdah Chiu, Chinese Views on the Sources of International Law, 28 *Har Intl L J* 289, 295-96 (1987). Xue Hanqin & J Qian, International Treaties in the Chinese Domestic Legal System, 8 *Chinese J Intl L* (2009) 299–322.

[98] K Grzybowski, *Soviet Theory of Treaties*, in, SK Agrawala (ed.), Essays on the Law of Treaties: With Special Reference to India (Orient Longman, Mumbai, 1969) 201-205.

[99] Even today China does not go beyond treaty and customary law as trusted sources. Bing Bing Jia, The Relations between Treaties and Custom, 9 *Chinese J Intl L* (2010), 81–109 who says even 'separateness of these two sources is at times blurred, but shall always be maintained.' Written Statement of China' *Accordance with International Law of the Unilateral Declaration of Independence in respect of Kosovo* (2010) 6, para 3 <http://www.icj-cij.org/docket/files/141/15611.pdf>. 'Judicial decisions' domestic and international both, 'may serve as subsidiary means for the identification of rules of customary international law.' *Third report on identification of customary international law*, Michael Wood, Special Rapporteur, 67th Session of the ILC, UN Doc A/CN.4/682. Besides, China's outstanding issues with regard to its territorial sovereignty are also the most likely explanation why, Muller thinks, for the first time PRC decided to appear before the ICJ in the *Kosovo* proceedings. W Muller, China's sovereignty in international law: from Historical Grievance to Pragmatic Tool, 1 *China-EU L J* (2013) 35–59, 51. Since in the *Case no 21*, the ITLOS has before it a request for an

assiduously conservative approach to sources of international law in contentious proceedings as against their increased participation in written submissions to advisory opinion proceedings.

IV. Concluson

This chapter has first tried to demonstrate that the doctrine of *non liquet* has been rather important in the sources of international law. In the early years of decolonization many aspiring new states tried to claim independence using writings of the publicists (e.g., Hyderabad's case before Security Council). There cannot be a better example of the power of writings. Second, as a strategy, western publicists in their writings reinforced arguments, that failed before a court. The internationalization of contracts is an excellent case in point in this regard. Through a structural process such arguments would become usable primary sources. It is noteworthy that in 2014, the ICJ accepted the validity of even tacit agreements.[100]

The fact that submissions by Western UN Member states before ICTs cite publicists in their written submissions is testimony to the fact that such sovereigns do anchor their arguments in existing scholarship. Historically, and in comparison to the rest of the world, Western States offer more value to the views of the publicists. This difference points to the relationship between State and the private individuals in the

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advisory opinion submitted pursuant to an international agreement other than the UNCLOS, the PRC is wary given any two or more states in South China Sea might sign an agreement to ask the Tribubal to offer opinion on law of the sea issue. The PRC has recently said that 'there is, at present, no provision in UNCLOS that can serve as a basis for the advisory competence of the full bench of the ITLOS'. Request for An Advisory Opinion submitted by the Sub-Regional Fisheries Commission (SRFC), Written Statement of the PRC, Case No. 21, ITLOS, para 94(b) <https://www.itlos.org/fileadmin/itlos/documents/cases/case_no.21/written_statements_round1/C21_8_China_orig_Eng.pdf>.

[100] *Maritime Dispute (Peru v Chile)* (Judgment of 27 January 2014) para 91

capitalist and socialist-communist countries. Liberal states, naturally capitalists, exchange opinions with their publicists. This occasions writings sitting in the footnotes of the written submission by such states. On the contrary, the socialist and communist States, believing in collectivity against the individualistic view, perceive the anchoring of their opinion in publicists as almost heretical.

But the truth is that many developing countries seek the advise of law firms based in Europe or the United States in the matters of international law.[101] Therefore, abstaining from citing a publicist does not mean that non-Western States do not value the opinion of the publicists. For instance, Judge *ad hoc* Tarazi in his dissenting opinion in *Tehran Hostage* case discussed French municipal ruling and a French jurist.[102] Indeed, publicists as experts, continue to form opinions and make international law.[103]

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[101] Papa, *supra* note 41, at 88.
[102] The Dissenting Opinion of Judge Tarazi in *Tehran Hostage Case* [1980] ICJ Rep 63.
[103] David Kennedy, Challenging Expert Rule: The Politics of Global Governance, 27 *Sydney L Rev* (2005) 5-28. More recently in *Romak* arbitration Uzbekistan relied 'on scholarly writings as well as decisions and awards of arbitral tribunals.'Romak v. Republic of Uzbekistan, PCA Case No. AA280 (2009) at para. 95. Interestingly enough Romak, the Swiss Company, rebutted saying because this arbitration is conducted under the UNCITRAL Rules, 'the *Salini* criteria are inapplicable and irrelevant, having been developed within the context of ICSID case law.' Ibid. 107.

Chap III: *Transnational Law* and Decolonisation: Jessup as an Actor

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The chapter 3 unpacks Jessup's *Transnational Law*, a post-war innovation as an example of the role of jurists as sources of law. *Transnational Law* presents perhaps the most suitable example of the private life of international law. In 1956 Jessup popularized *Transnational Law* to conflate national and international law. This scholarly innovation represented an astute legal argument to neutralize the sovereignty of newly decolonized states in disputes with investors. Before 1956, in arbitrations involving Latin American, East European and Asian States, Western arbitrators made an effort to negative sovereignty against investors on the question of "governing law" and the "choice of law"; latter being a chapter in *Transnational Law*. After the nationalization of the Suez Canal, Egyptian President Nasser's rejection of the internationalization of the Constantinople Convention by Dulles, Secretary to President Eisenhower, captures the tension that the application of transnational law on colonial treaties exhibited. After 1956, Western scholars disparaged international law of the permanent sovereignty over natural resources even as they sought to limit the use of *rebus sic stantibus*.

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I. Capitulations and Concessions Contracts Before *Transnational Law*

> Corporate bodies, whether political or nonpolitical, have certainly been treated in orthodoxy theory as fictions, but their essential reality as entities is now well accepted and law deals with them as such. … Transnational situations, then, may involve individuals, corporations, states, organizations of states, or other groups.[1]

The very idea of sovereignty hides an enigma in relation to concessions contracts, the primary economic tool used during centuries of colonialism to exploit natural resources. Historically speaking, concessions contract an accommodation of the rights

[1] P Jessup, *Transnational Law* (New Haven: Yale University Press, 1956), 3; cf David Pierce, Post-Formation Choice of Law in Contract, 50 *Mod L Rev* (1987) 176-201.

of Western traders by Asian rulers.[2] Capitulations served to impose conditions for the residence of Europeans in such Kingdoms for free trade and commerce.[3] The signing of the Treaty of Nanjing, an unequal treaty, between the British and the representatives of the Qing dynasty in 1842 is a good example.[4]

Colonial powers, often after having defeated a native sovereign, used a legal tool, extraterritoriality, to plant foot in the local territory. Later they would strip the locals off sovereignty in a gradual expansion of authority. The motives usually were overwhelmingly commercial and it also covered exemptions from criminal prosecution of the foreigners from local laws—e.g., extraterritoriality in the Treaty of Nanjing. Most of the times, the inadequacies of the native laws were proffered as the reason for creating mixed courts that applied foreign law. Colonial privateers as legal norm entrepreneurs in such ways successfully planted seed of Western law in new soils, albeit with the power of gunboats diplomacy.[5]

Japan followed the British East India Company's model, but cared much less about law than territorial domination and commercial exploitation. After defeating Russia in the Russo-Japanese war of 1905, Japan established the South Manchuria Railway Company in China to promote the business and commercial interest of Japanese

[2] CH Alexandrowicz, *An Introduction to the History of the Law of Nations in the East Indies: 16th, 17th and 18th centuries* (Oxford: Clarendon Press, 1967) 97. See for a discussion on Ottoman-French commercial treaty, A Shalakany, Arbitration and the Third World: A Plea for Reassessing Bias under the Specter of Neoliberalism, 41 *Harv Intl L J* (2000) 419, 431-33.
[3] M Sornarajah, Problems in Applying the Restrictive Theory of Sovereign Immunity, 31 *ICLQ* (1982) 661- 685, 673.
[4] Phil CW Chan, China's Approaches to International Law since the Opium War, 27 *Leiden J Intl L* (2014) 859–892, 866.
[5] However there was a treaty of 7 February 1631 between the King of Persia and the Netherlands, which gave favourable treatment to Persian traders. CH Alexandrowicz-Alexander, A Persian Treaty in the Seventeenth Century, 8 *Indian Yrbk Intl Aff* (1958) 201.

citizens.[6] In China, the world witnessed two varieties of colonialism from two worlds, the West and the East—while the former forced an unequal treaty and extraterritorially, the latter inflicted Asian form of colonization.

By maintaining that China had no history of corporate law a European tradition of philosophical prejudices about Chinese law developed into a distinctively American ideology of empire.[7] The first Sino–US treaty in 1844 authorized the extraterritorial application of American law. A kind of legal imperialism found its fullest expression in an American district court's jurisdiction over China.[8] Similarly France, like Portugal, too had extraterritorial enclaves in India.[9]

Later with Japan's desire to include a racial equality clause turned down at the Paris Peace Conference of 1919, Western racism indeed gained a legal meaning. Trade and commerce did not deliver upon its *laissez faire* promise; it did not lift the Asians to the level of the Western imperial powers. Yet, for American and Europeans lawyers to see transnational law, an innovation to deflate sovereignty in commercial dispute, as an innocuous innovation is to disregard history of colonialism all together. In the world of mercantilism facilitated by colonialism, while the cost of the production of international law through innovative arguments was passed on to the non-West, its makers, the West, kept the profits that accrued.

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[6] R Mitter, *China's War With Japan 1937-1945: The struggle for Survival* (London: Penguin, 2014) 20, 25.
[7] T Ruskola, Legal Orientalism, 101 *Michigan Law Review* (2002) 179-234.
[8] T Ruskola, *Legal Orientalism: China, the United States, and Modern Law* (Harvard University Press 2013).
[9] See BR Whyte, Waiting For The Esquimo: An Historical and Documentary Study of the Cooch Behar Enclaves of India and Bangladesh, *Research Paper 8, School of Anthropology, Geography and Environmental Studies, The University of Melbourne* (2002) 419.

Legal *orientalism* was thus born. And transnational law, one that emerged soon after the end of the World War II, was an innovation to defend capitulations. This transnational law, much like colonialism, was born with congenital dislike for sovereignty of the non-Western peoples and States. As Huang put it in 1957, concessions contracts have vital effect upon world economy, and in other spheres, warranting a consideration of its nature and legal status.[10] Historically, oil in the Middle East, Latin America and Africa, and basic minerals and other extractive products in all parts of the world were exploited under concessions contracts.

Subsequently, Judge Guha Roy questioned whether the responsibility of states for injuries, economic or otherwise, to aliens is a part of universal international law.[11] Both Lillich and Judge Jessup challenged Guha Roy.[12] A later, Abi-Saab wrote about state responsibility and colonial contracts succinctly:

> The colonial administration granted concessions to nationals of the colonizing powers. The liquidation of such situations is necessary for any rational social reconstruction. It can, however, be hampered by a rigorous application of the traditional rules of state responsibility. This is the reason for the necessity for the newly independent states to find ways and means to hold these rules in check.[13]

When decolonization challenged colonial treaties Western lawyers chose not to factor

[10] T Huang, Some International and Legal Aspects of the Suez Canal Question, 51 *American J Intl L* (1957) 277, 289.
[11] SN Guha Roy, Is the Law of Responsibility of States For Injuries to Aliens A Part of Universal International Law? 55 *American J Intl L* (1961) 863, 891.
[12] RB Lillich, The Diplomatic Protection of Nationals Abroad: An Elementary Principle of International Law Under Attack, 69 *American J Intl L* (1975) 359. Lillich garners the support of Phillip Jessup, Non-Universal International Law, 12 *Columbia J Transnl L* (1973) 415.
[13] G Abi-Saab, The Newly Independent States And The Rules Of International Law: An Outline, 8 *Howard L J* (1962) 95, 114. Sinha gave an excellent account of how developing counties felt about various aspects of international law. SP Sinha, Perspective of the Newly Independent States on the Binding Quality of International Law, 14 *ICLQ* (1965) 121.

in the sympathetic nature of colonial contracts while interpreting treaties that favored Western traders.[14] After the World War II, in his *Transnational Law* Jessup addressed the problem that seeing national law and international law as two separate constituencies created without addressing colonialism. For him colonialism was just a granted fact of world history with no doctrinal implication on international law.

When newly born States began using sovereignty as the central tenet of international law, for Jessup, States had lost the monopoly over the production of international law. In fact, Jessup saw developing African and Asian countries colluding with the Latin American countries to 'fasten the blame on the wealthy countries of the West' that operated 'under slogans like self-determination'.[15] As such actions and will of developing states did not produce international law. Therefore after being admitted to the UN system as full participants,

> [M]any of the new States of Africa and Asia tended to devote much of their efforts on forcing a re-examination of certain sociological and normative foundations of positive international law and some of its basic assumptions as they relate to the new political and socio-economic realities engendered by decolonisation and sovereignty.[16]

In 1970, the British Foreign and Commonwealth Office issued a background paper maintaining the position that 'foreigners are on occasions entitled under international to higher standards of compensation that those available to local nationals.'[17] Guha

[14] A Anghie, *Imperialism, Sovereignty and the Making of International Law* (NY: CUP, 2004), 85.
[15] Jessup, *supra* note 1, 19-20.
[16] SL Sempasa, Obstacles to International Commercial Arbitration in African Countries, 41 *ICLQ* (1992) 387– 413, 390.
[17] Expropriation of UK Property in Developing Countries, Background Paper No. 5, Expropriation and Nationalisation of British Companies in South Asian Countries, FCO 37/547, in *Foreign Office Files for India, Pakistan and Afghanistan, 1965-1971* (1970) para. 5.

Roy had in 1961 questioned such a treatment of alien being part of universal international law.[18] Besides, adequate compensation was an unsettled question in as much as the adequate value or price was to be decided by free market or the price set by the expropriating government.[19] This was actually a moot question in the nationalization of "Sterling Tea Estates" in Sri Lanka. A speaking note prepared by O'Neill of the South Asia Department of the British Foreign Office, made an erroneous proposition that '[i]t is up to the companies themselves to decide what compensation will be acceptable.'[20] He thought the price offered by the Sri Lankan government while nationalizing tea estates was 'well below a free market price'.[21]

The *Suez* Canal presents another example. Following two concessions granted by the Turkish Viceroy of Egypt *La Compagnie Universelle du Canal Maritime de Suez* was created via a statute dated 5 January 1856.[22] After the stipulated life of 99 years the Egyptian government was entitled to take over the canal, paying the Company its value as fixed either by agreement or, failing that, like the Sri Lankan colonial estates, by "experts".[23]

In international law in such ways a legal right could be birthed by a mere assertion to that effect. Little wonder 'the support for the norm of full compensation', as

[18] Guha Roy, *supra* note 11, 876-77.
[19] N Girvan, *Corporate Imperialism, Conflict and Expropriation: Essays in Transnational Corporations and Economic Nationalism in the Third World* (New York; Myron E. Sharpe, 1976). Cf. H Dagan, *Unjust Enrichment: A Study of Private Law and Public Values* (NY: CUP, 1997) 136-37.
[20] Speaking Note, *supra* note 26, para. 9.
[21] *Ibid*. BS Chimni, The Principle of Permanent Sovereignty over Natural Resources: Toward a Radical Interpretation, 38 *Indian J Intl L* (1998) 213–14.
[22] French text r*eproduced* in The Suez Canal: A Selection of Documents Relating to the International Status of the Suez Canal and the Position of the Suez Canal Company, *Society of Comp Legislation and Intl L* (1956) l, 11-31.
[23] G Marston, Armed Intervention in the 1956 Suez Canal Crisis: The Legal Advice Tendered to the British Government, 37 *ICLQ* (1988), 773 at 774. See, C Peevers, *The Politics of Justifying Force: The Suez Crisis, the Iraq War, and International Law* (Oxford, OUP, 2014) 67.

Sornarajah writes, 'can only be found in the weakest sources of law—the decisions of some tribunals and the writings of some publicists.'[24] Much of the British investments vicariously attached to its citizens, natural or corporate, took for granted the existence of a right of diplomatic protection of its nationals abroad as part of universal international law.[25] Subsequently it was extended to cover economic injuries as well. It is not that nationalization *per se* is illegal in international law. But as Britain maintained, it be non-discriminatory and compensation adequate, prompt, and effective.[26]

This chapter looks at motivations, material conditions and history behind the innovation called *Transnational Law* and its subsequent use. The timing of decolonization and the simultaneous rise of transnational law need an investigation to light up the alley of commercial agenda that precipitated international law.[27] Notably, while during the colonial period Western States sought to neutralize the sovereignty of Latin American and East European States in investor state arbitrations, the creation of Jessup's *Transnational Law* and its explicit and expedient use by Western scholars in commercial matters characterized the period after decolonization.

II. Birth of Jessup's *Transnational Law*

Jessup's invention presents a "distinctly liberal strain of imperial apologetics that

[24] M Sornarajah, *The International Law on Foreign Investment* 3rd edn. (NY: CUP, 2010) 443.
[25] Guha Roy, *supra* note 11, at 876. S Pahuja, *Decolonising International Law: Development, Economic Growth and Politics of Universality* (New Delhi: CUP, 2012) 135.
[26] Speaking Note, International Committee of the Labour Party: Sri Lanka, FCO 37/ 1710, Nationalisation of Sterling Tea Estates in Sri Lanka, in, *Foreign Office Files for India, Pakistan and Afghanistan 1972-1980* (1976) para. 5.
[27] I Porras, Appropriating Nature: Commerce, Property, and the Commodification of Nature in the Law of Nations, 27 *Leiden J Intl L* (2014) 641, 643.

rushed first to the defence of the British Empire before First World War and then to the aid of American imperialism after the Cold War."[28] In 1956, professor Phillip Jessup, as he was then, popularized the idea of transnational law.[29] Seeds of his transnational law however lay in his Julius Rosenthal Foundation lecture at Northwestern University School of Law on April 18, 1947.[30] Indeed a very lucidly penned piece, it banked on the existing American cases and settlements of awards by tribunals to articulately present a case of sources of international law.[31] Agreeing to the power of publications as sources of law, he noted: 'the opinions of our courts more and more cite law review articles.[32]' "The writers", according to him, 'have played a notable role in the development of international law and their contribution cannot be discredited just by calling them "professors".'[33]

Jessup was rather explicit about the role of ICJ Statute Article 38(1)(d)'s second part. 'It is the publicists' he was of the opinion, 'who now have important claim to consideration in connection with the progressive development of international law and its codification which is being undertaken by the General Assembly of the United Nations in accordance with the obligation imposed upon it by Article 13, par. 1(a) of the Charter.'[34] Jessup's this imaginative piece also drove the role of publicists of the various civilized nations as sources of international law to the fore. He invoked, quite understandably, the works of other publicists in support of arguments made therein. Jessup was certainly one of the most respected publicists of the post-World War II

[28] Onur Ulas Ince, Imperial pasts, imperial presents, *European Journal of Political Theory* (2016 forthcoming).
[29] Jessup, *Transnational Law*, *supra* note 1.
[30] P Jessup, The International Court of Justice and Legal Matters, 42 *Illinois L Rev* (1947), 273.
[31] Ibid., 276-280.
[32] Ibid., 278.
[33] Ibid., 279.
[34] Jessup, *supra* note 30, 297.

world, thus, as ICJ Statute Article 38(1)(d) puts it, a source to determine the law.

A. Arbitrations and the Making of Commercial International Law

In 1927 Lauterpacht lamented the attempt of publicists to distinguish between contract and treaties foretelling that such attempts are "doomed to failure".[35] The main legal questions to arise from disputes involving the breach of concession contracts were whether such contracts are treaties and the issue of the "choice of law". Notably, even though the idea of sovereignty came to the fore in Europe, the Latin American states in investor state arbitrations before and after the First World War were its most frequent users.

Naturally, in the opening pages of his Transnational Law Jessup quotes Georges Scelle saying that international law should not be 'taken exclusively in its Latin etymology'.[36] What he meant was that in commercial matters one must not take sovereignty very seriously. Before the formation of the United Nations, the world was part of the Empire, British or otherwise; the League of Nations had only forty-four participants.[37] Some of such cases like *Cheek v Siam*, involved Asian Kingdoms and East European states too as defendants.[38] The *Cedroni v Guatemala* arbitration found the one-sided termination of the contract by Guatemalan government illegal.[39]

[35] H Lauterpacht, *Private Law Sources And Analogies of International Law* (Connecticut: Archon Books, 1970, Originally Published 1927), 156. Cf. VS Mani, Audi Alteram Partem: Journey of a Principle from the Realms of Private Procedural Law to the Realms of International Procedural Law, 9 *Indian J Intl L* (1969) 381.
[36] Jessup, *supra* note 1, 1.
[37] See, Niall Ferguson, *The Empire: Empire: How Britain Made the Modern World* (London, Penguin Books, 2004).
[38] Award of March 21, 1898, 5 Moore, International Arbitrations 5069 at 5071; *Czechoslovakia v. Radio Corporation of America*, Award of April 1, 1932, 30 *American J Intl L* (1936) 523.
[39] *Cedroni (Italy) v Guatemala*, Award of Oct. 12, 1898, H. La Fountaine, Pasicrisie Internationale (1902) 606.

Similarly, in *Company General of the Orinoco* case before the 1902 French-Venezuelan Mixed Claims Commission, the termination of the contract by Venezuela was held to give rise to an international liability to Great Britain.[40] In *May v Guatemala*, Robert May was awarded damages against the Government of Guatemala.[41]

Again in *Shufeldt* case, a tribunal ruled that a Guatemalan legislation regarding cancellation of concession contract was subject to review by an international court even thought in the tribunal's view the issues involved were only contractual.[42] What is more, in *Shufeldt* arbitration the investor was awarded compensation based, among other things, on "anxiety of mind".[43] It is of particular interest to note that the preliminary draft prepared in 1957 by F. V. Garcia Amador explicitly provides that international obligations whose breach entails State responsibility are those 'resulting from any of the sources of international law'.[44] Will this also cover subsidiary sources remains an interesting question.

The line of Latin American cases is rather large.[45] Quite intriguingly, while investors

[40] *Company General of the Orinoco (France) v. Venezuela,* Opinion of Umpire Plumley, July 31, 1905, Ralston' Report (1906) 244, 322.
[41] *RH May v. Guatemala*, Award of Nov. 16, 1900, 1900 Papers Relating to the Foreign Relations of the United States 659, 672.
[42] *P W Shufedt (US) v Guatemala*, Award of July 24, 1930, 24 *American Journal of International Law* (1930) 799.
[43] See, Sornarajah, *supra* note 24, 158.
[44] See, *Yrbk of the International Law Commission*, 1976, vol. II, Part I, A/CN.4/SER.A/1976/Add.l (Part 1), 11. A typical way for the ILC to start a proposition is to think of what writers have said. 'The works of writers who have discussed the international responsibility of States give but scanty treatment in their works to the question of the possible significance of the source of the international obligation breached. Many writers are content merely to state that an internationally wrongful act and, hence, international responsibility, exist if there has been a breach of an international obligation.' Cf. E Jiminez de Arechaga, Application of the Rules of State Responsibility to the Nationalization of Foreign-Owned Property, in, Kamal Hossain (ed) *Legal Aspects of the New International Economic Order* (Frances Pinter Publishers 1980), 229–30.
[45] *El Tirunfo* (US-El Salvador), US Foreign Relations (1900), 838-862; *Milligan v Peru*, US-Peruvian Claims Commission under Convention of December 4, 1868, 2 Moore International Arbitrations 1643-

came to such poor countries rich in resources on the logic of development of such countries, in *Czechoslovakia v. Radio Corporation of America*, the arbitrator opined that the fact that the State has not realized its expectations of profit couldn't be considered a reason sufficient enough from releasing the state from its obligation pursuant to the concession contracts.[46] Sornarajah writes:

> Takings in pursuance of economic programme came to be debated in after Russian revolution. The Eastern bloc states maintained that such taking was non-compensable … there were two regions, Eastern Europe and Latin America, where European attitudes to state taking were questioned. With the independence of Africa and Asia, two more regions were added, and there were four regions that stood outside the European sphere … [thus] it is futile to suggest that any customary international law would have developed on this point, despite the suggestions of some writers to the contrary.[47]

So much for the democratic legitimacy of international legal doctrines! Much earlier, *Radio Corp v. China* arbitration had suggested that '[t]he Chinese Government can certainly sign away a part of its liberty of action'.[48] Counterintuitively, thus, if the PCIJ[49] and ICJ cases[50] are anything to go by, the public international law of concession contracts uses arbitration between private investors and non-Western

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1644 (1898) *(ex gratia); North and South American Construction Co. (US) v Chile*, 3 *ibid.* 2318; *Hammeken v. Mexico*, Mexican Claims Commission under Convention of July 4, 1868, 4 ibid., 3470-3472; *Central and South American Telegraph Co v Chile*, U. S.-Chilean Claims Commission under Convention of August 7, 1892, 2 Moore's Digest 1477 (1898); *Punchard, McTaggart, Lowther & Co. v Colombia*, Award of Oct. 17, 1899, H La Fontaine, *supra* note 39, at 544; Aboilard (France) *v* Haiti, Award of July 26, 1905, 12 *Rev. Gen. de Droit Int. Public, Documents* (1905), 12-17; *Landreau v Peru*, Award of Oct. 26, 1922, 17 *American J Intl L* (1923) 157.

[46] *Czechoslovakia*, Ibid., 534.

[47] Sornarajah, *supra* note 24, 366.

[48] *Radio Corporation of America v. Republic of China*, *American J Intl L* (1930) 535, 540.

[49] *The Mavromattis Jerusalem Concessions*, Judgment of March 26, 1925, PCIJ Ser.A No 5 (Governmental action interfering with exclusivity of a concession, admission by respondent government of the lack of power under treaty to effect expropriation).

[50] *Anglo-Iranian Oil Co.*, *infra* note **Error! Bookmark not defined.**.

sovereign states as sources. In Serbian Loan case the PCIJ tried to settle this question.[51] The public international law of concession contracts thus emerged from, as Carlston puts it, "living law" of investor-state contracts.[52] Naturally *laissez-faire* lawyers were quick to pick up such arguments; a bid was made to internationalize contracts on the basis of the general principles of law and on the question of choice of applicable law.[53]

While during colonization, concession contracts were read as treaties, the imposition of restrictions on sovereign power became all the more obvious after decolonization as arbitrators sought to curtail the international law of "permanent sovereignty" over natural resources.[54] Even so, Article 2 of the Charter of Economic Rights and Duties of States provided that '[e]very State has and shall freely exercise full and permanent sovereignty, including full possession, use and disposal, over all its wealth, natural resources and economic activities.'[55] The rejection of the explicit international law of permanent sovereignty by arbitrators in *Aminoil* saying this "contention" of permanent sovereignty "lacks all foundation" is therefore simply astounding.[56] Nonetheless, in *AGIP v Congo*, the arbitration panel tethered Congo to the provisions of contract against the sovereign will.[57]

B. International Law After *Transnational Law:* Ideologies As Legal

[51] *Payment of Various Serbian Loans Issued in France* (Fr v Yugo.), 1929 PCIJ (ser A) No 20 (July 12).
[52] KS Carlston, Concession Agreements And Nationalization, 52 *American J Intl L* (1958) 260.
[53] See, Sornarajah, *supra* note 24, at 383. For an excellent summary of post-war scholarship see, Richard A Falk, New Approaches To The Study of International Law, 61 *American J Intl L* (1967) 477.
[54] *Permanent Sovereignty Over natural Resources*, GA Res 1803, U.N. Doc. A/5217 (1962); *Saudi Arabia v. Arabian American Oil Co*., (1963) 27 ILR 117. Pahuja, *supra* note 25, 148.
[55] *The Charter of Economic Rights and Duties of States*, G.A. Res., 3281, U.N. Doc. A/9631 (1973), at 49.
[56] *Government of Kuwait v. American Independent Oil Co.*, 21 ILM 976, 1021 (1982).
[57] *AGIP v. Popular Republic of Congo* (1982) 21 ILM 726.

Doctrines

During the interwar period, and in decades after the World War II, the most highly qualified publicists of the various Western nations—Borchard, Cheng, Delson, Verdross and Wortle, among others—all wrote on expropriation, concession contracts and international law.[58] Some of the successors of these publicists are Amerasinghe, Domke, Dolzer and Schwebel.[59] One wonders how, if ever, the sovereign will, if not the arbitrators, made international law of concessions. However such pro-capital view of international law did not go unchallenged as Soviet writers opposed restrictions on sovereign powers.[60] International law thus became the normative battlefield between apologists of capitalism and protagonists of socialist view of international law. The

[58] They are: Clyde Eagleton, *The Responsibility of States in International Law* (NY: New York University Press, 1928), 165; CC Hyde, Confiscatory Expropriation, 32 *American J Intl L* (1938) 758, 760-761, BA Wortley, Expropriation in International Law, 33 *Grotius Society Transactions* (1947) 25, 30, 31; JN Hyde, Permanent Sovereignty over Natural Wealth and Resources, 50 *American J Intl L* (1956) 854, 862; DP O'Connell, *The Law of State Succession* (NY: CUP, 1956) 107; A Nussbaum, The Arbitration between the Lena Goldfields, Ltd. and the Soviet Government, 36 *Cornell L Q* (1950) 30, 38-39; EM Borchard, *The Diplomatic Protection of Citizens Abroad or Law of International Claims* (NY: Banks Law Publishing Co., 1925); H Herz, Expropriation of Foreign Property, 35 *American J Intl L* (1941) 243; JL Kunz, The Mexican Expropriations, 17 *NYU L Q Rev* (1940) 327; FA Mann, The Law Governing State Contracts, 21 *British Yrbk Intl L* (1944) 11, 22; NR Doman, Postwar Nationalization of Foreign Property in Europe, 48 *Colum L Rev* (1948) 1125; SJ Rubin, Nationalization and Compensation: A Comparative Approach, 17 *Univ Chicago L Rev* (1950) 458; B Cheng, Expropriation in International Law, 21 *The Solicitor* (1954) 98, 100; DP O'Connell, A Critique of Iranian Oil Litigation, 4 *ICLQ* (1955) 267; F Morgenstern, Recognition and Enforcement of Foreign Legislative, Administrative and Judicial Acts which are Contrary to International Law, 4 *Intl L Q* (1951) 326, 329; see, however, R Delson, Nationalization of the Suez Canal Company: Issues of Public and Private International Law, 57 *Colum L Rev* (1957) 755, 776-778; GA van Hecke, Confiscation, Expropriation and the Conflict of Laws, 4 *Intl L Q* (1951) 345; Seidl-Hohenveldern, Extraterritorial Effects of Confiscations and Expropriations, 49 *Michigan L Rev* (1951) 851; Seidl-Hohenveldern, Chilean Copper Nationalization Before the German Courts, 69 *American J Intl L* (1975) 110, 111-12; ED Re, Nationalization of Foreign Owned Property, 36 *Minnesota L Rev* (1952) 323; A Drucker, Compensation for Nationalized Property: The British Practice, 49 *American J Intl L* (1955) 477; CJ Olmstead, Nationalization of Foreign Property Interests, Particularly Those Subject to Agreements with the State, 32 *NYU L Q Rev* (1956) 1122.

[59] SM Schwebel, *International Protection of Contract Arrangements,* 53 *ASIL Prceedings* (1959) 266, 266; R Dolzer, New Foundations of the Law of Expropriation of Alien Property, 75 *American J Intl L* (1981) 553, 585.

[60] GE Vilkov, Nationalisation and International Law, *Soviet Yrbk Intl L* (1960) 58, 77 (1961); VI Sapozhnikov, Neocolonialistic Doctrines of International Protection of Foreign Concessions, *Soviet Yrbk Intl L* (1968) 90, 98. See for a perspective, AFM Maniruzzaman, State Contracts in Contemporary International Law: Monist Versus Dualist Controversies, 12 *European J Intl L* (2001) 309; Pahuja, *supra* note 25, 128.

doctrine of *rebus sic stantibus* stands for the fundamental change in circumstances that can lead to limiting a state's obligations arising from treaties.[61] Article 62 of the Vienna Convention on the Law of Treaties finally gave expression to this doctrine. During the interwar period, while the Western scholars, in relation to contracts, canvassed *pacta sunt servanda*,[62] they at the same time sought to limit *rebus sic stantibus*, in relation to colonial treaties.[63] More particularly, McNair (1925) and Lauterpacht (1927) were at the forefront of rejecting *rebus sic stantibus*.[64]

Given Anghie's thesis that colonialism has been central to the doctrine of international law much doctrinal clarity is desired vis-à-vis VCLT Article 62. While diluting the importance of *rebus sic stantibus* Brierly compares treaties with contracts.[65] For the development of international law Lauterpahct, wanted to 'reduce the emanations of the so-called *rebus sic stantibus* doctrine to the manageable confines of a general principle of law applied by an international tribunal at the instance of the state which claims to be released from the treaty on account of a change in vital circumstances' bolstering *pacta sunt servanda* at the same time.[66] His

[61] OJ Lissitzyn, *Treaties and Changed Circumstances (Rebus Sic Stantibus),* 61 *American J Intl L* (1967) 895-922. Wright had noted the East-West difference on *rebus sic stantibus*. See, Q Wright, *The Strengthening of International Law*, 98 Recueil Des Cours (1959-III) 78.
[62] *Libyan American Oil Company v. Government of the Libyan Arab Republic*, (1977) 62 ILR 140; *Revere Copper & Brass, Inc. v Overseas Private Investment Corporation*, 17 ILM (1978) 1321, 1342.
[63] See, M Craven, What Happened to Unequal Treaties? The Continuities of Informal Empire, 74 *Nordic J Intl L* (2006) 335, 367. A De Jonge, From Unequal Treaties to Differential Treatment: Is There a Role for Equality in Treaty Relations? 4 *Asian J Intl L* (2014) 125, 127. R von Mehren & Kourides, International Arbitrations Between States and Foreign Private Parties: The Libyan Nationalization Cases, 75 *American J Intl L* (1981) 476, 551. Cf. E Jimenez de Aréchaga, State Responsibility for the Nationalization of Foreign Owned Property, 11 *NYU J Intl L & Policy* (1978) 179.
[64] A McNair, So-Called State Servitudes, 6 *British Yrbk Intl L* (1925) 122, cited in Craven, *supra* note 63, 367.
[65] JL Brierly, *The Law of Nations* (6th edn., Oxford: Clarendon Press, 1963) 337.
[66] H Lauterpacht, Codification and Development of International Law, 49 *American J Intl L* (1955) 16, 17. J Kunz, The Meaning and the Range of the Norm *Pacta Sunt Servanda*, 39 *American J Intl L* (1945) 180, 190.

this view however came much later as in his 1927 text titled Private Law Sources he saw *rebus sic stantibus* as a cause of 'embarrassment to international publicists'.[67]

More recently, the issue of *pacta sunt servanda* versus *rebus sic stantibus* resurfaced at the ICJ in *Gabčíkovo-Nagymaros Project* case.[68] Hungry in this case presented arguments in support of the lawfulness of the termination of a treaty using the doctrine of *rebus sic stantibus*. Hungary argued that it was entitled to invoke a number of events which, cumulatively, would have constituted a "fundamental change of circumstances" understood within the meaning of VCLT Article 62.[69] 'The negative and conditional wording of Article 62 of the Vienna Convention on the Law of Treaties is a clear indication' the ICJ however said 'that the stability of treaty relations requires that the plea of fundamental change of circumstances be applied only in exceptional cases.'[70] However drawing the limits of *pacta sunt servanda* Judge Rezek declared in *Gabčíkovo-Nagymaros* case:

> [T]he rule *pacta sunt servanda* means that the treaty creates reciprocal rights between the parties on the basis of a convergence of interests, a pooling of sovereign wills which in all probability will continue to coincide over time. When on both sides of the treaty process, there is a lack of rigour in doing what has been agreed, the commitment weakens and becomes vulnerable to formal repudiation by one of the parties, irrespective of the question of which party was the first to neglect its duties, and it hardly matters that the parties lacked rigour in different ways. Treaties derive their

[67] Lauterpacht, *Private Law Sources*, *supra* note 35, 167. Cf. *Statement of Indian Delegate in the Security Council during the Kashmir Debate*, U.N. Security Council Official Record, 12th year, 764th meeting 26 (S/PV 764) (1957). For China's use of *rebus sic stantibus* see, Chan, *supra* note 4, 874. *Denunciation of the Treaty of Nov. 2nd 1856 Between China and Belgium* P.C.I.J. Rep. Series A, No. 8 (1927) 4–5 discussed in Craven, *supra* note 63, 367-368. D Kennedy, The Sources of International Law, 2 *American Univ J Intl L & Pol* (1987) 57–60.
[68] *Gabčíkovo-Nagymaros Project (Hungary/Slovakia)*, [1997] ICJ Rep p.7, 59.
[69] Ibid. 64.
[70] Ibid. 65.

> force from the will of the States which conclude them. They do not have an objective value which makes them sacred regardless of those common intentions.[71]

Judge Rezek's observation points to an eager and uncritical promotion of one doctrine over other by international law's stalwart scholars that ironically passes on the cost of the development of international to former colonies while former colonizers remain beneficiaries; a doctrinal continuation of colonial *status quo*.

Why should one legal principle be elevated and other depressed is not governed by any doctrine or rule of law, it is an ideological position clothed as a legal argument. And where breaches were seen legal, Dolzer held the view that since expectation of parties govern a contract, and that during the colonial times multinational companies had higher expectations, such expectations should yield higher compensation in the event of a breach![72] However, the right of every State freely to choose its economic system as an aspect of the (economic) sovereign equality of States was introduced in the *Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States*.[73] A writer's doctrinal, view time, and supporting political and geopolitical environment, metamorphoses into a law when an "invisible college of lawyers" sitting on the same side of the ideological fence invoke it.[74] Such a college of lawyers can even paper over UN declarations.[75]

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[71] *Declaration by Judge Rezek*, Ibid., 86. Cf A d'Amato, Treaties as a source of general rules of international law, 3 *Harvard Intl L Club Bulletin* (1961-1962) 1, 13.
[72] Dolzer, *supra* note 59, 580.
[73] See further, Report of the Secretary-General, Progressive Development of the Principles and Norms of International Law Relating to a New International Economic Order, UN Doc A/39/504/Add.1, 23 October 1984, para 3.
[74] *See generally*, Patrick M Norton, A Law of the Future or A Law of The Past? Modern Tribunals and the International Law of Expropriation, 85 *American J Intl L* (1991) 474.
[75] G Abi-Saab, Permanent Sovereignty over Natural Resources, in M Bedjaoui (ed), *International Law: Achievements and Prospects* (UNESCO/Martinus Nijhoff 1991) 600.

The international law of concession contracts is one such candidate for a historical analysis of this law. No wonder in 1961 Guha Roy, thought 'what at first sight appear to be generous sacrifices of acquired rights and interests of considerable value but are really in most cases no more than either belated justice or overdue rectifications of past wrongs'.[76] Therefore, the developing countries' bid at outlawing economic coercion using VCLT Article 52 is then understandable. Article 52 says: 'A treaty is void if its conclusion has been procured by the threat or use of force in violation of the principles of international law embodied in the Charter of the United Nations.'[77]

III. Publicists' Reception of *Transnational Law*

During 1950s, international arbitrations and decisions involving expropriations or nationalizations of concessions, owned wholly or predominantly by foreign nationals, pressed the newly minted transnational law in the service of private property. Legally speaking, these concession agreements were half contract and half legislation, and half treaty and half ordinary municipal contract.[78] As such this "schizophrenic nature"—the result of an agreement between a state and a foreign corporation or individual—led to controversy about these agreements' international status.[79] The Western judicial scheme, the American system for example, as Dickstein explains, 'is predicated upon the notion that particular cases will be tried upon the merits of their

[76] Guha Roy, *supra* note 11, 891.
[77] Article 52: *Vienna Convention on the Law of Treaties*, 23 May 1969, 1155 U.N.T.S. 331, 8 I.L.M. 679; S Malawer, A New Concept of Consent And World Public Order, 4 *Vanderbilt J Transnl L* (1970) 1, 28.
[78] ME Dickstein, Revitalizing the International Law Governing Concession Agreements, 6 *Intl Tax & Business L* (1988) 54; A McNair, The Applicability of "General Principles of Law" To Contracts Between A State And A Foreign National (1957) *ABA Sec Mineral & Natural Resources Law Proceedings* (1957) 168, 170.
[79] Dickstein, Ibid.

particular facts.'[80] Thus, previous misapplications of the law would have no effect upon its proper application to a present set of facts.[81] Effectively then innocence of history is used as a tool of interpretation of international law.

Furthermore, Friedmann saw Jessup addressing the 'increasing fluidity of the traditional distinction between public and private international law' through transnational law, which would, instead of sovereignty or power, work on 'the premise that jurisdiction is essentially a matter of procedure which could be amicably arranged among the nations of the world.'[82] Dillard, the President of the American Society of International Law at the time, noted that the Society was 'acting as a catalyst for the exchange of ideas and documents among practicing lawyers, government officials, teachers of law, political scientists, and corporate officials' helping to foster new concepts in transnational law.[83]

Again, University of Virginia Professor Ramazani noted that '[w]ith the proliferation of international oil contracts, the problem of the choice of law … deserves investigations by the students of "transnational law."[84] For Amerasinghe, the fact that a tribunal is disconnected from any municipal legal system makes the tribunal "a transnational one". [85] Discussing state contracts in international law, Jennings

[80] Ibid., 60.
[81] Ibid.
[82] WG Friedmann, Corporate Power, Government by Private Groups, and the Law, 57 *Colum L Rev* (1957) 155, 176 fn 60.
[83] HC Dillard, A Tribute To Philip C. Jessup And Some Comments On International Adjudication, 62 *Colum L Rev* (1962) 1138, 1140, note 5.
[84] RK Ramazani, Choice-Of-Law Problems And International Oil Contracts: A Case Study, 11 *ICLQ* (1962) 503, 518.
[85] CF Amerasinghe, Some Legal Problems of State Trading in Southeast Asia, 20 *Vanderbilt L Rev* (1967) 257, 269. For an uncritical reception of transnational law, see, C Ku & PF Diehl, International Law as Operating and Normative Systems: An Overview, in, Charlotte Ku & Paul F Diehl (eds) *International Law: Classic and Contemporary Readings,* 3rd edn (Boulder: Lynne Rienner Publishers, 2009) 1, 10.

invoking Jessup noted 'that there is a great wealth of legal material from which answers to these problems may be fashioned whether by judicial elaboration or otherwise.'[86]

Authors are not alone in accepting transnational law. Among the practitioners Domke was perhaps the most ardent student of transnational law.[87] He noted that Jessup's transnationalism 'far from being an outgrowth of only Western concepts, is indeed an expression of fundamental principles embodied in long established legal systems throughout the world.'[88] All of this has been said of course without first clearing the dichotomy that colonialism wedged, among other aspects, into the sources of international law.[89]

'A truly realistic analysis of the law', Alfred von Verdross wrote, shows 'that every positive juridical order has its roots in the ethics of a certain community, that it cannot be understood apart from its moral basis.'[90] One wonders if Verdross' idea of "forbidden treaties" could be extended to cover colonial treaties as bad sources on "moral basis" given colonial servitude, slavery and violence accompanied colonial capture by Great Powers; something antithetical to *jus cogens*.[91]

If that were so, it would have crippled commerce based on concessions system and would straight away terminate many colonial treaties and contracts. It however took

[86] RY Jennings, State Contracts in International Law, 55 *British Yrbk Intl L* (1961) 156, 178.
[87] M Domke, The Settlement of International Investment Disputes, 12 *The Business Lawyer* (1957) 264, 271.
[88] M Domke, Foreign Nationalizations: Some Aspects Of Contemporary International Law, 55 *American J Intl L* (1961) 585.
[89] Sornarajah, *supra* note 24, 19.
[90] Alfred von Verdross, Forbidden Treaties in International Law, 31 *American J Intl L* (1937) 571, 576.
[91] For a discussion on *jus cogens* and the reaction of various governments, see Fifth Report on the Law of Treaties, by Sir Humphrey Waldock, Special, Rapporteur, U.N. Doc., A/CN.4/183 and Add.1-4 (1966) vol. 2 ILC Yrbk, U.N. Doc. A/CN.4/SER.A/1966/Add. 1, para. 20-30.

two World Wars for the world to see the condemnation of colonialism as an issue of *jus cogens*, let alone the condemnation of colonial treaties. The 1984 'Second Report on the Draft Code of Offences Against the Peace and Security of Mankind' noted this with disappointment mixed with astonishment:

> The condemnation of colonialism falls within the sphere of jus cogens, and it is surprising that no reference should have been made to this phenomenon in a draft code drawn up in 1954. It was necessary to wait until 1960 for the adoption of the well-known Declaration on the Granting of Independence to Colonial Countries and Peoples, outlawing colonialism. However, the Charter of the United Nations itself already contained the principle of the condemnation of colonialism.[92]

There was another question in need of an answer, would *jus cogens* rule apply only to treaties concluded after its emergence, or could it also apply to earlier treaties? In the 846th meeting, the ILC 'agreed that nullity of that kind could not be extended into the past *ad infinitum*.'[93] While considering the 'validity of the treaties by which colonial frontiers had been established' the ILC unfortunately 'did not wish to lay down a rule whose consequences would be so absolute.'[94] It is understandable.

The jurists of the ILC could not suggest measures that would give a knee-jerk jolt to international commerce and trade. Ranganathan has recently called attention to the

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[92] *Mr. Doudou Thiam, Special Rapporteur, Second Report on the Draft Code of Offences Against the Peace and Security of Mankind, 1 February 1984, ILC, 36th Session*, U.N. Doc. A/CN.4/377 and Corr.1, at p. 96, para. 48.
[93] *Law of Treaties, 846th Meeting*, (1966), vol. 1(2) Yearbook of the ILC, U.N. Doc. A/CN.4/SER.A/1966, p. 17, para. 74.
[94] *Ibid*. para. 75.

ILC's "subtle" project of strengthening international law.[95] The ILC's project on treaties, she insightfully argues, 'was informed by an appreciation of the politics of international law and was founded on liberal and constructivist assumptions.'[96] The ILC in relation to treaties 'was concerned neither to overload the idea of international law as always providing authoritative solutions, nor to concede its limits to situations of low political charge.'[97] Instead, as Ranganathan concludes, the ILC's approach to treaty conflicts reveals a determination to bolster the influence of international law by deliberately creating treaty conflicts, i.e. pitting one 'legality' against another, putting international law before politics as a result.[98]

IV. The Suez Crisis: The East versus the West on *Transnational Law*

But for the presence of the *Suez* Canal in the Egyptian territory, the West's interest and investment in Egypt would have been a lesser concern. The Khedive of Egypt made a concession in 1856 to Ferdinand de Lesseps to dig a canal across the Isthmus of Suez. This instrument established the Universal Suez Maritime Canal Company for a duration of 99 years from the opening of the Canal, provided for free and equal navigation of the Canal, and for the distribution of tolls. Now, the "concession was confirmed by a Firman of the Sultan of Turkey in 1866. The Universal Suez Canal Company was financed by Egypt and by private investors, largely French. The Canal was opened to traffic in 1868."[99]

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[95] S Ranganathan, Between Philosophy and Anxiety? The Early International Law Commission, Treaty Conflict and the Project of International Law, 83 *British Yrbk Intl L* (2012) 82.
[96] Ibid., 82.
[97] Ibid.
[98] Ibid. 92. The VCLT's one 'identified lacuna is that these rules disregard many differences present in different kinds of treaties.' Ahmad Ali Ghouri, Is Characterization of Treaties a Solution to Treaty Conflicts? 11 *Chinese J Intl L* (2012) 247–280.
[99] Q Wright, Interventions, 1956, 51 *American J Intl L* (1957) 257, 261.

That the "official Egyptian attitudes" toward 'international legal order in general' has been a subject of scholarly study bespeaks of the importance of the Suez Canal for the international trade and commerce.[100] It occasioned independent Egypt's first diplomatic showdown with the West after the Second World War just as the *Lotus* case was Turkey's first legal dispute with France and India's with Portugal. Egyptian president Abdel Nasser nationalized the Suez Canal in July of 1956.

The principal legal issue involved in Egyptian nationalization was 'whether or not the Company was Egyptian'.[101] Obviously Egypt thought it was; the Western powers, voiced in Dulles' words, maintained that the 1888 Constantinople Convention and the international nature of investors invested the Canal with international legal status.[102] Huang, for instance, after careful examination of relevant documents and most importantly, "international law of concessions" argued that the Declaration of the Ottoman Porte of December 1, 1873 gave the Company an international legal status.[103] When the Government of France contended that, because of its unique status, the Suez Canal Company is amenable not solely to Egyptian law, but also to French and international law,[104] one could see this line of argument came from the fount of *Abu Dhabi* arbitration.

In *Saudi Arabia and the Arabian American Oil Company arbitration*, the Tribunal held "that public international law should be applied to the effects of the Concession,

[100] Kathryn B Doherty, Rhetoric and Reality: A Study of Contemporary Official Egyptian Attitudes Toward the International Legal Order, 62 *American J Intl L* (1968) 335, 336.
[101] Doherty, *supra* note 100, 347.
[102] *Transcript of Secretary Dulles' News Conference*, (1956) 35 Department of State Bulletin 406, 407 (Dulles' Transcript).
[103] Huang, *supra* note 10, 307.
[104] UN. Doc. S/P.V. 735, 17, 18, cited in Ibid., 286.

when objective reasons lead it to conclude that certain matters cannot be governed by any rule of municipal law of any state".[105] Such an interpretative choice is political as if "certain matters cannot be governed by any rule of municipal law of any state" it should then become an ideal case, in commercial matters, of *non-liquet* and not an excuse for judicial activism. What is more, Nasser's action led British cabinet to think that "the use of armed force against Egypt" is a possibility "as a legitimate measure".[106] This was in complete contravention to the UN Charter principle that changed the old law of aggression as legitimate to illegitimate. The British Cabinet's view is revealing. Nasser's action 'amounted to no more than a decision to buy out the shareholders', British case for the use of force in commercial matter needed "wider international grounds" of justification.[107]

Yet again publicists came in the aid of the British position. Professor Arthur Goodhart, published a letter in The Times on 11 August 1956, opining that the view that under 'international law force must never be used except to repel direct territorial attack … cannot be accepted, as the use of force is not so limited'.[108] In a clear example political persuasion based on publicists' view, British Cabinet member Viscount Kilmuir, while quoting professor Goodhart's article in the Cabinet meeting, advised Britain to attack Egypt.[109]

Among the many other geopolitical reasons, Nasser is said to have nationalized the Canal after the United States reneged on a promise to provide funds for construction

[105] *Saudi Arabia v. Arabian American Oil Co*., 27 ILR 117; FA Mann, The Proper Law of Contracts Concluded by International Persons, 35 *British Yrbk Intl L* (1959) 34, 47-49.
[106] Marston, *supra* note 23, 776.
[107] Quoted in Ibid.
[108] quoted in Ibid at 778. Cf. MK Nawaz, Limits of Self-Defence: Legitimacy of Use of Force Against Economic Strangulation, 16 *Indian J Intl L* (1976) 252.
[109] quoted in Ibid. 778.

of the Aswan Dam on the Nile River. Though such economic considerations were certainly important, as Doherty says, "the deeper motivation appears to be political: the attainment of full sovereignty and national dignity".[110] Indeed, secretary to President Eisenhower, Mr. Dulles, while answering whether he felt that the Suez crisis would have developed if the United States had not withdrawn American offer of aid for the Aswan Dam, he replied in affirmative:

> I feel quite confident that it would have happened in any event. Indeed President Nasser did not, and does not, attempt to justify his action on the ground of the withdrawal of aid to the Aswan Dam. That would indeed be a very feeble ground upon which to justify it. He justifies it as a step in his program of developing the influence of Egypt, what he calls the "grandeur" of Egypt, and as a part of his program of moving from "triumph to triumph." He puts it on these broad grounds and says he himself has been studying it for over 2 years.[111]

Notably, the same Mr. Dulles, when at the 1919 Paris Peace Conference, had suggested that Egyptian demands for self-determination from British colonialism "should not even be acknowledged".[112] Egypt, as a developing country, maintained that a state may nationalize foreign assets upon payment of "adequate" compensation and that its payment to the Company's shareholder fulfilled that requirement although the compensation amounted to only one third of the Company's estimated loss.[113]

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[110] Doherty, *supra* note 100, 238, fn. 89.
[111] Dulles' Transcript, *supra* note 102, 407-08.
[112] Cited in Pankaj Mishra, *From the Ruins of Empire: The Revolt Against the West And The Remaking of Asia* (London: Penguin Books, 2013) 200. Quite notably, the accounts of Dulles' diplomacy has been the subject of both, emotional heat and scholarly detachment. See, Coral Bell, The Diplomacy of Mr. Dulles, 20 *Intl J* (1965) 90.
[113] UN Doc. A/3898.

Egypt acted on the basis of prompt, adequate and effective compensation for the total value of nationalized assets. But expectedly the value of a property in Egypt and West would be different with no calculable free market value to be imposed.[114] Furthermore, the history of the capture of Egypt by the British is not all together irrelevant here; soon after the eruption of the First World War in 1914, 'the British had declared Egypt a protectorate of the British Empire, formalizing the 1882 invasion and temporary occupation of the country.'[115] And after decolonization, when advocating treaty as a formal source of international law, Western commentators and lawyers strategically ignored the way such treaties were made. To be sure, much of the "concession contracts" signed under the shadow of Imperial threat are then elevated into the realm of international law by calling them "treaties".[116] In that sense, Huang's study of international law of concession that came a year after Jessup's Transnational Law, amounts to an expected transnationalisation of the law of concessions.[117] In 1964, Fatouros made the argument that different standards be applied in judging claims to actions of developing countries emerging from the receding of colonial tides simply because such states have nascent political, legal and economic system.[118]

A. The transnational law of the *Suez* Crisis

The representative of Egypt maintained in the Security Council that the mere fact that

[114] Doherty, *supra* note 100, 348.
[115] Mishra, *supra* note 112, 189.
[116] Portugal made such analogous arguments in the *Right of Passage* case where it said that the contracts signed (*sanad*, *saranjam or jagir*) with the Marathas as amounting to cession of territory. See, *Right of Passage Case*, (merits) [1960] ICJ Rep 6 at 38. See for a discussion, Martins Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP, Oxford, 2013) 131.
[117] Huang, *supra* note 10, 289-297.
[118] AA Fatouros, International Law and the Third World, 50 *Virginia L Rev* (1964) 811; Doherty, *supra* note 100, 362.

the 1888 Convention made mention of the concession agreements did not confer upon them the status of a treaty.[119] The instant development of the law of concessions at the time of the *Suez* Crisis had origins in concession agreements that Hyde liked to call "international economic development contracts".[120] But, as Carlston wrote in relation to concession agreements, "legal rules could not be fully understood or evaluated without a fairly clear understanding of the social facts which they were designed to regulate."[121]

Many of the international economic development contracts concealed behind the verbiage of legal drafting the past of callous rulers in the developing world, privateers and the subsequent direct colonial capture or indirect control of the governments. Therefore in the post UN Charter world, self-determination was the touchstone of which every international legal rule was adjudged. Notably however Huang bluntly postulates "political pressure and indirect means … exerted to secure the grant does not necessarily invalidate the concession if the laws of the conceding state have been complied with."[122]

This of course is debatable. Even in the absence of a negotiation reduced in black and white, it has been argued, lawyer may invoke the haloed and almost legalized doctrine of good faith in international law.[123] For instance, Tariq Hassan writes that under the maxim *pacta sunt servanda*, international law has long recognized that parties to a treaty are bound to perform their obligations thereunder in good faith. This obligation

[119] U.N. Doc. S/P.V. 736, 1, 7.
[120] JN Hyde, Permanent Sovereignty over Natural Wealth and Resources, 50 *American J Intl L* (1956) 854, 862.
[121] Carlston, *supra* note 52, 260.
[122] Huang, *supra* note 10, 292.
[123] T Hassan, Good Faith in Treaty Formation, 21 *Virginia J Intl L* (1981) 443.

to perform in good faith has been thought to arise only after a treaty has been ratified and has entered into force. More recently, however, the international community has come to recognize an application of the principle of good faith to the treaty formation process itself.[124]

But the Middle East is an altogether different story. After the World War I, mandates were added to the British Empire without even the regular official pantomime known as "declaring a protectorate".[125] The doctrine of good faith was used many times, as Portugal did in the *Right of Passage* case, to protect colonial possessions. But how often has colonization been put as a question within the vocabulary of good faith?

Nasser's move of 1956 was judged in the light of his allegiance to Non Aligned Movement and good relations with the Soviet Union.[126] The Egyptian Press quoted President Nasser's astonishment on American observation that the 1888 Constantinople Convention had given an international character to the *Suez* Canal.[127] Yet Egypt accepted the ICJ's jurisdiction.[128] The American media asked Secretary Dulles explain "the meaning of "international" in that connection".[129] Secretary Dulles replied:

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[124] Ibid (footnotes Omitted).
[125] Ferguson, *supra* note 37, 316.
[126] Secretary Dulles of the United States spoke that Almost throughout the entire London conference the Soviet Union 'was carrying on an extreme form of propaganda through its Arab-language radio in Egypt, designed to make it extremely difficult for President Nasser to accept even a fair solution.' See, *Transcript of Secretary Dulles' News Conference*, *supra* note 102, 407.
[127] *Ibid*., 408.
[128] Egypt: Declaration recognizing as compulsory the jurisdiction of the International Court of Justice in conformity with article 36, paragraph 2, of the Statute of the International Court of Justice and in pursuance and for the purposes of paragraph 9 (b) of the declaration of the Government of Egypt of 24 April 1957 on the Suez Canal and the arrangements for its operation, Cairo, 18 July 1957, 13 *ICJ Yearbook* 127 (1958–59) 142.
[129] *Transcript of Secretary Dulles' News Conference*, *supra* note 102, 407.

> [T]he Suez Canal was, of course, built before Egypt was an independent state, when it was still a part of the Ottoman Empire, and at that period it was internationalized by the treaty of 1888, which provides that it shall be a waterway freely open in time of peace and war to the traffic of all of the nations. That treaty was signed by the nations at that time principally interested in the canal and constituting the then "great powers" of the world. It was open for adherence by all countries of the world.[130]

For Dulles it was not necessary to think of the problem in terms of these very great issues, 'these great slogans, such as the slogans of 'nationalism versus internationalism,' or 'nationalism versus colonialism,' or 'Asia versus Europe,' or any such things.'[131] The British were angry at the canal's nationalization and sought the support of France, which believed that Nasser was supporting rebels in the French colonial rule of Algeria. Secretary Dulles who represented the United States at the London Conference on *Suez* Crisis summed up the Soviet propaganda in the following words: 'That propaganda was, in effect, saying to the Egyptian people: Any solution that comes out of the London conference is colonialism, is imperialism, and if you accept it you will have subordinated Egypt again to the colonial rule which you have thrown off.'[132]

B. The Suez Crisis, Publicists and Applied *Transnational Law*

In response to the nationalization of the Suez Canal, on February 12, 1957, the French Government introduced a bill declaring the *Compagnie Universelle de Suez* to be a purely French Company not subject to the laws of a foreign state. The Americans too

[130] Ibid.
[131] Ibid., 407.
[132] *Ibid*.

contemplated "creative thought [to] devis[e] new forms of protection for American investments."[133] Martin Domke, the then Vice President of the American Arbitration Association, noted that the "Suez Canal crisis demonstrates that international law failed to offer new solutions adequate to meet new problems."[134] Legal protection of the investor, he wrote, "in judicial determination of his rights in the foreign country as well as on the international level, requires a new approach to time-old remedial aspect."[135]

And for such a "new approach to time-old remedial aspect" Domke was to turn to Jessup's *Transnational Law*.[136] It is hardly surprising that Domke invoked Friedmann, transnationalism's most astute and devoted subscriber for digging a new approach for *Suez* crisis.[137] For Domke transnational law provided such a new approach, which to Hugo Hahn was inspired by "pragmatic considerations" and "utilitarian concept".[138] Domke noted:

> This development shows a new international "law" governing the taking of property of foreigners when in the national interest of a country in which such assets are located. Economic development, not only in underdeveloped countries, may require appropriation of public resources for public use. It has been labeled the sovereign right of countries to dispose of natural resources and wealth, without mentioning an express

[133] M Domke, American Protection against Foreign Expropriation in the Light of the Suez Canal Crisis, 105 *Univ Pennsylvania L Rev* (1957) 1033, 1034.
[134] Ibid., 1042. Fitzmaurice who became a judge of the ICJ prepared a paper, 'Why the Egyptian action in nationalising the Suez Canal is illegal' for the London Conference. FO 800/747; the copy in the Law Officers' Department file bears at its head the handwritten comment: 'This is not a considered legal opinion but was intended to give us talking points at the Conference' (LO 2/825).
[135] Domke, Ibid., 1042.
[136] Ibid. 1043.
[137] Ibid., quoting Friedmann, Corporate Power, Government by Private Groups, and the Law, 57 *Colum L Rev* (1957) 155, 169. It is little wonder that the law bulletin established by Friedmann was later named Columbia Journal of Transnational Law.
[138] H Hahn, Euratom: The Conception of an International Personality, 71 *Harv L Rev* (1958) 1001, 1013 (references omitted).

> or implied obligation to compensate foreign investors. The resolution of the General Assembly of December 21, 1952 recognized such a right and in spite of the criticism encountered […][139]

"We have to face the fact that competitive coexistence," Domke noted in 1957, "in one form or the other, is here to stay, bringing about new challenges which the Western world has to meet by new approaches to international legal relations."[140] Most importantly, "Creative thought" he pondered "will become necessary to cope with new challenges."[141] Domke wrote in the vocabulary of what many would call reverse-colonialism: "We are, of course, aware of the fact that the Suez Canal crisis is not solely—or even principally—concerned with the nationalization of the Suez Canal Company".[142] More is involved, namely the unilateral abrogation by a foreign government of contracts voluntarily entered into which it decides no longer to respect. [143] Domke uncritically assumes that such contracts were "voluntarily entered"? In fact such attitudes are part of litigation strategies. Indeed Western publicists' reply to "nationalization" of colonial properties by Iran, Egypt, Indonesia, and Cuba in 1950s was an astute transnationalization of international law. However what must not escape attention is that such innovations in law sprang from the writing of publicists citing other publicists.[144]

To be sure, the history of colonial investments leads from one colonizer to another. It is hard to miss the fact that the French joined against Egypt because they were trying

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[139] Domke, *supra* note 133, 1034.
[140] Ibid
[141] Ibid.
[142] Ibid.
[143] Ibid.
[144] M Domke, Foreign Nationalizations: Some Aspects of Contemporary International Law, 55 *American J Intl L* (1961) 585, 596.

to protect its colonial interests in Algeria. How could a movement to overthrow a colonial regime be legal question within international law? And when the erstwhile colonizer did sit to talk in the language of law, the violence came out in the form or normative annihilation of laws other than those emerging from the general principles of law of the civilized nations. The overall argument here is that international law was read as accepting colonialism as a matter of property law transnationalised. International law, Judge Guha Roy wrote:

> [W]hich the worldwide community of states today inherits is the law which owes its genesis and growth, first, to the attempts of these states to regulate their mutual intercourse in their own interests and, secondly, to the use made of it during the period of colonialism.[145]

Yet the doctrine of international law sat comfortably with the colonial capture of lands and resources. Western publicists thus had to internationalize contracts to defend colonial properties without first resolving the doctrinal puzzles that colonialism presented. While within international law the properties built on conquered land had protection of the law, the same law was blind to the temporal attachment of property to colonial land. Ironically, the role of equity and fairness in expropriation became part of the doctrine only after decolonization.[146]

V. Conclusion

[145] Guha Roy, *supra* note 11, 866.
[146] Sornarajah, *supra* note 89, 5.

The time and occasion of the use of transnationalism as an argument presents an example of astute lawyering by writers. However, for the history of international law, the search for the conditions in which transnationalism flourished is important. Among other things, this search is important to highlight the role and power of scholarly writings not as the textual "subsidiary means" but functionally in the making of international law. Transnational law stands for the creativity of arguments within international law. It however also disrobes the idealism that international law purportedly covers itself with. Transnationalism as a legal argument rose to puncture the sovereignty of newly decolonized states and for the protection of properties accrued though colonialism. And as Dezalay and Garth say:

> The law and legal practices directed to the north-south disputes … developed to reflect the interest of Western businesses in avoiding national courts and laws. And merchants found the services useful and valuable also because the perceived autonomy and universality of the *lex mercatoria* enabled the Western merchants to ensure – at least statistically – their domination and their profits in their business relations with ex-colonial governments.[147]

At a time the arguments of equity could be used to highlight the colonial nature of property acquisition, transnationalism rose as a counterargument. Transnationalism, as Sornarajah would say, was pushed into the sphere of international legal argument for purely commercial needs of the erstwhile colonizers. That concession agreements as municipal contracts in 1950s gave host nations with colonial past absolute authority leaving the corporations of developed nations unprotected. The Suez crisis

[147] Y Dezalay & B Garth, *Dealing in Virtue: International Commercial Arbitration and the construction of a transnational Legal Order* (University of Chicago, London/ Chicago, 1996) 98.

thus explains the reasons for the growth of the doctrine of the internationalized contract in international law. The concept of the internationalized contract was derived from the comparison of concession agreements to treaties. By turning contracts into treaty, a legal fiction was created saying international law should now govern such treaty-turned contract. This international law was often called the *transnational* law.

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Chap. IV: Auxiliary sources, Indian judiciary and decolonisation: A Postcolonial Account

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This chapter presents India's case as an example of the reception of international law's subsidiary sources. It is argued that India's political decolonisation did not engender her legal postcolonialism. The Indian Supreme Court continued using international law's subsidiary sources uncritically even as the executive rejected primary law sources like colonial treaties. In 1955, while the Indian executive declared India to be not bound any old or modern treaty between India and other countries, to which she had not subscribed, Indian court adjudged 'writings of publicists' a source of the law of nations. Part of the reason for Indian judges' faith in less consensual subsidiary sources was India's anomalous position in international law between the first Paris Peace Conference and its independence in 1947. A sense of colonial continuity of law swayed the minds of judges. However, this sense of colonial continuity would dissipate due to the environment created by, *inter alia*, the Non-Aligned Movement (1955), ruling in the *Right of Passage* case (1960), Declaration on the Granting of Independence to Colonial Countries and Peoples (1960), and the passing of the United Nations declarations on Permanent Sovereignty over Natural Resources (1962). Between 1947 and 1977, it forced the Indian judiciary to take a more nuanced position on International law's subsidiary sources, expediting the coupling of India's postcolonial executive and structurally colonial judiciary.

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I. Introduction

> Indian Supreme Court justices sprinkled foreign precedents in their judgments to demonstrate that a cosmopolitan approach had at, least been attempted.[1]

[1] R Dhavan, Borrowed Ideas: On the Impact of American Scholarship on Indian Law, 33 *American J Comp L* (1985) 505, 513.

Since the early days of the UN, publicists have applied comparative law to international law.[2] The ICJ Statute Article 38(1)(d) says, cases—international and domestic—and scholarship are sources of international law.[3] The reception of international cases in domestic law is a matter of comparative law, but since they are imported for the resolution of domestic cases, the issue can be studied within Roberts' epithet 'comparative international law'.

Commentators who characterize ICJ Article 38 on sources on sources—namely Article 38—through the prism of positivism rely on both the order in which the sources are listed, and the manner in which they are described.[4] They treat the order as a hierarchy, from the most to the least consensual source: 'treaties before custom before general principles before judicial decisions before publicists.'[5] Though the actual text of Article 38(1)(d) of the Statute places writers before judicial decisions, practice has elevated judicial decisions above teachings.[6]

> Creating a hierarchy among sources based on a frozen characterization of each source as more or less "consensual" advances the project of domesticating the tension between authority and normative criticism within sources doctrine as a whole ... In one vision,

[2] LB Wehle, Comparative Law's Proper Task For The International Court, 99 *Univ Pennsylvania L Rev* (1950) 13-24, WE Butler, International Law and the Comparative Method, in W E Butler (ed), *International Law in Comparative Perspective* (1980) 25, 33; M Koskenniemi, The Case for Comparative International Law, 20 *Finnish Yrbk Intl L* (2009) 1, 1; BN Mamlyuk & U Mattei, Comparative International Law, 36 *Brooklyn J Intl L* (2011) 385. A Roberts, Comparative International Law? The Role of National Courts In Creating And Enforcing International Law, 60 *ICLQ* (2011) 57–92 at 74. M Benatar, International Law, Domestic Lenses, (3)2 *Cambridge J Intl & Comp L* (2014) 357–380.

[3] Statute of the International Court of Justice, June 26, 1945, 33 UNTS 993, Art. 38(1)(d).

[4] D Kennedy, The Sources of International Law, 2 *American Univ J Intl L & Policy* (1987) 1, 29. American authors have talked about the use of international law as a method of reading domestic law. RG Steinhardt, The Role of International Law As a Canon of Domestic Statutory Construction, 43 *Vanderbilt L Rev* (1990) 1103.

[5] Kennedy, Ibid.

[6] A Enabulele, The Avoidance of *non liquet* by the International Court of Justice, the Completeness of the sources of International Law in Article 38(1) of the Statute of the Court and the role of Judicial Decisions in Article 38(1)(d), 38 *Commonwealth Law Bulletin* (2012) 617, 630.

> treaty is the master of custom because it is more consensual [positivists], in another the reverse [naturalists] … [T]he overall project of establishing distinctions and hierarchies [of the sources of international law] protects the image of a doctrinal resolution to the social problem of conflicting authority centers.[7]

Be that as it may, the comparativists have spilt sufficient ink on the Indian Supreme Court's reception, or lack thereof, of foreign judgments.[8] Lawyers have also penned on the Court's manifest borrowings of foreign scholarship.[9] Besides, there is an availability of scholarship on the Court's generous use of public international law in cases involving human rights issues.[10] The idea of a 'comparative international law' brings comparativists and international lawyers together in understanding the reception of international law by the domestic courts. Such an approach enables us to see Indian courts and their reception of international cases and scholarship—the subsidiary sources of international law—in a new light.

International cases appear in judgments of the Indian Supreme Court through the mandate of Article 51 of the Indian Constitution.[11] According to Article 51, "State shall endeavour to: (*a*) promote international peace and security; (*b*) maintain just

[7] Kennedy, *supra* note 4, 29-30.
[8] AK Thiruvengadam, Forswearing 'Foreign Moods, Fads or Fashions'? Contextualising the Refusal of Koushal to Engage with Foreign Law, 6 *NUJS L Rev* (2013) 595–612. Kalb says 'references to international and foreign law in a court's decisions can perform an important communicative function about the court's fidelity to rule of law principles.' J Kalb, The Judicial Role in New Democracies: A Strategic Account of Comparative Citation, 38 *Yale J Intl L* (2013) 423, 437-38 (footnotes omitted); Adam M Smith, Making Itself at Home—Understanding Foreign Law in Domestic Jurisprudence: The Indian Case, 24 *Berkeley J Intl L* (2006) 218. BR Opeskin, Constitutional Modelling: The Domestic Effect of International Law in Commonwealth Countries, 27 *Commonwealth Law Bulletin* (2001) 1242-1278. L Rajamani & A Sengupta, The Supreme Court, in, NJ Jayal & PB Mehta, *The Oxford Companion to Politics in India* (New Delhi, Oxford India Paperbacks, 2011) 80.
[9] Dhavan, *supra* note 1, 513.
[10] Anashri Pillay, Revisiting The Indian Experience of Economic And Social Rights Adjudication: The Need For A Principled Approach To Judicial Activism And Restraint, 63 *ICLQ* (2014) 385-408. C Chinkin, The Commonwealth and Women's Rights, 25 *Commonwealth Law Bulletin* (1999) 96-109.
[11] PC Rao, *The Indian Constitution And International Law* (Taxmann, New Delhi, 1993) 126-197.

relations between nations; (*c*) foster respect for international law and treaty obligations; and (*d*) encourage settlement of international disputes by arbitration."[12] Furthermore, a colonial continuity of law allowed Indian judges to incorporate international law through Article 372(1) of the Indian Constitution. Article 372 says: "Notwithstanding the repeal by this Constitution … all the laws in force in the territory of India immediately before the commencement of this Constitution shall continue in force therein until altered or repealed or amended by a competent Legislature or other competent authority".

Despite Nehru's opposition to colonial treaties for political consumption, India considered itself bound by approximately 627 treaties devised by the British administration in India.[13] In the *Rosline George* case, the Delhi High Court said: '[n]ew nations inherit the treaty obligations of the former colonies' and India therefore 'agreed to take an assignment of all treaties signed on its behalf by Great Britain.'[14] The scholarship on the reception of public international law by Indian courts excludes the nuanced story of Indian courts and the auxiliary sources of international law, i.e. writings of the publicists of international law and cases, domestic and international.[15] A principle reason for this might be the fact that the Court has been mostly constitutional lawyers' subject of study. International lawyers

[12] The Constitution of India, Part IV: Directive Principles of State Policy, Art 51, <http://lawmin.nic.in/olwing/coi/coi-english/Const.Pock%202Pg.Rom8Fsss(7).pdf>. *Kesavananda Bharati v State of Kerala*, MANU/SC/0445/1973, para. 164. See SC Kashyap, *The Constitution of Indian and International Law*, in BN Patel (ed) *India and International Law* (Martinus Nijhoff, Leiden/London 2005) 9-32, 19.

[13] MK Nawaz, International Law In the Contemporary Practice of India: Some Perspectives, 57 *ASIL Proceedings* (1963) 279.

[14] *Rosline George v. Union of India*, MANU/DE/0428/1990, para 1.

[15] Both early and current scholarships do not talk about it. SK Agrawala, Law of Nations as Interpreted and Applied by Indian Courts and Legislature, 2 *Indian J Intl L* (1962) 431; SK Agrawala, India's Contribution to the Development of International Law—The Role of Indian Courts, in, RP Anand, (ed) *Asian States and the Development of Universal International Law* (Delhi/London: Vikas Publications, 1972) 72; VG Hegde, Indian Courts and International Law, 23 *Leiden J Intl L* (2010) 53–77.

working on Indian courts perhaps expected constitutional lawyers to build a consistent theory.

In recent times, much of the scholarship on the Indian Supreme Court has been produced in light of the alleged judicial activism of the Indian judges.[16] From an international lawyers' perspective, it is somewhat apparent that the Court's unexplained and uncritical borrowing of international law's subsidiary sources in its early years was, although structurally comparative, a symptom that led to full fledged activism. A call to human rights and the later suspension of civil rights during the emergency of 1975 was the justification added to the legal liberalism that had long been in practice.[17] Factually, even the Emergency that suspended all civil rights had external factors at play: an earlier proclamation of emergency made in 1971 during the war with Pakistan, an international event, had yet not been withdrawn.[18] Indira Gandhi government superimposed the Emergency of 1975 over the earlier emergency of 1971. The reason given for the former was combating internal disorder whereas the latter had come in the first place for confronting the threat of external aggression.[19]

Besides, the rise of nationalism and the quest for sovereignty among the newly decolonized people of colour notwithstanding, a sense of colonial continuity among Indian judges is also tied with India's anomalous position and status in international law between the first Paris Peace Conference and its independence in 1947. W. E.

[16] The Thirty- Ninth Amendment of 1975 of the Indian Constitution conferred validity on Mrs. Gandhi's election, despite the decision of any court to the contrary. The Supreme Court struck down that clause of the Thirty-Ninth Amendment as being violative of the basic structure of the Constitution in *Indira Gandhi v Raj Narain*, AIR 1975 SC 2299. On June 25, 1975 the Gandhi government advised the President to declare emergency under Article 352 of the Constitution. SP Sathe, Judicial Activism: The Indian Experience, 6 *Washington Univ J L & Policy* (2001) 29, 94.
[17] Ibid., 49, 93-96.
[18] Ibid.
[19] Ibid.

Beckett, legal advisor of the British Foreign Office, on 19 March 1946 wrote about the obligation of the future Indian Government, employing the writings of the publicists.[20] Publicists such as Rama Rao, Oppenheim, and Poulose, amongst others, have also noted that India's status within international law was an anomaly.[21]

Thus, the position of India in matters of international law in the minds of early judges of the Indian Supreme Court was shaped by colonial writings such as Beckett's. This explains the existence of a tradition of generous and uncritical borrowings by the Indian judges of international legal materials, particularly subsidiary sources in their decisions. In fact much of international law in the minds of Indian judges is almost like common law.[22]

In 2006 Indian scholar Upendra Baxi asked, 'how may anyone ever fully offer an impact analysis of the role of the 'publicists' in the shaping of the normativity' of international law?[23] How does one become a highly qualified publicist? Perhaps by writing along the lines of those already recognized as highly qualified publicists and citing them as a proof of the unity of arguments made. One has to then, as Tushnet says, commit to a 'project of international law, that is, to the proposition that nation-states ought to resolve an ever-increasing number and ever-wider range of their disputes through the means of existing and emergent rules of international law rather

[20] WE Beckett, *State Succession in the Matter of Treaties: Obligations of a Future Indian Government*, Opinion By the Legal Advisor of the Foreign Office, FO 371/67725, in Future of French and Portuguese territories in India: Extent of Inheritance of Treaty Obligations by a Future Indian Government, (Foreign Office Files for India, Pakistan and Afghanistan, 1947-1964, 1947) (closed until 1978).

[21] TS Rama Rao, Some Problems of International Law in India, 6 *Indian Yrbk Intl Aff* (1957); more recently see, RP Anand, The Formation of International Organizations and India: A Historical Study, 23 *Leiden J Intl L* (2010) 5–21.

[22] *Centre for Public Interest Litigation and Ors. v. Union of India & Ors.*, MANU/SC/0089/2012, para. 65.

[23] U Baxi, New Approaches to the History of International Law, 19 *Leiden Journal of International Law* (2006), 555-566, 559 (deitalicized).

than, economic or, worse, military force.'[24] Indeed there is an invisible college of 'the most qualified publicist of the various nations', however undemocratic, who compete for space and persuasion.[25] In a recent meticulous study conducted in 2012, Peil has demonstrated that at the ICJ not only are generalist writers cited more than experts, but it is even possible to identify the "most-favored publicists".[26] This not so invisible college of lawyers now—judges on international tribunals, members of the ILC and those fortunate to move between academia and government—clearly do make international law.

With their number going up due to decolonization, in the 1960s developing countries saw General Assembly as an important vehicle through which they could press their claims for economic justice.[27] It was a process through which the developing countries sought to convert the 'law of nations' into 'law of the peoples' of the nations.[28]

Having broken away from Britain a decade and a half earlier before the mass decolonization in Africa, India under Nehru's leadership was busy rallying countries for the Non Aligned Movement (NAM) at the height of the Cold War.[29] I argue that

[24] M Tushnet, Academics As Lawmakers, 29 *Univ Queensland L J* (2010) 19, 20.
[25] J d'Aspremont, Wording in International Law, 25 *Leiden J Intl L* (2012) 557, 577.
[26] M Peil, Scholarly Writings as a Source of Law: A Survey of the Use of Doctrine by the International Court of Justice, 1 *Cambridge J Intl & Comp L* (2012) 136, 158.
[27] ME Salomon, From NIEO To Now And the Unfinishable Story of Economic Justice, 62 *ICLQ* (2013) 31, 33.
[28] U Baxi, What May the "Third World" Expect from International Law? in, R Falk, B Rajagopal & J Stephens (eds), *International Law and the Third World: Reshaping Justice* (Routledge-Cavendish 2008) 16.
[29] Both the courts and the executive have kept in sync with the NAM spirit. *Amar Nath Sehgal v. Union of India and Anr.*, MANU/DE/0216/2005. The Ministry of External Affairs in 2012 updated NAM history on its website. The NAM 'was created and founded during the collapse of the colonial system and the independence struggles of the peoples of Africa, Asia, Latin America and other regions of the world and at the height of the Cold War.' Ministry of External Affairs, Government of India, *History and Evolution of Non-Aligned Movement*, August 22, 2012, <http://www.mea.gov.in/in-focus-article.htm?20349/History+and+Evolution+of+NonAligned+Movement>.

the environment created by the NAM movement,[30] the UN declarations on sovereignty and decolonization, General Assembly resolution 1514 (XV) on *Declaration on the Granting of Independence to Colonial Countries and Peoples*,[31] and *Permanent Sovereignty over natural Resources*[32] egged on the Courts to rethink the sources of international law. The Indian Ministry of External Affairs notes:

> In 1960, in the light of the results achieved in Bandung, the creation of the Movement of Non-Aligned Countries was given a decisive boost during the Fifteenth Ordinary Session of the United Nations General Assembly, during which 17 new African and Asian countries were admitted. A key role was played in this process by the then Heads of State and Government Gamal Abdel Nasser of Egypt, Kwame Nkrumah of Ghana, Shri Jawaharlal Nehru of India, Ahmed Sukarno of Indonesia and Josip Broz Tito of Yugoslavia, who later became the founding fathers of the movement and its emblematic leaders. Six years after Bandung, the Movement of Non-Aligned Countries was founded on a wider geographical basis at the First Summit Conference of Belgrade, which was … was attended by 25 countries.[33]

For a short period of time, Indonesia, an important member of the NAM, withdrew from the UN citing 'the circumstances which have been created by colonial powers in the United Nations so blatantly against our anti-colonial struggle and indeed against the lofty principles and purposes of the United Nations Charter.'[34] However UN declaration of *New International Economic Order* (the NIEO) of 1974 engendered

[30] See, First Conference of Heads of State or Government of Non-Aligned Countries, Belgrade, 6 September, 1961.
[31] Declaration on the Granting of Independence to Colonial Countries and Peoples, G.A. Res. 1514 (XV), 14 December 1960, UN Doc. A/4684.
[32] Permanent Sovereignty over Natural Resources, 14 December 1962, G.A. Res. 1803 (XVII), U.N. Doc. A/5217.
[33] Indian Ministry of External Affairs, *supra* note 29, paras. 4-5.
[34] Letter Dated 20 January 1965 From The First Deputy Prime Minister And Minister For Foreign Affairs Of Indonesia Addressed To The Secretary-General, 4 ILM (1965) 364.

hope.[35] Many Indian international lawyers expressed hope in the NIEO.[36] A general neglect of the NIEO, Anghie wrote in 2015, 'in contemporary discussions and analyses of international relations has obscured the scale of this initiative and the seriousness with which it was treated by states, international institutions, and scholars alike.'[37]

> Regardless of the particular area of international law it was seeking to reform, the Third World had to address and challenge the fundamental issue of the legal doctrine regarding the sources of international law that in its conservative version would negate any attempt at reform … Consent is the basis of international law—no sovereign state is bound by a rule unless it has consented either explicitly, as in the case of a treaty, or else more implicitly as in the case sometimes of customary law. This presented a crucial problem to Third World jurists: Western states, although in a minority, could exercise their sovereignty and refuse to accept the legal reforms proposed by the NIEO, and this refusal would be permissible under international law.[38]

Indeed, law was an important dimension of the NIEO and the politics of international law was the single biggest politics that the developing states had to play.[39] While auxiliary sources of international law for the Indian courts were both a common law and customary law from the start, Indian publicists' normative discomfort with the

[35] New International Economic Order, UNGA Res., 3202 (S-VI), 1 May 1974, Official Records of the General Assembly: Sixth Special Session, Supplement No. 1 (A/9559), pp. 3-12. See, M Bedjaoui, *Towards A New International Order* (New York: Holmes & Meier, 1979).
[36] SK Agarwala, The Emerging International Economic Order, 17 *Indian J Intl L* (1977) 261, KV Raman, Transnational Corporations, International Law, and the New International Economic Order, 6 *Syracuse J Intl L & Commerce* (1978) 17; KB Lall, India and the New International Economic Order, 17 *Intl Studies* (1978) 435; SP Shukla, New International Economic Order, 18 *Indian J Intl L* (1978) 290; R Khan, The Normative Character of the New International Economic Order—A Framework of Enquiry, 18 *Indian J Intl L* (1978) 294; NP Jain, An Approach to the International Economic Order, 19 *Indian Journal of International Law* (1979) 544. More recently, P Ranjan, India and Bilateral Investment Treaties—A Changing Landscape, 29 *ICSID Review* (2014) 419, 424.
[37] A Anghie, Legal Aspects of the New International Economic Order, 6 *Humanity* (2015) 145.
[38] Ibid. 149.
[39] Ibid. 145.

auxiliary sources of the law of nations was palpably visible. In order to deal with this issue, the Indian Society of International law organized "1977-78 Indo-Soviet Seminars" on sources. Indian judge to the ICJ, Nagendra Singh, played an active role.[40] Both Indian and Soviet publicists expressed normative discomfort with auxiliary sources.[41]

In light of the foregoing historical and structural account of subsidiary sources, the *Right of Passage* case offered a definitive moment to Indian judiciary to rethink its continuity with colonial law in postcolonial India. A sense of territorial integrity, after Portugal questioned it at the ICJ, ushered in this rethinking. Though the Court did not become nationalist immediately, the ICJ ruling did allow the Court to sympathize with or at least understand the Indian executive's dilemma. The judiciary and executive thus coupled for a period of time before the court became active again on issues of human rights.[42] The coupling and decoupling of the Indian executive and the judiciary tells a tale of the reception of auxiliary sources of international law which also includes foreign law.

This narrative has been missing in the literature, if any, on subsidiary sources of international law in India. Further, the lack of an express international case involving an erstwhile colonial power in the early days of their birth did not allow other newly

[40] N Singh, Indo-Soviet Seminars of 1977 and 1978, 19 (4) *Indian J Intl L* (1979) 471. In the seminar, both Soviet and Indian publicists challenged the general theory of sources, see, G Tunkin, General Theory of Sources of International Law, 19 *Indian J Intl L* (1979) 474; RS Pathak, The General Theory of the Sources of Contemporary International Law, 19 *Indian J Intl L* (1979) 483.
[41] MK Nawaz, Other Sources of International Law: Are Judicial Decisions of the International Court of Justice A Source of International Law, 19 *Indian J Intl L* (1979) 526; T Starzina, Auxiliary Sources of International Law, 19 *Indian J Intl L* (1979) 522.
[42] R Higgins, Human rights: Some questions of Integrity, 15 *Commonwealth Law Bulletin* (1989) 598-614.

decolonized countries a similar opportunity to rethink international law.[43] In that sense India's case is a unique one, worthy of enquiry.

While the Indian Government accepted colonial treaties, quite curiously, the Indian Court kept using the views of the publicist and ICJ's decisions—lower order sources—for clarifying the points of law. For example, in 1996 in the *Vellore Citizen* case, the Indian Supreme Court expected "international Law jurists" to "finalise" the "salient features" of "[s]ustainable [d]evelopment" as a 'part of the Customary International Law'.[44] This chapter argues that Portugal's challenge to India's sovereignty at the ICJ had a subtle but sure impact on the Court's understanding of the subsidiary sources. This new understanding of the Court led to the coupling of India's judiciary and executive as the Court became more nationalist.

II. Comparative International Law in India: In need of Nuance?

Indeed, there is a twist in the story of comparative international law when applied to countries that were a product of decolonization. Unlike a flat result that the application of comparative international law on American and British cases produces, the use of comparative international law in India displays a nuanced politico-legal process that expose the relationship of the judiciary and the executive in freshly decolonized countries. The Indian Supreme Court that was very comparative since the start was so, as discussed before, because of a sense of colonial continuity of the British law. But this would change due to a judgment of the ICJ and the environment

[43] It is interesting that a recent textbook on international law discusses India and self-determination. W Mansell & K Openshaw, *International Law: A Critical Introduction* (Hart Publishing, 2013) 54. For India's special role among other developing country see, S Yildirim, Expanding Secularism's Scope: An Indian Case Study, 52 *American J Comp L* (2004) 901.
[44] *Vellore Citizens Welfare Forum v Union of India*, MANU/SC/0686/1996, para 10.

created by UN declarations during the 1960s and 1970s, and the NAM movement.

A. Comparative International Law And Indian Courts

Akin to a normative discomfort in importing, or the unexplained eagerness in borrowing cases from the Privy Council and the American Supreme Court, a reading of the Indian Supreme Court's reception of subsidiary sources of international law exposes a normative rancor engendered by decolonization and international law's recognition of self-determination.[45] The General Assembly resolution 1514 (XV) of 14 December 1960[46] that 'Welcom[ed] the emergence in recent years of a large number of dependent territories into freedom and independence' gave further shot in the arm to the idea of decolonization, which Indian courts began to take note of. After the UN declaration on self–determination, Indian judges saw international law as fractured; it lost its colonial continuity as the new countries saw a part of international law's sources repugnant.

Writers of international law whose scholarship was colonial-neutral i.e. who did not see colonialism as a doctrinal problem of international law suddenly were not good subsidiary sources of international law anymore. A typical example of the loss of colonial continuity in decolonial countries is the sentiment expressed by Keba Mbaye, a Judge of the ICJ, that African, Asian, and Latin American countries saw arbitration as a foreign judicial institution imposed upon them and not a system of international

[45] UN Charter Article 1(2), '*The Purposes of the United Nations are:* To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples' <http://www.un.org/en/documents/charter/chapter1.shtml>.
[46] *Declaration on the Granting of Independence to Colonial Countries and Peoples*, Adopted by General Assembly resolution 1514 (XV) of 14 December 1960 <http://www.un.org/en/decolonization/declaration.shtml>.

justice.[47]

The account of comparative citation of foreign law in India is no less fascinating. In the *Virendra Singh v Uttar Pradesh* case,[48] while the petitioners relied upon American cases, the State of Uttar Pradesh relied heavily on the Privy Council decisions. The Supreme Court subsequently overruled *Virendra Singh* in *Mithibarwala* case.[49] Justice Subba Rao, while dissenting in *Mithibarwala*, noted the importance of the *Virendra Singh* case stating *Virendra Singh* case 'pleaded for a departure from imperialistic traditions' in 'adopt[ing] the American traditions, which are in consonance with the realities of the situation created by our Constitution.'[50]

Justice Rao particularly noted counsel Tricumdass' submission that the Court discard the 'theory of public international law that underlies the decisions of the Privy Council', and 'accept and give effect to what might be termed the American view'.[51] In the 1960s, the Indian Supreme Court stood askance between the continuity of English colonial law and the possibility of borrowing American cases. At the Supreme Court of India lawyers called for a postcolonial understanding and application of cases distinguishing British and American jurisprudence based on the similarity of history. Fresh from the bout of colonization, to some Indian lawyer, comparative law seemed fairer and untainted source to rely upon than international law that had colonial origins.

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[47] K Mbaye, The Complementary Roles of Judges and Arbitrators in Ensuring that International Commercial Arbitration is Effective, in, *60 Years of ICC Arbitration: A Look At The Future* (Paris: ICC Publishing S.A., 1984) 293, 293-95.
[48] *Virendra Singh v. State of Uttar Pradesh*, AIR 1954 SC 447.
[49] *State of Gujarat v. Vora Fiddali Badruddin Mithibarwala*, MANU/SC/0031/1964 (*Mithibarwala*).
[50] Ibid. para. 83.
[51] Ibid. para. 45.

But self-determination is a concept and subject of public international law too. Thus far there has been no definitive study to ascertain if the Indian Supreme Court, while discussing matters involving public international law, exhibited a similar debate on subsidiary sources of international law, i.e. writings of the publicists and judicial decisions of international courts. Between 1950s and 1960s and even much later, the Court generously imported British and American authors and ICJ cases in rulings that had international law as an issue to be discussed. Trained in the common law tradition, Indian judges wrote with a sense of colonial continuity, even though the executive called for a postcolonial understanding of international law and institutions. Another reason for the judges to see a colonial continuity, as did Justice Mudholkar in *Mithibarwala* case, was the Indian Constitution's Article 372, holding that all laws in place prior to the constitution's passage were to remain in place unless repealed.[52]

In the *Eastern Newspaper case*, for instance, the Court thought "writings of publicists" is a source of the law of nations as the 'distinction between formal and material sources is difficult to maintain.'[53] In fact the Court noted *Gramophone* case where it held that 'even in the absence of municipal law, the treaties/conventions could not only be looked into, but could also be used to interpret municipal laws so as to bring them in consonance with international law.'[54] But this position had begun to gradually change since 1960, the year the ICJ ruled in the *Right of Passage* case between Portugal and India.[55]

[52] Mithibarwala, *supra* note 49, para. 205.
[53] *Indian & Eastern Newspaper Society, New Delhi v Commissioner of Income Tax, New Delhi*, MANU/SC/0328/1979, para. 8.
[54] *Gramophone* case, *infra* note 151.
[55] *Case Concerning Right of Passage over Indian Territory (Portugal v. India)* (Merits), Judgment of 12 April 1960, [1960] ICJ Rep 6

What led to this realization however? Notably, General Assembly resolution 1514 (XV) came only 6 months after the ICJ had ruled in the *Right of Passage case*.[56] In many ways the UN General Assembly endorsed the ICJ's studied approach to newly decolonized nations in the *Right to Passage case* after becoming '[c]onvinced that all peoples have an inalienable right to complete freedom, the exercise of their sovereignty and the integrity of their national territory'.[57]

The idea of comparative international law points out that the academics, practitioners and international and national courts increasingly seek to identify and interpret international law by engaging in comparative analyses of various domestic court decisions. Indian Supreme Court since its inception in 1950 has engaged in comparative invoking, if not analysis, of American and British cases, as well as international law's subsidiary sources. But soon with the actions taking place in the sphere of international law, Indian courts began displaying a nuanced rejection of international law's subsidiary sources.

B. Publicists of Decolonized States

The publicists from decolonized States also display a different political economy that merits a mention here. The conflict as to the relevance of publicists from the newly independent states took place largely in the context of the efforts of the decolonized states to change the economic structure established during colonialism. These states believed that the structure of the existing order favoured the erstwhile imperial states. Consequently, a division arose between attitudes of developed and developing states.

[56] Ibid.
[57] General Assembly resolution 1514 (XV), *supra* note 46, para. 11.

Sornarajah maintains that in certain circumstances writings of Western scholars were used as the main source for reaching a decision.[58] Doctrinally speaking, the ICJ article 38(1)(d) does not factor in the differences between a developing and a developed nation. That this provision survived the World War II and existed before the United Nations began favoring major decolonization is very important. Therein lies the political economy of the subsidiary sources. There is gap of almost two decades between the establishment of the ICJ and the UN Declaration on the NIEO in the wake of the widening 'gap between the developed and the developing countries.'[59] Admittedly, as the resolution puts it, the UN was 'established at a time when most of the developing countries did not even exist as independent States.'[60]

It is important to recount the use of these sources deemed subsidiary by the ICJ statute, between the day the ICJ Statute was adopted and the day the NIEO resolution was passed. This was the period in which many erstwhile colonies were graduating to a sovereign status. This process was politically charged and emotionally tied to the history of colonial rule and injustices. The new countries had to reconsider the older contracts made between colonizers and the colonies. Resource rich states had their economies dependent upon the exploitation of natural resources.[61] In 2012, the

[58] M Sornarajah, *The International Law on Foreign Investment*, 3rd edn., (Cambridge University Press, NY, 2011) 277.
[59] NIEO, *supra* note 35. *See*, Wenhua Shan, From North-South Divide to Private-Public Debate: Revival of the Calvo Doctrine and the Changing Landscape in International Investment Law, 27 *Northwestern J Intl L & Business* (2007) 631, 632
[60] Ibid.
[61] SK Banerjee, The Concept of Permanent Sovereignty Over Natural Resources—An Analysis, 8 *Indian J Intl L* (1968) 515, BS Chimni, The Principle of Permanent Sovereignty over Natural Resources: Toward a Radical Interpretation, 38 *Indian J Intl L* (1998) 208, 213–14. VI Sapozhnikov, Sovereignty over Natural Resources, *Soviet Yearbook International Law* (1964-65) 93, 94. J Summers, *Peoples and International Law*, 2nd Edn (Martinus Nijhoff, Leiden, 2014) 344.

Supreme Court of India in the *Centre for PIL* case borrowed the international law on natural resource from subsidiary international law that has changed after the NIEO:

> The ownership regime relating to natural resources … In international law … rests upon the concept of sovereignty and seeks to respect the principle of permanent sovereignty (of peoples and nations) over (their) natural resources as asserted in the 17th Session of the United Nations General Assemble [*sic*] and then affirmed as a customary international norm by the International Court of Justice in the case opposing the Democratic Republic of Congo to Uganda. Common Law recognizes States as having the authority to protect natural resources insofar as the resources are within the interests of the general public. The State is deemed to have a proprietary interest in natural resources and must act as guardian and trustee in relation to the same.[62]

After decolonization, existing colonial contracts tied natural resources by contract to exploitation by foreign multinational corporations.[63] Some of these contracts relating to oil became the subject of international litigation. *Texaco v Libya* arbitration, for example, as Raman and other scholars said then, was the first international decision purporting to examine the status of the NIEO as evidence of emerging customary international law.[64] But unfortunately, *Texaco* award of a single arbitrator points to efforts at preventing the wishes of the developing countries being given weight within

[62] *Centre for Public Interest Litigation and Ors. v. Union of India & Ors.*, MANU/SC/0089/2012, at para. 65. Chimni, *supra* note 61, 213–14.
[63] N Schrijver, *Sovereignty over Natural Resources: Balancing Rights and Duties* (Cambridge University Press 1997) 36. Georges Abi-Saab, Permanent Sovereignty over Natural Resources, in, M Bedjaoui (ed), *International Law: Achievements and Prospects* (UNESCO/Martinus Nijhoff 1991) 600.
[64] Raman, *supra* note, 36, 53, Banerjee, *supra* note 61, 515, Chimni, *supra* note 61, 13-14. S Rangarajan, The Structure of and Legal Control Over Multinational Corporations in a Mixed Economy, 15 *Indian J Intl L* (1975) 453; WD Verwey, The Establishment of a New International Economic Order and the Realization of the Right to Development and Welfare–A Legal Survey, 21 *Indian Journal of International Law* (1981), 1.

customary international law.[65] The arbitrator, Professor Dupuy, dismissed the resolutions of the General Assembly on the NIEO as having only aspirational value. He effectively regarded General Assembly resolutions as not having law creating effect given the lack of consensus.[66] Thus through interaction between arbitral awards and writings, a new law was created contrary to what was stated in the NIEO.

An intriguing situation arises thus; while General Assembly resolutions do not create international law, writings of the publicists, a subsidiary source, does. No wonder, after the NIEO, 'sovereign equality, that in theory offers a normative defence against unwelcomed commercial influence, has failed to embed any positive requirements to advance a comprehensive system of equitable benefit-sharing internationally.'[67] In the first postcolonial phase Indian courts stood witness to the doctrinal disquiet between international investment law and decolonization.[68]

Perhaps therefore, for instance, in the 1958 *Dalmia Cement Co*. case the Indian Supreme Court, while comparing the view of the ICJ and in reference to contracts, noted: 'all rights to property, including those in real estate, are lost when a new sovereign takes over except in so far as the new sovereign chooses to recognize them

[65] *Texaco Overseas Petroleum v Libya*, 53 ILR 389. Cf. M Sornarajah, The Myth of International Contract Law, 15 *J World Trade* (1981) 187–217.
[66] R Higgings, *International Law And Avoidance, Containment and Resolution of Disputes*, Recueil Des Cours (1991-V), at 55.
[67] Salomon, *supra* note 27, at 34. Sempasa writes that African countries (like most Third World nations) largely focused their greatest attention over the last half a century upon emphasising the exigent issues impacting upon their autonomy as the principle of permanent sovereignty over natural wealth and resources and the quest for a NIEO which are presented as necessary linkages to any normative rules, particularly those which relate to economic development contracts between developing States and multinational companies. Samson L Sempasa, Obstacles to International Commercial Arbitration in African Countries, 41 *ICLQ* (1992) 387, 390–94.
[68] PS Rao, General Principles of International Law and India, in Bimal N Patel, *supra* note 12, 52.

or confer new rights in them.'[69] This position is in complete disagreement with what Beckett had to say in 1946 about the obligations of a future Indian government.[70] Again in *State Trading Corporation*, the Indian Supreme Court ruled that '[t]he fact corporations may be nationals of the country for purposes of international law will not make them citizens of this country for purposes of municipal law or the Constitution.'[71]

III. Political Economy of the ICJ Statute Article 38(1)(d) on Subsidiary Sources

The past few years have seen a steady rise in the scholarship on subsidiary sources of international law.[72] President of the 1920 drafting committee, Baron Descamps, maintained that in the absence of treaties or custom, the Court should rely on the works of publicists to avoid the blind alley of *non-liquet*.[73] Clearly, teachings of the most highly qualified publicists were included in the text of Article 38(1)(d) to purge *non-liquet* i.e. to avoid a situation where an international tribunal thinks it does not have any law to administer in the case at hand.[74] The Indian Supreme Court in *Gandhi v State of Gujarat* nodded in support of this proposition saying, 'The court is not

[69] *Dalmia Dadri Cement Co v The Commissioner of Income Tax*, MANU/SC/0084/1958 (Justice Vivian Bose) para. 26-30.
[70] Beckett, *supra* note 20, para. 5.
[71] *State Trading Corporation v. Commercial Tax Officer*, MANU/SC/0038/1963, para. 23.
[72] Peil, *supra* note 26, 136, AZ Borda, A Formal Approach to Article 38(1)(d) of the ICJ Statute from the Perspective of the International Criminal Courts and Tribunals, 24 *European J Intl L* (2013) 649; Enabulele, *supra* note 6, 617.
[73] Process-Verbaux of the Proceedings of the Committee of Jurists 16 June–24 July 1920, in, *Procès-Verbaux of the Proceedings of the Committee 16th–July 24th 1920 with Annexes* (The Hague: Van Langerhuysen Bros., 1920) 318.
[74] J Stone, *Non Liquet* and the Function of Law in the International Community 35 *British Yrbk Intl L* (1959) 123, 138.

entitled to decline to determine the legal meaning of a statute on the principle "non-liquet".'[75]

The Indian Supreme Court's borrowing of the lower order and less consensual subsidary sources of international law when the executve rejected even main sources remains an unexplained enigma. While shifting through the jurisprudence of the Court, one comes across this nuance. Indeed, the Court has made a good use of subsidiary sources despite the fact that many scholars find strong evidence that 'judges favor the states that appoint them' to ICJ thus making the use of decisions of international courts not the best sources of international law.[76]

There is another way to look at writings of the publicists; through the lens of ICJ Statute article 17(2) which says 'No member may participate in the decision of any case in which he has previously taken part as agent, counsel, or advocate for one of the parties, or as a member of a national or international court, or of a commission of enquiry, or in any other capacity.'[77]

Thus participation in a particular case bars a judge from that case on the simple grounds of the conflict of interests. It is noteworthy to see what the ICJ actually sees as valid enough to consider it as an example of showing conflicting interest; if a member has participated 'as agent, counsel, or advocate for one of the parties'. These

[75] *DJ Gandhi v. State of Gujarat*, MANU/SC/0163/1989, para. 10.
[76] E A Posner & Miguel de Figueiredo, Is the International Court of Justice Biased? 34 *J Legal Studies* (2005) 599. Perhaps therefore power is being passed from international commercial arbitration user parties, to arbitral institutions (alongside proposals for centralized arbitrator information) as a solution to perceived problems of arbitrator bias and lack of diversity. See, Magdalene D'Silva, Dealing in Power: Gatekeepers in Arbitrator Appointment in International Commercial Arbitration, 5 *J Intl Dispute Settlement* (2014) 605–634.
[77] ICJ Statute, *supra* note 3.

are duties in which one provides "legal assistance" to one of the parties leading to an assumption that the person may want a particular party to win. Such "legal assistance" in the form of written arguments is a subject of private domain. But imagine a scholar who has published a piece in a journal and then gets elevated to the ICJ as a member. Will an author's particular writing, naturally part of 38(1)(d), attract ICJ Article 17?[78] Well, it depends. As Reisman wrote in 1960:

> General legal articles, of course, are not framed as memoranda. There has been no study of the genealogy of articles. It seems certain, however, that many specific problems occur to scholars because of concrete cases that arise or appear to be developing. The article deals with the case or, at least, with the facts of the case, though the matter is generalized, perhaps cloaked. In a few instances, the relation to the case will be apparent on the face of the article. In most instances, however, the genealogy of the article will be known with certainty only by the writer. If there is a relation, it might constitute a disability under Article 17, assuming that a doctrinalist, by virtue of his status in Article 38 of the Statute, is considered an official for the purposes of Article 17.[79]

Lauterpacht and Jessup were two of the most vocal supporters of the views of publicists as sources.[80] Lauterpacht sat uncomfortably with the gap in practice that he

[78] With James Crawford's election to the ICJ, Four Judges Elected To Serve On International Court of Justice, <http://www.un.org/apps/news/story.asp?NewsID=49277#.VHyA_Ut_ibA>, one can expect his recusal from cases in which he has given opinion. More recently, on 29 June 2015, Lubanga moved the ICC to disqualify Judge Fernández de Gurmendi because of her previous involvement in the case before the same 'Chamber in a situation which might reasonably cast doubt on her impartiality' as 'parts of the curriculum vitae, which do not appear' in her 'public presentation on the website of the International Criminal Court, confirm that she performed high-level functions within the Office of the Prosecutor.' *The Prosecutor v Thomas Lubanga Dyilo*, Urgent Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi, No ICC-01/04-01/06 (29 June 2015) paras 7, 10.

[79] WM Reisman, Revision of the South West Africa Cases, 7 *Virginia J Intl L* (1966) 1, 53.

[80] H Lauterpacht, *The Development of International Law by the International Court* (CUP, New York, 1958) 25. P Jessup, The International Court of Justice and Legal Matters, 42 *Illinois L Rev* (1947) 279

thought is at odds with the plain language of the ICJ Statute.[81] The ICJ has made reference to publicists only on two occasions: the *Anglo-Norwegian Fisheries* and *Nottebohm* cases.[82] Notably, Lauterpacht had advised a party in the *Nottebohm* case and thus did not participate in that phase of the case, which arose during his incumbency.[83] He specifically cited the ICJ Statute Article 17 in his letter of February 7, 1955 to the Court.[84] The more recent 2002 ICC Statute Article 41(2)(a) provides:

> A judge shall not participate in any case in which his or her impartiality might reasonably be doubted on any ground. A judge shall be disqualified from a case in accordance with this paragraph if, inter alia, that judge has previously been involved in any capacity in that case before the Court or in a related criminal case at the national level involving the person being investigated or prosecuted. A judge shall also be disqualified on such other grounds as may be provided for in the Rules of Procedure and Evidence.

Invoking this ICC Article, on 29 June 2015, Lubanga moved the ICC to disqualify Judge Fernández de Gurmendi because of her previous involvement in the case before the same 'Chamber in a situation which might reasonably cast doubt on her impartiality' as 'parts of the curriculum vitae, which do not appear' in her 'public

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saying writers 'have played a notable role in the development of international law and their contribution cannot be discredited just by calling them "professors".'

[81] Peil *supra* note 26, 143.

[82] 'It is true that the experts of the Second Sub-Committee of the Second Committee of the 1930 Conference for the codification of international law' in *Fisheries case* [1951] ICJ Rep 116, 129. '[S]ame tendency prevails in the writings of publicists and in practice.' *The Nottebohm Case (Second Phase),* [1955] ICJ Rep 4, 22.

[83] Reisman, *supra* note 79, 51.

[84] Cited in Ibid., fn 188.

presentation on the website of the International Criminal Court, confirm that she performed high-level functions within the Office of the Prosecutor.'[85]

IV. India And the *Right of Passage* Case

The *Right of Passage* case is relevant to India in many ways. The case attracted the concern of Indian courts about the doctrine of territorial sovereignty. It is in this sense that the *Right of Passage* case was a watershed moment central to the coupling of India's body politic with its judiciary, at least in the decade that followed.

After Britain took control of India, the Portuguese continued the peaceful use of the passage to Goa till the Second World War. In the *Right of Passage* case, Portugal complained about the progressive restriction of its right of passage between October 1953 and July 1954. The ICJ held that 'Portugal had in 1954 a right of passage over intervening Indian territory … to the extent necessary for the exercise of Portuguese sovereignty'[86] 'in respect of private persons, civil officials and goods in general'.[87] By nine votes to six, the ICJ found that 'India has not acted contrary to its obligations resulting from Portugal's right of passage in respect of private persons, civil officials and goods in general'.[88]

Historically speaking, with regard to the coupling of India's body politic with its judiciary, the chapter contends that the role of the *Right of Passage* case is significant

[85] *The Prosecutor v Thomas Lubanga Dyilo*, Urgent Defence Application for the Disqualification of Judge Silvia Fernández de Gurmendi, No ICC-01/04-01/06 (29 June 2015) [7, 10].
[86] *Case Concerning Right of Passage over Indian Territory (Portugal v. India)* (Merits), Judgment of 12 April 1960 [1960] I.C.J. Rep. 6, 45.
[87] Ibid., 46
[88] Ibid.

as it reawakened the Indian judiciary to the importance of territorial sovereignty in postcolonial States. The Government of India had contended that the subject matter of the Portuguese claim was 'too vague for the Court to be able to pass upon it by the application only of the legal rules enumerated in Article 38, paragraph 1, of the Statute', as the ICJ Statute enumerates, the sources of international law.[89] The arguments from the Indian Government before the ICJ had struck at the root of the traditional sources of international law, an argument that heralded a postcolonial perspective on the sources of international law. Quite notably, the ICJ while observing that the enclaves under contention were "of negligible political and economic importance to India", propounded political ideas, which went beyond the ICJ's legal mandate.

> [T]he Indian Government and people have doubtless never concealed their desire that the Goans should be allowed to join the Union of Independent India to which they are attached ethnically and culturally, whereas however the Indian Government has always said with equal force that that reunion must be achieved without violence; whereas it is difficult to see why any different attitude should have been adopted with regard to the enclaves which are of negligible political and economic importance to India.[90]

Such views on the 'political and economic importance to India' serve as a smoking gun to the subsequent *exposé* registered in the diplomatic *communiqué* between London and Lisbon after the ruling. Sir Charles Sterling, the then ambassador of Britain to Lisbon recorded the Portuguese Foreign Minister's conversation that Portugal did not get a completely favourable ruling from the ICJ 'due only to the

[89] *Right of Passage* case, supra note 86, 12.
[90] Ibid., 24.

illness of the British Judge and the death of one of the Latin American Judges committed to the Portuguese cause'.[91] Notably, the ICJ contemplated upon India's "annexationist designs".[92] In the past, *Maratha* kings ruled this part of India and from time to time 'the Portuguese were granted authority to put down revolt or rebellion in the assigned villages'. Portugal cited this as 'an indication that they were granted sovereignty over the villages'.[93] The ICJ ruled:

> Whereas Portugal is equally unfounded in her reliance upon recognition of Portuguese sovereignty in the enclaves, either contained in a treaty of 1779 negotiated by Portugal with the *Maratha* Empire, or flowing from the attitude of the British or Indian Governments between 1818 and 1954; Whereas the negotiations of 1779 never resulted in an agreement and whereas the draft treaty in contemplation in any event involved no transfer of sovereignty.[94]

Alexandrowicz and Anand, and more recently, Chimni have all argued that the recognition of a treaty of 1779 entered into between the Portuguese and the Marathas in the *Right of Passage* case established conclusive proof of the fact that, far from being in a legal vacuum, the confrontation between the "two worlds" took place on a footing of equality in the ensuing commercial and political transactions.[95] The *Right*

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[91] Letter of Sir C Stirling, on April 30, 1960), No. 51 (1012/5/60, Portuguese Right of Passage Over Indian Territory: Judgement of the International Court of The Hague FO 371/152541, in, *Foreign Office Files for India, Pakistan and Afghanistan 1947-64 documents* (1960), para. 6.
[92] *Right of Passage*, *supra* note 86, 25.
[93] Ibid., 38.
[94] Ibid., 23.
[95] Professor Alexandrowicz in the past has maintained that an attempt was made in the Right of Passage proceedings to contest the validity of the Treaty by our general notions of treaty law. The ICJ emphasized in its judgment that an eighteenth-century treaty must be interpreted on the basis of legal notions peculiar to both parties and in force at the time of its conclusion. See CH Alexandrowicz, Doctrinal Aspects of The Universality of the Law of Nations, 37 *British Yrbk Intl L* (1961) 506, 512. See also Anand, Editor's Note, in RP Anand (ed) *Asian States and the Development of Universal International Law*, *supra* note 15, xii; BS Chimni, International Law Scholarship in Post-Colonial India: Coping with Dualism, 23 *Leiden J Intl L* (2010) 23, 34.

of Passage case was India's first case at the ICJ.[96] It was India's litmus test to stamp its newfound sovereignty. India was seeking to put its foot down on the last attempt from a European nation to claim parts of the disputed territory based on colonialist arguments. The ICJ verdict worked both ways; it gave a sense of satisfaction to Portugal by stating that it still had the right of civil passage, and to India by stating that Portugal could not conduct an armed intervention into the affairs, which India claimed was internal in nature.[97]

A. The Political Economy of the *Right of Passage* case

The *Right of Passage* ruling was delivered on 12 April 1960. Like any other nationalist upsurge, India won its freedom after a protracted struggle against the British Crown that involved civil disobedience as well as armed rebellion. Fortuitously, the *Right of Passage* case preceded most of the rulings that the Indian Supreme Court delivered where the Court had to rule on the reception of international law in the domestic legal order. The political economy of this case is rather important for understanding, to use Nehru's phrase, India's tryst with international law.

The Security Council subsequently debated the issue of self-determination and the use of force in relation to Goa.[98] In 1956, Portugal had refused to agree that it had any self-governing territories.[99] However, due to the arguments from Soviet Union and Ceylon (now Sri Lanka), Goa was seen as a non-self-governing territory, which

[96] *Right of Passage*, *supra* note 86.
[97] RP Anand, The International Court of Justice and the Development of International Law, 7 *International Studies* (1965) 228.
[98] UNGA, Complaint by Portugal (Goa), Decisions of 18 December 1961, 987th meeting and 998th meeting (S/5030), paras. 2-10, 98, 128-9.
[99] MK Nawaz, Colonies, Self-Government and the United Nations, *Indian Yrbk Intl Aff* (1962) 3, 23.

refuted the Portuguese arguments.[100] In the 987th meeting, C.S. Jha, the representative of India, stated that the Portuguese had invented a "legal fiction" by putting before the Council a question of a colonial nature.[101] Therefore, a question of aggression did not arise. Though Keith thought that India's arguments on Goa were motivated by self-interest, which is hardly an irony given that erstwhile colonized countries had to pull together disparate territories to create a nation and claim sovereign status, India's practice found support in the so-called "salt-water" theory of self-determination.[102]

Indian sovereignty, a species of postcolonial sovereignty, stood hostage to British and Portuguese diplomacy for a long time after its independence. Naturally, India was quick to act politically and finally annexed Goa and other former Portuguese enclaves in 1961 into the Union of India.[103] The archives of the British Foreign Office are replete with diplomatic exchanges about how even after the ICJ judgment, British ships did not seek diplomatic clearance, a sovereign matter, before entering India.[104] J.H. Fawcett from the Office of the British Deputy High Commissioner, Bombay, in his letter to London, wrote a brief note on Hindu-Catholic relations after the new Indian takeover in Goa. Portuguese, he said, 'cannot for example have been pleased to see a large and ugly statue of Gandhi erected at one end of the main square of Old

[100] KJ Keith, Asian Attitudes to International Law, 3 *Australian Yrbk Intl L* (1967) 1, 17.
[101] Such accusations were supported by Indian judges like Guha Roy, see, SN Guha Roy, Is the Law of Responsibility of States for Injuries to Aliens a Part of Universal International Law? 55 *American J Intl L* (1961) 863, 879, who stated: 'What again does Brierly mean by saying that the theory does not introduce any fiction of law'?
[102] Keith, *supra* note 100, 17. As late as 1974, Sinha had asked whether self-determination had indeed become an established principle of international law. See SP Sinha, Has Self-Determination Become a Principle of International Law Today? 14 *Indian J Intl L* (1974) 332.
[103] See Internal Political Affairs of Goa, Daman and Diu in FCO 37/266, *Foreign Office Files India, Pakistan and Afghanistan: 1965-1971* (1967-1968). Portugal has been concerned about the self-determination of its former colonies. Another example of such a concern is *Case Concerning East Timor (Portugal v Australia)*, [1995] ICJ Rep 90.
[104] Letter of W. F. Mumford, 3rd October, 1968, Ibid., 4.

Goa', which is 'surrounded by the great monuments of Catholic Portugal'.[105] As Abi-Saab notes, during the Goa debate 'some newly independent states elaborated the theory that colonialism is a permanent aggression' and therefore 'reconquering colonized territory, far from being an aggression, is a legitimate act of self-defence.'[106] Naturally, such views met with heavy resistance from Western powers.[107]

B. Rulings in the Shadow of the *Right of Passage*

In *Monterio v. State of Goa*, the Indian Supreme Court accepted that the Indian Armed Forces, following a short military action, did occupy Goa.[108] Goa came under Indian administration from 20 December 1961 and was governed under the Goa, Daman and Diu (Administration) Ordinance 1962 promulgated by the President of India.[109] The formation of the United Nations Charter was a watershed moment in the shift of jurisprudence in international law as the Charter declared illegal any acquisition of territory by war or aggression. This was a change of position as earlier the writers of international law had seen title by aggression as being good.[110] In *Monterio*, to the dismay of many western commentators, Justice Hidayatullah ruled 'events after the Second World War have shown that transfer of title to territory by conquest is still recognised.'[111] Justice M. Hidayatullah, the former Chief Justice and acting President of India in 1968, expressed a similar opinion while disagreeing with leading British publicists in 1969, the year the Vienna Convention on the Law of the

[105] Letter of J.H. Fawcett of 27 June 1968, ibid., 15.
[106] G Abi-Saab, The Newly Independent States And The Rules Of International Law: An Outline, 8 *Howard L J* (1962) 95, 112.
[107] Ibid.
[108] *Remedios Monterio v. State of Goa*, 26 March 1969, A.I.R. 1970 SC 329, para. 3.
[109] Ibid.
[110] See, The Act for Regulating and Ordering the Troops that are, or May be Raised, for the Defense of this Colony (Connecticut), 1775, by King of Great Britain.
[111] *Remedios* Monterio, *supra* note 108, para. 25.

Treaties was adopted:[112]

> [Indian] representatives do not seem to be alive to the requirements of our Constitution. The suggestions of Brierly, Hersch Lauterpacht and Gerald Fitzmaurice do not serve to remove our difficulties but make them greater. The suggestion of Hersch Lauterpacht that there should be compulsory submission of the question of international Court of Justice cannot avail in India where Supreme Court will be moved to examine the legality of the consent.[113]

Similarly while discussing the "Goa incident" Professor Quincy Wright wrote that the 'military take-over of Goa by India' was of legal importance, primarily because it indicated 'a major difference between the East and the West in the interpretation' of the UN law.[114]

V. An Account of the Indian Supreme Court's Reception of the Subsidiary Sources

The Supreme Court of India held its first sitting on 28 January 1950. It goes without saying that in order to know the use and application of international law one has to ground one's study in national jurisdictions. While discussing the sources of international law it is important to consider the municipal effects of international norms, and the force of international treaties, upon non-signatories.[115] While the

[112] 1969 Vienna Convention on the Law of Treaties, 23 May 1969, 1155 UNTS 331.
[113] M Hidayatullah, Foreword, in, SK Agrawala, (ed) *Essays on the Law of Treaties: With Special Reference to India* (Mumbai: Orient Longman, 1969) vi. See CG Raghavan, Treaties Making Power Under The Constitution of India, in, Agrawala (ed) Ibid., 217, 218. However, in 1974, India signed up to the compulsory jurisdiction of the ICJ.
[114] Q Wright, The Goa Incident, 56 *American J Intl L* (1962) 617.
[115] Kennedy, *supra* note 4, 12.

structures of Indian courts retained this colonial legacy, Hegde observes, 'the response of the political establishment of the new India towards international law was anti-colonial.' [116] Yet the judiciary first acknowledged the role of publicists in international law in *Singhji v. Rajasthan* considering "juristic opinion" as a source of law.[117] Much later in *Eastern Newspaper* it said 'submissions of professional lawyers and the seminal activities of legal academics enjoy no higher status' but the 'only exception is provided by the writings of publicists in, international law.'[118] In the spirit of colonial continuity since 1950, the Indian Supreme Court believed that subsidiary sources complete international law. Even though early rulings of the Indian Court first pointed out to the anachronism of colonialism,[119] the judges failed to point out the nuance that borrowing subsidiary sources of international law in domestic cases would induce.

As the 'death of colonialism and the end of World War II birthed new nations across the globe,' the Court remarked in *Coelho* 'these states embraced rights as foundations to their new constitutions.' [120] Justice Mudholker when inking his opinion in *Mithibarwala*, tried to situate international law in a postcolonial frame but then he failed to proffer an effective postcolonial view.[121] Justice Mudholker opined:

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[116] Hegde, *supra* note 15, 53. Also see, VS Mani, Effectuation of International Law in the Municipal Legal Order: The Law and Practice in India, 4 *Asian Yrbk Intl L* (1997) 145.
[117] *Thakur Amar Singhji v State of Rajasthan*, MANU/SC/0013/1955, para. 46. Other cases before the *Right of Passage* case where the Supreme Court talked of international law are *Bengal Company v Bihar*, MANU/SC/0083/1955; *Madras v Rajagopalan*, MANU/SC/0068/1955; *Ahmed v Bombay*, MANU/SC/0043/1957, etc.
[118] *Eastern Newspaper Society v Commissioner of IT*, MANU/SC/0328/1979, para. 8.
[119] *Madhav Rao Scindia v Union of India*, MANU/SC/0050/1970, para. 104. In *Rajeev Mankotia v. Secretary to the President of India*, MANU/SC/0743/1997, whether a building that 'furnishe[d] the historical evidence of the Colonial holocaust unleashed on Indians … required to be maintained as historical monument of national importance, [was] the question before' the Court, para. 2.
[120] *IR Coelho v State of Tamil Nadu and Ors.*, MANU/SC/0595/2007., para. 61.
[121] *State of Gujarat v. Badruddin Mithibarwala*, *supra* note 49, para. 212.

> Now, a rule of international law on which the several Privy Council decisions as to the effect of conquest or cession on the private rights of the inhabitants of the conquered or ceded territory is founded has become a part of the common law of this country. This is 'law in force' and is saved by Art. 372 of the Constitution. The courts in India are, therefore, bound to enforce that rule and not a rule of international law governing the same matter based upon the principle of state succession which had received the approval of Marshall C.J. and which has also received the approval of several text-book writers, including Hyd (*sic*). It is true that the International Court of Justice has also stated the law on the point to be the same but that does not alter the position so far as the municipal courts are concerned.[122]

Mudholkar refused the lure of judicial activism in effect rejecting legal postcolonialism: 'If in the light of this our law is regarded as inequitous or a survival of an imperialistic system the remedy lies not with us but with the legislature or with the appropriate Government by granting recognition to the private rights of the inhabitants of a newly acquired territory.'[123] In such ways, the Court continued to borrow authors of international law who did not see colonialism as a problem of international law.[124] This meant that while the Court's heart was postcolonial, its mind remained colonial. It saw scholarship as colonial-neutral.

All this would however change gradually but only after Portugal's challenged India's sovereignty in the *Right of Passage* case.[125] It was soon visible as a year after the

[122] Ibid. para. 205.
[123] Ibid.
[124] See an interesting argument in, SK Agrawala, The Role of General Assembly Resolutions as Trend-setters of Private Practice, 21 *Indian J Intl L* (1981) 513. In fairness to the Indian Judges, scholars did not see colonialism as central to international law formation and thus inimical to rights of colonized peoples until Anghie's seminal work. A Anghie, *Imperialism, Sovereignty and the Making of International Law* (NY: CUP, 2007).
[125] *Right of Passage over Indian Terrirories (Portugal v India) (Merits)* [1960] ICJ Rep 6, 9.

Right of Passage decision, in *Sahib v Chief Commissioner*, a decision about a French colony, the Indian Supreme Court ruled that Pondicherry not being within the territory of India, a situation created by the French colonialism, is somewhat anomalous.[126] Judging the political tension patent to this subject, the Court was surely careful enough to point out that the Indian government has "enough power" even at the stage of the 'de facto transfer to remedy the situation.'[127] The Court thus saw the executive the makers of international law and cared less about what foreign international law scholars had to say about international law on this issue. In 1950, the Indian Supreme Court first spoke of 'international law' in *Saksena v State* in relation to extradition.[128] While quoting Wheaton later, the Court said that a 'sovereign state, could not be sued against its will in the municipal courts of India'.[129]

After 1960, we see a clear change in the Court's approach to ICJ rulings. In the *State Trading Case*, the Indian Supreme Court held that a corporation may be national of India for purposes of international law but that this will not make it citizen for the municipal law.[130] *State Trading* is notable because 13 years into its existence, the Indian Court displayed an impressive use and application of the teachings of the highly qualified publicists of the various nations. When the judgment is given a closer read, we see that of the nine judges sitting in the bench only three wrote their opinions. And among those 3 judges, Justice Hidayatullah takes the lion's share in citing, quoting and analyzing the views of the publicists; English, French and

[126] *Masthan Sahib v. Chief Commissioner, Pondicherry*, 8 December 1961, AIR 1962 SC 797, para. 45.
[127] Ibid. From a juristic point of view, a rigid reading of Sahib v Chief Commissioner leads to the ratio in *Electronics Corporation of India Ltd. v. Commissioner of Income Tax and Anr.* MANU/SC/0331/1989, suggesting that Parliament's powers to legislate means only a competence to enact laws with respect to aspects or causes that occur, arise or exist, or may be expected to do so, solely within India.
[128] *Saksena v. State*, MANU/SC/0016/1950, para. 8.
[129] *State of Tripura v Province of East Bengal*, MANU/SC/0027/1950, para. 7.
[130] *State Trading Corporation v Commercial Tax Officer*, MANU/SC/0038/1963

German.[131] Some of the scholars discussed to arrive at a position are Weis, Moore, Starke, Young, McNair, Oppenheim and Hyde. [132]

Mithibarwala followed the *State Trading* case wherein the Indian Supreme Court conducted a lengthy discussion on international law.[133] The Court had to discuss textbooks and the view of the ICJ asserting that the ICJ's position does not alter the position in municipal courts.[134] The Court talked about aligning Indian law with public international law only to the context expounded by the Privy Council in its decisions rendered on appeals from the Indian High Courts.[135] Next, the Court made an explicit reference to jurists and the PCIJ marking a distinction between what might be termed the theory of the law and the enforceability of these rights in municipal courts citing Hyde, for example.[136]

The Court defended India's position by saying '[n]either the comity of nations, nor any rule of International Law can be invoked to prevent a sovereign State from safeguarding its national economy and taking steps to protect it from abuse.'[137] Previously, in *Promod Deb* case, the Court had said international law might recognizes the right to private property upon the incumbency of a new sovereign, but

[131] See, Hidayatullah, Ibid., para. 26-100.
[132] Weis, Nationality and Statelessness in International Law (1956), Heinrich Ahrens, Cours De Droit Naturel (1860); III JB Moore, Digest of International Law (1906) para. 52, Starke, *An Introduction to International Law* (4th edn.); E. Hilton Young, *Nationality of a Juristic Person*, 22 Harv L Rev (1908–1909) 1, 2; A Mcnair, 24 *British YB Intl L* (1923) 44, RA Norem, Determination of Enemy Character of Corporations (1930) 24 *American J Intl L* (1930) 310; Oppenheim, International Law, (Lauterpacht ed.,), 2 Hyde, International Law (2nd edn.) (by Hidayatullah at paras. 33, 38, 52, 64, 67, 75 respectively). Hidayatullah studied at Cambridge, probably taught by McNair and/or Lauterpacht.
[133] *Mithibarwala*, *supra* note 49, 1043.
[134] Ibid. para. 210.
[135] Ibid. para. 14.
[136] Ibid. para. 53.
[137] Ibid. para. 58.

municipal courts have no jurisdiction to enforce such international obligations.[138] The Court chose to stress the role of dualism saying, 'it is not necessary that all treaties must be made a part of municipal law.' The Court drew support from Alexanderowicz, a professor at Madras University.[139] The Court further said: "Our practice and Constitution shows that there are limitations upon the powers of Courts in matters of treaties and Courts cannot step in where only political departments can act. The power of the Courts is further limited when the right is claimed against the political exercise of the power of the State."[140]

A year later, in *Commissioner of Income Tax*, the Indian Supreme Court was asked whether 'under International Law the assessee [sic] is immune from taxation.'[141] The High Court whose decision went for appeal at the Supreme court held that under international law, the respondent 'being a sovereign up to January 25, 1950, his income up to that date was immune from taxation'.[142] The case generated a full-blown discussion of the privilege of the sovereign. Palkhiwala, counsel for the respondent, argued that as, during the accounting year, the respondent was a ruling chief, 'he was exempt from taxation under the International Law.'[143]

Admittedly, the Court was forced to look into the evolutionary nature of the international law vis-à-vis the liability of a sovereign to taxation in respect of private property.[144] It is not hard to guess that there must not have existed any work on the subject by an Indian author then. Though a matter for a national court to decide, the

[138] *Deb v. State of Orissa*, 1 Supp SCR (1962) 405.
[139] Mithibarwala, *supra* note 49, para. 147.
[140] Ibid. at para. 148.
[141] Cited in *Commissioner of IT v. Osman A. Khan*, MANU/SC/0125/1965, para. 4-5.
[142] Ibid. para. 5.
[143] Ibid. at para. 10.
[144] Ibid. at para. 12.

Supreme Court reached out for an international law textbook. It relied upon, *inter alia*, *Oppenheim's International Law*, (8th edn., Vol. I).[145] It next invoked the power of a scholarly journal: 'Interesting and instructive discussion on the question of a foreign sovereign's immunity from taxation is respect of his private properties is found in the American Journal of International Law, Vol. 46, at p. 239, under the heading 'Immunity from Taxation of Foreign State-owned property' the Court said.[146]

What is more, the Court admittedly decided whether the Nizam (king) of Hyderabad was a sovereign or not based on this journal article and Oppenheim's view.[147] Later, in 1969 *Maganbhai Ishwarbhai*, Chief Justice Hidayatullah noted Judge Huber's observation in the *Island of Palmas* case about manifestations of territorial sovereignty.[148] Recently while representing Italy before the Indian Supreme Court Harish Salve invoked *Maganbhai* case in which the Court had held that unless there be a law in conflict with the treaty, the treaty must stand.[149] In *Lahoria* the Court while discussing the meaning of extradition invoked O'Connell, Cherif Bassiouni and Oppenheim.[150] In *Gramophone* case, quoting Lauterpacht, the Court tried to answer two questions: first, whether international law is, of its own force, drawn into the law of the land without the aid of a municipal statute and, second, whether, so drawn, it overrides municipal law in case of conflict.[151] But when international law runs into such conflict with municipal law, the Court was of the opinion that:

[145] Ibid.
[146] Ibid. para. 13.
[147] Ibid. para. 16, 17. The Court had similar issues at hand in *Raja H Singh v. Commissioner of IT*, MANU/SC/0242/1971.
[148] *Maganbhai Ishwarbhai Patel/Manikant Tiwari v Union of India*, MANU/SC/0044/1969, para. 56.
[149] *Republic of Italy thr Ambassador v Union of India*, MANU/SC/0059/2013, para. 40.
[150] *Daya Singh Lahoria v Union of India*, MANU/SC/0260/2001, at para. 7.
[151] *Gramophone Company of India v Pandey*, MANU/SC/0187/1984, para. 4.

> [T]he sovereignty and the integrity of the Republic and the supremacy of the constituted legislatures in making the laws may not be subjected to external rules except to the extent legitimately accepted by the constituted legislatures themselves. The doctrine of incorporation also recognises the position that the rules of international law are incorporated into national law and considered to be part of the national law, unless they are in conflict with an Act of Parliament.[152]

The Court quoted Fried, '[t]he test of a treaty are its exceptions. The proof of a treaty pudding is, when it cannot be eaten.'[153] More recently, in *Narmada Bachao Andolan* the Indian Court mentioned the International Law Commission's definition of precautionary principle.[154] In *Jolly Varghese* case**,** Justice Krishna Iyer relied on Robertson to support India's dualism.[155] In *Thakur* the Court invoked Lauterpacht on the importance of the principle of equality.[156] In the celebrated case of *Indra Sawhney*, the Supreme Court quoted Judge Tanaka's opinion from *South West Africa Cases (Second Phase)*.[157] The Indian Supreme Court in *Vishaka* held international conventions the norms of which are absent in domestic law are to be read into Indian constitutional rights.[158]

International law is truly an externalization of European pacts, agreements and treaties through colonialism. Factually speaking, first the straitjacket of international law was created, and then as and when countries became free an attempt was made to

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[152] Ibid. para. 5. The Court drew support from *Tractoroexport, Moscow v Tarapore & Co*., MANU/SC/0003/1969 quoting John HE Fried, The 1965 Convention on Transit Trade of Land-Locked States, 6 *Indian J Intl L* (1966) 9.
[153] Ibid., para. 10.
[154] *Narmada Bachao Andolan v Union of India*, MANU/SC/0640/2000, para. 119.
[155] *Jolly George Varghese v Bank of Cochin*, MANU/SC/0014/1980, para. 10. This case clarified that regarding international conventional or treaty law, India subscribes to the dualist position; such agreements have no binding effect unless implemented by legislation. See Smith, *supra* note 8, 243.
[156] *Thakur v. Union of India*, MANU/SC/1397/2008, para. 4.
[157] *Indra Sawhney v. Union of India*, MANU/SC/0104/1993, paras. 407, 408.
[158] *Vishaka v. State of Rajasthan*, (1997) 6 SCC 241.

fit them into it. That 'the history of international law' as Jennings wrote, 'is essentially the story of a struggle between the idea of a legally ordered society of States, on the one hand, and, on the other, the idea of a mere juxtaposition of sovereign States each one ultimately legally autonomous'[159] became all the more clear after decolonization.

There is no doubt that for many developing countries, India for example, international law is as much a matter of politics as it is of law. This is evidenced by the fact that out of the four ICJ judges from India, two were bureaucrats while the later two Supreme Court judges. Furthermore in the matters of human rights,[160] women empowerment, prisoners' rights, and most recently, rights to access to medicine,[161] Indian domestic courts have been one of the biggest conductors and consumers of international law. In relation to bilateral investment treaties India has been open. As PS Rao notes, 'the context in which these Agreements are being negotiated departs from the earlier phase involving the immediate post-decolonisation period.'[162]

VI. Conclusion

Perhaps the single most important problem in advocating domestic courts as agents of international law is the collapse of the separation of powers in developing countries. International law is a matter of foreign office or the ministry of external affairs and it is political though conducted within the established legal boundaries. Thus to put faith in the mountain of cases from the British and the North American courts decided

[159] RY Jennings, The Progress of International Law, 34 *British Yrbk Intl L* (1958) 334.
[160] *Charan Lal Sahu v Union of India*, AIR 1990 SC 1480.
[161] *Novartis AG v Union of India*, MANU/SC/0281/2013.
[162] PS Rao, Bilateral Investment Protection Agreements: A Legal Framework for the Protection of Foreign Investments, 26 *Commonwealth Law Bulletin* (2000) 623.

before 1920 (comparative) and the subsequent PCIJ and ICJ rulings using writers and publicists of international law (subsidiary) appeared crass to many third world scholars, lawyers, judges and even courts.

The reception of international law in India presents a dichotomy. The two principal receptors, scholars and the courts, exhibit varied approaches also due to the classic divorce between teachers and courts in India. Many ask what form has the old structural borrowing of the Court has taken today. However, a more important observation is that while early Indian judges to the ICJ, Sir Benegal Rao and Nagendra Singh, were bureaucrats, more recently international judges from India have been domestic judges: judges Judge Pathak and Judge Bhandari both come from the Supreme Court while judge to the ITLOS judge PC Rao comes from the Indian foreign ministry.[163]

Methodological weaknesses, Chimni says, compounded by 'formalist and statist orientation' characterises Indian scholarship preventing it from coming to grips with the character of international law and doctrinal import of dualism in developing countries.[164] While there is still today a hard disjoint between Indian and western scholars, the Indian judges and bureaucrats of the Indian foreign ministry are, through legal soliloquy, more aligned with international courts and foreign bureaucrats. Notably, the division of opinions at the PCIJ in the *Lotus* case, gleaned from the dissenting opinions it generated, first pointed to 'the unsatisfactory nature of international law concerning extension of national competence to crimes on the high

[163] However Knop thinks international lawyers are too quick to dismiss domestic judges. Karen Knop, Here and there: International Law in Domestic Courts, 32 *NYU J Intl L & Politics* (2000) 501.
[164] Chimni, *supra* note 95, 42.

seas and helped in the development of law in this regard.'[165] In the *Republic of Italy* case before the Indian Supreme Court, India's reference to the *Lotus* case and the distinction of facts made by the Indian Court allowed it to appreciate the authority of the UNCLOS, a law later in time.

In such ways, the Indian Supreme Court has succeeded in opening new windows to welcome international legal norms through the generous use of the ICJ article 38(1)(d). However, it does not see, as much as Lauterpacht would have wanted to, its rulings becoming sources of international law.[166] At best Indian rulings are *opinio juris*. Yet international law's appeal to India has gone up as it distinguished *Republic of Italy case* from *Lotus* case in the light of the UNCLOS.

It is however also clear that when the Indian Supreme Court applies international law; it applies it because that international law has been incorporated into the municipal law of India.[167] The Indian Supreme Court's dislike of the colonial furniture within the postcolonial state building, of which the rule of law is a central part, has been pathological and nuanced.[168] It continues to affect India's understanding of the sources of international law where it uses both the components of the ICJ article 38(1)(d) to settle domestic cases. The avoidance of *non-liquet* within international law is an assumption of the completeness of the sources of international law by the Indian

[165] RP Anand, Role of Individual and Dissenting Opinions in international adjudication, 14 *ICLQ* (1965) 803.
[166] *Scindia* case, *supra* note 119, para. 46.
[167] Citing *Hukumchand Mills v State of Madhya Pradesh*, AIR 1964 SC 1329 and *Mani v Sangeetha Theatre*, (2004) 12 SCC 278, Mr. Banerji, representing India, urged that if the executive authority had the requisite power under the law, and if the action taken by the executive could be justified under some other power, mere reference to a wrong provision of law would not vitiate the exercise of power by the executive, so long as the said power exists. *Republic of Italy* case, *supra* note 149, para. 58.
[168] *State of Maharashtra v. Chavan*, MANU/SC/1055/2010, at para. 45.

Supreme Court.[169] It is thus argued that the completeness of the sources of the law within the meaning of ICJ Statute article 38(1) allows the Indian Supreme Court to plug gaps in the domestic law with the support of rulings of international and foreign courts and writings of publicists.

Thus domestic courts are becoming an important agent of international law today. Monism or dualisms, commentators today expect the rulings of international courts to develop the law of state immunities by national courts. Some also maintain that the distinction between contract claims (domestic) and treaty claims (international) does not necessarily justifies the existence of two wholly separate layers of legal obligations. Furthermore, more recently, another notable issue is that of domestic courts often erring when they grant effects to foreign award judgments.

India is its good example: The Indian Supreme Court in *Bhatia International* actively ruled that Indian courts have the power to order interim measures for arbitration conducted outside India only to overrule *Bhatia* in *Bharat Aluminium Co* case.[170] Thus while apt in borrowing from foreign and international rulings, the Indian Supreme Court has shown a dim empathy in enforcing foreign awards. As Nariman says:

> [T]he peculiar feature of a domestic award in India is that its finality is not respected by the parties nor looked upon too seriously by courts: for over fifty years (from 1940 to 1996) courts in India had become accustomed to supervising arbitral awards, and

[169] Enabulele, *supra* note 6, 651.
[170] *Bhatia International v. Bulk Trading*, 2002, 2 S.C.C. 105. The Court however overruled *Bhatia* in *Bharat Aluminium Co. v. Kaiser Aluminium*, 2012, 9 S.C.C. 552.

setting them aside for errors apparent on their face (a jurisdiction done away with only under the 1996 Act).[171]

The President of India on 12th April, 2012 approached the Indian Supreme Court for an the opinion as 'the Government of India has received various notices from companies based in other countries, invoking bilateral investment agreements and seeking damages against the Union of India by reason of the cancellation/threat of cancellation of the licenses.'[172] India has entered into BITs with eighty-six countries; seventy-three of which have already come into force. Ranjan and Raju point out that despite these many BITs, only after the foreign investors used BITs to slap India with investment treaty arbitration notices did India woke up to this reality.[173] This situation calls for a new prediction on how will the court and the executive balance international investment law with domestic law. Just as the 1960s allowed the Indian judiciary to couple with the executive, the new environment created by the BITs will perhaps generate the second phase of coupling of India's executive and the judiciary.

In all this the court will have to make sense of the abundant scholarly outpourings on international investment law since 1990s. Importing subsidiary sources today is as much a matter of the training of the judges as that of the structural constraints in unlearning the doctrines of law received through colonial intercourse.

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[171] FS Nariman, India And International Arbitration, 41 *George Washington Intl L Rev* (2009) 367, 378.
[172] *In Re: Special Reference No. 1 of 2012*, MANU/SC/0793/2012.
[173] Today foreign investors have challenged a host of state measures like cancellation of licenses by courts to legislations imposing retrospective taxes encroaching upon India's judicial sovereignty. Prabhash Ranjan & Deepak Raju, Bilateral Investment Treaties and Indian Judiciary, 46 *George Washington Intl L Rev* (2014) 809-847.

Chap V: Treaties, Contracts, and colonialism: The private life of public international law

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Chapter 5 argues that the protection of private property undercuts both the law of contracts and international law in way that it ossifies colonialism's impact on the doctrines of international law. I examine three tracts of time (a) the nineteenth century, (b) the interwar years (1920–1945), and, (c) the decades after decolonisation (1960 onwards) to argue that these three time periods are characterised respectively by three phenomena: (1) the unequal treaties regime (2) the contractualization of international law, and, (3) internationalisation of contracts and, as its subset, couching of the European-native legal relations within the vocabulary of international law. In order to accommodate the presence of the unequal-treaty regimes, the nineteenth century writers did not find consent central to treaty-making. At the time, the British courts accepted the unequal treaties entered into by the *East India Company* as an exercise of the Company's "sovereign and political power". After the obligation of understanding compliance with treaties in terms of their colonial context expired in the twentieth century, perfecting the analogy between treaties and contracts became fashionable. The purported commonality between, both, the private law and the public international law underpinned efforts by Lauterpacht and McNair to offer private law analogies of public international law. Its product, a contractual approach to international law, had the effect of ossifying the political context of unequal treaties, and thus that of the colonial and semi-colonial legal histories.

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I. Introduction

> "The Plurinational State of Bolivia as party to this arbitration cannot be considered without acknowledging the particularities of its people, model of State and recent history." *South American Silver Limited v. Bolivia*[1]

In those words in *South American Silver case*, Bolivia asserts that her vision of international

[1] *South American Silver Limited v Bolivia*, UNCITRAL, PCA Case No. 2013-15 (31 March 2015) 8, para 35.

law is mandated by "the particularities of its people, model of State and recent history" that even the investors need to take note of. Indeed the particularities of a given state's people, the model of that State's governance and history—postcolonial or colonial—are factors that international law cannot afford to ignore. In the case of many developing countries, the present is so impacted by the colonial past that international law simply appears to be the extension of a colonial power's private law.

For instance, in 1958, the Indian Law Commission was of the view that the codification of the *Indian Contract Act* by the British Parliament in 1872, in essence, was a codification of the British customs of the time on "real property law".[2] But underpinning a "system of property law", Schwarzenberger noted in 1952, "lie, shrewdly hidden, the fundamental political, social and economic decisions on which these legal rules are based."[3] Thus when the British real property law became the Indian contract law, "the fundamental political, social and economic decisions" of Britain struck roots in the Indian Subcontinent. Soon after, Indian native states and investors had to not only put up with the foreignness of commercial law, they had now upon them a duty to learn the law and practice it. The legal co-option, although inaugurated by the colonial companies, the British and the Portuguese, set the stage for a subsequent takeover by the British Crown. After decolonisation, the argument that the law of the protection of alien property abroad is part of a universal international law offered an example of the "shrewdly hidden" colonial ontologies of private property.[4]

[2] Law Comission of India, Thirteenth Report : Indian Contract Act, 1872 (Ministry of Law, Govt of India, 1958) 1< http://lawcommissionofindia.nic.in/1-50/report13.pdf>. For a discussion in political theory over the meaning of property see, Onur Ulas Ince, Property**,** in, Michael Gibbons (ed) *The Encyclopedia of Political Thought* (John Wiley & Sons, 2015) 3008–3018.
[3] G Schwarzenberger, The Protection of British Property Abroad, 2 *Current Legal Problems* (1952) 295.
[4] SN Guha Roy, Is the law of responsibility of states for injuries to aliens a part of universal international law? 55 *American J Int'l L* (1961) 863-891. SP Sinha, Perspective of the newly independent states on the binding quality of international law, 14 *ICLQ* (1965) 121, 128. See, Andrew Fitzmaurice, *Sovereignty, Property, and Empire, 1500-2000* (CUP, NY, 2014).

This chapter examines three tracts of time (a) pre League of Nations years i.e. the nineteenth century, (b) the interwar years (1920–1945), and, (c) decades after decolonisation (1960–to this day).[5] I argue that these tracts of time are characterised respectively by three phenomena:

(1) unequal treaties;

(2) the contractualization of international law, and;

(3) internationalisation of contracts.[6]

Within common law, the free consent of the parties has been fundamental to the validity of a contract, but as the twentieth century scholars argued, not for the unequal treaties.[7] In order to accommodate the political context of the unequal treaties between the European powers and some East Asian states since the seventeenth century, European writers of the time chose to not consider coercion illegal. The twentieth-century common law writers tried to develop a natural law approach to the sources of international law.

By contrast, states born of decolonisation, naturally dualist, since the start drew a fault line between a colonial treaty and new treaty. Countries born of decolonization viewed all its treaties with suspicion based on the time of its drafting. If a treaty is older than a sovereign, and drafted, signed and ratified by the previous colonial government, new nations could, then, theoretically speaking, make the distinction that was made in Europe between treaties

[5] The interwar jurists wrote in favour of treaties being contractual to advance a regime, first, for the protection of semi-colonially obtained private property. Later, post-decolonization, a continuation of this approach amounted to the defence on colonially obtained property. This resulted in the denial of the legal value of the New International Economic Order Declaration on the Establishment of a New International Economic Order, UN Doc A/RES/S-6/3201 (1 May 1974) para 7 that says the NIEO "shall be one of the most important bases of economic relations between all peoples and all nations." See, Antony Anghie, Legal aspects of the New International Economic Order, 6 *Humanity* (2015) 145.

[6] Francisco Orrego Vicuña, Of Contracts and Treaties in the Global Market, 8 *Max Planck UN Yrarbook* (2004) 341, 342-48. A Fatouros, International Law and the Internationalized Contract, 74 *Am J Intl L* (1980) 134.

[7] Henry Wheaton, *Elements of international law: with a sketch of the history of the science* (Philadelphia: Carey, Lea & Blanchard, 1836).

signed by "the Kings above law" and those made by "States bound by law". Developing countries could, theoretically speaking, treat treaties signed by colonial government as ones made by Kings above law; only the treaties that the new countries signed after re-birth could bind them.

In 1920, the League of Nations generally established conventions and treaties as a source of law. Therefore, for the PCIJ Statute even unequal treaties would be covered under the arch of "convention" within the meaning of the PCIJ Statute Article 38(1)(d). Such treaties now could not be seen as repugnant even after the manifest lack of consent understood in the contractual or private law sense. Yet, not only would the early 20th century writers drew contractual analogies of international law, ironically, after decolonisation, the breach of such unequal treaties, for western writers, warranted contractual remedies.[8]

A contractual approach to international law, doctrinally problematic in the interwar years, became politically incorrect after decolonisation. Therefore writers developed a new approach of the internationalisation of contracts that flipped the interwar approach. Using law as an antidote to power and politics, *ad hoc* judicial tribunals, aided by the writings of the publicists, championed both the approaches.[9] Since the beginning, this doctrinally

[8] The ICJ Statute thus, textually, legitimized in international law the imposition of inequality, *inter alia*, on China, Siam and Japan. No wonder, at the first opportunity after the setting up of the PCIJ, nationalist China thought of the change in fundamental circumstances as an emerging doctrine of international law. *Denunciation of the Treaty of 2nd November 1856 between China and Belgium case* signified use of *rebus sic stantibus*, the clausula, and the political rather than a judicial settlement of the dispute. *Denunciation of the Treaty of 2nd November 1856 Between China and Belgium* PCIJ Rep. Series A, No. 8 (1927) 4–5. China argued that its declaration was consistent with Article 19 of the Covenant of the League and, therefore, if any appeal against termination were to be made, it should go to the Assembly of the League rather than to a judicial tribunal. Matt Craven**,** What Happened to Unequal Treaties? The Continuities of Informal Empire 74 *Nordic J Intl L* (2005) 368.

[9] P Singh, The Rough and Tumble of International Courts and Tribunals, 55 *Indian J Intl L* (2015) 330 ff.

problematic approach would be condoned as the rise of innovation in postcolonial international dispute settlement.[10]

A politics of contractual international law is palpably visible here: after the birth of the PCIJ, first a contractual approach was employed to ossify the political context of unequal treaties to make them sources of international law. Second, after decolonisation, I argue, this ossification of the context of the treaties were brushed under the carpet to retrieve from the contractual international law remedies of private law against new sovereigns. The investor-state tribunals became the agents of private remedies for investors against the state. This chapter argues that irrespective of the currency used—colonialism or unequal treaties (semi-colonialism)—private making of public international and the protection of private property remains the only purchase. The use of contractual precepts for the making of international law, effectively, brushed under the carpet both colonial and semi-colonial histories. The interwar contractual approaches to international law, after decolonisation, transformed into an argument for the internationalisation of contracts. The private law remedies for investors against developing countries, prevalent to this day, evidences this.

II. The years before the League of Nations

A. Colonialism, Semi-colonialism and Treaties before the League

In 2005, Anghie wrote that "colonialism is somewhat pervasive, foundational in international law; and this is suggested in the way that the battle over state responsibility shifts to another area of international law, sources doctrine."[11] Later that year, Craven critiqued Anghie:

[10] PC Jessup, *Transnational Law* (Yale Univ Pressm New Haven, 1956) is a good example of the rise of innovation.

> For all of the profound insights that Anghie's analysis brings to the study of the relationship between international law and colonialism, … the experience of China, Siam and Japan appears to have been far more central to the colonising mission than might otherwise be supposed: they were subjected to the full weight of a culturally- loaded international regime whose disciplinary thrust – both to open economies to external trade on propitious terms, and to 'civilise the natives' by insisting upon legal and administrative reform – was largely indistinguishable from that associated with formal colonial rule.[12]

An intellectual disputation aside, Anghie has today established the central role of colonialism in the growth of international legal doctrines. Craven however identifies semi-colonialism or the unequal treaty regimes as the vanguard of informal empires after decolonisation. One could summarize the Anghie-Craven debate as an attempt to identify, between colonialism and semi-colonialism, a unique key historical experience with which to further explain the continuities of informal empires.

That said, free consent of parties is fundamental to the validity of a contract, however, as the nineteenth century writers argued, not to international law. In order to accommodate the political context of the unequal treaties between the European powers and some East Asian states since the seventeenth century, writers did not consider coercion illegal. The twentieth century jurists nevertheless attempted an analogy of international law with contract law. This interwar juristic imposition of the laws of the civilized nations, essentially private law, on capital importing countries was underpinned by a contractual approach to international law.[13]

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[11] Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (CUP, New York, 2005) 241, 243.
[12] Craven**,** *supra* note 8, at 381, 382.
[13] Anghie, *supra* note 11, 241.

The nineteenth century writers awarded to Asians and Africans legal personality just enough to allow them to sign away their sovereignty. Anghie has critiqued this as "native consent".[14] In turn, Craven has critiqued Anghie for reading colonialism in terms of sovereignty and territorial titles alone, charging Anghie with essentialising colonialism.[15] Craven suggests that semi-colonialism—epitomised by the regime of unequal treaties—and not colonialism proper is central to the understanding of the postcolonial continuities of informal empires. Recently, Lorca, has argued that international law universalised when elites from "semi-peripheral" polities borrowed European language and vocabulary.[16]

Notably, Craven offers the polities of "China, Siam and Japan" as examples for the non-Western parties to the unequal treaties regime of international law. To begin with, perhaps that might be one of the reasons for the difference of opinion between Anghie and Craven. Anghie, much like Judge Pal of the Tokyo tribunal, would see Japan as a colonizing power competing with Britain and other European power and not as semi-colonized, like China.[17] More recently, with his currency of semi-periphery, Arnuf Lorca seems to occupy a perceived space between Anghie and Craven arguing "international law became universal only when non-Western jurists internalized European legal thought, transforming nineteenth-century international law along … doctrinal, professional, and normative dimensions."[18]

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[14] Ibid 95.
[15] Craven, *supra* note 8, 382.
[16] AB Lorca, Universal International Law: Nineteenth-Century Histories of Imposition and Appropriation, 51 Harv Intl L J (2010) 475.
[17] Japan's understanding as a competing colonial power was central to Judge Pal's dissent at the Tokyo Tribunal and Anghie would agree to Japan's characterization as such. See, *The International Tribunal of the Far East, Dissenting Opinion of Justice Pal* (Tokyo: Kokushu-Kankokai, 1999) 323–344, 347–382. Pal discussed in detail the Japanese militarisation and preparation for colonialism.
[18] Lorca, *supra* note 16, 478. U Özsu, Agency, Universality, and the Politics of International Legal History, 52 *Harv Intl L J online* (2010) 5. "Westernization was not a variable external to local economic conditions, shaped by such factors as the European legal system … Westernization was often an endogenous response to the failure of local custom to secure frictionless global transactions." T Roy, *Indigo and law in colonial* India, 64 (S1) *Economic History Rev* (2011) 60, 73.

In other words, western law, a source of international law as defined by ICJ Article 38(1)(c), first set foot in Asia to ensure a "frictionless global transaction". In that sense, international law competes with *lex mercatoria*, a set of private norms. This competition became all the more acute during the interwar period, particularly because of a new communist concept of property after the Russian revolution and the use of sovereignty principles by a non-Tsarist Russia.[19] I do not see any contradiction between the arguments advanced by Anghie and Craven; in fact they appear complementary while building a complete picture of colonialism, private law and public international law. While Anghie's approach, I argue, contributes to international legal theory, Craven's is to international legal history. As such, these findings fall in line with my overall thesis that private actors, as norm entrepreneurs as well as private norms, make up the body of public international law.[20]

B. British Courts and the *East India Company*'s Public and Private character

Initially, the positivists of the nineteenth century could not readily reconcile treaties by way of analogy to contracts, as Lauterpacht and McNair were to do later.[21] Why a change of guard

[19] Gigory I Tunkin, The Contemporary Soviet Theory of International Law (1978) 31 *Current Legal Problems* 177 –188.

[20] In 1910, Elihu Root, said "[A] standard of justice, very simple, very fundamental and of such general acceptance by all civilized countries as to form a part of the international law of the world ... If any country's system of law and administration does not conform to that standard, although the people of the country may be content or compelled to live under it, no other country can be compelled to accept it as furnishing a satisfactory measure of treatment to its citizens." E Root, The Basis of Protection to Citizens Residing Abroad, 7 *ASIL Proceedings* (1910) 16, 22. Leading publicists Dolzer and Schreuer refer to Root's aforementioned proposition to be the "dominant position" in international law. It is widely known that Carlos Calvo, the famous Argentine jurist, has stated that in the disputes between an alien and a government, the former has to resort to local remedies waiving diplomatic protection from her own government. M Garcia-Mora, The Calvo Clause In Latin American Constitutions And International Law, 33 *Marquette L Rev* (1950) 205. However Calvo's competing formulation for Dolzer and Schreuer is "marginal" although historically Latin American states took this approach. R Dolzer & C Schreuer, *Principles of International Investment Law* (OUP, 2008) 12, as dicussed in D Schneiderman, The Global Regime of Investor Rights: Return to the Standards of Civilised Justice? 5 *Transnational Legal Theory* (2015) 60, 61. G Kaufmann-Kohler, Soft Law in International Arbitration: Codification and Normativity, 1 *J Intl Dispute Settlement* (2010) 283-299. Cf A al Faruque, Creating Customary International Law Through Bilateral Investment Treaties: A Critical Appraisal, 44 *Indian J Intl L* (2004) 292, 296.

[21] Matthew Craven**,** What Happened to Unequal Treaties? The Continuities of Informal Empire 74 *Nordic J Intl L* (2005) 335, 363.

then? In the nineteenth century, as Craven writes, European order "seemed to rest upon the terms of various peace treaties" where keeping the "distribution of power overshadowed any concern for formal consent."[22] For such writers, "any legal insistence upon a perfect exercise of voluntary will was to be understood as being conditioned by the context in which any particular agreement was to be found."[23] Craven quotes Wheaton thus: "The obligation of treaties, by whatever denomination they may be called, is founded, not merely upon the contract itself, but upon those mutual relations between the two States, which may have induced them to enter into certain engagements."[24]

The *East India Company*, a registered company in England, could, notably, make both, unequal treaties by war or sign contracts. It operated transnationally between the Law of the Nations and the private law of England. When Wheaton spoke of evaluating treaties "not merely upon the contract itself, but upon those mutual relations between the two States" he advanced a contextual legal explanation of the seventeenth century East-West power relations. A number of cases before the British courts between native rulers, native creditors and the Company testify to this reality. In *Doss v Secretary of State*, the private moneylender who loaned the King of Oudh—Oudh being taken over subsequently by the Government of the East India Company and later the Company by the British crown—argued:

> The *East India Company* took possession of *Oudh* as a sovereign power, and at the same time, according to the law of nations, became liable to pay the public debts and liabilities of the annexed province. Consequently the debt we now claim was transferred in 1856 to the *East India Company*, but it was a debt incapable of being enforced either against the King of *Oudh* or the Company by means of the ordinary tribunals. Then, in 1858 the Crown succeeded the

[22] Ibid. 361
[23] Ibid. 361.
[24] Wheaton, quoted in, Craven, *supra* note 21, 348.

> Company, and became the transferee of this debt, which can now be enforced against the Secretary of State for *India*, who by that Act is made the person to be sued.[25]

The Vice-Chancellor enumerated the "principal difficulty" of the case at hand as "whether this is not an act of State, and therefore that you cannot sue. No doubt the *East India Company* in its trading capacity might have been sued, but the company had two rights—that of a trading company and of a political power."[26] The British court said: "[I]n this case the acts of the *East India Company*, in exercising public and political power, were acts which were afterwards recognised by our Government, and they became acts of State for which the Crown alone was responsible, and that they cannot be called in question by any Court of justice. Their only remedy, if they have any, is by petition of right to the Queen."[27] Such cases go further when it comes to exposing the normative discomfort in domesticating public and private nature of international law and colonialism. *Doss* recognised as distinct the existence of a mercantile and public function of the East India Company: "The *East India Company* filled two positions; on the one hand, it was a great trading corporation, having liabilities of vast importance. Then they had accorded to them a *de facto* dominion [sovereignty] over large tracts of country."[28]

Interestingly, the Indian creditor, among other things quoted Wheaton's *Elements of International Law* as authority in support of it's position.[29] Doss lost on the technical ground of *forum non conveniens*. The aggrieved Indian creditor noted the inconsistency of the British court in such matters. Although the court found no jurisdiction, Doss observed that British

[25] *Doss v Secretary of State for India in Council Equity* (1874–75) LR 19 Eq. 509, 522
[26] Ibid,525.
[27] Ibid 516.
[28] The Kingdom of Oudh was one of the provinces of the empire of Delhi, but in 1819 the King of Oudh was recognised as an independent sovereign, and continued so until February 1856, when his territories were annexed to the British dominion. The legal position of the British Government and the *East India Company* is evidenced by many Acts of the British Parliament. Ibid 516.
[29] Ibid. 526.

courts had entertained "suits upon the subject of property in the colonies."[30] In *Tulloch v Hartley*, for example, where it was held that a Court of Equity in England would entertain a bill to settle the boundaries of real estate in Jamaica reveals a tendency of the nineteenth century British courts to ratify those acts of the British Company that brought land territory to the Crown, but not accept, on the logic of the public and private division of the acts of the British Companies, the encumbrances attached to the land captured.[31]

In contrast, in *Ex-Rajah of Coorg v EIC*, the Indian King argued and "insisted that the two notes belonged to him personally and individually, and as his own private property, and not as Rajah of Coorg".[32] The British Court however "considered that they belonged to the Plaintiff in his character of Rajah of Coorg, and not in any private character."[33] In any case, the Plaintiff further "insisted that they had been considered and treated (upon principles … the law of nations) as exempt from seizure and confiscation, and had not been seized or confiscated, but had been retained by the Defendants as property held by them on deposit or trust".[34]

Sir John Romilly, went on to note the "principal difficulty … aris[ing] from the double character filled by the Defendants the East India Company. They were both a company of merchants trading to the East Indies".[35] The British court, while condoning the confiscation of the promissory notes belonging to the native king, a British court refused a remedy because the Company's taking possession of the notes was not of "mercantile character …but

[30] Ibid 523.
[31] *Tulloch v Hartley* (1841) 62 ER 814. In this case the court gave judgment, without mentioning any doubt as to the jurisdiction.
[32] *Ex-Rajah of Coorg v East India Company* (1860) 54 E.R. 642, 644
[33] Ibid.
[34] Ibid.
[35] Ibid 646.

… in the exercise of their sovereign and political power."[36]

Such cases establish the role of the Western companies in aiding the development of an artificial public-private divide that worked against the native sovereigns. By developing a doctrine of a private and a public function of the company in the colonies, the European courts were able to aid the export of wealth from colonies while adjudging the takeover of the colonies as legal within the Law of the Nations. Also, the courts tried to distinguish between the company's liabilities arising from a contract (private) from that from a treaty (public). While a contract was a private law matter for the companies, a treaty after war constituted an "exercise of their sovereign and political power". In fact, an early writers on the issue of the choice of law in colonial contracts, Brown, wrote that "[d]uring the colonial period … companies treated the selection of a proper law to govern the contract as a matter of convenience rather than substance."[37] No wonder, today, with an appetite for disagreements, the "[c]onflicts scholars … have helped to confuse courts and make a mess of choice-of-law analysis."[38] In the hands of the tribe of the common law scholars, those working between private law and public international law, this mess became only bigger in the case of the colonial concession contracts.

III. The Interwar Years (1914–1945): The Contractualisation of International Law

Collins has recently criticized the common law conception of "standardized contracts" for "mistaking contracts for law, thereby misrepresenting private rules as public norms, even though they lack the qualities of abstraction, system, and generality commonly associated

[36] Ibid.
[37] R Brown, Choice of law provisions in concession and related contracts, 39 *Mod L Rev* (1976) 625.
[38] Larry Kramer, Choice of law in complex litigation, 71 *NYU Law Review* (1996) 547.

with law."[39] One can read Collins' critique as compatible with my thesis on the contractual approach to international law. The interwar British lawyers, it is argued, mistook contracts for international law, the lack of the qualities of abstraction, system, and generality commonly associate with international law notwithstanding. A contractual approach to treaties served to take the focus away from the use of "duress" in the making of the unequal Peace treaties in Asia.

In terms of jurisprudence, it brought naturalism back to the study of international law's sources doctrine. In Britain, the law of contract itself emerges from the *lex Mercatoria*, a well-known example of natural law of private property. The jurisprudential natural law approach of contractual precepts for the making of international law, as Lauterpacht and McNair did, had the effect of brushing under the carpet both colonial and semi-colonial histories.[40]

Equally notable is the impetus the birth of the permanent international courts; the PCIJ for example, gave to the contractual and private reading of public international law. British international lawyers, influenced in good measure by common law, first mistook "contracts for law", misrepresenting subsequently private rules as public norms. Private law, or *lex mercatoria*, even though it lacked, to quote Collins, "the qualities of abstraction, system, and generality commonly associated with law" would now become the bricks of the house of international law. The contractual approach to international law, in that sense, is a product of

[39] Hugh Collins, Flipping Wreck: Lex Mercatoria on the Shoals of Ius Cogens, in, Stefan Grundmann, Florian Möslein & Karl Riesenhuber *Contract Governance: Dimensions in Law and Interdisciplinary Research* (OUP, Oxford, 2015) 383, 386.

[40] In *Mighell v Sultan of Johore*, the British Court of Appeal ruled that "the fact that a foreign sovereign has been residing in this country, and has entered into a contract here, under an assumed name, as if a private individual, does not amount to a submission to the jurisdiction, or render him liable to be sued for breach of such contract." *Mighell v Sultan of Johore* [1894] 1 Q.B. 149.

twentieth century natural law approach of Lauterpacht and McNair.[41] Naturally, therefore, investigating such writers' turn away from positivism, as does Craven, has a useful purchase. This approach aimed at enlarging the basket of sources doctrine to allow private laws to sit with classic sources of international law. Contracts could thus be compared with international treaties.

For that to happen, consent had to be ruled out from the reading of international law. A century before, Peace Treaties, the dominant form of treaty-making characterized the global political scene. Craven's study of such treaties together with their context and political environment of the time expose the essential role of power, duress and force in their making. In order to reconcile the use of duress in treaty-making as just and legal, writers distinguished between a just duress and a wrongful one in international law. At the turn of the 19th century, the PCIJ Statute, and later the ICJ, recognized treaties as sources of international law: "international conventions, whether general or particular, establishing rules expressly recognized by the contesting states". It is notable that the Statute refers to "general" and "particular" conventions from which the PCIJ had to identify "rules expressly recognized by the contesting states". As such the PCIJ did not rule out the role of consent.

By contrast, in 1927, Lauterpacht had tendered an analogy that 'the legal nature of private law contracts and international law treaties is essentially the same' to which McNair subscribed lock, stock and barrel.[42] For them, a consensual or contractual international law was to ossify the "overriding considerations of political necessity" and political context of the

[41] H Lauterpacht, *Private Law Sources and Analogies of International Law* (Longman, Green & Co, New York/Calcutta, 1927) 155-80.
[42] McNair, Introduction, ibid, v-vi. Curtis J. Mahoney, Treaties as Contracts: Textualism, Contract Theory, and the Interpretation of Treaties, 116 *Yale L J* (2007) 823 "suggests instead that courts draw from modern contract theory in developing canons of treaty interpretation."

unequal treaty regime.[43] Referring to the East Asian unequal treaties, Craven notes, in the twentieth century "[s]ome way had to be found to allow some treaties to be changed without bringing the whole edifice of law crashing to the ground".[44] For Lauterpacht and NcNair, a way out of this impasse "was to separate their concern for peace and good order from their rationalization as to the binding force of treaties."[45] Once freed from the obligation of "understanding compliance with treaties in terms of their contextual or political significance, international lawyers were then able to talk about the perfection of the analogy between treaties and contracts."[46]

In other words, after the League of Nations began limiting recourse to force, unequal treaties could thereafter be understood as 'agreements governed by international law, whose binding force depended upon the "autonomous will of the parties".'[47] For the sources doctrine, it meant that opinions of the twentieth century writers, those that took a contractual view of international law – brushing under the carpet histories of both colonialism and semi-colonialism – would pass off as sources to determine the rules of law.

The contractualization of international law has left footprints of its march. The *Lena Goldfield* arbitration in 1930 between the government of Soviet Russia and British investors is a case in point. While reporting *Lena* arbitration, Nussbaum noted that 'unjust enrichment, bases of the Lena claims, have long been recognized as legitimate causes of action under the various systems of law, including international law'. Not only did he fail to cite a source or

[43] Craven, *supra* note 21, 364, fn 107.
[44] "How could they explain to the Chinese that unilateral termination was not an option whilst allowing others to readily engage in precisely the same process?" Craven, *supra* note 21, 366.
[45] Ibid.
[46] Ibid.
[47] Ibid. 367.

authority for his argument, rather, he even grossly misquoted the actual taward.[48] The actual words were: 'On ordinary legal principles this constitutes a right of action for damages, but the Court prefers to base its award on the principle of "unjust enrichment".'[49] Unjust enrichment, a principle of private law, was never so established a principle of international law, let alone against a sovereign.

A year before, in 1929, the PCIJ *Serbian Loans case* distinguished contracts that are subjects of international law and those that are subjects of domestic law: "Any contract which is not a contract between States in their capacity as subjects of international law is based on the municipal law of some country."[50] Consequently, it is governed by "private international law or the doctrine of the conflict of laws".[51] In the civil law system too the conflation of public law and private law presented a problem that for Mann reflected a lack of "due regard" by "public international lawyers … to the character and teachings of private international law":

> [T]he Swiss-French doctrine, as formulated by its authors, stems from a fundamental error which would not have arisen if public international lawyers had had due regard to the character and teachings of private international law: in the type of case where there is room for the problem at all under customary public international law, no breach of contract in fact occurs and, consequently, the principle of *pacta sunt servanda* is not infringed.[52]

Yet common law writers and arbitrators placed a great deal of reliance upon analogy between treaties and contracts. The *Lena Goldfields* award by an *ad hoc* tribunal, allowed an

[48] The Arbitration Between the Lena Goldfields Ltd. And The Soviet Government, Award of Sept. 3, 1930, 36 *Cornell L Q* (1950-1951) 31, 41.
[49] Ibid., 51
[50] *Payment of Various Serbian Loans Issued in France* (Fr. v. Yugo.), 1929 P.C.I.J. (ser. A) No. 20 (July 12) 41
[51] Ibid.
[52] FA Mann, State Contracts and State Responsibility, 54 *American J Intl L* (1960) 572, 578, 580-81.

opportunity for private investors to move away from the PCIJ's approach.[53] The *Lena* case occasioned the use by investors of British private law and a moral vocabulary of "unjust enrichment". Lauterpacht's text written three years before '*With Special Reference to International Arbitration*' was a significant influence.[54] With Lauterpacht as the chief protagonist of this view, the interwar British jurists developed a natural law of private law principles to create public international law.[55] Besides, Lauterpcaht and McNair often cross-cited each other to argue that domestic decisions could be used as sources in international law.[56] Taking the contractual approach to treaties further, McNair argued that concession contracts were treaties.[57] For him, all contracts were treaties therefore general principles of law from civilized nations could be used to interpret them.

Effectively, *Lena* allowed scholars to erroneously argue that the award equated "unjust enrichment" with "full damages".[58] Friedmann was the first to recognize the conflation of unjust enrichment and full damages saying unjust enrichment does not mean 'an obligation to pay full, adequate and prompt compensation'.[59] Later in 1974 Schreuer agreed saying such an advocacy is a 'means to dress up policy consideration or ideological preference' stemming from 'the much more general and indeterminate concept of unjust enrichment'.[60] This is just one of the many examples that preceded the wholesale creation of international law by

[53] *Lena Goldfields, Ltd. v USSR*, Award of Sept 3, 1930, 36 *Cornell L Q* (1950) 42, 50.
[54] Lauterpacht, *supra* note 41, 155-80. EA Belgrad, General Principles of Law and the Use of Private Law Analogies in International Law: The Applicability of "General Principles", 9 *Indian J Intl L* (1969) 483.
[55] H Lauterpacht, Decisions of Municipal Courts as a source of international Law, 10 *Brit YB Intl L* (1929) 65.
[56] Ibid,
[57] Arnol McNair, The General Principlesof Law Recognized by Civilized Nations, 23 *British YB Int'l L* (1957) 1.
[58] Friedmann was first to recognize the conflation of unjust enrichment and full damages saying unjust enrichment does not mean 'an obligation to pay full, adequate and prompt compensation'. W Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1964) 207-210.
[59] W Friedmann, *The Changing Structure of International Law* (New York: Columbia University Press, 1964) 207-210.
[60] C Schreuer, Unjustified Enrichment in International Law, 22 *American J Comp L* (1974) 281, 285.

jurists.[61] Before and after the World War II, it was not uncommon for scholars to anchor their arguments and buttress their legal opinion by an exclusive reference to other publicists.[62]

Perhaps the deployment by the British investors of a moralist natural law vocabulary of "unjust enrichment" was in line with the rising natural law approach of Lauterpacht and McNair. This new natural law approach attacked non-European sovereignty or understanding of property not in conformity with capital exporting states. Later while discussing the general principles of law recognized by civilized nations, Lord McNair noted the *Lena* award with far greater accuracy but with the same effect of depositing contract into the orbit of international law.[63]

However, a question arises: why was colonial capture not "unjust enrichment"? About a century later, Anghie would answer this question. For the nineteenth century positivists, as for the twentieth century naturalists, "colonial problems constituted a separate and distinct set of issues which were principally of a political character".[64] As a number of British cases discussed above clarify, even for the British courts, colonialism espoused by the British corporations, particularly when ossifying native sovereignty, constituted an exercise of the corporation's "sovereign and political power". As a result, colonialism "did not impinge in any significant way on the core theoretical concerns" either of private law of England or of international law.

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[61] Schwarzenberger, for example, explicitly 'quote[d] German authors such as Professor Herbert Kraus, who was in close touch with the German Foreign Office during the Weimar Republic, and who was Professor of International Law at Göttingen University under the Nazi regime until 1937.' G Schwarzenberger, The Bank For International Settlements and the Czech gold assets held by the Bank of England, 3 *Modern L Rev* (1939) 151-152.

[62] Professor Sornarajah has made this point on many occasions. M Sornarajah, Power And Justice: Third World Resistance in International Law, 10 *Singapore Yrnk Intl L* (2006) 31.

[63] A McNair, The Applicability of General Principles of Law to Contracts between a State and a Foreign National, *ABA Sec. Mineral & Natural Resource Law Proceedings* (1957) iii, 168, 173.

[64] Anghie, *supra* note 11, 34–35. O Shoyele, State Succession And Debts in the African States, 22 *Polish Yrbk Intl L* (1995-96) 65, 79.

IV. Colonial Contracts after decolonisation

The law of contracts in India emerged in the context of colonialism. The British Parliament enacted the Indian Contract Act 1872, that, as the Indian Law Commission put it in 1958, codified the British customs and usages of "real property law".[65] Soon after decolonization, writing in defence of private property, a contractual view of international law, and assailing newly acquired sovereignty occurred hand in hand.[66] After decolonisation, Western arbitrators were too eager to read a breach of private law, i.e. contracts, by a sovereign as a breach of public international law. It was in this context that the doctrine of internationalisation of contracts began.[67]

A. The Internationalisation of Contracts

> There was no authority to turn to for [the] doctrine other than "academic dressing" (interview 81, 2). The charismatic notables, therefore, found it … much easier to invoke the grand principles of law in support of their decisions, and the principles became embodied in those notables in the eyes of their colleague and their potential adversaries. Their colleagues … were as a general rule too respectful to these high judges or academic grand masters to dare contest their right to speak in the name of law.[68]

The empirical evidences generated by interviews with the top arbitrators lead Dezalay and

[65] The Indian Law Commission Report, *supra* note 2, 1.
[66] Anghie, *supra* note 11, 240-244. Gilles Cuniberti, The merchant who would not be king: Unreasoned Fears about Private Lawmaking, in, HM Watt & DP Arroyo (ed) *Private International Law and Global Governance* (OUP, NY, 1014) 141.
[67] Orrego Vicuña explains this with the use of French sources while Sornarajah's exposition is based on literature in English. See, Orrego Vicuña, *supra* note 6, 342 ff; M Sornarajah, *The International Law on Foreign Investment* 3rd edn. (CUP, NY, 2011) 289.
[68] Bryant G Garth & Yves Dezalay, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order* (University of Chicago Press, 1996) 89.

Garth to attest to the internationalisation of private law by "charismatic notables" at a time these notables shot down General Assembly resolution as non-law.[69] Sornarajah points out that, against the will of weaker states, Western publicists have through the force of their writings internationalized contracts, particularly those about oil.[70] The internationalisation of contracts was intended at neutralising political postcolonialism with legal colonialism. While attempting to internationalize private law against developing countries, the western companies not only wanted to exclude themselves from the local courts and judges, but they avoided "recourse to the laws of these countries".[71]

In terms of litigation strategy, after mass decolonization in Asia and Africa, investors made two arguments for the protection of private capital: (1) Replacing the law of the place of contracts by western law, and (2) Replacing local contracts by the language of international law of treaty. Decolonization was accompanied by investor-state arbitrations that sprang out of efforts by the states of the Middle East to terminate or renegotiate long-term petroleum concession contracts.[72] There possibly cannot be a better example of the influence of scholarly writings on arbitrators who in the name of transnational arbitration replaced the *lex loci* with British or French law. The ICJ Article 38(1) (c) on general principles of civilized nations supported this corporate strategy in no small part. The *Abu Dhabi* arbitration is an apt

[69] Thus the sole arbitrator in *Texaco v Libya* said that although UN resolutions have a legal value, they are variable. The arbitrator then said that some of the resolutions referred to by the Libyan government "were supported by a majority of Member States but not by any of the developed countries with market economies which carry on the largest part of international trade." It is the "developed countries with market economies which carry on the largest part of international trade" that make a UN declaration *contra legem* even though a larger number of developing countries with smaller part of international trade do think otherwise. *Texaco Overseas Petroleum Co. v. Libya*, 17 ILM 1 (1978).

[70] What is notable is that the internationalization of contacts theory is rooted in arbitral awards and writings of the publicist. Sornarajah, *supra* note 84, 289. AFM Maniruzzaman, State Contracts in Contemporary International Law: Monist versus Dualist Controversies, 12 *EJIL* (2001) 309-328. M Sornarajah, *Resistance and Change in the International Law on Foreign Investment*. (CUP, Cambridge, 2015).

[71] Dezalay & Garth, *supra* note 68, 86.

[72] *Ruler of Qatar v. International Marine Oil Co*., 20 ILR (1953) 534. Such arbitrations were all a result of, as Anghie says, a new transnational view of international law. Anghie, *supra* note 11, 226.

case in point.[73] At the time the award came out, it was, quite literally, a classic case of the (Middle) East meets the West. It busted the hornet's nest of norms as the new wine of transnational law was served in the bottle of comparative law. Friedmann, while serving this wine to the academia thirsty for answers, stood somewhere between apology and optimism:

> Lord Asquith in the *Abu Dhabi* Arbitration … use[s] comparative law as a guide to the principles that, in the circumstances of the ease, are most appropriate and equitable. This will, in most, though by no means in all, cases, involve a comparison of the relevant principles of the most representative systems of the common-law and the civil-law world. In certain cases it may be necessary to examine some of the non-Western legal systems, such as Muslim or Hindu law, now actively represented in the family of nations.[74]

Lord Asquith himself in his *Award* made no bones about his borrowings from scholarly opinions. He notably introduced his footnote in the following words: 'Perhaps I may make this footnote the vehicle for an expression of gratitude to those who addressed me, for bringing to my notice some of the voluminous literature, articles, addresses and other publications—by experts … Those from which I have derived the most instruction.'[75] Lord Asquith's words speak for itself. In relation to the *Abu Dhabi* arbitration some scholrs suggested that 'a good *deal* of weight should be added to [the award's] persuasiveness by reason of the appearance on behalf of the parties of such jurists of international repute as Professors Lauterpacht and Waldock and Sir Walter Moncton.'[76] Moreover, judges have formulated the concept of expropriation unjustified not within the doctrine of law, but, rather patronizingly, as rooted in the need to develop poor countries with foreign capital. For

[73] *Petroleum Dev. Ltd. v. Sheikh of Abu Dhabi*, 18 ILR (1951) 144.
[74] See for example, Wolfgang Friedmann, Uses of "General Principles" In the Development of International Law, 57 *American J Intl L* (1963) 279.
[75] *Award of Lord Asquith of Bishopstone*, 1 *ICLQ* (1952) 247, 258.
[76] EJ Cosford Jr., The Continental Shelf And The Abu Dhabi Award, 1 *McGill L J* (1953)109, 113.

example, Judge Carneiro in the *Anglo-Iranian Oil Co* case said:

> [W]hen there are so many countries in need of foreign capital for the development of their economy, it would not only be unjust, it would be a grave mistake to expose such capital, without restriction or guarantee, to the hazards of the legislation of countries in which such capital has been invested.[77]

The French text of the concessions agreement upon which this case was based had used the term "agreement" and "convention" interchangeably. In their Memorial, the British, displaying astute lawyering, referred to the concession agreement as "concessions convention" to read it as a treaty which the ICJ rejected.[78] There cannot possibly be a better example of the influence of scholarly writings on arbitrators who in the name of transnational arbitration replaced the *lex loci* with British or French law supported, in no small part, by the ICJ Article 38(1)(c) on general principles of civilized nations. Such arbitrations came up due to the decision by some Middle Eastern states to terminate or renegotiate long-term petroleum concessions agreements.[79]

Jennings, leading British publicist of the time, has recognized that from time to time the Powers did intervene in pursuance of pecuniary claims; perhaps the best-known instance was the blockade of the Venezuelan ports by Germany, Great Britain and Italy in 1902, to enforce a series of claims, several of which arose out of contracts.[80] But then he says that '[t]hese

[77] *Anglo-Iranian Oil co. case (jurisdiction),* Judgment [1952] ICJ Rep p. 93, 162. Sornarajah contextualizes this patronizing attitude by arguing that such a view 'merely shows the paucity of justifications possessed by international lawyers, all of whom, of course, will claim a high degree of rectitude, scholarship and impartiality, in formulating theories to advance the cause of foreign investors from their states.' Sornarajah, *supra* note 84, 293; G Schwarzenberger, Decolonisation and the Protection of Foreign Investments, 20 *Current Legal Problems* (1967) 213-231.
[78] *Anglo-Iranian Oil co. case,* Ibid., 112.
[79] *Ruler of Qatar v. International Marine Oil Co*., 20 ILR 534 (1953).
[80] RY Jennings, State Contracts in International Law, 37 *British Yrbk Intl L* (1961) 157.

early precedents, however, must be approached with caution, if only because the instances tend to be somewhat one-sided, in that a resort to self-help was necessarily a case of the strong enforcing a solution on the relatively weak.' He further says they are not 'for that reason necessarily bad law'![81] Against Jennings' liberal uplifting of investor-state contracts to the level of treaty, Sornarajah advances a different legal opinion:

> Being domestic contracts, contracts of foreign investment create obligations only in domestic law. It is without doubt that, through the use of appropriate language, the rights so created can be lifted up and subjected to an international regime of protection. But, the extent of those rights must depend on domestic law. They cannot be expanded by an international mechanism.[82]

Not only did Jennings make a very strong case for the internationalization of contracts through the force of scholarly opinion, he furthermore opined that a 'case of the strong enforcing a solution on the relatively weak' should not be seen as a bad law. Further, Jennings' analogy equating contracts with treaties to avoid *non liquet* with the force of the ICJ Statute 38(1)(d) was contrary to the existing view at the time. Thus Jennings' view fertilized the idea that contracts, understood in its classic sense, become a subject of international law.[83]

By contrast, Professor Sornarajah has pointed out that soon after decolonization, the issues regarding the legality and force of contracts in international law arose.[84] However, the early

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[81] Ibid., 159.
[82] See, Legal Opinion of M. Sornarajah, in, *El Paso Energy International Company v. Argentina*, Case No. ARB/03/15, at para. 12, <http://www.italaw.com/sites/default/files/case-documents/ita0970.pdf>.
[83] Jennings, *supra* note 80, 157.
[84] "It is an interesting aside to note that the United States in its formative years, as an importer of European capital, had experiences similar to those which developing countries presently have, and took stances not dissimilar to those developing countries now take. But after its emergence as a regional economic power, it

interpretation of contracts as an instrument of international law meant international law, a set of customs from "civilized states," becomes the applicable law repudiating the locality of contracts.[85] Later in the *Sapphire* case, the arbitrator ruled that concession contracts have a "quasi-international character" releasing it from the 'sovereignty of a particular legal system.'[86] Here although Iran was the *lex loci*, for various reasons the parties did not choose Iranian law. The general principles of law of civilized nations as mentioned in the ICJ Article 38(1)(c) were held to be the governing law.[87]

In *Saudi Arabia v Arabian American Oil Co* case, both Saudi Arabian law and general principles of law were held to govern the contract while limiting the concept of permanent sovereignty over natural resources.[88] Similar results were reached in *Texaco Overseas Petroleum* arbitration.[89]

Most recently, after the government of Venezuela decided to re-structure certain oil projects in 2007 so as to bring them in line with the 2001 Hydrocarbons Law, ExxonMobil and ConocoPhillips decided to exit Venezuela. These companies subsequently initiated a series of

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insisted that its Latin American neighbours should treat foreign investors in accordance with international standards." referring the *The Rose Mary* case where it was said the settled practice of the international law trumping municipal law can be ascertained from 'decided cases and from the writings of jurists.' *Anglo-Iranian Oil Co Ltd v. Jaffrate (The Rose Mary)* [1953] 1 WLR 246 (Supreme Ct Aden), at 253-57. The *Barcelona Traction case* testifies that operative part aside, even *obiter dicta* can add to the value of precedent. It was on "*egra omnes*" in *Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain),* Judgment, [1970] ICJ Rep 3, 32, 33–34. For if the publicists' view do determine the sources of law, a larger group of publicist will, within the democratic understanding, determine sources more accurately than those in the minority. Perhaps therefore during the debates in the Assembly of the League of Nations, Argentina unsuccessfully proposed an amendment to prevent the PCIJ's decisions from acquiring the authority of judicial precedent. G Guillaume, The Use of Precedent by International Judges and Arbitrators, 2 *J Intl Dispute Settlement* (2011) 5, 8. When the doctrinal ordering of sources doctrine is disturbed by pushing the "subsidiary means" within 38(1)(d) to situate it with 38(1)(a)-(c), many issues of political economy crop up. See, M Peil, Scholarly writings as a source of law: a survey of the use of doctrine by the International Court of Justice, 1 *Cambridge J Intl & Comp L* (2012) 136–161, 139.

[85] See for an important discussion, Anastasios Gourgourinis, The Distinction between Interpretation and Application of Norms in International Adjudication, 2 *J Intl Dispute Settlement* (2011) 31-57.

[86] *Sapphire International Petroleums Ltd. v. National Iranian Oil Co*., 35 ILR (1963) 136, 173.

[87] Ibid.

[88] *Saudi Arabia v. Arabian American Oil Co*., 27 ILR (1958) 117.

[89] *Texaco Overseas Petroleum Co. & California Asiatic Oil Co. v. Government of the Libyan Arab Republic*, 17 ILM (1978) 1.

arbitrations involving some of the largest claims ever put before international tribunals. However, the bargains that the companies insist they are defending are not reflected in the agreements that they had actually signed. Generally speaking, these arbitrations amount to an attempt on the part of these companies to use international arbitral tribunals to re-draft on their behalf the contracts they had negotiated, so as to secure a windfall (which they had never bargained for) upon their exit from Venezuela.[90] The multinational companies that exited Venezuela have argued for a breach of treaty and not of contract.[91]

The sole arbitrator Lord Asquith in the *Abu Dhabi* award made no bones about his borrowings from scholarly opinions.[92] Referring to Lauterpacht's paper on Sovereignty over Submarine Areas, Asquith noted that Lauterpacht's paper is 'is likely to be published … almost simultaneously with this Award.'[93] However, Jessup in his transnational law saw this award as the issue of 'lex non conveniens, if such a rule existed, as it should.'[94] Much later Amerasinghe however wrote apologetically for Lord Asquith while justifying the use of "general principle of law" in the *Abu Dhabi* arbitration[95] although he did not explicitly support the internationalization of contract theory.[96] The pro-investor bias of arbitrators in invest-state arbitratins remians moot to this day.

More recently, in March 2015, before an investment dispute tribunal Bolivia applied a pre-colonial reading of the Bolivian nation recognising the nations of tribal and aboriginal

[90] Juan Carlos Boué, Enforcing *Pacta Sunt Servanda*? Conoco-Phillips and Exxon-Mobil Versus the Bolivarian Republic of Venezuela, 5 *J Intl Dispute Settlement* (2014) 438–474.
[91] Ibid. 451.
[92] *Petroleum Dev Ltd. v Sheikh of Abu Dhabi*, 18 ILR (1951) 144.
[93] Ibid.
[94] Jessup, *supra* note 10, 82.
[95] CF Amerasinghe, Some Legal Problems of State Trading in Southeast Asia, 20 *Vanderbilt L Rev* (1967) 257, 270.
[96] CF Amerasinghe, State Breaches of Contracts with Aliens and International Law, 58 *American J Intl L* (1964) 881.

peoples within the state.[97] It said 'The Plurinational State of Bolivia as party to this arbitration cannot be considered without acknowledging the particularities of its people, model of State and recent history. Bolivia accused the investor of not coming with "clean hands" supporting its claims based on judicial decisions and writings of the publicists.[98] In his dissenting note in *Abaclat* arbitration, Abi-Saab noted a clear 'modification or revision of the existing rules,' while defining what gap filling is:

> A gap or lacuna is a void, an empty legal space not covered by any rule. But here we have a complete legal regulation, covering almost every instance of the proceedings. What the majority award proposes is to replace most of it by another set of rules, which cannot be seen, by any stretch of imagination, as filling a void.[99]

The practical value of prior arbitral award as a precedent in an on-going arbitration is, nevertheless, rather obvious. In January 2015, in *Philip Morris Asia Ltd v Australia* case, the claimant sought to introduce into the record two sources.[100] Those two subsidiary sources are a recent award in the arbitration' the *Gremcitel SA v Peru*,[101] and 'legal opinion by Justice Ian Callinan'.[102] Overruling the respondent state's objections, the tribunal accepted the admission of both the sources, and 'the Tribunal notes that the Gremcitel Award is intended to be submitted as legal authority.'[103] Despite the doctrinal import to the contrary, in actual arbitrations, gauging from the disagreement between the claimant and respondent, prior awards work like a primary source.

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[97] *South American Silver Limited v Bolivia*, UNCITRAL, PCA Case No. 2013-15 (31 March 2015) 8, para 35.
[98] Ibid 84-85. Likewise, the Indian model BIT text of 2015 has invoked the *Calvo* clause The Model Text for the Indian Bilateral Investment Treaty < http://finmin.nic.in/the_ministry/dept_eco_affairs/investment_division/ModelBIT_Annex.pdf>.
[99] Dissenting Opinion of Georges Abi-Saab, *Abaclat and Others v. Argentina* (Decision on Jurisdiction and Admissibility) <http://italaw.com/documents/Abaclat_Dissenting_Opinion.pdf> para 213.
[100] *Philip Morris Asia Ltd v Australia*, Procedural Order No. 14 Regarding Admission of Expert Evidence and Legal Authorities, PCA Case No. 2012-12 (20 January 2015).a
[101] *Renée Rose Levy and Gremcitel SA v. Republic of Peru*, ICSID Case No ARB/11/17 (9 January 2015).
[102] *Philip Morris*, *supra* note 100, 2 para 1,3.
[103] Ibid 2 para 1.2,,3 para 2.4.

B. A Suitable Semantics: Translating native legal relations into a treaty

The *Right of Passage* case between India and Portugal is illustrative in more than one ways.[104] During the arguments before the ICJ, Portugal translated local Indian legal terms *sanad*, *jagir* and *sararanjam* that actually refer to land grants in India, as the *Marathas* handing over sovereignty over certain areas to Portugal. The ICJ rightly disagreed on the handing over of territory thus rejecting the translation of *Urdu* local terms into treaty.[105] Although the ICJ kept "treaty" as a term of reference, the Court noted:

> From an examination of the various texts of that article placed before it, the Court is unable to conclude that the language employed therein was intended to transfer sovereignty over the villages to the Portuguese. There are several instances on the record of treaties concluded by the *Marathas* that show that, where a transfer of sovereignty was intended, appropriate and adequate expressions like cession "in perpetuity" or "in perpetual sovereignty" were used. The expressions used in the two *sanads* and connected relevant documents establish, on the other hand, that what was granted to the Portuguese was only a revenue tenure called a *jagir* or *saranjam* of the value of 12,000 rupees a year. This was a very common form of grant in India and not a single instance has been brought to the notice of the Court in which such a grant has

[104] *Right of Passage over Indian Territory* (Port. v. India), [1960] ICJ Rep 6, 38. Western publicists were to pick this profitable line of arguments, manipulating the imprecision of meaning, against countries born of decolonization. The Portuguese arguments in the *Right of Passage* case in favor of the treaty-fication of contracts in the 1960s perhaps became the basis for western arbitrators to internationalize the oil contracts between Western companies and Middle Eastern countries. Scholars writing in favour of internationalization of contracts would present their analysis as "settled law" using a less nuanced use of *pacta sunt servanda*. Even in the matters of domestic law, '[a]s a matter of legal logic,' Megaw LJ found "insuperable difficulty" in *Armar Shipping* case 'in seeing by what system of law you are to decide what, if any, is the legal effect of a new event which occurs when a contract is already in existence with no proper law, but, instead, with a "floating non-law".' *Armar Shipping Co. Ltd. v. Caisse Algerienne de'Assurance et de Reassurance, the Armar* [1981] WLR 207 (CA) 215.

[105] *Right of Passage*, ibid, 38.

been construed as amounting to a cession of territory in sovereignty.[106]

Judge Armand-Ugon's dissent noted that these 'term[s] had no single and legally precise meaning.'[107] By translating *sanad* or decree into a treaty thus giving it a vocabulary of international law, the Portuguese tried to elevate contracts to the position of treaties. How could contract be used to hand over sovereignty to another state? More recent works in legal history of India argues that as the British East India Company established its territorial empire in India, "the British braided together notions of sovereignty that then existed in Europe with those that existed in South Asia." [108] Sudipta Sen argues that "In British India, where Persian had long been recognized as the official language of correspondence with the Mughals and other native regimes, terms close or analogous to 'sovereignty' in contemporary Persian or Hindustani usage such as *mulkgiri* or *iqtidar* were never seriously considered as substantively equivalent concepts in contemporary debates on the legal validity of East India Company's territorial acquisitions."[109]

After decolonisation, a margin of translation allowed the erstwhile colonial powers to use of a rigid colonial vocabulary of international law against the newly free peoples. It is argued that the Portuguese arguments though unsuccessful in the *Right of Passage* case became the springboard for innovative argument for putting down the sovereignty of states born of decolonisation.

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[106] Portugal relied on the Treaty of Poona of 1779 and on *sanads* (decrees), issued by the Maratha ruler in 1783 and 1785, as having conferred sovereignty on Portugal over the enclaves with the right of passage to them. Ibid. (Italics supplied).

[107] Dissenting Opinion of Judge Armand-Ugon, in, *Case Concerning Right of Passage over Indian Territory (Portugal v. India) (Merits),* Judgment of 12 April 1960, [1960] ICJ Rep 6, 79.

[108] Kavita Datla, The Origins of Indirect Rule in India: Hyderabad and the British Imperial Order, 33 Law & History Rev (2015) 324;

[109] Sudipta Sen, "Unfinished Conquest: Residual Sovereignty and the Legal Foundations of the British Empire in India," Law, 9 *Culture, and the Humanities* (2013) 227, 240-41.

V. From Systemic Integration to the Rejection of the NIEO

International investment law is perhaps the best example of the analogy from private law being deployed by lawyers to *de facto* make law on foreign investment.[110] The fall of the Berlin wall and break-up of the Soviet Russia further entrenched the view that any non-capitalist doctrine of international law would ultimately bite dust. Private investors would invest in developing countries with the arguments that they are doing so for the development of the economy while their own profits are only a welcome spin-off. Only when sovereign states would try to curtail the freedom of the investors would the investors use private law concepts to defend their international investments. In the process they would even use concepts borrowed from human rights regime to defend their investments.[111]

Recently, for instance, Paparinskis argues that international human rights can fill the temporal gap between classic and modern content of international minimum standards that fair and equitable treatment of investment demands.[112] He therefore argues that the concept of the international minimum standard within investment law should focus on the arbitrariness of form and procedure rather than various policy choices of States and expectations of investors. Paparinskis links human rights to investment law. He seems to argue for a human right of investors. He is of the view that arguments from human rights treaties may be used to explain analogous investment protection rules using 'relevant' rules

[110] Lauterpacht, *supra* note 41, 156. cf. VS Mani, *Audi Alteram Partem*: Journey of a Principle from the Realms of Private Procedural Law to the Realms of International Procedural Law, 9 *Indian J Intl L* (1969) 381.
[111] B Simma, Foreign Investment Arbitration: A Place for Human Rights, 60 *Intl & Comp L Q* (2011) 573. Recently, M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (OUP, Oxford, 2013) 125, has made a case for using human rights to construct arguments for investors. Cf. ME Salomon, From NIEO to Now and the Unfinishable Story of Economic Justice, 62 *Intl & Comp L Q* (2013) 1, 44.
[112] M Paparinskis, *The International Minimum Standard and Fair and Equitable Treatment* (Oxford: OUP, 2013) 8.

as described in the VCLT Article 31(3)(c).[113] Article 31(3)(c) of the VCLT says that for interpreting treaties, together with the context, 'any relevant rules of international law applicable in the relations between the parties' can also be used. Even the strictest possible interpretation of the VCLT Article 31(3)(c) according to him allows parallel human rights obligations to become "relevant" in the interpretative process.[114]

Paparinskis draws strength from the prior arguments made, as discussed before, by scholars and judges who view VCLT Artilcle 31(3)(c) as an article of "systemic" integration.[115] Besides, negotiation history, another tool for interpreting international law, of the VCLT reveals that Article 31(3)(c) had been included to avoid the risk of *non liquet,* namely, a situation when a tribunal decides that it has no rules available to apply to the case before it. All this allows Paparinskis to argue that in an investor-state dispute, investors can draw on "relevant rules" from human rights to protect their investment. In that sense he seeks to achieve a "systemic" integration of human rights and investment law.

From a theoretical point of view, conflating human rights and investment law is problematic. First, bringing substantive human rights law to fill the gap of investment law through structural arguments is astute, and imaginative but also legally didactic. Substantively speaking, human rights and investment law address different subjects and an attempt to use human rights law for investor protection amount to legal pontification in need of a scrutiny. Such an approach therefore begs the question whether "any relevant rules" from human rights could be invoked in support of investment protection? Of course investors have a legal right

[113] Ibid 228.
[114] Ibid. 175.
[115] C Mclachlan, The Principle of systemic integration and Article 31(3)(C) of the Vienna Convention, 54 *ICLQ* (2005) 279; Separate opinion of Judge Cançado Trindade, in, *Whaling in the Antarctic (Australia v. Japan: New Zealand intervening)* paras. 25-26. P Merkouris, *Article 31(3)(c) VCLT and the Principle of Systemic Integration: Normative Shadows in Plato's Cave* (Brill/Nijhoff, The Hague, 2015).

to have their investment protected. To however put rich and powerful investors in the same class as, addressee of international human rights law needs more theory building.

Such a systemic stitching of international law's two regimes comes at the cost of ignoring the class reality of international society. That international law addresses the world that is divided in classes is a truism.[116] Naturally, to Paparinskis the 'historical narrative of the resistance' by States that called for a New International Economic Order is not 'particularly helpful'.[117] The rejection of the NIEO today exposes that a transnational capitalist class, mostly comprising investors, shapes international law to its benefit.[118]

Ironically within the doctrine of sources of International law,[119] while international law finds writings of publicists as sources of international law, certain investment awards ruled out even United Nations declarations on the NIEO as sources of international law given the lack of consensus in the NIEO declaration.[120] This means while writings of scholars can make international law, UN declarations, often a product of negotiations between states, can still be rejected as sources by arbitrators in investor state disputes. Thus a small class of writers, writing in favour of an extended protection of investors can paper over the will of many states.

VI. Conclusion

The PCIJ Statute, and later, Article 38(1) (a) of the ICJ Statute, states that the court shall apply 'international conventions, whether general or particular, establishing rules expressly

[116] BS Chimni, 'Prolegomena to a Class Approach to International Law', 21 *Eur J Int Law* (2010) 57-82.
[117] Paparinskis (n 112) 163. Cf. M Sornarajah, *Resistance and Change in the International Law on Foreign Investment* (CUP 2015) 54-61.
[118] ME Salomon, From NIEO To Now And the Unfinishable Story of Economic Justice, 62 *ICLQ* (2013) 31, 34.
[119] See, Article 38(1)(d), of the Statute of the International Court of Justice, 33 UNTS 993 (June 26, 1945).
[120] *Texaco Overseas Petroleum v Libya*, 53 ILR 389; R Higgings, *International Law And Avoidance, Containment and Resolution of Disputes*, Recueil Des Cours (1991-V) 55.

recognized by the contesting states'.[121] While ICJ Article 38(1)(a) talks about rules expressly recognized by the parties, the ICJ Article 38(1)(c) invites the World Court to apply "the general principles of law recognized by civilized nations". In some ways, the latter takes away what the former intended to give i.e. autonomy to the parties. The latter, expectedly, became the springboard of juristic activism to advance a contractual view of international law.[122]

Intellectual property is the newest kind of property that capital exporting nations invest in and earn revenues from. And here too similar battle lines are visible. A policy based argument to remove intellectual property from the determined province of the law of contracts, for some lawyers, amounts to naiveté.[123] The nature of international economic law, by baring the capitalist nature of public international law, only proves that the latter is a made of private norms. In the twenty-first century, the use of "systemic" integration of investment law and human rights law has uncanny resemblances to the interwar and post 1945 battle of norms.

Blind to the vicissitudes of class reality, scholars argue that international minimum standards applicable to individual humans should now be extended to individual investors. To make the point differently, a new natural law approach to international investment law seeks to enrich it by lifting lock, stock, and barrel the protection of humans in human rights law. However, it is simply an extension of the old natural law approach of the interwar years. The role of publicists that cross-cite each other to make a suitable international law is rather visible here.

[121] ICJ Statute, UNTS (1945) < http://www.icj-cij.org/documents/?p1=4&p2=2>.
[122] Anghie, *supra* note 11, 240-244.
[123] 'Only the most naive observer, or one with a clear political agenda, can look at the intellectual property laws and their history and suggest that policy in the property sphere trumps or precludes the influence of contract.' Raymond Nimmer, Breaking Barriers: The Relation between Contract and Intellectual Property Law, 13 *Berkeley Tech. LJ* (1998) 827.

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Concluding the Thesis

Without belaboring what has already been said in the last five chapters, the thesis has tried to examine the nature of public international law. The thesis has argued that public international law is functionally private in nature. The private enterprise of international law has been facilitated by, both, (1) private norm entrepreneurs and the artificial public private distinction between the acts of the European colonial corporations (see chap 5).

My thesis attempts to problematize international law's sources; the subsidiary sources. To the extent, both, judicial decisions and writings of the publicists are seen as sources to determine the rules of international law, they come with a heavy European bias. These subsidiary sources operationalize the other sources.

Therefore, in the twenty first century, we must read such sources critically. I have attempted that. In order to do so, I have run the readers through the various tracts of time; the nineteenth century (chapters 1 and 5), the interwar period (chapters 2 and 5), the time after decolonization (chapters 3, 4, and 5) to this day. The tread that binds the whole thesis is the role of jurists and judicial decisions, although deemed subsidiary by the doctrine of sources, have been much more than subsidiary. The study of the "more than subsidiary" impact of these sources is qualitative than quantitative.

The thesis argues that Western jurists with the power of their network, or with their invisible college of lawyers, have developed the doctrines of international law for the protection of private property. In that sense, public international law is a product of the private functions of colonial companies and of the arguments advanced to protect and promote their interest. For example, the law of the protection of aliens abroad

emerges from the concern for the protection of the property of the alien.

Once initiated into such a world, countries born of decolonization were faced with the task of decolonizing international law. The biggest challenged they faced was the opinions of the established, or as the ICJ statute calls them, "the most highly qualified publicists of the various nations". Given that the centuries preceding the birth of the League of Nations witnessed colonialism and the regime of unequal treaties with the non-West, one cannot simply assume that the Western jurists would give within their doctrine a place to the concerns of the Other; those that were not "civilized nations".

A critical examination of the jurists and their work on the various aspects of international law animates my thesis. I discuss a range of issues and example to prove a omnipresent bias for private property in the writings of the jurists. Furthermore, when states began to deviate from the capitalist view of property, western jurists cited each other as a proof of existence of a law that was pro-capital. In that sense, the lock of the primary sources of international law (sated in ICJ Statute article 38(1) (a)-(c) were unlocked by 38(1)(d). The subsidiary sources had, metaphorically speaking, a key function in the making of international law.

To the extent the non-Western jurists remain a small minority in the invisible college of lawyers, the concerns of developing countries remain unaddressed. That the elite of the developing countries now find their interest aligned to the Western bourgeoisie, put together, they form a transitional class that acts likes states. They are shaping law to their advantage to the expense of the subalterns in both the East and the West.

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