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INTERNATIONAL LAW IN THE NEXT TWO DECADES:
FORM OR SUBSTANCE?
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ALBERTO COSTI

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AN INTERNATIONAL LAWYER'S ODYSSEY: FROM NATURAL LAW TO EMPIRICISM

*Ivan Shearer**

In a career spanning more than five decades, Ivan Shearer has acted as teacher, practitioner, judge and adviser in Australia and around the world. In this keynote address, he recounts his personal journey in international law, looking at the changes in approaches to the subject over this period and the evolution of new theoretical approaches. He traces his own journey from an understanding of international law as essentially based in natural law to a position which he describes as empiricism. While theorists will always be important for the discipline of international law, he suggests that there is a pressing need for international lawyers to be steeped in traditional legal doctrine and methodology and to keep their feet firmly on the ground.

I was invited by the organisers of the Australian and New Zealand Society of International Law (ANZSIL) Annual Conference, along with others, to look back 20 years in reflecting on the development of international law, and then to look forward. What might be the same and what might be different?

I have taken a liberty with the invitation, in the first part of my keynote address, to look back further than 20 years, since everything must have a beginning; and to take 1992 as a starting point would – in my case – be quite arbitrary. Indeed – and this is the biggest liberty – I propose briefly to recount my personal journey in international law. Thus, this address will not be a scholarly one, replete with footnotes.

I embarked on my law studies at the University of Adelaide as a 17-year old in 1956. This was far too young; I should have taken a gap year. The LLB was then a four-year programme in which only two non-law elective subjects were prescribed. Few students combined law with another degree. The Law Faculty comprised only three full-time teaching members, the rest of the subjects being taught by legal practitioners on a part-time basis. The three full-time staff members were the

* Emeritus Professor of International Law, University of Sydney. This is a revised version of a keynote address presented at the 20th Annual Conference of the Australian and New Zealand Society of International Law in Wellington, 5–7 July 2012.

Dean, Professor (later Sir) Richard Blackburn, Gerald Fridman and DP O'Connell. Blackburn taught "Elements of Law" (Introduction to Legal Method) and Contract, Fridman Criminal Law and Torts, and O'Connell Federal Constitutional Law and Jurisprudence. They were later joined by Leo Blair (father of the later British Prime Minister Tony Blair) who taught Roman Law (compulsory) and General Constitutional Law.

It might seem strange that Public International Law was not part of the curriculum (although Private International Law was). It had been taught at Adelaide before and after World War I, including by such luminaries as Sir John Salmond (later a judge in New Zealand) and Coleman Phillipson, but was dropped during the 1930s. It is even stranger that O'Connell, a New Zealander who joined the staff in 1952 fresh from his PhD at Cambridge under Sir Hersch Lauterpacht, was unsuccessful in securing the restoration of the subject until 1960, the year after I graduated.

Two years of articles to a practitioner (South Australia had an undivided profession) were required for admission to legal practice. I served the first year with a law firm which had, as its leading counsel, a later Chief Justice of the State, John Bray QC. I had the privilege of clerking for him in a number of appearances in court, including the famous Rohan Rivett seditious libel case.¹ I substituted my second year with a position as a Judges' Associate at the Supreme Court, serving Mr Justice Ross. This was a useful preparation for a career at the Bar, which I had then intended.

But then Fate called in the shape of an invitation by Professor O'Connell to become his research assistant in a project funded by the Ford Foundation through the International Law Association for an examination of state practice in relation to state succession to treaties in the post-colonial period. The broad issue was whether the treaties applied by the colonial powers to their colonies, protectorates and trust territories would continue to bind newly independent states, or whether the slate would be wiped clean. Did the concept of self-determination necessarily imply "clean slate" or were other options available?

As a first step, I was despatched to the Max Planck Institute for Foreign Public and International Law in Heidelberg, Germany, for a period of nine months to survey relevant literature, especially the 19th century German literature on the subject. This was, as they say, a life-changing experience. The Institute was then, as now, a veritable powerhouse of international law, generously endowed, and with a breathtakingly large library collection spanning many languages and jurisdictions. The dedicated scholars there, under the direction at that time of Professor Hermann Mosler (later a judge of the International Court of Justice), demonstrated to me the power and reality of public international law as a discipline. (There are separate Max Planck Institutes elsewhere in Germany for Private International law, Comparative Law and International Criminal Law.) The weekly

¹ Since this prosecution resulted in an acquittal it is not to be found in the law reports. However, the case and the background to the case – which involved the trial of an aborigine, Rupert Max Stuart, for rape and murder – are to be found in KS Inglis *The Stuart Case* (2nd ed, Black Inc Publishing, Melbourne, 2002).

Referentenbesprechung allowed us younger scholars to present our work to the older academy and receive feedback. Being conducted entirely in German forced my school German to advance rapidly. One was expected to keep Institute hours: 8–6 on weekdays and 8–1 on Saturdays, lunch for the unmarried at a *Stammtisch*. All very German...

During my time in Germany I attended the research session of The Hague Academy of International Law, whose subject that year (1962) was fortuitously state succession. The course director was Professor Ignaz Seidl-Hohenveldern, then of the University of the Saarland, later of the University of Cologne.

The remaining three months of my year away were spent, first, at the Faculty of Law of La Sorbonne in Paris, under the supervision of Professor Charles Rousseau, for a survey of French colonial practice in the application of treaties, and then in London doing the same thing in the archives of the Foreign and Colonial Office. My research paper from The Hague was read with interest by Professor Rousseau, who generously translated it himself into French and published it in the *Revue Générale de Droit International Public*, which he edited. So my very first publication was in French, a language I hardly knew at the time!

I should digress briefly on Professor Rousseau. He was a great admirer of the New Zealand writer Katherine Mansfield and laid flowers on her grave in Paris on each anniversary of her birth. The first edition of his general textbook appeared a few months after the liberation of Paris in 1944. He read some nine newspapers a day in as many languages in order to collect material for incidents having a bearing on international law, supplying maps (where appropriate) and commentary by himself. He even included on one occasion an account of the throwing of a custard pie in the face of the Third Secretary of the Soviet Embassy at a student function in Canberra. This section of the *Revue Générale de Droit International Public*, headed "Chronique des faits internationaux", is a rich source of material to this day.

What came out of that year was a great love of international law gained through total immersion in the subject. Remember that I had never studied international law formally as an undergraduate. I have always since been among those who urge that international law should form part of the compulsory core of legal education since an understanding of it is essential in our globalised legal environment; it is not something that can be acquired on the fly. I won't say that I acquired it that way, since I was reading widely during my research year in Europe as well as concentrating on state succession. But I suppose that my entry into the world of international law was coloured by the vehicle of state succession, which led me into the vast store of international conventions on so many subjects and into their application in domestic legal systems. Above all, I saw through treaty research the unfolding history of how nations behave, from the earliest treaties through to the era of the United Nations. There was, of course, a theoretical dimension – namely continuity versus clean slate, as above – but the practical realities of international relations also had to be taken into account. Moreover, I had the privilege of working among established scholars, thereby shaping my conceptions of international law as a living reality as well as a discipline.

On return to Adelaide at the end of 1963, I faced a choice: return to the practice of the law or accept a tutorship at the University, embark on a Master's degree and continue with the state succession project. I chose the latter. My Master's thesis was not on state succession but on extradition law in the Commonwealth. (I later expanded this into a general treatise on extradition law for the SJD degree at Northwestern University Law School.) Again, that subject was not essentially theory-based but directed to a functional study of the relationship between treaties, national law and the substantive criminal law.

Upon my return from the United States, there was field work on state succession to be done in Africa, and a university lectureship. O'Connell stood before a large map in his office and we (or rather he) divided the continent between us. I was allocated to Uganda, the Congo (Kinshasa), Togo, Benin, Ghana, Sierra Leone, The Gambia and Senegal, with Liberia thrown in as a territory not previously under colonial rule. Time does not permit me to tell of my adventures there. But from the point of view of international law, I encountered a wide range of attitudes towards state succession and international law generally, ranging from the sophisticated to the frankly ignorant. The Congo, especially, was in a very sad state, as each overturned government burned all its files before leaving. (This put another face on "clean slate".) A young French lawyer engaged to sort out the mess after the third such upheaval was not to be found in the Ministry; he was to be found, despondent, drinking Ricard on the veranda of the Hotel Memling and counting the days until he could return home.

As a lecturer, I was assigned to teach Elements of Law (which included a substantial immersion into the law of statutory interpretation) and parts of International Law, where I covered for Professor O'Connell during his absences. Among my students was James Crawford, who remembers the experience kindly. (You are welcome to ascribe any deficiencies in his knowledge and understanding of international law to me.) I naturally followed O'Connell's approach to the subject which was to see international law as essentially based on natural law. Why states tended to obey international law was through a combination of seeking the good by applying right reason to the facts of the matter and self-interest in reciprocity. The institution of law was an essential consequence of states, as well as individuals, living in community. O'Connell's approach is contained in his article "Rational Foundations of International Law" in the *Sydney Law Review* in 1957.² He drew an interesting comparison between the development of international law and the evolution of the law of negligence in English law in diagrammatical form, proceeding from the first primary axiomatic truth of natural law ("Seek the Good and Avoid Evil") through the secondary derivative truth (truth induced from the nature of Man – "Seek the Social Good"), to the necessary direct inference ("Do not Harm Thy Neighbour").

2 DP O'Connell "Rational Foundations of International Law" (1957) 2 Syd LR 253.

Lord Atkin's speech in *Donoghue v Stevenson* is an example of deductive reasoning relatively rare in the common law, but it fits international law well.³ It also helps (at least for me) to understand what many regard as a patent contradiction in the notion of customary international law as including the psychological element *opinio juris sive necessitatis*. How, many ask, can states act on the basis of propositions yet to be confirmed by a consistency of state practice? The answer, I believe, lies in the natural law foundations of international law in which the phrase *opinio juris sive necessitatis* is to be understood as meaning "the conviction that it is already the law or ought by (logical or practical) necessity to be so". Indeed, a version of that phrase has it more clearly: "*opinio juris ex necessitate*" ("*the conviction that it is the law as a matter of necessity*").

Of course, nowadays, it is a rare body of international law that has not been shaped, to a greater or lesser extent, by conventional international law. That "black letter law" may or may not be expressive of a deduction from the natural law. Quite often it is the product of compromise and accommodation of conflicting interests that can be quite arbitrary in its effects. For this reason, O'Connell was hostile to the codification of the law of the sea, in particular, through the United Nations Convention on the Law of the Sea.⁴ I like to think also that James Crawford's successful avoidance of sending the International Law Commission's Draft Articles on the Responsibility of States for Internationally Wrongful Acts (2001)⁵ to a diplomatic conference for development into a convention was based on the same reason. "The integrity of the discipline" (a characteristic phrase of O'Connell's) was seen by both to be in danger of undermining by political horse-trading.

In O'Connell's classes of the 1960s, not much attention was paid to theories of international law. There was considerable discussion of the justification of Australia's participation in the Vietnam War and we studied the implications of the Cuban Missile Crisis of 1962, essentially black-letter legal questions. There was the usual discussion of the question "Is international law really law?" in which the position of the positivists was rejected. The nuanced approach by Herbert Hart was allowed some airplay. The only current rival theory at the time was the policy-science approach of Harold Lasswell and Myres McDougal, otherwise known as "the New Haven School". It was difficult to understand what those writers were saying because their vocabulary was specially coined to expound it. (Had I but known, Rosalyn Higgins was able to express in accessible language what Lasswell and McDougal were proposing.) I asked O'Connell once whether I should spend time learning this arcane language. "No", he replied: "it will all go away soon".

3 *Donoghue v Stevenson* [1932] AC 562 (HL).

4 United Nations Convention on the Law of the Sea 1833 UNTS 3 (opened for signature 10 December 1982, entered into force 16 November 1994).

5 *Responsibility of states for internationally wrongful acts* [2001] vol 2, pt 2 YILC 26 annexed to *Responsibility of states for internationally wrongful acts* GA Res 56/83, A/RES/56/83 (2001), and corrected by document A/56/49(Vol. I)/Corr.4 (2001).

Well, of course, it didn't quite go away. It became corrupted in a way that Lasswell and McDougal never intended into meaning that "international law is whatever serves the foreign policy interests of the United States". That view has infected three generations of American international lawyers, including many of those in government positions, to this day. I actually heard the Chief Counsel to President Carter, Lloyd C Cutler, use just that phrase to describe international law at a luncheon meeting of the American Society of International Law in the early 1980s.

I took a break from teaching in 1971–72, and for a part of 1974, to accept a commission from the United Nations Development Programme (UNDP) to advise the government of the Kingdom of Lesotho on treaty succession. It had previously been the British Colony of Basutoland and is totally land-locked within the Republic of South Africa. Although my job description was confined to treaty succession, I soon came to be asked for legal advice on other questions. The government's only legal advisers were officers seconded from South Africa, whose loyalties were, therefore, suspect. Among other tasks that fell to me was that of drafting legislation necessary to implement treaties, including laws on racial discrimination. (My prior teaching of statutory interpretation proved highly useful.) A recurrent point of friction between Lesotho and its powerful neighbour was transit and access to and from the sea. I was recalled in 1974 to accompany the Delegation of Lesotho to the Caracas session of the Third United Nations Conference on the Law of the Sea, a session which saw many of the central features of the later Convention emerge and take shape. Participation in such a large law-making event was an experience given to few academics and not to be forgotten.

Before returning to Australia, I was offered the position of Attorney-General of Lesotho. I hesitated in turning it down since I had been totally absorbed and happy in the challenge of managing legal responses to a small developing country's many problems. But I had been offered a chair at the University of New South Wales and I saw academia as offering a more dependable future.

If I could sum up my experience of, and attitude towards, international law at this point, it would be to say that I saw international law essentially as a discipline and body of law necessarily to be applied to the resolution of actual problems in inter-state relations. I also saw it as necessary to justify international law as a source of Australian law, influencing judicial choices when the subject-matter impinged on Australia's treaty relations and its obligations under customary international law. Theorising was kept at a basic level; in that, I followed O'Connell's "harmonisation approach" to the relationship between international and national law, as a bridge between the automatic incorporation and specific adoption theories. Bearing in mind the still sceptical attitudes exhibited by Australian judges towards international law, I was determined to maintain my status as an enrolled barrister and membership of the Bar Association, as an exhibition of "street-cred". In that capacity, I was able to give occasional opinions and appeared as junior counsel in a number of cases involving international law. After O'Connell's election to the Chichele Chair in Oxford in 1972, I took over his role as a regular lecturer to naval legal courses on the law of the sea and the international law of

armed conflict. Now in uniform as a reserve naval officer, I had to respond to the concerns of the captains of ships in real operations. Additionally, I received commissions from the Commonwealth Secretariat in London to advise two Pacific Island countries on treaty succession and law of the sea problems, and on the reform of Commonwealth extradition arrangements, and from the Australian government to advise on the international law aspects of two border bridges in Southeast Asia, financed under our aid programmes. In all this, abstract theories of international law were neither required nor desired.

Nor were theories desired or required in later years when I served as a judge ad hoc on the International Tribunal for the Law of the Sea, on arbitrations under the Convention on the Law of the Sea, or as a member of the Eminent Persons Group inquiring into alleged breaches of human rights and international humanitarian law in Sri Lanka (2007–2008). I should also mention the valuable year (1991) I spent as a visiting academic in the Legal Office of the Department of Foreign Affairs and Trade, where I became fully immersed in the intersections of law, policy and diplomacy.

Moving a little closer to the time period to which I was instructed to look back, the 1970s and 1980s were a period of unprecedented expansion in universities and available courses. International law was an optional subject at the University of New South Wales, but became a popular one, as at other universities. At the University of Sydney, under the leadership of James Crawford, International Law (embracing both Public and Private International Law) became compulsory. Competition for appointment to teaching posts in Law became more competitive, with the possession of a PhD increasingly being seen as desirable if not mandatory. With this came an explosion in the number of journals where aspiring, as well as established, scholars could publish their work. Back in the 1960s, international lawyers could count the number of journals relevant to their work on the fingers of one hand. Now, it became increasingly hard to keep up with general scholarship and reading necessarily became highly selective.

It was at about this time that the theory of law – or approach to law – known as Critical Legal Studies entered the field of scholarly discourse. As an outgrowth of American Realism, it began in a relatively benign way, but in my view it soon came to be poisonously subversive of all law. Although emanating from North America, it came close to home in the devastating impact it had on the Law School of Macquarie University. (Happily, that Law School has since recovered.) International law was not exempt from efforts to prove that law was an illusion, and that the Emperor wore no clothes. Undoubtedly, there are certain insights to be gained from this approach, especially in the hands of its more moderate exponents, such as David Kennedy and Martti Koskiennemi, but ultimately in my view it does nothing to promote good order in the international system. Viewed through the eyes of developing states and rogue states, this theory must be regarded as a sign of Western decadence, and as an excuse to throw off the constraints of the established international legal system. Significantly, so far as I can see, most of the writers of this School have had little if any exposure to the real world of international legal practice.

Another aspect of legal scholarship in the more recent period is worthy of mention. The proliferation of published monographs in international law has been truly staggering. There is hardly a topic of international law that does not have a suite of books devoted to it. Nearly all are the product of scholars seeking to advance their academic careers. The old fashioned text book has been relegated to inferior status and accorded a lower status in the scale of merit points for those seeking appointment or promotion. It is notable too that those general treatises that remain come not from the United States but from Europe: Oppenheim, O'Connell, Shaw and others from continental Europe.⁶ An old joke has it that "if it is in Oppenheim, then it is international law." (It is pleasing that a new edition is presently under preparation.) Brownlie has appeared in a new edition, prepared by James Crawford.⁷ Neither book espouses a particular theory of international law (none of their editors is in need of further promotion). They, and a few other general treatises (to which we should add that of our own Gillian Triggs),⁸ can still be relied on as dispassionate expositions of relevant rules and practice.

This observation leads me towards the end of my odyssey: empiricism. I have not shaken off altogether my natural law roots. But in the face of so much law-making through the quasi-legislative processes of multilateral conventions, declarations and rulings by international institutions, and so-called soft law (to say nothing of the jurisprudence of the greatly increased number of international courts and tribunals), the role of customary international law has decreased and with it the possibility of reasoning always from basic principles. One is reminded of what the poet Alfred Lord Tennyson wrote about the common law:⁹

Mastering the lawless science of our law,
That codeless myriad of precedent,
That wilderness of single instances,
Thro' which a few, by wit or fortune led,
May beat a pathway out to wealth and fame.

That might overstate the incoherence of the common law – and certainly of international law – but it does mean that addressing any issue of international law today requires the assembly and critical evaluation of a wider range of sources than ever before. Does theory help in the task of

6 See Robert Jennings and Arthur Watts (eds) *Oppenheim's International Law* (9th ed, Longman, London, 1992); DP O'Connell *International Law* (2nd ed, Stevens & Sons, London, 1970); and Malcolm N Shaw *International Law* (6th ed, Cambridge University Press, Cambridge (UK), 2008).

7 James Crawford (ed) *Brownlie's Principles of Public International Law* (8th ed, Oxford University Press, Oxford, 2012).

8 Gillian Triggs *International Law: Contemporary Principles and Practices* (2nd ed, LexisNexis, Sydney, 2011).

9 Alfred Lord Tennyson *Aylmer's Field with Introduction and Notes by WT Webb* (Macmillan and Co, London, 1891) at 14.

advising a government or private client; or in arguing a case before an international court or tribunal?¹⁰

May I give some examples here?

Some time ago, after the conclusion of the Third United Nations Conference on the Law of the Sea, I was asked by a Pacific Island nation to advise it whether it should sign and ratify the Convention on the Law of the Sea. The Convention offered a number of obvious advantages to it, especially in providing a clear foundation for its maritime resources jurisdiction to 200 nautical miles. But there was a problem. This nation comprised a number of islands, some of them quite distant from one another. Could they claim archipelagic status for themselves, which would considerably magnify their maritime claims as well as contribute to their national security? The provisions of art 46(b) of the Convention on the Law of the Sea seemed to favour that state in stating the definition of an archipelago as:

... a group of islands, including parts of islands, interconnecting waters and other natural features which are so closely interrelated that such islands, waters and other natural features form an intrinsic geographical, economic and political entity, or which historically have been regarded as such.

So far, so good. But art 47(1), prescribing the conditions for drawing archipelagic baselines, states that the ratio of the area of water to the area of land, thus enclosed, should be no greater than nine to one. In the case of my client, that ratio had been calculated at more than 20 to one. Moreover, art 47(2) prescribed limits to the length of archipelagic baselines as not exceeding 100 nautical miles, "except that up to 3 per cent of the total number of baselines ... may exceed that length, up to a maximum length of 125 nautical miles." My client's baselines exceeded these limits. It was clear that these very precise – indeed arbitrary – provisions came out of the fraught negotiating processes of the Third United Nations Conference on the Law of the Sea, in which the archipelagic states represented there proposed measurements (subsequently adopted) that corresponded to their own situations. My client was not an independent state at the time of the Conference and was thus not represented.

It was clear that this nation could not become a party to the Convention if it wished to maintain its claim to archipelagic status. I advised it to stay outside the Convention and rely on the evolution of customary law to fortify its more general aims with regard to maritime resources (as the United States has done). As for the archipelagic claim, it could proceed in good conscience to promote that claim outside the Convention (as a persistent objector, if you will) but claiming also that only the broad definition of archipelago could enter into the realm of custom, not a convention-specific regime founded on arbitrary measurements.

10 Louis Henkin thought not, in reviewing McDougal's approach: Louis Henkin *How Nations Behave* (FA Praeger, New York, 1968) at 35–36.

I viewed this as a sensible and principled approach to a real problem, using the traditional tools of international law methodology. It stands in contrast to those states, such as China, which are parties to the Convention of the Law of the Sea but which advance claims to assert security jurisdiction in their contiguous zones and even their exclusive economic zones, clearly contrary to the wording and intent of the Convention. Those claims rest on some opaque theory of national security and the principle of the peaceful uses of the oceans. Critical legal theorists unwittingly weaken the case against such pretensions.

I take two other examples of conflicting approaches based on experience from my period of service as an elected member of the United Nations Human Rights Committee from 2001 to 2008. Both, to my mind, represent a difference in approach based on unarticulated premises. They come from the jurisdiction of the Committee to hear individual communications. The first is *Haraldsson v Iceland*,¹¹ where the dispute concerned the compatibility of the legislative regime devised by Iceland for the allocation of fishing licences with the non-discrimination provisions of the International Covenant on Civil and Political Rights (ICCPR).¹² That regime had been the subject of extensive discussion and debate in Iceland over several years and had been judged lawful by Iceland's highest court. Was the resulting discrimination among different classes of applicants for licences based on objective grounds and proportionate in relation to the aims of the legislation? A majority of the Committee thought not; after just a few hours of study, it declared Iceland in violation of art 26 of the ICCPR.¹³ I was among the six dissentients in holding that it was not in violation. I reached that decision in light of all the evidence. My unarticulated premise, however, was that, except in a very clear case of a violation of the ICCPR, the Committee ought not to substitute its own evaluation of a complex question of competing values for that of a democratic country which had devoted years of effort in attempting to resolve the problem.¹⁴

The other was the case of *Sayadi and Vinck v Belgium*.¹⁵ The two applicants in that case had been listed as supporters of terrorism in the United Nations Sanctions List, which, to them, had immediate consequences for their freedom of movement and ability to conduct their business affairs. This list is compiled and maintained by a committee of the United Nations Security Council. Their names had been supplied to the United Nations Sanctions Committee by Belgium pursuant to a resolution of the Security Council.¹⁶ It later appeared that a mistake had been made. Belgium

11 *Haraldsson and Sveinsson v Iceland* CCPR/C/91/D/1306/2004 (2007).

12 International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976), art 26.

13 *Haraldsson and Sveinsson v Iceland*, above n 11, at [10]–[11].

14 Per Ms Elisabeth Palm, Mr Ivan Shearer and Ms Iulia Antoanella Motoc (dissenting).

15 *Sayadi and Vinck v Belgium* CCPR/C/94/D/1472/2006 (2008).

16 SC Res 1455, SC/Res/1455 (2003).

applied on several occasions to have their names taken off the list, but to no avail. The issue was whether Belgium was responsible for breaches of the ICCPR in respect of those consequences. The Human Rights Committee upheld the complaints. Several members appended separate opinions. I was the sole dissident.¹⁷ I took the view that Belgium had acted in good faith in identifying the two applicants to the Sanctions Committee at the latter's request. It had, in my view, no option but to comply with a binding decision of the Security Council. For the majority of the Committee, however, the provisions of the ICCPR were on a par with the Charter of the United Nations, and any response to the Sanctions Committee was subject to a consideration of the rights of the applicants under the ICCPR.¹⁸ This, in my view, was a step too far in re-ordering a state's obligations under binding international instruments and was incompatible with art 103 of the Charter. For the majority, however, there was no hierarchy of obligations. It seemed to me that the unarticulated premise of the majority of the Committee in both cases was the need to privilege human rights over all other considerations, and to privilege also the superiority of the Human Rights Committee over other responsible bodies, whether national or supranational.

Of course, these thoughts of mine are open to debate. Different minds will see things differently, even applying the traditional methods of legal reasoning where no particular theory is being espoused. I was pleased, however, by the recent decision of the International Court of Justice in *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening)*, where the Court overwhelmingly rejected an attempt by Italy and Greece to privilege advances in international humanitarian law over established rules of order in relation to the immunity of state property in foreign jurisdictions.¹⁹ The Court did this by applying the traditional methodology of international law. If there was an unarticulated premise, it would be the empiricist one of looking to the consequences of a decision in the opposite direction, which would be to dig up old wrongs thought to have been righted (or buried) long ago and to unsettle stable relations between states.

I was asked to look into the future. Just when I had embarked on preparing this address, the issue for January 2012 of the *American Journal of International Law*, to which I subscribe, came in by snail mail. The lead article by Gregory Shaffer and Tom Ginsburg immediately caught my eye. Its title is "The Empirical Turn in International Legal Scholarship".²⁰ Was this to be the consolation to my feelings of isolation in the world of "isms" that have clamoured for my attention over the years? Well, yes and no. The authors state in conclusion that:²¹

17 Per Mr Ivan Shearer (dissenting).

18 *Sayadi and Vinck v Belgium*, above n 15, at [10.6].

19 *Jurisdictional Immunities of the State (Germany v Italy: Greece intervening) (Merits)* [2012] ICJ Rep 99.

20 Gregory Shaffer and Tom Ginsburg "The Empirical Turn in International Legal Scholarship" (2012) 106 AJIL 1.

21 At 44.

We act in situation-specific contexts. We thus need to focus attention on the processes, mechanisms, and conditions for the production, conveyance and implementation of international law within such contexts. The focus on empirical study, we contend, thus gives rise to midlevel theory that helps us to assess the conditions under which international law works, rather than to grander theoretical claims about *whether* it works.

The authors, however, have not been able to resist the urge to label their approach – which they apply to several selected areas of international law – with the name of yet another theory: "Conditional IL Theory". Does an approach looking at facts, circumstances and particular contexts, always assuming the essential structure of the international legal system, need a name and hifalutin language to go with it?

I believe that we have now entered a period of unprecedented resort by states and individuals to international courts and tribunals. Matters which were formerly – in the absence of such widely accessible avenues of recourse – the subject of diplomatic disputation and scholarly speculation only are going forward to compulsory third-party dispute settlement bodies. At the universal level, I am thinking especially of international arbitration, both inter-state and commercial, and the tribunals of the World Trade Organization. Beginning with the European institutions, regional dispute resolution bodies are developing and I believe they will further expand. International law is becoming an "open system" in the manner described by James Crawford.²² While theorists will always play a respected – if sometimes controversial – role in analysing the results of these activities and predicting trends, the need now is for more and more international lawyers to become involved in these processes, as advisers, judges, arbitrators and counsel. If we are to participate in this world, we lawyers need to be steeped in traditional legal doctrine and methodology and keep our feet firmly on the ground.

²² See generally James Crawford *International Law as an Open System – Selected Essays* (Cameron May, London, 2002).