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Law, Language, and Power
—English and the Production of Ignorance in International Law

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Abstract
In this article I examine the unintentional production of ignorance following from the hegemony of the English language in international law scholarship and its impact on legal outcomes. In doing so, I am influenced by critical discourse analysis (CDA), specifically following Fairclough and Van Dijk and their focus on the relationship between language and power – specifically their focus on how language contributes to the domination of some people over others. In developing this I start with arguing that the dominance of English in the expert discourse in international law means that priority is given to certain narratives (e.g., the canon of Western philosophy) and epistemologies (of ignorance) over others. This is because the use of English appears to be symptomatic of the dominance of Western (Euro-American) legalism, and the use of English may reinforce this dominance. Illustrating these points, I use the dissenting opinion of Judge *Weeramantry* in the Nuclear Weapons case before the International Court of Justice (ICJ) and international criminal law. I conclude with some reflections on law and language more generally and propose themes for further research and offer practical suggestions for a more pluralistic knowledge production in international law.

Keywords
power, international law, critical discourse studies, experts, narrative, argumentation

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1. Introduction

English has become the dominant language of international law scholarship (Tomuschat, 2017: 197).[1] Interesting implications of that dominance have already been studied. For example, it has been pointed out that

> "The emergence of English as the global lingua franca is a critical factor in developing and sustaining legal cultures and English is closely associated with the common law." (Roberts, 2017: 88)

This and similar themes have been part of a research project called "comparative international law", which looks at different conceptions of the law in different geographical spaces of international law, and what that means for its international knowledge (Roberts et al., 2018). Furthermore, the dominance of English in the negotiation and preparation of international legal texts in international fora, courts and other institutions has also been looked at (Tomuschat, 2017).

All of these previous inquiries have in common that they are interested (in a broad sense) in the connection between language and knowledge production. What has been absent in scholarship to date is, however, an analysis of the production of ignorance in international law. In this article I am interested in the unintentional production of ignorance following from the hegemony of the English language in international law scholarship. In doing so, I am influenced by critical discourse analysis (CDA), specifically following Fairclough and Van Dijk and their focus on the relationship between language and power (specifically their focus on how language contributes to the domination of some people over others (Fairclough, 1989: 3; van Dijk, 1993).[2] CDA seeks to:

> "render explicit underlying meanings so as to uncover that which may be hidden or normalized; to attend to the effects of intertextuality (the ways in which a text relates to other texts); and to attend to the effects of historical and synchronic contexts." (Rajah, 2015: 344–345)

My argument about language as an important factor in the production of ignorance in international law proceeds as follows. In developing this I need to draw on several building blocks of the process of ignorance production, so I make three interrelated claims about law, language, culture and power.

First, I argue that legal experts (referring to *inter alia* scholars, judges, arbitrators, government lawyers, legal advisors, lawyers) create and give meaning to law and legal institutions but they also (re-)produce ignorance about other possible meanings.

Second, and relating to that, I claim that becoming an expert is partly about learning to view the world as others in the profession see it. These views of the world – as I will explain later – are developed, (re)constructed and reproduced by narratives shared within that profession (i.e., expert community), for example, through the textbooks and scholarship used in legal training.

[1] On the historical trend of (mostly European) academic journals switching to exclusively English publications, see Tomuschat (2017: 214–225).

[2] See further on the general themes of law and language scholarship: Mertz and Rajah (2014); Rajah (2015).

Then, I attempt to highlight the role of language in this context; specifically, I argue that language is not a neutral medium of communication but also comes with the narratives shared in that particular language community and the respective hegemonic culture from which specific concepts and interpretations of the world follow to the expense of others. The highly specialized and technical language and style used in international law scholarship excludes many voices and thus different narratives and produces ignorance about them. And it is on this basis of ignorance that legal experts give and create meaning to law and legal institutions that necessarily reproduces a hegemonic discourse. There would be too much to unpack here, so I confine myself to one case study to show the relevance of such inquiry: I am thinking about what difference ignorance makes in actual decisions and why it matters with respect to possible alternative legal outcomes.[3]

In short my argument may be summarized as follows: the dominance of the English language in the expert discourse in international law means that priority is given to certain narratives (e.g., the canon of Western philosophy) and epistemologies (of ignorance) (Alcoff, 2007) over others (e.g., the canon of South Asian philosophy). This is because the use of English appears to be symptomatic of the dominance of Western (Euro-American) legalism, and the use of English may reinforce this dominance.[4] Illustrating these points, I will use the dissenting opinion of Judge *Weeramantry* in the Nuclear Weapons case before the International Court of Justice (ICJ) and international criminal law and conclude with some reflections on law and language more generally and propose themes for further research. I end with practical suggestions for a more pluralistic knowledge production in international law.

2. Experts, Law and Language

A good starting point in the inquiry into the production of ignorance is the scholarly discourse about fragmentation and specialization (International Law Commission, 2006). The more specialized a field of law is, the more distinct its narratives through which legal issues are analyzed, viewed and resolved. On the other hand, those distinct narratives are the product of experts, and it therefore matters how these narratives are created and reproduced and by whom. Second, real consequences for legal answers follow from it.

[3] That different legal outcomes are important to think about has been impressively demonstrated by a volume on feminist judgments in international law, see Hodson & Lavers (2019).

[4] While there are certainly substantive differences between European, Anglo, and American legal systems and legal cultures, they do share common cultural values "that emerged in the Enlightenment and substantiate an understanding of law based on individualism and an individual's capacity to possess property, express identity, and claim rights." (Darian-Smith, 2013: 6).

In that research, it has been observed that, as a consequence of the fragmentation in international law, different fields of law provide different answers to the same normative problems (Koskenniemi, 2009: 11).[5] This phenomenon has been described as the "proliferation of particularized normative orders" (Darian-Smith, 2013: 37).[6] For example, the authors of a classic textbook on international investment law refer to the case of *Bayindir v Pakistan* (Award of 27 Aug 2009, par. 389) to observe the "divergence in the objectives and the normative structures of trade law and investment law" (Dolzer & Schreuer, 2012: 206). Because of such differences, "[a]nswers to legal questions become dependent on whom you ask, what rule system is your focus on." (Koskenniemi, 2009: 9; see also Fischer-Lescano & Teubner, 2004: 1017; Grosse Ruse-Khan, 2016: 5–7). In illustrating this, *Koskenniemi* describes how using the "vocabulary" of trade, human rights, or environmental law relating to a specific issue such as the transport of hazardous chemicals, results in giving priority to some solutions, actors or interests over others (Koskenniemi, 2009: 11).[7] In other words, the answers to legal questions, i.e., the meaning of legal rules, depend on specialized knowledge (Somek, 2006: 19–21) and what knowledge (trade, human rights or environmental law, for instance) is being applied.

This is particularly true when the question at hand involves two or more distinct legal disciplines. For example, the legality of a UN Security Council referral of a situation involving a non-party state to the International Criminal Court (ICC) is viewed by most international criminal lawyers as clearly permissible, while international organizations (IO) lawyers see issues regarding the extent and effect of a conferral of powers from one IO to another (Lentner, 2018b: 33–39, 49–53). Another example is the protection of intellectual property rights through international investment agreements. Here, investment lawyers tend to view IP just like any other property, whereas IP lawyers do not (see also Lentner, 2018c). In both instances, the different fields of law have different answers to the same legal question. It thus depends on the actors called upon to decide on these issues what knowledge they apply.

What often remains overlooked is the fact that it is individuals, (specialized) legal experts, that give these different answers (Somek, 2006: 19). These answers are, of course, not a given and every student of law learns that many different legal answers are plausible (Somek, 2006: 11). Hence fundamentally, the answers themselves are – put simplistically – the product of academics, legal advisors, judges, arbitrators, and lawyers (Somek, 2006: 19–21; Lentner, 2018a: 9). Indeed "law" as such is the creation of a social group (or groups) and (at least in our modern liberal democracies) – to some extent – the product of experts. This contention also finds support in recent work on legal theory.

[5] This is of course true for law generally. See further on this Fischer-Lescano & Teubner (2004).

[6] See also David Nelken, who writes in the context of different legal cultures that "Legal culture is not necessarily uniform (organisationally and meaningfully) across different branches of law. Lawyers specialising in some subjects may have less in common with other lawyers outside their field than they have with those abroad." (Nelken, 2004: 4).

[7] For the example of how narratives shape the question of the protection of intellectual property rights in international investment law, see Lentner (2018a: 1).

According to *Tamanaha's* "Realistic Theory of Law", law is "whatever social groups conventionally attach the label 'law' to." (Tamanaha, 2017: 194).

This insight, of course not, entirely novel. Scholars *have addressed the role of experts and specialized knowledge*. *David Kennedy* shows how experts create meaning (and hence answers to legal questions) by reproducing narratives (Kennedy, 2016: 23–31). And already *Robert Cover*, writing in the Harvard Law Review in 1983, addressed the importance of narratives for the meaning of legal rules. He wrote that law and narrative are inseparably related in that it is the context of narratives that gives law a certain meaning (Cover, 1983: 4–5).[8] Even more fundamentally, narratives are "integral to the way we structure, account for and display our understanding of our human condition and experience." (Thornborrow, 2012: 51). So are concepts derived from narratives. Concepts provide the "mental architecture by which we understand the world." (Ginsburg & Stephanopoulos, 2017: 147). But narratives and concepts themselves do not appear in a vacuum – experts create them, too.

This is why *Kennedy* calls narratives "world-making stories". He demonstrates that becoming an expert is partly about learning to view the world as others in the profession see it (Kennedy, 2016: 23).[9] Legal training, starting with the textbooks and the exams we go through (in addition to the social practice of it all) shapes us and our understanding of the world around us – which itself is heavily influenced by the way the experts who have taught us view it. And this in turn reproduces certain narratives and understandings of the world that we thereby construct. As Fairclough reminds us, the world we live in "is massively a humanly created world, a world created in the course of social practice." (Fairclough, 1989: 37) The field of law is as such an important part of the broader social construction of reality (Suntrup, 2017). And "social structures not only determine social practice, they are also a product of social practice." (Fairclough, 1989: 37)

Coming back to legal experts, the above is not to say that no disagreement between lawyers on specific questions of law exists, even when they share a specific narrative of a discipline; clearly there can be and often is disagreement. In fact, the application of international law involves "highly rationalized struggles" between legal experts concerning the "official representation of the social world." (Bourdieu, 1987: 849).[10] But when a particular narrative is shared a lot of the meaning is already predetermined and certain meanings precluded.

It is thus important to dig deeper into discursive practices, i.e., arguments and contestation of narratives in international law.

[8] For an example of why narratives matter, see Roberts' discussion of different "paradigms" of fields of law used to analogize international investment law (2013: 45–94).

[9] Here the epistemology of Austrian contemporary philosopher Josef Mitterer (2011) seems to provide an interesting philosophical foundation of this view.

[10] See also d'Aspremont (2016: 4).

3. Narratives, Arguments and Contestation

Prevailing narratives in law are often contested (see, in the context of international relations theory, Wiener, 2018), but – as I will argue – the language (in its cultural context) in which narratives are disputed demarcates the possibility of argument. Before returning to language in this context, it is important to clarify the role of argumentation in international law. Contestation takes place when opposing arguments are exchanged. Indeed, it has become commonplace in international law to present (international) law as argumentative practice.[11] Arguments are in competition with each other for persuading target audiences such as courts, governments, scholars, lawyers.

The key issue is then who determines what the "correct" legal interpretation is and by what standards this ought to be decided. Existing scholarship seems to be in agreement that argumentative practice is only constrained by interpretive communities.[12] This notion, with its inheritance of rule-skepticism, pervades international legal scholarship (here the influence of critical legal studies is undeniable) (Kennedy, 1980). That skepticism is the general philosophical foundation for the underlying claim that the practice of argument has gotten more important since the erosion of the concept of truth altogether (Venzke, 2014). All lawyers know that there is not one "truth" in legal interpretation. But this also means that without the reference point of truth, we turn from arguments to competing opinions (Wohlrapp, 2008: 7–8) and then the question becomes merely descriptive when we want to determine what the law says on a particular issue: the law and its interpretation is then merely that which is successful and accepted by the relevant interpretative community (Venzke, 2014).

This description of argumentative practice is true for experts generally. The most accomplished experts are in fact often uncertain of their expertise and arguments. But what stabilizes their argumentative practices is the practice itself: a common sensibility of what constitutes plausible expert argument (Kennedy, 2016: 9–10).

From a more general and epistemic point of view, this should not be surprising. The Austrian philosopher Josef Mitterer reminds us to recognize that the fundamental epistemological distinction between object and interpretation (which we also find in traditional positivist accounts of law) has historically been used to establish one opinion as "true" and shield it from contestation by others (Mitterer, 2011).

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[11] Already the cover text of Koskenniemi (2005) provides that "[t]his book presents a critical view of international law as an argumentative practice". See Venzke (2014: 9); Kratochwil (1989: 238); Cass (1996: 359–360) (summarizing that "Newstream lawyers refer to law as a system of 'linguistic maneuvers', or as a practice of argument rather than a system of rules"). See also d'Aspremont & van den Herik (2013: 4).

[12] Consider the prominence of the notion in many of the contributions in the recommendable recent volume by Bianchi et al. (2015). As a further example see d'Aspremont (2012) and Venzke (2012). The deconstructivist Stanley Fish seems to have paved the way for this notion. He concludes that in interpretation there is no privileged position outside texts, from which principles of interpretation can be derived: "'whatever' readers do, 'it will only be interpretation in another guise because, like it or not, interpretation is the only game in town'." It follows, that there cannot be any outside criteria for the evaluation of legal arguments, because these are themselves interpretations (Fish, 1980: 267–277, 355).

In light of these observations, I propose to open up the spaces of argumentative practice for participation of people outside specialized academic and professional circles. How such spaces can be created goes beyond this article; but what would be an important step is "intense and careful listening" (Heathcote, 2019: xv). In the context of feminist dialogues on international law, Gina Heathcote proposes this practice "in order to participate in disruptive dialogues that are also transformative, rather than replicating the existing global order." (Heathcote, 2019: xv). She proposes specifically

> "listening to indigenous voices, feminists in the global south and feminists from outside of academia—but not to save and not to appropriate their texts. Rather, to ask, and then to listen, to what matters and how things must change for their lives to matter." (Heathcote, 2019: xv)

I believe such approach should be taken to marginalized and excluded voices from international law scholarship generally.

4. The Interpretive Community in International Law and Language

Returning to the previous building block of argument, if the success of one argument over another is determined by the interpretive community, an important factor for the outcome of an interpretation will be the language spoken by this community and the cultural background knowledge that shapes the understanding of language: For with language and culture comes a set of shared narratives and categories. (I define culture here with anthropologist Lawrence Rosen as the "capacity for creating the categories of our experience" [2006: 3–4].)

As observed by the historian Daniel Immerwahr,

> "Languages shape thought, making some ideas more readily thinkable and others less so. At the same time, they shape societies. Which languages you speak affects which communities you join, which books you read, which places you feel at home. That a single language has become the dominant tongue on the planet, spoken to a degree by nearly all educated and powerful people, is thus an occurrence of profound consequence." (Immerwahr, 2019: 318)

Language and culture are thus interrelated – and both effect law. As observed by socio-legal scholar Darian-Smith, law "is a dynamic artifact of cultural engagement. This means that all law – however defined – is constituted through its cultural and social environments and imparted with meaning by the people who experience and engage with it." (Darian-Smith, 2013: 39).

Indeed, as Darian-Smith continues to explain,

> "It is often forgotten in Western legal arenas – especially among law students and legal practitioners – that law is a product of cultural processes and always involves political, economic, and socio-cultural dimensions. Law cannot be thought of as existing outside specific cultural contexts because it only has

> meaning and significance amidst people with shared understandings of how a particular society is organized and functions." (Darian-Smith, 2013: 40)

We have already seen how narratives are important for the interpretation and creation of law. Law reflects deeply held cultural assumptions (Darian-Smith, 2013: 41), and "[t]he creation of legal meaning takes place always through an essentially cultural medium" (Cover, 1983: 11). But it is also law itself that "participates in the production of meanings within the shared semiotic system of a culture, but it is also a product of that culture and the practices that reproduce it" (Darian-Smith, 2013: 60). International legal arguments indeed follow highly predictable patterns of discourses (d'Aspremont, 2020: 8).

In this context, the dominance of English in mainstream international scholarship is undeniable. The most esteemed and most relevant journals and publishers are publishing in English.[13] Furthermore, *Anthea Roberts* empirically demonstrated the importance of language for international law. She argues that in fact international law academics in different states have different influences and this affects the way how they understand international law (Roberts, 2017: 10). And, she particularly demonstrates how Western – and Anglo-American approaches in particular – have had a disproportionate influence in defining what counts as the "international" due to the fact that English serves as the lingua franca in international law (Roberts, 2017: 10). International law generally

> "must be understood in relation to a distinction between the West and the rest of the world, and the role of that distinction in the generation of doctrines, institutions and state practices." (Kennedy, 1997: 748)

Because the success of one legal interpretation over another depends largely (if not entirely) on the interpretive community, it matters what language (with what cultural assumptions) the interpretive community speaks.[14] Language plays an important part in the social construction of reality and the dominance of English in the international legal context means that "English logic, worldview, and preferences are more likely to prevail and shape what 'reality' is taken to mean." (Focarelli, 2012: 96). International legal arguments are thus dominated by a specific mode of thought, reinforcing "Western bias in its Anglo-American variant" (Focarelli, 2012: 96).

This has also more obvious consequences for the production of ignorance: whatever is not available or received in that language is either non-existent or irrelevant.[15] If the

[13] For journals, e.g., American Journal of International Law, European Journal of International Law, Leiden Journal of International Law, just to name a few. For publishers, e.g., Oxford University Press, Cambridge University Press, Edward Elgar, Brill, Springer. On this see also Tomuschat (2017).

[14] Esteemed Emeritus Professor of International Law of Humboldt University Berlin, Germany, Christian Tomuschat suggested recently that "the concentration on English leads to neglect of writing in other languages, and accordingly, to an impoverishment of intellectual debate. The use of English tends to degenerate into a tool of political hegemony. All international lawyers should make an effort to reach at least a passive knowledge of the traditional European languages in order to avoid a 'déformation linguistique'".

[15] Immi Tallgren pointed to this when thinking about a genealogy of critical international law, that will have their own "empty spaces and silences", because these are "mostly communicated in the academia of the North and published in English, even if frequently by non-native speakers, and that this focus on the English-speaking academia, with its codes of conduct and jargon, its renowned journals and publishers, is overshadowing not only

interpretative community ignores a paper that challenges dominant narratives, legal concepts, etc., "it cannot be turned into a fact; it simply cannot", as "[f]act construction is so much a collective process that an isolated person builds only dreams, claims and feelings, not facts." (Latour, 1987: 40).

Hence, certain narratives are difficult to be challenge from outside a language community. This is because it is also that interpretive community that decides on what and who is being published and hence read. And these practice in turn influence the background knowledge available to experts on the basis of which they make decisions. An example from the literature is the Eurocentric (albeit well-meaning) nature of the human rights corpus (Darian-Smith, 2013: 88– 89):

> "the pioneering work of many non-Western activists and other human rights heroes are not acknowledged by the contemporary human rights movement. These historically important struggles, together with the norms anchored in non-Western cultures and societies, have either been overlooked or rejected in the construction of the current understanding of human rights."[16]

Thus, the use of a particular language has consequences for political choices, as it provides for a certain background knowledge and narratives.[17] It privileges one interpretation of the world over others, with consequences for decisions made on that basis. Looking at decisions of international courts and tribunals, for example, English-language sources are heavily relied on and cited in support of specific legal conclusions (Bohlander, 2014). The eminent German international law scholar, Christian Tomuschat, put it this way in the context of diplomatic language: by using a language, one

> "can never avoid endorsing, at least implicitly, the wealth of the historical tradition of that language. Of necessity, legal concepts have their past. … Obviously, agreeing on a specific language of communication is not meant to accept as such all the connotations which the terms of that language have acquired in their history." (Tomuschat, 2017: 199)

The example I want to give here to show where language and its narratives had consequences for the outcome of a case is the ICJ's opinion on nuclear weapons.

other known critical corners… but in particular a whole horizon of others one is even more ignorant of?" (Tallgren, 2014: 75).

[16] Among the overlooked works are Josiah Mwangi Karluki, "Mau Mau" Detainee: The Account by a Kenyan African of His Experiences in Detention Camps 1953–1960 (1963); Kwame Nkrumah, Autobiography of Kwame Nkrumah (1973); Mohandas K. Ghandi, An Autobiography: The Story of My Experiments with Truth (1957). That is true even though those accounts are available in English, which points to a subtle role of hegemonic discourses and the role of power developed further in section 6 below. See also Kapur (2014).

[17] More generally on background knowledge and decision-making see, e.g., Kennedy (2016: 7–10).

5. Judge Weeramantry's Dissenting Opinion in the Nuclear Weapons Case

5.1. The Dissent

In the case of the advisory opinion on nuclear weapons, the ICJ was asked to give an opinion on the legality of the use or threat of use of nuclear weapons in international law. While the majority held that there might be possible circumstances under which the use or threat of use of nuclear weapons could be legal, Judge *Weeramantry* was one of the judges who disagreed and issued an extensive dissenting opinion on the matter.

For current purposes I will focus on the counter-narrative judge *Weeramantry* introduces leading him to a different conclusion. He stresses that it

> "greatly strengthens the concept of humanitarian laws of war to note that this is not a recent invention, nor the product of any one culture" (Weeramantry, 1996: 256).

He notes the multicultural roots of humanitarian law in Hindu, Buddhist, Chinese, Christian, Islamic and traditional African culture (Weeramantry, 1996: 256). He insists that these must be considered by the Court as well, writing:

> "In rendering an advisory opinion on a matter of humanitarian law concerning the permissibility of the use of force to a degree capable of destroying all of humanity, it would be a grave omission indeed to neglect the humanitarian perspectives available from this major segment of the world's cultural traditions." (Weeramantry, 1996: 259)

> "It is against such a varied cultural background that these questions must be considered and not merely as though they are a new sentiment invented in the nineteenth century and so slenderly rooted in universal tradition that they may be lightly overridden." (Weeramantry, 1996: 260)

On the legal issue at hand, he invokes the ancient South Asian tradition regarding the prohibition on the use of hyper destructive weapons as found in the *Ramayana* and the *Mahabhavatha* epics written in Sanskrit, among others and similar legal historical roots of such prohibition (Weeramantry, 1996: 256 et seq).

Against this multicultural narrative, Judge Weeramantry builds his legal argument. Discussing more recent developments in codified international humanitarian law, he refers to examples of prohibited weapons that are unnecessarily cruel and causing excessive and unnecessary suffering (Weeramantry, 1996: 261– 263). In reviewing the practice and opinio juris of states, Judge Werramantry concludes that the Martens Clause has clearly attained the status of a customary international law rule (Weeramantry, 1996: 264). And after going through the specific existing prohibitions imposed by international humanitarian law on the use of weapons, he concludes

> "that the use or threat of use of nuclear weapons is incompatible with international law and with the very foundations on which that system rests." (Weeramantry, 1996: 331)

The dissenting opinion thus validates my arguments. Going through the multicultural roots of international humanitarian law he clearly sought to introduce a counter narrative on the basis of which he then meticulously analyses the current state of the law on the issue. This shows that narratives indeed matter for the interpretation of law, because they are the context that give certain rules and principles meaning. The related role of language and alternative narratives in the decision deserves separate treatment in the following subsection.

5.2. Western and Alternative Narratives

Looking into the Western narratives at issue here, they seem to be heavily influenced by the ancient Roman teachings of Cicero. And these are quite different from their South Asian counterparts. Hugo Grotius famously quoted Cicero "Inter bellum ac pacis nihil est medium" – "there is no medium between war and peace" (Grotius, 1625: 832). Some early British cases (mis-)quoted Cicero in embracing the idea that military matters fall outside the jurisdiction of common law courts.[18] Furthermore, Clausewitz also drew upon the mindset generally attributed to *Cicero* to postulate that: war is an act of force, and there is no logical limit in the application of force (Newton, 2018). And this influence continues: recently, a sitting judge on the Appeals Chamber of the International Criminal Court invoked this notion to infer that the appeal of Jean Pierre *Bemba* from his conviction for war crimes might be unfounded (*Prosecutor v Bemba*).

In the most common English textbooks on international humanitarian law one can find the following: Most representative for international legal opinion in the field (Yves, 1998: 1), the International Committee of the Red Cross presents a narrative of international humanitarian law that stretches from the legend of *Gilgamesh*, the idealized hero of ancient Mesopotamia later adopted by the Assyrians, over *Thucydides* and the Peloponnesian War, to ancient Roman thought, and the enlightenment thinkers, *Locke* and *Montesquieu* (Guillermand, 1994: 216– 235).

There are other historical narratives and precedents for rules on how to conduct warfare. But these are not generally taught in (Western) law schools. The Sanskrit epics Judge *Weeremantry* refers to, for example, are only found in curricula of religious studies in the West (besides now being mentioned in connection with his dissenting opinion).[19] However, the Asian tradition actually offers many interesting examples of rules on the conduct of warfare. For example, the Code of Manu (*Manusmriti*), a systematic attempt

[18] See on the misunderstandings over Cicero's writing in this regard Newton (2018: 869–872).

[19] See the curricula in religious studies of universities such as Harvard University, University of Edinburgh, Columbia University, Oxford University. This is of course a very cursory look at the reception of Indian epics in the West and only serves as anecdotal evidence, but the general textbooks on international humanitarian law in English equally do not refence them.

to codify the scattered rules of public and private Hindu law made by a sage called Manu in about 880 BC (Subedi, 2003: 339), provides *inter alia* that

> "no man, engaged in combat, smite his foe with sharp weapons concealed in wood, nor with arrows mischievously barbed, nor with poisoned arrows, nor with darts blazing with fire." (Bandyopadhyay, 1920: 141)

In *Mahabharata*, also referred to by Judge *Weeramantry*, poisoned or barbed arrows were not to be used and resort to hyperdestructive weapons was forbidden (Subedi, 2003). It also prohibited the poisoning of wells and tanks (Bandyopadhyay, 1920: 152). According to the Ramayana, destruction *en masse* was forbidden (Green, 1998). And similar to today's dominant objective to minimize the impact of war and to make war as humane as possible, Hindu laws of war also required fair play on the battlefield, meaning for example the prohibition of inequality in fighting so that a

> "nuclear weapon state would not be allowed to use nuclear weapons against a non-nuclear armed state, and a chemical weapon state would be forbidden from using chemical weapons against a state not having such weapons." (Subedi, 2013: 339)

Buddism outlaws war altogether (Weeramantry, 1996). Other rules are found in African and Islamic sources (Green, 1996). All of which are generally not discussed further in the classic textbooks used in Western legal training.[20]

The dissenting opinion thus clearly shows how language, culture and associated narratives influences legal determinations. Language matters, because we have seen that the effort of Judge Weeramantry to introduce a counter narrative was unsuccessful in part because the rules and customs he refers to simply did not form part of the historical (English-language) canon of the hegemonic legal discourse. Imagine that instead of English, international law scholarship including the ICJ would use Sanskrit as its language, the outcome of the decision might have been different.

Therefore, it is important for international law scholarship to open up the discourse particularly for those that have been historically excluded from shaping the narratives. This would mean pluralizing and enriching the discourse not just with other languages but with the narratives and modes of thought associated with them. That said, language and the narratives attached to it cannot, however, be understood in isolation from power (to this aspect I will return to in section 6).

As a first step, international law scholarship must engage more with the types of epistemologies of ignorance that always are at play because of the situatedness of the knower (Alcoff, 2007: 40).

[20] See, e.g., Tsagourias Nicholas and Morrison Alasdair, International Humanitarian Law (Cambridge University Press 2018); Guilfoyle Douglas, International Criminal Law (Oxford University Press 2016); Anthony Aust, Handbook of International Law (2nd ed., Cambridge University Press 2010); Crawford Emily and Pert Alison, International Humanitarian Law (Cambridge University Press 2015); Malcolm N. Shaw, International Law (8th ed., Cambridge University Press 2017).

6. Language and the Power of Law or the Law of Power

Language and the hegemonic discourses it (re)produces might, of course, only be a symptom of the underlying power structure in world politics. The distribution of power is a majorly important dimension of language, culture, narrative and expertise in law (Phillipson, 2008). Indeed, language is a social practice that performs the "the conjunctions of knowledge and power through which institutions and actors produce and reproduce meaning and authority" (Rajah, 2015: 365).

The use of English as the lingua franca of international law is not merely a historical coincidence (Immerwahr, 2019: 318 et seq). Rather, it is the result of how power has been distributed in the unipolar world order lead by the USA. Lawyers, as experts, develop narratives and use particular language based on this underlying power structure. If we want to end the reproduction of the hegemonic discourse that ensues, the expert struggle has to be opened up to include different languages and voices. But if that pluralization of the international legal discourse is not accompanied with a meaningful redistribution of power, we would only be curing symptoms and not the root causes of the issues outlined in this article.

7. Excursus: Legal Language and International Legalism

The same points about language and narratives seem to be valid for legal language. Legal language is highly technical as well as complex, and also comes with certain shared views and narratives about the world. Furthermore, not only the social world but especially the legal world is constructed by them. This is what led the renowned Harvard political scientist Judith Shklar to view legalism as an ideology (Shklar, 1986: 1–28). Legalism in her view is a practice, specifically the practice of using law and legal arguments to explain, justify, or contest acts and policies.[21] I agree that this is something that we as lawyers regularly do and that insight is important for understanding the broader implication of (hegemonic) expert discourse. This is because it also tells us who gets to participate in the creation of legal meaning (and ignorance) and who does not. It also explains why the ideological aspect of legalism is rarely (if at all) acknowledged by international lawyers: as Fairclough noted: "Ideology is most effective when its workings are least visible." (Fairclough, 1989: 85).

[21] This view on legalism has been picked up by a contemporary political scientist, *Ian Hurd*. He contends that the political system that is thereby created requires governments to fit their policies within parameters defined by international law. To be sure, governments have a great deal of agency within that system – to evade, interpret, contest, and ignore specific laws – but they are not able to remove themselves from the international rule of law as a system of governance that defines acceptable behavior (Hurd, 2017: 265–278).

The way this is achieved is by way of common sense and naturalization. Critical discourse analysis describes this process as follows:

> "A dominant discourse is subject to a process of naturalization, in which it appears to lose its connection with particular ideologies and interests and become the common-sense practice of the institution. Thus when ideology becomes common sense, it apparently ceases to be ideology; this is itself an ideological effect, for ideology is truly effective only when it is disguised." (Fairclough, 1989: 107)

Naturalizing word meanings is hence an effective way of "constraining the contents of discourse and, in the long term, knowledge and beliefs." (Fairclough, 1989: 105–106).

But the subject position, as an international lawyer for example, is also naturalized and thus also constrains subjects (Fairclough, 1989: 105–106). In the long term this also contributes "to the socialization of persons and to the delimitation of the 'stock' of social identities in a given institution or society." (Fairclough, 1989: 105–106). In other words, not only are international lawyers constrained by what has been naturalized as common-sense meanings and their ideology, the socialization of international lawyers also plays an important role. This is why it has been concluded that "Naturalization, then, is the most formidable weapon in the armory of power, and therefore a significant focus of struggle." (Fairclough, 1989: 105–106).

Law and legal language are thus not neutral and independent from power, and I would add that this is particularly the case when the specialized vocabulary of legal discourse excludes certain actors from involvement. This again results in certain legal narratives and legal ideology that remain uncontested from outside that interpretive community of lawyers and legal experts: it becomes common-sensical and naturalized.

All this situatedness of the knower (here legal expert) produces ignorance. This is because of the constraints on access on such discourse is thus not only language but the specialist vocabularies and jargons of a profession that serve to exclude outsiders – while the social constraints on who can achieve membership in those professions are often glossed over (Fairclough, 1989: 64). On that basis, legal interpretations and determinations are made without regard to outside views and narratives that otherwise could lead to different outcomes.

8. Conclusion

Putting the pieces of my argument together exposes the fact that the dominance of English in mainstream international law scholarship ensures the reproduction of a hegemonic discourse in which priority is given to certain "Western" narratives over others, hence producing ignorance of alternatives narratives, ideas and imaginaries. This directly impacts legal interpretation and institutions. Because the success of one legal interpretation over another depends largely (if not entirely) on the interpretive community, it matters what language this interpretive community speaks.

Illustrating these points, I have given a concrete example of the effect on actual normative questions in international law. Using the dissenting opinion of Judge *Weeramantry* in the ICJ Nuclear Weapons case I highlighted how certain narratives (for example those about the ancient prohibition of hyper-destructive weapons in the laws of war in the South Asian tradition, generally not known in the West) have not been seriously considered by the majority vote.

What does all this mean for scholarship? It encourages scholars to look more empirically at how international legalism and language produces ignorance. It suggests a more empirical project, one that looks for evidence of how language and experts speaking a particular language affects international law and decision-making. We need to look into the role of language as an ignorance producer and gatekeeper for access to contestation of narratives and worldviews. But this should not be a merely theoretical issue: narratives matter and counter narratives must be introduced by looking into other cultures, traditions and languages to find them.[22] The whole process of knowledge and ignorance production in international law needs to be better analyzed.

Before all else, we should ensure a discourse that empowers those speakers who have for too long not had a voice in the interpretative community of international law. This requires first careful listening.

References

Alcoff, Linda M. (2007). Epistemology of Ignorance: Three Types. In S. Sullivan & N. Tuana (Eds.), *Race and Epistemologies of Ignorance: Three Types* (39–57). State University of New York Press.

Bandyopadhyay, Pramathanath (1920). *International Law and Custom in Ancient India*. Calcutta UP.

Bianchi, Andrea, Peat, Daniel & Windsor, Matthew (Eds.) (2015). *Interpretation in International Law*. Oxford UP. DOI: 10.1093/acprof:oso/9780198725749.001.0001

Bohlander, Michael (2014). Language, Culture, Legal Traditions, and International Criminal Justice. *Journal of International Criminal Justice*, *12*, 491–513. DOI: 10.1093/jicj/mqu034

Bourdieu, Pierre (1987). The Force of Law: Toward a Sociology of the Juridical Field. *Hastings Law Journal*, *38*, 805–853.

Cass, Deborah Z. (1996). Navigating the Newstream: Recent Critical Scholarship in International Law. *Nordic Journal of International Law*, *65*, 341–383.

Cover, Robert M. (1983). The Supreme Court, 1982 Term—Foreword: Nomos and Narrative. *Harvard Law Review*, *97*, 4–68.

Darian-Smith, Eve (2013). *Laws and societies in global contexts: Contemporary approaches*. Cambridge UP.

d'Aspremont, Jean (2012). Wording in International Law. *Leiden Journal of International Law*, *25*(3), 575–602. DOI: 10.1017/S0922156512000283

d'Aspremont, Jean (2016). *Epistemic Forces in International Law: Foundational Doctrines and Techniques of International Legal Argumentation. Elgar international law*. Edward Elgar.

[22] See, for example, the recent discussion of introducing non-Western female philosophers into the canon, Dag Herbjørnsrud, First Women of Philosophy (aeon 2018), available at aeon.co/essays/before-the-canon-the-non-european-women-who-founded-philosophy.

d'Aspremont, Jean (2020). International Legal Methods: Working for a Tragic and Cynical Routine. *Forthcoming in* Rossana Deplano & Nicholas Tsagourias (Eds.), Handbook on Research Methods in International Law. Edward Elgar.

d'Aspremont, Jean & van den Herik, Larissa (2013). The Digitalization of the Assembly Line of Knowledge About Law: A Reinvention of the Confrontational Nature of Legal Scholarship? *Amsterdam Law School Legal Studies Research Paper* (54), 1–15.

Dolzer, Rudolf & Schreuer, Christoph (2012). *Principles of International Investment Law* (2nd ed.). Oxford UP.

Fairclough, Norman (1989). *Language and power*. Longman.

Fischer-Lescano, Andreas & Teubner, Gunther (2004). Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law. *Michigan Journal of International Law, 25*(4), 999–1046.

Fish, Stanley (1980). *Is there a text in this class?* Harvard UP.

Focarelli, Carlo (2012). *International law as social construct: The struggle for global justice*. Oxford UP.

Ginsburg, Tom & Stephanopoulos, Nicholas (2017). The Concepts of Law. *University of Chicago Law Review, 84*, 147–175.

Green, L.C. (1998). Cicero and Clausewitz or Quincy Wright: The Interplay of Law and War. *USAFA Journal of Legal Studies*, 9, 59–98.

Green, Leslie C. (1996). Enforcement of the Law in International and Non-International Conflicts – The Way Ahead. *Denver Journal of International Law & Policy*, 24(2–3), 285–320.

Grosse Ruse-Khan, Henning (2016). *Protection of Intellectual Property in International Law*. Oxford UP.

Guillermand, Jean (1994). *The Historical Foundations of Humanitarian Action*. International Committee of the Red Cross.

Heathcote, Gina (2019). *Feminist Dialogues on International Law*. Oxford UP.

Hodson, Loveday & Lavers, Troy (Eds.) (2019). *Feminist judgments in international law*. Hart.

Hurd, Ian (2017). *How to do things with international law*. Princeton UP.

Immerwahr, Daniel (2019). *How to hide an empire: A short history of the greater United States*. Penguin Random House.

Kapur, Ratna (2014). Sexual subalterns, human rights and the limits of the liberal imaginary, available at opendemocracy.net/en/sexual-subalterns-human-rights-and-limits-of-liberal-imaginary.

Kennedy, David (1980). Theses about International Law Discourse. *German Yearbook of International Law*, 353–390.

Kennedy, David (1997). Book Review: The Right of Conquest by Sharon Korman. *American Journal of International Law, 91*(4), 745–748.

Kennedy, David (2016). *A World of Struggle*. Oxford UP.

Koskenniemi, Martti (2005). *From apology to Utopia: The structure of international legal argument : reissue with a new epilogue*. Cambridge UP.

Koskenniemi, Martti (2009). The Politics of International Law – 20 Years Later. *European Journal of International Law, 20*(1), 7–19. DOI: 10.1093/ejil/chp006

Kratochwil, Friedrich V. (1989). *Rules, Norms, and Decisions: On the conditions of practical and legal reasoning in international relations and domestic affairs*. Cambridge UP. DOI: 10.1017/CBO9780511491429.013

Latour, Bruno (1987). *Science in Action: How to follow scientists and engineers through society*. Harvard UP.

Lentner, Gabriel M. (2018a). Nomos and Narrative: The Protection of Intellectual Property Rights in International Investment Law. *TTLF Working Paper No 34*.

Lentner, Gabriel M. (2018b). *The UN Security Council and the International Criminal Court: The Referral Mechanism in Theory and Practice*. Edward Elgar.

Lentner, Gabriel M. (2018c). Treating Data as Property? A View from International Investment Arbitration. *Medien und Recht International*, 71–72.

Mertz, Elizabeth E. & Rajah, Jothie (2014). Language-and-Law Scholarship: An Interdisciplinary Conversation and a Post-9/11 Example. *Annual Review of Law and Social Science, 10*(1), 169–183. DOI: 10.1146/annurev-lawsocsci-102612-133958

Mitterer, Josef (2011). *Das Jenseits der Philosophie: Wider das dualistische Erkenntnisprinzip*. Velbrück Wissenschaft.

Nelken, David (2004). Using the Concept of Legal Culture. *UC Berkeley Papers Presented in the Center for the Study of Law and Society Bag Lunch Speaker Series*, 1–27.

Newton, Michael A. (2018). Reframing the Proportionality Principle. *Vanderbilt Journal of Transnational Law*, *51*, 867–885.

Phillipson, Robert (2008). The Linguistic Imperialism of Neoliberal Empire. *Critical Inquiry in Language Studies*, *5*(1), 1–43. DOI: 10.1080/15427580701696886

Rajah, Jothie (2015). 'Rule of Law' as Transnational Legal Order. In T. C. Halliday & G. Shaffer (Eds.), *Transnational Legal Orders* (pp. 340–373). Cambridge UP.

Roberts, Anthea (2013). Clash of Paradigms: Actors and Analogies shaping the Investment Treaty System. *American Journal of International Law*, *107*, 45–94.

Roberts, Anthea (2017). *Is International Law International?* Oxford UP.

Roberts, Anthea, Stephan, Paul B., Verdier, Pierre-Hugues & Versteeg, Mila (Eds.) (2018). *Comparative International Law*. Oxford UP.

Rosen, Lawrence (2006). *Law as Culture: An Invitation*. Princeton UP.

Shklar, Judith N. (1986). *Legalism: Law, Morals, and Political Trials*. Harvard UP.

Somek, Alexander (2006). *Rechtliches Wissen*. Suhrkamp.

Subedi, Surya P. (2003). The Concept in Hinduism of 'Just War'. *J Conflict Security Law*, 8(2) 339–361.

Suntrup, Jan C. (2017). Michel Foucault and the Competing Alethurgies of Law. *Oxford Journal of Legal Studies*, *37*(2), 301–325. DOI: 10.1093/ojls/gqw019

Tallgren, Immi (2014). Who are 'we' in international criminal law? On critics and membership. In Schwöbel, Christine E. J. (Ed.), *Critical approaches to international criminal law: An introduction* (71–95).

Tamanaha, Brian Z. (2017). *A realistic theory of law*. Cambridge UP.

Thornborrow, Joanna (2012). Narrative Analysis. In J. P. Gee & M. Handford (Eds.), *Routledge handbooks in applied linguistics. The Routledge handbook of discourse analysis*. Routledge.

Tomuschat, Christian (2017). The (Hegemonic?) Role of the English Language. *Nordic Journal of International Law*, *86*, 196–227.

Venzke, Ingo (2012). *How interpretation makes international law: On semantic change and normative twists*. Oxford UP.

Venzke, Ingo (2014). What Makes for a Valid Legal Argument? *Leiden Journal of International Law*, *27*(4), 811–816. DOI: 10.1017/S0922156514000363

Wohlrapp, Harald (2008). *Der Begriff des Arguments: Über die Beziehungen zwischen Wissen, Forschen, Glauben, Subjektivität und Vernunft*. Königshausen & Neumann.

Yves, Sandoz (1998). *The International Committee of the Red Cross as guardian of international humanitarian law*. International Committee of the Red Cross.