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The 'Common Law Method': British Approaches to the Development of International Law

By Devika Hovell *

Abstract

For better or for worse, the 'English school' or 'British tradition' of international law has eluded systematization or definition. This article examines the responses of a UK legal adviser, a British judge on the International Court of Justice and influential scholars to a particular case, the *Corfu Channel* case. In doing so, it is possible to identify clear synergies in the mainstream legal method of British international lawyers. It should not be surprising that this method follows in the common law tradition, displaying its three key hallmarks of connection to social practice, focus on courts and an anti-theoretical tendency. Identity and analysis of these characteristics helps us to understand the distinctive contribution of British approaches to international law and the work this 'common law method' has done in strengthening and shaping international law. Identifying these characteristics is also important in order to understand the more problematic implications of their application in the international legal context. The common law method has consequences for the structure and direction of the international legal system, including the parameters of its community, the site of its authority and the role of theory in its development. Reflection on these strengths and weaknesses helps us better understand British contributions to international law. Paradoxically, the route to a more universal international law requires us first to understand the ways in which it is plural.

Keywords: British tradition, common law, Corfu Channel, self-defence, international legal theory.

I. Introduction

One of the contemporary challenges for those engaging with international law is to understand its pluralist dimension: international law is at once universal and particular. The existence of the British Yearbook of

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International Law attests to this. The British Yearbook was one of a collection of international law journals established in the early 20th century highlighting an explicit national allegiance in its title.[1] Yet what does it mean for something to be British and international simultaneously? Reflecting on the occasion of the Yearbook's centennial volume, is it possible to identify an English school or British tradition of international law? Previous studies have been quite dismissive of the idea.[2] Yet the question is an important one for continuing study. It provides an entry point into the intellectual traditions of thought, sensibilities and assumptions underlying British interpretations of international law, stripping away pretensions of their universality.[3] Sociological, professional and ideological distinctions between international lawyers should neither be disregarded nor disparaged but are a constitutive element of a necessarily pluralist international law.

George Orwell's essay on 'England your England' was a comment on the fact there is something distinctive and recognizable in English civilization – '[t]he gentleness, the hypocrisy, the thoughtlessness, the reverence for law and the hatred of uniforms…, along with the suet puddings and misty skies'.[4] Orwell expressed confidence in an English identity that was 'continuous, it stretches into the future and the past, there is something in it that persists, as in a living creature'.[5] Writing during the Blitz of 1941 as the Nazi bombers flew overhead, his essay sought to identify and solidify national culture at a time of existential threat. The establishment of the British Yearbook also addressed an existential crisis of sorts, this time for international law. Its launch was intended to be a shot in the arm for a subject that was, at the time in England, a neglected field. Orwell's confidence in the persistence of the English identity as a 'living creature' finds its reflection in the first Editorial's attempt to rally the cause of international law by describing it as a 'living force'.[6] Yet, in 1923, one of the Yearbook's first Editors, Pearce Higgins, gave an excoriating perspective on the health of international law in England, commenting that '[a]s one of the editors of the British Yearbook of International Law, I can testify to the difficulties which are encountered in obtaining competent contributors'.[7] He spoke of the

[1] I de la Rasilla, 'A Very Short History of International Law Journals (1869-2018)' (2018) 29(1) EJIL 137, 150.

[2] H Lauterpacht, 'The So-Called Anglo-American and Continental Schools of Thought in International Law' (1931) 12 BYIL 31; J Crawford, 'Public International Law in Twentieth Century England' in J Beatson and R Zimmermann (eds), *Jurists Uprooted: German-speaking Emigré Lawyers in Twentieth Century Britain* (OUP 2004) 681, 700; C Warbrick, 'The Theory of International Law: Is there an English Contribution' in P Allott, T Carty and M Koskenniemi, *Theory and International Law: An Introduction* (The British Institute of International and Comparative Law 1991); R Higgins, 'Preface' in R McCorquodale and J-P Gauci, *British Influences on International Law, 1915-2015* (Brill 2016) ix.

[3] S Ranganathan, 'The "English School" of International Law: Soundings via the 1972 Jubilee Essays' (2021) 80(S1) CLJ S126.

[4] G Orwell, 'England Your England' in *The Lion and the Unicorn: Socialism and the English Genius* (first published 1941, Penguin 2018).

[5] ibid.

[6] 'Introduction' (1920-1921) 1 BYIL iii.

[7] A P Higgins, 'The Present Position of the Study of International Law in England' (1923) 39(4) LQR 507, 510.

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'scarcely veiled contempt with which international law is viewed by practising members of the Bar and the Legal profession in general',[8] noting that, 'in England it would seem that a knowledge of international law is not considered as an essential qualification even for those who are appointed to posts where questions which involve its application are of daily occurrence, [including] the Foreign Office and Diplomatic Service'.[9]

This complex psychology of fortitude and insecurity is relevant to our discussion of British international legal method. One of the central claims of this article is that the mainstream method of British international lawyers was forged during the early to mid-twentieth century from a combination of supreme confidence in the superiority of English legal method combined with an anxiety to overcome jurisprudential claims prevalent in England at the time that international law was 'not really law'. In this article, the idea of a distinctively British method is examined through the lens of responses by British international lawyers to the *Corfu Channel* case, the first case decided by the International Court of Justice and a case that coincided with a transitional moment in international law regulating the use of force. The focus of the article is squarely on legal rather than political actors, examining the response by a set of British international lawyers whose work has been particularly influential in shaping British legal interpretations of the legal framework for the use of force in the post-Charter era. It is a study in mainstream method and in no way seeks to invite neglect of the methods and insights contributed by British international legal scholars writing outside the mainstream. In examining the work of an influential set of actors, including a UK foreign office legal adviser, an ICJ judge and scholars, our interest is more in their method of reasoning than the substantive outcomes of this reasoning. This enables the identification of a common underlying methodology that I will refer to as the 'common law method'. The claim is that the mainstream British tradition of international law follows in a positivist but also distinctly common law tradition. By identifying the characteristics of this tradition, we are better able to assess the way in which the common law method can contribute to but also distort understandings of the community, authority and function of international law.[10]

II. International Law between Austin and Dicey

Consistently with the nature of Pearce Higgins' remarks set out above, lamentations on the paltry attention to international law by English

[8] ibid 510.
[9] ibid 511.
[10] This framing connects with a broader conception of international law, set out in D Hovell, 'The Elements of International Legal Positivism' (2022) 75 Current Legal Problems 71.

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lawyers continued throughout the first half of the twentieth century.[11] Blame for the English law fraternity's disregard for international law was laid regularly at the feet of John Austin.[12] In 1832, Austin had famously drawn a distinction between positive law and positive morality, relegating international law to the latter category. According to Austin, positive law was that set by a sovereign body for an independent political society in which that body is sovereign or supreme.[13] International law was not therefore 'law properly so-called' as 'no supreme government is in a state of subjection to another' such that 'the government commanding does not command in its character of political superior'.[14] Successive Oxford Professors of Jurisprudence, Henry Maine and Frederick Pollock, refuted Austin's classification of international law, with Maine dismissing it as 'very interesting and quite innocuous'[15] and Pollock scoffing that '[y]ou may define it as "positive international morality" not having the nature of true law, but if you do, the facts are against you'.[16]

Nevertheless, Austin's downgrading of international law proved sticky to shake. According to Arnold McNair, 'there can be no question that the poor repute of International Law in Great Britain until recent times is largely due to him'.[17] Austin's exclusion of international law from the category of law had done much 'to withhold from it the allegiance which a law-abiding people like the British attach to rules of law merely because

[11] See, eg, F Pollock, 'The Lawyer as a Citizen of the World' (1932) 48 LQR 37, 40-41; W E Beckett 'International Law in England' (1939) 55 LQR 257; A McNair 'The Need for the Wider Teaching of International Law' (1943) 29 Transactions of the Grotius Society 85; A D McNair, 'International Law in Practice' (1947) 1 ILQ 4; A McNair, 'The Wider Teaching of International Law' (1952) 2 Journal of the Society of Public Teachers of Law 10; D H N Johnson, 'The English Tradition in International Law' (1962) 11 ICLQ 416.

[12] Paradoxically, John Austin's Chair at the University of London was in 'Jurisprudence and the Law of Nations', though the latter subject is rarely acknowledged in references to his Chair: W E Rumble 'Introduction' to J Austin, *The Province of Jurisprudence Determined* (first published 1832, Hackett 1995) ix.

[13] Austin, *The Province of Jurisprudence Determined*, 116-17.

[14] ibid 124. International law was not 'armed with a sanction and does not impose a duty', nor is it enforced by a 'determinate and assignable' body authorized to enforce the law (at 125).

[15] H S Maine, *International Law* (2nd edn, Murray 1894) 49. Though Colin Warbrick notes that Maine himself saw real defects in international law, including the absence of law-developing and law-enforcing mechanisms: Maine, *International Law*, 52-53, cited in C Warbrick, 'The Theory of International Law: Is there an English Contribution' in P Allott, T Carty and M Koskenniemi, *Theory and International Law: An Introduction* (The British Institute of International and Comparative Law 1991) 54.

[16] F Pollock, 'The Methods of Jurisprudence' (1882) 8 Law Magazine and Review (4th Series) 25, 38. Though see Neil Duxbury's suggestion that Pollock qualified this position in subsequent writings: N Duxbury, 'Why English Jurisprudence is Analytical' (2004) 57 Current Legal Problems 1, 18, citing F Pollock, *A First Book of Jurisprudence* (Macmillan 1896) 13.

[17] McNair 'The Need for the Wider Teaching of International Law', 86. See also A L Goodhart, 'Recent Tendencies in English Jurisprudence' (1929) 7 Canadian Bar Review 275, 279-80; Beckett, 'International Law in England', 263; Johnson, 'The English Tradition in International Law', 422; I Brownlie, 'The Reality and Efficacy of International Law' (1981) 52 BYIL 1, 4; H Waldock, 'The Regulation of the Use of Force by Individual States' (1952) 81 Recueil des Cours de l'Académie de Droit International 455; Jennings, 'Introduction' in C Wickremasinghe (ed), *The International Lawyer as Practitioner* (2000) xxi.

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they are law'.[18] The consequence was that any writer on international law in England 'had to take into account the writings of John Austin, and meet the challenge of showing how international law could correctly be denominated law'.[19]

At the time Austin was writing, international law in England was connected more to European legal culture and the civil law tradition. From 1565 until its dissolution in 1857, a body known as the 'Doctors Commons', a society of professors and advocates concerned with the practice of Civil and Canon Law, was regarded as the 'chief pool of knowledge of international law' in the UK.[20] Writing to the Duke of Buckingham in his capacity as Attorney-General in 1614, Francis Bacon explained that 'though I am a Professor of the Common-Law', it was necessary to understand 'there is also another Law, which is called the Civil or Ecclesiastical Law' which 'is not to be neglected', and that 'Professors of that Law, called civilians, ... should not be discountenanced nor discouraged, else whensoever we shall have ought to do with any Foreign King or State, we shall be at a miserable loss, for want of Learned Men in that Profession'.[21] Gradually the practice developed whereby civil lawyers known as the King's (or Queen's) Advocate advised the Crown on questions of international law ('either alone or together with transient Attorneys- and Solicitors-General'), a practice discontinued in 1872 when Sir Travers Twiss resigned from the office of Queen's Advocate and no successor was appointed.

Following the abolition of the office of Queen's Advocate, international law in England once again became the province of English lawyers trained in the common law. This moment of transition opened the way for a shift in international legal method. Another intellectual pole around which English lawyers orbited at the time was A V Dicey.[22] As McNair recounts, '[w]ho, of those who fell under the spell of [his] book when young, can doubt that Dicey as teacher has largely contributed to the maintenance of the rule of law and to our respect for the Constitution?'[23] The common law was at the heart of Dicey's account of the rule of law, with Dicey defining law as 'rules...enforced by the Courts'.[24] For Dicey,

[18] McNair 'The Need for the Wider Teaching of International Law', 86. Glanville Williams explains international lawyers' collective disturbance at Austin's theory on the basis that, if accepted, 'it would rock their subject to its foundations': G L Williams, 'International Law and the Controversy Concerning the Word Law' (1945) 22 BYIL 146, 153.

[19] M Lobban, 'English Approaches to International Law in the Nineteenth Century' in M Craven, M Fitzmaurice and M Vogiatsi (eds), *Time, History and International Law* (Martinus Nijhoff 2007) 65, 66.

[20] Lord McNair, 'The Debt of International Law in Britain to the Civil Law and the Civilians' (1953) and ensuing discussion (1954) 39 Transactions of the Grotius Society 183; Crawford, 'Public International Law in Twentieth Century England', 685.

[21] Second Version of Letter from Sir Francis Bacon to Sir George Villiers, later Duke of Buckingham, in J Spedding *The Letters and Life of Francis Bacon* (Longmans 1872) 27, 39.

[22] As A W B Simpson describes it, 'A V Dicey's Introduction to the Study of the Law of the Constitution achieved a significance in English constitutional thought which it never really lost': *Human Rights and the End of Empire* (OUP 2001) 33.

[23] McNair, 'The Need for the Wider Teaching of International Law', 89.

[24] A V Dicey, *Introduction to the Study of the Law of the Constitution* (Macmillan 1885) 24-25.

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the distinctive character of English law lay in 'the singular deference shown by English lawyers to decided cases', a practice that he claimed 'moulded the whole genius of English law'.[25] The peculiar advantage of Dicey's vision of the rule of law for international lawyers was that it offered international law salvation from its Austinian fate, shifting the focus of law's definition away from sovereign command toward a form of judicial reasoning based on custom.

For some period of time prior to the twentieth century, international law had been a literary-historical tradition, developing a system of rules as a product of scholastic thought. Alberico Gentili, who held the Regius Chair at Oxford from 1587 after seeking religious exile in England, was one of the first scholars to recognize a realm of positive international law whose normative force stemmed from a history of practice rather than nature, grounded in the consensus of a specific political community with a shared historical past. As Francesca Iurlaro explains, Gentili combined reading of classical texts (the touchstone of historical and legal reliability) with pragmatic assessment of contemporary events, whereby the 'epistemic authority' of scholars reinforced solutions obtained through the application of legal pragmatism.[26] International legal scholars such as Georg Schwarzenberger described the method more critically, arguing that the result had been that 'these lawyers deduced their systems of the law of nations. . .from nowhere'.[27]

For English international lawyers, adoption of the common law method can therefore be understood as both a constructive and defensive mimetic position. The 'common law method', itself based on a history of custom derived from social practice, proved easy to adapt to the realm of international law and offered itself to international law as a potential 'civilizing' force in an unruly field. It also provided English international lawyers with a legal buttress against jurisprudential attacks on international law's status as law. It was of course a method that came naturally – potentially almost subconsciously – to international lawyers whose formative legal training was in the English legal system. Training in the common law method indoctrinates an immanent pride in its tradition, which can verge occasionally on cultural hubris. The common law was described by William Blackstone in terms of lineal attachment as 'the best birthright and noblest inheritance of mankind'. Dicey 'penned paeans to the magnificent imperial diffusion of English law across the globe',[28] speculating that

[25] A V Dicey, 'Digby on History of English Law' (1875) 21 The Nation 373 cited in M D Walters, *A V Dicey and the Common Law Constitutional Tradition: A Legal Turn of Mind* (CUP 2020) 90-91.

[26] F Iurlaro, *The Invention of Custom: Natural Law and the Law of Nations, ca 1550-1750* (OUP 2021) 103. See also J Waldron, 'A Defence of Gentili's Equation of the Law of Nations and the Law of Nature' in B Kingsbury and B Straumann (eds), *The Roman Foundations of the Law of Nations: Alberico Gentili and the Justice of Empire* (OUP 2010) 283.

[27] ibid 542.

[28] D Lino, 'The Rule of Law and the Rule of Empire: A V Dicey in Imperial Context' (2018) 81 MLR 739, 747.

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'[w]hen at some distant period thinkers sum up the results of English as they now sum up the results of Grecian or of Roman civilisation, they will, we may anticipate, hold that its main permanent effect has been the diffusion throughout the whole world of the law of England, together with those notions of freedom, of justice and of equity to which English law gives embodiment'.[29]

III. The Common Law Method

Before proceeding further, it is necessary to say something about what is meant by the 'common law method'. There is a wealth of literature on common law history and methodology, which demands careful attention and reflection. In considering its adoption and adaptation by British international lawyers, it is helpful to distil three fundamental characteristics of the method: (1) its connection to a history of social practice; (2) the centrality of courts and judicial reasoning; and (3) its anti-theoretical inclination.

A. Connection to a history of social practice

The British have traditionally held social lineage in high regard. This extends to the law. One of the hallmarks of the common law method is its pragmatism, or connection to a history of social practice. The common law method is often spoken about in terms of an 'inheritance' or tradition, a repository of experience embodying a sort of 'timeless truth' accepted as the legal expression of a community's shared historical past.

While this historical continuity is sometimes valued in terms of its contribution to the law's stability, consistency and equality, it is above all a reflection of the law's social dimension. Gerald Postema, known for his insights into the common law mind, argues that '[i]f it is possible. . .to capture in a single phrase what law *is*, according to classical Common Law theory, one might say that it is a form of social order manifested in the practice and common life of the nation'.[30] Social acceptance of the law rests on 'a shared sense of the *continuity* of the law with the past'.[31] It is through long experience and use that rules are accommodated to the 'frame' or 'disposition' of the nation, 'incorporated into their very Temperament, and, in a Manner, become the complection and the Constitution of the English Commonwealth'.[32] Dicey describes how,

[29] A V Dicey, 'A Common Citizenship for the English Race' (1897) 71 The Contemporary Review 457, 470. See also Letter from A V Dicey to O W Holmes Jr (3 April 1900), available at https://iiif.lib.harvard.edu/manifests/view/drs:36695747$38i, cited in Lino, 'The Rule of Law and the Rule of Empire', 749.

[30] G Postema, *Bentham and the Common Law Tradition* (OUP 2019) 37.

[31] ibid.

[32] Sir Matthew Hale, *The History of the Common Law* (1713), 30.

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through this gradual bottom-up accumulation of experience, English law becomes 'closely bound up with the life of the people', being 'the fruit of contests carried on in the Courts on behalf of the rights of individuals'.[33] The idea is that the accumulation and connection between decisions on individual disputes serves to strengthen the bond between law and the community to which it is applied.

B. Centrality of courts and judicial reasoning

One of the striking features of the common law method is its recognition of judge-made law as an independent source of law. Yet the ethic underlying judicial law-making through the common law method is quite distinct from that driving parliamentary law-making. According to the Diceyan tradition, judicial law-making is aimed at 'the maintenance of the logic or the symmetry of the law'.[34] Lord Devlin described the role of the common law judge as 'the disinterested application of known law'.[35] The common law method acknowledges the need to develop the law, though any such developments should be derived from existing legal materials using a judicial mode of reasoning, applying established principles and legal values in new contexts. This common law mode of reasoning militates against taking 'giant and sudden leaps forward' and confines judicial reasoning to 'the incremental interpretation of principle, applied to new ideas and conditions'.[36]

It has been suggested that judicial reasoning plays a more prominent place in common law systems on account of the lack of requirement for a simple majority judgment among the judges.[37] In common law systems, judges may elaborate quite different (even opposed) points of view in arguing for the decision they favour, making it 'much more candidly and publicly visible than does the continental style that in many disputed legal questions more than one point of view is possible'.[38] These differences of opinion do not lead to general outcry about law's indeterminacy on the basis that reasoning is carried out in accordance with certain implicit or explicit shared norms or normative canons as to what types of argument do and ought to carry weight in contested legal matters. The process of legal reasoning itself is a form of legal justification, geared around establishing consistency and coherence in the law.[39] It is

[33] Dicey, *Introduction to the Study of the Law of the Constitution*.

[34] A V Dicey, *Lectures on the relation between Law and Public Opinion in England during the Nineteenth Century* (1905) 362.

[35] Lord Devlin, 'Judges and Lawmakers' (1976) 39(1) Modern Law Review 1, 4.

[36] Andrew Burrows, 'Common Law Retrospectivity' in Andrew Burrows and others (eds), *Judge and Jurist: Essays in Memory of Lord Rodger of Earlsferry* (2013), 545, 550.

[37] N MacCormick, *Legal Reasoning and Legal Theory* (OUP 1994) 9-10.

[38] ibid 9.

[39] ibid 14.

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primarily through techniques of binding precedent and analogy that the common law seeks to guarantee this consistency and coherence.

The common law doctrine of binding precedent prescribes, in essence, 'thou shalt not controvert established and binding rules of law'.[40] It is, however, constrained by concepts of *ratio decidendi* and *obiter dicta*.[41] Only the *ratio* of a decision is binding, that is, rulings on points of law necessary to justify the decision in the case. Conversely, *obiter* discussion of points of law is non-binding, though can nevertheless have a profound influence on the development of the law, providing material that can be used by judges faced with analogous issues in subsequent cases. This sort of precedential thinking is by no means exclusive to British lawyers.[42] However, as Goodhart recognized, the doctrine of binding precedent is 'of peculiar interest to Anglo-American lawyers' and 'does not exist to the same degree in any other legal system'.[43] The distinction between the continental and common law approach to precedent has been described as a situation where prior cases *may* be used and a situation in which they *must* be followed in a subsequent case.[44] The notion of bindingness imports into common law reasoning many arguments over the correct 'explanation' and 'distinguishability' of binding precedents.[45] Applicable principles can emerge through a line of judicial decisions in which the applicable rules are concretized, glossed and sometimes restricted through judicial explanations and distinctions.

Another form of reasoning often adopted by common lawyers is that of analogy. Again, this is hardly a technique confined to the common law.[46] However, it best describes the reasoning preferred by the common law, namely case-by-case extension of existing rules to novel factual situations demonstrating relevant similarity, based on a logic of equality and coherence. Neil MacCormick acknowledges that what is at stake is essentially 'value-coherence' within a legal system. Those engaged in common law reasoning seek to understand the values underlying relevant legislation and case law, then extrapolate from them to develop principles applicable to the case before the court.[47] Through a methodology of analogical extension, the law is developed and refined through 'the steady accretion of judicial experience', 'the constant testing of the principle in new cases' and 'its steady reinforcement' through its necessary adoption in novel situations.[48]

[40] ibid 195.
[41] ibid 215.
[42] See Judge Abraham's Declaration in *Obligations concerning Negotiations relating to Cessation of the Nuclear Arms Race and to Nuclear Disarmament (Marshall Islands v UK)* (Preliminary Objections) [2016] ICJ Rep 833, 858.
[43] AL Goodhart, 'Precedent in English and Continental Law' (1934) 50 LQR 40, 41.
[44] M Shahabuddeen, *Precedent in the World Court* (CUP 2010) 9.
[45] N MacCormick, *Legal Reasoning and Legal Theory* (OUP 1994), 196.
[46] H P Glenn, *Legal Traditions of the World* (4th edn, OUP 2010).
[47] N MacCormick, *Legal Reasoning and Legal Theory* (OUP 1994) 153.
[48] ibid 159-60.

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C. Pragmatism and theory

Despite the quest for value coherence that clearly underlies common law judicial reasoning, common lawyers prefer to highlight the pragmatism of their legal method. One corollary of the common lawyer's celebration of their pragmatism is a certain distaste for theory.[49] The common law method arose partly in response to the threat of centralized authorities who purported to make law guided by nothing but their subjective assessments of the demands of justice, expediency and the common good.[50] The common law method was an exercise in escaping the subjectivity of values, working to achieve case-by-case solutions based on pragmatic convergence rather than 'theoretical abstractions divorced from society'.[51]

Patrick Atiyah famously critiqued the pragmatism and antitheoretical inclination of English common lawyers. Atiyah begins his Hamlyn Lectures remarking on the 'fairly uncontroversial suggestion that English lawyers are not only more inclined to the pragmatic and somewhat hostile to the theoretical approach, but positively glory in this preference'.[52] At the heart of Atiyah's critique was a perceived gap between legal practice and legal scholarship that he wished to see narrowed.[53] Atiyah identified legal pragmatism as a defensive professional posture adopted by practitioners. The effect of pragmatism was to hide the contributions of academic theory, often simply masking the fact a practitioner (or judge) was 'himself usually proceeding on the basis of some theory, seeking (albeit perhaps unconsciously) some rational objective; and his pragmatism may simply amount to an unwillingness to discuss his objectives, to examine his premisses, to open himself up to accountability'.[54]

Indeed, adoption of an anti-theoretical stance can be seen as veiled acknowledgement of a form of burden-sharing between practitioners and scholars, essential to maintaining perceptions of the common law's objectivity, on the one hand, and its coherence, on the other. According to a more transparent understanding of the inner workings of the common law, '[t]he judges [provide] the bricks, but the design of the building [is] largely the work of the writers'.[55] The common law is built on a bedrock of political and legal theory, infused with a long history of systematic reflection on the role of the state, parliamentary sovereignty, the nature of the judicial function and the separation of powers. The common law's separate strands of public law, torts law, contract law, criminal law (and so on) are also burgeoning sites of normativity. The day-to-day practice

[49] P Atiyah, *Pragmatism and Theory in English Law* (The Hamlyn Lectures (39th Series) 1987).
[50] G Postema, *Bentham and the Common Law Tradition* (OUP 1986) 4.
[51] Dicey, *Introduction to the Study of the Law of the Constitution*.
[52] Atiyah, *Pragmatism and Theory in English Law*, 3.
[53] N Duxbury, 'Struggling with Legal Theory' (1993) 43 University of Toronto Law Journal 889, 889.
[54] Atiyah, *Pragmatism and Theory in English Law*, 148.
[55] ibid 183.

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of the common law proceeds against the backdrop of avowedly philosophical thinking by towering figures of the discipline – A V Dicey, William Anson, Frederick Pollock, Glanville Williams – with which all practitioners will be familiar. Jurisprudence has long been a compulsory subject at most UK universities and most English common lawyers will have studied legal theory.[56] While judges and practitioners reserve to themselves a focus on the pragmatic business of deciding cases, this is appropriately done against the background of legal scholarship assuming adequate responsibility for the part played by reason and theory in the law.[57]

IV. British Approaches to the Corfu Channel Case

It has been possible to give only a brief synopsis of the key characteristics of the common law method. The aim in doing so is to provide a reference point to assist in understanding the international legal methodology of a set of influential British international lawyers. In order to circumscribe the potentially limitless scope of this inquiry, the focus of this section will be on the response by British international lawyers to a single case, the *Corfu Channel* case, decided by the International Court of Justice in 1949. This case is interesting for a number of reasons, not least because it was the first case before the International Court of Justice and involved the United Kingdom. The case also marked a transitional moment in the development of international law, addressing the implications of the shift in legal mindset from war as sovereign privilege to war as prohibited act.

Until the early twentieth century, war was a 'fact' recognized by international law.[58] Oppenheim described war unflinchingly in his 1906 treatise as 'the contention between two or more States through their armed forces for the purpose of overpowering each other and imposing such conditions of peace as the victor pleases'.[59] According to a traditional legal perspective, war was a legally admissible means of self-help for giving effect to state claims. It was in this way a 'crude substitute for a deficiency in international organization', fulfilling the function that might otherwise be performed by an international legislature in adapting the law to changed conditions.[60] Writing in 1922, Hyde accepted that, '[i]t

[56] In 1951, jurisprudence was a compulsory subject at undergraduate level in all universities except Cambridge and remains a compulsory subject in law degrees at the majority of UK universities: R H Graveson, 'The Teaching of Jurisprudence in England and Wales' (1951) 4(2) Journal of Legal Education 127, 132; H A Barnett and D M Yach, 'The Teaching of Jurisprudence and Legal Theory in British Universities and Polytechnics' (1985) 5(2) Legal Studies 151.

[57] ibid 184.

[58] J Westlake, *International Law*, vol 2 (CUP 1907) 3. Westlake described war as a natural function of the State, albeit 'a piece of savage nature partially reclaimed', and a prerogative of its uncontrolled sovereignty, ibid.

[59] L Oppenheim, *International Law: A Treatise*, vol 2 (Longmans 1906) 56, §54.

[60] H Lauterpacht, *Oppenheim's International Law: A Treatise*, vol 2 (7th edn, Longmans 1948) 178.

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always lies within the power of a State. . .to gain political or other advantages over another, not merely by the employment of force, but also by direct recourse to war'.[61] The prohibition of the use of force in the UN Charter, backed up by a centralized enforcement machinery, therefore marked a radical departure in international law. These legal developments, including a legally delimited right of self-defence in Article 51 of the Charter, seemed in its cumulative effect to leave 'little scope for forcible self-help within the pale of the law'.[62] Yet the momentous character of the change continued to be tested by states, including by the UK, in action that obscured the line between self-help and the narrower doctrine of Article 51 self-defence.

An early experiment came when Albania claimed the right to control the passage of foreign warships and merchant vessels through the Corfu Channel in 1946.[63] The UK disputed Albania's right to do so, asserting its right of innocent passage through the strait. On 22 October 1946, partly to test Albania's attitude, the UK sent a squadron of British warships through the Corfu Channel. Within Albanian territorial waters, two destroyers struck mines and were heavily damaged, resulting in the death of 44 men. The UK did not at this stage appeal to the Security Council, fearing that the veto would be applied to any proposal that the area should be swept for mines.[64] On 13 November 1946, two British minesweepers were sent to sweep the Corfu Channel, locating a minefield, which the UK then cleared. Though Albania was not then a party to the United Nations, the UK referred the matter to the Security Council, which issued a resolution on 9 April 1947 recommending that the two Governments refer the dispute to the International Court of Justice. On 22 May 1947, the UK filed a letter instituting proceedings against Albania in respect of injuries caused by mines to British ships in the Corfu Channel. The letter noted the appointment of Sir Eric Beckett, then Foreign Office Legal Adviser, as Agent for the United Kingdom. The British judge sitting on the Court at the time was Sir Arnold McNair. Certain international law scholars were invited to join the UK's legal team including Hersch Lauterpacht (who only joined in the preliminary jurisdictional phase) and Humphrey Waldock (who joined for the jurisdictional and merits phases). Derek Bowett and Ian Brownlie were the most prolific writers on the subject of the use of force in the UK at the time.

By way of summary of the Court's findings, the International Court of Justice found Albania was responsible under international law for the

[61] C Hyde, *International Law Chiefly as Interpreted and Applied by the United States* (Little, Brown and Company 1922) 189.

[62] I Brownlie, *International Law and the Use of Force by States* (OUP 1963) 281.

[63] The summary of facts is taken from M Fitzmaurice, 'The Corfu Channel Case and the Development of International Law' in N Ando, E McWhinney and R Wolfrum (eds), *Liber Amicorum Judge Shigeru Oda* (Brill 2002) 119.

[64] Waldock, 'The Regulation of the Use of Force by Individual States', 499.

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explosions that had taken place in Albanian waters and for the damage and loss of life which had ensued.[65] In a subsequent judgment, the Court assessed the amount of reparation owed to the United Kingdom and ordered Albania to pay £844,000.[66] The Court was satisfied that the October 1946 mission was in exercise of the UK's right of innocent passage and thereby did not violate Albania's sovereignty. This was despite the fact that the UK's intention 'must have been, not only to test Albania's attitude, but at the same time to demonstrate such force that [Albania] would abstain from firing again on passing ships'.[67] On the other hand, the Court found that the November 1946 minesweeping operation constituted a violation of Albanian sovereignty. The Court rejected the UK's arguments, both in relation to its alleged right of intervention and self-help. The Court stated it could only regard the UK's alleged right of intervention 'as the manifestation of a policy of force, such as has, in the past, given rise to most serious abuses and such as cannot, whatever be the present defects in international organization, find a place in international law'.[68] The Court also rejected the claim the minesweeping mission was justified as self-help, finding that '[b]etween independent States, respect for territorial sovereignty is an essential foundation of international relations. ... [T]o ensure respect for international law, of which it is the organ, the Court must declare that the action of the British Navy constituted a violation of Albanian sovereignty'.

A. Law's conscience: Sir Eric Beckett as Foreign Office Legal Adviser

Sir Eric Beckett was the fourth UK Foreign Office Legal Adviser, appointed to the office in 1945. The *Corfu Channel* case was the first of six ICJ cases in which Beckett was engaged during his 9-year term as Legal Adviser (notably a significant proportion of the 15 cases to which the UK has been party to date). In his capacity as Legal Adviser, Beckett was at the centre of the legal team responsible for the UK's pleadings in the case.[69]

Before engaging in an assessment of Beckett's legal method, it is important to say something about the various and distinct roles of the UK Foreign Office Legal Adviser. Gerald Fitzmaurice, another former UK Legal Adviser, noted that the role of the Legal Adviser involved both advice and defence. In the office's advisory role, the Legal Adviser's aim was to assist the government achieve its political aims where possible, advising 'as to the means, within the law, whereby his government can

[65] *Corfu Channel* (*UK v Albania*) (Merits) [1949] ICJ Rep 4.
[66] *Corfu Channel* (*UK v Albania)* (Compensation) [1949] ICJ Rep 244.
[67] *Corfu Channel* (*UK v Albania*) (Merits) [1949] ICJ Rep 4, 31.
[68] ibid 35.
[69] Of course, the presentation of a case before the ICJ is a team effort on behalf of the state and 'no one person can take the credit or be required to shoulder the blame for the manner in which the case is presented': G Fitzmaurice and F A Vallat, 'Sir (William) Eric Beckett, KCMG, QC (1896-1966): An Appreciation' (1968) 17(2) ICLQ 267, 286.

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achieve its aims, if these are legally achievable'.[70] This extended to a duty upon the Legal Adviser to act at times as legal Cassandra, with a duty 'to tell the government what courses it cannot take without running foul of the law, and to refuse as a lawyer to endorse any such course'.[71] Fitzmaurice described the advice tendered to governments by their legal advisers, whether acted upon or not, as 'the main basis of state practice in the international field'.[72] Though Fitzmaurice refers to practice, it is perhaps more appropriate to see the Legal Adviser as the most reliable source of a state's *opinio juris*, the legal conscience attached to practice that converts it into evidence of customary international law.

Yet, like Cassandra, it was the fate of the Legal Adviser that their advice would not always be followed. In these circumstances, the Legal Adviser was required to play a slightly different defensive legal role. Fitzmaurice noted that the Legal Adviser 'may even (matters of personal conscience apart) be called upon to repair or put the best face on legal blunders or misdeeds, in cases where his advice has not been followed or perhaps has not been sought at all'.[73] This was the role in which Beckett was acting as the UK agent before the International Court of Justice in *Corfu Channel*. In making arguments before a court, the Legal Adviser arguably had even more liberty to 'try on' legal arguments in the knowledge their merits would be determined by an independent arbiter.

In defending its November 1946 operation in the *Corfu Channel* case, the UK legal team led by Beckett relied on a limited right of intervention and self-help. One of the broader arguments famously raised by the UK was that the UK's minesweeping operation did not violate Article 2(4) as the action 'threatened neither the territorial integrity nor the political independence of Albania' and therefore fell outside the terms of the Article 2(4) prohibition as 'Albania suffered thereby neither territorial loss nor any part of its political independence'.[74] While recognizing that 'the large rights of forcible intervention and action to obtain redress by self-help which formally existed have now become more restricted and controlled with the growth of international organization',[75] Beckett argued in oral pleadings that there remained a 'limited right of self-help'. He defined this right very narrowly, existing 'where an injured State takes action to secure and preserve evidence as a measure preparatory to submitting its grievance to the appropriate international organization'.[76] Such a right was necessary based on the fact that '[i]nternational law, unhappily, cannot yet be regarded as a fully developed system of law either as to the

[70] ibid. See also I Sinclair, 'The Practice of International Law: the Foreign and Commonwealth Office' in B Cheng (ed), *International Law: Teaching and Practice* (Stevens 1982) 134; Sinclair, 'The Practitioner's View of International Law', 74.

[71] G Fitzmaurice, 'Legal Advisers and Foreign Affairs: Review Article' (1965) 59 AJIL 72, 73.

[72] ibid 72.

[73] ibid 74.

[74] W E Beckett, Oral Pleadings, 12 November 1948, 296.

[75] ibid.

[76] W E Beckett, Oral Pleadings, 19 January 1949, 582.

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certainty of its principles or more particularly as to its machinery for enforcing the law'.[77] He argued that it was unlikely that an interim order from the Court or recommendation from the Security Council could have been provided in time. In these circumstances, Beckett appealed to analogical reasoning, 'asking the Court to do what any Court can do, whose duty is to find the existing law and apply it to the facts namely to adapt an existing old principle to the position of the world today'.[78]

The UK team's legal arguments on this point were not accepted by the Court. From a methodological perspective, it is informative to consider Beckett's report to the UK Foreign Secretary, giving his view on the impact of the Court's decision on the development of international law. In his report, Beckett advises his government that the ICJ's findings are determinative – not just of the UK's rights and obligations in this case – but of the applicable legal principles. He reports that '[o]n the third point, namely whether it was lawful for the United Kingdom to have proceeded entirely on its own responsibility without the consent of Albania and without any authority from any international board, to sweep the Corfu Channel on 13th November, there is a unanimous decision against us'.[79] (Interestingly, he also notes: '[w]e hardly expected to succeed on these arguments'.[80]) Beckett then emphatically spells out the implications of the judgment in terms of a shift away from traditional notions of the right of intervention and the right of self-help. He reports that:

> The International Court has definitely condemned the alleged right of intervention, and declares that it does not find a place in modern international law. Similarly it holds that self-help (which, however, although the Court does not expressly do so, we must distinguish from self-defence) is now no longer allowed... The Court did not accept the United Kingdom argument that something in the name of self-help or intervention must be permissible in international law given the lacunas in international organisation. It showed no sympathy with the plea that it is necessary to allow a state to abstain or safeguard evidence in order to bring a complaint before an international body or court given the absence of an international police force.

Perhaps because this was one of the first judgments handed down by the ICJ, the report also takes the opportunity to engage in an assessment of whether the Court had fulfilled the UK's expectations of its role. Beckett's first stated concern was whether the Court's majority demonstrated the capacity to reach the conclusion 'which law and justice requires'. Here, Beckett engages in a frank and detailed assessment of the impartiality and ability of the individual judges ('the Chilean judge is senile and perfectly useless for all purposes'),[81] concluding overall that 'the Court's judgment

[77] W E Beckett, Oral Pleadings, 12 November 1948, 296.
[78] W E Beckett, Oral Pleadings, 19 January 1949, 582.
[79] W E Beckett, 'Report by the Agent on the Corfu Case' (19 May 1949) 3045.
[80] ibid 3052.

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reaches conclusions which seem to represent the best legal view and also [accords] with common sense and justice'.[82] His second concern is equally interesting, being whether the Court's judgment 'be a useful and important precedent on questions of law and procedure in future cases'.[83] Here, we see an early example of an emerging tendency to see ICJ decisions in terms of precedent, a distinctively common law approach to international judicial decision-making. The report evidences Beckett's view that, as UK agent, his role was to run legal interpretations before the Court for decision, while accepting he might not be successful. Having received a decision rejecting his argument, he considers further arguments foreclosed. Beckett appears to accept that the Court's judgment marks the transition from the former regime of self-help to a regime of non-intervention and non-use of force laid down by the UN Charter.

It is helpful to place this discussion in the context of broader reflection on Beckett's legal method. Beckett was described by his colleagues as a 'lawyer's lawyer'.[84] Whatever this means, it is certainly clear from Beckett's writings that he was comfortable with the idea (which might even have been considered progressive for the time) that state sovereignty involved subordination to international law. According to Beckett, the real foundations of instruments such as the Kellogg-Briand Pact and UN Charter lay in the fact that 'sovereign states are bound by a law superior to themselves', denial of which would render a state akin to an 'anti-Christ. . .denying the basis upon which alone they can claim to be members of the society of nations'.[85] For Beckett, it was essential to the international rule of law that states could not be judges in their own cause: 'no system of law worth the name could proceed on the basis that in case of necessity, of which the sovereign is the sole judge, the sovereign can do what he likes'.[86] Beckett clearly subscribed to the idea that Dicey's conception that 'no man is above the law' should also be extended to the international sphere.[87]

Beckett self-consciously employed a British method of legal reasoning. While he praised the energy of French engagement with international law ('[w]hat a wealth of literature and what lively interest among lawyers!'), Beckett concluded '[i]t is much better, both for the world as a whole and for Great Britain, that British legal views should form one of the main currents of international law, but they cannot do so unless British lawyers will treat the subject seriously'.[88] His colleagues and

[81] ibid 3047.
[82] ibid 3049.
[83] ibid 3046, 3049.
[84] I Sinclair, 'The Practitioner's View of International Law' in D Freestone, S Davidson and S Subedi (eds), *Contemporary Issues in International Law: A Collection on the Josephine Onoh Memorial Lectures* (Brill 2002) 64.
[85] Address at Wilton Park Centre (Unpublished, March 1949) cited in G Fitzmaurice and F A Vallat, 'Sir (William) Eric Beckett, KCMG, QC (1896-1966): An Appreciation' (1968) 17(2) ICLQ 267, 301.
[86] ibid 302.
[87] Dicey, *Introduction to the Study of the Law of the Constitution*, 189, 198.
[88] ibid 262.

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successors to the role of Legal Adviser, Gerald Fitzmaurice and Francis Vallat celebrated his inductive method and his preference to 'take the thing by stages'.[89] They noted 'his ability to sift and formulate principles in a manner which made them sensible even in extreme cases, and to classify individual cases accurately and effectively, as well as his facility for prescribing the practical measures required to meet the needs of the situation'.[90] While Fitzmaurice and Vallat accuse him of an 'instinctive love of reasoning from first principles for its own sake' and even of becoming a 'confirmed anti-positivist',[91] Beckett himself was critical of what he perceived as the continental legal methodology, namely 'the excessively theoretical treatment of a topic and the pages of complicated abstract reasoning from a priori principles. . .without a concrete example to help one through the maze'.[92] He argued that '[s]tarting from abstract principles. . .[builds] logical constructions of a complicated character which get farther from the truth the farther they leave the ground'. He argued that English method's 'corrective' would restrain international law's structure to solid and safe 'two-storey dimensions'.[93]

Beckett exhibited a distinctly Diceyan perspective on the importance of courts to law's development. He expressed little faith in codification.[94] Instead, he was a 'firm believer in international adjudication as a means of settling international disputes. . .and. . .he favoured in particular the utilisation as much as possible of the International Court for this purpose'.[95] For Beckett, 'case law is the best hope for the general development of international law'.[96] The role of the International Court of Justice was 'not merely to decide the cases brought before it but to develop international law by case law'. His interest in judicial determination was not so much in the immediate object of the decision, but 'in what supporting reasoning might contain bearing on points of principle, or having a potentially wider application than was involved by the facts

[89] Fitzmaurice and Vallat, 'Sir (William) Eric Beckett, KCMG, QC (1896-1966)', 289.
[90] ibid 283.
[91] ibid 297.
[92] Beckett, 'International Law in England', 261.
[93] ibid 262.
[94] His views on the rules of treaty interpretation are also interesting. For Beckett, these existed for the same reason 'which requires a court to give reasoned judgments, and in reaching its conclusions so far as possible base itself on principles of law of general application, and to show that. . .it is proceeding in the manner in which it has been the practice for the courts to proceed in. . .other cases. . .'. He rejected the relevance of the parties' intentions describing reference to *travaux preparatoires* as 'like bringing a dead hand from the grave', arguing that once the treaty text came into force, it assumed 'a sort of life of its own': see Address at Wilton Park Centre (Unpublished, March 1949) cited in Fitzmaurice and Vallat, 'Sir (William) Eric Beckett, KCMG, QC (1896-1966)', 436. It is worth revisiting the exchange of views between Beckett and Lauterpacht within the framework of the consideration of the topic by the Institut de Droit International between 1950 and 1956: (1950) 43(1) Annuaire de l'Institut de Droit International 336, 336-434 (Lauterpacht), 435-44 (Beckett); (1952) 44(2) Annuaire de l'Institut de Droit International 359, 359-406; (1956) 46 Annuaire de l'Institut de Droit International 317, 317-49, cited in Sinclair, 'The Practitioner's View of International Law', 65.
[95] E Beckett (1950) 43(1) Annuaire de l'Institut de Droit International 435, 444.
[96] Address at Wilton Park Centre (Unpublished, March 1949) cited in Fitzmaurice and Vallat, 'Sir (William) Eric Beckett, KCMG, QC (1896-1966)', 317.

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of the particular case itself'.[97] Beckett placed great value on legal scholarship, writing mainly for the *British Yearbook of International Law* and encouraging younger lawyers to do the same (something junior staff in the Foreign Office referred to as 'Eric's homework').[98] Yet the scholarship he considered would be of greatest use would be a 'volume on international law built up on the cases', which he noted would be 'a work which should be familiar and congenial to an English lawyer'.[99]

B. Law's custodian: Sir Arnold McNair as judge

One must be cautious in relying on the *Corfu Channel* case to assess the international legal method of Sir Arnold McNair as UK judge on the International Court of Justice. He seemingly voted with the majority on all counts (including on the finding against the UK) and appends no separate or dissenting opinion. We might take from his decision not to write a separate opinion or declaration that McNair either participated in the writing of the majority judgment, or at the very least considered his views to be adequately reflected.[100]

The majority judgment in the *Corfu Channel* case has been described by Stefan Talmon as reflecting a 'triangular method of legal reasoning familiar in common law systems'.[101] Talmon uses the term 'triangular method' as shorthand for the three-step approach typical to the common law method: (1) locating a binding precedent or rule applicable to facts similar to those before the Court, though dissimilar in certain respects; (2) identifying the principle underlying the precedent or rule; then (3) applying the principle by analogy to the case before the Court. This use of the term 'triangular method' takes us beyond the simplistic idea of common law reasoning as simply inductive or not deductive.[102] As discussed above, common law reasoning is a negotiation between the factual circumstances of a case, past precedents and existing principles and can pull in different directions depending on the level of development of the case law and indeed the number of existing principles in play.

We see the triangular method exhibited in the Court's determination of Albania's responsibility for the October 1946 mine explosions. Here, the Court takes note of the existence of a binding rule under the Hague

[97] Fitzmaurice and Vallat, 'Sir (William) Eric Beckett, KCMG, QC (1896-1966)', 316.
[98] Sinclair, 'The Practitioner's View of International Law', 65.
[99] Beckett 'International Law in England', 271.
[100] '[T]he quantum of an individual judge's output in terms of separate or dissenting opinions may stand in inverse relation to the extent of the judge's influence of the Court', with Crawford suspecting that McNair's influence on the collective reasoning of the Court was 'correspondingly greater': Crawford, 'Public International Law in Twentieth Century England', 684.
[101] S Talmon, 'Determining Customary International Law: The ICJ's Methodology between Induction, Deduction and Assertion' (2015) 26 EJIL 417, 424.
[102] Gerald Postema has said of common law reasoning that it is neither inductive nor deductive but analogical: G Postema, 'Philosophy of the Common Law' in J L Coleman, K Himma and S Shapiro (eds), *The Oxford Handbook of Jurisprudence & Philosophy of Law* (OUP 2004) 588, 594.

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Convention (VIII) of 1907, imposing a duty on states to notify ship owners and governments of the existence of a minefield in their territorial waters. The problem was that this Convention applied only during times of war and, as several dissenting judgments identify, there was at the time no uniform state practice that such a duty applied in peacetime. The Court therefore purported to fill a 'gap' in the law by extending the underlying principle from war to peace-time by analogy based on 'general and well-recognized principles, namely: elementary considerations of humanity, even more exacting in peace than in war; the principle of the freedom of maritime communication; and every State's obligation not to allow knowingly its territory to be used for acts contrary to the rights of other States'.[103] Faced with a set of facts to which a legal resolution was required in the absence of a clear legal principle, the Court deployed analogical reasoning to determine the appropriate legal position.

It is notable that there were five dissents (and one separate opinion) on the question of Albania's responsibility. While we should not read too much into this, all dissents and separate opinions came from judges from the civil law tradition and it is interesting to contrast and compare their reasoning to that of the majority. Judge Azevedo (Brazil) determined that the Hague Convention 'is not really applicable in this case, unless by an interpretation which would be carrying the method of analogy to an extreme limit'.[104] Judge Winiarski (Poland) held that 'there can be no question of a breach of a rule or of a principle of international law, save in so far as that rule or that principle exists', arguing that he would have found Albania's responsibility based on existing principle of due diligence rather than using the analogy proposed by the majority.[105] Recalling Beckett's disparaging assessment of the Chilean judge (discussed above), the Individual Opinion of Judge Alvarez (Chile) may well grate with the common lawyer, including his declaration of the existence of a 'new international law' founded on social interdependence and aimed at the realization of social justice.[106] Judge Alvarez concludes that a state's failure to notify affected states and ships about the laying of mines is an 'international delinquency' on the basis it is an act 'contrary to the sentiments of humanity'.[107]

Whether or not written at the hand of McNair, some of the majority's reasoning is certainly representative of his approach, though a broader analysis of his legal method is required to corroborate this. McNair was devoted to the 'lawyers' reason. . .applied to problems of international law'.[108] Fitzmaurice describes McNair's approach as 'a practical rather

[103] *Corfu Channel* (*UK v Albania*) (Merits) [1949] ICJ Rep 4, 22.
[104] Dissenting Opinion of Judge Azevedo, ibid 84.
[105] Dissenting Opinion of Judge Winiarski, ibid 53.
[106] Individual Opinion of Judge Alvarez, ibid 39-40.
[107] Individual Opinion of Judge Alvarez, ibid 45.
[108] R Y Jennings, 'Arnold McNair' (1975) 34(2) CLJ 177, 178.

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than a theoretical approach', adding that '[i]n this, he was typical of much of Anglo-Saxon mentality'.[109] McNair considered that the optimal means to determine the rules of international law was in the context of concrete disputes. He purports to have 'been struck by the different appearance that the rule of law may assume when it is being examined for the purpose of its application in practice to a set of ascertained facts. As stated in a text book it may sound the quintessence of wisdom, but when you come to apply it many necessary qualifications arise in your mind'.[110] In developing the rule of international law, McNair expressed the hope that one of the main sources of international law would be 'the general principles of law recognized by civilized nations' and expressed the hope that 'the common law of England and the principles of equity as developed by many generations of English lawyers [should exert] their proper influence in the building up of a comprehensive system of International Law'. According to McNair, '[i]t is most important that international law should from time to time get a good drench from the spirit of the common law'.[111]

McNair's response to the Austinian challenge to international law's legal status was therefore decidedly Diceyan and he self-consciously sought to follow the model of A V Dicey 'whose attractive Oxford lectures on the *Law of the Constitution* explained to generations of insular Englishmen the comforting superiority of their system'.[112] The role of courts in international law's development was clearly critical for McNair. One of his greatest legacies, the *Annual Digest of Public International Law Cases* (now known as the International Law Reports), was developed with a view to extracting material sources for the elaboration, adaptation and tempering of international law.[113] McNair's aim was to reveal that 'there is more international law in existence and daily accumulating "than this world dreams of" and…it is more international law that this world wants'.[114] In a 1949 address, McNair saw fit to remark that 'the past fifty years have transformed the essential character of International Law and consolidated it into a body of "hard law" consisting of arbitral and judicial case-law on the one hand and treaties on the other, much in the same way as English law consists of case-law and statute'.[115]

[109] G Fitzmaurice, 'Lord McNair' (1974-1975) 48 BYIL xi, xiv.

[110] C Parry (ed), *Lord McNair: Selected Papers and Bibliography* (A W Sijthoff 1974) 257.

[111] Jennings, 'Arnold McNair', 178.

[112] McNair, 'The Need for the Wider Teaching of International Law', 89.

[113] He also curated a set of *International Law Opinions*, pulling together a representative set of opinions given by the Law Officers of the Crown from the thousands of opinions on questions of international law rendered by from 1782 to 1902: A McNair, *International Law Opinions*, vols 1-3 (CUP 1956). This project was continued though not completed under the editorship of Clive Parry in the *British Digest of International Law compiled principally from the archives of the Foreign Office* (Stevens 1965) covering the period from 1860 to 1965. Of the 15 projected volumes, only volumes 2b, 5, 6, 7 and 8 were completed.

[114] A McNair and H Lauterpacht, 'Preface' in *Annual Digest of Public International Law, 1925-1926*, vol 1 (CUP 1929).

[115] A McNair, 'The International Court of Justice' in Parry, *Lord McNair: Selected Papers and Bibliography*, 213.

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In an era where the UK could claim a high level of prestige, McNair considered that British legal method should have a central role in international law's development. Shortly after his appointment to the International Court of Justice, McNair gave a speech to the Grotius Society on 'International Law in Practice'.[116] In it, he appealed to English lawyers to take a deeper interest in international law, arguing that 'English law, one of the most characteristic products of England, and one of her most valuable exports' had not yet 'pull[ed] its weight in establishing the rule of law between nations'.[117] McNair adopts an unapologetically imperialist tone noting that '[w]e have always been great colonisers, and our colonists have taken our law with them. We must not neglect a similar opportunity in the international field'.[118] As a judge of the International Court of Justice, McNair considered himself a custodian of international law, a body of law that he could contribute to not only as an international lawyer but as one trained in British legal method.

C. Law's curators: Reaction of UK scholars

The *Corfu Channel* judgment was handed down in a moment of shifting mindset from a system of unilateral self-help to one of collective security. States had long been accustomed to claiming the right to settle their disputes unilaterally, through mechanisms such as 'just war', self-help, self-protection and indeed self-defence. Just half a century before, Hall had described almost all the whole of the duties of states as subordinated to the right of self-preservation.[119] While the League of Nations, the Kellogg-Briand Pact and the UN Charter had clearly affected a radical change in the law, the relationship between the new Charter regime and classical international law required some navigation. As McNair recognized, collective security required collective revision of the *status quo.*[120] Yet, adoption of this collective mindset was far from widespread, even among UK scholars.

i. The traditionalist: Sir Humphrey Waldock

In his Hague lectures in 1952, Humphrey Waldock described collective security as 'of recent growth and. . .still only half-developed'.[121] Waldock joined those who considered the UN Charter did not displace but merely overlaid existing customary law, with scope for the latter's continuing operation. Yet Waldock potentially saw a greater role for classical international law in the post-Charter era than others. By way of veiled reference to Waldock's writing, Brownlie alluded to the fact that 'certain

[116] McNair, 'International Law in Practice'.
[117] ibid 13. See similar remarks in McNair, 'The Need for the Wider Teaching of International Law', 92.
[118] McNair, 'International Law in Practice', 13.
[119] W E Hall, *International Law* (8th edn, OUP 1924) 322.
[120] Arnold McNair, 'Collective Security' (1936) 17 *British Yearbook of International Law* 150, 164.
[121] Waldock, 'The Regulation of the Use of Force by Individual States', 455.

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jurists have tended to fossilize the "classical Law" of the nineteenth century as *the* customary law and regard those who suggest modifications in that position by treaty or otherwise as having to satisfy a high standard of proof'.[122] For Waldock, international law was a tradition to be handed down and carried forward within the community of international lawyers. The text of new treaties, particularly relatively new and untested ones, should not lightly be interpreted to stop or reverse the flow of this tide of tradition.

Waldock's legal method is described as '[a]nalysis and legal technique', with his writing compared favourably with 'the productions of those writers whose ambitious superstructures of theory did nothing to improve objectivity and tend to divert attention from the existing stock of experience'.[123] Yet his technique is clearly influenced by underlying views on the appropriate direction of the law. Waldock had acted for the UK as legal counsel in the *Corfu Channel* case. As discussed above, the UK had argued before the Court that the words 'territorial integrity or political independence' in Article 2(4) qualified the prohibition of the use of force, despite evidence in the *travaux preparatoires* that these words were inserted at the request of smaller powers to strengthen the prohibition. While acknowledging that the Court in *Corfu Channel* gave 'little encouragement to this line of argument', Waldock persisted in arguing in his academic writing that '[t]he insertion of these words left open the possibility of arguing. . .that an armed intervention which was not calculated to impair territorial integrity or political independence is not a breach of Article 2(4)'.[124]

It is interesting, then, that Waldock takes a directly contrasting methodological approach to the interpretation of Article 51. While he clearly supported a narrow literal interpretation of Article 2(4) based on the plain meaning of the text and disregarding the *travaux preparatoires*, he supported a broad purposive interpretation of Article 51, ignoring the plain meaning of the text and relying almost exclusively on the *travaux preparatoires*. Though the recently-enacted text of the UN Charter provided for an inherent right of self-defence 'if an armed attack occurs', Waldock argues that this did not serve to cut down the customary right and make it applicable only to the case of resistance to an armed attack.[125] He draws on the Charter's *travaux*, insisting that 'as is well known' Article 51 was not inserted for the purpose of defining the individual right of self-defence but of clarifying the position in regard to collective self-defence.[126] Waldock privileges traditional understandings of the scope of self-defence, arguing '[i]t would be a misreading of the whole intention of Article 51 to interpret it by mere implication as forbidding

[122] Brownlie, *International Law and the Use of Force by States*, 216.
[123] ibid 73.
[124] Waldock, 'The Regulation of the Use of Force by Individual States', 493.
[125] ibid 496.
[126] ibid 497.

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forcible self-defence in resistance to an illegal use of force not constituting an "armed attack"'.[127]

Of course, Waldock could not ignore the judgment in the *Corfu Channel* case. Yet, using well-honed common law techniques, he worked to interpret the judgment to his advantage. Despite the fact the *Corfu Channel* case was not framed as a case that implicated either self-defence or self-help, Waldock claimed the case raised the two issues directly, declaring the Court's judgment on both issues to be 'very illuminating'.[128] While he accepted that the Court had 'completely rejected' the UK claim to a limited right of self-help to investigate the cause of its injury and preserve the evidence, he concludes that the 'general principle of self-protection remains untouched by the Charter'. In doing so, he deployed the common law technique of distinguishing, drawing a separation between the claimed right and other persisting rights. Waldock drew a distinction between forcible self-help to obtain redress for rights already violated (rejected by the Court) from forcible self-help to affirm legal rights. On the basis that the Court had not found the UK October passage through the strait to be unlawful, Waldock concluded that the Court's judgment supported the idea that '[a] threat and, indeed, use of force. . .is not contrary to Article 2(4) when it is in affirmation of rights which have been illegally and forcibly denied'.[129] Indeed, he argued that the Court had gone even further, not merely permitting forcible self-help to ensure safe exercise of a right but 'to test the attitude of the wrongdoer *and to coerce it into future good behaviour*'.[130] In Waldock's view, this went close to allowing 'forcible *self-help* without reference to the United Nations'.[131]

In phrasing often used as a badge of honour in connection with England's best international lawyers, Brownlie's tribute to Waldock recognizes that he 'had no deep interest in theory'.[132] Yet Brownlie is quick to add that Waldock was by no means indifferent to the 'world of ideas', that is 'the political and moral concepts and standards at work in society and which influence law-making'.[133] Waldock's interpretation of the *Corfu Channel* case is clearly motivated by his idea that classical international law's recognition of the unilateral right of self-protection should not easily be revoked. Yet he does not enter into discussion of this idea, masking it instead behind an allusion to technical legal reasoning. Very limited authority is cited in support of his interpretation of the *Corfu Channel* judgment. Particularly remarkable is his conclusion based on the judgment that the introduction of troops into foreign territory to

[127] ibid 497.
[128] ibid 499.
[129] ibid 500 (italics removed from original text).
[130] ibid 501.
[131] ibid 501.
[132] I Brownlie, 'The Calling of the International Lawyer: Sir Humphrey Waldock and his Work' (1983) 54(1) BYIL 7, 68.
[133] ibid 73.

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protect nationals, if not property, would be justified, albeit only in 'cases of extreme urgency to prevent irreparable injury'. No authority is cited at this point, with Waldock concluding his discussion by reference to 'the humanitarian consideration'.[134]

ii. The functionalist: Sir Derek Bowett

Deploying terms similar to those used to celebrate Waldock, Sir Derek Bowett is described in tributes as 'a realist and pragmatist, uninterested in theory'.[135] In his famous treatise on self-defence, Bowett describes his own method as 'empirical'.[136] According to Bowett, '[t]he characteristics of the right of self-defence can be ascertained from the writings of jurists, from state practice and from decisions of both municipal and international tribunals'.[137] It is difficult to question the pragmatism of one of the last international legal scholars to have engaged in active service during and in the aftermath of the Second World War. Remarkably, Bowett was on one of the ships that towed the destroyers damaged by mines in the Corfu Channel in October 1946 to Malta for repairs.[138] Just over a decade later, in 1958, Bowett published *Self-Defence in International Law*. Yet despite his self-description of his legal method, it is clear from this treatise that his legal reasoning about self-defence owes less to state practice and more to his underlying view of the systemic function of self-defence. It is notable that in his description of relevant sources, set out above, he gives first billing to scholarship, a prioritisation reflected in his legal writing.

Like Waldock, Bowett situated and interpreted Article 51 self-defence in continuity with pre-Charter law. His description of the nature of self-defence draws predominantly on the writings of early jurists including Vitoria, Grotius and Vattel.[139] Based on the 'the writings of [these] early jurists', he determines that a state's right of self-defence must be correlative to a breach of legal duty owed to that state, a correlation which Bowett considered 'clearly essential if self-defence is to be regarded as a legal concept'.[140] For Bowett, self-defence was essentially connected to legal responsibility and could only be a response to 'conduct by states which is delictual as being in breach of a duty established by international law'.[141] For Bowett, the function of self-defence is to act as a mechanism for the protection of certain essential legal rights of a state.

Bowett was conscious he was writing shortly after the enactment of the UN Charter, when the parameters of the right of self-defence were

[134] Waldock, 'The Regulation of the Use of Force by Individual States', 503.
[135] J Crawford, 'Sir Derek Bowett CBE, QC, FBA (1927-2009)' (2009) 80(1) BYIL 1.
[136] D Bowett, *Self-Defence in International Law* (Praeger 1958) 8.
[137] ibid 169.
[138] Crawford, 'Sir Derek Bowett CBE, QC, FBA (1927-2009)', 2. During the passage, one of these destroyers, the Saumarez, had to be sunk.
[139] Bowett, *Self-Defence in International Law*, 4-8.
[140] ibid 9.
[141] ibid 269.

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speculative. Yet, like Waldock, he is reluctant to sever self-defence from its traditional roots, even where this was inconsistent with the Charter text. According to Bowett, self-defence was not a creation of the Charter but was common to all systems of law.[142] It was a form of self-help conceding to individual members the right 'to take initial measures of protection [of certain essential rights] until the centralized machinery comes into operation'.[143] Its scope in any particular system was connected to the degree of maturity of that system of law, both in terms of the development of legal rights and the effectiveness of centralized machinery.[144]

The connection Bowett draws between self-defence and legal responsibility for delicts leads him to place courts at the centre of his juridical understanding of self-defence. For Bowett, it was essential that the determination of legal responsibility (and commission of a delict) had to be subject to 'eventual review by an impartial organ entrusted with the task of allocating legal responsibility between the states involved'.[145] He identifies the Charter's recognition of objectively-determinable formula of the prohibition of the use of force (rather than the more subjective terminology of 'war') as the moment when the concept of self-defence finally achieved 'juridical connotation' in international law. Yet he concludes his treatise with the sentence, '[t]he right of self-defence can only achieve full recognition in a legal system which embodies the compulsory settlement of the question of legal responsibility on which the whole concept of self-defence depends'.[146]

Against the backdrop of his broader functional interpretation of the right of self-defence and the priority he accords to the role of courts, it is interesting to consider his interpretation of the *Corfu Channel* judgment. Given Bowett's interpretation of self-defence as a mechanism available to states to protect their legal rights, the judgment potentially erodes his conception of the scope of self-defence. Yet Bowett determines that '[t]he judgement is not. . .free from ambiguity'.[147] He deploys the common law method, characterising the precedential remit of the judgment as narrow. While he acknowledges it is possible to interpret the judgment as a condemnation of intervention and self-help, he argues that the precedential effect of the judgment should be confined such that only such interventions as are a 'manifestation of a policy of force' would be unlawful. In his view, this would leave scope for the continuing legality of interventions for the purpose of protecting the legal rights of the intervening

[142] ibid 3.
[143] ibid 3, 195.
[144] ibid 269, 270-271.
[145] ibid 273. Notably he did not consider that the General Assembly or Security Council could perform this role.
[146] ibid 274.
[147] ibid 15.

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state.[148] He argues it is 'inaccurate and misleading' to suggest that the inclusion of the text 'if an armed attack occurs' in Article 51 means that self-defence is confined to the eventuality of an armed attack. For Bowett, the scope of the prohibition on the use of force is defined by Article 2(4), which leaves the traditional right of self-defence unimpaired. The *travaux preparatoires* to Article 51 suggest only that the article should safeguard the right of self-defence, not restrict it and to interpret the text otherwise would 'represent a marked departure from the position under traditional international law'.[149]

Bowett also favours a narrow interpretation of the Article 2(4) prohibition of force, arguing its scope should be qualified by the phrase 'against the territorial integrity or political independence of any state'. He recognizes that this was the argument run by Sir Eric Beckett on behalf of the UK in the *Corfu Channel* case, though adds 'the finding of the Court, against the United Kingdom on this point, made no specific reference either to this argument or indeed to Article 2(4)'.[150] Accordingly, he determines that the judgment is not an authoritative decision on the meaning of Article 2(4) as it makes no specific reference to the Article and is based on general principles.[151] In the absence of 'authoritative decisions' on the meaning of Article 2(4), he then discusses its interpretation in light of accepted rules of construction, concluding that 'the phrase having been included. . .must be given its plain meaning'.[152] In his view, support for this qualified interpretation is strengthened by the fact that giving Article 2(4) 'its plain meaning coincides with the limitations on the obligation of non-intervention which traditional international law recognizes'.[153] For Bowett, 'invasion of territory necessitated by the imminence of an attack from that territory, and justified by the conditions governing the exercise of the right of self-defence under general international law would not be prohibited by Article 2(4)'.[154]

iii. The formalist: Sir Ian Brownlie

Like Waldock and Bowett, Sir Ian Brownlie also privileged the importance of classical international law. Over half his famous 1963 treatise on *International Law and the Use of Force* is given over to a historical perspective on the law, extending from ancient civilizations to the present.[155] For Brownlie, this perspective was important because 'the creation of

[148] ibid 15.
[149] ibid 188.
[150] ibid 151.
[151] ibid 147.
[152] ibid 152.
[153] ibid 152.
[154] ibid 152.
[155] Part III of the treatise is concerned with 'Legal Justifications for the Use of Force in the Modern Law' and even the first two sections of this Part engage with the periods 1920-1939.

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rules of international law is a process which extends over a considerable period of time'.[156] However, unlike Waldock and Bowett, one of Brownlie's main aims in presenting an historical outline of customary law was to demonstrate 'the unsatisfactory and confused state of the customary law' before 1920.[157] Historically, the law had been bound up with the 'amorphous right of self-preservation' and its diffuse character reflected 'the lack of legal regulation of the use of force in the nineteenth century'. By establishing the chaotic state of customary law in the pre-Charter era, Brownlie argued it was less possible to assume that the Charter could be qualified by 'nebulous doctrines derived from the period in which international life was ordered in ways now obsolete'.[158]

As has been discussed, the *Corfu Channel* case addresses the question as to whether certain forms of self-help survived legal developments between 1920 and 1945 in the legal regulation of the use of force. In this respect, though without referring to *Corfu Channel*, Brownlie refutes Waldock and Bowett's interpretations of the scope of the customary right of self-defence on the basis these interpretations 'have little relation to state practice', implicating 'action formerly held to be self-defence, at a time when self-defence was a phrase regarded as interchangeable with "self-preservation" and "necessity"'.[159] While noting the generality of Article 51's reference to 'the inherent right', he invokes the principle of effectiveness against the idea that a broader customary right continues to exist alongside the Charter, asking '[w]hy have treaty provisions at all?'.[160] According to Brownlie, '[t]he phrasing of Article 51 was almost certainly not regarded as a novel development of the law by the delegations at San Francisco, and generally speaking – by 1945 – self-defence was understood to be justified only in case of an attack by the forces of a state'.[161] He concludes that Article 51 has received 'general acceptance' of states.[162]

Brownlie addresses the *Corfu Channel* case more expressly in connection with his discussion of the related principle of self-help. In terms of the scope of forcible self-help, he expresses regret that the Court did not express itself more clearly on the issue. He cautions that the decision may need to be confined to its facts rather than regarding it as 'the source for any propositions of general application concerning the legality of certain acts by states'.[163] He is plainly concerned that the factual basis of the October passage was a forcible assertion of rights, or forcible self-help and makes a (feeble) attempt to consider the possibility that the binding precedential effect of the judgment can be narrowed to rights of passage

[156] Brownlie, *International Law and the Use of Force by States*, 1-2.
[157] ibid 216.
[158] ibid 217.
[159] ibid 274.
[160] ibid 273.
[161] ibid 280.
[162] ibid 280.
[163] ibid 284.

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in straits and territorial waters. Yet he acknowledges that there is 'no logical reason why the doctrine should not extend to forcible exercise of passage on land or of treaty rights'.[164] Faced with this logic, Brownlie can only assert '[i]f, as it would seem to do, the majority Judgment permits the forcible exercise of rights the decision has unfortunate implications' and 'contradict[s] the general trend of legal developments since the appearance of the League Covenant'.[165] According to Brownlie, '[t]o talk of the defence of legal rights is to return to nineteenth-century notions of self-help, albeit in a more respectable terminology'.[166] Rather than trying to interpret or distinguish the decision, he essentially argues that the Court should have come to a different decision and that it would have been 'better if the Court had recognized that forcible affirmation of rights falls under the ban on "the alleged right of intervention"'.[167] Brownlie finds that the Court's condemnation of the 'alleged right of intervention' in the context of the November passage as 'the manifestation of a policy of force' does not help matters as it is 'considerably qualified by the actual decision of the Court on the legality of the passage of 22 October'. In explaining the reduced legal effect of this condemnation, he deploys common law thinking, arguing that 'the value of the pronouncement is decreased by its generality and ambiguity, its character as *obiter dictum*, and the absence of any reference to the provisions of the United Nations Charter'.[168]

Brownlie does not therefore seek to fold the Court's reasoning in *Corfu Channel* into a broader coherent narrative about the direction of the law. An aspect of Brownlie's method was to recognize 'the contours of international problems and to emphasise the dispositive effect that facts may have on legal outcomes'.[169] According to Brownlie, the task of the lawyer was to 'make a sober inquiry with Article 38(1) of the Statute of the International Court of Justice as a guide'.[170] The object of the inquiry was to locate 'the all-important *evidences* of the existence of consensus among states concerning particular rules or practices'.[171] Brownlie's legal method is described as 'sustained technical analysis' which led to identification of 'a series of discrete rules grouped under the rubric of certain general, often imperfect, principles of international law'.[172] The messy flip-side of this focus on 'rules which have received general acceptance by states' was that the lawyer had to recognize this would leave areas of

[164] ibid 287.
[165] ibid 287.
[166] ibid 288.
[167] ibid 288.
[168] ibid 289.
[169] J Crawford, 'Ian Brownlie: 1932-2010' (2012) 11 Biographical Memoirs of Fellows of the British Academy 55, 70.
[170] Brownlie, *International Law and the Use of Force by States*, vii.
[171] Brownlie, *Principles of Public International Law*, 4; Brownlie, *International Law and the Use of Force by States*, vii.
[172] Crawford, 'Ian Brownlie: 1932-2010', 70.

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controversy, doubt and technical lacunae.[173] Here, the duty of the lawyer was to discover and demarcate these areas. Brownlie was firmly of the view that '[t]he Court applies the law and does not make it'.[174] For Brownlie, courts were not the central actors in international law-making and he notes 'a feeling on the part of the founders that the courts were intended to settle disputes as they came to it rather than to shape the law'.[175]

In terms of his broader legal method, Brownlie disparaged working from *a priori* reasoning to fill out law's incomplete canvas, which tended to 'weaken existing norms by subjecting them to theoretical rather than legal analysis'.[176] For Brownlie, theory was supernumerary, producing 'no real benefits and frequently [obscuring] the more interesting questions'.[177] He has been described as not just untheoretical but anti-theoretical,[178] a sentiment displayed in his remark that '[t]here is no doubt room for a whole treatise on the harm caused to the business of legal investigation by theory'. For him, the relevant premise was the 'reality of international law' and the more interesting and necessary inquiry was into the 'performance or efficacy of the law'.[179] Brownlie subscribed firmly to the idea that '[i]n state relations as in other contexts the life of the law has not been logic but experience'.[180] The title of his Festschrift, *The Reality of International Law*, was chosen to reflect his 'unapologetic pragmatism'.[181] Brownlie did not shirk from the idea that he was a formalist in terms of legal method: '[i]f "formalism" be regarded as a synonym for resort to legal method then of course one need not shrink from it'.[182]

iv. The idealist: Sir Hersch Lauterpacht

To compare Brownlie with Lauterpacht is a study in contrast. Lauterpacht saw the legal order in no small part as an effect of judicial imagination.[183] His complex views on the constructive role of judges are set out in the *Function of Law in the International Community* and *Development of International Law by the International Court*. Lauterpacht identified the

[173] Brownlie, *International Law and the Use of Force by States*, vii.
[174] I Brownlie, *Principles of Public International Law* (6th edn, CUP 2003) 20.
[175] ibid 20.
[176] ibid.
[177] I Brownlie, 'International Law at the fiftieth anniversary of the United Nations: General Course on Public International Law' (1995) 255 Recueil des Cours de l'Académie de Droit International 21, 30.
[178] Warbrick, 'The Theory of International Law'.
[179] Brownlie, 'The Reality and Efficacy of International Law', 2.
[180] I Brownlie, 'Recognition in Theory and Practice' in R S J Macdonald and D M Johnson (eds), *The Structure and Process of International Law: Essays in Legal Philosophy, Doctrine and Theory* (Brill 1983) 627.
[181] G Goodwin-Gill and S Talmon, 'Introduction' in G Goodwin-Gill and S Talmon (eds), *The Reality of International Law: Essays in Honour of Ian Brownlie* (OUP 1999) ix.
[182] Brownlie, *International Law and the Use of Force by States*, vii.
[183] M Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870-1960* (CUP 2009) ch 5, 399.

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need for a carefully choreographed separation of roles between judge and scholar. He appreciated that judging involved an exercise in interpretation, recognizing 'the necessity for bold judicial action…in the international sphere'[184] but also the need to shape and alter the law 'without admitting it', that is, 'with caution', 'guided…by existing law; …while remembering that stability and uncertainty are no less of the essence of the law than justice'.[185] The task of the judge was to 'state what the law is'.[186] Scholars, on the other hand, were tasked with explaining the coherence of particular decisions in the broader international legal system. For Lauterpacht, it was appropriate to leave it to 'the writers, and not…the Judge, to place against the background of previous practice and doctrine the rules of law as laid down by the Court'.[187]

Though Lauterpacht is one of the UK's most famous and celebrated international lawyers, he was also intellectually regarded as an outsider in terms of legal method. His (eventually successful) nomination to the International Court of Justice was opposed by the then-Attorney-General Sir Lional Heald, who remarked that 'our representative at The Hague should both be and be seen to be thoroughly British, whereas Lauterpacht cannot help the fact that he does not qualify in this way either by birth, by name or by education'.[188] Sir Ian Sinclair contrasts Lauterpacht – 'above all other things, a scholar whose forte lay in the formulation and exposition of the law' – with Sir Humphrey Waldock, 'the practical man of affairs'. Lauterpacht worked to bridge this divide, seeking to refute the view that a fundamental difference existed between the Anglo-American and continental schools of legal thought.[189] He proposed the (inevitable) development of international law as a 'common law of mankind'. For Lauterpacht, humanitarian ideals and human rights emerged from a specifically British tradition.[190]

Sir Hersch Lauterpacht acted for the UK in the preliminary jurisdictional phase of the *Corfu Channel* case, though he did not do so on the Merits. Lauterpacht the scholar (distinguishing, here, Lauterpacht in his subsequent role as judge of the ICJ)[191] described the Court's judgment on self-help as 'possibly controversial in its comprehensiveness', describing it as an 'emphatic rejection' of the right of intervention.[192] As noted above, other

[184] ibid 77.
[185] ibid 75.
[186] H Lauterpacht, *The Development of International Law by the International Court* (Stevens & Sons 1958) 21.
[187] ibid 89.
[188] Cited in P Sands, 'Global Governance and the International Judiciary: Choosing our Judges' (2003) 56 Current Legal Problems 481, 493.
[189] Lauterpacht, 'The So-Called Anglo-American and Continental Schools of Thought in International Law'.
[190] H Lauterpacht, *International Law and Human Rights* (Praeger 1950) 127-41.
[191] See, in this respect, contributions on Hersch Lauterpacht in the British Yearbook of International Law: C Wilfred Jenks, 'Hersch Lauterpacht: The Scholar as Prophet' (1960) 36 BYIL 1 and G Fitzmaurice, 'Hersch Lauterpacht – the Scholar as Judge – Part I' (1961) 37 BYIL 1 and 'Hersch Lauterpacht – the Scholar as Judge – Part II' (1962) 38 BYIL 1.

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scholars interpreted the judgment somewhat differently. Lauterpacht's interpretation should be read in connection with his urge to be rid of classical rights of intervention and self-help, an interpretation based in his broader theory of international law rather than a reflection of state practice. For Lauterpacht, the right to war recognized in the 18th, 19th and early 20th centuries created juridical objections of a fundamental nature, such that he considered it was 'scientifically more appropriate to regard [the right to war] . . . as inconsistent with a true system of law'.[193] The fact that 'by the exercise of a purely discretionary right of declaring war, a State could with one stroke release itself. . .from all the obligations of international law' 'constituted a radical break in the continuity of the system of International Law and was analogous to the authorisation of a revolution in the very constitution of a state'.[194] The prohibition on the use of force in the Kellogg-Briand Pact removed 'the principal objection to. . .[the] recognition [of International Law] as a system of law'.[195] However, one shortcoming of the Pact was that it left uncertainty as to how far the prohibition of resort to war included measures of force short of war. For Lauterpacht, Article 2(4) corrected this, leaving no further room for doubt. He describes the prohibition in Article 2(4) as 'absolute except with regard to the use of force in fulfilment of the obligations to give effect to the Charter or in pursuance of action in self-defence consistently with the provisions of Article 51 of the Charter'.[196] Without citing the *Corfu Channel* judgment, Lauterpacht states that '[t]erritorial sovereignty, especially where coupled with 'political independence,' is synonymous with territorial inviolability' such that 'a State would be acting in breach of its obligations under the Charter if it were to invade or commit an act of force within the territory of another State, in anticipation of an alleged impending attack or in order to obtain redress'.[197]

Of course, Lauterpacht acknowledged that the right of self-defence was a recognized exception, not only under Article 51 but as 'a permanent limitation of the prohibition of recourse to force in any system of law'.[198] He also recognized that, in the first instance, the decision to have recourse to force should be left to the unfettered judgment of the party which deems itself to be in danger. However, it did not follow from its character as an 'inherent natural right' that states possessed the legal faculty to remain ultimate judges of the justification of their action. Instead he declared it to be a 'general principle of jurisprudence'[199] and a matter of 'elementary principles of interpretation'[200] that this right should be 'controlled by and accountable to a higher authority. . .in a position to act effectively in accordance with its

[192] Lauterpacht, *The Development of International Law by the International Court*, 90.
[193] Lauterpacht, *Oppenheim's International Law: a Treatise*, 178-79 n4.
[194] ibid 179, §52ff.
[195] ibid 196, §52l.
[196] ibid 154, §52a.
[197] ibid 154, §52a.
[198] ibid 187, 52g.
[199] ibid 159, 52b.
[200] ibid 187-88.

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constitution', and was indeed 'a proper subject for impartial determination by judicial or other bodies'.[201]

V. International Law and the Common Law Method

By surveying a variety of responses to a single case, this article seeks to provide a focus through which to understand the legal method of some of the UK's most influential international lawyers. The fact the case occurred at a transitional moment in international law focuses attention on international legal method in a moment of necessary innovation. In this moment, we see British international lawyers draw on a range of techniques that are recognizably part of the common law method, albeit to different extents and with different results. Attachment to this method betrays an interesting psychology of international lawyers at once confident in their centrality to international law's development, yet unable to shake the lingering anxiety of being confined to English law's periphery. This final section examines the implications of the common law method for the development of international law and the international legal system. It also provides the opportunity to reflect on the extent to which an unthinking application of this method has the potential to impact international law's community, authority and function, making international law less international, less authoritative and less purposeful.

A. International law's community: Bottom-up or imperialist method?

The common law method seeks to connect the development of rules to a history of social practice. As discussed above, one of the aims in doing so is to establish a continuous bond between law's development and the community to which it is applied. There are at least two problems with this idea applied to the international legal sphere. First, it presupposes the existence of a fair amount of practice from which generalizable rules may be forged. In 1947, Georg Schwarzenberger, then Reader in International Law at University College London, wrote his piece on 'The Inductive Approach to International Law'.[202] Schwarzenberger noted that the small number of states and the sporadic character (and at times secret nature) of legal relations between those states explained why, in the international sphere, 'a considerable time had to elapse before a body of material suitable for inductive treatment could accumulate'.[203] According to Schwarzenberger, at the time he was writing, the significant increase in available material of state practice – 'not to speak of the multitude of decisions on international law by international and municipal courts' – 'created the possibility of a different

[201] ibid 188, 52g.
[202] G Schwarzenberger, 'The Inductive Approach to International Law' (1947) 60 HLR 539.
[203] ibid 541.

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approach to international law'.[204] He called international lawyers away from 'the dreamland of deductive speculation to the reality of hard work on raw material waiting for the workman'.[205] Appreciating the enormity of the task of gathering the immense material of state practice, Schwarzenberger proposed that 'the most that can be done at this stage is a systematic analysis, country by country, of the attitudes of the subjects of international law to the rules of international customary law' such that it was possible to 'erect the superstructure of a comparative analysis of state practice'.[206]

This final observation highlights the second problem with the application of common law method to the international sphere. Schwarzenberger's view was that the task could only adequately be achieved if it was a collective enterprise by scholars from a range of different states, thereby unearthing the practice of the *community* of members to which it was to apply. While the challenge was taken up by British international lawyers, the result is a lopsidedness that threatens to collapse (or at least undermine) the whole structure. The practice discussed is very often disproportionately the practice of the United Kingdom and its closest allies. While some might construe the result as imperialist, it might instead be appropriate to interpret the common law method more generously as an exercise in wishful thinking. The hope was that where the British might lead, the rest of the academic world would follow, feeding the practice of other states into the collective enterprise. McNair's first edition of his famous *Law of Treaties* aimed to 'state the law relating to treaties from an international aspect and in the light of international sources, while at the same time preserving the point of view of the average common lawyer'. However, he acknowledges in his first edition that his 'sources are almost entirely native [and]...does not profess to include all the relevant and available materials'.[207] His hope was that 'its publication (and the publication of similar volumes in other countries) will make it easier to write [a treatise upon the international law of Treaties] in the future'. Other influential British publications reflect similar limitations. The 594 pages of Oppenheim's first volume cites to only 54 cases and incidents.[208] Brownlie was (in theory) highly concerned with the 'parochialism' and 'insularity' evident in the narrow range of municipal legislation and state practice examined by many textbooks on international law.[209] In his treatise on the use of force, he expressly attempted 'to be comprehensive in approaching the practice of states and to avoid offering the practice of a

[204] ibid 544.
[205] ibid 562.
[206] ibid 564.
[207] A McNair, *The Law of Treaties* (OUP 1938) viii. This first edition was part of a project directed by Professor Hyde of Columbia University and was intended to be one of a group of three books stating the law of treaties as understood in the United Kingdom, France and Germany respectively. Unfortunately, the French and German books never materialised: DHN Johnson, 'Book Review: The Law of Treaties by Lord McNair' (1962) 11 ICLQ 596.
[208] W M Reisman, 'Lassa Oppenheim's Nine Lives' (1994) 19 Yale Journal of International Law 255, 265.
[209] I Brownlie, 'The Teaching of International Law' (1972) 2 Georgia Journal of International and Comparative Law 97, 98.

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particular group of states as evidence of generally accepted rules of public international law'.[210] Yet his detailed history of the legal regulation of the use of force by states is almost entirely European (bar two pages devoted to 'Some Ancient Civilizations') and, while the Table of Cases reflects references to a single case each from Burma, Malaya, Palestine, Singapore, China and the USSR, there are references to over 50 cases from England, the Netherlands and the United States. According to Russian international legal scholar Grigory Tunkin, Brownlie's work was in the mainstream of international legal doctrine, approaching international law 'from the position of the Anglo-American common law, and a detailed analysis of international and national, principally Anglo-American, practice in the realm of international law'.[211]

Attempts by British international lawyers to import the common law method into international legal thinking begins to look like straightforward domination where that history of practice is only selectively considered. It is interesting to consider A V Dicey's scruples in exporting English common law to the subcontinent. Dicey was concerned that, in order for the qualities of the common law to be truly instantiated, they had to emerge from the bottom up through gradual processes of legal development, which in Britain had been a 'steady, centuries-long civilisational progression'.[212] Its transplant to foreign territories risked being oppressive 'where foreign tribunals deal with a society of which they do not understand either the habits or the ideas'.[213] Dicey cautioned that this 'sudden creation of legal order' in foreign territories had a 'dark side [that] may not be visible to Englishmen, but it will certainly be seen by future historians'.[214] Similarly, use of the common law method as a device through which to reconcile practice and justice in international law without taking account of civilizational difference risks being more than a hermeneutic stance and starts to look more like a powerful ideological tool through which to present the British viewpoint as a unitary, binding and trans-historically valid legal vocabulary.[215] The adoption of the common law method may offer an affirmative answer to whether international law is law but, in doing so, potentially deprives it of its character as 'international'.

[210] Brownlie, *International Law and the Use of Force by States*, vii. For some the selectivity is considered less problematic. In his chapter on the history of international law, Stephen Neff (barely) regrets that '[i]t will. . .not be possible to give more than the most token attention to the developments outside the Western mainstream': S C Neff, 'A Short History of International Law' in M Evans (ed), *International Law* (5th edn, OUP 2018) 3.

[211] G I Tunkin, 'Introduction' to I Brownlie, *Mazhdunarodnoe parvo (v dvukh knigakh)*, translated from 2nd English edition, cited in W E Butler, 'English International Legal Doctrine in Soviet Translations' (1981) 51 BYIL 253, 257.

[212] Lino, 'The Rule of Law and the Rule of Empire', 763.

[213] A V Dicey, 'Wheeler's Short History of India' (1880) 31 Nation 240, 241, cited in Lino, 'The Rule of Law and the Rule of Empire', 762.

[214] ibid.

[215] Iurlaro, *The Invention of Custom*, 104.

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B. International law's authority: The 'mind's-eye' court

To the English legal mind, accustomed as it is to judicial authority, international law's state of 'ordered anarchy' creates considerable intellectual anxiety. On the occasion of the UK's signature of the Optional Clause of the Statute of the Permanent Court of International Justice, the British Secretary of State expressed His Majesty's Government's view that, by comparison to the 'continental' method of codification, 'the method of building up a body of law by a series of legal decisions, a method which produced the English Common Law, may be the more suitable for at any rate some important branches of the Law of Nations'.[216] Underlying this proposal is a hope immanent also in the method adopted by British international lawyers: that, by treating international law as an emanation of judicial decisions and judicial reasoning akin to the common law, international law might be transformed into a system with a commensurate degree of objectivity, consistency and flexibility. An imagined court is seemingly always in the mind's eye of the British international lawyer interpreting or developing international law. This manifests itself in two interrelated ways: first, a disproportionate focus on judicial decisions as a source of international law; and secondly, deployment of common law judicial reasoning, including techniques such as binding precedent and analogy.

It is clear from the writings of the practitioners and scholars surveyed above that courts have pride of place in their accounts of international law's sources. It is fittingly in the English tradition that McNair and Lauterpacht chose to expend their labours on collating a digest of the case law of international and national courts rather than alternative material as evidence of international law.[217] For scholars such as Bowett and Lauterpacht, international law's authority – or its quality as 'law' – was deeply connected to developing mechanisms for its objective determination, of which courts were the best example.[218] Schwarzenberger expressed 'little doubt that international courts, and especially the two world courts, should have pride of place in the hierarchy of the elements of law-determining agencies'.[219] He considered that 'the primary emphasis on decisions of international courts provides the necessary yardstick by which the subjectivism of state practice can be measured'.[220] Schwarzenberger's book on *International Law as Applied by International Courts and Tribunals* has been described as exhibiting an 'almost touching faith in the "objectifying" capacities of the World Court to create international law'.[221] Jurists from other legal traditions describe the British method as embodying an exaggerated regard for the judicial function of international law. Soviet jurist Grigory Tunkin remarked

[216] 'Permanent Court of International Justice: Memorandum on the Signature by the Majesty's Government in the United Kingdom of the Optional Clause of Statute' (1931) 25(2) AJIL 82, 88.
[217] McNair and Lauterpacht, Preface.
[218] ibid 259.
[219] Schwarzenberger, 'The Inductive Approach to International Law', 553.
[220] ibid 570.
[221] Crawford, 'Public International Law in Twentieth Century England', 683.

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upon the '[b]ourgeois, and perhaps especially the English doctrine of international law, [treating] the question of the operation of international law chiefly on the plane of its application by international courts and arbitral tribunals'.[222] In his introduction to the Soviet translation of Brownlie's textbook, Tunkin described Brownlie as a 'jurist of the English school' who exaggerated the significance of judgments and advisory opinions of the ICJ and arbitral awards.[223] For Tunkin, this method did 'not reflect the real role of international law in international life', touching upon 'merely an insignificant sphere of the functioning of international law'.[224]

A related characteristic of the British method is the adoption of common law judicial reasoning, which can extend to a recognition of the common law doctrine of precedent, arguably beyond parameters formally recognized by international law. According to the terms of the Statute of the International Court of Justice, judgments of the International Court of Justice 'have no binding force except between the parties and in respect of the particular case'.[225] Notwithstanding this, the case note on the *Corfu Channel* case in the British Yearbook of International Law remarks that '[t]he relevant sections in text-books dealing with intervention and self-help will require careful rewriting in the light of the Court's Judgment'.[226] It is clear that, for many of the British international lawyers surveyed above, the Court's judgment was considered to have authoritative reach well beyond the immediate parties. For example, despite the fact that Eric Beckett had argued for a contrary position, once the Court handed down its judgment, Beckett advises the UK government this legal position was now foreclosed. While Waldock and Bowett adopt in their writing legal positions seemingly in conflict with the Court's judgment, they understand they cannot ignore the authority of the judgment but instead engage in rather elaborate efforts to distinguish the Court's findings.[227]

Judicial decisions, particularly those of the Permanent Court of International Justice and International Court of Justice, tend to be treated by British international lawyers as binding precedents despite the fact there is no formal doctrine of precedent in international law. It is clear that some authority is granted to judicial decisions in Article 38(1)(d) of the ICJ Statute as a 'subsidiary means for the determination of rules of law'. However, British international lawyers have exhibited a

[222] Butler, 'English International Legal Doctrine in Soviet Translations', 260.
[223] ibid 259.
[224] ibid 260-61.
[225] Statute of the International Court of Justice, Article 59. Lauterpacht suggests this broad wording was essentially concerned to clarify decisions would not bind those exercising a right of intervention under Article 63 of the Statute: Lauterpacht, *The Development of International Law by the International Court*, 8.
[226] J Mervyn Jones, 'Corfu Channel Case: Merits' (1949) 26 BYIL 447, 453.
[227] Waldock's respect for judicial precedent is also evident in Brownlie's anecdote that 'when in the *Anglo-French Continental Shelf* case the United Kingdom presented arguments very similar to those he had made as Counsel in 1969, Waldock, as arbitrator, rejected them': Brownlie, 'The Calling of the International Lawyer', 34.

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tendency to elevate the status of judicial decisions from subsidiary to determinative status. Brierly uses the title 'Judicial precedents' to describe the import of Article 38(1)(d), explaining that 'the English theory of [the] binding force [of judicial decisions] is a natural tendency of all judicial procedure'.[228] Fitzmaurice sought to draw a distinction between the idea of ICJ judgments as 'authority' though not necessarily 'authoritative', albeit going on to say that 'even controversial [decisions] tend in the course of years to be generally regarded as law'.[229] In his view, the judicial or arbitral decision 'must be regarded as having a special status that differentiates it from other material sources. . .at least a quasi-formal source [or]. . .sources which tribunals are bound to take into account, even if they are not bound to follow them; so that, if the tribunal concerned does not follow a given decision, it must at least be in a position to distinguish or refute it on specific grounds'.[230] Lauterpacht too considers that even if, in law, judicial decisions are merely a subsidiary source, '[i]n fact they are to a substantial degree identical with the sources of law enumerated in the first three paragraphs of Article 38'.[231] While acknowledging that, on the one hand, the absence of a legislative process in the international sphere left 'no room for rigid veneration of precedent',[232] on the other hand, he argued that reliance on precedent was even more compelling in the international sphere 'in keeping with the ever-present requirement of certainty in the administration of justice, [and] with the necessity of avoiding the appearance of any excess of judicial discretion'.[233] In 1967, Robert Jennings remarked that since the 'judicial decision has become so important in the development of international law it is surprising that relatively so little has been done to elaborate principles governing the use of precedents in international law'.[234] This was a task taken up by common-law-trained lawyer and judge Mohamed Shahabuddeen in 1996 in his book on *Precedent in the World Court* (fittingly with a foreword by Jennings), in which he concludes that the Court's judgments are 'no less authoritative than are decisions of the House of Lords'.[235]

[228] JL Brierly, *The Law of Nations* (5th edn, Clarendon Press 1955) 64.

[229] G Fitzmaurice, *The Law and Procedure of the International Court of Justice* (Grotius Publications 1986) xxxii.

[230] G Fitzmaurice, 'Some Problems Regarding the Formal Sources of International Law' in F M van Asbeck and others (eds), *Symbolae Verzijl* (Martinus Nijhoff 1958) 172-3.

[231] Lauterpacht, *The Development of International Law by the International Court*, 22.

[232] ibid 19. See also Lauterpacht, 'The So-Called Anglo-American and Continental Schools of Thought in International Law', 57.

[233] ibid 14.

[234] R Jennings, 'General Course on Principles of International Law' (1967) 121 Recueil des Cours 342. He goes on to say that 'international law could here benefit from a consideration of the techniques which the common law – the case law *par excellence* – has evolved for dealing with this question. . .in particular the extraction of the *ratio decidendi* of the case and its differentiation from *obiter dicta*' (342-43).

[235] Shahabuddeen, *Precedent in the World Court*, 239.

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Another form of reasoning often adopted by British international lawyers is that of analogy. Analogical reasoning presumes the idea of a legal system that is relatively complete and sufficiently determinate.[236] For British international lawyers, analogy has been regarded as a useful technique to address perceived deficiencies in international law, namely its incompleteness and decentralized nature.[237] Watts and Jennings emphasize that international law 'may now properly be regarded as a complete system' such that 'every international situation is capable of being determined as a matter of law, either by the application of specific legal rules where they already exist or by the application of legal rules derived, by the use of known legal techniques, from other legal rules or principles'.[238] In circumstances where it is beyond the capacity of any legislature to address novel and constantly changing conditions, Gerald Fitzmaurice noted the particular importance of courts and judicial reasoning. Fitzmaurice recognized that, '[i]n these circumstances, international tribunals, and in particular one having the prestige of the International Court, have a special role to play in supplying the elements of innovation necessary to the good health of any legal system, and in resolving otherwise irresolvable conflicts of state practice by a "clarification" of the law, which, be it noted, frequently involves in fact, though never in theory, an element of innovation'.

C. International law's purpose: Anti-theoretical inclinations

Reading in memoriam tributes to some of the UK's most influential international lawyers, including Derek Bowett, Humphrey Waldock and Ian Brownlie, it is curious to find a consistent thread celebrating both the pragmatism of these lawyers and their distaste for theory. As discussed above, pragmatism and its anti-theoretical corollary reflect characteristics that are generally associated with the common lawyer, connected to a desire to preserve law's objectivity.[239] Evoking a similar sentiment, Schwarzenberger explained that the pragmatism of British international lawyers stemmedfrom a desire to build their career's work from the concrete material of state practice, rather than 'producing a beautiful spiral in the air, coming from nowhere and disappearing in the clouds'.[240] At times, the hostility to theory seems to derive from somewhere more personal and altogether less rational. It could be that the threat posed by English jurisprudes such as John Austin and HLA Hart, relegating international law to the vanishing point of law, left international lawyers with a personal score to settle. Beware the jilted lawyer,

[236] F Bordin, *The Analogy between States and International Organizations* (CUP 2018) 33.
[237] Bordin, *The Analogy between States and International Organizations*, 31.
[238] A Watts and R Jennings (eds), *Oppenheim's International Law* (9th edn, OUP 1992) 12-13.
[239] P Atiyah, *Pragmatism and Theory in English Law* (The Hamlyn Lectures (39th Series) 1987).
[240] Schwarzenberger, 'The Inductive Approach to International Law', 570.

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Brownlie seems to say, as he remarked in his Hague lectures that '[i]n spite of considerable exposure to theory, and some experience in teaching jurisprudence, my ultimate position has been that, with one exception, theory produces no real benefits and frequently obscures the more interesting questions'.[241]

There are at least three problems with the anti-theoretical inclination of certain British international lawyers. First, much of international law's substance can be missed in a methodological focus on the elaboration of rules through their practical application in particular cases. For Schwarzenberger, there was no more effective way to focus international law's development than through judicial resolution of disputes, explaining 'there is a world of difference between practicing shooting with dummy ammunition on a wooden target and firing in earnest with live ammunition on a living target'.[242] As Fitzmaurice explains, 'justice is seldom achieved by directly aiming at it: rather it is a by-product of the application of legal rules and principles, a consequence of the general order, certainty and stability introduced into human and international relationships through the regular and systematic application of known rules and principles'.[243] Yet, while there may be an appealing logic to this pragmatic method, concrete cases are not subject to judicial resolution in international law in the same routine manner as they are in domestic law. Reducing international law to individual cases threatenes to distort and obscure its nature as a collective enterprise, hollowing out its substance and introducing the danger that the whole subject will 'dissolve into a wilderness of single instances'.[244]

The second problem is that the anti-theoretical affectation has been adopted in rather a more sweeping way by British international lawyers than by domestic common lawyers, adopted by both practitioners and scholars. Brierly recognized how the training of English lawyers leads them to 'exalt the function of the judge [and]...deprecate that of the text-writer'.[245] This has created particular problems in international law where many of the most influential scholars have also been practitioners, including Foreign Office legal advisers, counsel before the ICJ and ICJ judges. The British international legal practitioner-scholar assumes an almost Jekyll and Hyde identity, working constantly to surface the exalted identity and trying to repress the other. There is a sense from the regular refrain of 'distaste for theory' in tributes to these alloyed professionals

[241] Brownlie, 'International Law at the fiftieth anniversary of the United Nations', 26-27. His one exception was Hans Kelsen's determination that the ultimate source of legal obligation lay outside the law, entrenching Brownlie in his conclusion that the basis of legal obligation was no concern of lawyers.

[242] Schwarzenberger, 'The Inductive Approach to International Law', 554.

[243] G Fitzmaurice, 'The United Nations and the Rule of Law' (1953) 38 Transactions of the Grotius Society 135, 147.

[244] C Warbrick, 'Brownlie's Principles of Public International Law: An Assessment' (2000) 11 EJIL 621, 633.

[245] Brierly, *The Law of Nations*, 66.

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that they felt the need to prove their connectedness to 'real world' practice, edging out opportunities for deeper theoretical thinking that might inform that practice. This has not served the cause of international law.

A third related problem is that the pragmatic or anti-theoretical approach makes a disingenuous claim to objectivity. It is clear from the very different analyses by Waldock, Bowett, Brownlie and Lauterpacht to the *Corfu Channel* case that – while three of the four eschewed the influence of theory – each was motivated by different factors attributable not to practice but to well-developed (if sometimes implicit) positions on the tradition, function and value of self-help, self-protection and self-defence in the international legal system. In the common law context, the idea that the common law is discovered not made is accepted as a 'childish fiction'[246] believed only by 'those with a taste for fairy tales'.[247] This legal fiction is less damaging in a legal context already well supported by political and legal theory. However, the impact is more problematic where the effect is not simply to mask but to suppress deeper discussion of the method through which international law is developed. Corralling state practice without attention to law's purpose, function and system would seem to encourage the very arbitrariness that pragmatism strives to avoid. Laws without rational purpose are no better than mindless habits or whims.[248] Practice and theory should not be regarded by international lawyers as binary or opposable terms. As Fitzmaurice recognized, 'the goal of international law in the future is as much bound up with certainty and stability as with flexibility and progress, but. . .both are necessary'.[249]

VI. Conclusion

For better or for worse, the 'English school' or 'British tradition' of international law has eluded systematization or definition. By focusing in on the responses of a UK legal adviser, a British judge on the International Court of Justice and influential scholars to the *Corfu Channel* case, it is possible to identify clear synergies in the mainstream legal method of British international lawyers. It should not be surprising that this method follows in the common law tradition, displaying its three key hallmarks of connection to social practice, focus on courts and an anti-theoretical tendency. Recognition of these characteristics helps us to understand the distinctive contribution of British approaches to international law and the work the common law method has done in strengthening and shaping international

[246] J Austin, *Lectures on Jurisprudence of the Philosophy of Positive Law* (5th edn, first published 1863, R Campbell 1885) 634.

[247] Lord Reid, 'The Judge as Law-maker' (1972) 12(1) Journal of the Society of Public Teachers of Law 22.

[248] G Postema, *Bentham and the Common Law Tradition* (OUP 1986) 334.

[249] G Fitzmaurice, 'The Future of Public International Law' (1973) Livre du Centenaire of the Institute de Droit International 208.

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law. Analysis in terms of these characteristics also assists in understanding the more problematic implications of their application in the international legal context. The common law method has consequences for the structure and direction of the international legal system, including the parameters of its community, the site of its authority and the role of theory in its development. Reflection on these strengths and weaknesses helps us better understand British contributions to international law. Paradoxically, the route to a more universal international law requires us first to understand the ways in which it is plural.

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