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ARTICLE

The Divisible College: A Day in the Lives of Public International Law

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Abstract

This is an article about two things. First, the bifurcation of public international law (PIL) into two distinct forms: The material and the narrative. And second, the methodological fragmentation of international lawyers into discrete communities. After setting the substantive fragmentation of PIL as the context of analysis, I deploy Susan Marks' concept of "false contingency" to distinguish material and narrative PIL. I briefly examine each, and their interactions, before turning to a specific manifestation of material PIL that I call the Global Legal Order (GLO).

I then sketch the radical indeterminacy of narrative PIL, its manifestations in the ontological indeterminacy of the commonly accepted sources of PIL, and its source in PIL's lack of authority and institutionalization. This contrasts with the determinacy and authority of the GLO. Next, I turn to the "fragmentation" of international lawyers into distinct "communities of practice." In fact, this process turns out to be one of agglomeration, international lawyers are constructed within communities of practice, which glom together to create the appearance of PIL.

Finally, I turn to how these communities function by pitting "performances of legality" in "vicarious litigation," using the Chagos Islands case as an illustration. This is contrasted with the functioning of the operative legal system that is the GLO. I examine the constituent institutions of this system, and how they operate together to produce direct and indirect governance in under-developed states. In practice, this policy imposition immiserates states and antagonizes local populations. It necessitates oppressive governance which entails what narrative PIL determines to be "human rights abuses."

Keywords: Public International Law; Theory of International Law; Development; International Economic Law; Poverty

A. Introduction, Context and Assumption: Fragmentation

I wish to engage in what Anthea Roberts has called "comparative international law."[1] For me this means entertaining the possibility that what we call public international law (PIL) is in fact

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This article has been long in the making and represents the current state of my reflections on public international law, indeterminacy, and neocolonialism. It is written from the Global South and seeks to centralize the under-developed states' experiences of international law. Many people have contributed with ideas, critiques, and discussion, but I would particularly like to thank Isobel Roelle, Rosie Capps, Emily Jones, Ntina Tzouvala, and Geoff Gordon for their help and support. All errors of course remain my own.

[1]Anthea Robert, Is International Law International? 2 (2017).

comprised of (many) different "legal systems." Roberts focuses on differences at the global level, I wish to focus on differences within what she calls the "Anglo-American" tradition. I will suggest that this tradition is composed of multiple "communities of practice" each "performing legality" in perpetually deferred "vicarious litigations." I call this the fragmentation of international lawyers.

Whether we like it or not, PIL is fragmented. It almost certainly always has been, though some argue its center held for a while; a few even maintain it still does. PIL is fragmented along two axes: The disciplinary and the theoretical. Each axis has its own driving forces and coping mechanisms, but they have no necessary correlation. Different theoretical approaches are deployed within each of the fragmented subsystems. However, the two axes work together to maintain an understanding of PIL as a functioning, if weak, legal system.

It is widely recognized that PIL is differentiated into functional specializations: Law of the Sea, Human Rights, Humanitarian Law, Environmental Law, Economic Law, and so on. Contemporary debates are framed around the (actual or ideal) interactions between the various sub-systems. Do they co-operate or compete? Can they be made coherent? Should they be hierarchized? Which should have precedence? Positions in this debate range from constitutionalism, through the coherence strategies of "international public law" or "global administrative law," to celebration of the sub-systems' autonomy. I believe that the systems are autonomous. But, as this is not the axis I explore, I simply postulate that the sub-systems of PIL are functionally differentiated.

I focus instead on theoretical fragmentation: On the *effect of the existence* of a multitude of different approaches to PIL; and the incompatible definitions of the discipline they embody. I will elucidate the manner in which these beliefs construct and differentiate international lawyers into distinct communities. And how they structure engagements between these. This approach allows for a more comprehensive understanding of the "practice of international law"; yet it seems curiously under-analyzed. The precise self-understanding of each community is less important than the simple facts of their coexistence, difference, and (non-) interaction.

There are, of course, many articles published promoting specific theories of PIL, I have even written a few myself.[2] But these are monologues or, at most, dialogues of the deaf, between advocates misrepresenting and shouting past one another. They are incompatible and in conflict with one another. As well as the variety of theories themselves, there is also a professional tendency to "pick and mix" theories and methodologies to support whatever end PIL is being used to justify or repudiate. Theories are reverse engineered to provide the rules which demonstrate the conclusion.

But most international lawyers have foundational theoretical commitments; consistent postures which identify their allegiance to a particular school or approach. They are formalists or instrumentalists, positivists or natural lawyers, functionalists or pragmatists, critics or believers. This remains true even though few deploy their preferred approach with dogmatic consistency.

These commitments divide international lawyers into distinct groups and communities within and between their functional specialties. I develop a framework to perceive the formation and internal operations of these communities; their insularity and their interactions—their coexistence. I use this to outline a topography of PIL. To bring to light its battlefields and demilitarized zones, mundane practices, and daily lives.

I contextualize these activities within the observable (and oft bemoaned) reality that very few of the thousands of legal claims the communities produce have any apparent impact on the physical world. The multitudinous monographs, edited collections, and articles published, the increasingly lively blogosphere; even the "authoritative" *special rapporteur's* reports, and committee, commission, or tribunal determinations, have no obvious bearing on the real-life disputes they purport to examine and resolve. It is startling that this glaring lack of impact is generally found uninteresting;

[2]Jason Beckett, *Behind Relative Normativity: Rules and Process as Prerequisites of Law*, 12 EUR. J. INT'L. L. 627 (2001); Jason Beckett, *Countering Uncertainty and Ending Up/Down Arguments:* Prolegomena *to a Response to NAIL*, 16 EUR. J. OF INT'L. L. 213 (2005); Jason Beckett, *The Hartian Tradition in International Law*, 1 J. JURIS. 53 (2007).

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blithely subsumed under the traditional lament that PIL really ought to be better implemented or enforced.

I suggest that this widespread and normalized, yet strange, acceptance of systemic impotence is maintained by a combination of PIL's progressive eschatology, and its communities' quotidian practices. On the one hand, there is a widespread, but unfounded, assumption that PIL is slowly developing its institutional and enforcement structures. On the other we have intra-community solidarity, inter-community rivalry, and the trappings of career success. Together, these sustain the professional practices of PIL, and their academic imitations. As academics, we don't "do law," we explain and illustrate what we think "doing law" means. We describe, and so validate, the conduct of those we think of as practitioners. In doing so, we self-referentially authenticate them as officials in our imaginary legal systems. We do this collaboratively, within our communities of practice. Our work continues to have no obvious impact on the real-life events we purport to analyze.

B. On Method 1: The Material and the Immaterial

There are two forms of international law: Material PIL and narrative PIL. Material PIL regulates the world, narrative PIL comments on certain aspects and effects of this regulation. Material PIL generates binding commands, while narrative PIL produces legal fantasies—visions of an unrealizable world to come. Susan Marks' concept of "false contingency" gives us a lens through which to distinguish the two systems.[3]

Marks coined the term false contingency for a form of analysis which asks why, in a constructed and contingent social world, certain things happen and others do not, and why this gives rise to discernable patterns. Analyzing why some legal claims are realized while others remain ephemeral, Marks develops a distinction between legal pronouncements which affect the material world of distributions and choices, and those which do not: Material and narrative PIL respectively.

Although all methodologies are arbitrary assemblages of discrimination, Marks' focus on actualization is productive. It exposes a different data set from which to analyze PIL, and its role in regulating global order. Marks' approach allows us to identify and theorize data by distinguishing normative demands which are actualized from those which are not. This approach is concerned with empirically observable impacts and patterns. It focuses on what will actually happen if a state pursues a specific activity, deemed delinquent, by either material or narrative PIL. Will the "delinquent" state incur a "cost"? Will it be punished, corrected, coerced into compliance? Will the "law" be upheld through enforcement action? Is the probability of enforcement likely to secure advance compliance? Or will the delinquent state endure nothing more than the scorn of its self-appointed judges? Are there empirically visible patterns of conduct which might identify legal rules?

Marks encourages us to look at PIL from the perspective of actualization, not how "good" a legal argument is, but whether it was actualized or not. We can then determine whether there are patterns among those norms which are actualized, indicators that suggest likely realization of similar norms in the future. This perspective also emphasizes that most of the legal claims made in the name of PIL are not actualized, they are false contingencies.

I wish to dispute the common understanding that PIL is a legal system. I do this by adopting H.L.A Hart's critique of PIL's lack of material or empirical identifiers. That is, I will argue that the absence of enforcement of PIL deprives it of its character as a legal system. I understand that it is unfashionable, perhaps even impolite, to return to Hart when critiquing PIL. Yet I plan to do so, and I should explain why. I used to believe that Hart's critique didn't matter, it only showed that

[3]Susan Marks, *False Contingency,* 62 CURRENT L. PROBS. 1, 11 (2009); Susan Marks, *Human Rights and Root Causes*, 74 MOD. L. REV., 57 (2011).

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his theory was wrong, or inappropriate for PIL. [4] PIL might have been weak, but it functioned like a legal system, despite its lack of institutionalization. I have changed my mind on this point.

This is because I have come to realize that narrative PIL shares its normative space with material PIL. We have focused on narrative PIL while material PIL plays out uncommented. Consequently, we must turn our attention to material PIL, in particular the global legal order (GLO). As it currently functions, this closely resembles the Hartian archetype. It is institutionalized, ideologically homogeneous, possessing the "committed internal point of view", and its commands are obeyed or enforced. It has rules of recognition, change, and adjudication. It is operated by an institutionally powerful, ideologically homogenous, community within international economic law. The GLO is the contemporary manifestation of extractive PIL.[5] Its normative injunctions have *observable*, often deleterious, effects in the physical world.

The concept of a "legal system" on which I rely, is drawn from the analysis of municipal law, from the jurisprudence of *municipal* legal systems. Thinkers as diverse as Bentham, Austin, Holmes, Cohen, Llewelyn, Fuller, Kelsen, Hart, and Dworkin agree on certain criteria for a legal system—some demand more, others argue that the criteria are not met. These include the need for institutionalization and enforcement as prerequisites for the *identification* or recognition of legal norms. A norm is objectively observable only in compliance and enforcement.

However, the key contrast in this article is not between PIL and municipal law, but between narrative PIL and the GLO. The Hartian theory of municipal law is either banal—law is what judges do, but how they interpret law is discretionary—or implausible—all judges decide cases in a coherent, internalized, and thus predictable way. Nonetheless, it is worth emphasizing that the nature of indeterminacy is different in municipal law and PIL. In municipal law, indeterminacy is constrained, temporarily suppressed, by authoritative judgment; particularly of apex courts.

The legality of abortion was recently under legal dispute in the USA, and the Supreme Court over-ruled the iconic *Roe* v. *Wade* judgment.[6] The "constitutional law" on abortion is radically indeterminate, the court could have made any of three incompatible decisions: Abortion is constitutionally protected in all states; the constitution says nothing on abortion, it is a state decision; or abortion is constitutionally prohibited in all states. The law neither determined nor predicted this decision. The politics of the Bench helped us predict the decision, but the law was used only to justify it.

Nonetheless, despite this indeterminacy, we can identify impartially the current US law on abortion, at least in its core tenets. Under *Roe* v. *Wade* abortion was constitutionally protected in the USA, even if its peripheries were contested, and its center under threat. This same determinability remains even after the Supreme Court, in *Dobbs* v. *Jackson Women's Health Organization*,[7] over-ruled *Roe* v. *Wade*. The law has changed, the legality of abortion is now a state decision, but we have a temporarily authoritative determination of what the law is. Only at the moment of decision does the law's radical indeterminacy come into play, it is then suppressed by the fact and content of the authoritative decision. The indeterminacy remains at the textual and discursive levels: There was a dissenting opinion, attorneys can challenge the law in subsequent cases, academics can critique the decision and the new law. But at the material level, everyone will still be able to agree on what the law actually is— whether they support or oppose it.

Law is an institutional fact, a thought object, but the institutions in which it is formed are brute facts, manifested in empirical reality. The enforcement of law is also a brute fact,

[4]*See* Beckett, *The Hartian Tradition, supra* note 2.

[5]Jason Beckett, *Harry Potter and the Gluttonous Machine: Reflections on International Law, Poverty, and the Secret Success of Failure*, 13 TRADE, L. & DEV. 317 (2021).

[6]*See* Roe v. Wade, 410 U.S. 113 (1973).

[7]*See*, Dobbs v. Jackson Women's Health Organization, 597 U.S. ___ (2022).

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empirically observable, and sometimes patterned, consistent. This enforcement, what is deemed to be the dispositive rule, and how it is interpreted, is the law as it is actualized—the law as it becomes a brute fact, and thus becomes observable. Alternative dispositive rules and interpretations are dispelled. If the enforcement of law is consistent, these dispelled alternatives are excluded from the legal system. This is what Robert Cover calls the "jurispathic function" of the court.[8] In applying law, courts kill off alternative normative visions; we must kill law to create law.

The jurispathic function is central to the courts' role in maintaining the legal system. Legal arguments are easy to create, alternative normative visions proliferate, and the courts' role is to maintain order, to tame "the fecundity of the jurisgenerative."[9] The courts distinguish competent from incompetent legal argument, and create authoritative interpretations of the text in question. The jurispathic function maintains consistency, to define "legally cognizable material" and thus restrict it to manageable proportions. Competent legal arguments and authoritative interpretations are those consistent with the courts' previous rulings. These will be, to varying degrees, consistent and inconsistent, but will likely display certain "structural biases" which manifest the politics of the legal system.

The jurispathic function is rarely able to keep more than a semblance of coherence unless the substantive politics of the system officials are consistent. This political homogeneity is what Hart referred to as the "committed internal point of view." The more politically diverse the system officials are, the less easy it is to predict what will be accepted as competent legal argument, and which interpretations will become authoritative. In the absence of system officials, it is impossible to determine which argumentative techniques are competent, or which interpretations are authoritative. In narrative PIL, there are no authoritative system officials or institutions, the jurispathic function is missing entirely, and legal claims proliferate unconstrained. All legal argument becomes equally (in)competent, with no text or interpretation authoritative.

Here indeterminacy is radical and inescapable. This is because there is no person or body authorized to make authoritative decisions on the momentary content and meaning of the law. The system is not institutionalized, and anyone can claim to determine its content. These claims will be received differently by different audiences in different times and places. The professional practices and competencies of their proponents will factor into this reception; but the understanding of professional competence will differ between disparate communities of international lawyers. Different communities perceive different systems of narrative PIL, different rules. There is no mechanism or referent through which to evaluate their relative competences, each is as unauthoritative as the others.

Narrative PIL is radically indeterminate, municipal law is momentarily determinate but subject to unpredictable change. My argument is that that specific manifestation of material PIL that I call the GLO sustains its temporal determinacy to the point that it becomes a fully empirically observable, normatively internalized, coherent, and predictable, legal system. We can identify its laws impartially, whether we support or oppose them. But as a rule we do not, we expunge this data from the analyses of narrative PIL. Narrative PIL is not a legal system; the GLO is. And it produces the delinquency that narrative PIL can identify, but not correct.

To summarize so far, the set of discourses we have come to call PIL is bifurcated into material and narrative forms. Material PIL regulates the world, while narrative PIL comments on the world as regulated. Material PIL follows an extractive logic, while narrative PIL manifests a variety of emancipatory logics. Material PIL contains, but exceeds, the set of institutions I call the GLO. Narrative PIL is fragmented along both disciplinary and methodological axes. Narrative PIL is radically indeterminate, the GLO is not—it is highly determinate and predictable. The rest of

[8]Robert Cover, *Nomos and Narrative*, 97 HARV. L. REV. 5, 40 (1983).
[9]*Id.*

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material PIL becomes determinable as it is actualized; I take no position on whether it is predictable.

False contingency operates as an analytic schema which allows us to differentiate between normative claims that are actualized and those which are not. This is important in both legal academia and the various practices we call PIL. Academics and international lawyers each mass-produce legal claims, often in the pursuit of "progressive legal change."[10] However, few of these are realized in practice—judges do not change their opinions in accordance with academic dictates, and PIL is "unenforced." This creates a distinction between material and immaterial legal claims (or norms, or laws).

In PIL, it unveils a distinction between two normative orders which I call "material PIL"[11] and "narrative PIL." Narrative PIL is immaterial, it leaves no trace beyond its texts and arguments, no impact on the events examined. It has no empirical referent, and its texts and arguments are contradictory, it is radically indeterminate. Material PIL in contrast is clearly determinable, and in places highly determinate. This is because its injunctions are inscribed on the body of the Earth and the bodies of her inhabitants. Put simply, material PIL is that which actually happens, those normative claims which are actualized, which can be seen in empirical reality.

False contingency exposes the bifurcation of PIL into two distinct systems: the quietly operative system of material PIL and the spectacularly ineffectual critiques launched by narrative PIL. I would like first to outline material and narrative PIL, and second to identify a specific subset of material PIL which, I contend, operates as a self-contained legal system. I call this the Global Legal Order (GLO).

I. Material PIL

Material PIL is an *authoritative* practice, quiet, effective, technocratic; yet politically charged and ethically problematic. It has long been recognized, as Louis Henkin noted in 1979, "The daily sober loyalty of nations to the law and their obligation is hardly noted. It is probably the case that *almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time*."[12]

This is the PIL of diplomatic recognition, of passports and visa controls, international postal services and the internet, satellite communications and entertainment, shipping, and maritime lanes. It is also the PIL of actual military maneuvers, bases, logistics, and conflict. Of the restricted movement of peoples, and the unrestricted movement of capital. The PIL of poverty, debt peonage, and enforced under-development,[13] whose role in the creation and maintenance of the "suffering caused by social normality" is rarely analyzed.[14]

This prosaic reality of PIL regulates not only our travels, communications, and entertainment but also the clothes we wear, the food we consume, and the technologies we use. It regulates the way in which resources are moved around the world: Concentrated in some places while desperately lacking in others. Put bluntly, it maintains and directs the flows of wealth and poverty, freedom, and oppression, in our radically unjust world.[15]

[10]Pierre Schlag, The Enchantment of Reason 9 (1998).

[11]Geoff Gordon, *Contradiction & the Court: Heterodox Analysis of Economic Coercion in International Law*, 34 Temp. Int'l & Compar. L.J. 283 (2020).

[12]Louis Henkin, How Nations Behave 47 (2d ed. 1979).

[13]Beckett, *supra* note 5.

[14]Martti Koskenniemi, *'The Lady Doth Protest Too Much' Kosovo, and the Turn to Ethics in International Law,* 65 Mod. L. Rev. 159, 173 (2002).

[15]John Linarelli, Margot E. Salomon & Muthucumaraswamy Sornarajah, The Misery of International Law: Confrontations with Injustice in the Global Economy (2017).

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II. Narrative PIL

Although little is written about the (necessary) legality of the World's atrocities, gallons of ink are spilled over forests of pages condemning their postulated illegalities. False contingency challenges us to engage these analyses critically. In particular to ask which laws were "breached," how the norms were identified, what specific feature made them law. All of this should be reconsidered in light of the key distinction: The claims are not dispositive of the issue. However well-crafted they may be, the claims of narrative PIL are false contingencies.

In this way, false contingency draws our attention to the very real contingency of the legal arguments constituting narrative PIL. It is inarguable that ethical legal norms can be identified, interpreted, and applied and that they can also be made to lead to definitive legal conclusions and judgments. It is also inarguable that this can only be done in non-authoritative, non-institutionalized settings, and that these conclusions will be neither consistent nor enforced. Different international lawyers will reach different conclusions, often based on different premises.

In other words, the law cannot become determinable until it is actualized or authoritatively applied and enforced. Narrative PIL functions without this constraint, allowing its practitioners to identify and interpret the law *as if* the bench would share their ethical and political leanings. However, the practitioners' ethical and political leanings vary, the claims they make are incompatible. They cannot all be "correct," yet they co-exist.

In an institutionalized legal system we could draw a distinction between which claims were enforced, and which were rejected. The rejected claims become legally invalid, the enforced legally valid. This is the court's "jurispathic function." In determining one meaning to be correct, the court also determines alternative meanings to be false—it kills off alternative normative visions. Narrative PIL has no jurispathic function, it can proliferate unconstrained.

Legal claims can be built from positive rights—like the claims that international human rights law (IHRL) should ensure that everyone has shelter, food, healthcare, decent working conditions, and a livable environment.[16] These are noble aims, which I personally endorse. But they cannot be brought about through IHRL, or the "obligations" it creates. It is not just that there is no institution to enforce their compliance, but rather that the underlying structure—the GLO—renders them economically impossible.[17] They are false contingencies, not because they could never happen, but because they cannot happen without systemic change. And systemic change is beyond the focus, and reach, of IHRL.[18]

Nonetheless, these legal claims, excoriations, and judgments, do have certain functions. They bolster publication records and boost careers; they also allow a feeling of sentimental satisfaction: The "Very Bad Thing" has been exposed to the "Shining Light of Legality" and can be Considered Resolved. Writing now, as someone who previously engaged enthusiastically in this endeavor, I believe that its adherents are simply blind to its ineffectuality and convinced that they are applying *the*—objectively determinate and largely just—law, and that that is in itself important. They believe, or at least I believed, that they are speaking truth to power by holding the candle of law to the darkness of politics. In fact, narrative PIL disguises and perpetuates material PIL—on which it, in turn, relies for material support.[19]

III. The Interaction of Material and Narrative PIL

Material PIL operates quietly behind the spectacular "failures" of the laws of peace and humanity. It directly affects material reality, manifesting the actual functioning of PIL, in all of those

[16]United Nations Human Rights Committee, *General Comment No. 36 on Article 6 of the International Covenant on Civil and Political Rights, on the Right to Life*, U.N. Doc. CCPR/C/CG/36 (Oct. 30, 2018).

[17]Susan Marks, *Human Rights and the Bottom Billion*, 1 Eur. Hum. Rts. L. Rev. 37 (2009).

[18]Jessica Whyte, The Morals of the Market: Human Rights and the Rise of Neoliberalism (2019).

[19]Gordon, *supra* note 11

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instances where we are taught to think of PIL as "failing." It is a layer which exposes PIL as not only the advocate of solutions, but also as the cause of the problems to be solved.

For example, there were narrative arguments for and against the legality of the US led invasion of Iraq in 2003. At the narrative level, PIL was radically indeterminate, and the invasion was both legal and illegal. At the material level however, the invasion went ahead, and the ensuing "transformative occupation" was subsequently endorsed by the UN. Moreover, no-one was tried or punished for the fact, or conduct, of the invasion. In material PIL, the invasion was lawful. That could, of course, change, if the leaders of the invasion were to be retrospectively punished. But that is unlikely to happen, it is a false contingency—a legal possibility precluded for mappable, structural, reasons. There are many discursive arguments for illegality, but no available institutional means to actualize them. Even if the case were to appear in a court, there is no guarantee that the accused would be convicted—that would depend entirely on the disposition of the bench,[20] not the quality of the legal arguments put before them.

Consequently, in narrative PIL, I focus less on "the practice of PIL," than on the non-effects of that practice, and the reasons for them. I am less concerned with how specific communities construct their laws and judgments than with the fact that these judgments rarely affect the reality being judged. Narrative PIL's demands, however carefully formulated, go unheeded. They are false contingencies, but we continue to produce them, and watch them fail.

Beneath the spectacular sideshow of narrative PIL—the interminable official, activist, and academic squabbles—material PIL operates discretely; regulating flows of resources, and sites of exploitation and oppression. One subsystem of material PIL, the GLO, does this with the force and consistency of a determinate legal system.

IV. The GLO

As I analyze the visible effects of material PIL in the world, four institutions stand out: The International Monetary Fund (IMF), the World Bank, the World Trade Organization (WTO), and the system of International Investment Arbitration (IIA). These operate together to form the discrete legal system I call the GLO. They possess the power to enforce their commands. They are dominated by a unitary community, bound by commitment to a specific, internally coherent, ideology.

Material PIL includes but exceeds the GLO. But the GLO stands out for its coherence, its formal legal rationality. It is self-contained and self-reproducing. The GLO has a strong jurispathic function. It is immune to external critique,[21] and retains the purity of its normative vision. It is an extractive system, reproducing oppression and exploitation.[22]

Each of the four institutions has a mechanism for giving commands, and a mechanism for enforcing these. The international financial institutions (IFIs) use conditionalities, enforced by non-disbursement for non-compliance; the WTO has its treaties and the dispute settlement process leading to formal sanctions; and IIA has its enforcement procedure under the New York Convention. Each issues commands backed by sanctions. More importantly, they do so in concert, manifesting a singular ideology consistently and coherently. Their commands are expressed and enforced consistently, they are regular, predictable, and form the recognizable laws of a legal system.

C. Narrative PIL, by Contrast, Is Radically Indeterminate

There are two levels at which radical indeterminacy is structurally embedded in narrative PIL. First, it is manifested in the inconsistencies and tautologies of the commonly accepted sources

[20]For a series of examples of legal rulings at odds with the supposed ethics of human rights law, see Paul O'Connell, *The Death of Socioeconomic Rights*, 74 MOD. L. REV. 532 (2011).

[21]LINARELLI ET. AL., *supra* note 15.

[22]Beckett, *supra* note 5.

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doctrine. Second, it is entailed by narrative PIL's lack of institutionalization, hierarchy, and external authority.

I. Sources Doctrine, Interpretative Fallacies, and Ontological Indeterminacy:

It is commonly accepted that the sources international law are enumerated in article 38(1) of the Statute of the International Court of Justice (ICJ). This lists three primary sources: international treaties, customary international law (CIL) and general principles of international law, and one subsidiary source: the writings of publicists and the judgments of courts. The first two sources are taken to be the most important and form the focus of my exposition; each is internally incoherent.

To treat article 38(1) as the source of PIL, is to embrace a structural tautology. But that is unimportant, the real problem is that the sources *themselves* are internally indeterminate. It is relatively easy to identify specific international treaties and the states party to them. But determining the content of their obligations is fraught with difficulty and outright contradiction. The rules of treaty interpretation, encapsulated in articles 31 and 32 of the Vienna Convention on the Law of Treaties (VCLT) are contradictory to the point of meaninglessness. Article 31 initially asserts that one must merely read the treaty, neither adding nor removing any words. Article 32 qualifies this. If the "natural" reading produces an "absurd" (i.e., unpalatable) result, one may go behind the text to find the "intention of the parties" and apply that instead. Returning to article 31, if the result is *still* undesirable, one may impose an "object and purpose" on the text, and (re)interpret in its light. This allows the interpreter to add or remove words as necessary to realize the *telos* imposed.

Some argue that the qualification that a "natural meaning" can only be rejected if it is "manifestly absurd or unreasonable" provides a genuine constraint and underwrites a distinction between "interpreting" the text and "abusing" it.[23] This is rendered untenable by the plethora of contradictory texts on treaty interpretation which circulate concurrently around the domains we call PIL. Holding dogmatically to a single, arbitrarily chosen, technique leads only to the joy of consistent, but impotent, "rightness." Deploying interchangeable techniques of treaty interpretation under the guise of "eclectic pragmatism" gives the "interpreter" absolute freedom. Treaty law is *methodologically indeterminate*.

The content of CIL norms is subject to the same interpretive impasse. *And* there is an interminable dispute over when norms of CIL even *exist*. This flows from the article 38(1) definition: "International custom, as evidence of a general practice accepted as law" which has inspired confusion over the methodology for determining the existence of CIL.[24] It is generally accepted that customary international law is composed of two elements—state practice and *opinio juris*. Of course, no-one knows how much practice or *opinio* is required to "create" a norm. And worse, the definition of each element is disputed; as is the relationship between them. It has even been argued that only one element is necessary: *Opinio*;[25] *or* practice![26] And that moral desirability alone suffices.[27]

Assuming both elements are necessary, they could create CIL as *either* an aggregate *or* a synthesis. To provide a synthesis, the two elements would have to be part of the same thing, inexorably bound and inseparable. To be an aggregate, the opposite must be assumed, that each element

[23]*See e.g.*, Richard Gardiner, Treaty Interpretation (2017).

[24]Jason Beckett, *Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL*, 16 Eur. J. of Int'l. L. 213 (2005).

[25]Bin Cheng, *United Nations Resolutions on Outer Space: "Instant" International Customary Law?*, 5 Indian J. of Int'l. L. 23 (1965).

[26]Hans Kelsen, *Théorie du droit international coutumier*, 1 Revue Internationale de la Theorie du Droit 253 (1939).

[27]John Tasioulas, *In Defence of Relative Normativity: Communitarian Values and the Nicaragua Case,* 16 Oxford J. L. Stud. 85 (1996).

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enjoys an atomistic existence. These options encapsulate the classic[28] and the modern[29] theories respectively. They *cannot* be reconciled.[30] The ICJ has endorsed both approaches,[31] and continues to do so.[32] Then there is the definition of each element.

There are two options for State Practice: Either it is *everything* that States do, or it is *some of* what States do. Before this choice is made, we must decide how to determine which of the things that states do count as Practice. This question has been answered in different ways: For a natural lawyer it is the congruence of the action with a posited ethical order which separates Practice from mere Conduct; for a positivist *opinio juris* differentiates the two. Those adopting an aggregationist theory must assume all state actions to be Practice.

Opinio juris, is another term of many meanings. It could be a "state of mind" imputed to states; which has been variously defined as a belief in legality,[33] a consent to be bound,[34] or a normative claim for legality.[35] It has also been identified as a characteristic of state conduct—the acting state's claim that its conduct accords with "existing" CIL, or proposes it be altered.[36] This can be complemented by analyses of other states' response to the claim, or not.[37] Alternatively, *opinio* could refer to what states say;[38] here it could be all that they say or some of what they say—such as, that sufficiently congruent with "World Order Values" (whatever those are).[39]

It is impossible to track the potential permutations of the "agreed" elements of CIL. Each combination specifies different data and sees norm formation differently; each identifies different rules. There is an available theory for any norm we wish to identify, and another to refute it. CIL is a technique through which ethical and political desires are re-presented as legal norms. It is an open-ended language to be used, not an object to be described. Amnesty International, for example, can simultaneously assert that *at least* 141 states torture their citizens,[40] *and* that there is a clear CIL prohibition on torture.[41] The ICJ has proclaimed that "permanent sovereignty over natural resources" is a customary right for all states,[42] despite the fact that no under-developed state possesses this. For over sixty years, debates about "humanitarian intervention" have focused on the existence and meanings of purported norms of CIL.[43] As have those on pre-emptive, or even "precautionary" self-defense.[44] And then there are *jus cogens* norms . . . .

"In practice," this profusion of articulated and unarticulated theories is masked by the apparent agreement about the structure and elements of CIL. Disputes over which rules *exist* are elided with disputes over the meaning and applicability of rules already *presumed* to exist. Disputes which characterize the practice of law, like the interpretive disputes in treaty law, cannot be resolved.

[28]Anthea E. Roberts, *Traditional and Modern Approaches to Customary International Law: A Reconciliation*, 95 AM. J. OF INT'L. L. 757 (2004).

[29]*Id.*; *see also* Anthony D'Amato, *The Concept of Special Custom in International Law*, 63 AM. J OF INT'L L. 211 (1969).

[30]*Contra* Roberts, *supra* note 28.

[31]*See e.g.*, N. Sea Continental Shelf (Ger. v. Den.), Judgement, 1968 I.C.J. 9, 149 (Apr. 1968), Military and Paramilitary Activities in and Against Nicaragua (Nicar. V. U.S.), Judgement, 1986 I.C.J. 14 (June 28)

[32]Koskenniemi furnishes further examples in the Epilogue to the second edition of MARTTI KOSKENNIEMI, FROM APOLOGY TO UTOPIA (1989).

[33]HUGH A. W. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 47 (1972).

[34]Cheng, *supra* note 25.

[35]Beckett, *supra* note 24.

[36]James Crawford & Thomas Viles, *International Law on a Given Day*, *in* INTERNATIONAL LAW AS AN OPEN SYSTEM (2002).

[37]*Id.*

[38]D'Amato, *supra* note 29.

[39]Tasioulas, *supra* note 27.

[40]*Stop Torture*, AMNESTY INTERNATIONAL, https://www.amnesty.org/en/get-involved/stop-torture/ (last accessed Oct. 22, 2022).

[41]*Combating Torture and Other Ill-Treatment: A Manual for Action*, AMNESTY INTERNATIONAL 53 (2003), https://www.amnesty.org/en/wp-content/uploads/2021/06/act400012003en.pdf.

[42]*See e.g.*, Armed Activities on the Territory of the Congo (Dem. Rep. Congo v. Uganda), Judgment, 2005 I.C.J. (Dec. 2005).

[43]HUMANITARIAN INTERVENTION AND THE UNITED NATIONS (Richard R. Baxter & Richard B. Lillich eds., 1973).

[44]Saki R. Dockrill, *Dealing with Fear: Implementing the Bush Doctrine of Pre-Emptive Attack*, 34 POL. & POL'Y 344 (2007).

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There is no body within the horizontally diffuse structures of narrative PIL with the competence to give authoritative answers. As no-one can "objectively" identify when its norms exist, CIL is *ontologically indeterminate*.

II. Institutionalization, Authority, and the Determinacy of Law

Law is an institutional practice, an institutional fact.[45] It is not a tangible object,[46] and cannot be registered by our senses. Instead, it must be sought in the practices from which it arises and is manifested. Authoritative legal institutions, with enforcement powers are a prerequisite for the identification of law. Absent these, legal norms and their interpretations exist only in the eyes of their beholders. Narrative PIL lacks these prerequisites; it is *structurally* incapable of producing determinable legal content. Its rules cannot be impartially identified; not only because there is no authoritative procedure to facilitate that, but more fundamentally, because there is no data against which to test it. Valid legal norms and interpretations can be impartially identified *only* as they manifest in empirical reality.

To produce observable norms, law must be an "organized, social practice of violence,"[47] where "legal interpretive acts signal and occasion the imposition of violence upon others."[48] This act of socially sanctioned violence *establishes the existence* of a legal norm. Valid laws are observable only in the *actual enforcement* of past judicial decisions. The distinction between competent interpretative and argumentative techniques must also be sought here. Enforcing law also occasions destruction in the normative realm. In affirming one interpretation, it destroys the alternatives. This is the interpreter's "jurispathic function." Courts must eradicate incompetent techniques of legal argumentation to reveal the competent techniques which remain. It is the fact of being used in court, and *not rejected* by the bench, which *identifies* a norm as valid, or an argumentative technique as competent.

Consequently, "neither legal interpretation nor the violence it occasions may be properly understood apart from one another."[49] The requirement for enforcement *constrains* the identification and interpretation of legal norms. If norms are enforced consistently, empirically observable patterns will emerge, revealing the system's laws. Only an authoritative legal order can provide the data from which to impartially identify legal norms, valid interpretations, and competent argumentative techniques.

Narrative PIL has no capacity to enforce its demands; it cannot inscribe its will on the Earth, and so, cannot create observable legal norms. It *cannot* produce determinate legal demands. It offers no data against which legal arguments could be evaluated, or the competent and incompetent distinguished. Lacking authority, Narrative PIL has no jurispathic capacity. It mass produces incompatible, equally (in)competent legal demands, which cannot be delimited or hierarchized; and so, co-exist indiscriminately. Unable to destroy law, it cannot create law. Unable to exclude incompetent argumentative or interpretative techniques, it cannot be used to identify competent ones. It is impossible to determine which norms exist *because all norms exist*; and all techniques of identification, interpretation, and application are *equally competent*.

This radical indeterminacy both drives and disguises the fragmentation of international lawyers into a profusion of "communities of practice." Each community functions by refusing to see their consistent lack of effect in the world, or by acknowledging and excusing this. Each community is capable of imposing patterns on the data, fabricating "determinable norms," and competent argumentative practices; but only by excluding most data as "non-legal," beyond the field,

[45]Neil MacCormick & Ota Weinberger, An Institutional Theory of Law (1986).
[46]*Id.* at 49.
[47]Robert M. Cover, *Violence and the Word*, 95 Yale L. J. 1601 (1986).
[48]*Id.*
[49]*Id.* at 1602.

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incompetent, or inadmissible.[50] These mass exclusions are always arbitrary and are not accepted by the other communities, who exclude differently.

Each community ignores most of the practices and products of PIL. In doing so, they are able to create artificially stabilized, inter-subjectively agreed, images of a functioning, professional, practice. These imaginary legal systems can indeed identify and apply their norms consistently, but only within the community. Their "judgments" are not binding on any other community, and rarely influence the material world. Neither the system nor its norms have authority beyond the community. This is rationalized by conceptualizing inefficacy as a systemic problem: A deficit of compliance and enforcement mechanisms.

Communities of practice exist throughout PIL, in perpetual, but unacknowledged, conflict. They fill the pages of journals and books with their claims and counterclaims, analyses, and critiques. I explore these phenomena using a combination of Beverly and Etienne Wenger-Trayner's "communities of practice," and Nicholas Rajkovic's schema of "performances of legality" in "vicarious litigation." Together, these reveal how our radically indeterminate PIL continues to reproduce itself.

I see my analysis as complementary to Anthea Roberts' project of: "'[C]omparative international law,' which examine cross-national similarities and differences in the way that international law is understood, interpreted, applied, and approached by actors in and from different states."[51] Roberts draws our attention to the differences between the ways in which international law scholars of the five permanent members of the United Nations Security Council (UNSC) approach PIL. She: "[E]xplores how different national communities of international lawyers construct their understandings of international law in ways that belie the field's claim to universality and perpetuate certain forms of difference and dominance."[52]

So, we have two different movements at play, first a "fragmentation" of international lawyers into "national" communities, then patterns of dominance appearing among these communities. International lawyers are constructed in particular settings, and as the settings vary so do the constructions. International lawyers are made differently in different traditions, in different *communities*. Moreover, there is a hierarchy among these communities, as: "[A]ctors, materials, and approaches from some states and regions have come to dominate certain transnational flows and forums in ways that make them disproportionately influential in constructing the 'international'—a point that holds true for Western actors, materials, and approaches in general, and Anglo-American ones in particular."[53]

We can see the same two movements at play *within* national traditions, or at least within my own "Anglo-American" tradition. The national college of international lawyers is divisible too. Here international lawyers are constructed by communities of practice. They are trained to perform legality in community approved ways, to recognize and produce "competent legal arguments" according to community constructed standards. These standards, these normative visions, are internalized in disciplinary training; but they differ from community to community. These communities are not as easy to demarcate as simple national divides; they form a complex ethnography.

There are also hierarchies, "forms of difference and dominance," among these communities. There are mainstreams and "sidestreams" within each subfield of PIL in the Anglo-American tradition. Some communities are "disproportionately influential" in the definition, focus, and identification of PIL. Others are marginalized, their concerns relegated to the periphery of the discourse. These are missing in an analysis as abstract as Roberts', this is not an omission or

[50]Stephen Riley, *The Philosophy of International Law*, *in* Research Methods in International Law: A Handbook (Deplano & Tsagourias eds. 2021).

[51]Anthea Roberts, Is International Law International? 2 (2017).

[52]*Id.* at 1.

[53]*Id.* at 5.

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oversight but a necessary effect of her problematic.[54] I believe her basic project of mapping community differences is well-suited to be transposed down a level to outline a comparative analysis of the communities within a specific tradition.

This narrowed focus allows for a more detailed, though far from granular, analysis; a more nuanced picture emerges. But it is the same difference, reproduced in fractal form: The fragmentation of communities within the national traditions. My analysis is also wider than Roberts'. Moving beyond merely "mainstream" academic material in the tradition, I expose the marginal. More importantly, I contextualize the analysis within the reality of material PIL, this emphasizes an underlying divide between discursive PIL and material PIL. Behind the many competing communities, the GLO operates quietly. In this context I believe my analysis also follows in the spirit of Roberts' project, whereby: "[T]his project encourages international lawyers to be more reflective about the particularities of their frameworks and perspectives, and more reflexive about how they engage with the field."[55]

D. Professional Construction and the Agglomeration of International Lawyers

International lawyers are professionally constructed within different "communities" and this process conditions, or even determines, our understanding of PIL and its practice. That is, different international lawyers learn to "do" PIL in different ways; our communities define PIL for us, identifying specific institutions, texts, and argumentative techniques, as authoritative and competent. These background assumptions are internalized during disciplinary training; but their content differs from community to community.

We are not trained to be "international lawyers as such," but to represent the particular traditions, postures, and rituals, of our formative communities. There is no "PIL as such," no "invisible college of international lawyers," only a divisible college of discrete communities. PIL is radically indeterminate, and each community functions to impose intelligibility and create the appearance of determinability. They can succeed only within their own construction of PIL. But all have different constructions, and none is more competent than any other. The existence of these communities has been acknowledged in international legal discourse, but from the assumption that they are new, and dangerous, phenomena—which threaten PIL as a unitary entity already under threat, and so must be examined and contained.

There is no agreed name for these communities. But naming them is important. Although "what matters most is to analyze . . . how these communities are structured and how they function;"[56] the concepts we import from other disciplines come with their own baggage. This affects analyses conducted through them. We need a concept which reveals, rather than distorts, how PIL's communities are structured and function. The existing analyses must be problematized. In my view, these were undermined by three things: The attempt to fit the data into the adopted concepts, the oscillation between concept, and the analysts' own desire for unity in PIL.

We are not trained to be "international lawyers as such," nor trade lawyers, human rights lawyers, environmental lawyers, *et cetera* "as such." But we are taught to think of ourselves that way. We are professionally constructed within specific communities of international lawyers, each delimited in numerous ways: Geographically, politically, ideologically, theoretically, *et cetera.* Each constructs its own normative universe, with its own causal or imputational laws, exceptions, rationalizations, and standards of legal judgment—which its members internalize and *believe to be* "international law."

[54]See Gordon, *supra* note 11, at 218–9.

[55]Roberts, *supra* note 51, at 1.

[56]Andrea Bianchi, *Epistemic Communities*, *in* Concepts for International Law: Contributions to Disciplinary Thought 269 (Jean D'Aspremont & Sahib Singh eds., 2019).

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I. Categories of Community:

The two main categories through which PIL's fragmentation has been analyzed are "interpretive" and "epistemic" communities. The former imported from literary studies, the latter from constructivist international relations. Each concept bears the trace of its home discipline; they provide inapt lenses to evaluate the structure and functioning of PIL's communities. These are productive, they create texts and data; this is alien to interpretive communities, which work with texts created elsewhere. However, they lack the objectivity, social capital, and policy relevance which characterize epistemic communities. Waibel and Bianchi have attempted to overcome these limitations: Both by oscillating between the two concepts in different contexts, and by imposing their own beliefs about PIL onto the data.

a. Interpretive Communities:

Law is an interpretative practice. "Nowhere else do theory and practice interact more closely than in the art of treaty interpretation."[57] Its archetypal question is: How does this rule apply to that conduct? However, this presupposes another question: What does the rule mean? And yet more fundamentally: Do texts, including rules, have singular, self-evident, meanings; or is meaning necessarily a synthesis between text and reader? Stanley Fish calls the first idea "formalism," "the thesis that it is possible to put down marks so self-sufficiently perspicuous that they repel interpretation."[58]

This is similar to, but stronger than, the lawyer's belief in textual interpretation, or the fantasy of auto-interpretative treaty provisions. It is a comforting, but unrealistic, conviction. To make sense of a text, a reader inevitably inserts their own ethics and experiences into its interstices and ambiguities. This is not the conscious act of a self-aware sovereign individual, but the habituated impulse of situated readers.[59] Fish calls this membership of an "interpretative community" and provides the now classic definition:

> [A] point of view or way of organizing experience that share[s] individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance [are] the content of the consciousness of a community's members who [are] therefore no longer individuals, but . . . embedded in the community's enterprise.[60]

These ideas help to explain both the interpretative certainty within individual communities, and the absence of agreement between communities. However, the act of interpreting presupposes the existence of agreed texts; it does not tell us how texts are chosen. In PIL, there is no agreement on what constitutes the texts or norms relevant to a given dispute. Behind the interpretative dispute lies an epistemic conflict, over the *content* of PIL. Individual communities in PIL must *produce* the texts; the norm(s) to be interpreted. It is not only a question of what a given norm means, which is already radically indeterminate, but also a conflict over which norms exist, and which apply to the given or chosen facts.[61] International lawyers' operations go deeper than those of an interpretative community.

[57]Michael Waibel, *Demystifying the Art of Interpretation*, 22 Eur. J. of Int'l L. 572 (2011).

[58]Stanley E. Fish, *The Law Wishes to Have a Formal Existence*, *in* There's No Such Thing as Free Speech . . . And It's a Good Thing Too 141, 143 (1994).

[59]Pierre Schlag, "*Le hors de texte, c'est moi*": *The Politics of Form and the Domestication of Deconstruction*, 11 Cardozo L. Rev. 1631 (1990).

[60]Stanley E. Fish, Is There a Text in this Class? The Authority of Interpretive Communities, 338 (1980).

[61]Martti Koskenniemi, *The Politics of International Law—20 Years Later*, 20 Eur. J. of Int'l L. 7, 9 (2009).

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b. Epistemic Communities

PIL has been analyzed as a plethora "epistemic communities," which actively construct knowledge, rather than make sense of knowledge constructed elsewhere. Epistemic communities *create* the knowledge on which their practice depends. They separate valid from invalid knowledge, truth from error: "[T]hey delimit, for their members, *the* proper construction of social reality."[62] The key function of these communities is to create standards by which "true" and "false," "competent" and "incompetent," legal claims are distinguished. They manifest disciplinary training and professional construction: Creating and inhabiting their own normative universes.

"Ultimately the function of epistemic communities lies in achieving consensual knowledge in any given domain of expertise."[63] This domain could be large or small, encompassing the global public, relevant policymakers, the discipline of PIL, or even the community's own small part in that discipline. However, for Haas, and as imported into the study of PIL, epistemic communities must *actually* affect policy making. In his canonical definition: "A network of professionals with recognized expertise and competence in a particular domain and an authoritative claim to policy-relevant knowledge within that domain or issue-area."[64]

Epistemic communities must "enjoy social authority based on their reputation for impartial expertise."[65] PIL communities claim authority to determine which norms exist, and how those apply; but lack "the social authority or legitimacy of the technical authority commanded by epistemic communities."[66] Haas' definition excludes most communities of international lawyers. The GLO is an epistemic community in this sense,[67] the communities of narrative PIL are not.

International environmental law, for example, is normatively pleasing, but practically ineffective: "[I]nsufficiently institutionalized to generate common truth tests and a tight sociological network. . . . [it] lacks the core causal beliefs and truth tests that define an epistemic community."[68] This is true, *if* we try to conceive of environmental law as a *single* epistemic community, *and* we include effectiveness as a criteria for existence. Haas' definition is unnecessarily restrictive, capturing only successful, or promising, epistemic communities of whose agenda he approves.[69] It is methodologically inapt to conflate the idea of epistemic communities with the idea of *effective* epistemic communities. There is no reason why an epistemic community has to be externally effective in order to function.

There can be multiple epistemic communities in any given regime; their public influence or approval is a marker of success, not a condition of existence. Epistemic communities can have much less grand ambitions than Haas demands. Moreover, for PIL, the field of contestation is not really "public respect" but professional recognition—within a community of international lawyers. There *are* communities of environmental lawyers with "core causal beliefs and truth tests." What is missing is a *dominant* community which can impose its will elsewhere and affect political decision-making.

Haas' definition makes sense for quantitative political science; but it does not capture the full possibilities of the concept. It could be modified, but as it stands, and has been used, it does not capture the character of PIL's communities.

[62]John G. Ruggie, *International Regimes, Transactions, and Change: Embedded Liberalism in the Post-War Economic Order*, 36(2) Int'l Org. 379 (1982).

[63]*Id.*

[64]Peter M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, 46 Int'l Org. 1, 3 (1992).

[65]Bianchi, *supra* note 56, at 254.

[66]Peter M. Haas, Epistemic Communities, Constructivism, and International Environmental Politics 177 (2015).

[67]Jason Yackee, *Controlling the International Investment Law Agency*, 53 Harv. Int'l. L. J. 391, 401 (2012).

[68]*Id.*

[69]*Id.* at 167–80.

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c. Communities of Practice

The term "community of practice" was coined by Beverly and Etienne Wenger-Trayner.[70] These "are groups of people who share a concern or a passion for something they do and learn how to do it better as they interact regularly."[71] A "commitment to the domain, and . . . a shared competence . . . distinguishes members from other people."[72] This allows them to "engage in joint activities and discussions, help each other, and share information"[73] to "build relationships that enable them to learn from each other."[74]

Members "develop a shared repertoire of resources: experiences, stories, tools, ways of addressing recurring problems."[75] This need not be intentional, "learning can be the reason the community comes together or an incidental outcome of member's interactions."[76] These communities evaluate the competence of their members, who "care about their standing with each other."[77] Policy-relevance or impact is not important to the identification of communities of practice, "the domain is not necessarily something recognized as 'expertise' outside the community."[78]

Internally, however, they manifest "the constitutive power . . . to shape collective beliefs and understandings for the community."[79] The impact is profound "such collective understandings . . . become 'background knowledge' and 'structure' to the community that, in turn, shape the perception of the world of its members, the way in which they act, they evaluate other groups' world views and how they set their priorities."[80] The concept of "community of practice" best captures the setting in which individual international lawyers are formed. These are where we internalize our specific practices of norm identification and application; our standards for evaluating the competence of legal argument. PIL comprises a multitude of co-existing communities of practice. But the "invisible college" retains a strong desire to see it as unitary.

d. Shattered Dreams – PIL as a Litany of Diffuse Communities

Bianchi and Waibel insist on understanding PIL as a unity; albeit one under threat, and to be protected. They fail to recognize themselves as situated within, and constructed by, quite specific communities. They situate their analyses within the self-description of their community. For Waibel, "the *emergence* of distinct interpretive communities in international law is potentially a serious risk for international law as a field."[81] Bianchi concurs, "the problem is the fragmentation into interpretive communities!"[82]

Waibel and Bianchi oscillate between the claims that PIL is *one* community and that it is *many different* communities. They initially present PIL as a *single* community. Waibel asserts that "anyone who routinely applies the VCLT could be regarded as forming part of the interpretive community of international lawyers."[83] For Bianchi, "Article 38 is . . . a good illustration of the general

[70]Beverly Etienne Wegner-Trayner & Etienne Wenger-Trayner, Introductions to *Communities of Practice* (2015), https://wenger-trayner.com/wp-content/uploads/2015/04/07-Brief-introduction-to-communities-of-practice.pdf.

[71]*Id.* at 2.

[72]*Id.*

[73]*Id.*

[74]*Id.*

[75]*Id.*

[76]*Id.*

[77]*Id.*

[78]*Id.*

[79]Bianchi, *supra* note 56, at 266.

[80]*Id.*

[81]Michael Waibel, *Interpretive Communities in International Law* 1, 3 (Univ. of Cambridge Faculty of L. Rsch. Paper No. 62/201, Oct. 2014) (emphasis added).

[82]Andrea Bianchi, *Looking Ahead: International Law's Main Challenges*, *in* Routledge Handbook of International Law 404 (David Armstrong ed., 2008).

[83]Waibel, *supra* note 81.

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epistemic community of international law." These fix "the terms of the discourse and shape the way in which we look at international law;"[84] producing "an epistemic community that shapes the discourse and sets the boundaries for what is accepted and/or acceptable in the scientific discipline and in the practice of international law."[85]

Each acknowledges a "diversity of interpreters and epistemic communities" in which "interpretive methodologies . . . vary considerably." And that neither Article 38, nor the VCLT "significantly constrain interpretation."[86] Yet they remain enthralled with "the complex and broad epistemic community that shapes up international law." And the "distinct epistemic communities that constitute the episteme of international law as an academic discipline or a social practice."[87] In each case, although under threat or siege, the unity can be perceived, and could be restored.

The fragmentation of PIL into multiple subdisciplines is presented as a process which threatens this unity. But the dream of unity is simply transposed to the individual regimes. With a singular "philosophy animating a particular regime," to ensure "that 'extraneous' interests . . . are kept largely at bay."[88] Each "is primarily concerned with the pursuit of its own goals" and so *the* "epistemic community associated with each regime has strong incentives to work towards the achievements of their regime's goals."[89] Yet these regimes are not internally homogeneous.[90] Consequently, "it is likely that the close-knit epistemic communities in human rights law and international trade law are more influential, as compared to the more diffuse epistemic community in general international law."[91]

This is simply not so; there is no singular community in human rights law. There are many different approaches. Upendra Baxi distinguishes between the entirely antagonistic "UDHR" and "TREMF" paradigms in IHRL; with the former committed to ideals of social justice, and the latter wedded to market friendly interpretations.[92] Trade law is likewise internally splintered into conflicting communities and competing visions—though a dominant community has captured its operative institutions, emerging as the GLO.

Bianchi acknowledges fragmentation *within* the subfields of international law. But also retains the dream of unity; rooted in the past, but now transposed to the future. His communities "are carriers of 'distinct normative visions' that they advocate more or less overtly *in order to gain or consolidate control of any given field*."[93] Order can be restored; both in the capture of "one of the substantive areas in which they operate," and, eventually, over "the whole of international law."[94] The dream of unity will not die. It distorts analyses by disguising the situationality of the researcher.

These confusions can be avoided if we accept that there is no singular epistemic community anywhere in PIL. It is not shattered and waiting to be re-constructed. It is plural and contested. There are multiple communities of practice at work throughout PIL, some concerned with the same subject matter, others with different specializations. There are multiple different approaches taken and conclusions reached in each field.

The contours of this conflict *cannot* be seen in "how epistemic communities over time have . . . shaped the perception of what is and what is not (international) law."[95] Because that

[84]Bianchi, *supra* note 56, at 267.
[85]*Id.* at 257.
[86]Waibel, *supra* note 81.
[87]Bianchi, *supra* note 56, at 258.
[88]Waibel, *supra* note 57, at 573.
[89]*Id.*
[90]*Id.*
[91]*Id.*
[92]Upendra Baxi, The Future of Human Rights 132 (2002).
[93]Bianchi, *supra* note 56, at 264.
[94]*Id.*
[95]*Id.*

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presumes that PIL is a "thing" which can be objectively observed at different moments of its existence, and this is not so. PIL has no objective existence, instead there are co-existing and competing communities of practice, each with its own procedures for identifying the norms of PIL; for determining their applicability; and for constructing their meaning. Each of these believes its own techniques and conclusions to be universal: "true." In fact, it is probably better not to say that PIL fragmented. But rather that it was never a legal system at all. It is, and always has been, a peculiar agglomeration of communities of practice, each imaging their own public international legal systems. Which we have come loosely, provisionally, and arbitrarily, to understand as a discourse, practice, or invisible college. Our "imagined community" of PIL.

Each community interacts only with *certain* others, and even these interactions are limited by each community's belief in its own truth. They are fundamentally self-referential, and choose interlocutors based on similarity to self, understood as intelligibility or competence. As a result, communications are limited, and it becomes easy to confuse intra-community agreement with truth, practice, or "the facts of international law." This tendency should be resisted. PIL will not be unified.

There are many different ways of understanding, or "doing," PIL. These have varying levels of prestige in specific settings. They co-exist but rarely interact. Generally, participants remain in the communities which constructed them; though occasionally they may relocate to more intellectually or ethically hospitable climes. All of the communities exist in a vast, undifferentiated, normative plane; each believes its own imagined settlement of that plane to be real: To be PIL.

Sometimes, this plain can be flooded by a "mainstream" in a particular place and time. Such a mainstream develops the capacity to define PIL within its sphere of hegemony. If this sphere is wide, at least in terms of professed adherence and allegiance, this can function to drown out dissenting voices. But not to drown the dissenters, nor the dissent. These mainstreams do not escape indeterminacy, they simply refuse to acknowledge it. Competing communities remain.

There is an unending circulation of paradigms for international law; like a Kuhnian revolution, but multiplied and infinitely stalled. In the Kuhnian analysis, paradigms can coexist briefly, but usually one is dominant in a specific field.[96] Harvey argues that it is the one which best answers material questions; that paradigm shifts are driven materially, not philosophically.[97] However, narrative PIL has no materiality beyond itself, no material answers to questions; only speculations. That is why so many paradigms can coexist in one normative space—they have nothing to govern or predict.

PIL has always been an agglomeration of different groups, streams, perspectives, and schools. The "problem" is the fact that the historical mainstream of European PIL—Bianchi and Waibel's community—can no longer silence its competitors. The marginalized Communities have always had voices, but now they have audiences too. Places to challenge the mainstream, to refuse its terms of vicarious litigation, its definitions of competent legal performance. This is, naturally, unsettling for those accustomed to life in the comfort of mainstream hegemony.[98]

PIL is not actually a thing, but a conflictual mass of discrete communities; it did not fragment into communities of practice. PIL is *constituted of* communities of practice—which somehow agglomerated into the discourses, terrains, and practices that we *have come to understand* as PIL. Each has its own standards for norm-recognition and interpretation: Its own definition of acceptable, competent, and admirable "legal performances." The undisclosed "vicarious litigations" between these communities characterize narrative PIL and contain our varied and varying understandings of it. Attempting to escape radical indeterminacy, communities form around preferred sacred texts, methodologies, and institutions. Of course, this does not work. There is no

[96]Thomas Kuhn, The Structure of Scientific Revolutions (1962)

[97]David Harvey, *Revolutionary and Counter Revolutionary Theory in Geography and the Problem of Ghetto Formation*, 4 Antipode 1 (July 1972)

[98]Martti Koskenniemi, *International Law in Europe: Between Tradition and Renewal*, 16 Eur. J. of Int'l L. 113, 115 (2005).

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escape, only denial. Narrative PIL is indeterminate to its core; every claim made in its name is arbitrary and foundationless.

E. Performing Legality: How PIL's Communities Function

As bodies of norms, all legal systems are radically indeterminate. The law can be read differently by different people. In municipal legal systems, this indeterminacy is suppressed by momentarily authoritative judgments. The U.S. Supreme Court's decision in the Dobbs case was legally entirely undetermined, the judges decided as their politics, ethics, and so on determine. There was a minority dissenting opinion. However, the judgment made the law clear, and relatively determinate—impartially cognizable to supporters and opponents alike.

Indeterminacy is constrained by the structural bias of institutions. Consequently, the more homogeneous an institution's system officials are, the more indeterminacy will be constrained. Judgments will be consistent, not because of the law, but because of the consistency of structural bias. All judges will interpret the law in the same way. This homogeneity is to be pursued by adopting the "committed internal point of view."[99] This is a commitment to the normative vision of the legal system. Conversely then, the more diverse the system officials are, the less structural bias will constrain or determine decisions. Lawyers and judges with different normative commitments will argue and decide the law in different ways.

I am not a student of municipal law, but I suspect that most municipal legal systems embrace a degree of diversity in their system officials. As such, they can only suppress indeterminacy to a certain extent, and over a certain period of time. There is always the possibility of a novel argument, interpretation, or rule being accepted. The GLO, however, displays exactly the kind of ideological homogeneity, the internalized commitment to a shared normative vision, that the Hartian theory valorizes. Its system officials are committed to the same norms, the same interpretative strategies, and the same neoliberal consensus. Consequently, its decisions are consistent and predictable. They are observable because they are obeyed, and enforcement is available if they are breached.

Narrative PIL has no authoritative institutions, and so no system officials.[100] There is no body authorized to make or determine the law. Indeterminacy cannot be suppressed, alternative normative visions cannot be pruned, only ignored or denied. Narrative PIL has no authority, no determinable content, and no institution authorized to produce or identify its norms. Yet international *lawyers* simply carry on their business as usual as if none of that were true.[101] We have routinized techniques through which the absence of effect is invisibilized or excused; and PIL's radical indeterminacy is made to appear constrained or suppressed. These techniques are produced by our communities of practice, and only work within them; but they can traverse intra-disciplinary boundaries.

PIL is fragmented into functional subsystems, but these too are internally fractured, contested, and incoherent. Each contains various streams, or schools of thought—various communities of practice. Economic law, for example, has dogmatic neoliberals, textualists, proponents of ethical redistribution and/or human rights. These communities disagree about what counts as a norm within their functional domain and about how norms should be interpreted or applied. The same is true in every specialized regime. PIL and its various subsystems were never unitary, coherent, or determinate; but embeddedness in a community of practice makes it appear otherwise.

[99]H. L. A. Hart, The Concept of Law 89 (1994).

[100]Jason Beckett, *The Deceptive Dyad: How Falseness Structures International Law*, 8 Indonesian J. Int'l Compar. L. 277, 314 (2021).

[101]Samantha Besson, *Theorising the Sources of International Law*, *in* The Philosophy of International Law 163 (Samantha Besson & John Tasioulas eds.); Başak Cali, *On Interpretivism and International Law,* 20 Eur. J. of Int'l. L. 805 (2009); Jean D'Aspremont, *Martti Koskenniemi, the Mainstream, and Self-Reflectivity*, 29 Leiden J. of Int'l.L. 625 (2016).

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Viewed "objectively" as a whole, PIL is indeterminate at every level—norm identification, interpretative and argumentative techniques, institutional allegiance—precisely because it is a non-authoritative system. Every legal posture, every normative proposition or argumentative technique is equally (in)competent in every subsystem. There is no international legal system, only a multitude of equally "legally cognizable materials"[102] and "competent legal arguments."[103] Each of which is an entirely arbitrary collection of assumptions, techniques, and attitudes. Tzouvala pushes this yet further:

> Besides professional custom and habit there is little reason why all debates about law should awkwardly mimic the modalities of arguing one's case in front of a court of law at all. . . . It remains unclear why any reflection on law . . . should respond to this interpellation by constantly acting as if one represents a state in front of an imaginary judge.[104]

And yet that is exactly how the commonly understood "practice" of PIL functions. Participants choose a subject, or an instance of state conduct, and subject it to scrutiny under the terms of PIL *as constructed by their community*. They seek to demonstrate what that law is, what it means, and how it should be applied. Argumentatively, they adopt the posture of the advocate, and conclusorily, that of the judge. Members of different communities do the same things; but each under the terms of *their community's* PIL. They all pass their judgments, and—nothing happens.

This topography situates the GLO, institutionalized and determinate, alongside narrative PIL, comprising numerous co-existing and conflicting communities. An "ethical PIL"[105] often presented (ironically unironically) as the "actual practice" of PIL. This narrative PIL is fragmented along both functional and methodological fault lines. Its practitioners are formed, and operate, within specific communities; and each community has its own techniques for identifying legal data, and denying indeterminacy. Every participant feeds off of the radical indeterminacy of PIL; even those who deny its existence.

The "actual practice of PIL," the identification, creation, interpretation, and application of norms, takes place within closed communities, and through their interactions with one another. Each community has developed or inherited its own criteria for law-making and identification, for interpretation and application, for competence and judgment. They are communities of practice, whose functioning can be understood using Rajkovic's concepts of "performances of legality" perpetually suspended in "vicarious litigation." Rajkovic's analytic schema complements and expands Marks', it helps to explain why communities continue to mass-produce false contingencies. It allows us to perceive and interpret the intra- and inter- group dynamics of the varying communities which comprise narrative PIL. Members of these communities are *performing legality*.

I. Performances of Legality, Lawfare 2.0

Rajkovic developed his concepts through an expansion and re-situation of "lawfare,"[106] an evolution of military strategy which "illustrates how a hybrid model of combat has materialized, where legality assumes a foreground, and not background, position in combat strategy."[107] He argues that the concept of lawfare is inadequate, because it "relies, explicitly, on a compulsory

[102]Pierre Schlag, *Spam Jurisprudence, Air Law, and the Rank Anxiety of Nothing Happening (A Report on the State of the Art)*, 97 GEO. 803, 812 (2009).

[103]Koskenniemi, *supra* note 31, at 566–68.

[104]NTINA TZOUVALA, CAPITALISM AS CIVILISATION: A HISTORY OF INTERNATIONAL LAW 170 (2020).

[105]Geoff Gordon, *The Time of Contingency in International Law*, *in* CONTINGENCY IN INTERNATIONAL LAW: ON THE POSSIBILITY OF DIFFERENT LEGAL HISTORIES 162 (Ingo Venzke & Kevin Heller eds., 2021).

[106]Nicholas Rajkovic, *Performing "Legality" in the Theatre of Hostilities: Asymmetric Conflict, Lawfare and the Rise of Vicarious Litigation*, 21 SAN DIEGO INT'L L. J., 435 (2020).

[107]*Id.* at 439.

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rather than an institutional theory of power" while "law and IHL have an inherent institutional quality."[108] Within this institutional context, the participants "are doing something more . . . they are producing *performances of legality*."[109] Which "should be understood as patterned actions directed at an organized context . . . which aim to construct appearances of lawfulness." Their "chief goal is . . . validation from a global audience of legal experts, public opinion, and sovereign decision-makers."[110]

These are professional exercises in PIL, techniques for weaponizing IHL's radical indeterminacy.[111] Consequently, "the term 'performances' does not imply cynical theatrics, but rather concerted actions to display legality or illegality as an integral part of warfare."[112] These "appeal implicitly and explicitly to recognized legal interpretations and standards, so as to enact the trappings of obligation, competence and imperative compliance."[113] Individual communities produce performances of legality which are partial and partisan; in aggregate these are in conflict with one another. Their aim is "to influence . . . formal and informal judgments across the theatre's more expansive and global audience. "[114] "This has led to a distinctive struggle between adversaries over appearances of legality and illegality, which has produced an institutional and narrative battlespace of growing importance that [Rajkovic] conceptualizes as *vicarious litigation*."[115]

Rajkovic maintains the image of International Humanitarian Law (IHL) as an institutional order, where things (used to) work. Vicarious litigation disrupts this functionality as it takes place in an imaginary, or metaphorical, court.[116] Although "the emphasis on legal performances draws . . . from a history of legalistic discourse and rights-based activism . . . there is a darker implication to this distinctive outgrowth of legalization."[117] "Vicarious litigation can readily escalate into a vortex of militarized legalism with no actual court for resolution, which, while proliferating references to legality, paradoxically disables the institutional coherence, authority, and power of IHL."[118]

For Rajkovic, IHL retains its own defined content, its "relative autonomy" from politics; because "there is only a rare possibility of dominating the institution, by knowing how to direct an institutional apparatus versus an adversary with like intentions and skills."[119] It was not traditionally indeterminate, but may be made so by the impacts of vicarious litigation.

This is simply not so. IHL was *always* a situated—as well as a contested, fragmented, and indeterminate—set of narrative constructions sharing only a common theme and title. IHL and PIL have never been authoritative, and consequently, have never been coherent or determinable. They are languages through which political claims are presented as something greater than idiosyncratic desires. As such, they are "institutional and narrative battlespaces,"[120] where different communities of practice compete for space, attention, and prestige. They are sites of (linguistic) conflict, where: "Legality . . . becomes less about demonstrating blackletter compliance . . . and more about how rival legal performances seek to impose governing appearances of illegality or lawfulness."[121]

These performances are not a "novel institutional mutation of IHL."[122] They are the very "practice of PIL" itself. False contingency allows us to perceive and clarify, the fate of most ethical claims expressed through PIL: They are not realized. This is best explained not by paeans to enforcement

[108] *Id.* at 455.
[109] *Id.* at 440.
[110] *Id.* at 442.
[111] *See Id.*
[112] *Id.* at 437.
[113] *Id.*
[114] *Id.*
[115] *Id.*
[116] *See Id.*
[117] *Id.* at 456.
[118] *Id.*
[119] *Id.* at 455.
[120] *Id.* at 439.
[121] *Id.* at 444.
[122] *Id.* at 456.

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or norm internalization, but by the systemic constraints imposed by the GLO. The various legal claims are constructed within individual communities of practice. Here, professional training allows members of each community to deny, or suppress, any misgivings about both their contingency and their falseness. The communities provide a sense of belonging, an assurance of being part of a good project. The concepts of legal performances in vicarious litigation add a dynamic element to the analysis, allowing us to perceive and understand the operations of the competing professional communities which constitute PIL; their self-replication and reproduction over time, as well as their momentary creations in time, their legal demands.

II. "The Actual Practice" of PIL as Simulacrum:

IHL is a theatre in which multiple and competing presentations of legality are performed: Vicarious litigations pursued; and distinct communities of practice compete with, denigrate, and ignore one another. This fragmentation of international lawyers pervades the terrain we call PIL. Communities develop and self-replicate in all fields: humanitarians, militarists, and Red Crossers in IHL; literalists, institutionalists, and anti-regulationists in environmental law; positivists, natural lawyers, pragmatists, and crits in the theory of PIL; and so on. The various vicarious litigations which comprise IHL illustrate "the practice of PIL" in a microcosm and expose the virtual reality of narrative PIL in general.

Competing communities co-exist in every sub-system of PIL. They are constituted around ethics, ideologies, methodologies, theories, geopolitical focus, leaning, and so on. They operate within and between sub-disciplinary boundaries. The analyses produced by each of these communities are presented as the perspective of that subsystem, or even of PIL itself. The communities are insular and self-referential, each privileging its own rituals and forms, its own *ways of performing*, and thus of *judging*, legality. They are engaged in endless, though often unacknowledged, vicarious litigation.

These communities interact and cross-fertilize in many ways. Thus, an international lawyer may be a positivist, a textualist, and a conservationist environmental lawyer with global constitutionalist leanings. Alternatively, they could be a natural lawyer with a penchant for teleological interpretation who understands and applies IHRL in an ethically maximalist way. There are infinite possible permutations, and each operates in some form within every subsystem of PIL. There, each enacts its own performances of legality as legal claim, judgment, analysis, expansion, or critique.

These performances take many forms but exist chaotically and contradictorily alongside one another. They become lectures and seminars, conference papers and keynotes, working groups and conclusions, books and articles, reports and decisions, General Comments, "authoritative interpretations," blogs, and debates. They pit individual, and communities of, international lawyers against each other in sometimes civil, sometimes heated—often mutually deaf—vicarious litigations.

They manifest in an endless array of concurrent performances of legality, suspended in perpetual deferral before imaginary,[123] hypothetical,[124] or metaphorical, courts: The "court of public opinion", or a "tribunal" of impartial international lawyers, "a global matrix of legal experts, activist groups (e.g. Human Rights Watch) and para-judicial entities (e.g. UN commissions and Human Rights Rapporteurs)."[125] the clash of performances in quintessentially vicarious litigations.

[123]*See* Ronald Dworkin, *A New Philosophy For International Law*, 41 PHIL & PUB. AFF. 2, 12 (2013).
[124]*See* HUGH A. W. THIRLWAY, INTERNATIONAL CUSTOMARY LAW AND CODIFICATION 47 (1972).
[125]*Id.*

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Performances are practiced and honed within the community. This structure can generate intra-community agreement, inter-subjective determinacy, hierarchy, and patterns of reward or sanction. International lawyers are inculcated into these groups through training, specialization, and socialization, so that intra-group approval seems synonymous with legal objectivity and competent argument. However, the structure is too fragmented and too horizontal to create the conditions for inter-group evaluation or adjudication. This renders the ongoing litigations "vicarious," or *virtual*, unreal, and thus irresolvable and interminable. Yet each side will claim victory—imagining a judgment congruent with their own analysis—their own stipulative identification and application of the law—and thus believe they have exonerated PIL by establishing guilt elsewhere.

The most common victories are pyrrhic. The law is identified and interpreted precisely as it is "breached". Behavior is attacked as illegal, but nothing is done—there is no punishment or accountability—and in response, the "winning" community laments and continues. Their training allows them to rationalize and excuse this ongoing lack of impact—be it through compliance studies, complaints about enforcement, projection into the future, or downright denial. However, this should be reckoned with. We must also recognize the abandoned argument: The *unresolved* dispute itself, where one community's victory is *not* the other's defeat. The breach of one community's law is the *application of another community's law*. As John Bellinger noted in defense of the 2003 invasion of Iraq: "[O]ur critics often assert the law as they wish it were, rather than as it actually exists today. This leads to claims that we violate international law—when we have simply not reached the result or interpretation that these critics prefer."[126]

In other words, no interpretation is more valid than any other; the law is radically indeterminate. This means that different communities will identify and interpret the law in different ways. Narrative PIL can be presented as coherent and determinate *within* individual legal communities, under this analysis, the illegality of the Iraq invasion is as easy to demonstrate as its legality. However, it remains *self-evidently* radically indeterminate *between* different communities. These will identify and interpret the law in different ways, reaching incompatible conclusions. There is no authority which sits above the communities: no sovereign, no judge, no authorized decision-maker to choose *authoritatively* between the competing interpretations. No interpretation is more valid than any other.

This is the inexorability of radical indeterminacy. The techniques deployed to deny or domesticate indeterminacy *within* groups only increase the level of indeterminacy *between* groups. By simultaneously exacerbating and denying radical indeterminacy, the fragmentation of international lawyers ensures its own self-replication. But here we remain, trapped in indeterminable PIL: Community constructs producing community-competent analyses, and ignoring false contingency's incessant warning that material PIL is actualizing all around us.

III. The Chagos Islands Case

The intersection of these concerns is encapsulated in the ongoing tragedy of the Chagos Islanders, and the realities of both their dispossession and the US military base on Diego Garcia. The recent ICJ ruling will do nothing to alter these realities.[127] Whether or not the U.K.'s claim to sovereignty over the islands , or the presence of the US base there, "breaches" PIL, each is also an *actualization* of PIL. In Rajkovic's terms, the islanders' legal team—especially Phillipe Sands—put on an extraordinarily good performance of legality in the penultimate vicarious litigation, an ICJ Advisory Opinion, staged in the Peace Palace *itself*. And they "won," as their claim was endorsed by the bench. However, false contingency reminds us that it remains a normative provocation,

[126]John B. Bellinger, Legal Advisor, U.S. Department of State, Remarks at the Hague: The United States and International Law (June 6, 2007).

[127]Legal Consequences of the Separation of the Chagos Archipelago from Mauritius in 1965 (2017).

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which will be declined. The U.K. will not give up sovereignty and control over the Chagos Islands, nor will the U.S. abandon its military base. Instead, they will challenge the authority, impartiality, and competence of the ICJ; and continue business as usual.

This unveils a complex of interrelated issues, which necessarily flow from the ICJ's utter lack of enforcement capacity, exemplifying the fact that *the ICJ is not really a court*. Structurally speaking, the ICJ's opinion as to what the relevant law is and means, is no more important or authoritative, than Sands' or that of the UK's lead counsel, Robert Buckland. It is not more systemically authoritative than mine, or yours. It *cannot be* more systemically authoritative because there is no (legal) system of which it is part. The ICJ offers a site where legal performances can be staged, but the litigations remain vicarious, because nothing flows from the judgments. An advisory opinion is simply a legal brief, prepared for the UN General Assembly; but even in contentious decisions, a judgment is in effect, merely guidance to the parties. Nothing actually transpires if this is unilaterally rejected.[128]

As ICJ decisions are not enforced, they cannot be considered authoritative. Lacking "reflexive links to socially organized violence,"[129] they cannot serve the role of stabilizing the law, nor of determining authoritatively which legal norms exist or what they mean. Put differently, those who *choose* to accept the claimed authority of the ICJ do *not* thereby become more competent international lawyers than those who reject that claim. The two groups simply understand PIL differently – they *perceive different international legal systems*. The Islanders "won" in the ICJ, but that victory is rendered pyrrhic because the U.S. and U.K. "won" in reality. Their version of PIL remains *actualized* in the physical world of distributions and outcomes.

From the perspective of false contingency, the key distinction is not between good and bad, competent and incompetent, as it relates to legal performances, but between the law which is "actualized" and that which is not: material and narrative PIL. The radical indeterminacy of narrative PIL is ethically neutral, as it entails that any fact, any action, or any proposed course of action, is *simultaneously* lawful and unlawful. U.K. control, sovereignty, over the Chagos Islands is the actualization of material PIL. The U.S. base on Diego Garcia is, likewise, the realization of material PIL. Each is a *manifestation* of PIL. The ICJ's determination of their "illegality" cannot alter that.

The U.K., as a state, and a waning global power, is a manifestation of material PIL. Its very existence is made possible by material PIL. Its conduct—whether in trade, aid, war, or territorial control—is the actualization of PIL. The same is true of the U.S., of its military , and of its naval base on Diego Garcia. Recall that that base first came to prominence in the European consciousness as a layover for so-called "extraordinary rendition" flights. Those secretive transfers of persons rarely disclosed, the black sites rarely examined, all for treatment rarely less than abhorrent were also presented as illegal. Yet, the U.S. persisted; and could do so *only* through the consistent operation of material PIL.

No state is refusing to cooperate with the US because of these claimed illegalities; refusing to trade with her, refusing to allow her planes into their airspace. No state is even refusing to allow planes or ships from Diego Garcia itself to land or dock. The U.S. military—like any military—is a creature of international law. It could not exist or function without PIL. It relies on treaties to facilitate arms sales, training, movement around the world, establish overseas bases, and secure the food, uniforms, and amenities of its soldiers. It is the embodiment of actualized international law; entirely immune to the theatrics of performed international law.

This distinction between performed and actualized PIL is vital to any accurate analysis of the role of law in the construction of the present – including those aspects of the present deemed "unlawful." We must pay attention to the consistent unfolding and realization of material PIL, which lurks beneath the spectacular performances of legality in vicarious litigation across the

[128]*See* Gordon, *supra* note 11.

[129]Cover, *supra* note 47, at 1601.

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courts of public and professional opinion. These performances are, ultimately, meaningless, intractable, and a distraction, and yet they persist. They serve a function within a unified greater system, and must be examined as such.[130]

F. The GLO and Human Rights (Abuses):

The GLO is a distinct and functionally differentiated sub-system of material PIL, it resides in what I thought of as the contradictory and indeterminate domain of International Economic Law (IEL). It is operated, and regulated, by a specific set of system officials belonging to a single *epistemic* community.

It was in uncovering the GLO that I first began to understand the distinction between material and narrative PIL, in the form of the GLO and its critics—progressive international economic lawyers.[131] The critiques seemed well informed, the alternative solutions plausible and normatively edifying. Yet the institutions were unmoved and unresponsive; they continued on their path and produced consistent decisions. Their decisions were manifested in reality as they were implemented or enforced.

IEL remains part of narrative PIL. It is indeterminate, contradictory, contested; a discursive playground for neoliberal zealots and social justice warriors to fight over. A virtual battlefield, a site of "vicarious litigation," and competing legal claims, where everything is simultaneously legal and illegal. In contrast, the GLO is a specific part of material PIL, where rules are predictable and enforced. Once I recognized the two normative systems, the difference between them, enforcement and compliance, became obvious. So too did the coherence and predictability of the GLO's operations.

I am not, by training or inclination, a trade lawyer or an economist. I was compelled toward studying this area by the recurring dead-ends I encountered when trying to analyze global injustice. My training in PIL, and my increasingly critical disposition towards it, was proving of little help in making sense of the global catastrophes of the present. PIL could name injustices, but it could neither explain nor constrain them. It seemed blind to their systemic character, noting only their continued occurrences, and posited itself as the solution to problems it did not understand.[132]

It was while pursuing these enquiries that I finally began to understand the *radicality* of indeterminacy in PIL; the ability to use the language of PIL to justify or condemn *any course of action*. I could then see PIL's absolute ethical neutrality: How it could condemn or defend war or abortion, detention or torture, freedom or restraint, wealth or poverty. But this indeterminacy co-existed with clear *patterns* of global injustice. These patterns were determinate and predictable: Poverty and oppression were consistently reproduced in the under-developed world.

PIL appeared unmoored from reality. Narrative PIL *is* unmoored from reality, but that is not the whole story. Although IEL as a discourse is indeterminate, as a practice it is not. There is a system of *institutionalized IEL*. For example, the international financial institutions (the IMF and World Bank) (IFIs); the World Trade Organization (WTO) and the system of International Investment Arbitration (IIA)—the GLO. As discursive sites these remain contested and indeterminate. But in practice that indeterminacy has been suppressed by the ideological homogeneity of the system officials.

All four of these institutions—unlike the institutions of narrative PIL—have coercive authority;[133] they can enforce their decisions, impose sanctions. They make laws with real and

[130] *See* Gordon, *supra* note 11.

[131] *See* Oisin Suttle, *Rules and Values in International Adjudication: The Case of the WTO Appellate Body*, 68 INT'L & COMPAR. L. Q. 401 (2019).

[132] *See* Susan Marks, *Human Rights and Root Causes*, 74 MOD. L. REV. 57 (2011).

[133] *See* LINARELLI ET AL., *supra* note 15, at 1.

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identifiable effects in the world. All four have authoritative system officials who can enact and enforce those laws. And all four institutions remain enthralled to that version of neoliberalism formerly known as the Washington Consensus.[134] With this coercive power, ideological homogeneity, and their "legal-rational" operations, they combine to form an archetypal Hartian legal system. The kind of legal system I'd always hoped to find in PIL, and yet very much *not* the one I wanted to find.

There are multiple communities of practice engaged in narrative IEL. However, there is a single, dominant, *epistemic* community which has captured its institutional machinery. This is a tight knit community of economists, lawyers, and technocrats bound by their commitment to the nostrums of neoliberal thinking. They are the system officials of the GLO. They operate together with a cumulative legal effect that is greater than the sum of its parts; a singular, cohesive legal system. Largely impervious to external critique, these officials have developed and expanded the GLO's original texts through their jurisprudence and implementation advice.

The technocrats charged with the day-to-day running of the system form "the most influential epistemic communities," and focus on "the value of liberalization for foreign investors and for . . . development."[135] This is a self-replicating community of "academic and consultant authors, who in turn are recognized by others as experts due to their having been endorsed by the WTO. These are the individuals who are then in demand as consultants on technical assistance projects."[136] As they understand, "their task . . . almost always involves seeking liberalization in the broadest possible terms."[137]

They work together to implement a wide range of neo-liberalizing legal and economic reforms in "institutional and administrative systems . . . in the areas of trade in goods and services, commercial dispute settlement, intellectual property rights protection, development of foreign direct investment, and transparency and the right to appeal."[138] These reforms are truly locked-in as they are: "[P]artnered with extensive educational programs that include training for officials, lawyers, judges, and business leaders; revision of university curriculums and capacity development; and media-based public education campaigns."[139]

This facilitates the local internalization of the GLO's project of governance by "remote control."[140] It is part of a wider, interlocking system of coercive global governance, material PIL. "The WTO Secretariat is . . . an . . . epistemic community that communicates a powerful discourse . . . which almost always involves seeking liberalization in the broadest possible terms."[141] The WTO's charter commits it, and hence its members, to co-operation with the IFIs, "with a view to achieving greater coherence in global economic policy-making."[142] But this liberalization does not facilitate development. Rather, it is a global infrastructure of exploitation and immiseration, regulating "the distribution of advantages through a coercively structured legal order."[143]

This is a world-making project, pursued coercively against the under-developed state: A one-size-fits-all policy imposition. It took its present form in the 1980's, as the global debt crisis forced

[134]*See* Alexander Kentikelenis, Thomas H. Stubbs & Lawrence P. King, *IMF Conditionality and Development Policy Space, 1985-2014*, 23(4) Rev. of Int'l Pol. Econ. 543 (2016); *See also* Grietje Baars, The Corporation, Law, and Capitalism A Radical Perspective on the Role of Law in the Global Political Economy 7 (2019).

[135]Lisa Toohey, *Accession as Dialogue: Epistemic Communities and the World Trade Organization,* 27(2) LEIDEN J. Int'l.L. 397, 407 (2014).

[136]*Id.* at 409.

[137]*Id.* at 415.

[138]*Id.* at 413.

[139]*Id.*

[140]Jason Hickel, The Divide: A Brief Guide to Global Inequality and its Solutions 22 (2017).

[141]Toohey, *supra* note 135, at 415.

[142]Marrakesh Agreement Establishing the World Trade Organization, Apr. 15, 1994, 1867 U.N.T.S. 154, Art. III:5 [hereinafter Marrakesh Agreement].

[143]Linarelli et al., *supra* note 15, at 32.

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under-developed states into the hands of the IFIs, which had, not coincidentally, been purged of their Keynesian officials and captured by neoliberal technocrats.[144] The under-developed states were entirely at the mercy of this nascently hegemonic regime by threat of bankruptcy and effective exclusion from the global economy.[145] Its rule is publicly legitimated by those states' consent. But there was nothing voluntary or negotiated about the "agreements," rather "consent" was secured under duress.

As Paul Volcker, then Chair of the US Federal Reserve, and a principal architect of the debt crisis, observed: "When the Fund consults with a poor and weak country, the country gets in line."[146] Consequently, "it may be compelled to accept conditions [otherwise] . . . considered politically unacceptable." "A country has no choice but to accept conditions and is obliged to do things it would not otherwise do."[147] This allowed the IFIs to impose a neoliberal, anti-development, agenda onto the under-developed world.

The loan conditionalities which the IFIs imposed were rigid and obligatory. They took the form of direct orders, "with over 80% of programmes between 1990 and 2004 including conditions," which demanded neoliberal restructuring.[148] The policies inflicted by the IFIs can be grouped into four sets: stabilization, liberalization, deregulation, and privatization. Each represents a specific aspect of neoliberal economic faith and each has been coercively imposed on unwilling states and governments by interlocking institutional imperatives:

> [T]he various multilateral agencies harmonized and upheld one another's conditions; while the presence of structural adjustment programmes also served as a 'stamp of approval' that could catalyse additional bilateral aid . . . and mobilise financial flows from private international capital . . . policy leverage was also consolidated through greater selectivity in awarding project loans to countries that were compliant with these policies.[149]

These now infamous, but continuing, structural adjustment policies (SAPs) did not bring economic development, but began a process of immiserating states and peoples.[150] GDP growth was stalled or reversed,[151] and governance became more oppressive:

> [As] countries implemented World Bank and IMF-financed structural adjustment programs (SAPs), respect for human rights diminished. World Bank and IMF structural adjustment programs usually cause increased hardship for the poor, greater civil conflict, and more repression of human rights. . . . The poor, organized labor, and other civil society groups protest these outcomes. Governments respond to challenges to their authority by murdering, imprisoning, torturing, and disappearing more of their citizens.[152]

The WTO complements and further embeds the neoliberal agenda initiated by the IFIs. The "contemporary pattern . . . suggest[s] that the WTO is moving yet further from the . . . 'embedded liberalism' of the GATT era . . . towards a very different type of liberal economic and political

[144]Betul Sari-Aksakal, *World Bank and Keynesian Economics*, 10 Bus. & Econ. Res. J., 77, 81 (2009); Alexander Kentikelenis & Sarah Babb, *The Making of Neoliberal Globalization: Norm Substitution and the Politics of Clandestine Institutional Change*, 134 Am. J. of Soc. 1720 (2019).

[145]*See* Beckett, *supra* note 5.

[146]Harold James, *From Grandmotherliness to Governance The Evolution of IMF Conditionality*, Fin. & Dev. Dec. 1988.

[147]Ariel Buira, An Analysis of IMF Conditionality, 16–17 (G-24 Discussion Paper Series, Paper No. 22, Aug. 2003).

[148]Thomas Stubbs & Alexander Kentikelenis, *Conditionality and Sovereign Debt: An Overview of Human Rights Implications*, *in* Sovereign Debt and Human Rights (Illias Bantekas & Cephas Lumina eds., 2019).

[149]*Id.*

[150]*See* Linarelli et al., *supra* note 15.

[151]*See* Hickel, *supra* note 140.

[152]M. Rodwan Abouharb & David Cingarelli, Human Rights and Structural Adjustment 4 (2008).

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values."[153] These too are imposed behind a veneer of consent, but that "consent" is far from free. "In the contemporary economic environment, there are very few states who would wish to wander aimlessly outside the WTO system."[154] This is particularly true for those already sapped into dependence on foreign direct investment.

The most important provisions of the WTO, for present purposes, are: The Agreement on Subsidies and Countervailing Measures (SCM); the Technical Barriers to Trade (TBT) Agreement; and the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPs). Through these provisions, the most coercive aspects of the GLO are imposed, and entrenched within, the under-developed states.

SCM prohibits under-developed nations from using the type of nascent industry protective tariffs and subsidies, through which the over-developed countries built their own national economies.[155] It functions to trap them in their customary role as deposits of raw natural resources and low-cost labor. The TBT agreement complements this, forcing states to streamline their regulatory structures to ensure access to foreign corporations, and prevent favorable treatment for nascent national industries. It was formulated and extended by the same epistemic community, as they "filled the concept of a 'trade barrier' with meaning."[156]

TRIPs entrench this immiseration, obligating under-developed states to recognize the intellectual property regimes of their over-developed "adversaries."[157] This ensures that they pay monopoly prices for digital and physical technological advances, and for life-saving medicines. These rent-ensuring monopoly structures are once again imposed in the name of "free trade" ideology—"a total abstraction from reality."[158] The coerced consent of the victims is justified by the doctrine of development. But no state has ever developed using these policy prescriptions, and none ever will. That is precisely the point. Together, these agreements and the IFI conditionalities *prevent states from developing*.

The internal cohesion, the "distinctive normative vision,", of this governing epistemic community is clear. When "faced with disconfirming evidence," like the lack of development and the increase of exploitation and repression, "the view of the organisations was that structural adjustment programmes had paid insufficient attention to the institutions that allow markets to function . . . but that the underlying market-liberalizing impetus was essentially correct."[159] There had to be yet more, yet deeper, reform. The cure to the pains of neoliberal reform was the intensification of neoliberal reform.

Under the direction of this epistemic community, the neoliberal diktats of the GLO have been made to cohere and interlock well—to preclude the possibility of under-developed states ever actually developing.[160] To legitimize this, the fiction that the flow of foreign investments drives economic development "is advanced by credible international financial institutions, like the World Bank and International Monetary Fund, based on theoretical and statistical models linking the flows of foreign investment to economic development."[161] Under-developed states "are forced to accept them" and to implement "a package of measures that are prescribed by neoliberal economics."[162]

[153]Toohey, *supra* note 135, at 417.

[154]*Id.* at 415.

[155]*See generally* Ha-Joon Chang, Bad Samaritans (2008).

[156]Waibel, *supra* note 81.

[157]Yash Tandon, Trade as War (2015).

[158]*Id.*

[159]Thomas Stubbs & Alexander Kentikelenis, *Conditionality and Sovereign Debt: An Overview of Human Rights Implications*, *in* Sovereign Debt and Human Rights (Illias Bantekas & Cephas Lumina eds., 2019).

[160]Beckett, *supra* note 5.

[161]Linarelli et al., *supra* note 15, at 152.

[162]*Id.*

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This creates a dualistic and contradictory experience of the global economic order, legitimated by "consent," the unequal burdens, like the unequal treaties of an earlier era, having been "voluntarily" assumed. That consent is entirely fictional. On the rare occasions developed states negotiate with the IFIs, they do so from a position of strength, able to resist both demands and advice.[163] Likewise with the WTO,[164] which they created in their own entirely imagined image, and the IIA system which has remained essentially unchanged from its original colonial form.[165]

For the under-developed states, the GLO rules as a legal system. Its rules are determinate and predictable, they demand "pro-market" reforms at the economic and constitutional levels.[166] This flows from "the way the trade architecture . . . is intentionally designed to interject into domestic policy space and to operate based on trade values."[167] It entrenches "the dominant approach in trade and investment circles that their subject matter is largely distinct from the social contract that states have with their people."[168] This is colonial governance redux. Neocolonialism streamlined for maximal efficiency and minimal visibility.

The GLO has presided over four decades of "developmental" carnage, with spectacular results. "In 1960, at the end of colonialism, per capita income in the richest country was thirty-two times higher than in the poorest country . . . by 2000, the ratio was 134 to 1."[169] This rise continues apace, the ratio is now 439 to one.[170] It is the direct effect of lawful governance by the GLO. The under-developed states' debts also continue to rise,[171] as did poverty under unameliorated SAPs,[172] and inequality within and between states increases.[173]

This is a system of perpetual debt peonage and neo-colonial governance. It immiserates the masses of the under-developed world to subsidize the over-developed states. Economists estimate that the under-developed states surrender a net three *trillion* dollars annually to the over-developed world.[174] This is augmented by another 2.6 *trillion* dollars lost to "unequal exchange."[175] The GLO governs this extraction.

Under-developed states lack economic sovereignty, and their debt is used to proscribe their policy space. They are "pressed to avoid taking measures that are needed to prevent poverty and encourage sustainable social development through distributive methods of taxation, environmental measures, and observance of human rights standards where those might impact on the foreign investors profits."[176] Consequently:

> Compliance with structural adjustment conditions causes governments to lessen respect for the economic and social rights of their citizens, including the rights to decent jobs, education,

[163]Semi-peripheral Greece might be an exception to this rule, or a portent of things to come.

[164]Tandon, *supra* note 157.

[165]Kate Miles, The Origins of International Investment Law: Empire, Environment and the Safeguarding of Capital (2013).

[166]Vijayashri Sripati, Constitution-Making Under UN Auspices: Fostering Dependency in Sovereign Lands (2020).

[167]Linarelli et al., *supra* note 15, at 134.

[168]*Id.* at 19.

[169]Hickel, *supra* note 140, at 16.

[170]*GDP Per Capita (Current US $)*, World Bank Grp., https://data.worldbank.org/indicator/NY.GDP.PCAP.CD?end=2019&most_recent_value_desc=false&start=2019&view=bar (last visited Sept. 26, 2022).

[171]Larry Elliott, *Debt in Developing Countries has Doubled in Less Than a Decade*, Guardian, Aug. 16, 2020, https://www.theguardian.com/world/2020/aug/16/debt-in-developing-countries-has-doubled-in-less-than-a-decade.

[172]*Distribution of Population Between Different Poverty Thresholds, World, 1981 to 2019*, Our World in Data, ~https://ourworldindata.org/grapher/distribution-of-population-between-different-poverty-thresholds-up-to-30-dollars?country=~OWID_WRL (last visited Sept. 26, 2022).

[173]*Total Wealth Per Capita, 1995 to 2014*, Our World in Data, https://ourworldindata.org/grapher/total-wealth-per-capita (last visited Sept. 26, 2022).

[174]Hickel, note 140, at 25–6.

[175]*Id.* at 28.

[176]Linarelli et al., *supra* note 15, at 161.

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> health care, and housing. This problem is compounded, because pressures from the World Bank and IMF to create a more business-friendly climate have encouraged the leaders of developing countries to reduce protections of workers from exploitation by employers.[177]

The "regimes of trade, investment, finance . . . are implicated in the construction of this misery . . . producing, reproducing, and embedding these ills."[178] This deployment "of the rule of law . . . promotes stability for foreign investment,"[179] and "ensures that trade unions are suppressed, political freedoms are curtailed, and the legal system is geared to furthering the interests of the dominant groups."[180] It is a system "best promoted in . . . dictatorships."[181]

The result is immiserated populations, which must be held in check by financially crippled, economically straight-jacketed, governments, ingraining the immiseration of the masses of the under-developed world and the rule of a cosmopolitan elite of savage robber barons. "A narrow elite in countries undergoing SAPs do benefit from restructuring and increased integration, but the main beneficiaries are foreign investors and traders."[182] This system subsidizes the states and citizens of the over-developed world, facilitating a range of policy choices—like IHRL compliance—which are simply unavailable to the under-developed states. There, the reforms continue, as does the political repression required to implement them, and the "human rights abuses" this entails: "The need to implement unpopular policies and the need to counter increased civil conflict, in turn, cause the governments of developing countries to reduce their respect for other human rights."[183] Put bluntly, "[G]overnments undergoing structural adjustment for the longest periods of time have murdered, tortured, politically imprisoned, and disappeared more of their citizens."[184]

To summarize briefly, the GLO is a legal system, a discrete part of material PIL. Its rule is consistent, determinate, and exploitative, the modern manifestation of the extractive function of material PIL.[185] Under the rule of the GLO, under-developed states are compelled to neoliberalize their economies and societies. This causes economic dislocation—it makes people poorer, less supported, and more open to exploitation. The GLO's policies are unpopular, as they bring mainly misery. If they are to be imposed, it must be by force and over protest.

But under-developed states are also under the watchful gazes of narrative PIL. From here, their human rights and environmental records will be scrutinized, and they will fare badly on human rights, at least. This is because they must follow the commands of the GLO, and these entail oppressive governance. If states do not implement them, they will be sanctioned: The IFIs will withhold future disbursement; the WTO adjudicative machinery will authorize sanctions; and the arbitral tribunal will award enforceable damages. The rule of the GLO is authoritative.

By contrast, narrative PIL possesses little persuasive force. Judgements will be passed by scholars, activists, NGOs, maybe even human rights committees, or special rapporteurs. There may be some public condemnation, but no funds will be halted, no sanctions imposed, and no damages awarded. The targeted states have no incentive to follow IHRL and are under direct command to breach it. Their actions, however abhorrent, are systemically rational. It is the rule of the GLO which needs to be brought to account.

[177]M. Rodwan Abouharb & David Cingranelli, Human Rights and Structural Adjustment 4 (2007).
[178]Linarelli et al., *supra* note 15, at 34.
[179]*Id.* at 172.
[180]*Id.* at 173
[181]*Id.*
[182]Jason Oringer & Carol Welch, *Structural Adjustment Programs*, Foreign Pol'y in Focus (Apr. 1, 1998), https://fpif.org/structural_adjustment_programs/.
[183]Abouharb & Cingranelli, *supra* note 177, at 5.
[184]*Id.* at 4.
[185]Beckett, *supra* note 5.

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G. Squaring the Circle: The Interdependence of Material and Ethical PIL

There is more to be said about the GLO, and how it expands through, or interacts with, other aspects of material PIL, notably the UN Security Council and globally active military structures. There is also much more mapping to be done in the fragmented disorders we call PIL. But that lies beyond this brief analysis. I will instead close by hypothesizing that these two different systems—superficially opposed in so many ways—actually form a unitary order where "[t]he ethical mandate of [PIL] occasions a translation exercise with respect to an overall goal, one shared with the powers that underwrite . . . the international system founded on economic coercion [which] continues to function . . . with lethal effectiveness."[186]

The interaction of the GLO and narrative PIL consists of their public loathing and private mutual support. Narrative PIL is not pointless. Things are much worse than that. It is a key component of our contemporary global order; a functional, operatively inoperative, complement to the GLO. Unpacking this apparent paradox "entails a closer look at the work that a [pronouncement of PIL] may do even when it is ignored."[187] These legal claims "establish an exception (transgression) to the norm (progressive community) contemplated by international law in practice, which is validated in the breach."[188] They function by "communicating the adequacy of international law, as a sort of beacon."[189]

They exonerate the present through the promise of continued progress towards a just future, assuring us that things are normally OK and only exceptionally aberrant. But this is simply untrue; as Susan Marks has shown, the "normal" and the "exceptional" are malleable discursive concepts.[190] If we perceive breaches of PIL as exceptional, as moments of crisis, then we are likely to overlook the global suffering routinely produced by the GLO. However, this suffering is in fact "normal." It is the global norm in a world where almost seventy percent of human beings live on the equivalent of less than ten dollars per day.[191] The GLO coercively regulates a world where 50,000 human beings die from poverty related causes *every single day*.[192] The deliberate production of death and suffering on this scale may be abhorrent, but it cannot be understood as exceptional.[193]

Even if we accept that international lawyers "are thoughtful and well-intentioned people,"[194] they still participate in the reproduction of a system of genocidal injustice. We cannot assume that "their ethical integrity and best intentions are sufficient to make the stuff of their professional practice a progressive good."[195] It is perfectly possible to do bad while trying to do good.

[186]Gordon, *supra* note 2, 303.

[187]*Id.*

[188]*Id.*

[189]*Id.*

[190]Susan Marks, *Apologising for Torture*, 73(3) NORDIC J. OF INT'L. L. 365 (2004).

[191]*Poverty Rate by Country 2022*, WORLD POPULATION REV., https://worldpopulationreview.com/country-rankings/poverty-rate-by-country.

[192]In 2005, the GLO was estimated to hasten the demise of 50,000 human beings *daily*. UNICEF, THE STATE OF THE WORLD'S CHILDREN 2005 (2005), https://www.unicef.org/reports/state-worlds-children-2005. 34,000 of its daily victims were children under five years old. WORLD HEALTH ORG., WORLD HEALTH REPORT 2005: MAKE EVERY MOTHER AND CHILD COUNT (2005), WORLD HEALTH REPORT 2005: MAKE EVERY MOTHER AND CHILD COUNT (2005). The Secretary General stated in his preface, "we still allow well over 10 million children and half a million mothers to die each year, although most of these deaths can be avoided." *Id.* at xii. It imposed untold suffering on billions more; yet the Euro-American world, in a spectacular display of denial and willful ignorance, chooses to "unsee" all of this.

Statistics are produced to show that poverty and poverty related deaths are going down, but these are often self-referential "indirect estimates" and hard to verify or believe. Even using these statistics, at any level above $1.90 per day (PPP to 2011 USD), global poverty is *higher* now than it was in 2000. Globally, more people die each year than did in the previous year. Child mortality is purported to be declining, but still to represent around 7 million deaths per year. Food insecurity and conflict are increasing, exacerbated by the effects of climate change. It seems counterintuitive to assume poverty related deaths are falling in this context. And even if it were true, the response would amount, at best, to a Blairesque "I think you'll find it's closer to 9 million" people the GLO kills annually.

[193]Marks, *supra* note 3.

[194]Gordon, *supra* note 11, at 303.

[195]*Id.*

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The endless spectacle of failure we call PIL is neither good nor innocent; it both conceals and legitimizes the violence of the GLO. It is intertwined with that machine, and it is materially rewarded for its service, "when international lawyers assume the reality of an idealized international community, their shared imagination creates the working stuff of networks that yield salaries, social expectations, professional obligations, and all of the real-world consequences that come with."[196]

The material realities of the GLO and the ethical ideals of PIL are aligned. "The ethical ideal is predicated in part on material distributions" effected by the GLO, "while [those] material distributions . . . are facilitated by the ethical legal and political ideals" generated by narrative PIL.[197] The GLO "works to secure and maintain economic conditions that underpin the institutions" of narrative PIL, "and determine in part the lived experiences and expectations of the professionals who practice" it.[198]

This is true for those who champion the "inalienable" or "self-evident" rights of IHRL. Mythical rights counterposed to a reality of legal oppression serve no purpose but to disguise, and entrench, that oppression. International lawyers seek to pit an imagined, though meticulously developed, ideal of underlying legal justice against a lived reality of legalized injustice. They fail, but they are not vanquished. They are rewarded because their Quixotic quest stabilizes the GLO, our *contemporary system of legalized injustice*.

H. Re-Situation: PIL "Made Strange"

This is not a call to stop "doing" PIL; but to reflect on what it means to "do PIL." To reflect on *how* we do PIL and *why* we do it that way. To ask how we conceive of, or identify, the "stuff" of PIL; not just its content, but its content forming procedures and argumentative techniques, its constitutive elements. What makes particular normative claims "law," or particular institutions "legal" or "authoritative"? It is a call to *problematize* the institutions, sacred texts, and exegetical styles we have inherited, adopted, or developed. To reflect on how we allocate, or identify, authority within the discipline. To make this our *problematic*; which "is not simply a set of questions; [but] the matrix or the angle from which it will become possible and even necessary to formulate a certain number of precise problems."[199]

Within a problematic, to think "is not to try to tell the truth about any particular given objects . . . as if there was a world out there waiting for us to lay our eyes on it; to think is to try to solve specific, singular problems."[200] When we think about PIL, we do not engage a ready-made, self-identifying, set of phenomena; we create, or presuppose, that dataset. We presume certain things to be included and others excluded; we presume the "lawness" of PIL, and to know what that means, and thus which things—texts, institutions, actions—possess it. These assumptions implicitly answer certain questions and thus structure our enquiries. But the questions themselves bear reopening.

What is the marker of "lawness" that distinguishes PIL from other practices? Which institutions and texts are perceived as authoritative? Which argumentative techniques are considered competent or exemplary? Tzouvala elaborates:

> [E]very single reading of international law, whether critical or mainstream, theoretical or doctrinal, is determined by a specific problematic that renders some aspects . . . hyper-visible and others invisible, or more accurately, unthinkable. . . . [It] does not treat these absences as

[196]*Id.* at 299–301.
[197]*Id.* at 302.
[198]*Id.* at 301.
[199]Patrice Maniglier, *What is a Problematic?*, 173 RADICAL PHIL. 21 (2012).
[200]*Id.*

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> accidental omissions or as indications of incompetence, but rather as necessary consequences of the problematic.[201]

If we start from the assumption that PIL possesses "lawness," that certain institutions (like the ICJ) are authoritative, and that certain text (like treaties) create "legal obligations," there will be an absence of interrogation into why that is so, or what it means. This is dictated by our problematic: if we wish to "apply" PIL, then any challenge to its "lawness" becomes "unthinkable." Consequently, our understanding is built on arbitrary and untested foundations. To shift the problematic is to expose those foundations for examination.

As regards institutions, my central question concerns authority: What does it mean for an institution to be authoritative? Which characteristics distinguish authoritative institutions, singularly or as a group? What do these institutions do, and does this materially affect the world? Do things "improve" when they act? Do things stagnate or regress when they do not? Legal texts generate similar questions. Which specific features identify a text as "legal"? How are they to be differentiated from non-legal texts? How do texts, including identifiable CIL, interact? Can they be hierarchized? Does the "interpretation and application" of these "legal texts" have observable effects in the physical or geopolitical world?

There are, of course, boilerplate answers to all of these questions. Institutions that mimic the rituals of municipal courts or legislatures are identified by form. The same for treaties—whose structural homology to contracts and legislation is taken as dispositive of their legal nature. H.L.A. Hart pointed all of this out long ago.[202] But his insight has been pointedly ignored, especially by self-proclaimed Hartians. Questions of function are largely exiled to the peripheries of the discipline, manifesting as dreams of eventual enforcement, or a dedication to compliance studies and its mysterious "compliance-pull."

Legal argumentation bears the burden of this exile. With no functionality criteria in play, it becomes completely arbitrary to model argumentative technique on any particular institutional setting or practice. For most international lawyers, the only places to argue are in conferences and journals; the only institutions to simulate are those which mimic municipal institutions. PIL is reduced to a re-presentation of domestic legal argumentation; with only arbitrarily chosen external referents to judge it against. Analogous questions thus arise: Why those techniques? Are they derived from "empirical" observations, or rhetorical, or statistical studies? If so, based on what? A specific institution in PIL or elsewhere? Are they model strategies drawn from philosophical idealism in some form?

At all three levels—institution, text, and argument—these questions are answered, implicitly and differently, by diffuse communities of practice. They are rarely engaged consciously, yet each community believes its own answers to be best. And there are no meta-standards against which that belief can be tested. So, how might we rank them, or assess superiority? What would form the data, either to judge a transplant or begin a new study, in PIL? Empirical analysis might work and provide interesting data about specific institutions. But the discipline as a whole is too plural, conflictual, and unruly, for such analyses. There is too much data and too many techniques for discriminating amongst it.

This altered problematic reveals narrative PIL as a fragmented accretion of differentiated communities of practice, existing in a vast normative void full of content, ever increasing content, and an ever-growing assortment of "legally cognizable materials." It is more like a legal black hole—an unbearable mass of normative "stuff": The elements of law. Undifferentiated law, each of it embodying some unreflected "lawness.." Each community's "legal system" has been constructed from materials abstracted from this mass. But through this act of inclusion (abstraction into the relevant), everything excluded is deemed irrelevant to the practice of PIL. It is banished into normative exile; the black hole is emptied of all "irrelevant" content.

[201] TZOUVALA, *supra* note 101, at 11–12.
[202] HART, *supra* note 99, Ch. 10.

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Again, of course, different communities do this differently. Every piece of the data is relevant to someone, to the construction of some specific international lawyer. And no community can expunge data claimed by another. The void cannot be emptied; the black hole retains all of its mass. Envisaged as a whole, the data reveals chaos. But any constriction or abstraction to a manageable data set, empirical or idealist, is entirely arbitrary. These "pre-interpretative" processes of data identification are taken as "given;"[203] "academic lawyers . . . begin in answers to those questions that they take to go without saying."[204] Both the questions and the answers are determined by PIL's "communities of practice;" that is their primary function. By imposing their problematic, communities *determine* the appropriate approach for their members. This provides both comfort and complacency. It is why we should reflect on our situated selves, our communities of practice. What do they demand from us; what do they give us; but also, what do they do in the world?

Each community perceives its beliefs to be true, important, and universal; each understands itself as uniquely competent, and its adversaries as misguided or incompetent. Whatever their interlocutors are advocating is not a (recognizable) practice of law; they are simply "not part of the discourse at all."[205] Absent significant self-analysis, the individual members of each community will unreflectively share and promulgate those beliefs, confusing our socialized beliefs with universal truths about PIL. This is patently absurd, but our professional training inures us to that absurdity. My own earlier work exemplifies this: "Law, to be understood or used at all, must be delimited and defined, it must be separated from non-law; and that separation must rest on something more discriminating than the self-image of its 'speakers.'"[206]

But that "something" could *only be* the self-image of the community-embedded international lawyer claiming the right to judge their peers and to judge who *counts as* a peer. Instead, it behooves us to remember that there are other communities of international lawyers, whose world views and core assumptions are very different to our own, and whose analyses, interpretations, and identifications of PIL are also very different to ours. They are no less international lawyers than we are. They are no less entitled to determine and define the content of PIL; no one has the authority to define PIL. We can only argue over its content or discuss its actualization—whether we perceive that as realization or breach.

I. Closing the Circle: A Return to My First Enquiries

With the benefit of hindsight and personal reflection, it becomes clear to me that this article has been very long in the making—it closes (for now) an inquiry I began well before I had heard of epistemic communities or the fragmentation of international law. This was the topic which drove my PhD, though I did not recognize it as such then. I spent many years pondering how to rescue PIL from its internal multiplicities and how to capture the system as a whole. I saw methodological pluralism as its defining pathology and sought a technique to constrain it. Twenty years on, I can appreciate that methodological, substantive, and political pluralities, like the radically indeterminate normative orders they produce, are in fact central to PIL's functioning. A necessary price, as Koskenniemi might say, for the discipline's imaginary centrality in international life, but also a deceptive cover for the very real centrality of its darker forces in our contemporary global (dis)order.

[203]Ronald Dworkin, Law's Empire 66 (1986).

[204]Ronald Dworkin, *A New Philosophy for International Law*, 41 Phil. & Pub. Affs. 2, 12 (2013).

[205]Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960, 499 (2002).

[206]Jason Beckett, *Rebel Without a Cause? Martti Koskenniemi and the Critical Legal Project,* 12 German L. J. 1080 (2006).

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