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## Editorial

### Editorial: The UK Taken in Adultery. Who Will Cast the First Stone?; A Modest Proposal on Zoom Teaching; In This Issue

#### The UK Taken in Adultery. Who Will Cast the First Stone?

*And the scribes and Pharisees brought unto him a woman taken in adultery; and when they had set her in the midst, [t]hey say unto him, Master, this woman was taken in adultery, in the very act. Now Moses in the law commanded us, that such should be stoned; but what sayest thou? So ... He lifted up himself and said unto them, he that is without sin among you, let him first cast a stone at her. (John 8:3 et seq)*

It should come as no great surprise that the UK Government, in putting before Parliament the UK Internal Market Bill ([https://en.wikipedia.org/wiki/Internal\\_Market\\_Bill](https://en.wikipedia.org/wiki/Internal_Market_Bill)), is now spicing with illegality its torrid meal of irresponsibility and incompetence in the manner in which Brexit was managed – from the Cameron *hors d'oeuvres*, through the Theresa May main course and, now, the Boris dessert. And *nota bene*: I am not calling into question the Brexit decision itself. It is the amateurism of the process which is so stupefying. Were any of the issues now being raised by HMG – to give but one example – not totally clear and present at the time the Agreement was signed?

Be that as it may, I am struck by the sanctimonious shrillness in the reactions of the UK's 'partners'. A state violating international law, pleading what in its view are overriding national interests or values? *Quelle horreur!* Whoever has heard of that? The Americans (and the Russians and other barbarians) maybe. But us, in Europe? *Nigdy!* Well, well. If the test is 'He that is without sin among you' I do not think that many, if any, stones would or could or should be cast. Governments, parliaments and, most troubling for our justified concern for the rule of law, supreme and constitutional courts are all partners in sin.

Here, then, is a very brief and partial 'sinology' to counteract a certain amnesia. The EU itself? Need I say more than *Beef Hormones?* Or *Bananas?* And even, brace yourselves, at least arguably, the famous *Kadi* decision by the European Court of Justice (<https://www.ejiltalk.org/letters-to-the-editor-respond-to-ejil-editorials-vol-195/>)? France? Take a quick refresher on the *Rainbow Warrior* saga, which consisted of an initial egregious violation of New Zealand's territorial integrity and sovereignty followed by a rather flagrant breach of, yes, the Agreement as to the treatment to be meted out to the French agents responsible for the sinking of the ship and the loss of innocent

life. The reason? *Raison d'Etat*, of course. And those interested in the arcane of EU legal history will find the French ‘sheep meat’ case (Case 232/78) relevant.

Italy? Well, think of the fairly recent decision of the Italian Constitutional Court (judgment 238 of 2014) which flew in the face of an adverse ruling of the International Court of Justice on the issue of reparations to victims of Nazi atrocities. Germany? Well, most Germans would accept that this is not a *Weiss* or black situation. And see this little vignette: <https://gpil.jura.uni-bonn.de/2020/09/breaches-of-international-law-in-a-very-specific-and-limited-way-a-remarkable-admission-by-a-german-chancellor/>?

Or take many of the Member States acting collectively: consider here the Kosovo (and Serbian) campaign of NATO bombing. You may think what you wish on the moral (or immoral) imperatives of that campaign. But you may not, I would think, hold that the action was legal under international law. Bruno Simma, in the most downloaded article in the history of EJIL, has written sensibly about this. He is a large tree under the branches of which I am happy to find shade (<http://www.ejil.org/pdfs/10/1/567.pdf>).

The list of examples may be continued. There is no shortage of cupboards and no shortage of skeletons. Maybe some readers from other European countries would like to add to the list.

Now I know there will be no shortage of critics who will argue that ‘there is a difference between this or that example of illegality and the UK’s actual and/or pending breach in this case’. Yes there is. Here we have an adulterer/ess who announces his/her infidelity in advance, seeks prior approval thereof from his/her family (the UK Parliament) and then nonchalantly offers the same partner new vows of loyalty (in seeking to negotiate a new Agreement with the EU).

Is there anything worse than a flagrant, openly admitted violation by a government of a bilateral treaty just recently signed? Curiously, in these circumstances my answer is not an automatic ‘No, there is nothing worse’.

Do we prefer the normal practice whereby states violate and try to cloak their actions with a whole range of dubious and forced legal justifications – justifications which at least in some deep sense pollute no less the integrity of the legal system? ‘Necessity’ and *rebus sic stantibus* are typically the last refuge of the scoundrel. Is there not something fresh in admitting openly: ‘we realize we made a mistake [even if such is entirely of their making in having agreed in the first place] which is, in our eyes, so huge that we cannot live with it’ – especially so for an Agreement meant to define a long-term relationship?

Legal history teaches us that the success of long-term relational treaties depends on both parties being invested in its success and having incentives for compliance.

And what do we normally consider ‘worse’ in domestic law: a violation of a bilateral contract by one of the parties thereto, or breaking general law, or even constitutional law? The WTO Treaty (*Hormones*, *Bananas*) is a law-making treaty and only the pedantic would call it the equivalent of a series of contracts. And the UN Charter (*Kadi*), not totally without reason, is often referred to as constitutional.

And is a violation of international law by the executive branch (to which there can often be judicial remedies) really worse from the perspective of international rule of

law than a violation by the highest courts of the land, from which there is no judicial remedy? And yes, *Weiss* consists in a violation of EU law, not international law, but in the eyes of some, given the constitutional nature of the EU, the damage to the rule of law is even greater.

The motivations, too, differ. Very noble in the case of *Kadi*. But how noble are the motives behind *Bananas* and *Rainbow Warrior*? And the Italian case is noble in the eyes of some (adequate compensation to victims of horrible war crimes) and self-serving in the eyes of others (an egregious double dipping by the Italians).

But in truth, I do not want to adjudicate normatively on the circumstances of the various cases in my very partial list. Good people and true can judge the circumstances and gravity of the violations differently. Apples and oranges to some, just (the same rotting) fruit to others. But at the end of the day, whatever position one may take, the differences seem to me to be not unlike that of being pushed from the 12th floor or from the 19th floor. The result in either case is still a nasty splash.

Does all this mean that I am advocating taking lightly this or any other violation of international law? Of course it doesn't. That would be a bad faith reading of this Editorial. What it does mean is that the situation is not helped by overloading an already fraught entanglement, in which both sides stand to lose so much, with excessive moralistic outrage by politicians whose countries were caught with their pants down on other occasions when a violation seemed to suit them.

And this, in my view, also goes for the commentariat coming from European academia in which some of the hues and cries appear to me just a tad overwrought. By contrast, I admire much of the critique from within the UK itself – not sanctimoniously speaking law to power, though here too, temperance is often more effective.

As to where lies responsibility for this farce/debacle and whether there is any merit in the British buyer's remorse, I invite you, if you are so inclined, to read my previous editorial, 'Brexit – Apportioning the Blame' (<https://www.ejiltalk.org/brexit-apportioning-the-blame/>). There are no saints here either.

JHHW

## A Modest Proposal on Zoom Teaching

No preliminaries are necessary here. One result of Covid-19 has been a shift to online teaching by Zoom (or similar platforms). In some law faculties all teaching is online. In most faculties most teaching is online with some hybrid teaching, and in a few (privileged) places in-person teaching remains viable.

It is also a commonplace that most teachers find Zoom teaching inferior to in-person teaching, both from a didactic and a human point of view. The two are oftentimes intertwined.

And yet the impact of Zoom teaching will differ according to one's style of teaching, and will affect some styles more than others. The challenge in each case, though, is to narrow the quality gap between in-person teaching and Zoom teaching, regardless of the style of teaching adopted.

At one end of the scale are those whose teaching is principally a lecture (with some time for questions at the end perhaps). At the other end are those, like myself, whose teaching, even in large classes, is principally through question and answer – the so-called Socratic method (though I am not sure what Socrates would think of this use of his name and method). Though the class is conducted through Q&A it is, as I tell my students, simply lecturing through their mouths, which has various benefits with which I need not trouble the reader here. I certainly do not want to argue for or against these different poles and the variants in between. Each has its pros and cons.

Grant me, however, that the gap between in-person and Zoom teaching is the narrowest the closer one's style of teaching is to the formal lecture. In fact, there are several faculties where the online teaching, or significant parts of it, at least in larger classes, is by recorded lectures.

For those whose style of teaching is closer to mine the Zoom challenge seems formidable. Indeed, the challenge for 'Socratic teachers' is greater also as regards in-person teaching. It is such a common experience to pose a question to a class and face 60 blank faces. There are so many reasons that explain this type of reticence. The teacher is then faced with a *Charybdis and Scylla* dilemma. You may rely on the 'usual suspects' – those who are always eager to participate. This carries two risks: essentially you are actively teaching only a small number of students while the rest regress to passive mode, pen poised to write down the 'right answer' without active mental and verbal engagement. Additionally, there is no correlation between eagerness to participate and quality of answer – a bit like a karaoke party where the microphone is habitually hogged by the tone deaf who are unaware how badly and out of tune they sing.

Alternatively, you can 'cold call' on students – even those who have not raised their hands. There is a naming and shaming cost to this method, which breeds resentment and anxiety (will he call on me?) and gives expression to that wise Talmudic saying: the strict cannot teach and the timid cannot learn. I have largely moved away from cold calling.

Here then is the 'Weiler Method' for dealing with this dilemma, both in person and on Zoom. When teaching in person, whenever I pose a question that is not trivial and requires some thinking and deployment of analytical and synthetic skills as well as legal imagination, I pose the question, explain it and then say: now, take five minutes to talk to your neighbours. In a 110-minute class this might happen as often as 10–15 times. I explain the benefits to the students: with more time to think and specially to deliberate with one's colleagues, the answers will be better thought out, substantial and substantive (not telegrams). Additionally, and I explain this too, I instruct them to do something that should become second habit: don't think only what you want to say but what would be the most effective way to say it. In other words, each exchange is also an exercise in articulate presentation.

There is a third reason for this method, which I do not explain: there is a much greater student willingness to speak and less reticence on my side to call not on an individual but on a group: What did your 'group' think? And invariably the answer will start with a 'We thought' this or that, spreading the risk, so to speak. I have been doing this for over 25 years and it works for the most part splendidly, even in jurisdictions

that are not accustomed to proactive teaching. Students adapt quickly – time to think, group deliberation, answer and then discussion from other groups and the instructor.

Does one not lose an awful lot of time? Well this goes to one's philosophy of teaching. I may 'cover' less, provide them with fewer fish, but turn them into extraordinary fishermen and women.

How, then, to adapt this to Zoom? By a very extensive and liberal use of the so-called Breakout Rooms (I call them Discussion Rooms – breakout makes me think my class is a prison). With a single click Zoom will allocate the students in an arbitrary fashion to as many discussion rooms as the instructor elects. I determine the number so that in any room there will be no more than three to four students (speak to your neighbour). After five minutes, sometimes less sometimes more (depending on the question), I click the students back and then simply cold call on any room by number: What did you in room 9 think? And so goes the class. The effect is very similar to the in-person experience, with the added advantage that throughout the class students are having real conversations with their colleagues, diminishing somewhat the Zoom alienation. And yes, I do this, too, in one of my classes that right now has 117 students. Finally, I request my students to have videos on. Concerns for privacy can be dealt with by another single click activating the artificial background. I have had no pushback and it definitely diminishes the alienating features of Zoom, not least talking to black screens. For your consideration.

JHHW

## In This Issue

The Articles section of this issue opens with an empirical study by *Laurence Helfer* and *Erik Voeten*, which identifies – through an analysis of minority opinions – an increase in European Court of Human Rights judgments that implicitly overturn prior progressive judgments. The authors suggest that these judgments represent a response to the populist backlash against human rights. In the next article, *Rián Derrig* revisits the work of the 'New Haven School' of policy-oriented jurisprudence. Using previously unexploited archival materials, Derrig challenges common assumptions regarding the historical background and intellectual origins of this school of thought. Thereafter, *Rémi Bachand* uses Marxist theory to shed new light on the causes underlying the current crisis of the WTO's Dispute Settlement Body. His analysis casts doubt on common explanations for this crisis, and suggests instead that it has to do with the inherent contradictions of neoliberalism and the role of the WTO as guarantor of the neoliberal order. The section concludes with *Merijn Chamon's* analysis of the contribution of the EU's practice of provisional application of treaties to international law.

The issue continues with a Focus on Foreign Cyberattacks against Civilians. *Joel Trachtman* explores the possibility of using export controls on intrusion software as a means to limit the cyberattack capacities of foreign states. He suggests adopting a 'dissemination control' approach, which will permit greater protection with less disruption of desirable software development. *Nicholas Tsagourias* addresses the problem of

attributing malicious cyber activities to states, which stems from the involvement of non-state actors in cyberattacks and from the high legal standards needed for attribution. He proposes ways to close these responsibility gaps and hold states accountable for their cyber operations. *Duncan Hollis* and *Martha Finnemore* discuss a related gap in state responsibility for cyberattacks. They observe that the naming of a state as being involved in a cyberattack does not always lead to shaming, and suggest a new model of accusation.

Our EJIL: Exchange! section juxtaposes two historiographic perspectives. *Henri de Waele* presents a historical account of the professionalization of international law scholarship and practice in the Netherlands during the 1920s and 1930s. This professionalization manifested itself, among other things, in the academic recognition of international law as a self-standing field, as well as in a growing public interest in the views of international lawyers. *Janne Nijman* offers a critical engagement with De Waele's article, calling for a more critical historiographical approach. Rather than reproducing traditional historiography, she emphasizes the need to raise 'the woman question' and the 'the colonial question' in any discussion of the professionalization of international law.

Janne Nijman also contributed the image for our Roaming Charges in this issue: the 2009 painting by Kerry James Marshall may be seen as a visual-art illustration of the critical historiographic approach propagated by Nijman. The painting forms part of a series of works that introduces Black figures – in this case a Black woman – into classical images of Western pictorial tradition, thereby creating what Marshall defines as a 'counter-archive' of art-historical images.

In the EJIL: Debate! in this issue, *Ardi Imseis* criticizes the United Nations' treatment of the prolonged Israeli occupation of the Palestinian Territories. He argues that rather than focusing on discrete violations of humanitarian and human rights law, the UN should acknowledge that this occupation violates *jus cogens* norms and is therefore illegal *per se*. Accordingly, the UN should require Israel to terminate the occupation without negotiation. *David Hughes* replies to Imseis by suggesting that the requirement to terminate the occupation should be based not on 'external' *jus cogens* norms, but rather on the law of occupation itself. He also argues that the UN can and should call for a negotiated agreement between Israel and the Palestinians without legitimizing the occupation or undermining the obligation to terminate it.

*Sara Hagemann* closes our occasional Changing the Guards series with a commentary on the achievements of the former President of the European Council, Donald Tusk.

With two review essays and five book reviews, this issue is rich in reviews (though there is more to come – wait for the next issue...). Not overly present in our most recent issues, international criminal law returns here with a vengeance: *Patryk I. Labuda's* review essay takes stock of the International Criminal Tribunal for Rwanda, and does so through the prism of four books that assess the Tribunal's legacy after 25 years. *Sophie Rigney* continues the reflection on the impact of international criminal justice on African politics in her review of *Distant Justice*. *Alexandre Skander Galand* reviews a work of different size and style, viz. the commentary on the crime of aggression edited

by Claus Kreß and Stefan Barriga. In addition to highlighting six significant additions to the literature, the three reviews provide a snapshot of the current state of the international criminal justice project.

Not all is ICL, though. This issue also features reviews on aspects of international economic law and dispute settlement. Financial nationalism (and ways of curbing it) is the theme of Federico Lupo-Pasini's recent monograph, addressed in a review essay by *Leonardo Borlini*. *Ntina Tzouvala* reviews *World Trade and Investment Law Reimagined* and sees in it 'a first step for us to challenge what is thinkable in international economic law circles'. *Jarrod Hepburn* is impressed with the careful argument put forward in Daniel Peat's *Comparative Reasoning in International Courts and Tribunals*, which was recently awarded the ESIL Book Prize, but identifies five areas in which 'the book holds back where more might be wanted'. *Ingo Venzke*, too, is impressed: he finds a lot to agree with in Anne Saab's *Narratives of Hunger*, one of a series of recent monographs on international law and global hunger, humankind's real scourge; but is concerned that the book 'overstates international law's narrative force'. Seven exciting reviews, then, all of them worth your time!

Finally, The Last Page in this issue presents two poems of an unusual nature and genesis. *Valentin Jeutner* applied the techniques of linguistic conceptual art to corpora of international law to create 'Elements of International Law' and 'Sir David Maxwell Fyfe'. He explains that for the first poem, all the judgments of the International Court of Justice were combined into one file and a corpus management software was instructed to search for combinations of references to the four elements (earth, sea, air, fire) and verbs to the element's immediate right. The results were selectively shortened and listed in order of their appearance in the corpus. For the second poem, the 42 volumes of the official records of the International Military Tribunal at Nuremberg were merged into one file and the software was used to identify the text's most common four-word combinations beginning with 'I'. The list of results was then sorted by frequency. The result reveals individuals who are searching.

SMHN and JHHW