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THE "ENGLISH SCHOOL" OF INTERNATIONAL LAW: SOUNDINGS VIA THE 1972 JUBILEE ESSAYS

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ABSTRACT. *As part of the Cambridge Law Journal's centenary celebrations, this article reads two essays from the journal's 50th anniversary issue. The essays, by Cambridge professors Robert Jennings and Derek Bowett offer resources for the history of international law and its historiography. They shine a light on key debates on the law of the sea at a crucial moment of its development. A close reading of these essays also reveals starting points for new scrutiny of an "English" tradition of international law, including the place of the academy within the tradition, its blueprints for the future of international law and international legal order, and its relation to empire and capitalism.*

KEYWORDS: *law of the sea, international legal history, English school, empire, extraction, capitalism, proceduralism, law journals.*

I. INTRODUCTION

The present issue celebrates the centenary of the Cambridge Law Journal by looking back at some of the pivotal scholarship in its pages. I take up the invitation to read two essays on the law of the sea, both published in the 50th anniversary counterpart to this volume: that is, the jubilee issue of April 1972. The first essay, *A Changing International Law of the Sea*, was by Robert Jennings, then the Whewell Professor of International Law at Cambridge.[1] The second, *Deep Sea-bed Resources: A Major Challenge*, was by Jennings's successor to the Whewell Professorship in 1981, Derek Bowett, then a lecturer in law as well as President of Queens' College, Cambridge.[2]

My reading draws from these essays resources both for the history of international law and its historiography. The essays offer a window into

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[1] R.Y. Jennings, "A Changing International Law of the Sea" [1972] C.L.J. 32.
[2] D.W. Bowett, "Deep Sea-bed Resources: A Major Challenge" [1972] C.L.J. 50.

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key 1950s–1970s debates on the development of the law of the sea and blueprints for international law. In showing the centrality of ocean resources to international legal practice and scholarship, they correct the omission of the ocean from international legal historiography of the twentieth century. A textual and sub-textual analysis of these essays, moreover, offers starting points for inquiry into important sites and contexts of law-making, legal education, publication, and practice; and for scrutiny of an "English" tradition of international law.

In Section II, I begin with a focus on the appearance of these essays in the journal's jubilee issue. That issue was an in-house affair, with members of the Cambridge law faculty asked to "take some development or event in their various subjects, which occurred within the fifty-year period, and to weave their papers around that".[3] That two of the twelve papers should have addressed the law of the sea – and should have been published in 1972 – was striking evidence of the importance of the law of the sea in public international law, and of the dynamism of this field at the time. It was also interesting for other reasons, which I discuss too. In Section III, I turn to the essays themselves, and suggest three ways of reading them together. I study the ways in which they spoke to, and past, each other. Especially, keeping in view the moment of flux in which the articles appeared, I draw out their particular visions for the future development of international law and the international order.

While Sections II and III of this article focus on the distinctive elements of the two essays – their themes, timing, presence in the CLJ, analyses and visions of international law and the future – Section IV takes the essays as emblematic of a larger "English school" approach to international law. I explore both what is highlighted when such an approach is usually discussed in scholarship and what is glossed over. The essays invite attention to the connections between the international legal academy and practice in the United Kingdom, and to the variations within as well as the coded style and silences of English legal scholarship. They remind us that many of the English school's stances (on the law of the sea and other topics), albeit explained in terms of commitment to the rule of law, balance and pragmatism, have empire and capitalism as their background. I close with the suggestion that further research into the genealogies, dissonances, and shared assumptions of the English school is important and necessary in a time when it is no longer plausible to bracket questions about international law's part in producing a particular kind of politico-economic ordering of the world, with deep implications for distributive and environmental justice.

[3] R.W.M. Dias and D.G.T. Williams, "Preface" [1972] C.L.J. 1.

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II. International Law (of the Sea) in the Jubilee Issue

There are at least three reasons why it is interesting that two of the twelve jubilee essays should have been on the law of the sea. *First*, international law has enjoyed a limited presence on the pages of the CLJ. As Henry Hollond, one of the journal's founders, noted in his contribution to the jubilee issue, the journal had a more "domestic" character from the start, though it had lost something of that character over time.[4] In fact, the first issue of the CLJ, which he directed attention towards, *had* included an article on international law as one of the five carried.[5] Nevertheless, Hollond was right: thereafter, articles on international law topics appeared sporadically, generally touching upon aspects of domestic law.[6]

The reasons for the relative paucity of international law scholarship in the CLJ are not obscure. In addition to the journal's own thrust on domestic law was the in-house publication of a specialist international law journal, the *British Yearbook of International Law* (BYIL). BYIL began operations in 1920, under the joint editorship of Whewell Professor Alexander Pearce Higgins and Cecil Hurst, and successive Whewell Professors have continued to edit it since. Cambridge academics have also served on its editorial committee and held other contributing positions. BYIL and two specialist quarterlies, the *American Journal of International Law* (established 1907) and the *International and Comparative Law Quarterly* (1952[7]) were the leading venues for Anglophone international law scholarship up to the era of the jubilee issue. Since then, international law journals and journals dedicated to specific fields of international law have mushroomed.[8] International law does of course appear in the CLJ, and routinely so in other forms: book reviews,[9] and case notes, where contributions from leading British international lawyers have been several and frequent. Even so, I hope this short tour explains why anyone picking up a copy of the jubilee issue might be (pleasantly!) surprised to find that of all the legal fields covered, it is international law that gets two innings.

Second, it is both interesting and instructive that of all the topics within international law, the authors should have written on the law of the sea. The

[4] H.A. Hollond, "The Origin of the Law Journal" [1972] C.L.J. 3.
[5] E. Pollock, "The International Court of the League of Nations" [1921] C.L.J. 29.
[6] E.g. H. Lauterpacht, "Allegiance, Diplomatic Protection and Criminal Jurisdiction over Aliens" [1947] C.L.J. 330; A.D. McNair, "The Effects of Peace Treaties upon Private Rights" [1941] C.L.J. 379. There were of course exceptions, e.g. D.H.N. Johnson, "Consolidation as a Root of Title in International Law" [1955] C.L.J. 215. R. Higgins, "International Law in a Changing System" [1999] C.L.J. 78 was a transcript of Rosalyn Higgins's Rede Lecture.
[7] The ICLQ was an amalgamation of two precursors: International Law Quarterly (1947–51) and Journal of Comparative Legislation and International Law (1918–51; previously Journal of the Society of Comparative Legislation (1896–1917)). It also absorbed the Transactions of the Grotius Society (1918–59) following the merger of the Grotius Society and the Society of Comparative Legislation in 1958 to form the British Institute of International and Comparative Law (BIICL).
[8] I. de la Rasilla, "A Very Short History of International Law Journals" (2018) 29 E.J.I.L. 137.
[9] Including of several BYIL volumes.

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authors chose the law of the sea from among a number of "developments or events" of the previous fifty years that they could have highlighted. Other possibilities included: the United Nations; the League of Nations; the International Court of Justice (ICJ) and its precursor; the codification and development of international law by the International Law Commission (ILC); the Bretton Woods system; the institutionalisation of human rights; institutional experiments relating to decolonisation; concepts of *jus cogens* and *erga omnes* norms; or, more generally, the explosion of treaties, the move to institutions, or topics they had previously written on, such as the acquisition of territory in international law,[10] or self-defence and the use of force.[11]

Of course, the law of the sea was not beyond either's expertise. Bowett, a former naval officer with experience at the UN Office of Legal Affairs during the negotiation of the 1958 Geneva Conventions on the Law of the Sea, had taken it as the topic of his 1967 Melland Schill lectures at Manchester University.[12] Jennings had published on the law of the sea, and had begun to explore it in the context of practice. Amongst other roles, he acted as a legal advisor to Royal Dutch Shell; he makes multiple appearances in the records of meetings between the British Government and John Blair, head of Shell's legal department, on matters relating to seabed resources.[13] Nevertheless, the choice to centre the law of the sea in the jubilee issue assumes importance when juxtaposed to current histories of international ordering that look back at the period from post-war to the present.

In these histories, whether produced by lawyers or historians, the law of the sea has only a marginal presence; the focus is usually on the other topics mentioned above.[14] This absence of the sea and of the ways its surfaces, depths, floors, habitats, and resources have factored into and shaped territorial political economies and world-making efforts of the twentieth century must count as more than a significant historical gap. It is a missed opportunity to "think with the ocean" to unsettle given understandings of space,

[10] R.Y. Jennings, *The Acquisition of Territory in International Law* (Manchester 1963).

[11] D.W. Bowett, *Self Defence in International Law* (Manchester 1958); D.W. Bowett, *United Nations Forces: A Legal Study of United Nations Practice* (London 1964); and D.W. Bowett, *The Search for Peace* (London 1972), in press at the time of the jubilee issue.

[12] D.W. Bowett, *The Law of the Sea* (Manchester 1967).

[13] One file reports a "rather embarrassing outburst" by Blair in connection with a proposal being then circulated by USA to limit national jurisdiction over the seabed. Jennings was present at the meeting, and was urged at the end by British officials "to try to persuade Mr Blair that nothing we were doing was prejudicing Shell's interests or leading to a situation in which final decision were being taken on the basis of inadequate consultation". Jennings "agreed to try to win over Mr Blair". He also agreed to produce an opinion on certain points of concern to Shell. H.A. Dudgeon to F.G.K. Gallagher, 18 January 1971, F.C.O. 76/328, U.K. National Archives.

[14] S. Ranganathan, "Decolonization and International Law: Putting the Ocean on the Map" (2021) 23 Journal of the History of International Law 161; R. Mawani, *Across Oceans of Law: The Komagata Maru and Jurisdiction in the Time of Empire* (Durham, NC 2018), 13.

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time, mobility and power.[15] It also overlooks the important role that (the making of) the law of the sea played as a site of imagination; of conceptual, procedural and institutional innovations; as a theatre for North/South and East/West conflicts (and conflicts and cooperation within and across those groupings); and as the locus of an extraordinarily rich documentary record.

While the reasons for the absence are not clear, the jubilee essays confirm that such reasons cannot include the suggestion that ocean-related developments were not central to the thinking of the time about significant developments in international law more broadly. Jennings and Bowett make clear that the sea was an area of preoccupation. They also place themselves in unlikely company: third world lawyers were amongst the others emphasising the making of the law of the sea as a critical (and potentially transformative) site for international ordering.[16]

Third, the specific moment in which these papers were written is an interesting one. 1971 and 1972 were rather extraordinary years in the trajectory of the law of the sea. The UN General Assembly decided in December 1970 to convene a major law-making conference from 1973, to address a vast range of oceans issues with a view to adopting a new treaty.[17] This decision followed from a number of factors: growing discontent with the Geneva Conventions; new questions relating to deep seabed resources; and the need to settle outstanding issues that the League of Nations codification conference (1930) and previous UN conferences (1958 and 1960) had failed to decide.

The Geneva Conventions had taken up novel issues, including rights over the continental shelf, but had remained "an expression of the 'traditional law of the sea'", "soon seen by a majority of States as obsolete".[18] The 1970 resolution calling for a new conference notes that "political and economic realities, scientific and technological developments of the past decade have accentuated the need for early and *progressive* development of the law of the sea", and that many of the present UN members had not been able to participate in the previous conference.[19]

The earlier conferences had not addressed deep seabed resources, but developments through the 1960s brought these resources into serious consideration thereafter. In 1967 – the year of Bowett's Schill lectures – a

[15] See e.g. P. Steinberg and K. Peters, "Wet Ontologies, Fluid Spaces: Giving Depth to Volume through Oceanic Thinking" (2015) 3 Environment and Planning D: Society and Space 247.

[16] E.g. R.P. Anand, *Origin and Development of the Law of the Sea*: *History of International Law Revisited* (The Hague 1983); M. Bedjaoui, *Towards a New International Economic Order* (Paris 1979). See B.S. Chimni, "International Law Scholarship in Post-colonial India: Coping with Dualism" (2010) 23 L.J.I.L. 23: "[t]he 1970s were almost entirely devoted to the law of the sea negotiations."

[17] U.N.G.A. Res. 2750C (XXV), 17 December 1970.

[18] T. Treves, "1958 Geneva Conventions on the Law of the Sea", available at http://legal.un.org/avl/ha/gclos/gclos.html (last accessed 22 June 2021).

[19] UNGA Res 2750C, Preamble, recitals 5–6, emphasis added.

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Maltese proposal suggested that the UN should place the seabed within a new concept of the commons, "the common heritage of mankind". Under this concept, the extraction of deep seabed resources would be conditioned on the distribution of the benefits of extraction amongst all states, especially developing ones.[20] On the day that it announced a new law-making conference, the UN General Assembly also formally declared the application of this concept to the seabed lying beyond the (unclearly defined) limits of national jurisdiction.[21] This obviously generated pressure to decide where the limits of national jurisdiction lay – the Geneva Conventions offering only vague criteria that fed fears that national claims might extend to the midpoint of the ocean.[22]

The problem of unclear limits was even more pressing in relation to the water column, as previous conferences had failed to decide the breadth of the territorial sea and fishery limits. There had followed further questions on navigation, such as rights of passage through straits. Moreover, concerns of oil pollution – heightened by the disastrous shipwreck of SS *Torrey Canyon* in March 1967[23] – led states, notably Canada, to contemplate jurisdiction over shipping in areas of the high seas. Although the International Maritime Organization addressed the issue of pollution in part with the conclusion of the 1973 Convention on the Prevention of Marine Pollution, "the controversial issue of nationally-created pollution zones was left aside as one to be considered by the then forthcoming [UN conference]".[24]

Thus, there was a lot on the agenda for the Third UN Conference on the Law of the Sea (UNCLOS III), and the time between 1970 and 1973 was intended as a preparatory period. To this end, the General Assembly expanded the membership and terms of reference of the Seabed Committee that it had established following the Maltese proposal in 1967, asking it to prepare draft articles and lists of relevant subjects and issues.[25] These would provide the basis for negotiations at UNCLOS III. However, the Seabed Committee as a preparatory body was quite different

[20] Malta, "Request for the Inclusion of a Supplementary Item", U.N. Doc. A/6695, 18 August 1967; Speech of the Maltese Prime Minister G. Borg Olivier, U.N. Doc. A/PV.1582, 6 October 1967, para 104ff; Speech of the Maltese Permanent Representative A. Pardo, U.N. Docs. A/C.1/PV.1515–1516, 1 November 1967.

[21] UNGA Res. 2749 (XXV), 17 December 1970.

[22] However, in 1969, the ICJ drew a distinction between the continental shelf as a "natural prolongation of the land" of a coastal state and distinctive "ocean depths": *North Sea Continental Shelf (Germany/Denmark; Germany/Netherlands)*, [1969] I.C.J. Rep. 3, para. 19. See also R.Y. Jennings, "The Limits of Continental Shelf Jurisdiction: Some Possible Implications of the North Sea Case Judgment" (1969) 18 I.C.L.Q. 819, 826–27.

[23] A. Vaughan, "Torrey Canyon Disaster: The UK's Worst-ever Oil Spill 50 Years On", *The Guardian*, available at https://www.theguardian.com/environment/2017/mar/18/torrey-canyon-disaster-uk-worst-ever-oil-spill-50tha-anniversary (last accessed 22 June 2021). However, the UK protested Canada's declaration of its intention to exercise jurisdiction over pollution zones in the high seas: D. Anderson, "British Influence on the Law of the Sea 1915-2015" in R. McCorquodale and J.-P. Gauci (eds.), *British Influences on International Law 1915–2015* (London 2016), 177.

[24] Anderson, "British Influence", 177–78.

[25] U.N.G.A. Res. 2750C, paras. 5–6.

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from the ILC, which had done the preparatory work for UNCLOS I of 1958. State representatives, rather than legal experts, comprised its members; it was obviously larger; and it was animated by the recognition that the enterprise was that of making new law, rather than codifying or ratifying the old. The proceedings were expressly "political", with differences of interest prominently on display; agreements on drafts were hard to reach.[26] It was clear that UNCLOS III would be a tense and exciting affair.[27]

All this meant that 1971 and 1972 were, on the one hand, years of an exhausting wait for the start of something and, on the other hand, rife with possibility about what could take shape at UNCLOS III. The two papers are thus as much (or indeed less) about past developments as they are about future directions, not only of the law of the sea but also of international law.

III. The Jubilee Essays

A. First Reading: A Division of Labour

On a first reading, the two essays appear to reflect an agreed division of labour between their authors, covering different aspects of the law of the sea. Jennings was interested in (what would become of) the freedom of navigation in the face of concerns around pollution, overfishing and the outward creep of coastal jurisdiction. He began by describing the "classical" law of the sea as "relatively simple, certain and stable", and as balancing closed and open sea doctrines by allocating narrow territorial waters to coastal states, subject to the duty to allow innocent passage of foreign ships, and designating the remainder (the high seas) as the province of particular freedoms available to all states.[28] The Geneva Conventions codified these arrangements; but also embraced tendencies that worked to unsettle them. Inter alia, they permitted coastal states to make more expansive continental shelf claims, exercise some limited jurisdiction in a zone contiguous to their territorial seas, and draw straight baselines, departing from the geography of the coast, in certain circumstances.[29] The Geneva

[26] Needless to say, all law-making is political; I use the term here only to emphasise that those participating in the work of the Seabed Committee were without any pretence that matters stood otherwise – by contrast, a preparatory body like the ILC operates on the premise of applying legal expertise to deduce rather than make rules.

[27] It turned out so to a much greater extent than predicted. Detailed accounts include: E.L. Miles, *Global Ocean Politics: The Decision Process at the Third United Nations Conference on the Law of the Sea, 1973–1982* (The Hague 1998); M. Schmidt, *Common Heritage or Common Burden? The United States Position on the Development of a Regime for Deep Sea-bed Mining in the Law of the Sea Convention* (Oxford 1989); W. Wertenbaker, "A Reporter at Large: Law of the Sea – I & II", *The New Yorker*, 1 August 1983, 38; and 8 August 1983, 56.

[28] Jennings, "A Changing International Law", 32.

[29] Jennings references *Anglo-Norwegian Fisheries* [1951] I.C.J. Rep. 116, as "loosening the grip of the old law about sea boundaries": ibid., at 34.

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Conventions' failure to specify the breadth of the territorial sea also confirmed that the law no longer provided a clear rule. Jennings conceded that these factors made clear the need for a change in the law.

Nevertheless, he was wistful about the scale on which the change was proposed. Despite the Geneva Conventions' potential for self-disruption, he considered them "a very successful consolidation of maritime international law" and their influence as "far beyond the strict ambit of the list of actual ratifications, respectable as that list is".[30] To him it was "remarkable" that the General Assembly should have proposed a new conference on the law of the sea, moreover one also reopening questions settled by the Geneva Conventions.[31] The "fact, important as it is", of changes in the world community, did not quite answer whether it should "seem to invalidate the work of the [ILC]". Nor was Jennings persuaded of the wisdom of calling a conference "without the benefit of proper scientific preparation" by the ILC.[32]

Having aired these doubts, Jennings turned to discussing the direction in which international law should change. Here, he pressed for a future that embraced the expansion of coastal states' extraterritorial jurisdiction as a solution to the issues of sustainable fishing and ocean pollution. Jennings found the proposition attractive for several reasons. It hewed most closely to the traditional model of applying and enforcing international law. It recognised developments in state practice. Moreover, it potentially reformulated rights in the language of "custodianship" – language borrowed from Canada – the coastal state not only protecting its own interest, but also stewarding the oceans on behalf of the international community.[33] Although rather elusive in suggesting the compatibility of state and community interests (particularly in the matter of resource exploitation: which disappears from the discussion after a mention), Jennings was clear that the notion of custodianship would not only qualify jurisdiction exercised in the high seas, but also within territorial waters, and would include protecting free navigation as a common interest.[34] He envisaged a complementary role for an international organisation in overseeing states' discharge of their individual rights and custodianship duties.

In contrast to Jennings, Bowett was concerned specifically with seabed resources. His essay began by describing the possibilities that technological

[30] Ibid., at 33. Here, he echoes Bowett, *The Law of the Sea*, 4. Cf. both with Treves, "1958 Geneva Conventions on the Law of the Sea".

[31] Ibid.

[32] Ibid.

[33] Ibid., at 40–46.

[34] However, Jennings did not regard the notion of custodianship as jurisgenerative in itself: "[c]ustodianship … is no legal shibboleth making lawful that which would otherwise be unlawful. In fact, valuable as it is as a suggestive idea for the making of new law, it will remain ambivalent in application unless and until it can be embodied in actual rules of law established on a functional basis. What is needed, whether in the form of treaty or otherwise, is quite a lot of hard, black-letter law": ibid., at 47.

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changes had brought into view, including extraction of oil and gas at the foot of the continental slope, recovery of phosphorites and metalliferous brines, and of course, the mining of manganese nodules. Although widespread exploitation of these resources remained "a decade or more away", the problem of establishing a legal regime was "presently acute". Bowett here echoed the common view of the time that "a legal regime must be established before serious exploration and exploitation of seabed minerals can begin".[35] A legal regime was an essential precondition because investments would not be forthcoming without security of tenure over extraction sites; the law of the sea as it then stood, and especially the freedom principle, did not suffice. Thus, while asserting that the future extraction of seabed resources was certain, Bowett recognised that this certainty was premised upon the development of international law in the direction of facilitating it. The questions that remained had to do with the details of the law: the precise limit of national jurisdiction, the exact shape of the regime, and the institutions set up to administer it. Bowett explored these issues by reference to the different proposals then in circulation.

As to the limit of national jurisdiction, Bowett considered that it should be precise, based on the "simpler" criterion of distance from the shore rather than depth of the seabed, but that the 200-mile claim of Latin American states was "excessive".[36] As to the shape of the regime, he tended towards the idea of an international institution empowered to grant exploration and exploitation licences directly to contractors (public or private), oversee their activities, and receive and redistribute a percentage of the revenue generated. This was against proposals to delegate the licensing authority to states on the one hand, and proposals to charge the international authority itself with the conduct of mining operations on the other.[37]

On the design of the institutions, Bowett leant towards the US proposal, which envisaged institutions resembling those in existence today. That is: a seabed authority with an assembly, council, secretariat and expert committees (much like the International Seabed Authority); an international seabed boundary review commission (much like the Commission on the Limits of the Continental Shelf); and a tribunal for the settlement of disputes with compulsory jurisdiction over states (much like the International Tribunal for the Law of the Sea).[38] While finding attractive certain features of an alternative proposal by Elisabeth Mann Borgese, particularly that it

[35] Bowett, "Deep Sea-bed Resources", 53.
[36] Ibid., at 55.
[37] Ibid., at 58–59.
[38] A key difference was that Bowett and the US did not imagine the authority would actively conduct mining operations; while the 1982 UN Convention on the Law of the Sea did empower it to play this role via an organ called "the Enterprise". However, the changes made to the regime in 1994, via the Agreement for the Implementation of Part XI of the Convention, have deferred the Enterprise to an indefinite future.

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would apply the regime to "ocean space" – seabed *and* seawaters rather than just the seabed – he felt it presented too many complexities to be generally welcome to states.[39] He especially considered that the suggestion to include representatives of mining corporations, producers and consumers of seabed minerals, fishing organisations, and scientific bodies in the authority's assembly too "radical" a move towards supranationalism.[40] As in all other matters, Bowett's preference was to steer a middle course: "whilst overt 'supranationalism' may have to be avoided, in practice a good deal of supranational authority may have to be conceded."[41]

So far and read this way, there is not much conversation between the essays, suggesting a lack of engagement between the two scholars and colleagues beyond coordinating their topics to avoid overlaps. But in fact, the essays do speak to (or perhaps at) each other on some significant points, namely, the role of international institutions, and the US trusteeship proposal.

B. Second Reading: Contrasting Views

For Bowett, direct governance of the high seas and deep seabed by an international agency held considerable appeal. Not only did he regard direct licensing and regulation of seabed mining by an international authority a better approach than delegating these functions to states, he also suggested the desirability – if only in the long term – of a single international agency overseeing international "ocean space" as a whole.[42] Moreover, he regarded the concept of the common heritage of mankind, from which flowed the proposals for international administration, "entirely consistent with the traditional approach to the High Seas as *res communis*, open to both coastal and landlocked States". The novelty lay solely in the practical working out of the use of this common heritage:

> The practical problem, however, is to decide how this "common heritage" can be enjoyed by all States without resulting in complete anarchy. Obviously, a system of sharing is required, which necessarily involves licensing. This, in turn, involves questions of which authority grants the licences, to whom they may be granted, on what terms and to whom the licence fees and production royalties are payable.[43]

What Bowett regarded as consistent with the traditional approach represented to Jennings "a radical change" in the law of the sea. It is best to let Jennings's own words speak to this:

[39] Bowett, "Deep Sea-bed Resources", 64–65. See also E.M. Borgese, "The Ocean Regime: A Suggested Statute for the Peaceful Uses of the High Seas and the Seabed Beyond the Limits of National Jurisdiction", Center for the Study of Democratic Institutions Occasional Paper 1968.
[40] Ibid., at 64.
[41] Ibid., at 65.
[42] The Borgese proposal limited national claims over the seabed and seawaters to a 12-mile distance: ibid., at 55.
[43] Ibid., at 57.

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> This is not to say that an international agency could not be granted rights of jurisdiction and control over the high seas, or the sea-bed beyond national jurisdiction; indeed this may well come about in some degree in the reasonably near future. But it is important to realise what a radical change in the law of the high seas has to be accomplished in order to bring this about. For there is at present no notion of "international territory" in international law; indeed the fact that this looks like a contradiction in terms, is a measure of the novelty of it. … It may well be that radical changes in the law of the high seas, and of the seas generally, are desirable; but it will not assist their realisation to underestimate the novelty of creating any kind of quasi-territorial jurisdiction and control for an international institution, and the very broad spectrum of consenting states that would therefore be needed to launch such a change.[44]

It was after framing international jurisdiction and control over the seabed as a radical change that Jennings suggested delegation to the coastal state as the more suitable approach:

> At the same time it is very clear that something needs to be done about the present law of the sea, which is quite unequal to the problems of social ordering that confront the international community today. It is no doubt true that a legal system that is defined in terms of "freedoms" is not easily to be transformed into a system of government and regulation of the kind that may be needed. But a problem is not disposed of by showing merely that its solution may prove to be more difficult than might at first sight appear. It is reasonable, therefore, to ask what modifications and changes might be brought about through the medium of national jurisdiction regulated by international law – the traditional means of developing international law – not necessarily as an alternative to the creation of direct jurisdiction for international agencies, but possibly as a complement to such a development. In particular, it is worth asking the question whether the already existing tendency to augment coastal state jurisdiction – a tendency partly at least created by the pressure of modern problems which the orthodox law has failed to solve – could not itself be harnessed to help cope with the new situation.[45]

Jennings did not outright dismiss direct control by an international agency, possibly because it was already clear – not least due to the 1970 General Assembly resolutions – that some form of international administration was inevitable. He presented his proposal to augment powers of the coastal state as complementary. However, his argument effectively sought to limit the scope, both geographical and jurisdictional, of the international organisation's authority, carving out a much greater space for the coastal state. There was, in short, a divergence of views between the papers in relation to the regime each championed as the most appropriate, though, interestingly, each framed its positions as "traditional", juxtaposed to the "radical"

[44] Jennings, "A Changing International Law", 40. Bowett was sanguine about how matters would be resolved vis-à-vis states unwilling to accept the new treaty regime: "What may well happen is that the new International Sea-bed Agency will negotiate with any non-Contracting Party an agreed boundary between the national and the international areas at the time the new regime enters into force": Bowett, "Deep Sea-bed Resources", 56.

[45] Ibid.

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nature of less favoured proposals. The same pattern is apparent in how each engaged with the US proposal in relation to the seabed.

The US trusteeship idea, building on a proposal by US President Richard Nixon, involved coastal states limiting their claims via a 200-metre depth criterion (whereas under the Geneva Conventions, they were entitled to claim beyond the 200-metre depth mark). Coastal states would administer a stretch from the 200-metre point to an agreed limit as an intermediate trusteeship zone. The area beyond would be the international seabed, administered by an international agency. While coastal states could award licences in the trusteeship zone, they would transfer substantial revenue from extraction to the international agency for redistribution amongst all states.[46]

Jennings clearly did not favour the US proposal, taking care to distinguish the US "trusteeship" idea from his own idea of custodianship, describing the former as a "somewhat extreme example".[47] He argued that the US proposal required coastal states effectively to renounce their claims to most of the seabed and perform purely the office of trustee – rather than exercising their own proper rights for the benefit of the international community, as would be the case under custodianship. Again, he did not voice direct opposition to the trusteeship idea beyond qualifying it as "extreme", but was careful to suggest that if adopted, its scope should remain limited: "Whatever usefulness this may have in relation to the resources of part of the sea-bed, this device clearly has no usefulness in relation to problems such as that of securing rights of passage through territorial and internal waters, and through international straits."[48]

Bowett was more welcoming of the US proposal, describing it as "[p]rima facie … a remarkably generous offer" to surrender areas beyond the 200-meter limit that the US could have claimed as exploitable and therefore its own.[49] He then examined potential difficulties. These included the cold reception of the proposal within the US itself, with the American Bar Association dismissing it as "retrogressive, impractical, and not in the best interests of the United States".[50] There were also questions about the status of concessions already granted by states "in areas which ultimately prove to be outside national jurisdiction";[51] and the position of states who chose not to join the new treaty regime.[52] His discussion suggests

[46] Draft UN Convention on the International Seabed Area, working paper submitted by the USA, 3 August 1970, U.N. Doc. A/AC.138/25, 9 I.L.M. 1046.
[47] Jennings, "A Changing International Law", 46.
[48] Ibid., at 47.
[49] Bowett, "Deep Sea-bed Resources", 55.
[50] Ibid.
[51] He noted the US proposal did address this issue, providing that "any licences granted in the interim beyond the 200-metre limit should be granted subject to any new regime agreed upon", and that the grantor state should "compensate the licensee for any investment losses resulting from the application of this Convention": ibid., at 56.
[52] On this point, see note 44 above.

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that he did not regard any of these as insurmountable; the real issues lay elsewhere – in the very idea of the trusteeship zone. This intermediate zone undercut for him the premise that the US proposal was a major give-away, or even a clearer way of approaching delimitation:

> The objections to this idea are, first, that having eliminated the complexity of the outer-limit of national jurisdiction by substituting a simple 200-metre iso-bath line, the U.S. proposal now introduces a new boundary between the "trusteeship" area and remainder of the international sea-bed area. This new boundary is not only vague but likely to conform to no standard rule and to lead to disputes between the coastal State and the Sea-bed Boundary Review Commission in each case.
>
> The second, and main, objection is that the "trusteeship" area really gives exclusive control to the coastal State – subject only to the rules to be agreed in the Treaty and to the obligation to pay over to the International Authority between 50 per cent and 66⅔ per cent of the production royalties or payments. … This proposal for "trusteeship" has been widely criticised as being a disguised form of national jurisdiction, totally at variance with the idea of the sea-bed as the "common heritage of mankind".[53]

Thus, a proposal that was unattractive to Jennings because it divested coastal states of their rights was unattractive to Bowett for the opposite reason: it invested coastal states with control over too large an area of the seabed in the guise of trusteeship. Like Jennings, however, Bowett made an accommodative move, suggesting that "'trusteeship' as a temporary phase, say for ten years … would perhaps be more attractive since it would leave the coastal States with responsibility for control over the area most likely to be exploitable and would give the International Authority time to develop its own machinery of control and inspection".[54]

The divergence of views between Jennings and Bowett was on important and fundamental questions: the shape of the future international order and the place of states and international organisations within it. The essays outline different models of supranational governance, albeit in qualified terms, with both authors deprecating strong advocacy of particular positions. A direct exchange between them on their points of difference would have been of value, not only to those, like myself, who look back at these essays now, but also to their contemporaries, and law students being trained in Britain and indeed other Commonwealth jurisdictions at the time.

As it is however, they only briefly acknowledge each other – Jennings cross-references Bowett's essay in his discussion of the US proposal,[55] while Bowett references another essay by Jennings in his discussion of the appropriate reading of the Geneva Conventions, juxtaposing

53 Bowett, "Deep Sea-bed Resources", 60–61.
54 Ibid.
55 Jennings, "A Changing International Law", 46.

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Jennings's "more liberal view" of the continental shelf to L.F.E. Goldie's restrictive one.[56] These are but passing engagements.

C. Third Reading: Speaking Past

It is of course worth considering that, at the time of writing, Jennings and Bowett may have been preoccupied with separate ongoing engagements.

Jennings was advising Shell on developments relating to the law of the sea and their implications for Shell's access to submarine fossil fuels. The account of a meeting in January 1971 between Shell and the British Foreign and Commonwealth Office (FCO) suggests that Shell (or at least its legal department[57]) was plainly uncomfortable with the US proposal. Jennings, present at this meeting, agreed to author an opinion on the proposal's implications for the rights of coastal states, including in the event of their not joining, or withdrawing from, the relevant treaties. That he articulated his support for expansive coastal states' rights in this context is all the more apparent from a report authored by John Blair of Shell later that year.[58] Blair reviewed the issues that had come up at the Seabed Committee, finding promise in a Venezuelan proposal to give coastal states exclusive rights for a 200-mile distance or 200-meter depth, whichever was further seaward. He also discussed the Canadian custodianship idea making similar points as Jennings, albeit with less enthusiasm for what custodianship might imply vis-à-vis the limitation of coastal states' rights. Reading Jennings's essay alongside archival materials on the Shell–FCO discussions makes it possible to contextualise Jennings as seeking both to further oil companies' preference for extended coastal state jurisdiction, and to reformulate coastal states' rights as matched by accompanying duties (seizing upon the arguments afforded by Canada to suggest the complementarity of national and community interests).

A similar contextualisation of Bowett indicates that his focus too was elsewhere. In his Schill lectures, Bowett had offered a characterisation of what he saw as the key debate on the law of the sea. The opposition he highlighted was between Myers McDougal, founder of the "New Haven school" of international law, and Max Sorenson, who served as judge ad hoc of the ICJ for the *North Sea Continental Shelf* cases. McDougal regarded it both possible and necessary to identify and prioritise the "common interest" of states in the "use and enjoyment" of the oceans above individual interests; while Sorenson considered it "the function of law . . . to strike an acceptable balance between divergent interests" without

[56] Bowett, "Deep Sea-bed Resources", 53–54.

[57] In a marginal note, Assistant Under-Secretary Gallagher noted "It is a great pity that our contacts with Shell on the subject are with lawyers and not with those with practical experience of offshore operations": F.C.O. 76/328.

[58] J. Blair to D.A. Campbell, 3 November 1971, F.C.O. 76/328.

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elevating some interests as those of the international community as a whole.[59] Bowett favoured McDougal's view, suggesting that distinctions could be drawn between purely national and community interests although the categories were dynamic, and that the law must move towards protecting the latter.[60] Bowett's essay may well represent the same enterprise that characterised his book: evaluating conflicting interests and proposed solutions by reference to community interests. That is, the debate he was joining was with those whom he regarded as favouring a value-free settlement of conflicting interests rather than those like Jennings who seemed to accept the idea of community interests, even if they favoured different paths to the realisation of these interests.

Besides writing with respect to different, if overlapping, conversations, Jennings and Bowett may have omitted to notice their own debate for another reason: the similarities in their styles and assumptions. These similarities, which I will examine in the next section, are what raise the question of the existence and defining features of an "English school". That there do exist differences within the framework of these similarities makes it all the more unfortunate that they pass unexamined; for they provide the texture and clarify the coordinates of this school, and illuminate the futures it regarded as falling within the acceptable range.

IV. An English School?

Albeit in a fragmentary way, international law literature speaks to the existence of an "English" (though sometimes glossed as British or Commonwealth or Anglo-American[61]) tradition of international law. References to this tradition are made, for example, in the British Institute of International and Comparative Law's *British Influences on International Law 1915–2015*.[62] Rosalyn Higgins sets the ball rolling:

> This project has, of course, made me ponder if there is any such thing as a "British Approach," to international law. I think there is a tradition of the

[59] Bowett, *The Law of the Sea*, 2–3.

[60] Bowett's favourable engagement with McDougal's view is striking given Colin Warbrick's recollection of the general disdain for his work in Cambridge in the 1960s: "one was not allowed to make reference to the copious writings of Myers McDougal and his associates. McDougal, so it was put about, 'had a theory' – much as one might speak in the same deprecating way about someone who 'had a theory' that the Earth was flat or that the bad weather was caused by the Germans. … [T]he uncongeniality of McDougal's theory to the English tradition [was] apparent – he thought that international law was *for* something, for, that is, something beyond facilitating the self-interested objectives of sovereign States as evidenced by their actual practices. Such a proposition ran counter to the sharp positivism then being inculcated at Cambridge": C. Warbrick, "Introduction" in P. Allott et al. (eds.), *Theory and International Law: An Introduction* (London 1991), xi.

[61] However, D.H.N. Johnson pointed out the differences between the English and Scottish, and English and American approaches to international law and legal education: D.H.N. Johnson, "The English Tradition in International Law", (1962) 11 I.C.L.Q. 416, 418–23. A single "Commonwealth" tradition also deserves critical scrutiny, particularly as to its uptake beyond the "white" states, despite the undeniable English influences.

[62] McCorquodale and Gauci (eds.), *British Influences*.

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> legal history of international law, and – while the contemporary and hot topics of course attract attention – a serious interest in other, ongoing but less fashionable questions of international law. Breadth and originality of scholarship may properly be regarded as British characteristics. So far as approaches to international law are concerned, these have changed over time. In the 70's British international law was very rule-based: the whys, hows and wherefores were regarded as evidence of being tainted by American influences.[63]

However, she notes, the insular element is in decline: "the internet and travel between countries has happily put an end to rigidity as a national characteristic. French, German, American and British authors today feel very comfortable intellectually with each other."[64] Stephen Samuel argues "there is a benefit, with certain cautions, in carrying a view that British international lawyers do orientate themselves towards certain ideals".[65] These emerge as a leaning towards pragmatism and "a sensibility that eschews theory"; positivism; and the placing of legal rectitude above the Government's political preferences (as in case of the Iraq War).[66] Philippe Sands and Arman Sarvarian use a review of leading British figures to "identify a signature characteristic: a culturally unique approach to the idea of the 'rule of law', balancing principle, pragmatism and efficiency". From crisp character sketches – Gerald Fitzmaurice,[67] Humphrey Waldock,[68] Jennings,[69] Rosalyn Higgins,[70] Bowett,[71] Ian Brownlie,[72] and Hersch[73] and Eli Lauterpacht[74] – they build a picture of

[63] R. Higgins, "Preface" in McCorquodale and Gauci (eds.), *British Influences*, ix.
[64] Ibid.
[65] S. Samuel, "British Influences on the 'Ideals' of International Lawyers" in McCorquodale and Gauci (eds.), *British Influences*, 76, 77.
[66] Ibid., at 84–87.
[67] "His methodical, doctrinal and tightly-reasoned juridical outlook embodies the rigour and conservatism of the UK's civil service": P. Sands and A. Sarvarian, "The Contribution of the UK Bar to International Law" in McCorquodale and Gauci (eds.), *British Influences*, 497, 503.
[68] "[U]ninterested in theory: his approach was positivist, doctrinal and empirical – forensically seeking to ascertain the views of States to determine the law": ibid., at 504.
[69] "[L]ike Fitzmaurice and Waldock . . . a pragmatist: impatient of utopians and cynics alike, his style was focused upon evolutionary change through institutional and doctrinal development. His tools were clarity and precision, and his moderate and conciliating voice. . .. His focus on practical matters, particularly doctrine and procedure, exemplified the 'British school' of international law": ibid., at 506.
[70] "[S]haring with her predecessors the pragmatism, practicality and interest in procedure that are hallmarks of British international lawyers": ibid., at 509.
[71] "[A]n utterly practical advocate and scholar who 'remained throughout a realist and pragmatist, uninterested in theory but with nonetheless a clear view of international law as a significant aspect of international relations in "the search for peace"'": ibid., at 514, quoting J. Crawford, "Sir Derek Bowett CBE, QC, FBA (1927–2009)" (2009) 80 B.Y.I.L.1.
[72] A "well-known distaste for theory"; his career illustrates "the professional objectivity that the English Bar aspires to in its loyalty not to country narrowly understood but to the rule of law as an ideal which his country espouses": ibid., at 514, 516–17.
[73] "[A]typical 'UK international lawyer'; 'penchant for theoretical discourse . . . less tainted by the British taste for "functional pragmatism"'; 'in many ways formed during his student years [in Lwow and Vienna]'; yet 'driven by a liberal, cosmopolitan worldview, focused on developing the potential for international institutions – especially courts – to effect real change upon international relations. This reflects a penchant for pragmatism and tangible gains acquired during his many years of professional life in Britain'": ibid., at 502.
[74] "[F]orensic attention to detail, rigorously logical argumentation and a style of communication that manages to be both dynamic and easy on the ear": ibid., at 518.

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widely (if not universally[75]) shared attributes. They summarise these as "commitment to the ideal of the rule of law"; "evident dedication to work ethic, meticulousness and professional competence"; "a premium on a highly pragmatic approach preferring practicality over theoretical integrity".[76]

This presentation of the English tradition naturally leads to further questions. Recent episodes like the Iraq War are difficult to assimilate into a simple account of British ideals.[77] One might wonder too if there is anything distinctively English (or British) about the identified attributes – even the allergy to theory is not confined to English international lawyers. Here, however, I would like to think with some different questions: not whether the qualities are distinctively English, but how these qualities (or claim to them) have been deployed. In what follows, taking the jubilee essays as emblematic, I foreground a few associations of the English tradition, including some uncomfortable ones, and suggest possible lines for future research. The reason to do so, warts and all, is the influence of that tradition upon international law.

While English lawyers were not, of course, the sole determinants of the law of the sea, or of international law more broadly, their influence permeated much inter- and post-war law-making, in addition to predominating the long 19th century. As *British Influences* shows, they shaped legal regimes not only in the matter of specific policies, but also in terms of overall approaches and the design of secondary rules. There is surprisingly little by way of specific exploration of the politics of their contributions, and, especially, the structural underpinnings of their famed attributes.[78] Such an exploration would not only illuminate present legal regimes, but also, I hope, strengthen reflection about all that is carried forward when the style and posture of the English tradition is assumed in the present day.

[75] See e.g. M. Clark, "British Contributions to the Concept of Recognition during the Interwar Period: Williams, Baty and Lauterpacht" in McCorquodale and Gauci (eds.), *British Influences*, 110–44. Especially, Rosalyn Higgins and Hersch Lauterpacht are recognised as theoretically-engaged: e.g. C. Warbrick, "The Theory of International Law: Is there an English Contribution" in Allott et al., *Theory and International Law*, 49.

[76] Sands and Sarvarian, "The Contribution of the UK Bar", 519.

[77] See M. Wood, "The Iraq Inquiry: Some Personal Reflections" (2017) 87 B.Y.I.L. 149; M. Windsor, "The Special Responsibility of Government Lawyers and the Iraq Inquiry" (2017) 87 B.Y.I.L. 159.

[78] Some important works include: M. Garcia-Salmones, *The Project of Positivism in International Law* (Oxford 2013); B. Kingsbury, "Legal Positivism as Normative Politics: International Society, Balance of Power and Lassa Oppenheim's Positive International Law" (2002) 13 E.J.I.L. 401; M. Koskenniemi, "Lauterpacht: The Victorian Tradition in International Law" (1997) 2 E.J.I.L. 215 (focusing on specific scholars); A. Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge 2005); A. Orford, "Embodying Internationalism: The Making of International Lawyers" (1998) 19 Australian Yearbook of International Law 1; J. Crawford, "Public International Law in Twentieth-century England" in R. Zimmerman and J. Beatson (eds.), *Jurists Uprooted: German-speaking Émigré Lawyers in Twentieth Century Britain* (Oxford 2004), 681; G. Hernandez, "The Responsibility of the International Legal Academic: Situating the Grammarian Within the 'Invisible College'" in J. D'Aspremont, A. Nollkaemper and W. Werner (eds.), *International Law as a Profession* (Cambridge 2017); A. Bianchi, *International Law Theories* (Oxford 2017), 21–43 (on mainstream approaches).

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The jubilee essays offer a handy resource in this respect. Their authors count among typical representatives of the English tradition. They are also, by their biographies, men associated both with the high noon of the tradition and its (still bright) dusk. For instance we might see in Bowett's endorsement of McDougal's view, or Jennings' appreciation for the concept (if not the jurisgenerativity) of "custodianship", the coming openness to other intellectual approaches that Rosalyn Higgins describes. The essays are written along the arc of that transition, around the midpoints of both men's careers. They are unexceptional rather than standout examples of each of their scholarships, yet written for a context that invited them to take a reflective approach.[79] Moreover, as seen above, the essays reveal differences between the two scholars – suggesting the range of possible associations of the English tradition – as well as a curiously similar style. Most striking here is the claim of moderation that suffuses both, as they deploy adjectives like "radical", "shrill" and "excessive" against ideas they do not support, even as they avoid appearing to dismiss them outright. In the following, I thus draw liberally upon the essays, including their assertions, style and silences, to suggest some directions for further work.

A. The Place of the School in the English Tradition

Firstly, then, it is worth examining the place of the "school" within the English tradition.[80] The tradition is commonly analysed in the context of practice, with the academy not seen as a distinct theatre of its operation. This seems right at one level, for it reflects the historical relationship between the two. In the nineteenth and early twentieth centuries, the international law academy was both small and marginal to practice.[81] Although Britain was a major participant in international conferences, treaties and organisations, and routinely dealt with international legal questions in administering its vast empire, the British Government did not regard academic training in international law a necessary qualification. D.H.N. Johnson recollects Pearce Higgins's lament about the "scarcely veiled contempt 'with which international law was viewed by practising members of the Bar and the legal profession in general'":

> "'In England it would seem,' he said, 'that a knowledge of international law is not considered an essential qualification even for those who are appointed to

[79] Neither recalls his jubilee essays as a major work, nor do tributes by other scholars mention them.

[80] I do not want to suggest a hard conceptual distinction between "tradition" and "school", but it is worth noting that in much literature a "school" denotes an intellectual community operating within and through specific academic venues, albeit not reducible to those venues alone. See O. Okafor, "Critical Third World Approaches to International Law (TWAIL): Theory, Methodology, or Both?" (2008) 10 International Community Law Review 371; W.M. Reisman, S. Wiessner and A.R. Willard, "The New Haven School: A Brief Introduction" (2007) 32 Yale J.I.L 575–82; Bianchi, *International Law Theories*, 10.

[81] Crawford, "Public International Law in Twentieth-century England", 685; Johnson, "The English Tradition", 426.

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> posts where questions which involve its application are of daily occurrence.' He let it be known that he was referring to the Foreign Office, the Diplomatic Service and the Service Departments."[82]

Pearce Higgins worked with Cecil Hurst, then Legal Adviser to the Foreign Office, to strengthen links between practitioners and academics; BYIL was one such endeavour. Their successors, Arnold McNair and Hersch Lauterpacht (Whewell Professors), and William Malkin and Eric Beckett (Legal Advisers), continued these efforts.[83] Due to their efforts, and particularly the influence of what has been dubbed the McNair Group,[84] academia and practice were well integrated by the time Jennings and Bowett wrote their jubilee essays, including in the authors' own individual careers. The process of making international law "respectable" in the eyes of practitioners shaped the academy's pragmatic, anti-theory orientation.[85]

Nevertheless, it is important not to overlook the role that the academy played in disseminating the English tradition, in discursively reinforcing it and in recruiting new members. The literature offers only brief glimpses of the academic resources, processes, activities and people that were instrumental in building the tradition.[86] This is a striking gap particularly as teaching, students, and the university environment are the themes that many emphasise when invited to look back on their careers and

[82] Johnson refers to A.P. Higgins, "Present Position of the Study of International Law in England" (1923) 39 L.Q.R. 507, 511.

[83] On the legal advisers, see K. Jones, "Marking Foreign Policy by Justice: The Legal Advisers to the Foreign Office, 1876–1953", in McCorquodale and Gauci (eds.), *British Influences*, 28.

[84] R. Cryer, "International Law and the Illusion of Novelty: Georg Schwarzenberger" in McCorquodale and Gauci (eds.), *British Influences*, 458. For a visualisation of the influence and social connections of McNair Group, see L.L.S. Pereira and N. Ridi, "Mapping the Invisible College of International Lawyers through Obituaries" (2021) 35 L.J.I.L. 67.

[85] Johnson, "The English Tradition", 432; noting also the impact of John Austin's dismissal of international law as positive morality, which led international lawyers, "anxious to impress their legal colleagues that international law really was a positive system of law … to go too far in severing the links which connected international law with the principles of morality and natural law." Antony Carty has observed a sharp break between the theoretically oriented John Westlake and his Cambridge successors in this respect. However he also hints at the different underpinnings of Oppenheim's and Pearce Higgins's or McNair's turns away from theory; the latter two were keen to court the interest of the practitioners, the former, "merely the humblest scribbler of student manuals", simply imported to England the teachings of Rudolf von Jhering: A. Carty, "Why Theory? The Implications for International law Teaching" in Allott et al., *Theory and International Law*, 75, 77–82. Benedict Kingsbury takes a less dismissive view of Oppenheim's writings but agrees with Carty's analysis of the break between Westlake and Oppenheim, and of Oppenheim's positivism as deriving from a learnt normative tradition: Kingsbury, "Legal Positivism as Normative Politics", esp. 406–09. James Crawford cautions against efforts to "discover" any sophisticated theoretical tradition in the English international legal academy even prior to Oppenheim: Crawford, "Public International Law in Twentieth-century England", 688–92.

[86] See R. McCorquodale and J.-P. Gauci, "Introduction – From Grotius to Higgins: British Influences on International Law 1915–2015" in McCorquodale and Gauci (eds.), *British Influences*, 1, 4: "Whilst it might not be measurable, and it does not get much attention in this volume, British teaching has played an important role in the development of international law.… Many practitioners, judges, politicians and policy-makers from the all over the world have benefited over this century from a British education in public international law, and a British influence might be traced to the way they practice and teach international law." The influence of the academy is also emphasised in A. Rasulov, "Remarks on the British Tradition of International Law", Conference Paper, Comparative Visions of Global Public Order, Harvard Law School, 5–6 March 2005 (on file with the author).

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contributions. In an interview with Antonio Cassese, Jennings, for instance, speaks eloquently about all three, placing teaching at the top of his scholarly contributions, proudly recalling that his students became "Lord Chief Justices or Attorney-Generals, or Ministers of Justice, or even Prime Ministers", and noting that "governments generally grossly underestimate the power of teachers".[87] Although refusing to acknowledge a "Jennings school", he refers multiple times to an English one and to the importance to it of the university and its academic traditions.[88] To him, it is McNair's own education and teaching that make him part of the English school despite his Scottish background; whereas Lauterpacht was not fully part of the English school, not only because he was trained abroad, but also because "I think he never wholly understood the University and Colleges, and how the system worked".[89] Bowett's interview with Lesley Dingle is peppered with evaluations of various people's teaching abilities; it also reveals that a chunk of his writing was in order to produce reading materials for law students.[90]

There are several trails worth pursuing in building a thicker account of the English school. These include of course curriculum, pedagogy, and the relationship of teaching to scholarly approach: what did centres like Cambridge, Oxford, and the University of London teach as international law; (how) did figures like Lauterpacht sublimate their theoretical leanings in the classroom; how did a figure like Bowett come to place his work in the context of New Haven thinking? It is also worth investigating the material resources, including the endowment of teaching posts, international law libraries and scholarships. This last apparently did not always produce the desired outcome: Pearce Higgins notes that the Whewell Scholarship, awarded at Cambridge since 1868 "for the encouragement of the study of international law", had mostly served as a "valuable prize for a clever student, who, after winning it, ceased to take any further interest in the subject, or, at any rate, gave no further evidence of doing anything to advance the study of International Law by making any contributions to its literature".[91]

A prosopography of the figures involved, and especially the development and coordinates of circles of influence like the McNair Group, might take as a point of departure the more diverse backgrounds of the group members as compared to their Foreign Office contemporaries. The latter were

[87] A. Cassese, "Interview with Sir Robert Jennings: October 1994" in A. Cassese (ed.), *Five Masters of International Law: Conversations with R-J Dupuy, E Jiménez de Aréchaga, R Jennings, L Henkin and O Schachter* (London 2011), 119, 148, 163. In addition to Cambridge, Jennings lectured at the Inns of Court, where he taught many of his foreign students, especially from the Commonwealth.

[88] Ibid., at 162–63.

[89] Ibid., at 123.

[90] L. Dingle, "Conversations with Professor Sir Derek William Bowett", available at https://www.squire.law.cam.ac.uk/eminent-scholars-archiveprofessor-sir-derek-bowett/conversations-professor-sir-derek-bowett-emeritus (last accessed 22 June 2021).

[91] Higgins, "Present Position of the Study of International Law", 509.

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invariably educated in public schools (e.g. Malkin, Beckett, Fitzmaurice, William Evans, James Fawcett, Joyce Gutteridge and others; the Canadian-educated Francis Vallat was an exception). Many of the former went to state schools (e.g. Jennings, Bowett, Wilfred Jenks, as also Rosalyn Higgins); took their undergraduate degree outside of Cambridge, Oxford or the LSE (Hersch Lauterpacht, Clive Parry, Gillian White); Lauterpacht was also an émigré escaping anti-Semitic persecution. Although the English tradition is viewed generally in terms of its striking uniformities – mostly male, mostly white – these social differences are worth investigating for how they might illuminate different routes to academic centres such as Cambridge, and the impact of those centres themselves upon subsequent careers, and the forging of positions on various international legal questions.[92]

B. The View from Nowhere and Its Blind Spots

Second, future work might explore the influence of empire in shaping both the tradition and the school. This should really be a trite point by now given that Britain's imperial eminence was so clearly the backdrop for the increasing legal workload of the Foreign Office, to the point where the arrangements for legal advice that had been in place (especially ad hoc following the dissolution of Doctors' Commons in 1857) no longer sufficed.[93] Following the appointment of Julian Pauncefote from the Colonial Legal Service as a legal Assistant Secretary in 1876, a full-time Legal Adviser was appointed in 1886 (Edward Davidson), with positions of first and second assistants (Hurst, 1902; Malkin, 1914) being added as the volume of work increased. With jumps in workload during the inter-war period, and then with post-war arrangements and decolonisation, the numbers increased to approximately 17 by 1968, when the Foreign Office was amalgamated into the new FCO (from 2020, the Foreign, Commonwealth and Development Office). In 2019, the FCO Legal Directorate comprised about 70 lawyers.

It was its imperial standing and questions arising from its dealings with, and in relation to, its colonial territories that brought Britain to (pivotal roles at) major international conferences, shaped its positions on key issues, and "meant that legal principles emanating from [it] reached far into the territories it occupied".[94] Empire was the context of origin for much of what

[92] See B.S. Chimni, "Prolegomena to a Class Approach to International Law" (2010) 21 E.J.I.L. 57. For further possible directions for such an inquiry (albeit offered in a contemporary context) see A. Rasulov, "The Discipline as a Field of Struggle: The Politics and the Economy of Knowledge Production in International Law" in A. Bianchi and M. Hirsch (eds.), *International Law's Invisible Frames* (Oxford forthcoming).

[93] G.G. Fitzmaurice and F.A. Vallat, "Sir (William) Eric Beckett, K.C.M.G., Q.C. (1896–1966)" (1968) 17 I.C.L.Q. 267, 268–70.

[94] McCorquodale and Gauci, "Introduction", 3.

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we take as international law; and also the impetus behind the embrace of the idea of international law as virtuous, as progressive, liberal, and universal in its promise of equality (albeit deferred on the condition of sufficient "civilisation").[95] This embrace could serve multiple ends for imperial international lawyers: it could justify empire as a means to spread the rule of law, permit distance from its violence and misery, and allow those so inclined the sense – and occasionally the resources – of being its conscience-keepers.[96] The style of the English tradition was well suited to these ends: the tones of objectivity, the claim, always, of siding with moderation against "extreme" or "radical" views, of abiding by legal rectitude. Rectitude, in turn, was defined by way of a convenient mixture of pragmatism and positivism,[97] thus eliding evaluation by both standards. This style served to cloak imperial preference as common sense and interest as virtue, and to dismiss anti-imperial stances as unsophisticated or disorderly.[98]

Jennings and Bowett did not have to be card-carrying imperialists (and they were not) in order to perpetuate the style and its politics in the post-war era. In fact, the style so fully internalises its underpinning assumptions that it appears as one without an accompanying worldview, "the view from nowhere", rather than from a particular vantage point.[99] Nevertheless, it comes with telling blind spots, one of which is the failure to engage with third world subjectivity in any serious way. We see that at work in the jubilee essays. While the essays recognise that decolonisation constitutes the context for change in the law of the sea, new states receive distorted consideration. The essays see them as capable of contributing state practice, but not as the source of ideas or policies. Thus, the proposals that Jennings takes up for consideration are those by Canada and the US, and in Bowett's case, by the US and Borgese. The lack of engagement with

[95] A point third world lawyers have made often. The groundbreaking work is Anghie, *Imperialism, Sovereignty and the Making of International Law*. The peculiarly "British" sense of this association is highlighted in Koskenniemi, "The Victorian Tradition", 220–21.

[96] See in this context J. Pitts, *Boundaries of the International: Law and Empire* (Cambridge, MA 2018); I. Shivji, "Law's Empire and Empire's Lawlessness: Beyond the Anglo-American Law" (2003) 1 Law, Social Justice & Global Development Journal, available at https://warwick.ac.uk/fac/soc/law/elj/lgd/2003_1/shivji2/ (last accessed 22 June 2021).

[97] See inter alia N. Tsagourias, "Contributions of British International Lawyers to the Law on the Use of Force" in McCorquodale and Gauci (eds.), *British Influences*, 301, 316: "One may thus place British international law thinking at the intersection of European formalism and American policy oriented jurisprudence."

[98] Perhaps the best illustration is Gerald Fitzmaurice's opinions in the South West Africa cases. See V. Kattan, "Decolonizing the International Court of Justice: The Experience of Judge Sir Muhammad Zafrulla Khan in the South West Africa Cases" (2015) 5 Asian Journal of International Law 310. Notably, however, Jennings refused to assist South Africa, regarding that as "beyond my limit", despite the "tradition of the English Bar whereby if you are offered a brief and you can do it, you ought to take it on": Cassese, "Interview with Sir Robert Jennings", 138.

[99] In contrast, Jennings assessed the New Haven approach as effectively determined by policy. "I was a bit bothered by the way McDougal in his writings posited questions and then nearly always came round to what was the American Government's point of view; and perhaps he got a bit of a shock when his own pupil, Richard Falk, got different answers by the same method": ibid., at 164.

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third world positions and arguments is most obvious in Bowett's discussion of developing states' interests in deep seabed mining. Not only does he turn solely to English voices (the Bishop of Norwich and Lord Ritchie-Calder) to answer the question of policies that would be in the interests of "less-developed" states, he also then unsurprisingly misreads what these states were demanding. Thus, he suggests that "smaller" or "underdeveloped" states only seek a fair economic share and need not be "burden[ed]" with the responsibility of supervising licences;[100] missing the point that developing states were precisely seeking an active role in both the conduct and the administration of seabed mining.

Given the links between the academy and Foreign Office practice, that practice and empire, and empire and international law, it is surprising that English school is not much analysed through this lens beyond individuals like Lauterpacht. Especially, its operations in the post-war era via figures like Jennings and Bowett (and many others) receive little attention. Not only would a scrutiny of their work as scholars and practitioners shine a light on the imperial legacies informing the secondary rules, judicial decisions and primary regimes shaped by British influences in the so-called postcolonial period; it would also offer up useful dissonances. These include, for example, where a figure's conduct deviates from the tradition's norms, such as Jennings' honourable refusal to advise apartheid South Africa despite the cab-rank rule;[101] or a debate makes visible multiple extant doctrinal understandings, such as the differences between Jennings and Bowett highlighted earlier.[102] Such dissonances strip away the illusion of a view from nowhere, and provide an entry point into the underlying politics of the doctrinal views held by figures within the tradition, as well as the tradition's internal complexity, its intellectual genealogies and adaptations to the expectations of changing times.

C. Blueprints for the Future

It is perhaps in its blueprints for the future of international law and international order that the English school offers the most material for exploring its ideology. There is one line of analysis that highlights a belief in "incrementalism" as a hallmark of the tradition,[103] and it is certainly true in the example of the jubilee essays that "radical" changes are regarded with disfavour. Yet English lawyers have "midwifed" the creation of new rules and institutions on several occasions. In the context of the law of the sea, for instance, English lawyers were early champions of the continental shelf doctrine, perceiving quickly that the principle of the freedom of the sea

[100] Bowett, "Deep Sea-bed Resources", 58–59.
[101] See note 98 above.
[102] The range of positions on the use of force are another illuminating context. See for an overview, see Tsagourias, "Contributions of British International Lawyers".
[103] See e.g. Sands and Sarvarian, "The Contribution of the UK Bar", 519.

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would not suit the growing interest in oil extraction.[104] They explained the case for separating seabed and seawater regimes, and later played an influential role in the division of the ocean into multiple spatial and functional zones – a sea change from the legal imaginary of a uniform ocean (with exceptional particular regimes), that had prevailed for three centuries. English contributions to international law have included both the fostering of major changes *and* the conservation of old rules, principles and approaches. Two inquiries follow from this. Firstly, when and in what contexts has the choice been for the one rather than the other? Secondly, why and in what contexts does the accompanying discourse often shy away from acknowledging even major legal innovations as "radical"?

A mapping of English contributions in these terms, that is, of blueprints for legal development and whether they lean in the direction of innovation or conservation, and how they present what is advocated in the accompanying discourse, would be a difficult exercise, but it could be a revealing one. Such an exercise might confirm that English preferences for innovation and conservation tend to reinscribe capitalism. This would be true for example not only of the continental shelf doctrine but also of the version of the doctrine that English lawyers preferred. Thus, against early suggestions for "internationalisation" of oil extraction, or treating the seabed as part of – not separate from – the sea, English lawyers argued for enclosure of the seabed within national jurisdiction as the most feasible approach from the perspective of exploiting valuable natural resources (and favoured by oil companies).[105]

The exercise of national jurisdiction however became suspect where it could impede capitalist interests. The nationalisation of the Anglo-Iranian Oil Company by Iran in 1951 led the UK to bring a case before the ICJ (Beckett, Hersch Lauterpacht, Waldock, Johnson all appearing for the UK) and orchestrate a coup against the Iranian Prime Minister Mohammad Mossadegh, and English lawyers to examine the ways in which international law could regulate contracts between states and corporations.[106] Similarly,

[104] C. Hurst, "The Continental Shelf" (1948) 34 Transactions of the Grotius Society 153; H. Lauterpacht, "Sovereignty over Submarine Areas" (1950) 27 B.Y.I.L. 376.

[105] E.g. H. Waldock, "The Legal Basis of Claims to the Continental Shelf" (1950) 36 Transactions of the Grotius Society 115, 136.

[106] A.D. McNair, "The Applicability of General Principles of Law to Contracts between a State and a Foreign National" (1957) American Bar Association Section of Mineral and Natural Resources Law. Proceedings 168; R.Y. Jennings, "State Contracts in International Law" (1961) 37 B.Y.I.L. 156. The ICJ, although dismissing the case brought by the UK for the lack of jurisdiction, did indicate provisional measures as the matter "could not be regarded *a priori* to fall completely outside the bounds of international jurisdiction": see S. Pahuja and C. Storr, "Rethinking Iran and International Law: The Anglo-Iranian Oil Company Case Revisited" in J. Crawford et al., *The International Legal Order: Current Needs and Possible Responses* (The Hague 2017), 53, 65. In an acknowledgment of the imbrication of capitalism and imperialism, in a later essay, Bowett noted that state contracts were selectively internationalised – where the state in question was a developing one, with developed states not accepting internationalisation of their own contracts: D.W. Bowett, "State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach" (1988) 59 B.Y.I.L. 49, 51. On the coup against Mossadegh, see e.g. O.A. Westad, *The Cold War: A World History* (London 2017), 268–73; P. Mishra, "Why Weren't They Grateful?", London Review of Books, 21

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demands for redistribution, such as by way of the movement for a new international economic order, met with some acknowledgement that improvements were necessary to ameliorate the real inequalities between developed and developing states, but also with the characterisation of third world demands as "clamorous", "shrill", "crusading slogans and shopping lists of desiderata", reminders that General Assembly resolutions – the vehicles for such demands – were non-binding, and critical assessment of preferred third world forums such as the UN Conference on Trade and Development.[107] The preference was for arrangements that would stabilise trade and investment, such as the Lome Convention of 1975. Likewise, in the case of the deep seabed, regimes that would facilitate corporations' access to its resources were preferred over more far-reaching proposals aiming to construct the political economy of seabed mining differently.[108]

Yet if capitalism might be the bottom-line in the English school's blueprints and responses, two potentially interruptive factors deserve closer analysis. The first is the school's affinity to proceduralism. While in some instances English lawyers appear to have wielded procedure simply as a policy tool – the notable example is of course *South West Africa*[109] – in other cases, such as *Anglo Iranian Oil Company*, fidelity to procedural correctness in matters such as finding jurisdiction has led them to support outcomes at variance with their own policy preferences.[110] It would be naïve to imagine the English school as always placing procedural correctness over other considerations, or as not seeking to instrumentalise procedure in many instances, but equally it would be wrong to dismiss the workings upon it of what Martti Koskenniemi has called a "culture of formalism".[111] A closer analysis might reveal more precisely the intersections – both supportive and conflictual – between that culture of formalism and the ideology of capitalism in the school's writings.[112]

June 2012, https://www.lrb.co.uk/the-paper/v34/n12/pankaj-mishra/why-weren-t-they-grateful (last accessed 22 June 2021).

[107] G. White, "A New International Economic Order" (1976) 16 Virginia Journal of International Law 323 all quotes from here); D.W. Bowett, "International Law and Economic Coercion" (1976) 16 Virginia Journal of International Law 245.

[108] On which see Ranganathan, "Decolonization and International Law", 171–75.

[109] *South West Africa (Ethiopia v South Africa; Liberia v South Africa) Second Phase*, [1966] I.C.J. Rep. 6. Fitzmaurice was part of the "majority" (the judges were evenly split) which used a procedural ground to dismiss the case at the *merits* stage, after a previous judgment had already decided on South Africa's preliminary objections. On that occasion, Fitzmaurice had authored a joint dissent with Percy Spender: *South West Africa (Ethiopia v South Africa; Liberia v South Africa) Preliminary Objections*, [1962] I.C.J. Rep. 319, 465.

[110] *Anglo Iranian Oil Company (United Kingdom v Iran) Jurisdiction*, [1952] I.C.J. Rep 93. But see also Pahuja and Storr's point about the court decision to grant provisional measures, at note 106 above. McNair, as judge, supported the decision to decline jurisdiction, although he thereafter made the case for international regulation of investment contracts.

[111] M. Koskenniemi, *The Gentle Civilizer of Nations: The Rise and Fall of International Law 1870–1960* (Cambridge 2001), 500ff.

[112] As an additional point, this would also bring within the frame of analyses what we know of the expressed political commitments of the school, such as Ian Brownlie's membership of the

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The second factor is the school's environmental leanings. In both jubilee essays, it is environmental considerations (oil pollution for Jennings; the connected ecosystems of the ocean for Bowett) that lead the authors to question, though not abandon, their preference for more modest, extraction- and commerce-friendly regimes. Thus, Jennings flirts with the idea, but not the jurisgenerativity of custodianship, and Bowett with the idea of an "ocean space" rather than seabed regime. The question of course is how far either might have been prepared to go if he had not found it as easy to assume that protection of the marine environment could be reconciled with exploitation of the sea's resources (an assumption placed under increasing strain by evidence of the ocean's growing fragility). Would they have been prepared to reconsider the relationships between extraction, distribution and environmental protection, so far as to support the alternative (non-competitive; public sector) models recommended by third world states, rather than calcifying into law the preferences of corporations?[113] This is not just an abstract invitation to hypothetical thinking; the possibilities of remaking those relationships is the question that faces states and international lawyers today in the context of fresh law-making vis-à-vis the sea's marine genetic and mineral resources. More broadly, the complex history of the place held by the environment in English international legal thought and practice – complete with trappings of romanticism, colonialism and conservationism – and its intersections with capitalist ideology, deserve further study.[114]

V. Until the Next Jubilee

The directions of inquiry I have suggested above are those inspired by the jubilee essays and it follows that they do not exhaust the ways in which one might unpack the English school. Nevertheless, they present possibilities of contending with the school's ideology and influence, and bring into view important and neglected questions.[115] These include whether there *are* differences in approach within the school; and if so, what work are these differences, as well as the overarching similarities of style doing in the

Communist Party (until 1968), joined while at Cambridge. According to Crawford, "it is difficult to detect any strong influence of Marxist ideas, either in his writings, in conversation or in his professional work, and he was always critical of the operation – or lack of it – of the rule of law in Eastern Europe": J. Crawford, "Ian Brownlie 1932–2010", (2012) XI Biographical Memoirs of Fellows of the British Academy 55, 56.

113 See Ranganathan, "Decolonization and International Law", 171–75.

114 Important work includes M. Prost and Y. Otomo, "British Influences on International Environmental Law: The Case of Wildlife Conservation" in McCorquodale and Gauci (eds.), *British Influences*, 192; S. Humphreys and Y. Otomo, "Theorizing International Environmental Law" in A. Orford, F. Hoffman and M. Clark (eds.), *The Oxford Handbook of the Theory of International Law* (Oxford 2016), 798.

115 For an essay in the Dutch context, see J. Nijman, "Marked Absences: Locating Gender and Race in International Legal History" (2020) E.J.I.L. 1025.

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world – then, and now. The school's connections to empire, capitalism and conservatism are worth serious engagement in understanding all that is packed into the identification of pragmatism, moderation, professionalism and theory scepticism as its core attributes. And so are the reinforcing as well as potentially interruptive workings of the school's proceduralism, and environmentalism.

Inviting detailed consideration of the school and its legacies, these directions of inquiry also serve the further critical purpose of "provincialising" the English school as a locus of power in international law, and within Britain. That is, by calling attention to the school's associations and its social world, they also seek to locate it in its particular venues, networks and contexts. Such a move not only highlights the political affinities and class identities that have underpinned the tradition, it also permits a sharper focus on the other outlooks and genealogies that are erased when a national tradition is defined by the practices of a select group. After all, not only were there other schools of international law in Britain (such as the Scottish), there were also important engagements that are not usually identified as pertaining to international law. We might include here feminist, anticolonial and left movements that shaped international law "from below";[116] "radical" transnational lawyering as exemplified in the careers of D.N. Pritt (Beckett and Fitzmaurice were pupils) and many UK-trained Asian and African lawyers;[117] and scholarly approaches such as the law-in-context movement pioneered at the University of Warwick by William Twining, Yash Ghai and others, building on intellectual legacies from Dar es Salaam, Accra and other Commonwealth law schools.[118]

These questions also bring up the relationship of the English tradition to others in Europe and in the western world more broadly. The questions asked in relation to the former here are of course applicable to the others too; indeed in being used to identify the contours of *English* tradition they already implicitly invite assessment of its distinctiveness from those other traditions. While empire and capitalism are a shared background, there may be genuine differences to explore in these traditions' sociologies of international law, self-definitions and particular languages of justification, and the relationships that their representative schools have borne

[116] E.g. B. Rajagopal, *International Law from Below: Development, Social Movements and Third World Resistance* (Cambridge 2003); and work by Karen Knop on the Greenham Common peace camp, e.g. K. Knop, "Foreign Relations and International Law", January 2020 (unpublished manuscript on file with author).

[117] See R. De, "The Postcolonial Career of DN Pritt: Decolonization and the International Culture of Rebellious Lawyering", Paper presented at Queen Mary University of London, Global Jurists Seminar, 14 December 2016 (on file with the author); M. Terretta, "Anti-colonial Lawyering, Post-war Human Rights and Decolonization across Imperial Boundaries in Africa" (2017) 52 Canadian Journal of History 448.

[118] See e.g. J. Harrington and A. Manji, "The Limits of Socio-legal Radicalism: Social and Legal Studies and Third World Scholarship" (2017) 26 Social and Legal Studies 700.

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with heterodox approaches.[119] As well as the commonalities and borrowings, the differences do some work in illuminating both range and limits of international law's politico-economic associations.

The project of rethinking international law's boundaries and foundations has by now acquired several traditions in its own right,[120] but has proceeded in Britain on parallel tracks with the mainstream project of "doing" international law while bracketing its politics. However, the coming world of the next half century, tending more to the imagination of J.G. Ballard than to the extractive certainties driving Jennings and Bowett's blueprints for international law's future development, makes the crossing of those tracks both urgent and inevitable. The inquiries suggested in this essay, revealing not least the elements of dissonance and dynamism even within the archetypical mainstream project of the English school, remind us that there are multiple ways in which it is available to us to live and work as international lawyers.

[119] Work on European international *law's* shared background of capitalism and empire includes, J.T. Gathii, "International Law and Eurocentricity" (1998) 9 E.J.I.L. 184; S. Marks, "Empire's Law" (2003) 10 Indiana Journal of Global Legal Studies 449; N. Tzouvala, "The Specter of Eurocentricism in International Legal History" (2021) 31 Yale J. L. & Hum. 413. Work on the variety within European/ western traditions in the contemporary context includes A. Roberts, *Is International Law International* (Oxford 2017). M. Koskenniemi, *To the Uttermost Parts of the Earth: Legal Imagination and International Power* (Cambridge 2021) explores the particular languages of justification developed across European empires and over time.

[120] See Rasulov, "The Discipline as a Field of Struggle".

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