
Editorial

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Brexit: No Happy Endings

I can think of no ‘happy ending’ scenario to this unfolding saga: like malaria, it is a malaise that has nested since British accession back in 1973, and erupts from time to time, though the current eruption is potentially of fatal proportions.

One cannot overstate the damage that a full-fledged exit of Britain will inflict on the EU. The importance goes well beyond the specificities of the functioning of the Union. It will survive and continue to function, even perhaps in some respects with less engine-room screeching. But as a global presence in the world, shaping and reshaping the impact will be huge, and to the detriment of the UK, the Union and the world. And internally, though not much might change on the surface, it will at the deepest spiritual level of European integration – and make no mistake, at its core the European construct has always been more than a functional, utilitarian enterprise – the damage will be equally shattering.

There are many in Britain who are sceptical about the benefits of British membership. But if Brexit results from a referendum vote, it is quite likely that it will be an English exit majority, with the opposite outcome in Scotland – almost inevitably leading to a Scottish exit from the UK, a catastrophic result by all accounts for the UK.

This MAD-like scenario assures at least one thing – that there will be no facile poker-playing in any future negotiations, the stakes are simply too high.

Allowing Scotland a referendum on its status within the UK was, in my eyes, the best of the British mature democratic tradition. Many express doubts whether the decision (for what it is) to allow a referendum for continued EU membership would justify such accolades. It was, according to some, holding the country hostage to the internal politics of the Tories. I don’t share this view. The fact that the EU issue has remained for so long – forever – a potent part of UK politics, together with the recent impressive successes of UKIP, means, in my opinion, that at some point the people should be able to express themselves, on such a critical ontological issue, directly. Be that as it may, a referendum was promised and to withdraw it at this point would undermine even further the fortunes of the Union in the UK and would be grist to the mill of the most populist of voices.

But, alas, even a victory for the ‘stay-in’ side in the referendum will solve little. The campaign will be ludicrous, a battle between different variants of scare tactics. One

will be drowned in a torrent of tendentious facts from both sides. Even if you manage to persuade enough of the electorate that the UK will be damaged by exit, that very argument will feed the ongoing malaria for generations. Membership will be forever contingent subject to a utilitarian evaluation. It is likely that the margin of victory of either side will not be huge, so that even a stay-in victory would mean that Europe will continue to occupy British internal politics for decades to come.

Leading up to a referendum the British Prime Minister, whether Tory or Labour, will have to win some ‘concessions’. That is likely to be another farce. There are only so many ‘opt-outs’ that are consistent with full membership of the Union, and the kind of general rule changes for everyone that might make a difference to the campaign are precisely those that the other Member States could not and would not give. But I would go even further. There is no medicine, in the form of ‘concessions’ or rule changes, which will cure the malaria. It is the very idea of membership in a Union such as the EU which at the end of the day simply does not sit well. It is an identitarian issue rather than this or that policy that may or may not be negotiated.

And this, in my view, points to what I think would be the least of all evils – a very second best, but better than any other outcome. A negotiated special status for Britain as Associate Member, or something of the like. Yes, participation in institutions and decision-making would be tricky (but don’t immediately scream ‘impossible!’). And as an Associate Member the UK could downgrade its market participation to goods, capital and services but not labour – again, do not scream ‘impossible!’ There are FTAs aplenty that do just that. It would be a different kind of variable geometry. In some operational details it might be messy, but the status issue would be clear and even iconic. It is far from ideal, but if the choice is continued years of seething and continued brakes on further integration for those who want it or a once and for all change of status, I reluctantly opt for the latter.

Finally, the creation of such a status might also solve the Turkish dossier – sharing a status with Britain might be the dignified compromise that both the EU and Turkey have been seeking without ever admitting such.

The *EJIL* Annual Foreword

Starting with the present issue, we will be publishing *The EJIL Foreword* in the first issue of each year.

The idea, and the title, are unashamedly ‘borrowed’ (we did not ask them) from the famous *Harvard Law Review* Foreword. We will be inviting each year a ‘distinguished’ scholar in the field – distinguished not simply by an illustrious career, but also by having, we believe, something interesting to say – to present a ‘state of the field’ type article, permitting on an annual basis a regular ‘deep breath’ reflection on international law with a horizontal appeal to many readers.

A higher word limit, in the range of 40,000 words, will permit, we trust and hope, a more extensive analysis, synthesis, conceptualization, or systemic theorization than is usually possible in an *EJIL* article. Considerable licence will be given to each author to define the topic of his or her Foreword, but in principle it will be expected to:

- define an original vision of the field, and/or
- reflect on the state of the discipline as a whole (or a particularly pressing challenge facing it)

in light of recent events and developments in practice.

The inaugural Foreword, by Jan Klabbers, published in this issue captures, in its ambition, breadth and depth, precisely the type of piece we have in mind. We also invite readers to watch the extensive [EJIL Live!](#) conversation with Professor Klabbers concerning his Foreword.

The celebrated Hague General Courses serve in some ways a similar function to *The EJIL Foreword*, but both the format and size of a General Course of International Law are quite different. Our own ambition and hope is that the Foreword will establish itself in its own way as a kind of ‘cousin’ of the General Course, an important ‘event’ on the IL intellectual calendar, and that over time the accumulation of *EJIL* Forewords will constitute a repository of profound reflection on international law itself and of self-reflection on the academic discipline of international law.

***EJIL* on your iPad!!!**

We have ‘gambled’ and invested considerable resources, human and material, in developing a tablet version of *EJIL*. We believe a tablet version represents a perfect adaptation of one of our most important identity markers to the digital age and current reading habits.

The identity marker has two facets. The first is our huge commitment to a Journal which is not only edited but ‘curated’. For each issue we pay attention not only to the individual articles but to the ensemble. We try to make, in each and every issue, the whole greater than the sum of the parts, with careful, even loving, attention given to the construction of an interesting, rich and satisfying whole. Not just something of interest to different tastes and constituencies, but a more holistic concept of what a good journal issue should be and feel like. I have habitually extolled (and cajoled) our readers to actually pick up the hard copy of *EJIL* to enjoy the ‘book feel’ of each issue.

The second facet is our long-standing commitment to the aesthetics of publication. It is based on the premise that beauty is an integral part of the world of the mind. A well-written article, for example, has a beauty that stands independently of the content as well as enhancing such. We all spend a huge amount of time and effort on our research and writing, and *EJIL* believes that the result deserves a presentation that does justice to such effort. A beautiful painting deserves a beautiful frame. If you look at the paper version of *EJIL* you cannot fail to notice this commitment reflected in seemingly trivial details such as the quality of paper and print. OUP has been our wonderful partner in crime in trying to achieve this.

We are, however, aware that for many the paper version is at best a (beautiful) doorstep. Hence the tablet version of *EJIL* – capturing both the holistic and ‘wholistic’ sense of each issue as well as its aesthetic qualities.

A tablet version is quite different to ‘going online’. The entire issue downloads onto your tablet. You can then browse and read at leisure away from your desk. If you are like me, it is likely to be on some long flight. You can leaf through the issue or click a title in the ToC and skip to it.

To be clear, the tablet version will not replace the online access that subscribers are entitled to on the OUP platform or the free access to the *EJIL* archives (except for the current year) on the www.ejil.org site. Rather, it will offer a new and different reading dimension.

We gambled that the tablet version will be a huge success with many of our existing subscribers and will encourage many other readers to become individual subscribers. Make no mistake: this initiative is not driven in any way by economic considerations. The individual subscription to *EJIL* is among the lowest in the field, if not the lowest, and has been kept constant for years. It is practically an at-cost price. You will also note that the difference between the individual subscription rate and the cost of membership in the European Society of International Law (ESIL) is negligible. All members of the Society are offered a subscription to *EJIL*. So my recommendation would be to use this occasion to become a member of ESIL and enjoy all membership benefits as well as a subscription to *EJIL*, including access to the new tablet version!

The app will launch with this issue of the Journal. In a first phase it will be available for Apple devices. An Android version will follow shortly. Access to content through the app will be limited to individual subscribers and ESIL members. Subscribers should visit www.exacteditions.com/print/ejil and enter their OUP customer ID number for authentication, then simply follow the links from that page to install the app to their device. New subscribers will receive full instructions from OUP.

For those attending the ASIL meeting in April, visit the OUP stand. There will be free access to the *EJIL* app in the vicinity.

Finally, although we tested a beta version for several months there are bound to be some teething problems (please be patient) and ways to improve the tablet version. Do not hesitate to write to us.

Vital Statistics

Here are our ‘vital stats’ for 2014. Each year we track trends in the submission and publication of unsolicited manuscripts according to criteria of gender, place of submission and language. Note that there are no special requirements for authors wishing to submit to *EJIL* (you don’t have to hold a PhD or have a tenured position or write with impeccable Oxford English) nor is there any editorial affirmative action in selecting manuscripts for publication. Our double-blind review process guards against that. So the statistics we present speak plainly about the submissions we receive and the manuscripts accepted for publication.

Having seen a rise in the percentage of manuscripts submitted and published by women authors in the previous two years, the figures stabilized in 2014 at 35 per cent both for submissions and accepted articles. The figure was 28 per cent for published articles (recall that published articles largely reflect submissions of the previous year). For now I regard this as a blip – I doubt it signals a trend.

We divide the world into four regions for our statistical purposes: the European Union, the Council of Europe countries outside the EU, the US and Canada, and the rest of the world. This statistic might seem a little misleading as it indicates the place of submission – normally the institution at which authors work or study, rather than

their actual nationality – but overall we believe it conveys a fairly reliable picture of our authors. Of the total number of manuscripts submitted in 2014, 43 per cent came from the EU, 8 per cent from CoE countries, 25 per cent from the US and Canada and 24 per cent from the rest of the world; very similar figures to those of the previous year. For accepted and published articles, the EU took a slightly larger share of the cake, with 58 and 59 per cent of the total, respectively, whilst CoE countries claimed 5 per cent of accepted articles and a larger 15 per cent of those published. For the US and Canada, the figures were 16 per cent for accepted articles and 20 per cent for those published, whereas the rest of the world took 21 per cent of accepted articles and only 6 per cent of published articles. The 2015 ‘published’ figures will reflect the higher rate of acceptances from the rest of the world in 2014.

Importantly for a European journal, we encourage submissions from non-native English speakers, not least by providing an excellent copy-editing service for all articles accepted for publication. I believe that our statistics on linguistic origin reflect this attention: 46 per cent of submissions came from English-speaking countries and 54 per cent were from non-English-speaking countries. The numbers dropped a little in 2014 for accepted articles but showed a positive trend towards non-English-speaking countries for published articles: 53 per cent and 44 per cent, respectively, for English-speaking countries and 47 per cent and 56 per cent, respectively, for those coming from non-English-speaking countries.

Finally, a word on the content of our issues. We seek to maintain a balance between unsolicited submissions and commissioned articles. We do not think of ourselves as a refereeing service but also, through our own generated symposia and the like, as shaping somewhat the discourse. For better or worse. In 2014, due to the ever-increasing number of outstanding unsolicited manuscripts we receive, the scales weighed more heavily in that direction, with 29 unsolicited articles for a total of 688 pages, whilst commissioned pieces numbered 17 and occupied 286 pages. We are considering an increase in the number of pages per volume to accommodate the increasing number of excellent articles we feel compelled to accept, whilst not neglecting the symposia and commissioned articles we proactively seek in order to contribute at the editorial level to our explorations of important and cutting-edge issues in international law.

25 Years of EJIL – A Retrospective

When planning first began to launch a journal of international law with a specifically European orientation the Berlin Wall was still standing. *EJIL* was born in a time of intense change – the first issue was published in 1990, the year of German reunification – and, indeed, the life of the Journal tracks our post-Cold War world. Twenty-five years later we celebrate *EJIL*’s birthday with a Retrospective – an exhibition in which visitors can glimpse not only the evolution of the Journal and the discipline but also in many respects the last quarter century in the life of international affairs and international law.

The exhibition, available on the *EJIL* and OUP websites, includes a main feature and some special exhibits. We selected, chronologically, year by year, two or more articles to represent each volume. Like curators of an exhibition we combed the *EJIL* archive,

at times marvelling at the rich choice of articles and at times anguishing over the difficult and ultimately subjective selection. We tried to choose articles that would give a flavour of the world in which they were written, the diversity of scholarly approaches which has been a hallmark of *EJIL* since its inception and, plain and simply, a ‘good read’ even in some cases after many years.

A number of special exhibits complete the Retrospective. The *EJIL* Tables of Contents have been aggregated into one chronological file, providing a fascinating account of the evolving field of international law and its community of scholars. *EJIL* has always had an eye for young talent and readers may well recognize some of today’s most respected scholars in their more youthful productions. The Editorials, too, have been collated into a single file, reflecting different styles and sensibilities of our various editors. Our Book Review Editor, Isabel Feichtner, selected 25 book reviews, one for each year, memorable for the book or for the review, to create another special exhibit. Finally, the Roaming Charges photos and the Last Page poems have been collated into special exhibits.

We hope you will enjoy the Retrospective and join us in a toast to another 25 years of academic excellence and innovation in *EJIL*.

ICON·S Conference

The second conference of the International Society of Public Law (ICON·S), around the theme of ‘Public Law in an Uncertain World’, will be held in New York, at the New York University School of Law, on 1–3 July, 2015. The Call for Papers and Panels is open until 10 April 2015 and more information is available on the [ICON·S website](#).

In this Issue

This issue opens with the first entry under our new, annual rubric, *The EJIL Foreword*. Taking the ongoing debate concerning the United Nations’ role in the Haitian cholera tragedy as his starting point, Jan Klabbers presents a masterly *tour d’horizon* of the intellectual origins, current state, and future prospects of the law of international organizations. In the process, he reconstructs – and exposes the blind spots and biases – of a functionalist theory that he identifies as specific to and underlying that law.

In the next article in the issue, Janina Dill presents a novel framework for understanding the different set of demands made on states in war. Identifying ‘three logics of waging war’ – associated respectively with international humanitarian law, military strategy, and an individual rights-based morality – she concludes that the three cannot be reconciled, presenting war-making states with an irresolvable ‘trilemma’. On a related topic, but adopting a very different approach, Amanda Alexander presents a new and revisionist history of international humanitarian law, locating its origins in the work of a particular set of actors from the 1970s onwards. Bart Smit Duijzentkunst and Sophia Dawkins draw from relational contract theory to construct an innovative model of arbitration in peace processes, and demonstrate the value of that theory and model through a set of carefully presented case studies. And Ulf

Linderfalk's short article on the perennially relevant topic of treaty interpretation adduces a series of well-chosen examples to elucidate the relationship between the aims and means of interpretation.

In *Roaming Charges*, the 'Moment of Dignity' is a photograph that celebrates the small traditions we risk losing in our fast-moving world. The photographer is Martin Lestra, PhD researcher at the European University Institute. We remind our readers that submissions to *Roaming Charges* are welcome.

The articles section of this issue is rounded out by the return of two of our regular rubrics, *EJIL: Debate!* and *Critical Review of International Jurisprudence*, both addressing topics relating to the European Court of Human Rights. Under the first, we present Stéphanie Henneke Vauchez's somewhat provocative article on the issue of gender balance within the Court, assessing the politics of the appointment process through a detailed analysis of the self-presentation by the 120 or so women who have applied for positions on the Court. We publish Replies by Françoise Tulkens and Fionnuala Ní Aoláin, both of whom have direct, personal experience of that process. Finally, Paolo Lobba surveys the development of the Court's jurisprudence on Holocaust denial, which he argues has important implications for 'denialism' in relation to other core international crimes. *The Last Page*, offering nourishment for the soul as well as the mind, presents a poem by Dimitri Van den Meerssche entitled 'Calling Themis'.

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* The views expressed here are personal to the Editor-in-Chief and do not reflect the official position of either the *European Journal of International Law* or the European University Institute.