



Rasulov, A. (2017) What is critique? Towards a sociology of disciplinary heterodoxy in contemporary international law. In: d'Aspremont, J., Gazzini, T., Nollkamper, A. and Werner, W. (eds.) *International Law as a Profession*. Cambridge University Press: Cambridge, pp. 189-221. ISBN 9781107140394

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Deposited on: 12 November 2015

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## What is Critique? Towards a Sociology of Disciplinary Heterodoxy in Contemporary International Law

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### 1. Introduction

What is critique? Deciding how one should answer this question in many ways can be regarded as the contemporary international law scholar's ultimate rite of passage. And for a good reason too. Think of this, if you will, as an ideological equivalent of the Rorschach blot: how you go about interpreting it - what angle you choose to tackle it from - will reveal far more about where you stand, intellectually, politically, and institutionally, than what you 'know' about what critique 'really means'.

This essay seeks to make two main contributions to the current debate about the meaning of critical international law. In the first place, it aims to develop a general concept of critique as a *system of academic practice*. The ultimate goal here is to produce a theoretical model that would allow us to understand 'critique' not as a projection of some abstract Platonic entity, be it 'leftism', 'postmodernism', or the Enlightenment, but as a historically determined articulation of a certain arrangement of socio-institutional patterns. What would happen to our understanding of the idea of critique in modern international law if we were to begin exploring it as a form of social practice, approaching it, in the final analysis, as nothing more than just a bundle of relatively stylized behavioural patterns? What would happen to our sense of our professional roles and identities - as lawyers and as academics - if we were to start recognising that what ultimately stands behind this idea is really just a certain way of organising the social division of labour within the legal-academic community, a pattern whose main parameters are determined by the broader economy of the international legal-academic process and nothing more mysterious or grandiose than that?

These and other related questions are covered for the most part in Section 2 of this essay. The narrative that I develop there starts with a fairly simple claim: the concept of critique, I argue, describes, in the final analysis, a purely relational state of being. It has no inherent objective meaning. There is no fixed essential core behind it, no self-evident truth, no in-built content. Whatever content we associate with this concept in practice in each given instance is assigned to it only because it has been explicitly differentiated from whatever other content we come to associate at the same time with the respective idea of the mainstream. Going by this logic, what makes something - a text, a theoretical tradition, a scholarly position - 'critical' in the eyes of contemporary international legal studies can never be properly explained if we only focus our attention on exploring the respective ideas, themes, or broader political programmes for which this text, tradition, or position serves as an expressive vehicle. To be 'critical' in the context of the international legal discipline means simply being entered into a certain pattern of relationship - a form of Saussurean differentiation - with whatever it is that at that time counts as the disciplinary orthodoxy, the 'dogma', or the 'mainstream', nothing more, nothing less. Or, to put it in a slightly different manner: there exists, in the final analysis, no principled difference in this context between critique and heterodoxy. Both categories refer to the exact same phenomenon, the essence

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\* School of Law, University of Glasgow. The writing of this essay has benefited from various conversations I have had over the years with David Kennedy, Arnulf Becker Lorca, Alejandro Lorite Escorihuela, Duncan Kennedy, Umüt Ozsu, John Haskell, Michelle Burgis-Kasthala, Robert Cryer, Scott Newton, and Christian Tams. All errors and omissions are mine alone.

of which consists in ‘being related to but also remaining different from whatever presently counts as the mainstream/orthodoxy’. Looking at it from this angle, it follows, furthermore, that there appears to be, ultimately, nothing self-evidently progressive or theoretically sophisticated about the critical international law tradition in the broader scheme of things. Some critical projects challenge the mainstream from the left; others do so from the right. Some do it in ways that are nuanced, intellectually provocative, and stimulating; others in ways that can at best only be described as blunt, tired, and unimaginative. When all is said and done, John Bolton, it will have to be recognised, has been as much of a critic of the disciplinary establishment in contemporary international law and its discursive and ideological conventions as Martti Koskenniemi or Anne Orford.

The second main contribution which this essay seeks to make concerns the question of historical lessons. Basing on the theories developed in Section 2 of this essay, in Sections 3 and 4 I propose to undertake an initial exploration of what for lack of a better description one might call the operative conditions of failure and success applicable to the workings of disciplinary heterodoxies in contemporary international law. Given the general space constraints, this part of my inquiry will be limited to only one practical case-study, the so-called ‘new approaches to international law’ (NAIL) movement, whose general institutional trajectory I will review in Section 3 of this essay. The reasons which inspired this choice should not be hard to deduce. For good or ill, in the eyes of most international lawyers over the last twenty years the concept of critique has been de facto synonymized with the NAIL movement. Though it seems possible today to speak of NAIL without ever invoking the idea of critical international law, it seems quite impossible to do the reverse. At the same time, given NAIL’s unprecedentedly large – for a heterodox tradition – impact on the evolution of the discipline’s general intellectual environment, its ‘local history’ also offers an incomparably rich opportunity to explore and analyse the broader structure of the heterodox institutional process in modern international law in general. Think of this, if you will, as an example of Ginzburg’s *Ansatzpunkt*: that special individual case which can be used as an epistemological platform from which to grasp the meaning and contents of some much broader historical phenomenon.<sup>1</sup>

The idea of looking at international law as a set of social and institutional practices, is not, of course, an entirely novel proposition. At the most immediate level, the research agenda which I develop in this essay can be seen as the direct descendant of the kind of investigative projects that were first initiated in the late 1990s by David Kennedy – see in particular his *Thinking against the Box*<sup>2</sup> and *The Disciplines of International Law and Policy*.<sup>3</sup> A considerable (even if not always obvious) theoretical debt is also owed in these pages to the scholarship of Jack Schlegel<sup>4</sup> and Pierre Schlag.<sup>5</sup> More generally, the methodology I adopt here can also be traced to the writings of the French social theorist Pierre Bourdieu<sup>6</sup> as well as to Louis Althusser’s work on knowledge as a productive system.<sup>7</sup> From a general Bourdieusian point of view, what I present here can be understood, essentially, as an attempt to develop a theory of international legal critique as a *field of*

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<sup>1</sup> See Carlo Ginzburg, ‘Latitude, Slaves, and the Bible: An Experiment in Microhistory’ (2005) 31 *Critical Inquiry* 665. Carlo Ginzburg, *Threads and Traces* (University of California Press: 2012) 193-214.

<sup>2</sup> David Kennedy, ‘When Renewal Repeats: Thinking against the Box’ (2000) 32 *NYUJ Int’l L&Pol* at 335.

<sup>3</sup> David Kennedy, ‘The Disciplines of International Law and Policy’ (1999) 12 *LJIL* at 9.

<sup>4</sup> See, e.g., John Henry Schlegel, *American Legal Realism and Empirical Social Science* (University of North Carolina Press, 1995).

<sup>5</sup> See, e.g., Pierre Schlag, ‘The Brilliant, the Curious, and the Wrong’ (1987) 39 *Stanford Law Review* 917.

<sup>6</sup> See Pierre Bourdieu, *The Field Of Cultural Production* (Columbia University Press, 1993).

<sup>7</sup> See, e.g., Louis Althusser, ‘From *Capital* to Marx’s Philosophy’, in Louis Althusser and Etienne Balibar, *Reading Capital* 13 (New Left Press, 1970).

*restricted cultural production*;<sup>8</sup> from an Althusserian point of view, as an attempt to decipher the internal dynamics which governs the workings of critical international law as a *system of social relations*. The immediate labels, though interesting to explore in their own right, do not matter so much, in the end, as the underlying logic of investigation.

## 2. The Sociology of Academic Production in Contemporary International Law: Some General Remarks

### 2.1 Materialism and Idealism

The question ‘what defines the idea of critique in international law?’ has long attracted the attention of international law scholars. For reasons that probably have as much to do with the trivial force of habit as with anything else, the vast majority of attempts to explore it to date, however, seem to have proceeded in one of two ways. Either the proposed account has tended to focus mostly on detailing the most significant intellectual contributions made by critical international law scholarship the development of international legal thought. The list of usual suspects here would typically include the so-called ‘indeterminacy thesis’, ‘the linguistic turn’, ‘critique of Eurocentrism’, etc. Or the main pride of place, analytically, has been assigned to what would be typically understood as the most common thematic motifs characteristic of the critical international law literature as a whole: ‘fondness for interdisciplinarity’, ‘writing about theory, not practice’, ‘taking a negative view of international law’s redemptive potential’, etc.<sup>9</sup>

In both cases, the essential effect has been to reduce the phenomenon of critique to some kind of abstract disembodied fetish: a metonymic expression of some grand transcendental entity hovering imperiously in the background. Whatever set of features is supposed on this view of things to separate critique from the rest of the disciplinary field around it is, thus, always understood to be a mere projection of some latent, exterior essence that silently governs the evolution of the international legal discipline and its constituent material processes and ideological conflicts, like some kind of small-time Hegelian *Weltgeist*. In this essay I propose to challenge the continuing dominance of this unreconstructedly *idealist* tradition of approaching the study of the

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<sup>8</sup> ‘The field of [cultural] production ... owes its ... structure to the opposition between the field of *restricted production as a system producing cultural goods (and the instruments for appropriating these goods) objectively destined for a public of producers of cultural goods*, and the field of large-scale cultural production, specifically organized with a view to the production of cultural goods destined for non-producers of cultural goods, “the public at large”. In contrast to [the latter], which submits to the laws of competition for the conquest of the largest possible market, *the field of restricted production tends to develop its own criteria for the evaluation of its products*, thus achieving the truly cultural recognition accorded by the peer group whose members are both privileged clients and competitors.’ Bourdieu, *supra* n. 6, at 115 (emphasis added).

<sup>9</sup> For various illustrations, see, among others, Christine Schwöbel, ‘Introduction’, in Christine Schwöbel (ed.), *Critical Approaches to International Criminal Law 1* (Routledge 2014); Tor Krever, *International Criminal Law: An Ideology Critique*, 26 LJIL 701, 704-7 (2013); Frederic Megret, ‘Where Does the Critique of International Human Rights Stand? An Exploration in 18 Vignettes’, in Jose-Maria Beneyto and David Kennedy (eds.), *New Approaches to International Law 3* (The Hague: TMC Asser 2012) 22-38; Thomas Skouteris, *The Notion of Progress in International Law Discourse* (The Hague: TMC Asser 2010) 22-38; China Mieville, *Between Equal Rights: A Marxist Theory of International Law* (Leiden: Brill 2005) at 48-60; Jason Beckett, ‘Countering Uncertainty and Ending Up/Down Arguments: Prolegomena to a Response to NAIL’ (2005) 16 EJIL at 213; Deborah Cass, ‘Navigating the Newstream: Recent Critical Scholarship in International Law’ (1996) 65 NJIL at 341; Anthony Carty, ‘Critical International Law: Recent Trends in the Theory of International Law’ (1991) 2 EJIL at 66; Nigel Purvis, ‘Critical Legal Studies in Public International Law’ (1991) 32 HILJ at 81.

internal workings of the international legal discipline. The way to do this begins, firstly, by displacing this tired combination of quasi-Hegelian approaches – can anyone today really take seriously the view that it is the evolution of abstract ideas (or styles of writing about them) that determines the march of history? – and, secondly, by outlining a fundamentally *materialist* theory of critique and its role and place in the international legal discipline.

In the pages below, I propose to recast the concept of international legal critique – and, with it, the concomitant idea of international legal heterodoxy – as, essentially, a placeholder category whose main discursive function consists in simply designating the existence within the broader social field of the international legal discipline of a certain pattern of socio-institutional arrangements, that is to say, a certain pattern of *social roles*, whose immediate configuration can be understood, in the final analysis, only in the light of the corresponding *structure of institutional resource distribution* and the *related dynamics of conflicts* permeating the internal social landscape of the international legal discipline.

What sort of resources and what kind of conflicts are we talking about here? I address both of these questions in greater detail in Section 2(4). For now, however, let me just add a couple of points concerning the issue of methodology. As I have noted earlier, the methodological orientation which I advocate in this essay falls generally under the rubric of the so-called materialist tradition of inquiry. This does not mean that it should be understood, however, as implying any kind of vulgar determinist theories of intellectual life or academic history. The argument that I make in this essay is both far more ‘modest’ in terms of its explanatory ambitions and far more ‘post-structuralist’ in terms of its general onto-theoretic presumptions than that.

Analytically, my principal starting assumptions in these pages can be understood as a combination of the following three points: (i) there appears to exist an obvious pattern of *correlation* between the way the most important ideational and discursive structures in contemporary international legal discourse have developed and transformed over time and the way the *operative structure of the underlying academic institutional processes* has changed and evolved over the same period;<sup>10</sup> (ii) judging from the available evidence, the two processes seem to be causally linked and on the whole it seems to be the latter of them which as the ‘chief determining instance’ of the former, not the other way around; and so (iii) to understand the evolution of those ideational and discursive structures most fully, it makes sense, therefore, to try to grasp first how the basic dynamics of these underlying academic institutional processes tends to work and why.

Note the emphasis placed on the words ‘academic’ and ‘institutional’. Just as it is not the movement of abstract ideas and discursive patterns that dictates the course of international law’s disciplinary evolution, so, too, it is not the march of events outside of it. To be sure, the chief determining instance in academic history always has to be sought in the domain of the underlying social relations; but it is the *internal* social relations that we need to look at in this context. Think of this, if you will, as a local variation on Althusser’s relative autonomy thesis: in order to explain the history of any given academic discipline, our best bet epistemologically is to focus the thrust of our inquiry on the evolution of the respective disciplinary field’s *internal* institutional patterns and structures, before we start looking anywhere beyond it.<sup>11</sup> And insofar as most disciplinary production in international law today happens within a decidedly academic institutional context, what this basically means in practice is that all our investigations of international law’s internal

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<sup>10</sup> Cf. Pierre Bourdieu, *Homo Academicus* (Stanford University Press, 1988) xvii: ‘[There exists ] an almost perfect homology between the space of the stances (conceived as a space of forms, styles and modes of expression as much as of contents expressed) and the space of positions held by their authors in the field of [academic] production.’

<sup>11</sup> See Louis Althusser, *Lenin and Philosophy and Other Essays* (New York: Monthly Review Press, 1971) 134-5.

disciplinary history must inevitably begin with an inquiry into the evolution of the corresponding institutional structures at the heart of the international legal-academic process.

Not that this means, of course, that any developments taking place in the ‘external world’ should therefore be dismissed as entirely irrelevant. Exogenous factors certainly do influence the course of international law’s disciplinary history – where would the Third World Approaches to International Law (TWAAIL), for example, be without decolonization? – but even so they do not constitute its primary engine of change.<sup>12</sup>

## 2.2 *Sociology of Continuities and Sociology of Conflicts*

Most recent accounts of the disciplinary history of international law, where they have turned to the investigation of what one may broadly call the sociological component of that history,<sup>13</sup> have tended to focus on studying the development of the discipline’s common horizons of imagination, or what Martti Koskenniemi at the start of *The Gentle Civilizer of Nations* calls the ‘sensibility’ of the international law profession.<sup>14</sup> The privileged order of events which they place at the centre of their investigative protocols is thus found mostly in the evolution of the discipline’s basic patterns of collective consciousness, or, which is essentially the same thing, the continuities in the evolution of its various epistemological, political, and ideological consensuses.

The approach which I advance in this essay proceeds from a completely different perspective. Rather than tracing the evolution of various intra-disciplinary consensuses and continuities, I take as my principal analytical premise the view that (i) the key to the study of any kind of disciplinary history lies in the evolution of that discipline’s general pattern of *internal social conflicts and contradictions*; and (ii) the most helpful clues to the discovery of this pattern come from the study of what in the Marxist tradition one would call the distribution of the primary means of disciplinary production, or, to use a slightly different theoretical vernacular, the *principal forms of academic capital (AC) valent within that disciplinary field*.

## 2.3 *Critique and Heterodoxy as Social Practices*

What are the main theoretical implications of the ‘sociology of conflicts’ approach? What broader assumptions about the practical workings of critical and heterodox legal traditions does this approach imply as part of its theoretical pre-givens?

*Implication 1:* Both ‘critique’ and ‘heterodoxy’ are purely contingent categories. Each describes what in effect is only a relatively regularized pattern of conduct expected from the occupants of certain social positions. The essence of this conduct consists in its conflictual and oppositional orientation. Beyond that, neither label has any determinate meaning. There is no

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<sup>12</sup>For Marxism the explanation of any phenomenon is in the last instance *internal*: it is the *internal* “contradiction” which the “motor”. The external circumstances are active: but [only] “through” the internal contradiction which they overdetermine.’ Louis Althusser, ‘Essays in Self-Criticism’ (1976) n. 2, at 80,

<sup>13</sup> See, eg, Andrew Lang, *World Trade Law after Neoliberalism* (Oxford University Press, 2011); Martti Koskenniemi, *The Fate of Public International Law: Between Technique and Politics* (2007) 70 *MLR* 1; Scott Newton, ‘The Dialectics of Law and Development’, in David Trubek and Alvaro Santos (eds.), *The New Law and Economic Development* (Cambridge University Press, 2006) 174.

<sup>14</sup> Martti Koskenniemi, *The Gentle Civilizer of Nations* (Cambridge University Press, 2002) 2.

stable essence behind them, no in-built political agenda, no fixed theoretical content. Anything that seeks to challenge and oppose that which at the present point counts as the mainstream/orthodoxy deserves to be included under the rubric of critique/heterodoxy. Other than this, there is not much to be said about the meaning of either concept at the abstract level .

*Implication 2:* Not all critical/heterodox traditions derive from the same theoretico-discursive quarters. Some critiques/heterodoxies challenge and oppose the mainstream/orthodoxy from the left, others do so from the right. Determining which side of the political spectrum any given critique/heterodoxy comes from, furthermore, is a task that can only be resolved in the context of the respective discipline's *internal* social landscape at a particular point in time.

Put differently, it does not make any sense to try to settle this question *in abstracto*, nor to try to decipher the ideological signatures of field-specific critical/heterodox phenomena by mapping them onto some externally validated system of coordinates, such as leftism *tout court* or 'the reactionary mind in general'. The first exercise is fundamentally pointless; the second, for the most part, a waste of time. It may certainly seem tempting to hope that someday it should be possible to discover one single measurement scale that could be applied directly to all the different socio-institutional and discursive domains across which we conduct our social lives. Both reason and experience, however, suggest that one should not make too much of this prospect. Just because a given critical/heterodox tradition positions itself within the context of the international legal landscape on what would normally count as the intra-disciplinary left, it does not follow at all that it should have achieved this effect by adopting as part of its analytical apparatus or discursive conventions the same theoretico-conceptual repertoire that one would typically associate with leftwing radical movements in other socio-institutional landscapes. To expect anything different would be a mark of Hegelian idealism.

*Implication 3:* Heterodoxy, to paraphrase Edward Said, is in itself neither an institution, nor a discipline: it exists only because of the heterodoxes who practice it.<sup>15</sup> Devoid of any intrinsic content, the concept of heterodoxy, thus, describes an ontological condition which consists only in a certain set of *social practices* carried out by the respective groups of international lawyers vis-à-vis one another, in the light of their shared experience of their discipline's broader ideological structure.

A slightly different way of putting this would be to say that the concept of heterodoxy essentially covers all that which is consistently *socialised* in open opposition to whatever at that point in time is commonly perceived, within the respective discipline's social setting, as the disciplinary mainstream or orthodoxy. Note the way the word 'socialised' is being used here: heterodoxies are *socialised to perceive themselves as being different* from the orthodoxies; this does not mean that the underlying process of socialisation itself is executed *differently*. At the end of the day, all heterodoxies in contemporary international law work according to the exact same set of operative laws and conditions as the respective orthodoxies. The only thing which changes is the immediate current location occupied by the given school or tradition within the field's broader landscape.

Or, to put it a little more bluntly: if one takes at all seriously the traditional Marxist argument that revolutions can only take place when the actual structure of the underlying social relations itself undergoes fundamental transformation, then, for all the countless disciplinary heterodoxies that have emerged in the field of international legal studies over the years, it follows that the history of the international legal discipline has *never* as yet seen a truly revolutionary movement or tradition .

*Implication 4:* Every heterodox legal tradition shares the same field of events and processes – and, thus, is also bound by the exact same set of institutional trends and preconditions – as the

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<sup>15</sup> See Edward Said, *Reflections on Exile and Other Essays* (Cambridge: Harvard University Press, 2002) 165.

rest of the international legal discipline. The mechanisms of constitution and reproduction deployed in the creation, maintenance, and transformation of any given heterodox tradition are fundamentally indistinguishable from those which govern the constitution and reproduction of other, more mainstream disciplinary traditions. The practical workings of any given heterodox tradition, be it NAIL or the New Haven school of international law, in this sense, are entirely indistinguishable from the practical workings of the corresponding mainstream traditions. Put differently, there is nothing special or unique about critical and heterodox traditions *as traditions*: the crits are no different in this regard from the formalists, the positivists from the postcolonialists, the feminist legal tradition from the law-and-economics movement. The contents of their writings and teachings may differ considerably, but the operative logics at the root of their actual social and institutional practices do not – with one big exception: when it comes to those practices whose logics are determined by the terms of the broader social contract concluded between the discipline of international law and the world outside it, each heterodoxy can afford to break that contract a lot more freely than the corresponding orthodoxy.

#### 2.4 *The Logic of the Academic Process: Three Laws of Academic Capital Accumulation according to the Sociology of Conflicts Approach*

There are a number of important analytical distinctions that need to be made to help us grasp more clearly the next part of the argument.

The first distinction concerns the basic opposition between what might be called *localised forms of academic capital* (AC) – such as, eg, control over the appointments process or the awarding of research grants at the level of one single university – and the more *systemic, or ‘de-territorialised’, forms of AC* – such as, eg, control over the editorial decisions in leading publications or the governing councils of the learned societies. The reason why this distinction is important is that it helps us formulate more precisely the first structural law that governs the evolutionary chances of every given disciplinary tradition: *the law of the simultaneous augmentation of volume and diversification of forms of academic resources*. No disciplinary tradition, movement, or school can survive in the long run if it does not accumulate sufficient stocks of local academic capital at each given university or research centre where it aims to implant itself. At the same time, no movement, tradition, or school will be able to expand its reach or reproduce itself successfully across generations if it does not simultaneously accumulate extensive stocks of de-territorialised institutional resources. Stated in these terms, the relative prospects of survival and success for any given disciplinary tradition over time can be understood as a function *both* of its overall volume of AC holdings *and* the degree to which these holdings remain internally diversified – or, as Bourdieu puts it, ‘the global volume of capital held (all the different species of capital ... lumped together) [and] the structure of this capital (as defined by the relative weight of the different species).’<sup>16</sup>

The second analytical distinction concerns the opposition between what one might call those forms of AC whose valence derives directly from international law’s *specific condition as an academic discipline* and those forms of AC whose valence generally does not depend on the specific features of the international legal discipline as such.

Under the first heading, it seems useful to distinguish four different categories of institutional resources:<sup>17</sup>

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<sup>16</sup> Pierre Bourdieu, *In Other Words* (Stanford University Press, 1990) 117.

<sup>17</sup> Cf. Bourdieu, *Homo Academicus*, n.10, at 39-40.



- (i) control over faculty appointments and promotions and the constitution and funding of graduate research programmes;
- (ii) disbursement and accumulation of research grants and fellowships (such as, eg, Cambridge and Oxford JRFs), scholarly prizes (such as, eg, the ASIL Certificate of Merit), and career achievement indicators (such as, eg, the membership in the *Institut de droit international*);
- (iii) membership of the editorial boards of the leading international law journals, external examining committees (especially in the case of doctoral programmes), and the governing councils of learned and professional societies (such as, eg, the ESIL);
- (iv) control over the key publication sites (such as, eg, the American Journal of International Law or the *Revue generale de droit international public*) and general networks for the dispersal of academic discursive output (such as, eg, the Oxford University Press or Dalloz).

Under the second heading, it also seems possible to distinguish four basic categories of resources:

- (i) *general financial resources* conceived primarily as the ability to secure long-term large-scale funding to enable the given movement's continuous participation in the general academic process, as manifested, eg, through the publication of genre-defining texts, the organization and attendance of conferences, the implementation of graduate programmes designed to train and prepare the next generation of the movement's members as well as to equip them with the requisite academic credentials so as to enable them to secure attractive appointments, etc.;
- (ii) *general ideological resources* conceived as the ability to negotiate successfully the formal institutional divides between the world of academia and the world of popular media, on the one hand, and between the world of academia and the realm of public politics, on the other;
- (iii) *general bureaucratic and managerial resources* conceived essentially as a combination of practical skills and organisational experience relating to the know-how of the general academic process and the specific forms of organisational capital relating to the efficient management of complexly territorialised institutional networks and the development of effective structures of internal (for that movement) decision-making;
- (iv) *general human resources* conceived essentially as the combination of the quantity and quality of active participants: leaders, rank-and-file members, 'acolytes', support staff, fellow travellers, allies and sympathisers, etc.

The crucial point that has to be noted is that with regard to the first group – the discipline-specific resources – each of the listed categories can be regarded not only as a representation of a certain set of institutional sites or processes but also as a manifestation of what in the language of the Actor-Network Theory one would call a *self-enclosed material semiotic regime*.<sup>18</sup> That is to say, each of these rubrics can be effectively understood as a representation of a more or less autonomous system of social practices that operates in the mode of symbolic economy.<sup>19</sup> The same, however, cannot be inferred about any of the categories that form part of the second group (non-discipline-specific resources).

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<sup>18</sup> A material semiotic regime is a regime that consists of socially conditioned material practices which carry and transmit 'second-order meanings' (Lotman). In other words, how we position ourselves vis-à-vis such practices always sends a message quite separate from the immediate content of what 'gets done' or 'is depicted' within those practices (Barthes). For a general overview of the Actor-Network Theory, see further John Law, *After Method: Mess in Social Science Research* (New York: Psychology Press, 2004); Bruno Latour, *Reassembling the Social* (Oxford University Press, 2005).

<sup>19</sup> For Bourdieu's account of the basic logic of symbolic economy, see Pierre Bourdieu, *Practical Reason: On the Theory of Action* (Stanford University Press, 1998) 92-122

The third important distinction that needs to be made as part of this theoretical ground-clearing exercise is the distinction between those institutional conditions which apply with equal force to all disciplinary movements, traditions, and schools, heterodoxies and orthodoxies alike, and those which tend to affect the heterodox schools and traditions in a decidedly different manner compared to the way they affect the disciplinary orthodoxies. One way to explain how this distinction tends to manifest itself in practice would be to connect the ideas of orthodoxy and heterodoxy to the Wallersteinian topography of core-periphery relations.<sup>20</sup> Looking at the practices of academic production from this angle, the basic argument could then be summarised this way: those disciplinary movements and traditions which secure the longest control over the discipline's core sites of production can extract, by virtue of their occupation of these sites, a whole range of *additional rents* which are never going to be available to those traditions that remain stuck within the discipline's socio-institutional periphery.

How exactly does this dynamic work? In a nutshell, the pattern goes something like this. It is a fairly self-evident fact that every disciplinary orthodoxy, simply by virtue of its occupation of the discipline's institutional centre-stage, tends to benefit from a considerable reduction in the costs of its socio-institutional reproduction. Both in terms of the various costs associated with the recruitment of new members and in terms of the various costs related to the proliferation of its discursive-ideological outputs, it regularly avoids many of the burdens borne by its heterodox rivals, not least in the field of graduate research funding.

To use a familiar example: neoclassical positivism (NCP) a la mode Ian Brownlie would not, all things being equal, have to 'worry' so much about its ability to secure generous PhD grants in order to attract sufficient numbers of top-class doctoral students to ensure its survival and reproduction across generations as, say, the feminist legal tradition (FLT) or Third World Approaches to International Law (TWAIL), thanks to the fact that, unlike the latter two, it has succeeded over the last several decades in gaining a considerable measure of presence at places like Oxford and Cambridge. Because of their traditionally high reputation, it can be assumed that bright, ambitious students will always apply to Oxbridge doctoral programmes. What is more, a sufficiently large proportion of them will also be prepared to do so even in the absence of any funding support, on the understanding that whatever financial burden this might create for them in the short run would almost certainly be outweighed by the significant improvement in their future career possibilities brought by the acquisition of an Oxbridge degree. At the same time, because they proceed to pursue their studies at Oxbridge, their ability to attract grant funding from external grant-giving institutions (say, a government scholarship scheme), all things being equal, would also usually turn out to be significantly higher than that of their peers looking to fund their doctoral studies at lower-rated institutions. Putting these patterns together, it follows that the need for the NCP network to establish a steady stream of grants financed from its 'internal' resources will be considerably lower, in proportionate terms, than it would be for TWAIL or the FLT. The NCP, in other words, will simply not feel the same pressure to go out of its way to provide additional financial incentives to its PhD cadre to entice them to join and stay with the NCP tradition, since it will always-already have a fairly well-established supply of high-quality PhD student material. This means, among various other things, that it will therefore be able, at this point, to reduce the amount of institutional efforts it would otherwise have expended on the maintenance of its *inter-generational reproduction* programme. In the same situation in which other, less centrally placed disciplinary traditions would have to direct a significant proportion of

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<sup>20</sup> I borrow this idea from Diego Lopez Medina and Duncan Kennedy. See Diego Lopez Medina, *Comparative Jurisprudence: Reception and Misreading of Transnational Legal Theory in Latin America* (SJD Thesis, Harvard Law School, 2001); Duncan Kennedy, 'Three Globalizations of Law and Legal Thought: 1850–2000', in Trubek and Santos, n.13, at 19.

their institutional resources towards the acquisition and disbursement of grants for their PhD cadre, the NCP tradition will thus find itself in the position where it will be able to re-funnel those resources towards other investment possibilities. The energy and organizational talents that would otherwise have been spent on negotiating the distribution of PhD grants among different social science departments (as well as among different traditions within the law department) can now be reallocated towards, eg, the organisation and financing of high-profile conferences, summer schools, new publications, interdisciplinary partnerships, strategic excursions into the realm of public media, etc.

Nor are these all the rents which the NCP movement is going to be able to extract in this situation. The fact that the institutional prestige of universities like Oxford and Cambridge can secure every movement present within their boundaries a steady supply of top-quality student material will also create a whole range of other highly attractive opportunities that the NCP tradition will be able to take advantage of that TWAIL and the FLT respectively will not. In the first instance, the ability to work with the best students and to enjoy the benefits of the reallocation of institutional resources towards conferences, publications, media work, etc. will usually strengthen the general interest and commitment among that segment of the NCP's academic community which from the career-affiliational point of view can be considered the most disciplinarily mobile, i.e. those entrepreneurial types who under a different set of circumstances would have been in the best position to switch successfully to another disciplinary tradition (eg international relations) or even a different professional path (civil society, government, etc.). The continued retention of these entrepreneurial talents in the long run is likely to bring a considerable increase in the inflow of external funding (eg, through the Leverhulme or the Marie Curie fellowship schemes) as well as the expansion of NCP's general ideological reach (eg, through regular appearances on the CNN or the appointment to the UK Attorney General's Public International Law panels of counsel). Both of these trends over time are likely to result in the steady improvement of NCP's overall bureaucratic and managerial capital stocks. The steady enhancement of its organizational and ideological resources, in turn, will enable the NCP to pursue a greater range of high-profile disciplinary initiatives as well as to entrench a greater number of individual NCP scholars across the key disciplinary institutional sites, which in turn will help attract the attention of further potential graduate students, the external funding community, and the ideological allies – and thus *ad infinitum*.<sup>21</sup>

A different way of describing this pattern would be to say that the occupiers of the disciplinary core typically tend to benefit a lot more than the occupiers of the disciplinary periphery from the effects of the second law of academic capital accumulation, the *general law of institutional resource convertibility*, which states, essentially, that any given species of AC can, under certain circumstances, be converted into another species of AC: high career-achievement indicators can be used to improve one's position in the struggle for research grants; general ideological capital can 'finance' the attainment of membership of the learned societies' governing councils, etc.

The more efficiently one species of AC can be converted into another species in the particular institutional context – and it needs to be noted, of course, that the law of resource convertibility does not always work smoothly, and it certainly does not work instantaneously – the more swiftly the respective movement or tradition can make up for whatever shortages or imbalances in its capital structure it may have developed otherwise. The more regularly a given movement or tradition can benefit from the law of resource convertibility, the greater becomes its

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<sup>21</sup> I develop this point in more detail in Akbar Rasulov, 'New Approaches to International Law: Images of a Genealogy', in Jose-Maria Beneyto and David Kennedy (eds.), *New Approaches to International Law* (The Hague: T M C Asser, 2012) 151, at 175-7.

*capacity for large-scale tactical and strategic manoeuvres*, including those required in order to secure the reformulation of the *standard protocols of intra-disciplinary knowledge-production* to its advantage, i.e. in ways that would be most profitable to its accumulated knowledge stocks, theoretical resources, and current human talent. Simply by occupying the core sites of disciplinary production mainstream disciplinary traditions can thus, in effect, make the disciplinary structure work on their behalf – and against the respective heterodoxies’ interests.<sup>22</sup>

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But here now comes an interesting complication: in the old Kantian taxonomy of academic disciplines, writes Bourdieu, law has traditionally been classed as a ‘higher faculty’, i.e. one of those disciplines whose main social function consists in the training of the various agents of political power – priests, doctors, judges – and which for that reason tend to be both ‘the most directly controlled’ by the political order and ‘the least autonomous from it’.<sup>23</sup> As a result of this close relationship of control and dependence, when it comes to *the organisation of their knowledge-production protocols*, the vast majority of juridical disciplines consistently tend to gravitate towards ‘what constitutes in Kant’s terms ... “the right wing of the parliament of knowledge” [which is deference to] authority’.<sup>24</sup> A large part of this trend, explains Bourdieu, can be traced to the ideas of social licensing and governance through the exercise of authorized knowledge:

The competence of the doctor or jurist is a technical competence guaranteed by the [state] law, which confers the authority and the authorization to use a more or less scientific knowledge: [the wide cultural acceptance of the idea of] the subordination of the medical researchers to the clinical practitioners expresses this subordination of knowledge to social power [very well. For, indeed,] the operation effected by Kant’s higher faculties is partly akin to social magic, which, as in initiation ceremonies, tends to consecrate a competence which is inextricably social and technical.<sup>25</sup>

At the opposite end of the spectrum from law and medicine, according to this theory, stand the so-called ‘lower faculties’: history, linguistics, mathematics, literature, etc. These are the disciplines, explains Bourdieu, which, having no inherent relationship of symbiosis with political power, tend to be both far less controlled by (and implicated in the reproduction of) the existing social order and thus also far less enthralled to the idea of disciplinary authority.<sup>26</sup> This means that, rather than usefulness to the temporal power and social acceptance, it is the ideals of

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<sup>22</sup> ‘It is through the weight they possess within this structure, more than through the direct [micro-level] interventions they may also makes ... that the dominant [schools] exert their pressure on the dominated [schools] and on their [institutional] strategies: [in effect, they thus] define regularities and sometimes [even change] the rules of the game, by imposing the definition of strengths most favourable to their interests and modifying the entire environment of the other [schools] and the system of constraints that bear on them or the space of possibles offered to them. The distribution of strength governs the distribution of chances of success ... through various mechanisms, such as the economies of scale or ‘barriers to entry’ resulting from the permanent disadvantage with which [heterodox schools] have to cope.’ Pierre Bourdieu, *The Social Structures of the Economy* (Cambridge: Polity Press, 2005) 195-6.

<sup>23</sup> Bourdieu, *Homo Academicu*, n.12, at 62.

<sup>24</sup> *Ibid.*, at 63.

<sup>25</sup> *Ibid.*

<sup>26</sup> *Ibid.*, at 62.

Enlightenment and analytical rigour – ‘the freedom to examine and to object’ – that are generally considered the most treasured values in this instance. Freed from the rule of social control, the knowledge-production protocols in such disciplines, observes Bourdieu, are left to be ruled by ‘the scholar’s own reason, that is to say, [their] own laws’.<sup>27</sup>

What exactly is the relevance of this divergence in knowledge-protocol dynamics for our purposes? The answer should not be hard to guess. All higher-faculty disciplines, notes Bourdieu, are organized in such a manner as to facilitate the production of a certain cadre of ‘executive agents able to put into practice, without questioning or doubting, within the limits of a given social order, the techniques and recipes of a body of knowledge which they claim neither to produce nor to transform.’<sup>28</sup> International law is not an exception in this regard, and the same pattern of authority vs. Enlightenment differentiation that organises the distribution of disciplines between the higher and lower faculties replicates itself within its internal disciplinary landscape. The closer a given tradition of international law moves to the institutional core of the international legal discipline, the greater becomes the pressure on it to organise its knowledge protocols in such a way as to facilitate the production of ‘mindless executive ants’. The more readily it accepts and internalizes this demand, the more difficult it becomes for it to win over the hearts and minds of the best and the brightest graduate students: coming over to the orthodox side may improve one’s career prospects, but the intellectual life one will lead within those quarters is certainly guaranteed to be deadly boring. And every bright student abhors boredom.

And thus we come to what may be described as the *third law of academic capital accumulation*. The one context in which being removed from the disciplinary core can, ultimately, become a source of *relative empowerment* for the heterodox disciplinary tradition is the one context which frequently matters the most: having distanced itself from the discipline’s centres of institutional power, the heterodox tradition does not need to limit itself to the reproduction of an intellectual culture guaranteed to supply a cadre of mindless executive ants to help prop up the existing social order. Freed from this unappealing burden, it can promise to its recruits something they could never hope to find if they joined a long-established orthodoxy: that simple old-fashioned experience of intellectual freedom that always attracts the greatest and the most generous minds of every generation.

For, there is, after all, something special about international law *as a discipline* that sets it apart from all other legal fields.<sup>29</sup> The vast majority of research students who come to international law seem to do so not because they are motivated by the promise of a better pay-check or a vastly improved social status. For many of them the ability to lead an intellectually fulfilling professional life – that ‘freedom to examine and to object’ that Kant and Bourdieu put such a premium on – seems to constitute a much more important consideration. The mainstream international law tradition, by virtue of its heavy investment in the existing political order, cannot afford the luxury of offering such kind of freedom to its members. Its heterodox counterparts, on the other hand, can – and in most cases readily do.

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<sup>27</sup> Ibid.

<sup>28</sup> Ibid., at 63.

<sup>29</sup> Cf. David Kennedy, ‘A New World Order: Yesterday, Today, and Tomorrow’ (1994) 4 TLCP 329, at 335.

### 3. NAIL as an Institutional Phenomenon<sup>30</sup>

#### 3.1 Institutional Story: Standard Account

The standard account of NAIL's history – at least as internalised by the movement's present-day participants and inheritors<sup>31</sup> – revolves around two heavily mythologised narratives. The first of these narratives focuses on what is commonly understood to be a long-established divergence between the intellectual and the organisational trajectories of NAIL; the second, on the broader role of the movement's 'ideological leaders', and in particular David Kennedy, in its establishment and evolution.

At the heart of the first narrative lies the idea – inspired, it seems, to a large degree by Duncan Kennedy's version of the history of the US CLS<sup>32</sup> – that there exists, in principle, a fundamental distinction between NAIL *as an academic movement* and NAIL *as an intellectual tradition*. The former phenomenon, it is understood, has had a much shorter lifespan than the latter. It also reflected a much greater sense of self-consciousness that has long since dissipated and become outmoded. The endpoint of its historical trajectory came sometime around 1998, when the so-called 'fin de NAIL' conference set out to disband the NAIL movement and retire the NAIL moniker.<sup>33</sup> Whatever happened under the NAIL rubric after that, on this view of things, consequently, can only be discussed in terms of the NAIL tradition but not the NAIL movement.

As could be gleaned from the way I have been using the terms 'tradition' and 'movement' in these pages, I find this argument by and large unconvincing. Firstly, unless one takes an extremely subjectivist approach to sociology, to verify the existence of a given social fact one needs to look at the patterns of the corresponding social practices before examining whatever self-serving accounts about them may have been produced by the interested parties, and the social practices of the NAIL community very strongly indicate, in my view, that the NAIL movement did not come to an end with the 'fin de NAIL' conference. Secondly, I do not think one can really talk of intellectual traditions as disembodied ideal realities. Traditions do not exist separately from – or outside of – the underlying social realities. If only for this reason alone, I do not find it particularly interesting to engage with this aspect of the traditional account of the NAIL history.

The second standard narrative about NAIL's institutional career trajectory, by contrast, deserves a lot more attention. At the root of this narrative lie a series of implicit but very far-reaching assumptions that directly concern the object of this inquiry. The most important among these assumptions concerns the question of individual leadership and the importance of personal connections.

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<sup>30</sup> In addition to those already mentioned, I owe my understanding of the institutional evolution of NAIL outlined in this section to conversations with Antony Anghie, Hani Sayed, Catriona Drew, Thomas Skouteris, Martti Koskenniemi, Susan Marks, Mikhail Xifaras, Matt Craven, Tanya Monforte, Rose Parfitt, B. S. Chimni, Nathaniel Berman, Itsuko Higashiuchi, Ileana Porras, Alvaro Santos, Karen Knop, Michael Fakhri, Reut Paz, Boris Mamlyuk, Fleur Johns, Owen Taylor, Robert Knox, and Vishaal Kishore.

<sup>31</sup> For further elaboration of this account and its underlying narrative programming, see Rasulov, *supra* n.23.

<sup>32</sup> See, e.g., Duncan Kennedy, 'Afterword', in Duncan Kennedy, *Legal Education and the Reproduction of Hierarchy* 202, 220 (2004) (CLS is dead as a movement but 'still very much alive as a "school" [and a] literature'). Cf. *infra* n. 35.

<sup>33</sup> See Thomas Skouteris, 'Fin de NAIL: New Approaches to International Law and Its Impact on Contemporary International Legal Scholarship' (1997) 10 LJIL at 415; Kennedy, *When Renewal Repeats: Thinking against the Box* n. 1, at 490-1.

The basic plotline here unfolds more or less as follows: NAIL's founding moment as an academic movement and an intellectual tradition came at some point in the late 1980s; its central institutional site was Harvard Law School. The first tremors which prefigured its emergence had taken place several years before that, on the other side of the Atlantic. Even though there had been no clearly identifiable institutional locus for the NAIL tradition to crystallize around at that point, each of the four scholars who are traditionally identified as part of its 'founding generation' – David Kennedy, Martti Koskenniemi, Anthony Carty, and Philip Allott – had a strongly pronounced European link at the time. Koskenniemi, Carty, and Allott lived and worked in Europe; Kennedy had spent several years, after finishing his legal studies, in Germany and then worked as a lawyer in Geneva and Brussels. All four had come to international law sharing the same broad set of commitments: to challenge the old boundaries, to transform the established knowledge protocols, to open up the field of international legal thought to various elements of the continental philosophic tradition, especially those historically favoured by the US CLS movement.

Three of the four, furthermore, had also brought with them considerable non-academic professional experience (Kennedy, Koskenniemi, and Allott). Two of them (Kennedy and Allott) had then gone on to teach at universities commonly regarded as part of the global academic elite (Harvard and Cambridge). Both had been educated at the same institutions themselves, having been taught and mentored into the international legal discipline by the leading international lawyers of the previous generation (Robert Jennings, Louis Sohn, Thomas Franck). The academic credentials of the other two seemed no less impressive: Carty had received his doctorate from Cambridge, Koskenniemi spent some time at Oxford and was otherwise a graduate of one of the leading international law schools in northern Europe (Turku).

All four were male, multilingual, and lawyers by training. All four also shared a strong dislike for the NCP, on the one hand, and Myres McDougal's policy-oriented jurisprudence, on the other.

And yet at first all these synergies did not amount to anything concrete. However many commonalities the four founders may have shared in terms of their individual profiles, none of them were sufficient to trigger the emergence of a new movement. It was not until Kennedy's Herculean project at Harvard began in earnest that NAIL's first lineaments started to take form.

Drawing on his experience with the US CLS movement, by the second half of the 1980s, Kennedy began to develop a dense network of inter-personal connections and mentoring structures, using his legendary international law course as his central ideological channel and primary recruitment platform. Coupled with his gradual rise to prominence within Harvard's internal institutional landscape, this created the necessary foundation for the emergence of the NAIL movement.

By the end of the decade each of the four founding figures went on to publish a trailblazing monograph – Carty in 1986, Kennedy in 1987, Koskenniemi in 1989, Allott in 1990 – which quickly secured for the newly emerging tradition a continuous presence in the discipline's collective consciousness as well as provided the newly emergent tradition with the first iteration of its literary canon. As the first crop of Kennedy's students began to secure academic jobs, starting with the Northeastern in Boston, then gradually expanding elsewhere, whatever doubts may have remained before now quickly dissipated: a new movement finally had arrived and at its social and institutional centre stood the figure of David Kennedy and his Harvard international law programme.

Over the next decade the founding figures' axis slowly dissolved. First Carty, then Allott gradually moved out of the rapidly expanding NAIL circle. Their place was filled by Kennedy's former students and junior associates: Nathaniel Berman, Karen Engle, Jorge Esquirol, Antony Anghie, Ileana Porrás, Thomas Skouteris, and various others. By the late 1990s, NAIL scholars were busy churning out an ever-increasing number of books, articles, and conference papers, inspiring in the process the emergence of a whole series of variously successfully institutional spin-offs, the most highly regarded of which became the TWAIL network.

The end of Kennedy's association with Harvard's doctoral programme triggered a short period of institutional crisis, a partial solution to which was found in the gradual expansion of the overseas NAIL network, with Helsinki, London, and Melbourne serving as the movement's main international outposts. Despite the noted attempt to retire the NAIL moniker in 1998, the movement thus continued to evolve and expand. By the mid-2000s, in addition to TWAIL, Kennedy's students and associates went on to set up a series of variously scaled research initiatives across Latin America and Western Europe, getting closely involved at some point in the formative stages of the European Society of International Law, slowly establishing a presence in the Cambridge University Press catalogue, the SOAS law school in London, and the *Leiden Journal of International Law*.

At all points, however, it was Kennedy's programme at Harvard that remained the movement's institutional and ideological headquarters. At the end of the 2000s, after a brief hiatus that had seen him move to Brown, Kennedy returned to Harvard, to establish a new institutional platform for the movement in the shape of the Institute for Global Law and Policy, and, having joined forces with the other NAIL teams at Melbourne, London, and the newly set-up English-speaking Sciences-Po law school in Paris, proceeded to take the NAIL enterprise to an entirely new level of institutional politics by aligning it with the Qatar Foundation-backed international law school initiative at Doha.

### 3.2 Institutional Story: General Picture – How the Network Evolved

I am not sure to what extent this set of narratives – I hesitate to call it anything more than that – can serve as a sufficiently reliable guide to understanding NAIL's history and in particular its record of intra-disciplinary achievements and failures. It certainly has quite a lot going for it, and yet, I remain convinced, if one were looking to develop a genuinely insightful, analytically *rigorous* account of NAIL's evolution, most of these narratives, ultimately, would have to be set aside.

The account that I would like to offer in their place is based on the theoretical framework outlined in Section 2 above. As a result of this it has a slightly formal structure and appearance, and so the easiest way to present it, I thought, would be by organizing it in the form of a table.

#### General Evolutionary Trajectory of the NAIL Movement

Developmental Stage	Institutional Configuration	Geographical Organization
Inception (early to mid-1980s)	<ul style="list-style-type: none"> <li>• <i>Overall organisational form</i>: a diffuse critical impulse derived as much from the theoretical reflections on the state of the disciplinary orthodoxy as the practical experiences of the founding figures outside the academic legal process</li> <li>• <i>Human capital structure</i>: the founding figures and some junior associates (the demographics is predominantly white, male, Western-originated, lawyers by training)</li> <li>• <i>Main patterns of academic production</i>: separate efforts and disparate projects focused around the publication of iconoclastic texts and delivery of legal education in traditional educational settings (eg</li> </ul>	No discernible territorial centre



	<p>Harvard JD courses)</p> <ul style="list-style-type: none"> <li>• <i>AC holdings configuration</i>: low stocks of discipline-specific capital, considerable potential in terms of academic and non-academic credentials</li> </ul>	
Emergence (mid- to late-1980s)	<ul style="list-style-type: none"> <li>• <i>Overall organisational form</i>: CLS-style ‘project’<sup>34</sup> conceived in part as an extension of the US CLS movement</li> <li>• <i>Human capital structure</i>: the founding figures and the first generation of NAIL scholars (average demographic profile: white, gender-balanced, Western-originated, lawyers by training)</li> <li>• <i>Dominant patterns of academic production</i>: iconoclastic books and long articles in US law journals; legal education in traditional educational settings; CLS-related conferences</li> <li>• <i>AC holdings configuration</i>: modest stocks derived primarily from the linkage with the US branch of CLS and the Harvard JD programme but also the extra-academic prestige indicators mobilised through the founding figures’ professional credentials</li> </ul>	Exclusively US-based with Harvard Law School as the sole central node
First crisis (mid- to late 1980s)	<ul style="list-style-type: none"> <li>• Repression of US CLS<sup>35</sup> causes a temporary freeze in the development of the NAIL movement, accompanied by a conscious attempt to distance the NAIL initiative from the CLS legacy</li> </ul>	
Re-start and rise to prominence (early to mid-1990s)	<ul style="list-style-type: none"> <li>• <i>Overall organisational form</i>: a standalone movement conceived as a self-conscious project of destabilising the discipline’s established protocols of knowledge production</li> <li>• <i>Human capital structure</i>: the founding figures, the first generation, and the gradually emerging second generation (average profile: ethnically mixed, less gender-balanced, increasingly Third-World-originated, but most participants still come from a predominantly legal-educational background)</li> <li>• <i>Dominant patterns of academic production</i>: books, edited volumes, long and medium-length articles in US and European-based law journals; Dighton</li> </ul>	Predominantly US-based with Harvard as the sole central node and the Northeastern Law School (Boston) as the main secondary outpost

<sup>34</sup> See Duncan Kennedy, *A Critique of Adjudication* (Cambridge: Harvard University Press, 1997) 6: ‘A project is a continuous goal-oriented practical activity based on an analysis of some kind (with a textual and oral tradition), but the goals and the analysis are not necessarily internally coherent or consistent over time. It is a collective effort, but all the players can change over time ... It isn’t a project unless people see it as such, but the way they see it doesn’t exhaust what outsiders can say about it.’

<sup>35</sup> For background on this, see further Kennedy, ‘Afterword’, n. 32; Pierre Schlag, *U.S. CLS* (1999) 10 L&C, at 199, 204-5.

	<p>weekends (off-campus, full-participation writing workshops);<sup>36</sup> large conferences; legal education in traditional educational settings with an increasing emphasis on graduate training programmes; counter-disciplinarity as an epistemic project</p> <ul style="list-style-type: none"> <li>• <i>AC holdings configuration</i>: high stocks of local AC at Harvard, low diversification of non-territorialised discipline-specific and non-discipline specific capital, modest bureaucratic capital holdings</li> </ul>	
Expansion and dispersion (mid-to late 1990s)	<ul style="list-style-type: none"> <li>• <i>Overall organisational form</i>: movement as a confederacy, crystallisation of explicitly distinct, mutually autonomous strands organised along thematic and theoretical divisions</li> <li>• <i>Human capital structure</i>: same as in previous period</li> <li>• <i>Dominant patterns of academic production</i>: long and medium-length articles in US and European-based law journals; exclusive orientation towards the academic legal process; Dighton weekends; large conferences, including with participation of members of other disciplinary traditions; legal education in traditional educational settings with a more strongly pronounced accent on graduate training programmes; multiple inter- and counter-disciplinarity</li> <li>• <i>AC holdings configuration</i>: modest improvement in non-territorialised discipline-specific capital holdings, further increase in local AC stocks at Harvard (but also in Helsinki), low diversification of non-discipline specific capital holdings</li> </ul>	Predominantly US-based, with a few outposts in Europe (Helsinki, London) and Harvard as the sole central node
Second crisis and 'rebirth' (late 1990s to mid-2000s)	<ul style="list-style-type: none"> <li>• <i>Overall organisational form</i>: movement in self-denial, progressive loosening of the confederacy as different strands take off on their own</li> <li>• <i>Human capital structure</i>: same as before with a steady influx of non-lawyers and gender-rebalancing</li> <li>• <i>Dominant patterns of academic production</i>: books and articles of varying length in European and sometimes US-based legal and interdisciplinary journals; large-scale conferences without the participation of any mainstreamers; legal education in traditional educational settings with principal focus on graduate programmes; attempts are made to turn the project away from an exclusively academic orientation; Dighton formula falls into relative disuse; radical counter-disciplinarity projects replaced by more modest inter-disciplinarity</li> </ul>	The Helsinki-Harvard-Toronto-London-Melbourne axis with Harvard as the first among equals

<sup>36</sup> On these, see further Rasulov, 'New Approaches to International Law: Images of a Genealogy', n. 21, at 161.

	<p>programmes</p> <ul style="list-style-type: none"> <li>• <i>AC holdings configuration</i>: the weakening of the Harvard ELRC basis is offset by the expansion of the territorial framework and the parallel diversification of the structure of both non-territorialised discipline-specific and non-discipline specific AC holdings, evidenced, <i>inter alia</i>, by the accumulation of new prestige indicators and the improvement of networking linkages outside the traditional academic field</li> </ul>	
<p>‘The long present’ (mid-2000s to the present day)</p>	<ul style="list-style-type: none"> <li>• <i>Overall organisational form</i>: movement as an institutional network, the discursive confederacy falls apart – ‘many projects, no common theme’ – just as in the institutional dimension the old framework is re-established and strengthened with the Doha project gradually emerging as the new focal point</li> <li>• <i>Human capital structure</i>: the third generation of NAIL scholars enters the scene (average profile: a lot more racially and gender-balanced, strong ‘European’ and Third Worldist presence, a considerable proportion of new players without a strong legal educational background or knowledge of the ‘traditional’ NAIL/CLS canon)</li> <li>• <i>Dominant patterns of academic production</i>: books and articles as before; revival of the Dighton formula, first, in the Brown and Harvard IGLP settings, subsequently in the IGLP Doha contexts; return to exclusive academic orientation; inter-disciplinarity as a canon; large-scale conferences without any mainstreamers; small-scale research workshops in numerous formats with strong cross-disciplinary attendance from economics, history, and science-technology-studies (STS); summer schools and graduate programmes as the principal educational forms and mechanisms of reproduction; increased circulation of graduate students and early career scholars across the movement’s institutional network</li> <li>• <i>AC holdings configuration</i>: dispersion of holdings, steady increase in ideological, bureaucratic, financial, and all forms of discipline-specific AC, stabilisation of publishing and publication dispersal networks</li> </ul>	<p>Rhizomatic in appearance, but centred along a clearly recognisable axis: Harvard-London-Paris-Doha axis</p>

### 3.3 Institutional Story: Specific Case – NAIL Publishing

One can think of many ways to relate the history of an academic movement. The somewhat formalised account proposed in the previous section provides a great deal of important insight into

the development of NAIL's institutional trajectories. But it also leaves many interesting details out. One possible way to redress this would be to supplement this account with various sets of relevant statistics concerning, say, the number of doctoral theses started and defended by NAIL-associated scholars in different years and in different countries; the total amount of research grants and scholarships won; the numbers of publishing contracts secured, professional achievement awards received, etc. An exercise of this nature, however, lies beyond the scope of the present essay. What I would like to offer in its stead is something slightly different – a relatively narrowly focused overview of the principal trends in the evolution of NAIL's publishing patterns.

*i. Early 1980s to mid-1990s.*

In the first few years of its existence, NAIL's chief publishing outlet was undoubtedly the *Harvard International Law Journal* (HILJ). Between 1985 and 1992 HILJ published a whole series of classical NAIL articles by Kennedy (1985, 1986, 1990 (with Leo Specht), 1991), James Boyle (1985), Gunther Frankenberg (1985), Dan Tarullo (1985), and Nathaniel Berman (1992), as well as that famous review essay by Nigel Purvis on critical legal studies in public international law.<sup>37</sup> *Wisconsin International Law Journal* provided a home for another two landmark essays (Kennedy, Berman), as did also the *American University Journal of International Law and Policy* (Kennedy, Ed Morgan). There were also several notable forays into the Michigan (Karen Engle, Anne Orford, Carty, Koskenniemi) and Yale (Berman, Morgan) journal clusters and even a couple of odd appearances in the *American Journal of International Law* (the famous essay on the feminist approaches by Hilary Charlesworth, Christine Chinkin, and Shelley Wright) and *Harvard Law Review* (Annelise Riles, Berman). Interestingly, unlike Harvard, which was Kennedy's home, and Wisconsin, which was historically linked to the old CLS crowd through David Trubek and Mark Tushnet, neither Michigan nor Yale had any obvious personnel connections to NAIL.

Outside North America, the only notable publishing connection during this period was established with the newly founded *European Journal of International Law* (EJIL). In the first three years of its existence EJIL published pieces by all three of European-based NAIL founding figures: Koskenniemi (1990), Carty (1991), and Allott (1992). *The Nordic Journal of International Law* and the *Finnish Yearbook of International Law* also ran a couple of pieces by Koskenniemi and Pal Wrangé. Beyond this and a few brief appearances in the ASIL Proceedings by Kennedy, there seemed to be no obvious patterns to NAIL's publishing practices. Unable yet to secure any lasting editorial appointments, NAIL members at this point seemed to be happy simply to take their publishing opportunities wherever they became available: *Texas Law Journal* (Kennedy), *Vanderbilt Journal of Transnational Law* (Carl Landauer), *International and Comparative Law Quarterly* (Koskenniemi, Riles), and even *Human Rights Quarterly* (Kennedy).

Three of the four classical NAIL monographs released during this period were placed with second-rate publishing houses: Carty published *The Decay of International Law* with Manchester University Press; Kennedy, his *International Legal Structures* with the German-based Nomos; Koskenniemi, *From Apology to Utopia* with Finnish lawyers' publishing corporation. Only Allott's *Eunomia* was released by a premier international publisher (Oxford).

*ii. Mid-1990s to mid-2000s*

Starting from the mid-1990s the NAIL-HILJ relationship gradually began to disintegrate. Henceforth only TWAIL-related themes could expect to receive any considerable coverage in HILJ, a pattern that, nevertheless, led to the publication of a whole series of first-class essays that

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<sup>37</sup> See Purvis, 'Critical Legal Studies in Public International Law', n. 7.

immediately came to be regarded as an important part of the NAIL canon, with Antony Anghie's *Finding Peripheries* confidently leading the field.

Around the turn of the century a few interesting pieces by Kennedy and Anghie (among others) appeared in the *New York Journal of International Law and Politics*, even though the NYU, like Yale, had no obviously identifiable NAIL faculty members.<sup>38</sup> Utah, on the other hand, did, which explains, among other things, the placing in the *Utah Law Review* of both Kennedy's remarkable 1994 essay on the 'international style' and the 1997 special issue on the 'new approaches to comparative law'.

The turn of the millennium finally witnessed the NAILmovement reaching the proverbial Mount Olympus, as a group of high-ranking NAIL participants were delegated the task of organising that year's American Society of International Law conference, which resulted in the inclusion of a large number of NAIL papers in that year's ASIL proceedings. The Michigan cluster of journals once again proved attractive (James Gathii in 2000) as did the American University journal (Berman in 1999).

In Europe, in the meantime, the NAIL-EJIL connection that had seemed so promising at the start of the decade failed to materialise into anything permanent, save for the occasional publication of various short pieces by Koskenniemi now and then. There was a brief period sometime around 2000, when it seemed as though NAIL's new UK-based allies and participants had come on the verge of pulling off a strategic break-through: Susan Marks, Gerry Simpson, Catriona Drew, Matt Craven, Carty, and Allott all made appearances in the EJIL pages between 1998 and 2001. But no editorial 'takeover' of any kind resulted from that, and soon enough the Brit-NAIL invasion had run its course.

The role that EJIL refused to take went instead at this stage to the *Leiden Journal of International Law* (LJIL), which for a few exciting years around the turn of the millennium, thanks in no small part to Thomas Skouteris's strategic manoeuvring, became NAIL's principal European platform. As other NAIL-related people started to join Skouteris on the LJIL board (Fleur Johns, Florian Hoffman), the journal began to release a steady stream of high-quality NAIL-coloured articles: Kennedy (1999), Berman (2000), Esquirol (2000), Morgan (2001), Carty (2001), Riles (2002), Gathii (2002), Koskenniemi and Leino (2002), Vasuki Nesiiah (2003), Skouteris (1998), as well as a special 2003 issue on international order (with appearances by a range of NAIL regulars) and the landmark symposium on Marxism and international law in 2004. Finally, the *Nordic Journal of International Law* saw a few interesting pieces too, most notably the 1996 review essay by Deborah Cass. Outside North America and Europe this period also welcomed the addition to the NAIL network of the *Australian Yearbook of International Law*.

### iii. Mid-2000s to present

The mid-2000s brought a brief reactivation of the NAIL-EJIL connection: after the Koskenniemi-led 2003 symposium on Alf Ross, 2004 saw the publication of the milestone essay on international law and imperialism by B.S. Chimni; 2005, pieces by Fleur Johns and George Galindo, the special issue on Philip Allott, and Koskenniemi's keynote lecture from the inaugural conference of the newly established European Society of International Law. This rich run of form, however, soon came to an end. More notably, nothing comparable happened on the AJIL end, although Engle had a medium-length piece published in 2005. HILJ published a few more TWAIL-themed pieces in the early and mid-2000s (Makau Mutua, Arnulf Becker Lorca, Chimni, Maximo Langer), as did also LJIL off the back of its four special issues on Alejandro Alvarez

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<sup>38</sup> It did, however, have Thomas Franck, a long-time friend and supporter of the movement, which might account for the relative longevity of the NAIL-NYU link: Morgan had a piece published there already in 1988; Berman in 1992.

(2006), T. O. Elias (2008), the Indian tradition of international law (2010), and the League of Nations (2011). In addition to that LJIL also ran a series of non-TWAIL NAIL-related pieces (Orford, Berman, Craven, Morgan, Marks, Aeyal Gross, Umut Ozsu, Sara Kendall).

The greatest change to NAIL's publishing pattern during this period, however, came on the front of book publishing. Unlike in the late 1980s, the majority of NAIL-related monographs published since 2000 have been placed with leading international publishers: Koskenniemi, Allott, Anghie, Karen Knop, Simpson, Orford, Johns, Michael Fakhri, and Becker Lorca all published with Cambridge University Press; Marks, Ozsu, and Craven with Oxford University Press; Kennedy with Princeton University Press. Another platform for NAIL-related monographs was found in the Koskenniemi-edited Erik Castren institute series at Brill (Outi Korhonen, Kerry Rittich, Reut Paz, Rene Uruena).

Since 2010, the main trends have included a combination of (i) a general pattern of diffusion at the journal level – beyond the occasional revivals of the LJIL and HILJ 'traditions', there do not seem to be any clear institutional linkages anymore, though the Finnish and Australian yearbooks continue to attract a steady stream of NAIL-inspired writings; (ii) the establishment of what to all intents and purposes seem to be designed as NAIL's 'in-house' publications (eg, *London Review of International Law*); and (iii) the continuous investment of ideological resources into the CUP connection at the level of monograph-production.

#### **4. By Way of an Afterword: NAIL's Lessons for a General Theory of Critical International Law**

There are many stories one could tell about the NAIL movement and its place in the history of heterodox international legal studies. Some of them have already been told;<sup>39</sup> others still await their occasion. Comparing NAIL's basic trajectory as an academic tradition with those of the other notable 20<sup>th</sup>-century international legal heterodoxies – the New Haven school, Kelsen's pure theory of law, Tunkin's Marxist positivism – it seems possible to distinguish *five* basic patterns that have consistently characterized its institutional career choices but which have not at the same time been replicated on the same scale by those other traditions. Whatever relationship may exist between these patterns and NAIL's greater record of intra-disciplinary success, remains, of course, still to be explained and conclusively demonstrated. For what it is worth, however, it seems to me that any future movement seeking to make a successful entry into international law's broader disciplinary landscape as part of its heterodox wing would certainly do very well not to ignore any potential lessons these patterns may imply.

#### **How Critique Works: The Patterns of Success and Survival for Heterodox Movements in Contemporary International Law**

- (i) Partial dispersion of the organisational dynamics:
- Institutional integration around one clearly identifiable axis of decision-making centres helps make the process of academic capital accumulation run more efficiently. The dynamics of consistent centralisation, however, should not extend to the field of discursive and epistemic protocols.

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<sup>39</sup> See, e.g., Kennedy, 'When Renewal Repeats: Thinking against the Box' n.1, at 476-500; Rasulov, 'New Approaches to International Law: Images of a Genealogy', n. 21; Skouteris, 'Fin de NAIL: New Approaches to International Law and Its Impact on Contemporary International Legal Scholarship', n. 33.

- A network built around a geographically spread-out institutional structure has better chances of surviving any kind of large-scale intra-disciplinary crisis than a network focused around one single central node.

(ii) ‘Smart diversification’:

- Every heterodox movement ought to diversify its academic capital holdings as far as possible. Not all diversification solutions, however, are equally optimal. All things being equal, in the short to medium term it pays more to invest into the development of the movement’s logistical bases and bureaucratic resources.
- The development of stable publishing and output dispersal networks and the accumulation of external prestige indicators are the two key preconditions for the movement’s ability to benefit from the second law of academic capital accumulation.
- To make the second law of academic capital accumulation work, the heterodox movement sooner or later should ‘storm the citadel’: whoever gains control of the discipline’s main institutional sites - the leading graduate programmes, governance of the learned societies, editorial boards – will control the terms of resource convertibility for everyone else.
- Funding trumps everything – except for the third law of academic capital accumulation. Boredom kills student recruitment.
- Recruitment only produces results when it is coupled with a smart strategy of social reproduction: putting in place something similar to the Dighton model will yield far better results than securing control over the design of the first-year curriculum if the final aim is to produce a community of professional intellectuals.

(iii) Exclusive academic orientation:

- Periodic forays into the realm of public media always pay off, and establishing links with diplomatic and legal practice communities will never hurt any disciplinary tradition, but in the end, for every heterodoxy, the game is always won (and lost) on the academic institutional turf.
- Targeting the operation of graduate programme is the most cost-efficient strategy under conditions of academic capital shortage.
- Small-scale research workshops work best when the main objective is to ensure the cultivation of internal social links and the training of the next generation of heterodox scholars, but nothing in the end compares to large-scale conferences when it comes to the accumulation of de-territorialised forms of academic capital.
- Heterodoxies should not aim to write for the mass market until they have stabilised themselves in institutional and financial terms. The most effective publishing strategy at the earliest stages is only to target professional academic audiences, opening up to inter-disciplinary linkages wherever it makes strategic sense.

(iv) Territorialised circulation of practices

- Every tradition, school, or movement exists only through its practices. When it comes to the organisation of its research and conferencing circuits, the wider the geographical framework the movement is able to cover, the better.
- Repetition is the parent of ideological entrenchment. The more regularized the circulation of the movement’s membership base across its constituent institutional nodes becomes, the more entrenched the movement’s practices will become; the more institutionalised, correspondingly, the movement itself is going to be in terms of its intra-disciplinary presence.

(v) Demographic diversification

- Building an academic movement is similar to building a political party. The more diversified the movement’s membership base becomes, the better chances it will have of spreading its influence and reproducing itself across different locales and generations.