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SYMPOSIUM ON THE ANTHROPOLOGY OF INTERNATIONAL LAW

TOWARD REJUVENATED INSPIRATION WITH THE UNBEARABLE LIGHTNESS OF ANTHROPOLOGY

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How might the connections between anthropology and international law become more dynamic? I reflect upon this question in this essay using ethnographic insights from the documentary cycles of the UN Human Rights Committee, the treaty body monitoring state compliance with the International Covenant on Civil and Political Rights. Building on recent anthropological scholarship on international organizations, bureaucracy, and documents, this essay discusses the knowledge practices and legal technicalities that characterize the international community of human rights lawyers. In particular, I reflect on the legal fiction of *difference* governing UN treaty bodies' operations and the empirical *sameness* of participants in different formal categories in the shared *community of practice* of human rights lawyers. I conclude by suggesting that anthropological insights could significantly enrich our shared understanding of the diverse and subtle effects of human rights monitoring. Simultaneously such insights may offer rejuvenated inspiration for those international lawyers tackling a sense of losing faith in their discipline, both as an influential tool of world improvement and an invigorating intellectual tradition.

Toward a Vibrant Debate?

This symposium invites us to reflect upon the relationship between anthropology and international law. To those of us working at the borders of these two fields, this invitation is regrettably familiar: ever since the late Sally Merry's pivotal statement regarding how anthropology could contribute to international law in 2006,[1] we have heard regular assurances that the "time is ripe" for this collaboration, that this is a natural alliance with benefits to all involved.

Yet, as I observed a few years ago,[2] we seem to be getting nowhere in actually developing a vibrant, sustained cross-disciplinary exchange. In the few works of international law addressing anthropology, the discipline appears either as a passing mention or casual stylistic choice. For example, when Gerry Simpson discussed the sentiments and emotions of international law in the *London Review of International Law*'s inaugural issue in 2015, he indicated "tentative ethnography" and "autobiographical legal theory," making no reference

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[1] Sally Engle Merry, *Anthropology and International Law*, 35 Ann. Rev. Anthropology 99 (2006).

[2] Miia Halme-Tuomisaari, *Toward a Lasting Anthropology of International Law/Governance*, 27 EJIL 235 (2016).

to anthropological scholarship, despite the anthropological nature of these themes.[3] The same occurred when political theorist Stephen Hopgood described David Kennedy's work as the "anthropology of the everyday impact of . . . legal-rational dynamic of modernity,"[4] even though Kennedy's work does not engage with ongoing anthropological debate.[5]

Why is engaging with anthropological research so difficult for international lawyers? Before addressing this question, it is necessary to ask which international lawyers do we mean, since it is not self-evident that we can address this group in the singular. Whereas fragmentation[6] forms a significant analytical challenge for international lawyers, it likewise poses dilemmas for anthropologists. Whom should we heed, for example, in ongoing contestations over the future of international human rights law? Should we listen to those scholars who argue that "the time is ripe" for the creation of the World Court of Human Rights,[7] or those who proclaim that not only is the time *absolutely* not ripe, but further, that the very idea is terrible?[8] These contrasting views concretize the fragmentation of the field of human rights law between different "schools" of thought.[9]

My scholarly trajectory—differing from many anthropologists but echoing the path of Annelise Riles —is characterized by analytical allegiance with a group of critical scholars. This scholarly alignment has provided me with distinct views of the limits of what international law may be capable of achieving, as well as the intrinsic ways in which it interacts with politics.[10] It has further offered insights into the colonial origins of international law, and the diverse ways in which many international legal arrangements—instead of working toward change—may uphold and reproduce troubling legacies.[11]

However, the greatest insights for anthropologists perhaps do not reside in continually tighter alliance with these intellectual projects. Anthropologists may have little to contribute to debates already attended to by sophisticated legal scholars. Further, inquiries originating from within the law will inevitably have analytical limits as the aspiration to explore the "real world" will inevitably proceed through distinctly "legal" goggles.[12] This, in turn, restricts new analytical avenues, as Riles candidly notes.[13]

[3] Gerry Simpson, *The Sentimental Life of International Law*, 3 London Rev. Int'l L. 3, 5, 11 (2015).

[4] Stephen Hopgood, *Law and Lawyers in a World After Virtue*, 4 London Rev. Int'l L. 451, 451–2 (2016).

[5] *See* Palaces of Hope: The Anthropology of Global Organizations (Ronald Niezen & Maria Sapignoli eds., 2017); Julie Billaud & Jane Cowan, *The Bureaucratisation of Utopia: Ethics, Affects and Subjectivities in International Governance Processes*, 28 Soc. Anthropology/Anthropologie Sociale 6 (2020).

[6] Martti Koskenniemi, Fragmentation of International Law: Difficulties Arising from the Diversification and Expansion of International Law, UN Doc. A/CN.4/L.682 (2006).

[7] Martin Scheinen, Towards a World Court of Human Rights (2009); Manfred Nowak, *A World Court of Human Rights*, *in* International Human Rights Institutions, Tribunals, and Courts 271 (Gerd Oberleitner ed., 2018).

[8] Philip Alston, *Against a World Court of Human Rights*, 28 Ethics & Int'l Affairs 197 (2014); Ignacio de la Rasilla, *The World Court of Human Rights: Rise, Fall and Revival?*, 19 Hum. Rts. L. Rev. 585 (2019).

[9] Miia Halme-Tuomisaari, Human Rights in Action: Learning Expert Knowledge (2010); Annelise Riles, *Anthropology, Human Rights, and Legal Knowledge: Culture in the Iron Cage*, 108 Am. Anthropologist 52 (2006).

[10] Martti Koskenniemi, From Apology to Utopia: The Structure of International Legal Argument (2009).

[11] Anthony Anghie, Imperialism, Sovereignty, and the Making of International Law (2005).

[12] Luis Eslava, Local Space, Global Life: The Everyday Operations of International Law and Development (2015).

[13] Annelise Riles, *Afterword: A Method More Than a Subject*, *in* Exploring the "Legal" In Socio-Legal Studies 257, 259 (David Cowan & Daniel Wincott eds., 2015).

Riles is not alone in these sentiments: talk of "loss of faith,"[14] challenge and decline,[15] and scholarly apathy[16] is rampant in international law. Importantly, this talk often refers both to international law as a progressive tool of world improvement and an intellectual project. Yet, speaking again of fragmentation, this attitude by no means affects all international lawyers, as is tangibly illustrated by the professionals who have over the past two decades been my main informants and interlocutors, namely activist international human rights lawyers.[17] Importantly, among this group I recognize no sentiments of "loss of faith" either in transnational dialogue or the law. By contrast, this group could be characterized as being deeply invested in continued efforts to improve the world by advancing the legalization of human rights, reflected by lobbying efforts to create the World Court of Human Rights.

In my research, I have examined how different activist techniques manifest themselves in the practices around the UN Human Rights Committee, one of ten treaty bodies to oversee how states comply with the obligations that they have undertaken by becoming parties to the main UN human rights covenants. In practice the treaty bodies' operations consist of the processing of periodic reports submitted by state parties in cycles referred to as "constructive dialogue,"[18] as well as, for distinct treaty bodies, the processing of individual communications.

The most important observation of my analysis is that the practices of treaty bodies have a complex relationship to the law: treaty bodies owe their existence directly to covenant provisions. Yet these provisions left the exact scope of treaty bodies' mandates for treaty bodies themselves to define. Simultaneously, all of the documents they produce are legally non-binding. Treaty body mandates thus contain a particular delicacy: they continually need to balance an aspiration for world change through robust and progressive interpretation of the treaty they monitor, while negotiating their mandates carefully so as not to alienate or provoke states reluctant to be subject to international oversight.[19]

In this balancing act, legal technicalities[20] assume particular importance. This term refers to the practicalities of treaty body operations including the arrangement of documents in covenant-like paragraphs and sub-paragraphs, as well as extensive reliance on individual pieces of legislation and court rulings in the "constructive dialogue" between Committee members and state delegates. An emphasis of legal technicality is also visible in the language of "jurisprudence" commonly utilized by Committee members, UN staff, as well as many scholars to refer to the legally non-binding processing of individual communications.[21]

In my analysis, legal technicalities acquire a sense of profound meaning from their intrinsic connection to the underlying vision for world improvement through the continually greater role of human rights and the law. Legal technicalities also increase the legitimacy of such "lawlike" organs as UN treaty bodies to work toward this improvement by emphasizing their underlying legal nature—binding force notwithstanding.

[14] Amy Cohen, *ADR and Some Thoughts on "the Social"*, *in* SEARCHING FOR CONTEMPORARY LEGAL THOUGHT 454 (Justin Desautels-Stein & Christopher Tomlins eds., 2017); Annelise Riles, *Outputs: The Promises and Perils of Ethnographic Engagement After the Loss of Faith in Transnational Dialogue*, 23 J. ROYAL ANTHROPOLOGICAL INST. 179, 183–4 (2017).

[15] Shirley V. Scott, *The Decline of International Law as a Normative Ideal*, 49 VICTORIA UNIV. WELLINGTON L. REV. 627 (2018); Douglas Guilfoyle, *The Future of International Law in an Authoritarian World*, EJIL:TALK! (2019).

[16] Peter Goodrich, *On the Relational Aesthetics of International Law*, 10 J. HIST. INT'L L. (2008).

[17] HALME-TUOMISAARI, *supra* note 9.

[18] UN Office of the High Commissioner for Human Rights, Guidance Note for States Parties on the Constructive Dialogue with the Human Rights Treaty Bodies, UN Doc. A/69/285.

[19] Miia Halme-Tuomisaari, *Guarding Utopia: Law, Vulnerability and Frustration at the UN Human Rights Committee*, 28 SOC. ANTHROPOLOGY 35 (2020).

[20] Riles, *supra* note 13.

[21] *See, e.g.*, UN Office of the High Commissioner for Human Rights, *About the Jurisprudence*.

"Being the State" and a Human Rights Activist

One insight my research yields is the contrast between the legal fiction of *difference* governing UN treaty bodies' operations and the empirical *sameness* of participants in different formal categories as a shared *community of practice* of human rights lawyers.[22] This sameness includes a common educational background of training in law and human rights, often with a master's degree or study exchanges in a handful of universities particularly in western and northern Europe or the United States. Often, work profiles overlap: members of UN expert committees or personnel of the UN Office of the High Commissioner for Human Rights (OHCHR) may have prior expertise working at human rights NGOs. Their professional tasks are likewise similar: working on human rights monitoring either at the UN or regional level primarily revolves around the production and processing of documents through similar legal technicalities.

If these observations of sameness are self-evident for UN treaty bodies experts, NGO delegates, and OHCHR personnel, they are more unexpected when it comes to state civil servants. After all, the very operational logic of treaty body sessions builds upon a formal separation between UN committees, NGOs, and states. In the treaty body proceedings, these categories are allocated sharply differing roles—a division that importantly upholds the legitimacy and independence of the monitoring mechanism. Expert members of UN treaty bodies are seen to embody the international community, with aid from local and international NGOs. Together, they are the purported guardians of the vision for greater realization of human rights around the world.

States, by contrast, are the targets of investigation, and thus their role is that of potential human rights violators. This is logical, as the fundamental purpose of international human rights covenants is to restrict the scope of state actions in order to secure the realization of individual rights. By extension, the very task of UN treaty bodies is to ensure that states live up to their lofty covenant commitments. Simultaneously, these elements give treaty body proceedings an inevitably confrontational flavor. Underlying tensions become cast as contestations over knowledge: who in the international community's eyes has both the capacity and legitimacy to present objective facts, and whose documents and presentations are reduced to mere propaganda?[23]

When appearing before treaty bodies and in other formal UN contexts, state delegates embody *difference* by speaking impersonally as state representatives. The expectation is that through skillful fulfilment of their professional tasks, they will satisfy committee members' queries with persuasive information and concomitantly portray their state's actions in a favorable light. Yet the agency of state delegates may be layered, as they may have a significant personal commitment to the advancement of human rights in their home states as well as similar professional background as NGO and committee representatives. Furthermore, state delegates, better than any international experts, know their states' shortcomings.

In practice, state delegates may mobilize this knowledge to achieve particular objectives. For example, an influential Finnish civil servant facilitated increased participation by indigenous peoples in treaty body proceedings by securing state funding for Sami groups so that they could join the NGO hearing in Geneva related to the "constructive dialogue" between the Human Rights Committee and Finland.[24] Civil servants also know the strategic impact that UN treaty bodies' proceedings may acquire domestically: while addressing an issue of minority rights, for example, a civil servant may create additional momentum for requests for funding or action plans by indicating

[22] Jean Lave & Etienne Wenger, Situated Learning: Legitimate Peripheral Participation (1991); Halme-Tuomisaari, *supra* note 9; Oscar Schacter, *Invisible College of International Lawyers*, 72 Nw. U. L. Rev. 217 (1977).

[23] Miia Halme-Tuomisaari, *Contested Representation: Exploring China's State Report*, 1 J. Leg. Anthropology 333, 334 (2013).

[24] Miia Halme-Tuomisaari, *Embodied Universalism at the UN Human Rights Committee: Meeting the World at the Palais Wilson*, *in* Palaces of Hope: Anthropology of the United Nations 127 (Ronald Niezen & Maria Sapignoli eds., 2017); *see also* Joshua Clark et al., *Being Like a State*, Pol. & Leg. Anthropology Rev. Online (May 2015).

that "even a high profile UN body notes that this is a problem in our country." This strategic goal is realized, even while recognizing that the concluding observations issued by treaty bodies on the basis of state reports are legally non-binding—the proceedings' most significant shortcoming from the point of view of many legal commentators. These ethnographic insights illustrate how human rights covenants and treaty body proceedings may acquire effects through subtle moments of lobbying.

These observations also give rise to a paradox: the reproach that a UN treaty body offers on a state's periodic report may appear as highly unwelcome to an individual civil servant who is "embodying the state" in their professional duties. Yet, by contrast, this reproach may appear highly desirable to these very same people as members of the activist international community of human rights lawyers. This concretizes how many state representatives possess a dual allegiance— their professional loyalty lies, on the one hand, to the state they formally embody, while on the other, to supporting the continually expanding influence of the international human rights regime, which they see as integral to the realization of human rights.

These characteristics of sameness pertain particularly to young civil servants,[25] echoing the temporality with which the contemporary human rights phenomenon has expanded: whereas it would have been unlikely that civil servants from foreign affairs ministries would have received international human rights education in the 1960s and 1970s—for one thing, such educational programs did not exist—today such training is more commonplace.[26]

The sameness characterizing human rights lawyers' community of practice has multifaceted analytical consequences by offering novel insights into what is international, even *universal*, in human rights monitoring practices. Here, one undisputed element is the spread of distinct knowledge practices and legal technicalities. As Riles notes, "what makes law global is the technical, in other words, the fact that a lawyer in Dubai or London will approach a legal document from a largely similar set of routinized pathways of thought."[27]

Light or Weighty?

How can these insights contribute to an alliance between international law and anthropology? I build upon Andrea Bianchi's recent reflections regarding what counts as "light" and "weighty" in international law.[28] Bianchi summarizes how "weighty" is typically "synonymous with rigorous, intellectually consistent, scientifically serious, committed, having a sense of purpose,"[29] leading further to the "widespread bias in favor of methods that are perceived to be more objective and scientific than others," such as economics.[30] "Light," by contrast, is the antithesis of all the above—and one can easily see how anthropology with its hazy methodology of ethnography would belong in this category. Additionally, "light" includes "exercises . . . in which one tries to draw insights and inspiration from outside the law."[31]

Bianchi further notes the "inferiority complex" from which the international legal community suffers, "based on the widespread perception that international law is ineffective."[32] Here, we see how anthropology could serve international law: as these insights illustrate, practices of international law may occur through processes and

[25] Halme-Tuomisaari, *supra* note 23, at 334 (2013).

[26] Elif Babul, Bureaucratic Intimacies: Translating Human Rights in Turkey (2017).

[27] Riles, *supra* note 13, at 258.

[28] Andrea Bianchi, *The Unbearable Lightness of International Law*, 6 London Rev. Int'l L. 335 (2018).

[29] *Id.* at 340.

[30] *Id.* at 344.

[31] *Id.* at 345.

[32] *Id.* at 343.

techniques that have little to do with how international lawyers *envisage* that the law will be effective, which is typically measured by the relative binding force of the law.

In this essay I have discussed these issues from the viewpoint of *sameness* embodied by distinct knowledge practices and legal technicalities that characterize the international community of human rights lawyers—whether they work as UN monitoring bodies experts, NGO representatives, or states' delegates. I have further discussed how this sameness paves the ground for subtle moments of lobbying inside state bureaucracies. I contrasted these findings with the legal fiction of *difference* between the categories of state, NGO, and expert.

I suggest that, instead of "light" or insignificant, such insights are quite "weighty." They could offer novel appreciation for the diverse effects of international law—particularly for subtly influential mechanisms that easily escape traditional legal analysis. Furthermore, these insights could reinvigorate international legal scholarship that may be tackling a sense of "loss of faith" in the discipline.