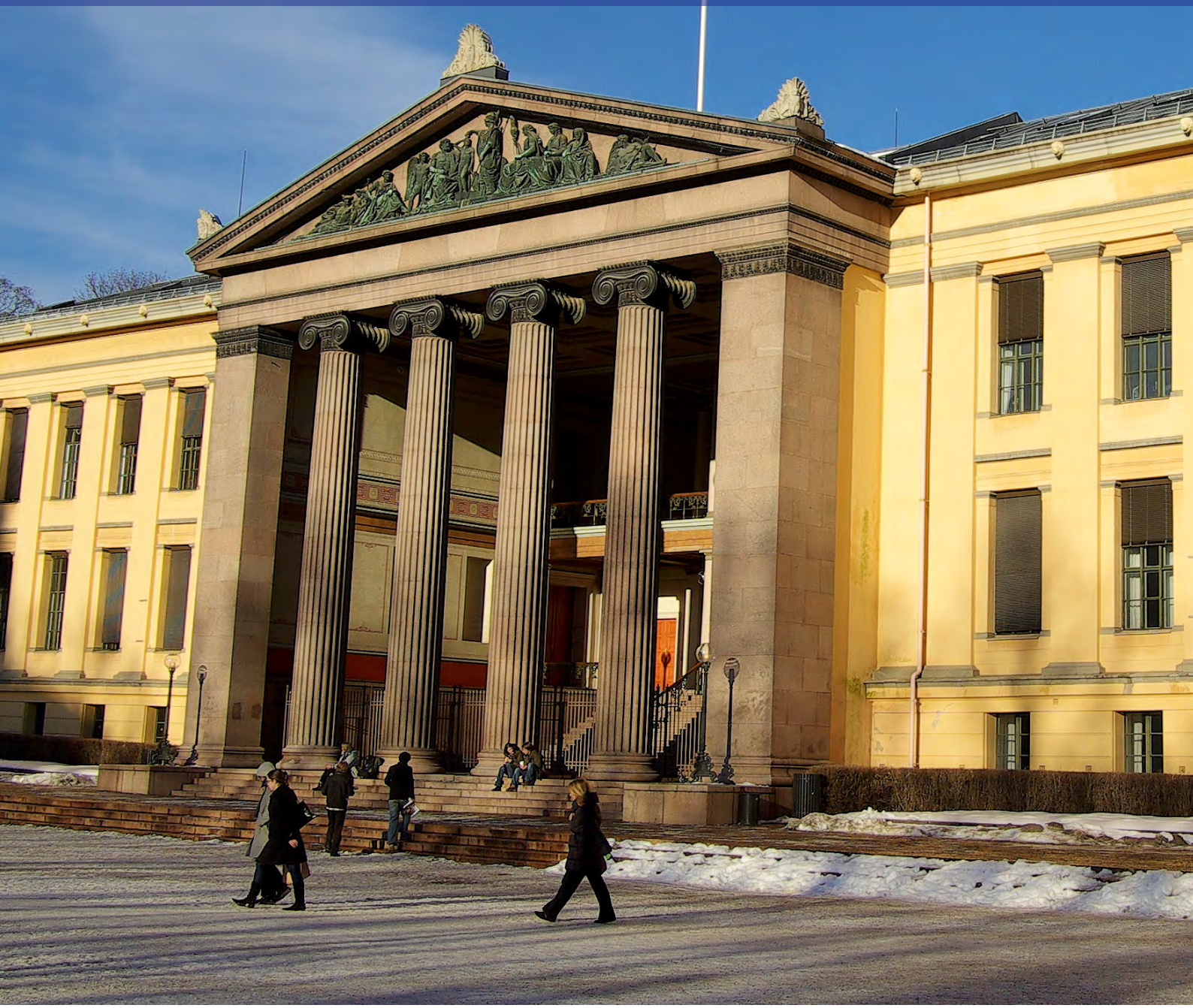
ESIL IGITLP European Conference Series on the Theory and Philosophy of International Law

The Reality of International Legal Theory:
Reality in International Legal Theory

Second ECTPIL & iCourts Conference / May 19-20 2022



UNIVERSITY OF COPENHAGEN
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Interest Group on International Legal Theory & Philosophy
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Second ECTPIL and iCourts Conference 19–20 May 2022

University of Copenhagen Faculty of Law / Karen Blixens Plads 16 / Auditorium 4A.0.69

The Reality of International Legal Theory – Reality in International Legal Theory

Programme

Thursday, 19 May 2022

13.30–13.50 Opening
- **Jakob v.H. Holtermann** (iCourts/co-organiser) and **Jörg Kammerhofer** (Freiburg/co-organiser)

13.50–14.30 *Keynote Speech*
Chair: **Jakob v.H. Holtermann**
- **Mikael Madsen** (iCourts)

14.30–16.00 *Panel 1: Theoretical Views on Reality in Legal Doctrine*
Chair: **Henrik Palmer Olsen** (iCourts)
- **Urska Sadl** (EUI): *How to Operationalize 'Grand Theories' of Adjudication for Systematic Legal-Empirical Research*
- **Ricardo Alexandre Sousa da Cunha** (Minho): *A Realist Perspective in the Relationship of Legal Orders: Building Meaning in an Increasingly Complex, Multidirectional and Cosmopolitan International Law*
- **Arthur Dyevre** (KU Leuven): Empirical Jurisprudence as a Realist Perspective on International Law Research

16.00–16.30 Coffee Break

16.30–17.30 *Panel 2: Normative Projects and Reality in International Legal Theory*
Chair: **Jakob v.H. Holtermann**
- **Nora Stappert** (Leeds) and **Yuna Han** (Oxford): *Practice Theory and International Law: Normativity, Access, and the Ethics of Methodology*
- **Nico Roman Weber** (EUI): *'Welcome to the Desert of the Real!' The Unreality of International Legal Theory*

19.00–22.00 Drinks and Dinner for Speakers and Chairs

Friday, 20 May 2022

09.00–10.45 *Panel 3: The 'Reality' of/in International Law*
Chair: **Astrid Kjeldgaard-Pedersen** (iCourts)
- **Ka Lok Yip** (Hamad Bin Khalifa, Doha): *International Law as a Popperian World 3 Object*
- **Helga Molbæk-Steensig** (EUI): *Studying Reality through Samples: Explicating Legal Methodologies for Discovering what the Law is*
- **Brad Roth** (Wayne State): *Applying a Realistic Interpretivism to International Law*

10.45–11.15 Coffee Break

11.15–13.00 *Panel 4: Contesting Legal Realism as Approach to International Law*
Chair: **Jörg Kammerhofer**
- **Andreas Føllesdal** (PluriCourts): *Turning to or Turning Away? Real International Law, Doctrinal Studies and International Legal Theory*
- **John Hursh** (DAWN): *Style over Substance: The Persistence of Realism in International Law*
- **William Hamilton Byrne** (iCourts): *Toward a Sociology of the Empirical Turn in International Legal Scholarship*

13.00–13.10 Closing
- **Jakob v.H. Holtermann**

Second ECTPIL and iCourts Conference 2022

The Reality of International Legal Theory – Reality in International Legal Theory

Participant Biographies and Abstracts

1. **Panel 1:** Theoretical Views on Reality in Legal Doctrine

Chair / Henrik Palmer Olsen / iCourts

Henrik Palmer Olsen is a Professor of Jurisprudence at the University of Copenhagen & co-founder of iCourts. He is a leading expert in legal theory and has published foundational research within the areas of jurisprudence, the separation of powers and the relationship between institutional design and notions of justice, with a recent focus on international courts.

1.1 Urška Šadl / EUI

Urška Šadl is a Global Research Fellow at iCourts centre of Excellence for International Courts at the Faculty of Law in Copenhagen and an Associate Professor at the Faculty of Law in Copenhagen (on special leave). She obtained her BA and Master degree in law from the Faculty of Law in Ljubljana. Urška also holds a LL.M. degree in Legal Studies from the College of Europe in Brugge and a PhD degree from the University of Copenhagen. She has completed research stays at King's College, London, Institute of European and Comparative Law at the University of Oxford and most recently visited the University of Michigan as Michigan Grotius Research Scholar.

How to Operationalize 'Grand Theories' of Adjudication for Systematic Legal-Empirical Research

1.2 Ricardo Alexandre Sousa da Cunha / University of Minho School of Law

Ricardo Alexandre Sousa da Cunha holds a degree in law and a PhD in Public Law Sciences from the University of Minho School of Law. Additionally, he holds a Masters in Public Law Sciences from the Faculty of Law of the University of Coimbra and the Faculty of Law of the University of Macau. He is Director of the Department of Law at the Polytechnic Institute of Cávado and Ave and Guest Lecturer at the Polytechnic Institute of

Cávado and Ave. Lastly, he is a law trainer at various institutions, including the Bar Association.

A Realist Perspective in the Relationship of Legal Orders: Building Meaning in an Increasingly Complex, Multidirectional and Cosmopolitan International Law

A realist legal methodology is particularly concerned with the conditions for its implementation – the ought that is. Even if such perspective is mostly directed at the way courts apply international law, the growing relevance of international law also imposes on other State organs, namely the legislator, when fulfilling the legislative obligations arising from international law, and public administration, when implementing administrative obligations. Many examples have arisen over the years in this regard, mostly after the events on 9/11/2001 regarding the sanctioning and prevention of terrorism and terrorism financing. Some realist prepositions may be discussed, as the need to implement different legal obligations leads the courts, public administration and the legislator to solve different legal antinomies.

The solution of the different cases must, firstly, attempt to solve the different legal conflicts before resorting to the rules of international state responsibility or of subsystems of international law. This is the methodological quest that still binds lawyers together (academics as much as practioneers), as "builders of meaning" in an increasingly complex, multidirectional and cosmopolitan legal order. This means that a realist legal methodology cannot open hand of the legal argumentation even if it considers all the human elements included in any legal decision - otherwise, it becomes a mere exercise of power. A legal realist methodology identifies the different Classes of legal indeterminacy in an increasingly complex quest, where the relationship between legal systems is also increasingly relevant. (1.) The existing sources of law are increasing more in numbers, diverse in nature, including different types of hard and soft sources of international, domestic and sub-systematic law, that coexist with the domestic, constitutional and ordinary legislation. (2.) The different powers, separated under the constitution, have different hermeneutic competences to solve these conflicts that need to be adequately considered regarding the legitimate (rational) legal interpretation law, (3.) the integration of facts into the law and (4.) the rational operations to produce a decision.

In this exercise, the political affirmation of legal autonomy, as a trait of sovereignty, has been as unavoidable as it has been the source of different problems – as the recent disputes over the primacy of European Union Law vs that of Member-States has highlighted. It is only ironic that Member-States argumentatively use the jurisprudence of the EUCJ on the relationship with International Law! A realist perspective of the relationship between legal systems tells us that primacy is the worst possible solution for a relationship – since it is argumentatively unsustainable – but it is also its natural result. A realist lawyer needs only to find better methodological tools navigate this increasingly complex, multidirectional and cosmopolitan law.

1.3 Arthur Dyevre / KU Leuven

Arthur Dyevre works in the fields of legal theory, judicial behavior, European integration, comparative law and comparative politics. Prior to coming to Leuven, he has held research fellowships at various institutions across Europe, including the European University Institute in Florence, the Centro de Estudios Politicos y Constitucionales (CEPC) in Madrid, and the Max Planck Institute for Comparative Public Law and International Law in Heidelberg.

His current work focuses on the application of automated content analysis techniques to legal texts; the interplay between national courts and the European Court of Justice in the EU; and the empirical foundations of the rationale for judicial review of legislation.

Empirical Jurisprudence as a Realist Perspective on International Law Research

2. **Panel 2:** *Normative Projects and Reality in International Legal Theory*

Chair / Jakob v.H. Holtermann / iCourts

Jakob v.H. Holtermann holds a BA & MA in Philosophy and Danish Literature & a PhD in philosophy Roskilde University. His primary fields of research are legal philosophy, Alf Ross, legal realism, naturalized jurisprudence, restorative justice, criminal justice ethics, international criminal justice ethics, international criminal courts, legal epistemology, blasphemy.

2.1 Nora Stappert / Leeds & Yuna Han / Oxford

Nora Stappert is a Lecturer in International Relations and International Law at the School of Politics and International Studies, University of Leeds. She is currently also a Senior Research Fellow at the Centre for Global Cooperation Research, University of Duisburg-Essen, where she am part of the research group 'Legitimation and Delegitimation in Global Cooperation' (February 2022 – January 2023).

Before coming to Leeds, she was a Marie Curie Fellow at the Centre for International Courts (iCourts) at Copenhagen's Faculty of Law. In addition, she was a postdoctoral research fellow at Gothenburg University, School of Global Studies, where she worked on a research programme on Legitimacy

in Global Governance, a collaboration between the universities of Stockholm, Lund, and Gothenburg.

Yuna Han is a Departmental Lecturer in International Relations at the University of Oxford, Department of Politics & International Relations. She is affiliated with St. Catherine's College.I research on the politics of international law, focusing on international criminal law and human rights accountability, and increasingly, pandemic politics. She is also interested in Constructivist IR theory.

Previously she was a Fellow in International Relations Theory at the London School of Economics & Political Science, and a research associate at the European University Institute. She has held research affiliations with the SOAS Centre on Conflict, Rights, and Justice (CCRJ) and the George Mason University's School for Conflict Analysis and Resolution.

She holds a DPhil (PhD) from the University of Oxford, MPhil from the University of Cambridge, and BA from Harvard University.

Practice Theory and International Law: Normativity, Access, and the Ethics of Methodology

2.2 Nico Roman Weber /EUI

Nico Roman Weber is a PhD researcher at the Law Department of the European University Institute in Florence.

'Welcome to the Desert of the Real!' The Unreality of International Legal Theory

Few things are as difficult as becoming a realist. Those who claim to be one fall more often than not under the spell of the 'hyperreal' (Baudrillard): they look upon the map of the natural world that actually covers it. International legal theorists drew perhaps the toughest lot of them all: not only do they need to decide whether their conceptualisations should contextualise the law but what the law actually is remains a perennial question. Most cosmopolitan liberal theories and their pluralist distractors do not count history among the constitutive elements of international law. This paper argues that this obliviousness is rooted in the (Neo-) Kantian paradigms, often transmitted via the proxies Habermas and Rawls, that those theories reflect. Lacking a sense of historicity beyond sweeping introductory remarks, they condemn us to reproduce the 'desert of the real'. They deprive us of a vision of the future – a reality in which international order will not be what it now is.

Among the liberal cosmopolitans, most try to conceptualise their reform proposals within a public law paradigm. They may draw inspiration from domestic administrative law (Kingsbury, Krisch Stewart), constitutional law (Habermas, Walker, Kymlicka), or broader notions such as the internationalisation of public authority (von Bogdandy). As diverse as those sound, it takes not much polemics to find common characteristics: Most of them put legitimacy concerns at the centre. They exclude, not least due to methodological concerns, all 'metaphysical' considerations and defer a thorough historical analysis to other (inter-) disciplinary endeavours. As a result, they propose reforms akin to the recipes they know from their domestic order that supposedly manages similar problems successfully.

The inclusion of global legal pluralists into the same (Neo-) Kantian legal ideology might surprise: do Berman, Krisch, Teubner & Co. not critique liberalism for its myopia, the projection of historically grown ideas onto collectives that thrived under their own? This critical attitude notwithstanding, I argue that they similarly manage the status quo with means known from the domestic liberal framework. Even their pluralism is, in nuce, an individualist universalism which in the form of global capitalism has become the universality they all would prefer to ignore.

The explicit renunciation of metaphysics does not render these theories automatically non- or post-metaphysical, nor does the lack of historicising make the suggested solutions any less historically contingent. Only by blending out how the current crises are the historical product of the structures that said theories wish to scale up they can pretend to offer solutions. Caught within the present, they reproduce the present with the means of the present. Alternatives are excluded since they would presuppose a different metaphysics that remains unspeakable under the dictum of Neo-Kantian scientism. Only a critique of metaphysics can renegotiate the relationship between the empirical and the normative, the laws of causality and freedom. Only then history can transform from background information to an integral part of our relationship with the law.

3. **Panel 3:** The 'Reality' of/in International Law

Chair / Astrid Kjeldgaard-Pedersen / iCourts

Astrid Kjeldgaard-Pederse is professor WSR in International Law, iCourts, at the faculty of Law at the University of Copenhagen. Her primary research interests are in international law, international criminal law, human rights, international humanitarian law, legal philosophy, the relationship between international law and domestic law, constitutional law.

3.1 Ka Lok Yip / Hamad Bin Khalifa, Doha

Dr. Ka Lok Yip holds an interdisciplinary PhD in international law and international relations from the Graduate Institute of International and Development Studies, Geneva. She has published extensively on issues related to armed conflicts and monitors armed conflicts in the region closely. She is also admitted to the practice of law in England and Wales and Hong Kong.

International Law as a Popperian World 3 Object

Karl Popper argued for three worlds of reality: the physical (world 1), the mental (world 2) and the products of the human mind (world 3). The proposed contribution cautions that the empirical turn by international law realists to focus on the physical reality of legal decision-making and the mental reality of the decision-makers risks reducing international law to a Popperian world 1 and world 2 object by hallowing it of its Popperian world 3 properties. Recognising the limits of language (itself a Popperian world 3 object) that expresses the law, the proposed contribution will draw on a practical example to illustrate how reconnecting international law with the wider social reality can shed light on the meaning of the law despite the semantic ambiguity and vindicate international law as a Popperian world 3 object, with normative force that is not determined merely upon adjudication.

The bulk of the life of international law is lived not in its adjudication, but in its making, dissemination and implementation, all of which exert real causal power in the wider social reality which in turn shapes the law. Failure to recognise the larger reality of international law leads to an oversight of the normative force of the law independent of both the physical and the mental dimension of its adjudication. Just like scientific realism holds that real entities exist outside of discourse, legal realism ought to recognise the existence of international law outside its concrete pronouncement by decision-makers, thereby enabling doctrinal analysis to be used as a legitimate means of emancipatory struggle. The skewed vision of the reality of international law as the physical reality of its adjudication and the mental reality of its adjudicators inhibits the ability to access and thereby to shape that larger reality of international law, thereby risking the conversion of legal realism into social irrealism in theory and stagnant conservativism in practice.

International law is equipped with assumptions about the wider social reality from which international law originates and can be traced. The failure to discern and vindicate the connection between the reality of international law and the wider social reality robs international law of its social roots and deprives it of any intrinsic content, thereby exacerbating its indeterminacy and risking its relegation as a subservient tool of the powerful almost as a self-fulfilling prophecy of the legal realists. Reconnecting international law with its wider social reality will reawaken the normative force of international law to act as a bulwark against epistemological domination and practical manipulation. For example, the controversial relationship between international human rights law (IHRL) and international humanitarian law (IHL) has often

been dealt with either as a matter of pure legal reasoning (lex specialis, systemic integration) or simple policy decision (civil versus military interests). Interrogating the wider social reality transcends both positions by uncovering the social ontological presuppositions of IHRL (structure) and IHL (agency) to reveal the historical social processes that have shaped these laws and to help distinguish between their content.

3.2 Helga Molbæk-Steensig / EUI

Helga Molbæk-Steensig is a PhD-researcher at EUI LAW working on a thesis on the content and consequences of the reform process at the European Court of Human Rights. I deal with questions of legitimacy and politicization of judicial bodies along with potential adjudicative responses, especially the use of the language of deference. I utilize mixed quantitative and qualitative methodologies.

Studying Reality through Samples: Explicating Legal Methodologies for Discovering what the Law is

3.3 Brad Roth / Wayne State

Brad Roth holds a joint appointment with the Department of Political Science at Wayne State University. He specializes in international law, comparative public law, and political and legal theory. His courses include Law, Authority and Resistance, International Law, International Protection of Human Rights, International Prosecution of State Actors, U.S. Foreign Relations Law, and Political Theory of Public Law. Before entering academia, he practiced law and served as law clerk to the chief justice of the New Jersey Supreme Court.

Applying a Realistic Interpretivism to International Law

Much of the currently prevalent philosophical discourse on the international legal order is traceable to the heady ambitions of the immediate post-Cold War era – the period from 11/9 (1989) to 9/11 (2001). Philosophical approaches to international law have thus tended to center universalist projects such as human rights, international criminal justice, democratization, and humanitarian intervention, rather than to appreciate (or, often, even to affirm) Cold War-era norms designed to cope with fragmentation, difference, and distrust. Such approaches are not well-suited to the future that is upon us – one that, in some crucial respects, looks more like the past. An efficacious international legal order cannot be markedly better, fairer, or more elegant than the actual conditions of global society permit.

According to Ronald Dworkin, "constructive interpretation is a matter of imposing purpose on an object or practice in order to make of it the best example of the form or genre to which it is taken to belong." For Dworkin,

legal interpretation properly entails a "moral reading" of source material that, "all things considered, makes the community's legal record the best it can be from the point of view of political morality."

Dworkin only belatedly came to apply his interpretivist approach to the international legal order, with his major contribution on that subject appearing only after his death. That contribution reflected an incomplete and skewed understanding of the international legal order's essential purposes, underestimating the enduring prevalence of discord and for that reason overstating the international system's role in enhancing the legitimacy of municipal governance.

Yet an alternative "moral reading" of the United Nations Charter-based international system, better grounded in the stubborn realities and practical imperatives of global political life, is both available and edifying, promising a more compelling account of the system's fundamental norms than can be furnished by international legal positivism. This moral reading highlights the international legal order's role as a framework of accommodation among bearers of differing interests and values, and eschews placing impractical conditions on the compromises needed to achieve interstate peace and cooperation.

What counts as law is open to creative efforts to attribute to the society's processes of political decision a normative scheme that is coherent and that has a presumptive orientation toward values inherent to legal order as a distinctive project. Creativity in legal interpretation is nonetheless properly bounded by relevant social facts that condition the plausibility of the account of any given society's governing norms.

As applied to the international legal order, the interpretive method must take account of the overall balance of considerations underlying the international legal order. These considerations include not only such "overlapping consensus" as can found within the international community on questions of justice, but also a concern to maintain self-government of distinct political communities and to guard against the exertions of untrusted (and untrustworthy) would-be implementers of universal principles, as well as to ensure that adherence to the international order's fundamentals remains a long-term "win-win" for variously situated constituents.

4. **Panel 4:** Contesting Legal Realism as Approach to International Law

Chair / Jörg Kammerhofer / University of Freiburg

Jörg Kammerhofer is a Senior Research Fellow at the University of Freiburg, Germany, and Privatdozent for international law and legal theory at the Vienna University of Economics, Austria. He is a generalist international law scholar and specialises in theory, sources, use of force, dispute settlement, investment law as well as in the theory of law, in particular the Pure Theory of Law. He has published widely on these topics, including his

recent monograph International Investment Law and Legal Theory: Expropriation and the Fragmentation of Sources (CUP 2021). He is erstwhile member and chair of the ESIL's Interest Group on International Legal Theory and Philosophy Co-ordinating Committee. As a member of the Hans Kelsen Research Group he is also involved in publishing the collected works edition of Hans Kelsen's writings.

4.1 Andreas Føllesdal / PluriCourts

Andreas Føllesdal is a political philosopher particularly interested in puzzles of globalization and Europeanization. As Fulbright Fellow at the Philosophy Department of Harvard University I graduated in 1991 with a PhD dissertation on The Normative Significance of State Borders, advised by philosophers John Rawls and TM Scanlon, and economist, later Nobel Laurate Amartya Sen. He exploited the opportunities to also study human rights law at Harvard Law School; welfare economics, game theory and international political economy at the Economics Department; and international relations at the Department of Government. He has continued multi-disciplinary research on international and global puzzles and dilemmas in the intersection of law, international relations and political theory.

Turning to or Turning Away? Real International Law, Doctrinal Studies and International Legal Theory

4.2 John Hursh / DAWN

John Hursh is the Program Director of DAWN. Previously, he served as Director of Research at the Stockton Center for International Law and Editor-in-Chief of International Law Studies at the U.S. Naval War College. He also served as Policy Analyst at the Enough Project, an NGO working to end genocide and crimes against humanity, where he focused on Sudan.

He has completed research in Sudan and Uganda addressing human rights violations, humanitarian issues, and government corruption. He also observed peace negotiations between the Government of Sudan and armed opposition groups in Addis Ababa, Ethiopia. He has published numerous academic articles and book chapters addressing a range of human rights and humanitarian issues. His writing has also appeared in African Arguments, World Politics Review, and Foreign Policy. He is a regular contributor to Just Security.

Style over Substance: The Persistence of Realism in International Law

In a notable critique of one account of realism in international law, Ian Hurd raises two important points. First, Hurd notes that realist accounts of international law often are so sweeping or so encompassing as to crowd out all other theoretical approaches. Realists most clearly demonstrate this overreach through a near deification of state power and through the common refrain that powerful states seek to shape the international order to their benefit. But these observations are obvious and hardly the sole purview of realists. As Hurd asks, "Who would deny that powerful states often evade their legal obligations, or that they strive to use their power to create a legal order that favors their interests?" Second, Hurd concludes that if realism is to be a useful theoretical approach to international law, it must be more limited in its claims and more distinct from other approaches. Here, Hurd notes that one way to differentiate realism from other approaches is that realists engage the international order foremost as skeptics.

Seizing on this insight, this paper argues that this skeptical outlook best characterizes the realist approach to international law. Realist guiding principles—that states only seek to enhance their power or violate international law when doing so advances their interests—are remarkably simplistic and provide little explanatory power past a superficial level. In contrast, the reality of international law and international legal processes are complex, nuanced, and less predictable.

How then can we explain the continued relevance of the realist approach? First, scholars and policymakers continue to conflate moral or political realism with the realist approach to international law. Second, the skeptical perspective that the realist approach brings to international law provides a justification for unilateral or unlawful action. This justification is of course self-fulfilling, but nonetheless useful for powerful states that can use doubt that the international community would support its interests as a preemptive foil to act. Third, and most importantly, realism provides what Hersch Lauterpacht called an "argumentative strategy," which, despite its basic character, remains persuasive. For Lauterpacht, the realist argument was simply an appeal to oneself as a sensible realist, while defining one's opponent as the inverse. Despite this obvious logical fallacy, this tactic remains an effective rhetorical tool for policymakers and politicians to mobilize support.

Donald Trump's America First mantra provides an especially apt example, as does George W. Bush's maxim that one is either with America or with the terrorists. By eliminating nuance, these reductive sentiments provide a populist impulse that proved politically successful. Such tactics also invoke a popular realist trope that the international system is an anarchic one and that only by maximizing power can a state maintain security. However, the great irony of the realist approach is that when applied, it often leads to insecurity and conflict, and ultimately does more to destabilize the international order than less power-centric approaches to international law. This paper addresses this irony and argues that despite its often-destabilizing results, the intuitive appeal of the realist approach will continue.

4.3 William Hamilton Byrne / iCourts

William Hamilton Byrne is a postdoctoral researcher is a postdoctoral researcher currently involved with the ERC Research Project Human Rights Nudge and Data Science for Asylum Legal Landscaping (DATA4ALL). He previously completed his PhD thesis at iCourts in the period 2017-2020. His research interests extend, but are not limited to: International Legal Theory, Sociology of International Law, Public International Law, International Human Rights Law, International Refugee Law. He teaches on international human rights law, international refugee law, and public international law.

Toward a Sociology of the Empirical Turn in International Legal Scholarship

This paper aims at systematically studying the so-called 'empirical turn in international legal scholarship' in order to identify the determinants and dynamics of this purported zeitgeist in international legal knowledge. We are interested in exploring (1) the factors behind the current boom in empirical international legal scholarship; (2) the extent to which the empirical turn is unique to the discipline(s) of international law; (3) whether the empirical turn is a universal path, or is instead concentrated in sites or between players; and (4) the empirical turn's broader implications in terms of politics of interdisciplinary legal knowledge.

Previous research has undertaken a 'brief sampling' of the empirical turn in US law journals (Shaffer and Ginsburg, 2012) and developed an epistemological typology (Holtermann and Madsen, 2016.) We draw inspiration from studies on the extent of empirical research in law reviews (Diamond and Mueller, 2010) and amongst academics (Siems and Siethigh, 2012) to cast a wider net. Our aim is to systematically map the field of empirical international legal studies in order to re-construct typologies and strands of research and understand their interactions in terms of politics and sociology of knowledge. We do so through three data sources: firstly, biographies of academics; secondly, empirical research in a wider body of law reviews; and thirdly funding patterns. This will be complimented by qualitative interviews with international legal scholars engaged in empirical work.

The paper constructs a historical narrative to show that international legal scholarship responded to the challenge of critical legal scholarship by firstly, carrying on as normal, or secondly, finding new ways to craft a legal science free from politics. It will be contended that the embrace of empirical methods is reflective of a desire to produce novel and relevant scholarship in light of a rigorous revision of the relative worth of social science in respect of maters of theory and funding and the expansion of international law as a field driven by intense competition for persuasive authority. The dilemma is accentuated by the omnipresent anxiety over naturalism as defeatist of the teleological orientation of international law and reductive of the ways in which academic capital may be exploited.

The paper will submit that the empirical turn in international legal scholarship should not be considered in isolation from greater trajectories to scientific unity in the social sciences more broadly. Empirical research quenches an epistemic thirst generated by the wake of 'post-' positivism, and is intuitively appealing for lawyers schooled in a vocabulary that encourages normative distance from the(ir) object. Empirical legal research shifts the burden of persuasion through an epistemic counter move that enables the international lawyer to enhance professional credibility and redefine their field in the current interdisciplinary oeuvre of academic social spaces. The question is thus no longer whether international legal scholarship is relevant any more, but rather, how relevant can it be?

The opening of the veritable empirical Pandora's box calls for greater reflection on the ideological nature of methodological choices, which sheds new light on claims of supposed interdisciplinary hostile takeovers and the apparent staking of the legitimate heir(s) to the throne. It further reignites the question of what 'empirical' really means in this context, as a 'method' or a representative choice. Moreover, the extent of this 'turn' as isolated to elite research centres in the Global North give rise to critical questions as to in whose name empirical international legal scholarship really speaks for.

Second ECTPIL and iCourts Conference 2022

The Reality of International Legal Theory – Reality in International Legal Theory

Conference Organisers

Jakob v.H. Holtermann holds a BA & MA in Philosophy and Danish Literature & a PhD in philosophy Roskilde University. His primary fields of research are legal philosophy, Alf Ross, legal realism, naturalized jurisprudence, restorative justice, criminal justice ethics, international criminal justice ethics, international criminal courts, legal epistemology, blasphemy.

Jörg Kammerhofer is a Senior Research Fellow at the University of Freiburg, Germany, and Privatdozent for international law and legal theory at the Vienna University of Economics, Austria. He is a generalist international law scholar and specialises in theory, sources, use of force, dispute settlement, investment law as well as in the theory of law, in particular the Pure Theory of Law. He has published widely on these topics, including his recent monograph International Investment Law and Legal Theory: Expropriation and the Fragmentation of Sources (CUP 2021).

Panos Merkouris is the Primary Investigator for the TRICI-Law Project & Professor of International Law at the University of Groningen. He holds a Chair on Interpretation & Dispute Settlement in International Law. Prof. Merkouris holds an LLB from the University of Athens, 2 LLMs on International Law from the University of Athens and UCL respectively, and a PhD from Queen Mary, University of London. He has taught as guest lecturer at UCL, Queen Mary, University of Athens, University of Thrace and Universidad Externado de Colombia.