Building Bridges with Political Science?: A Response from the Other Shore

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International legal theorists have, in recent years, shown considerable interest in the politics of international law, with somewhat gloomy results. The perceived environmental crisis has reinforced the need to understand compliance, though findings to date have not been particularly encouraging. Much that could be broadly termed critical legal studies has been pursued earnestly but with a sense of disillusionment if not outright futility. Recognition of the need for greater political sophistication in legal theory has prompted a number of calls for the building of bridges between international law and political science. Slaughter has, for example, advocated an institutionalist interdisciplinary dialogue.[1] She identified a number of lines of enquiry that she believed would benefit from direct interdisciplinary debate, including investigating organisational design and enquiring into international ethics. Abbott has advocated the actual convergence of the two disciplines into one joint discipline, possibly titled "the study of organized international cooperation".[2] At the 1995 annual meeting of the American Society of International Law, Slaughter went so far as to express the view that scholars of international law and international relations (already) do the same work, but just use different language.[3]

This paper is a response to the challenge that Slaughter and Abbott's comments have presented to political scientists, in particular to the suggestion that we engage more intensely in dialogue with international lawyers with a view to merging the two disciplines. I will begin by outlining a view of the nature of the relationship between the disciplines of international law and international relations (IR) which, informed by the work of Rotenstreich, highlights the need to retain different though complementary disciplinary perspectives on the shared subject matter of international law. A theorisation of international law as ideology will then be introduced. It is a political theorisation, clearly situated outside international law, yet able to account for the nature and political significance of legal dialogue. The paper will conclude by demonstrating the

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1 Slaughter Burley A, "International Law and International Relations Theory: A Dual Agenda" (1993) 87 *American Journal of International Law* 205 at 222–24.

2 Abbott KW, "Elements of a Joint Discipline" (1992) *Proceedings of the Annual Meetings of the American Society of International Law* 167.

3 Slaughter A, recorded comment from panel on "Theoretical Perspectives on International Institutions" at 89th Annual Meeting of the American Society of International Law, 5–8 April 1995.

effectiveness of a theorisation of international law as ideology for generating fresh hypotheses regarding several of the topics which have been placed on the agenda for interdisciplinary debate.

The Relationship Between the Disciplines of International Law and International Relations/Politics

Rotenstreich has explained the relationship between biology, history and the social sciences in terms of static versus dynamic levels of analysis. His insights can be useful for understanding the relationship between the disciplines of international law and international relations. According to Rotenstreich, biology, history and sociology all study the human being. The biologist regards a person as a structure of functions while the historian generally treats a person as a subject; a biologist is concerned with the operation of various parts of the human body while historians deal primarily with the relationship between bodies taken as single units. In the same way, what the historian regards as a structure of functions, the social scientist regards as a subject. Sociologists aim to characterise patterns of social interaction as single units, without being sidetracked by according undue consideration to the historical process within which each is a unique occurrence.[4]

As I understand Rotenstreich, he is pointing to the fact that within each discipline there is a need to keep enquiry focused and manageable and concentrated on subject matter at a particular level of analysis. The subject matter should be viewed as dynamically evolving and situated within the context provided by a relatively static conception of an entity at a higher level of analysis than the subject. The findings of the discipline which treats that subject at a lower level of analysis must also be taken into account. While most historians do not usually explain historical events in terms of the internal workings of the human body it would be expected that their accounts of human interaction are compatible with a modern understanding of how the human body functions.

Rotenstreich enables the clarifying of just what genuine interdisciplinary dialogue entails. For, while a discipline is characterised by a number of factors, including methodology, employment of the discipline's practitioners and their rationale for enquiry, Rotenstreich identifies the analytical perspective of a discipline as its primary characteristic. Inter-disciplinary dialogue must therefore involve more than mere conversations between international lawyers and political scientists as defined on the basis of their interest in international law and/or place of employment. True interdisciplinary dialogue requires international lawyers and political scientists to retain and clarify their distinct analytical perspectives—or, in the terms used by Rotenstreich, to retain the distinction between the static and the dynamic viewpoint.[5] Inter-disciplinary dialogue can then draw on the resulting tension between static and dynamic to challenge competing understandings of the shared subject matter.

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4 Rotenstreich N, *Time and Meaning in History* (1987), pp 50–52.

5 Ibid, p 51.

The analytical perspective of international law within the discipline of international law

Applied to the discipline of international law the insights of Rotenstreich suggest that international lawyers are primarily concerned with understanding the various elements of the international legal system and the inter-relationships between those components. International law, at a system level, constitutes the context within which these various components are studied. Since the emphasis of the lawyer is on the working of the various parts of the international legal system, we might expect the lawyer's view of the international legal system as a whole and its relationship to other parts of the system of international politics to be relatively unsophisticated. Application of the ideas of Rotenstreich would further suggest that international lawyers share a conception or competing conceptions of the international legal system as a whole which are peculiar to the discipline and which are relatively static. I believe that this is indeed the case. To give one very simple illustration, think of the issues regarding international law at a system level portrayed in that first chapter or two of an introductory text on international law. The major issue considered by many of those books for many years was whether international law was really law. The reason for asking such a question would not be immediately apparent to a political scientist studying world politics; it is a question very much grounded in the discipline of law.

The image of international law at a system level characteristic of the discipline of international law can be found underpinning the texts of international legal documents. The image is characterised by three principles. First, that international law is ultimately distinguishable from the current operation of power politics. If a legal adviser was asked to report on the invasion of one country by another, for example, he or she would do so on the basis that, because international law is politically neutral, it is equally applicable to the behaviour of both States and that the actions of each country could be categorised as legal or illegal. The second principle is that international law is already equipped to deal with whatever problem or dispute may arise—or, if and when new issues do appear, the relevant principles can be ascertained from the existant, more-or-less self-contained and internally consistent, body of law. Thus, in the example just described, the legal adviser would offer an opinion logically underpinned by the assumption that the body of international law contains provisions by which to ascertain the legal position of the aggressor country and that under attack. The third principle which I believe characterises a system level understanding of international law within the discipline of international law is that the rules that make up the system of international law are compulsory. If in doubt as to its correct course of action a state can consult its manuals of international law and proceed accordingly.

I would maintain that these three principles logically underpin international legal discourse and together constitute what I refer to as the "idea" of international law. Please note that I am in no way claiming that individuals believe these principles to be true. On the contrary, I would assume that lawyers, used to dealing with political reality, would be among the first to realise the

limitations of the idea: to recognise that international law is not a comprehensive set of rules; that there is no universal agreement as to what all those rules are; that the system is in a continuous state of flux; that almost any position can be presented as being legal (national leaders are generally quick to demonstrate that their country's actions accord with the dictates of international law); and that international law has not evolved in such a way as to treat equally every country. And for anyone who had been in any doubt as to the validity of what I have referred to as the idea of international law, critical legal theorists have made amply clear the discrepancy between that idea and reality. Critical theory points to the fact that international law does not, and indeed cannot, match the assumption that it is objective, determinate and coherent.[6]

Such a conception of international law as a system is nevertheless logically prior to international legal discourse. It is only a small step for international lawyers, interested in the political sway of their subject, to assume that any political influence of international law stems from its being at least almost objective, cohesive, comprehensive and compulsory. It is widely assumed that if international law is to be a vehicle for achieving world peace or avoiding environmental disaster greater efforts should be made to ensure that it matches those principles as closely as possible. The key to understanding the analytical perspective of the system of international law characteristic of the discipline of international law is thus the small word "should", the notion that even if international law falls short of these principles it *should* ideally match them. International lawyers *should* continue to aim to devise perfect treaties and States *should* be encouraged to respect international law in the interests of all.

Viewed in this context the writings of critical legal theorists, though challenging the discipline, have retained its analytical perspective. Critical Legal Studies (CLS)—and I acknowledge that I am using this term in a somewhat generic way to refer to a body of literature that is not homogenous—has not shed the perspective of the system of international law characteristic of the discipline of international law. As its very name suggests, CLS is critical of the fact that international law does not match its image. The pessimistic tenor of CLS writings on international law as a whole is, I believe, due to retention of the assumption that the political contribution to be made by international law derives from its matching as closely as possible the idea of international law.

The analytical perspective on international law of political scientists

The system of international law may operate as a structure of functions for the international lawyer, but for the political scientist, it is viewed primarily as a single entity; IR theorists are less concerned with the detail of the components of the system of international law than with the relationship of international law as a whole to the various other elements of world politics. The primary concern is with international law as an influence on State behaviour and the course of

6 See MacCormick N, "Reconstruction after Deconstruction: A Response to *CLS*" (1990) 10 *Oxford Journal of Legal Studies* 539 at 539.

international affairs. Does international law have any intrinsic influence or power?

If we are to regard international politics as in a relationship to international law which is similar to the relationship between history and biology, Rotenstreich suggests that IR theorists should take into account the insights of international lawyers. But they must do more than that, for there is one vital difference between the relationship of international law to politics and that of history to the social sciences. Treaties and other textual material produced by international lawyers play a direct role in the ongoing evolution of the international legal system in a way that biology discoveries do not directly affect the future physiology of the human body. This means that a political theorisation of international law should not only be compatible with, but should also be capable of explaining the political significance of, developments within international law. A political theorisation of international law must recognise that international lawyers operate at the level of interacting ideas and so explain the relationship of the resulting textual materials to the broader process of politics. Is a treaty a "mere scrap" of paper or does it have significance in its own right? And, if it does have intrinsic significance, how much, and why?

Accounting for the political sway of international law has been difficult for theorists of international politics, who have adopted one of three approaches to the task. The first two are what I call the "all or nothing" approaches. The realist position, viewed as an ideal type, assumes that international law is impotent; idealists believe that international law can bring about world peace. Those who have sought a more moderate position have opted for some form of functionalist explanation, regarding international law as fulfilling certain roles in international politics—such as legitimating action or defining membership of international society.[7] What all approaches have had in common has been an image of international law which does not depart significantly from the image which is characteristic of the discipline of international law. Even in the most sophisticated of the explanations of the political functions of international law, the image of international law has still been overwhelmingly that of the international law-as-rules "idea" of international law.

We still lack an adequate response to the question of just what political sway international law carries and the basis of that influence. I believe that the key to understanding the nature of the relationship between international law and international politics is what I have just referred to as the "idea" of international law. This idea is part of the system whose operation the political scientist must seek to explain. Rather than assume that the value of international law stems from its matching as closely as possible the idea of international law, a more appropriate task for those writing from a political perspective is, I propose, to ascertain the political role played by such an idea. And, if there is a discrepancy between the idea of international law and reality, to explain what the political significance of that discrepancy is.

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7 See Johnston DM, "Functionalism in the Theory of International Law" (1988) 26 *Canadian Yearbook of International Law* 3.

A political theorisation of international law must therefore be external to the system of international law in that it must account adequately for both the idea and the reality of international law and for the differences between the two. There has to date been no such theorisation. So much written by political scientists has adopted the perspective on international law of the international lawyer. It is therefore understandable that international lawyers have not perceived the significance of the different perspective of the political scientist. But I in no way regard myself as ahead of my time in proposing a theorisation of international law that is truly political in the sense that it derives from a perspective of international law that is external to international law and that treats the international legal system as one dynamic element amongst many in world politics.

International Law as Ideology

In order to investigate the political significance of what I refer to as the idea of international law I intend to apply to that idea the insights of certain theorists of ideology. By "ideology" I wish only to denote the analysis of an idea in relation to power, in this case the idea of international law in relation to global structures of power. There have been a number of schools of ideology theory. Many of the famous writers on ideology, such as Marx, assume ideology to be always false and hence to operate as an instrument of domination. An understanding of the politics of international law informed by this conception would view international law as an instrument of oppression. Evidence can certainly be found to support such a view. It is not difficult to see that international law has often served the interests of the most powerful, for example in the whole process of the expansion of the European States system and the ongoing process of globalisation. But evidence can also be found of times when international law helps change a *status quo* and serves the otherwise politically weak. The most striking example in modern history is probably the role of international law, including new legal concepts, in bringing about decolonisation. The principle of self-determination, for example, has functioned to assist the previously weak to gain political control over their territory.

I would therefore like to apply to international law a neutral conception of ideology which recognises that the idea of international law may not be wholly true, but neither is it wholly false. At any particular time aspects of the international legal system are in flux; the ideology is more true as regards particular components of international law than others. A neutral conception of ideology is able to account for international law as both oppressor and as liberator.[8] It posits that there is a particular set of ideas, which can be referred to as an ideology, integral to every socio-political order. Members of that order must continue to uphold the ideology if that political order is to remain in place.

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8 In particular I have drawn heavily on the work of Thompson J, *Studies in the Theory of Ideology* (1984). For a more detailed rationale and exposition of my theorisation see Scott SV, "International Law as Ideology: Theorizing the Relationship between International Law and International Politics" (1994) 5 *European Journal of International Law* 313.

They do so by implicitly accepting that ideology as a basis for interaction and engaging in dialogue which assumes the verity of the ideology. Since the ideology is essential to that socio-political order, upholding the ideology by having it logically underpin the expression of one's views is a requirement for participation in that order. A neutral conception of ideology accepts that the ideology generally functions to uphold the *status quo* but that this need not always be the case: ideology can also be used by the less powerful to bring about change in their own favour. The ideology is thus a mechanism of change within the political structure.

Such a conception of ideology can, I believe, inform our understanding of the political operation of international law. This is not to say that international law is "merely" ideology, but that the continued operation of the whole system of international law as we know it—the principles, norms, rules, treaties, institutions, and so on—and the political system of which it is an integral part are dependent on legal dialogue and texts continuing to assume the verity of the idea of international law. That idea will necessarily evolve over time but if the assumption was dropped, the system as we know it would not continue to exist.

Understanding State behaviour in relation to international law

A theorisation of international law as ideology is a political theorisation; it views international law from outside the discipline, revealing the fact that many of the questions that have hitherto been asked regarding the political operation of international law have not been political questions so much as legal ones. Questions as to why States do or do not obey international law, for example, assume the possibility of a clear legal/illegal categorisation of behaviour. While some theorists have suggested conceptualising a graduated scale of compliance,[9] a theorisation of international law as ideology goes further, subsuming questions as to when and why States comply under a broader, political perspective of state behaviour in relation to international law.

It has been hypothesised that what can be referred to as the ideology of international law plays an essential role in upholding power relations in world politics and offers a political mechanism by which any State can pursue its interests. This role can only be fulfilled if States continue to interact on the assumption that the ideology is valid. Every State therefore has a fundamental obligation to contribute to upholding the ideology, an obligation which should, arguably, be placed above the pursuit of any particular foreign policy objective.

There are two aspects of the ideology which must be assumed to be valid. The first is the possibility of a clear legal/illegal division of behaviour. Acceptance of this principle simply requires that such an assumption underlies any discussion of State behaviour in relation to international law. The second core principle is that international law is compulsory. It is often observed that a State generally attempts to present its own position or actions as being in accordance with the dictates of international law.

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9 See, eg Boyle F, *World Politics and International Law* (1985) pp 164–67.

This suggests that international law contributes to a foreign policy decision to the extent that the chosen course of action is explicable in terms which uphold the ideology of international law. Where the pertinent legal provisions are technical and very precise the range of behaviour which can be presented in terms which uphold the ideology is quite narrow as compared to instances in which the relevant rules or principles are ambiguous or ill-defined.

Of course some legal explanations are more convincing than others. A rather "far-fetched" legal justification for behaviour does not weaken the assumption that international law is compulsory so much as that there is a clear law/non-law boundary. Were all States always to provide weak explanations, this would be detrimental to the strength of the ideology. There is thus a normative obligation to act in such a way that a strong explanation is possible. On the other hand the goal of each State is undoubtedly to be able to act more-or-less as it pleases at the time, relatively unfettered by the provisions of international law.

This requires skilled legal advisers who have the opportunity to play an active part in policy formulation. While newly independent, small and weak States which may have the most to gain through the international legal system might seek a reputation for being a strong supporter of the system, more powerful States might prefer a reputation for being "smart", for being able to justify virtually any chosen policy or action on the basis of international law.

A theorisation of international law as ideology is able to account for what appears to be a "sliding scale" of compliance to non-compliance by interpreting State behaviour in relation to international law in political rather than legal terms. Through offering a political explanation it is able to account for factors which appear to determine compliance levels such as the size of the State and an obligation to comply.[10] I submit that this can therefore assist in assessing the relative importance of the identified factors in a particular situation and, for international lawyers, provide a basis for judging the relative merits of alternative enforcement mechanisms.

Understanding international ethics

International ethics is another "line of enquiry" identified by Slaughter as likely to benefit from interdisciplinary dialogue.[11] From the perspective offered by a theorisation of international law as ideology the relationship is a complex one: international legal discourse may lag behind international morality, or it may reflect current international ethical standards, or it may contribute to the evolution of those standards. This section will look briefly at some aspects of the interrelationship between international law, politics, and ethics as informed by a theorisation of international law as ideology.

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10 Chayes and Chayes have provided a useful summary of factors likely to determine compliance. Chayes A and Chayes AH, "On Compliance" (1993) 47 *International Organization* 175 at 177. For further discussion of those factors, viewed from the perspective of a theorisation of international law as ideology, see Scott SV, "Explaining Compliance: Broadening the Agenda for Enquiry" (1995) 30 *Australian Journal of Political Science* 288.

11 Slaughter Burley, n 1 above, 224.

International legal discourse gives practical expression to the idea of international law as objective, compulsory, and coherent. The body of international legal rules, principles and norms is continually under debate and expanding to deal with every aspect of the behaviour of States in the international arena. As new issues arise so international law expands to cover those areas in a manner such that the system retains the appearance of neutrality. Of course, the boundary line around that body of law is not, and never can be, clear-cut. At any stage some legal components or their definition are more widely accepted than others (hence the phenomenon of "soft law"). As has been seen it is the *idea* of a finite, self-contained body of law that plays an important role in world politics.

If an international legal principle or rule is to appear non-political it must be defined in terms which appear more general or abstract than the concrete political situations from which it arose. The definition must, though, be commensurate with contemporary standards of international ethics and accord with what has been referred to as the "idea" of international law. Where no widely agreed set of rules has yet emerged, lawyers have tended to draw on broad principles such as equity to give practical expression to the ideology.

The concept of *terra nullius* affords an interesting example of the role of international ethics in the definition of a legal concept because participation in the European system of international law actually operated as the political criterion by which such territory was identified.[12] During the era of the expansion of the international States system from the seventeenth to nineteenth century it was morally acceptable to take control of non-contiguous territory not yet within the international States system but it was not acceptable to discriminate legally even against non-members of the system of international law.[13] Thus while the actual or political criterion by which to classify territory as that available for acquisition was participation in the system of international law, publicists provided an assortment of "legal" definitions of the term. In the eighteenth century, Vattel defined *terra nullius* as land that savages "have no special need of and are making no present and continuous use of". The Nations of Europe were free to occupy such territory, if they had need of more land.[14] Walker, writing in 1895, referred to territory that was "uninhabited, or inhabited

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12 See discussion in Scott SV, "*Terra nullius* and the *Mabo* Judgment of the Australian High Court: A Case Study of the Operation of Legalist Reasoning as a Mechanism of Political-Legal Change", *Australian Journal of Politics and History* (forthcoming).

13 See *inter alia* Alexandrowicz CH, *An Introduction to the History of the Law of Nations in the East Indies (16th, 17th, and 18th centuries)* (1967), pp 235ff; Andrews JA, "The Concept of Statehood and the Acquisition of Territory in the Nineteenth Century" (1978) 94 *Law Quarterly Review* 409 at 410ff; and Bull H and Watson A, eds, *The Expansion of International Society* (1984), pp 425ff.

14 de Vattel E, *The Law of Nations, or, The Principles of Natural Law Applied to the Conduct and to the Affairs of Nations and of Sovereigns* (1964) vol 3, translation of the edition of 1758 by Fenwick CG.

only by a barbarous or semi-civilised people".[15] Such definitions would not, of course, accord with the ethical standards of the 1990s.

By the twentieth century it had become acceptable to discriminate on the basis of non-involvement in the European system of international law and so this criterion was advanced by certain writers. In 1908 Lawrence expressed the view that "all territory not in the possession of states who are members of the family of nations and subjects of International Law must be considered as technically *res nullius*";[16] in 1920 Oppenheim regarded *terra nullius* as that territory that "is no State's land, whether entirely uninhabited, as e.g. an island, or inhabited by natives whose community is not to be considered as a State".[17]

Where a political criterion in operation is acceptable by current ethical standards, the corresponding legal criterion need not differ so markedly, but must still be sufficiently removed from the immediate political context to appear objective. The criterion by which to gauge which European State had acquired rights to land that was previously *terra nullius* was "occupation"; this is not far removed from the practical criterion of political control though of course the political criterion was a relative concept (*greatest* political control or *most* effective occupation), as opposed to the legal concept which was expressed in absolute terms so as to uphold the ideology of international law. It is the difficulty which lawyers face in maintaining the balance in international legal discourse between being sufficiently political to be grounded in reality yet sufficiently removed to appear objective, that Koskenniemi explored in his key critical work *From Apology to Utopia.*[18]

Members of the system of international law can use changes to the ethical standards accepted by members of the system of international law as a vehicle for having particular rules which did not operate in their political favour amended, or new rules accepted. To continue with the *terra nullius* example, the Western Sahara Advisory Opinion of the International Court of Justice provides an example of an unsuccessful attempt to gain political advantage through the intersection of international law, morality, and politics.[19] By General Assembly Resolution 3292 (XXIX) of 13 December 1974, the Court had been asked to provide an advisory opinion on two questions:

> I. Was Western Sahara (Rio de Oro and Sakiet El Hamra) at the time of colonization by Spain a territory belonging to no-one? (*terra nullius*)?
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> If the answer to the first question is in the negative,

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15 Walker TA, *Manual of Public International Law* (1895), p 26.

16 Lawrence TJ, *The Principles of International Law* (1908), p 146. See also Davis GB, *The Elements of International Law* (1908), p 66.

17 Oppenheim L, *International Law, A Treatise* (1920), pp 383–84. Lindley, writing in 1926, considered land to be available for occupation if the dwellers thereon "are not united permanently for political action". Lindley MF, *The Acquisition and Government of Territory in International Law* (1926), p 24.

18 Koskenniemi M, *From Apology to Utopia* (1989).

19 *Western Sahara, Advisory Opinion*, ICJ Rep 1975, p 3.

II. What were the legal ties between this territory and the Kingdom of Morocco and the Mauritanian entity?[20]

These questions had their origins in the competing claims of Morocco and Mauritania to the Western Sahara as Spanish decolonisation became imminent in the 1960s. Both claimed to have legal ties with the Western Sahara which predated European colonisation.[21] Morocco proposed that the dispute be taken to the International Court of Justice but Spain declined.

At the meeting of the United Nations General Assembly on 30 September 1974 Morocco proposed that the International Court be asked to provide an advisory ruling on the question as to whether the territory of the Western Sahara had, at the time of colonisation, been *terra nullius* or under Moroccan sovereignty.[22] It seems that Morocco was hoping that, if the Court decided against the territory having been *terra nullius*, it would then conclude that the territory must have been under Moroccan sovereignty. Following discussions in the UN Fourth Committee the wording was changed to that found in the General Assembly resolution.

Morocco was clearly still aiming for a negative ruling on the first question. The specified definition of *terra nullius* as "land belonging to no-one" would appear to have been chosen to promote such a finding, drawing on twentieth century anti-racist morality to imply that, if a positive verdict were found, the inhabitants of the Western Sahara at the time of colonization had been regarded as less than human. Morocco, a new member of the international legal community was thus attempting to utilise changes in international morality to alter the international political power balance in its favour.

The tactic was unsuccessful in this instance. The Court pointed to the historical nature of the question and the need to respond on the basis of international law as it operated then.[23] The Court found that, in terms of State practice of the day, the Western Sahara had not been *terra nullius* but that, while legal ties with the Sultan of Morocco and the Mauritanian entity had existed, they had not been such as to affect the contemporary application to the territory of the principle of self-determination.[24]

Any system which allocates rights and duties to members of a structure of power relations is inevitably discriminatory, but international law must not appear so. As this brief discussion of the *terra nullius* concept has sought to illustrate, a legal principle or rule must uphold the ideology of international law by being defined in terms sufficiently removed from concrete political circumstances to appear non-political and yet commensurate with current

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20 *Western Sahara, Advisory Opinion*, n 19 above, p 14.

21 See Shaw M, "The Western Sahara Case" (1978) 49 *British Year Book of International Law* 119 at 121ff.

22 UN General Assembly A/PV.2249.

23 *Western Sahara, Advisory Opinion*, n 19 above, pp 38–39.

24 *Western Sahara, Advisory Opinion,* n 19 above, p 68. It is interesting that the Australian High Court, in the *Mabo* case chose to ignore the historical relativity of international law and decided that Australia had not been *terra nullius*. For further discussion of this see Scott, n 12 above.

international ethics. As international ethics evolve, so can international actors whose interests had not been best served by the application of those principles or rules argue for their change and/or for the introduction of new concepts. In such a situation international law serves as a pivot between international ethics and political reality. International law may, at the same time, serve to strengthen a new ethical or moral norm through lending it the legitimacy of the ideology of international law. A theorisation of international law as ideology which operates from a viewpoint external to the system of international law can help unravel the complex interrelationship between international law and international ethics and elucidate the political significance of that relationship. There is considerable potential for further interdisciplinary enquiry along these lines.

Investigating institutional design

What then of Slaughter's suggestion that investigation into organisational design could also benefit from interdisciplinary dialogue? Once again, a political theorisation of international law as ideology gives rise to fresh hypotheses of relevance to international lawyers.

It has been seen how international legal dialogue, including that regarding the system itself, serves to uphold the ideology of international law which is, in turn, integral to the international distribution of power. At the same time international legal discourse can be regarded as the agreed solution to the issue of how States should conduct their relations with each other. It is hypothesised that other international institutions can be perceived in the same dual light: as both the agreed solution to an issue of mutual concern amongst participants in the institution, and as upholding an ideology which is integral to the distribution of power both between participants in the institution and between that group of States and those external to it.

If international legal dialogue concerning the international legal institution as a whole and specific institutions within it—such as the International Court of Justice—are to uphold the ideology of international law, the design of those institutions must follow logically from that ideology. Hence, for example, Judges of the Court are "independent judges, elected regardless of their nationality", they may not exercise any "political or administrative function", they may not participate in the decision of any case in which they have previously acted as an agent or advocate, they must precede their duties with a solemn declaration that they will exercise their powers "impartially and conscientiously" and so on. Such provisions in the *Statute* of the Court follow logically from, and thereby serve to uphold, the idea of international law as politically neutral.[25] The institution is, in turn, strengthened through reinforcement of the ideology.

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25 Certain provisos are also included to ensure that the design of the institution does not stray too far from its political roots ("apology" to use Koskenniemi's term). For example, Article 31 of the *Statute* provides for a State which has no national on the bench to choose a person to sit as Judge for any case in which it is to appear.

What I am here suggesting is that an international institution is strongest where there is a tight logical nexus between three key features of its design: who can participate and how decisions are made; the fundamental issue addressed by the institution; and the ideology which underpins the structure as a whole. From the examples I have investigated so far, it appears that the ideology is generally referred to, though not overtly stated, in the international agreement establishing the institution. Thus in the case of the Antarctic regime, the small set of principles which constitute the foundation ideology relate to the nature of science. This ideology justifies science functioning as the criteria for membership of the "inner circle" of decision makers and for the "freezing" of territorial claims for the duration of the life of the management system known as the Antarctic Treaty System.

During the life of an institution, additional issues arise or increase in importance and new ideologies loom to compete with that on which the institution is grounded. It is hypothesised that the key to the ongoing success of an international institution is the retention of a tight logical nexus between issue, ideology, and institutional design.[26] The fact that such a logical structure is embedded in a legal agreement means that the ideology receives additional legitimation from the ideology of international law.

Conclusions: Opportunities for Inter-Disciplinary Dialogue Arising from a Theorisation of International Law as Ideology

A theorisation of international law as ideology postulates that the political significance of international law derives from the idea that international law is a more-or-less self-contained politically neutral set of compulsory rules. This idea accords international law significance within the system of world politics but can do so only so long as it is upheld in international legal discourse. It has been hypothesised herein that, were such support for the idea to cease, the system of international law and indeed, that of international politics of which law is an integral part, would no longer function in its present form. An understanding of the politics of international law which explains the relationship between the textual materials of international law and patterns of power in world politics provides the means by which to interpret the political significance of international legal writings.

If ongoing dialogue which assumes the verity of the ideology of international law is essential to the effectiveness of the system of international law, international legal theory is politically significant to the extent that it affects, or has the potential to affect, continued support for the ideology. As has already been seen, critical legal theory has been political to the extent that it questions the validity of the idea of international law but it still operates from the

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26 This hypothesis is explored in much greater depth in relation to the Antarctic Treaty System in Scott SV, "The Cognitive Structure of the Antarctic Regime", paper presented to the Conference of the Australian Political Science Association, September 1995.

analytical perspective characteristic of the discipline of law in that it does not challenge the notion that international law *should* match the idea. This means that, unless and until the work of critical theorists impacts on the actual wording of legal texts in such a way as to deny the verity or the ideal of that ideology, such work is not adversely affecting the capacity of international law to perform its political function. Indeed, to the extent that many critical theorists assume that the verity of the ideology is the key to its political role, critical theory may have actually helped sustain the idea of international law.

A theorisation of international law as ideology, of which but a brief outline has been presented in this paper, is an unashamedly political theorisation. It is situated outside international law and relates international law—at the basic level on which it operates: ideas expressed in legal materials—to the operation of world politics. As such it provides a suitable basis for interdisciplinary debate through defining, and assisting the maintenance of, a consistency of viewpoint. Theory *in* international law can now be readily distinguished from a theory *of* international law. Theory in law believes the ideology of international law to be true, or at least assumes that it should be. A political theory of law recognises the idea of international law to be an ideology and seeks understanding of the operation of that ideology. Through doing so it accounts in political terms for legal analysis although it cannot, of course, provide legal answers to questions internal to the discipline. International lawyers must retain the unenviable task of providing rules and formulating agreements which must appear objective and finite and able to be applied by a neutral observer.

In contrast to the prevailing tenor of much recent international legal and political theory, a theorisation of international law as ideology leads, if not to the joy of optimism then at least to cheerful pragmatism. It points to the fact that the theory or theories of politics contained in international law—both that of international law at a system level and those regarding other aspects of world politics—necessarily differ from reality; indeed it is the discrepancy between the two, together with, in many cases, the evolving ethical milieu in which they operate, that constitutes a mechanism of political change. It is a mechanism available to all States and, less directly, to other international actors. From a political perspective it does not make sense to decry legal fictions such as sovereign equality so much as to understand better how they can be used as vehicles for betterment of the world in which we live.

This paper is in large part a response to the calls of international lawyers for greater interdisciplinary dialogue. I have contended that a requisite for effective interdisciplinary debate is the retention and clarification of the distinct analytical perspective of each discipline, and further, that understanding of the political operation of international law has so far been inadequate because it has in large measure been based on the analytical perspective on international law of the discipline of international law. Lawyers who have reached out towards political science have not known how to approach the task of bridge-building because they have not perceived the nature and significance of the gulf between the two disciplines. The theorisation of international law as ideology offered here gives rise to innovative hypotheses regarding those subjects which members of the international legal discipline have identified as likely to profit from interdisciplinary dialogue. The challenge is now returned. Over to you!