



City Research Online

City, University of London Institutional Repository

Citation: Fahey, E. ORCID: 0000-0003-2603-5300, Odermatt, J. and O'Loughlin, E. (2019). Whose Global law? Comparative, Regional and Cyber Approaches to Law-Making (City Law School (CLS) Research Paper No. 2019/02). London, UK: The City Law School.

This is the published version of the paper.

This version of the publication may differ from the final published version.

Permanent repository link: <http://openaccess.city.ac.uk/id/eprint/22706/>

Link to published version: City Law School (CLS) Research Paper No. 2019/02

Copyright and reuse: City Research Online aims to make research outputs of City, University of London available to a wider audience. Copyright and Moral Rights remain with the author(s) and/or copyright holders. URLs from City Research Online may be freely distributed and linked to.

City Research Online:

<http://openaccess.city.ac.uk/>

publications@city.ac.uk



THE CITY
LAW SCHOOL
CITY, UNIVERSITY OF LONDON
— EST 1894 —

Academic excellence for business and the
professions



City Law School Working Paper 2019/02

Whose Global law? Comparative, Regional and Cyber Approaches to Law-Making
Report of the CLS Global Law Research Series 2019

ELAINE FAHEY, JED ODERMATT AND ELIZABETH O' LOUGHLIN

August 2019

www.city.ac.uk

ELAINE FAHEY, JED ODERMATT AND ELIZABETH O' LOUGHLIN

The City Law School

This text may be downloaded for personal research purposes only. Any additional reproduction for other purposes, whether in hard copy or electronically, requires the consent of the author(s). If cited or quoted, reference should be made to the name(s) of the author(s), the title, the number, and the working paper series

All rights reserved.

© 2019

The City Law School Working Paper Series are published by The City Law School, City University London, Northampton Square, London, EC1V 0HB.

An index to the working papers in The City Law School Working Paper Series is located at:
www.city.ac.uk/law/research/working-papers

WHOSE GLOBAL LAW? COMPARATIVE, REGIONAL AND CYBER APPROACHES TO LAW-MAKING

City Law School Global Law Summer Series Report 2019

Elaine Fahey, Jed Odermatt and Elizabeth O' Loughlin*

Abstract

The 2019 Global Law Research Dialogue Series convened by Elaine Fahey, Jed Odermatt and Elizabeth O'Loughlin was entitled 'Whose Global Law? Comparative, Regional and Methodological Lenses'. The series focused on three elements: 1) comparative law approaches to the study of global law, 2) regional approaches to law-making, 2) cyber law-making and methodology, as topical case studies, political problems or eternal legal methodology issues warranting discussions and reflections. The thematic areas selected in 2019, including one case study (Cyber), were chosen for their capacity to generate deliberation as to the global and its complex intersection with inter alia public, private, regional, criminal law and international law – not a conclusive list. The distinctive views of comparative public law and public international law continue to be distinct and separate strands of research warranting further reflection. In keeping with the aims of the series, the 2019 instalment brought together an array of scholars from public and private law, governance, science and technology, political economy and practice to reflect upon our understanding of law beyond the Nation State.

Key words: Global; comparative law; regional approaches; public international law; cyber law; methodology; law beyond the state

Introduction

1. [Global Law@City](#) is an interdisciplinary research series which takes places annually in the Spring/Summer semester at City Law School and is now in its fourth year. The seminars, dialogues, book talks and conferences have a broad mix of speakers approaching the idea of law beyond the State, from a variety of perspectives and approaches. The series has no fixed themes or agenda other than to act as a vibrant forum to discuss the 'global'. It is deliberately conducted at the end of the academic year to allow intellectual space and a forum for new works in progress or new publications to be discussed in a relatively informal and open environment. Global Law@City is additionally run as a collaboration between the International Law and Affairs Group (ILAG) and the Institute for the Study of European Law (ISEL) but also seeks to include public and private law scholars working at City where possible and expand the diversity of scholars involved.

* CITY LAW SCHOOL, CITY, UNIVERSITY OF LONDON.

2. The 2019 Global Law Research Dialogue Series convened by Elaine Fahey, Jed Odermatt and Elizabeth O'Loughlin was entitled 'Whose Global Law? Comparative, Regional and Methodological Lenses'. The series focused on three elements: 1) comparative law approaches to the study of global law, 2) regional approaches to law-making, 2) cyber law-making and methodology, as topical case studies, political problems or eternal legal methodology issues warranting discussions and reflections. The thematic areas selected in 2019, including one case study (Cyber), were chosen for their capacity to generate deliberation as to the global and its complex intersection with inter alia public, private, regional, criminal law and international law – not a conclusive list. The distinctive views of comparative public law and public international law continue to be distinct and separate strands of research warranting further reflection. In keeping with the aims of the series, the 2019 instalment brought together an array of scholars from public and private law, governance, science and technology, political economy and practice to reflect upon our understanding of law beyond the Nation State.¹

Event 1: Comparative Methodologies and Global Law

Introduction

3. The process of globalisation has fundamentally changed the purpose and remit of international law, fuelling a mounting interaction between international and domestic law and politics. The world order, and by extension the reach and limit of public authority, is increasingly globalised, privatised, and individualised, as a multitude of actors (state, non-state, public, private, individuals) now operate and make meaningful contributions to the legal and political world. Globalisation 'literally turns the world inside-out, nationalizing international law and internationalizing national law'.² This has given rise to greater convergence over, for example, the content of domestic constitutions,³ and the jurisprudence of domestic and international judicial decisions.⁴ Any use of the term 'global

¹ All events were free and open to the public in order to ensure its accessibility, topicality and diversity and featured a broad mixture of national and international speakers, the organisers and City scholars so far as possible.

² Anne-Marie Slaughter, 'Governing the Global Economy Through Government Networks' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 177.

³ Jiunn-Rong Yeh and Wen- Chen Chang, 'The Emergence of Transnational Constitutionalism: Its Features, Challenges and Solutions' (2008) 27(1) *Penn State International Law Review* 87, 97. On the influence of the international rights regime upon the spread of formal human rights into national constitutions, see Zachary Elkins, Tom Ginsburg and Beth A Simmons, 'Getting to Rights: Treaty Ratification, Constitutional Convergence, and Human Rights Practice' (2013) 54(1) *Harvard International Law Journal* 61, 63.

⁴ This can be evidenced in a number of ways: through domestic judicial references to international law and norms, including the decisions of international courts and tribunals; through domestic judicial references to the decisions of foreign courts and foreign law; through international courts' references to the decisions of other international courts; and through international courts' references to the decisions of domestic courts and laws. See generally, Anne-Marie Slaughter, 'Judicial Globalisation' (2000) 40(4) *Virginia Journal of International Law* 1103; and Sujit Choudhry, *The Migration of Constitutional Ideas* (CUP 2007).

law', however, has come with stark warnings. For example, it suggests that there is one single global law to talk of, when its use and meaning is deeply ambiguous.⁵ Those who study and engage with global law, rather than studying a settled concept, must accept it as a 'pattern of heavily overlapping, mutually connected and openly extended institutions, norms and processes', aware that the term 'may suggest identity where there is multiplicity, uniformity where there is diversity, closure where there is opening, simplicity where there is complexity, order where there is disarray, agreement where there is conflict, achievement where there is aspiration'.⁶

4. Comparative law scholarship plays a central role in studying the contours of these complexities, and can be counted upon to help identify, explain, and add nuance to any claims of global norm convergence across and within jurisdictions, disciplines, processes, and institutions.⁷ The comparative law endeavour, though, throws up complex methodological questions. Indeed, the field is known to lack settled explanations of its purpose or methods, these varying so substantially.⁸ Further, the comparator must be conscious of their own biases, for '[c]omparative analysis of law is a serious political act – does it not ascertain the other for me and inscribe him to the point where what I write becomes the other's legal identity?'⁹
5. On 18 June 2019 City Law School kicked off the 2019 [Global Law@City](#) interdisciplinary research dialogue series. This first event focussed on the question of [comparative methodologies and global law](#), and saw three leading scholars, [Veronika Fikfak](#) (University of Cambridge), [Liora Lazarus](#) (University of Oxford), and [Jacco Bomhoff](#) (London School of Economics), share their extensive expertise in methodological approaches to comparative law. The event considered 3 core areas: 1) *Comparative empirical approaches to quantifying global pain and suffering*, 2) *comparative dysfunctionism-legal failures* and 3) *Global perspectives on local knowledge*.

I. What are 'empirical' international approaches to quantifying pain and suffering?

6. The event began by hearing from Fikfak on her work, funded by the Economic and Social Research Council and the Newton Trust, which used quantitative and qualitative research methods to understand how the European Court of Human Rights (ECHR) determines compensation in human rights claims. Fikfak shared insights on navigating the design of

⁵ William Twining, *Globalisation and Legal Scholarship: Montesquieu Lecture 2009* (Nijmegen: Wolf Legal Publishers, 2011) 17-28.

⁶ Neil Walker, *Intimations of Global Law* (CUP 2015) 2, 16.

⁷ In the field of comparative constitutional law, see Dennis Davis, Alan Richter, and Cheryl Saunders (eds), *An Inquiry into the Existence of Global Values: Through the Lens of Comparative Constitutional Law* (Hart Publishing 2015); Benedikt Goderis and Mila Versteeg, 'The Diffusion of Constitutional Rights' (2014) 39 *International Review of Law and Economics* 1; and Rosalind Dixon and Eric A Posner, 'The Limits of Constitutional Convergence' (2011) 11(2) *Chicago Journal of International Law* 399.

⁸ Esin Örucü, 'Unde Venit, Quo Tendit Comparative Law' in Andrew Harding and Esin Örucü (eds), *Comparative Law in the 21st Century* (Kluwer 2002) 1-6.

⁹ Pierre Legrand, *Fragments of Law-as-Culture* (WEJ Tjennk Willink 1991) 84.

a large-scale empirical project. As a doctrinal lawyer herself, she cautioned that from the outset it should be determined whether the research question cannot be answered through doctrinal analysis alone. In this instance, it is the practice of the ECHR for the remedy to be discussed in three short sentences at the bottom of each judgment finding a violation, and the Court has remained silent on the principles it follows in determining compensation.¹⁰ Therefore doctrinal analysis alone reveals very little, driving Fikfak to construct a project which quantitatively and qualitatively studied the jurisprudence of the ECHR in order to discern principles from its practice. The quantitative portion of the study required the coding and empirical analysis of a dataset of 12,000 cases, followed up by interviews with legal practitioners involved with the work of the Court, and with current judges, in order to help understand and analyse variables and patterns within the dataset.

7. Fikfak stressed the importance of ensuring that the framing of the research design in studies of this nature is theoretically informed. Her initial research revealed three general approaches: victim-centred theories, constitutional justice-oriented theories, and theories which focus upon the status of the ECHR as an international court. Victim-centred approaches emphasise remedial justice; the primary function of the court is to rectify the wrong done to the individual victim. Such an approach focuses upon the personal circumstances of the victim, and how they perceive their own suffering, in recognition of the fact that all rights infringements assault the dignity and equality of the victim. A constitutional justice focus envisages the Court as primarily concerned with articulating the contents of the rights. The importance of the judgment, then, is less in the remedy, and more in the finding of a violation. The international court theory focusses upon the Court's role as a supranational actor capable of distilling standards and triggering reform at the domestic level.¹¹ These three theories provided a framework from which research questions and hypotheses could be extrapolated. This informed the coding design for the empirical analysis of the cases that would capture, for example, whether there were changing patterns in remedies granted to particularly vulnerable groups, whether there were variations between violations of different rights, or whether there were variations depending upon the infringing state. Fikfak shared some unexpected findings, including that the individual circumstances of the victim (e.g. age, gender, disability) does not impact the calculation of the remedy, and that when it comes to persistent non-compliance 'the Court's approach makes violations for frequent violators cheaper and turns the cost-benefit analysis upside down'.¹²

¹⁰ Veronika Fikfak, 'Compensation for Human Rights Violations' (Impact Pub 2017) 7.

¹¹ On general theories of remedies, see Dinah Shelton, *Remedies in International Human Rights Law* (3rd ed, OUP 2015) 19. A constitutional justice analysis of the ECHR has been provided in Alec Stone Sweet and Clare Ryan, *A Cosmopolitan Legal Order: Kant, Constitutional Justice, and the European Convention on Human Rights* (OUP 2018). On the power of international courts to influence and alter domestic institutions, see Anne-Marie Slaughter and William Burke-White, 'The Future of International Law is Domestic (or, The European Way of Law)' (2006) 47(2) *Harvard International Law Journal* 327.

¹² Veronika Fikfak, 'Changing State Behaviour: Damages before the European Court of Human Rights' (2018) 29(4) *European Journal of International Law* 1091, 1111-1112.

8. Fikfak concluded with a reflection upon some ethical challenges that arose in the course of the study. She shared her anxiety that a number of her findings would undermine the work of Court, at a time when anti-ECHR and anti-rights rhetoric continues unabated. In order to tackle this dilemma, she presented the data to judges and officials at the Court a year before publishing the results, so as to give them an opportunity to respond. In light of her results and open engagement with the institution, the Court has now set up a working group in order to review the Court's practice in this area.

II. Comparative dysfunctionalism: how to study comparative global 'legal failure'

9. Jacco Bomhoff offered an exploratory presentation on the potential value of studying 'legal failure' comparatively. A scholar renowned for his experience in comparative jurisprudence, he began by offering some initial thoughts about the potential challenges thrown up by an attempt to study legal failure comparatively. Is there a way in which studying failures can be rendered coherent? Can failure be cast as a legal concept? How do we demarcate what counts as a failure or as a success? It is quite common for legal commentary to pronounce that an outcome is a formal success but a substantive failure, or a partial failure.
10. Before coming to these pitfalls in greater detail, Bomhoff presented a short overview of the nature of legal comparison in order to bear out a broader claim: that one of comparative law scholarship's built-in biases remains a pre-disposition for comparing against perceived successful case studies.¹³ He demonstrated this by discussing the type of work that comes from the two widely accepted camps of comparative lawyers: functionalists, and expressivists. Functionalist comparativists work with what the law does, tending to focus less on rules but upon their effects and benefits. This factual approach therefore adopts the position that in order to understand the impact of whatever the object of study is (rules, statute, doctrine, etc.), the comparativist must also understand how that object of study relates to society. This turn to the relation between law and society, which sees them as separate but related, sparked the possibility that 'comparative law could become a science of the way in which societies dealt with similar problems on their paths toward progress'.¹⁴ It follows that the work of functionalists tends to take a reformist stance, searching for 'what works' abroad, which necessitates a preoccupation for studying success stories. Expressivist studies, or studies of law as culture, seek to convey an 'internal perspective' of foreign legal systems, for the 'primary task for which comparative lawyers are prepared by their training and experience is to

¹³ For example, it is very common in comparative constitutional law for there to be a search for a 'better way' to be found in the solutions and ways of other states. On this point, see Lazarus, who observes that comparativists' desire for domestic reform might lead them to 'emphasize difference using simplified or idealized constructions of foreign comparators': Liora Lazarus, *Contrasting Prisoner's Rights: A Comparative Examination of England and Germany* (OUP 2004) 10.

¹⁴ Ralf Michaels, 'The Functional Method of Comparative Law' in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 381, 348.

compare law from the interior point of view.¹⁵ Expressivists, though, may also have instrumentalist biases, seeking out inspiration for law reform, or seeking the greater harmonisation of law across borders.¹⁶ There therefore also exists an inherent optimism in expressivist studies, once again exposing a success focus bias in comparative law.

11. Having set out the general presence of 'success bias' in comparative law scholarship, Bomhoff thought through some of the practical hurdles to measuring 'failure'. Is it possible to develop a workable understanding of failure? The term can be both under and over inclusive. He contended that one could write a comparative study of failure by surveying legal practitioners in one discrete area of practice across two jurisdictions, and asking them, as local actors, what failures existed. At an abstract level, Bomhoff suggested that a theoretical framework of what amounts to 'bad law' could be instructive, which gives rise to a question of whether one focuses upon the internal coherence of the rule or law itself, or the impact that a rule or structure may have. A focus on the latter, he suggests, offers a workable paradigm. A key indicator might be a study of a mismatch between what a law or policy aims to do, and what it achieves in practice, or between a system's ideals, and its delivery. This, Bomhoff suggests, might plausibly be brought to light through surveys or interviews with local actors, though there may be a danger that a focus on local actors' understandings of failure might bring with it deeply held and entrenched local views. Bomhoff concludes that this should not dissuade us from thinking about studying legal failure further, for often comparative questions bring numerous methodological challenges.

III. Global perspectives on local knowledge: how can we see 'similarity' and 'find difference' as a method?

12. Liora Lazarus rounded off the evening with a return to the methodological framework of her book, *Contrasting Prisoner's Rights: A Comparative Examination of England and Germany* (OUP 2004). The book studies the 'social and legal cultural context' in which prisoners' rights in England have been shaped, and offers Germany as a juxtaposition, in order to crystallise the idiosyncrasies in the English prisoner rights framework.¹⁷ Beginning with some general tenets on the challenge of comparison, Lazarus introduced the main critique of the aforementioned functionalist tradition. Legrand argues that merely comparing rules across jurisdictions fails to reveal the value of comparison and calls upon comparativists to take up the 'contrarian challenge'; looking beyond formal legal rules to

¹⁵ John C Reitz, 'How to Do Comparative Law' (1998) 46(4) *American Journal of Comparative Law* 617, 628.

¹⁶ See, for example, Jan M Smits, 'Comparative Law and Its Influence on National Legal Systems', in Mathias Reimann and Reinhard Zimmermann (eds), *The Oxford Handbook of Comparative Law* (OUP 2006) 513; and Mauro Bussani and Ugo Mattei (eds), *The Common Core of European Private Law* (Kluwer Law International 2003).

¹⁷ Liora Lazarus, *Contrasting Prisoner's Rights: A Comparative Examination of England and Germany* (OUP 2004) 2.

a deeper understanding of the differences and 'foreignness of languages'.¹⁸ Such an endeavour requires the comparative scholar to adopt an interdisciplinary and theoretical approach to comparative law. This causes Lazarus to reflect that comparative scholarship now requires a legal scholar to be a legal historian, an economist, a theorist, a legal cultural studies expert. This, aggregated with the fact that comparative law is, and always will be, a method and not a subject, gives the field a kind of 'paradigmatic fluidity' making it 'especially susceptible to becoming the handmaiden of broader disciplinary and political movements in academic law'.¹⁹ She calls for a resistance to 'models' of comparative law, instead recognising that there are no easy solutions, and that one could employ common sense while aspiring to maintain a 'consciousness' of the enterprise.²⁰

13. Lazarus terms this kind of methodological awareness as 'reflective comparison'. Those who pursue expressivist or law-as-culture approaches to comparative law have a problematic task: they use comparison as a 'craft of interpretation', requiring them to expose 'a different structure of meaning' shedding light on new understandings of legal discourse.²¹ In pursuit of these efforts, the reflective comparativist must be conscious of the 'political act' of comparison, and must resist 'instrumental comparison'. Such pitfalls might lead to an overstatement of similarity in pursuit of a broader normative enterprise, such as the preservation of a global language on rights; or might overemphasise difference in pursuit of advancing a domestic reformist agenda.²² This does not mean that this kind of comparative endeavour does not allow for generalisable findings. In doing so, however, the comparativists must embrace their position as 'cultural intermediary'. In her cultural analysis in *Contrasting Prisoners' Rights*, Lazarus does not seek to define culture *in toto*, but rather to distil what 'social events, behaviours, institutions, or processes can be causally attributed'.²³ For the book she adopted an understanding of cultures that 'embraces the legal, constitutional, penal, political and rights systems in their formal sense, and the practices, beliefs and convictions of those operating and exerting influence with these systems, and of those viewing, criticising and influencing them from without'.²⁴

14. In tackling how to be both 'here and there', Lazarus concluded by arguing for a 'constructivist' approach to the problem: rather than attempting to act as a neutral observer of a different culture, a comparativist may place herself within her own analysis,

¹⁸ Pierre Legrand, 'How to Compare Now' (1996) 16(2) *Legal Studies* 232, 233-4. Others have made similar calls. For example, Nelken argued that 'merely juxtaposing descriptions of various aspects of criminal process in different cultures does little to advance the goal of explanation or understanding': David Nelken, 'Comparing Criminal Justice' in Mike Maguire, Rod Morgan and Robert Reiner (eds), *Oxford Handbook of Criminology* (3rd edn, OUP 2002) 175, 180.

¹⁹ Lazarus (n 16) 6.

²⁰ Otto Kahn-Freud, *Comparative Law as an Academic Subject* (1965) 4.

²¹ Pierre Legrand, 'Comparative Legal Studies and Commitment to Theory' (1995) 58(2) *Modern Law Review* 262, quoted in Lazarus (n 16) 8.

²² See generally Lazarus (n 16) 7-11.

²³ Clifford Geertz, 'Thick Description: Towards an Interpretive Theory of Culture' in Clifford Geertz (ed), *The Interpretation of Cultures* (Basic Books 1973) 3,14.

²⁴ Lazarus (n 16) 14.

for to be an outsider ‘may confer certain privileges, in particular a license to naïveté’.²⁵ In doing so, however, the reflective comparativist must know their audience, understanding what requires greater explanation to a foreign audience, and what does not. It is for this reason that Lazarus structured her approach to comparison in two ways. Part I of the book adopted an ‘implicit comparison’, providing a deep explanation of the legal, constitutional, and penal context for the evolution of prisoners’ rights in Germany. This part was required given her target foreign audience. Part II of the book conducted an ‘explicit comparison’, juxtaposing the local context against the new insights shown to the reader through the implicit comparison, in order to show uncovered insights for the reader’s understanding of the familiar.

Conclusions

15. Though the scope and approaches of the works presented were so varied, the event uncovered remarkable synergies. All three speakers unearthed a core message: that the choice of method should not drive the study. Fikfak cautioned that her empirical approach should only be used where doctrinal analysis alone cannot answer the question. Similarly, Bomhoff sought to advance different means of studying comparatively so that we might advance legal knowledge, while Lazarus carefully crafted a study that sought to cast a new perspective over settled understandings of prisoners’ rights. Such advice is sage; it invites us to study the problem, not the law; the world, not the literature. The importance of this is elucidated in the works of these three scholars. Fikfak’s mixed-methods approach demonstrates that her research design was dictated by what was required to answer the research question, and not the other way around. Bomhoff and Lazarus’ careful consideration of instrumental biases, and their creative solutions of how to account for them, aid our understanding of what is required for reflective comparison. The event gave insights and much food for thought on what is needed for rigorous and honest comparative legal scholarship.

Event 2: Regional Approaches to International Law

Introduction²⁶

16. International law is generally viewed as a universal system that applies in the same way across different countries and regions of the world. Nevertheless, this universality has

²⁵ Downes, quoted in Lazarus (n 16) 17.

²⁶ This section draws note of: Jed Odermatt, ‘Regional Approaches to International Law’ 109 *Amicus Curiae* (forthcoming 2019).

been increasingly under challenge. Different regions and countries, especially outside the West, have begun to develop practices and views towards international law that show that international law is perceived differently in different parts of the world. The idea of 'comparative international law' has also received more academic attention in the literature. The book 'Is International Law International?', for instance, challenges the concept that there is one view of international law, demonstrating how different regions have developed diverging understandings of international law.²⁷ The phenomenon of regional approaches to international law is not new, however, and the different approaches taken towards international law can often be explained by looking at the region's history.

17. Regional approaches to international law was the subject of the second event of the Global Law@City series. The need to understand the historical, political and economic reasons that drive regional approaches to international law emerged as one of the key themes. Lauri Mälksoo, University of Tartu, discussed his research on Russian approaches to international law.²⁸ These have developed both at the level of the Russian government, as well as in Russian scholarship. Prof Mälksoo discussed the implications of Russian approaches to international law for the claimed universality of the field in Europe and globally, and whether comparative perspectives can be drawn for the study of international law generally. Wim Muller, University of Maastricht, discussed the concept of 'International Law with Chinese Characteristics'. Dr Muller discussed how, with China's economic rise, there has also been a more assertive attitude towards international law, but that this assertiveness is curtailed by China's historic experience with international law. Mauro Barelli, City Law School, continued with this theme in 'China and the Responsibility to Protect'. Although China has asserted that sovereignty is a central part of its foreign policy, this has not always been the case in practice. This is an example of a common theme in the debate: what is the relationship between rhetoric about international law, both in academia and official statements, and the practice of international law, and how do they shape each other?

I. Understanding Russian approaches to international law

18. Lauri Mälksoo began with the complex question as to whether there was, or could ever be, a discipline labelled as 'comparative international law'? Anthea Roberts has ignited a significant debate on the subject, its contours, content and intellectual limits.²⁹ Mälksoo asks whether there are truly regional approaches to public international law. Moreover,

²⁷ Anthea Roberts *Is International Law International?* (OUP 2017).

²⁸ Lauri Mälksoo, *Russian Approaches to International Law* (OUP 2015).

²⁹ Paul B. Stephan, Pierre-Hugues Verdier, & Mila Versteeg (eds), *Comparative International Law* (OUP 2018).

he asks, where does this question come from? Those studying international law have always known of different approaches to international law, such as the approaches of dualism and monism, but they did not appear to be important enough to challenge the universality of the established shared European vision. The interest in regional approaches, Mälksoo argues, comes with the relative rise of powers outside the West.

19. Mälksoo points out that in Russia (communist and post-communist), political discourse and literature spoke a lot about international law, but that it was predominantly used as a political weapon, particularly against the West. When Western states criticised the Soviet Union for a lack of respect for human rights or democracy, it could respond that it was in fact Western countries that had been violating those principles.
20. Mälksoo also discussed the importance of language in the study of international law. In the past, European international lawyers were expected to speak English and French, as well as some German or Italian, yet today international law scholarship in the West is conducted primarily in English. The same cannot be said, however, of discourse on international law outside the West, where there are entire debates and discourse on international law in languages other than English. Mälksoo also commented on the phenomenon of different academic accents, when writing in different languages. A Russian scholar may feel comfortable writing things in Russian for a Russian audience, that they would not write for a wider audience, in English.
21. So what is a Russian approach to international law? Mälksoo noted that, for the most part, public international law has *not* been universal; in the 19th and early 20th Century, it was used to govern 'civilised nations'. Russia sat in an awkward position. It saw itself as the Eastern-most country of the 'civilised nations', but was also told by Western states that it was not civilised. Such disjuncture can also be seen in the Chinese approach to international law, discussed below.
22. Mälksoo notes a paradox in the way that international law is viewed. On the one hand, Russia argued that in its tradition, it would rather regulate without law, a view informed by the legal nihilism in Russian and Orthodox tradition. On the other hand, Russia saw itself as a protector of international law in its international relations. Mälksoo notes how the Russian tradition is not a rejection of international law, but more an emphasis on certain principles. The UN Charter, for instance, starts with the principles of the non-use of force and the principle of non-intervention. While the emphasis on human rights and democratic legitimacy increased in the West, nothing had changed the central importance of state sovereignty. Mälksoo finds this clash as being related to political philosophy. There is not only an emphasis on sovereignty, but it is also viewed as a core feature of international law, something that should be left alone.

23. Diverging approaches to international law can be seen, and are most acute, when empires disintegrate and there remains a phantom understanding of the spheres of influence. Countries had their independence restored, but the former empire was not willing to accept them as *de facto* fully sovereign. Today Moscow views the former empire in these terms: they are separate, but not foreign countries. The same approach is taken by the United Kingdom, which, although it recognises the compulsory jurisdiction of the ICJ, has made a reservation regarding disputes with current or former members of the Commonwealth. Similarly, Russia has not used international dispute settlement to deal with the post-Soviet disputes. In this post-imperial experience, there appears to be a disjuncture between the law and reality, one where public international law may apply in theory, but has no connection with reality. According to the maps, and to public international law, Transnistria, South Ossetia, and Crimea are not part of Russia, but this does not accord with the reality on the ground, and will not likely change in the near future.

II. The historical evolution of Chinese approaches to international law

24. The presentation by Wim Muller highlighted the need to understand history in international law. Lawyers tend to think of international law as universal and unchanging, Muller argues, especially if they have only had training in law. This does not fit with the reality, and there is a tension in international law between universality of international law, and regional variation. Looking at history, and regional approaches to international law, also helps us understand the deeper function of public international law in international society. As discussed by Mälksoo, one should look at the links between approaches to law, and political philosophy, and the question of what goals international law sets out to achieve.

25. Muller emphasised the need to understand the role of Chinese history in the development of a Chinese approach to international law. The modern international legal system is not indigenous to China, and had a disruptive effect when it was introduced. China historically viewed itself as the centre of an empire and a world order. Such a perception was challenged upon the invasion of foreign powers. Such feelings of distrust towards international law, based in feelings of humiliation, continued after the end of the Second World War. China was invited to be a member of the UN Security Council, but the People's Republic of China did not take up the seat until 1971. Such non-participation at the UNSC furthered this narrative of humiliation.

26. During this period, China accepted the international legal order, and would seek to achieve its aims within that order. Its foreign policy identified three core interests:

territorial sovereignty, regional security, and development. Since 1989, the foreign policy goals of China evolved further. China undertook market reforms in service of its development in the 1990s, and the fruit of such change was seen in the 2000s. China sought to assuage concerns about the 'rise of China' by coining the term 'peaceful rise', emphasising that Chinese economic development would not lead to it becoming a military or other kind of threat. Until 2010 China pursued these three 'modest' goals. It did not want to be seen as an aggressive power.

27. Under the leadership of Xi Jinping, China has found itself becoming more ambitious and assertive on the world stage. Such global ambition has called into question its traditional foreign policy and its place in the international legal order. China's foreign policy priorities, moreover, are reflected in its approach to the international legal order. First, it seeks to adhere to the principles in the Charter of the United Nations, of which sovereignty is viewed as an overarching value. China's five principles of co-existence, which were included in a peace treaty with India, are presented as one of China's main contributions to public international law. These principles include the respect for territorial integrity, non-aggression, non-interference in the internal affairs of other states, and the principle of equality and mutual benefit. Muller reminds us that such importance placed on state sovereignty is linked to China's history. From a Chinese perspective, sovereignty is the main foundation of international law, and as Wang Tiewa argues, 'a legal barrier protecting against foreign domination and aggression.'³⁰ Moreover, as Xue Hanqin, now judge of the ICJ, has argued, there is also an important cultural dimension. International law is a relatively new system for China, compared to European states.

28. Since around 2014, China no longer has a 'modest' approach to international law and has sought to challenge the interpretation of norms or shape international law. The Fourth Plenary Session of the 18th Communist Party of China (CPC) Central Committee (2014) Outcome Document states that China will:

vigorously participate in the formulation of international norms, promote the handling of foreign-related economic and social affairs according to the law, strengthen our country's discourse power and influence in international affairs, use legal methods to safeguard our country's sovereignty, security and development interests.

³⁰ 'The PRC sticks to the doctrine of sovereignty not only because China has bitter experiences of its sovereignty being ruthlessly encroached upon by foreign powers in the past, but that it also has the conviction that the principle of sovereignty is the only main foundation upon which international relations and international law can be established and developed. The Chinese put emphasis on sovereignty because it is the hard-worn prize of their long struggles for their lost sovereignty': Wang Tiewa, 'International Law in China: Historical and Contemporary Perspectives' (Collected Courses of the Hague Academy of International Law (II), 1990) 290.

29. The development of the law is thus at the centre of CCP policy. While China seeks to be a shaper of international norms, the way in which this occurs is subtle, and is unfolding at the moment. One area China has sought to shape is the field of international human rights. While China accepts international human rights, and believes they are universal in character, it asserts that the way they are interpreted and applied must take into account history, culture, and the specific circumstances of the country. China also seeks to be a key power and shaper of international norms in the field of cybersecurity. China argues that 'cyber sovereignty' should be a guiding principle regulating cyberspace. So far, such a view has gained little traction, although some states, including Russia, align with this position. This is an example, Muller argues, of an emerging gap between Western and non-Western states.

III. Chinese engagement with the Responsibility to Protect

30. Barelli continued with the discussion on Chinese approaches to international law, by focusing on China's approach to one debate in particular: the responsibility to protect.³¹ The contemporary debate in international law about the responsibility to protect doctrine (R2P) has forced China to confront its traditional opposition to intervention and intrusions into state sovereignty. While conducting research on the use of force and in particular on humanitarian intervention, Barelli became interested in the idea that different regions, and states, have very different understandings and interpretations of international law, and the development of the R2P principle is a case in point.

31. In essence, the principle of R2P means that when a state allows or commits atrocities against its people, the responsibility to protect these individuals can shift from the state to the international community. Under certain circumstances, the international community may step in to protect the people affected. This, of course, is a question that goes to the very heart of sovereignty. Barelli points out that China was recently criticised for failing its responsibility, as a permanent UN Security Council member, to resolve the unfolding crisis in Syria. While China called for a political resolution to the crisis, it vetoed any UN resolution that would impose sanctions, or allow the use of force, against Syria.

32. This presents a potential dilemma for China. China has an interest in maintaining the principle of respect for sovereignty, the non-use of force, and non-intervention. It is often used as a 'shield' against criticism of China, as it often responds to such criticism as 'meddling' in its internal affairs and an affront to its sovereignty. At the same time, however, as China has become a military and economic power, it has interests in

³¹ Mauro Barelli, 'Preventing and Responding to Atrocity Crimes: China, Sovereignty and the Responsibility to Protect' (2018) 23(2) *Journal of Conflict & Security Law* 173.

maintaining international stability, as its continued prosperity and economic growth is tied to peace. How, then, has China sought to reconcile these differences?

33. While R2P is recognised as a principle – it is a ‘guiding principle’, rather than a rule, Barelli argues – there remains uncertainty about the how it applies and under which circumstances. It is emerging as a recognised tool to shape the international response to atrocities, but the precise contours have not yet been shaped. It recognises that the international community should do ‘something’, but there are different conceptions of what this entails. R2P is understood as comprising three main pillars. The first, and least controversial, is that states have the primary responsibility to protect its population against atrocity crimes – genocide, war crimes, ethnic cleansing, and crimes against humanity. According to the second pillar, in cases where the state does not, or cannot protect its population, the international community may intervene peacefully to assist a state. This includes diplomatic and other support, or the use of peacekeeping, with the consent of the state. Like the first pillar, China views this as according with the principle of state sovereignty, since intervention can only take place with the consent of the state. The third pillar, on the other hand, means that if the circumstances require, the international community should be willing to take coercive measures, including military intervention. In order for such measures to be compatible with the R2P principle, they must be authorised by the UN Security Council. Thus, R2P differs from classical humanitarian intervention, in which an individual state intervenes to prevent genocide or other atrocities.
34. Rather than outright rejecting the validity of the third pillar, China has sought to engage with it. When discussions on R2P took place in international forums, including the UN Security Council, China actively took part in the process. This is an example, as discussed above, of China moving from a ‘rule-taker’ to a ‘rule-maker’, as China sought to shape the emergence of a new principle. How did it do so? First, it sought to limit as much as possible the circumstances that would trigger the third pillar. It also endorsed the so-called sequential approach, under which military intervention would only be considered once all other options had been tried. Such an approach, however, was not accepted by the international community, and the report of the UN Secretary General argued against such an interpretation. China has consistently argued that every effort should be made to resolve the crisis with consent of the state involved, but it has not ruled out the use of intervention authorised by the UN Security Council. The position of China can thus be summarised as: “we support R2P, as long as it does not challenge state sovereignty”. Clearly, there is a contradiction in such an approach, as R2P challenges unlimited state sovereignty by its nature.

35. Rather than focusing on rhetoric and official statements, Barelli argues, it is important to also look at the practice of China. Here, a more pragmatic picture emerges. On some occasions, China has shown a willingness to support R2P, such as in the case of Libya. While China supported sanctions against Libya and the referral of the situation to the International Criminal Court, it abstained on a resolution authorising the use of force. In this case, China did not object explicitly to the use of force in response to a humanitarian crisis.
36. It is understandable, then, that such an ambivalent position has been taken. China cannot take action, either rhetorically or in practice, that expressly undermines its commitment to the principle of state sovereignty. However, the practice of China, including the use of peacekeepers and implicit support of R2P operations, is beginning to challenge this. Different states and regions can take different approaches to international law, but such approaches are ultimately guided by political reasons. Slowly, China has begun to align itself with the position taken by a majority of other states, showing that its principled support of state sovereignty can also be mediated by politics.

Conclusions

37. The speakers' case studies and methods predominantly showed the significance of history and culture in the understanding of regionalism – a theme equally alive in discussions of approaches to comparative methodology at the first event in this year's series. The strategies of China and Russia regarding international law are increasingly studied alone and yet their joint initiatives remain significant (as Event 3 on Cyber law-making shows). In fact, such joint initiatives pose considerable challenges for understanding regionalism generally as a field, where history, culture and politics dominate.

Event 3: How Global is Cyber Law Regulation?

Introduction

38. Cyber regulation, governance and enforcement constitutes one of the topical themes of our times. At the national, regional and international level there are no shortages of law-making attempts to engage in cyber regulation. Barlow's infamous declaration of lawlessness with respect to cyber matters has constituted an anarchical and fundamental conceptual framing of the idea that law cannot ever hope to keep pace with the flourishing

intersection of the private sector, private actors, spatial and temporal digitised eras and a world beyond boundaries, at least in a digital sense.³² Cyber regulation is currently the subject of significant European regulation as to sanctions, multiple international expert groups, a London Global Court proposal for 2025, and some of the largest stakeholder engagement activities ever envisaged. The area of cyber regulation may be said to form a thriving research field with there being multiple regulatory components to reflect upon. It is a field of research necessitating further and deeper interdisciplinarity.

39. The forms of regulation emerging are frequently far-reaching but also in places paradoxical. Regional approaches still splinter efforts at the UN level to advance principles. One could contrast the ‘hyper-legalisation’ of the approach adopted by the EU using sanctions in the area of the CFSP³³ and the partially legalised approach of the EU as to cybercrime and cyber security and convergence, where it relied heavily upon private actors to standard-set and enforce those standards. Much concern has been expressed about the ‘coherence’ of global action on cyber law-making,³⁴ with multiple groups of states and regions engaged in parallel processes and actions (e.g. at UN level). It is also complex to make assertions about the depth of regional action where the fulsome nature of regulation is concerned. If there are cyber-sanctions, does this necessitate a holistic view of what constitutes cybercrime?³⁵ Cyber security? The internet of things? The notion of a security union? What is the most ‘advanced’ view of private actors or the private sector or informality and the informalisation of soft law governance? How ‘broad’, ‘conclusive’, ‘participatory’ or ‘international’ does a forum have to be for it to be truly global? Mainstreaming of cyber matters into law-making had been adopted as a core policy of certain regional systems and yet such a claim continues to appear perhaps overambitious and unrealistic.³⁶
40. Arguably some of the most distinctive conceptual work on digital boundaries has taken place at a sophisticated level but in the absence of elementary understandings of the term ‘cyber’ itself.³⁷ Efforts to develop ‘global’ standards, for example, a Budapest Convention, were frequently noted to constitute merely esoteric matters, in the absence of more holistic standard setting.³⁸ The politicisation of cyber law-making remains a

³² John P Barlow, *A Declaration of Independence of Cyberspace* (Electronic Frontier Foundation 1996); Hans Lindahl, ‘We and Cyberlaw: The Spatial Unity of Constitutional Orders’ (2013) 20 *Indiana Journal of Global Legal Studies* 697.

³³ Council Regulation 2019/796 of May 17, 2019, concerning restrictive measures against cyber-attacks threatening the Union or its Member States, preamble, art. 13, O.J. L 129I , 17.5.2019, p. 1–12; Council Decision (CFSP) 2019/797 of 17 May 2019, concerning restrictive measures against cyber-attacks threatening the Union or its Member States, art. 1(1), O.J. L 129I , 17.5.2019, p. 13–19.

³⁴ Helena Carrapiço and Ben Farrand ‘The European Union’s fight against cybercrime: policy, legal and practical challenges’ in Maria Fletcher, Ester Herlin-Karnell and Claudio Matera (eds), *The European Union as an Area of Freedom, Security and Justice* (Routledge 2016); Jed Odermatt, ‘The European Union as a cybersecurity actor’ in Steven Blockmans and Panos Koutrakos (eds), *Research Handbook on the EU’s Common Foreign and Security Policy* (Edward Elgar Publishing 2018).

³⁵ Elaine Fahey ‘The EU’s Cybercrime and Cyber-Security Rulemaking: Mapping the Internal and External Dimensions of EU Security’ (2014) 5(1) *European Journal of Risk Regulation* 46.

³⁶ Helena Carrapiço and Andres Barrinha, ‘The EU as a Coherent (Cyber)Security Actor?’ (2017) 55 *Journal of Common Market Studies* 1254.

³⁷ Mireille Hildebrandt, ‘Law As Computation in the Era of Artificial Legal Intelligence: Speaking Law to the Power of Statistics’ (2017), <<https://ssrn.com/abstract=2983045> or <http://dx.doi.org/10.2139/ssrn.2983045>> accessed 20 August 2019.

³⁸ European Treaty Series - No. 185. Convention. On Cybercrime. Budapest, 23.XI.2001.

dominant concern, which impacts upon issues of jurisdiction, enforcement and the tangible governance thereof.

41. Significant non-state governance mechanisms in the cyber domain have transformed the meaning of national territory and sovereignty.³⁹ Digital space is understood to be ‘a major new theatre for capital accumulation ... and global capital ...’.⁴⁰ Alternatively, cyberspace can be said to constitute a new domain but not an unprecedented one per se, whereby the challenges that it poses for states are similar to those that the international community has faced in the past as to other domains, such as the international law governing the high seas, outer space and Antarctica.⁴¹ One may argue that there are more actors, spaces, communities and users of cyberspace such that it lacks a comparator. Nevertheless, cyberspace has had a difficult relationship with international law and the Nation State. There is still no multilateral or uniform cyber law as an instrument of international law which is all encompassing.⁴² The US government has played a highly central role in maintaining the entity governing the internet, the ICANN, within its reach, but has in recent years gradually relinquished its special position with them and the private sector has stepped in, as discussed below. Cyber law-making was a predominantly global affair and yet its decentralisation through according powers to powerful global private entities continues to be both paradoxical and the antithesis of global law-making.⁴³
42. The final Global Law@City dialogue of Summer 2019 took place on 16 July 2019 and focused on the global dimension of cyber law-making. The dialogue was between Dr François Delerue, Researcher in Cyberdefence and International Law at *Institut de Recherche Stratégique de l'École Militaire* (IRSEM), Dr Russell Buchan, Senior Lecturer in Law, University of Sheffield and Robin Sellers, Barrister at 2 Kings Bench, and Senior Lecturer, City Law School . Two of the speakers approached the question from an international law perspective whilst a third examined jurisdictional, evidentiary and procedural questions of practice as to the transnational and cyber law-making. Graduate Teaching Assistant and doctoral candidate at City Law School Alex Gilder kick-started discussions, ensuring a lively and truly interdisciplinary debate. Members of City’s new [Institute for Cybersecurity](#) were also in attendance.

³⁹ Elaine Fahey, *Introduction to Law & Global Governance* (Edward Elgar 2018).

⁴⁰ Saskia Sassen, ‘Embedded Borderings: Making New Geographies of Centrality’ (2017) 6 *Territory, Politics, Governance* 1.

⁴¹ Kristen E Eichensher, ‘The Cyber Law of Nations’ (2015) 103 *Georgetown Law Journal* 317, 321.

⁴² See Thomas Streinz, ‘Towards a Global Cyberlaw’ NYU Emile Fellows Form (February 2017), http://www.law.nyu.edu/sites/default/files/upload_documents/Thomas%20Streinz%20forum%20draft.pdf.

⁴³ Eg Helena Carrapico and Ben Farrand ‘Blurring Public and Private: Cybersecurity in the Age of Regulatory Capitalism’ in O. Bures and H. Carrapico (eds) *Security Privatization* (Springer 2018)

43. Three areas were the subject of the event: 1) *does International law apply to Cyberspace?*; 2) *How does state sovereignty and territory apply in cyber space?*; and 3) *how to prosecute crime in cyber matters?*

I. Does international law apply to Cyberspace?

44. François Delerue began by outlining the central claim of his book, forthcoming with Cambridge University Press, 'Does International law apply to Cyberspace?', distinguishing between the question of the applicability of international law to cyberspace and the subsequent question of how the norms of international law apply to cyber operations.⁴⁴ Much theorisation on the notion of cyberspace was derived from the 1980s and science fiction. The speaker highlighted that the question of the applicability of international law to cyberspace was based on the assumption that cyberspace constitutes a new area for human activities similarly to land, air, the sea, and outer space. He demonstrated that this question is irrelevant, since cyberspace does not constitute a new legal domain and nothing prevents international law from applying to cyberspace and cyber operations. He also highlighted that the recourse to the term 'cyber warfare' had raised many difficult questions in this regard. He outlined a series of cases exposing the evolving place of States and strategies – including from Stuxnet to Sony hacking.
45. The presentation moved then onto three core questions relating to the international legal framework applicable to cyber operations: attribution, lawfulness and remedies. Attribution refers to the process of attributing an act or conduct to its perpetrator. In other words, it aims at answering the question: 'who did it?'. The attribution of cyber operations to States cannot be studied without dealing with questions of the attribution of cyber conduct to computers or individual perpetrators. The process of attribution is at the same time legal, factual and technical. State-sponsored cyber operations are often conducted by non-state actors. This situation triggers the question of attribution, and in particular how to attribute their conduct to the State. He argued that, in some cases, the degree of control required by international courts and tribunals might amount to an excessively high threshold to be applicable and relevant to the use of new technology. Ultimately, and this is the conclusion of his book, international law was not a panacea which brought a lot of responses to issues but not all. For instance, it would not solve the problem relating to the capacity of a State to attribute a cyber operation or to respond to it.
46. A discussion took place then on UN processes and how they had proved to be challenging. There has been a series of resolutions and five UN Groups of Governmental Experts on Developments in the Field of Information and Telecommunications in the

⁴⁴ François Delerue, *Cyber Operations and International Law* (CUP 2019).

Context of International Security. The latest UN Group, in June 2017, has been viewed by many commentators as a failure. For example, the refusal of China, Russia and Cuba to adopt a paragraph on the applicability self-defense, countermeasures and the law of armed conflicts in cyberspace indicates as much. This situation may be challenging for international law and international stability as it bears a clear risk of fragmentation of the international legal order. More recently, the international community has moved one step closer to the risk of fragmentation during the last session of the General Assembly of the United Nations in 2018. The General Assembly of the United Nations adopted two resolutions following on the failure of the 2016-2017 UN GGE. Both resolutions are calling for the creation of a process to follow up on the past UN GGE processes. Having two parallel processes discussing the application of international law to cyberspace, initiated by two different groups of States with divergent approaches on the application of some norms of international law, contribute to the risk of geographical fragmentation.

II. State sovereignty, territory and cyber regulation: whose sovereignty?

47. Russel Buchan outlined a central claim of his book,⁴⁵ that the principle of territorial sovereignty operates in the cyber domain, in relation to the interference in the computer networks of others states without their consent. It is a view increasingly supported by practice and evidence, including over 40 cyber policies adopted by nation states- many referencing it as an extant principle of international law, referencing in particular Danish policies or public statements of Harold Koh as to a legal rule or even the UN Group of Government legal experts, including 2013/ 2014 reports. Territorial sovereignty *could* be transposed into the setting of cyber. The UK's approach outlined in 2018 by its Attorney General is otherwise – that there is no rule under current international law that the general principle of territorial sovereignty can be extrapolated to apply to specific cyber activities. Buchan asserted that this is arguably both legally wrong and strategically unwise, and not strictly just as a matter of international law. It also sits at odds with the Tallinn Manual, which found the existence of an independent international legal rule that certain cyber operations constituted a violation of sovereignty.

48. Territorial sovereignty was a rule of international law and this was dispositive here. Given that there was a burgeoning view of States exercising sovereignty over infrastructure and 40+ positions on cybersecurity of States mentioning sovereignty, the UK had advanced a new principle of non-intervention. Coercion involved as an essential element of intervention which was undoubtedly complex. If subscribed to sovereignty as a principle rather than legal rule thesis, the starting point was the principle of non-intervention assuming nothing specialist being applicable. Many cyber operations of states would fall

⁴⁵ Russell Buchan, *Cyber-Espionage and International Law* (Hart 2018),

outside of the regulatory scope here and be otherwise lawful. These put the sovereignty deniers in a difficult position.

49. The Sony attack was a 'case in point' here. Coercion against the State was self-evidently complex here in a situation of a private company. The conduct of North Korea under the framework outlined above would be lawful. The DNC hack was another case in point, particularly as it involved the use of information. Yet how could such conduct be understood as coercion as to government action? Hacking into competitors and obtaining deleterious information and using it to persuade the electorate did not bring the State into the picture. It was lawful under the UK view. Espionage is not per se coercive and there might be never knowledge of the taking of the information. If subscribed to UK view, this conduct was lawful. Non-intervention was fatal. It created conceptual confusion and muddied the waters. Ultimately, the UK view here prevented the emergence of a global legal framework of global values. It was dangerous and unsound, both legally and strategically.

III. Prosecuting Cyber Crime: caught between specialist and traditional offences?

50. Robin Sellers outlined key litigation in the UK in recent times, which amply demonstrated a gap between specialist and traditional forms of offences at the heart of cyber-attacks, which are increasingly transnational in their form, content and litigation. Cybercrime creates many conceptual issues of confusion but also for practice. Cyber-attacks are regulated by much criminal law and in many traditional offences cyber technology is used rather than specialist or innovative offences and a series of recent cases demonstrated as much. The Daniel Kaye litigation taking place in the UK was outlined in detail where the defendant had been prosecuted at Blackfriars Crown Court in 2019 as to a Mirai botnet. Kaye had been described by the UK National Crime Agency as the most significant cybercriminal ever pursued in UK courts. The Kaye litigation was a useful example of the transnational dimensions thereto, the traditional components thereof and evidentiary challenges of undertaking such litigation. The devices it infected were open to instruction and the device would attack servers. The litigation involved a Liberian telecommunications company, prosecutions in Germany, the UK, a European Arrest Warrant and renting server space in the Netherlands and Ukraine, operating remotely. The defendant had notably burned down the cable running between Europe and Africa. Ultimately, their seized handset had shown their bitcoin and Mirai activity along with their email. The litigation had been governed by Computer Misuse legislation in the UK, by questions of finding a significant link- the location of the attack, the computing used in the attack, the computer facilitating the attack and the business being carried on and blackmail.

51. A further question for consideration was how duplication of proceedings across jurisdictions raises issues as to abuse of process and double jeopardy. Significant issues of the 'traditional' nature of the offences prosecuted also arose despite the technology innovations underlying them- always innovative, traditional, multi-jurisdictional. Investigative techniques here were also significant to reflect upon and how these caused difficulties and challenges in litigation. For example, CHIS- included undercover officers, surveillance, reporters, Regulation of Investigative Powers Act, system of authorisation under the Act and offences for misuse of intelligence products. There was a multitude of variables at play here. Cybercrime as a framework also does not necessarily operate so well given its composite actors, ranging from those engaging with the intelligence community, the hackers and then bloggers, journalists and others assisting the authorities. VPN usage and the coding of IP addresses additionally renders prosecution complex.
52. Sellers noted that mutual legal assistance, in his experience, was particularly slow and there is a piecemeal approach to international conventions. The Budapest Convention has been ratified by a very significant number of countries, including the US and Russia. Certain jurisdictions have generated a lot more litigation than others. There is also a significant resource problem and of technical experts for litigation and the use of in-house experts and their capacity to take on the growing sophisticated nature of the conduct, relative to qualifications and technical capacity needed to launch prosecutions.
53. The discussant, Alex Gilder, pressed the speakers on the understanding of the State as a public entity and servers and how the state was to be understood, particularly as to the ownership of specific servers. It raised the question as to the understanding of certain programmes, hosting government data. A discussion also took place as to the reality of the objective of regulating cyber warfare in the first instance. This raised the fundamental question about attribution and whether it was solvable at all.

Conclusions

54. Cyber law-making proved itself to be a highly complex and global idea, rooted in localism and fundamental contestations as to sovereignty, jurisdiction and territory. Its relationship to borders and the global still constituted a fascinating case in point of the awkward links with the global and its incomplete state. The event demonstrated many leading examples of the breakdown of regionalism and paradoxically also its rise. The ambitions still of local law-makers did not abate in their efforts to globalise.

Concluding Reflections from the Series Organisers

55. The dominant emphasis of the global law series upon methodology has unapologetically been an attempt to continue to press leading legal scholars on its formulations, construction and design as to mapping, conceptualising and theorising the global. The rich variety of issues and themes of the series have proven themselves both fascinating from a non-expert perspective but also scientifically of tremendous value. By elucidating the content of the series in old-fashioned typed form mostly (although a series of tweets can be found!), the series hopes to provide a simple and longer-term contribution to reflecting upon methods and the global. The developments in comparative public law, regionalism and cyber-law-making are highly instructive for the sophistication of methods and inter-disciplinary at the heart of the history, politics and culture of the global. We hope that readers enjoy these short reports read further the work of the speakers, to whom we are most grateful.

The City Law School
City, University of London
Northampton Square
London EC1V 0HB

T:+44(0)20 7040 3309

E: law@city.ac.uk



Email enquiries:

law@city.ac.uk

Telephone enquiries Find out more, visit

+44 (0) 44 02 7040 5787

www.city.ac.uk/law

www.city.ac.uk/law