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# SYMPOSIUM ON 150 YEARS OF THE INSTITUT DE DROIT INTERNATIONAL AND THE INTERNATIONAL LAW ASSOCIATION

## UNVEILING THE "LEGAL CONSCIENCE OF THE CIVILIZED WORLD:" A CRITICAL LOOK AT THE INSTITUT DE DROIT INTERNATIONAL

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For the past 150 years, the Institut de Droit International (IDI) has held a prominent position in the field of international law, garnering recognition as one of the world's distinguished professional organizations for international lawyers. Yet, a closer look at its structures reveals that in fact, the IDI has been and remains an elitist club, comprised of renowned international legal jurists, practitioners, and scholars. Its goal was and is to formulate "principles from which rules [of international law] could be deduced."[1] While there may be doubts regarding the contemporary authority of the IDI in shaping today's international law, it possessed significant influence during its first century of existence. Therefore, on the occasion of its 150th anniversary, this essay offers an alternative perspective on the IDI's contribution to the field, focusing on the implications of its claimed status of the "legal conscience of the civilized world" and exploring whether this status had somehow impacted international legal norms and principles. While further empirical investigation is required to establish a definitive correlation between the IDI's affiliations with the "civilized world" and a skewed focus of international law on Western legal traditions, a few examples can serve as a starting point. The illustrations from the IDI's engagement with the laws of war—specifically, the nineteenth-century regulation of occupation and the post-World War II determination of military targets—exemplify how the inherent elitism rooted in the notion of "civilization" can be discerned in pivotal advancements of international law.

### *The Elitism of the "Legal Conscience of the Civilized World"*

To receive an invitation to join the IDI could be a goal for many aspiring international lawyers. It signifies recognition from already "vetted" members who usually occupy the highest positions in international tribunals, organizations, universities, and law firms. Yet, only a few will receive such an invitation. The elitism of the IDI is entrenched in its restricted membership, which is limited to 132 members under the age of eighty and is acquired only via an invitation followed by a vote by incumbent members.[2] It is impossible to apply to become an IDI member, which exemplifies the idea of a club. One needs to have a certain level of recognition within the

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[1] *Statuts votés par la Conférence Juridique international de Gand, le 10 Sept. 1873*, Annuaire de l'Institut de Droit International, 1–2 (1877).

[2] Institut de Droit International, *Members*.

international law community. Thus, only by knowing its members (and being known by them), one may become part of the IDI.

The IDI's elitism is reflected in the history of members' elections, the majority of whom have similar origins and educational backgrounds. Although a recent welcome message by the secretary-general states that "[the IDI] has largely expanded to cover all regions of the world," the majority of the IDI's membership is still predominantly white and male.[3] While elected members are not officially representatives of their states, the geographical diversity of the IDI's membership seems to be an important element for studying and developing international law as it concerns (in most cases) all states. Presently, nationals of less than eighty states have been members of the IDI, leaving the views and approaches reflective of other parts of the global community outside the purview of this exclusive club.[4] Moreover, gender representation within the IDI has also been strikingly limited throughout its history. The IDI took seventy-five years to elect its first female member in 1948, and it took 102 years, until 1975, for the second woman to join.[5] Today, the female membership stands at around 20 percent.[6] While the stringent selection criteria based on the eminence and reputation of international legal scholars and practitioners may appear to be a reasonable standard for admission, the IDI risks overlooking important voices from outside its prestigious ranks. Yet, going against the ideology and traditions that were established some 150 years ago might have been a complex and long process.

When leading international lawyers and thinkers of the nineteenth century, Gustave Rolin-Jaequemyns, Gustave Moynier, Jean-Gaspard Bluntschli, and Pasquale S. Mancini, came up with the idea of establishing the IDI, their goal was to create an eminent organ, referred to as the "legal conscience of the civilized world," that would contribute to the codification of international law.[7] Among others, the idea of "civilized nations," dominant at the time, was used to promote elitist worldviews. The idea of civilization has often been associated with certain qualities such as progress, reason, and refinement, which were deemed superior to those of so-called "non-civilized" or "primitive" societies that supposedly had no capacity to govern themselves.[8] Similarly, elitist worldviews are often built on the premise that a select group of individuals possesses superior intellect, talent, or wealth that entitles them to occupy positions of power and authority. The concept of "civilization" from the perspective of colonialist Europe is therefore inherently entrenched in elitism.

Critical decisions related to international law, including its creation, negotiation, interpretation, and enforcement have always been made by elite actors.[9] Organized private professional groups, such as the IDI, also played crucial roles in "determining the letter, process, and outcome of the law."[10] Although the IDI was founded by a select group of male lawyers and publicists from Europe and North America who were considered the foremost authorities in their field, their intellectual abilities were not the sole criterion.[11] These individuals were chosen by Moynier and Rolin-Jaequemyns also for their social status and connections within the "civilized world."[12]

[3] Institut de Droit International, *Welcome Message from the Secretary-General*.

[4] Peter Macalister-Smith, *Institut de Droit International*, Max Planck Encyclopedia Int'l L. (2011).

[5] Fritz Münch, *Das Institut de Droit International*, 28 Arch. Völkerr. 76, 84 (1990).

[6] According to my calculations, there are currently twenty-seven female members of 132 positions.

[7] Gabriela A. Frei, Great Britain, International Law, and the Evolution of Maritime Strategic Thought, 1856–1914, at 93 (2020).

[8] Ntina Tzouvala, Capitalism As Civilisation: A History of International Law 44–87 (2020).

[9] Emilie M. Hafner-Burton, *Elite Decision-Making and International Law: Promises and Perils of the Behavioral Revolution*, 115 AJIL Unbound 242 (2021).

[10] *Id.*

[11] Carlos Calvo was from Buenos Aires, who nonetheless spent most of his professional life in France.

[12] On the composition politics of the IDI, see Vincent Genin, *L'institutionnalisation du droit international comme phénomène transnational (1869–1873): Les réseaux Européens de Gustave Rolin-Jaequemyns*, 18 J. Hist. Int'l L. 181, 186-189 (2016).

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The IDI used the term "civilization" as a way to characterize the qualities that international lawyers admired in their own societies.[13] This endorsed the social differences between the nations and painted the West as the standard-bearers of civilization and progress, and other societies as inferior and in need of Western guidance and influence, including in international law.[14] As Martti Koskenniemi put it: "[T]he members of the Institut de Droit International represented a self-confident, aristocratic liberalism that took for granted the moral superiority of its world-view."[15] Thus, the lack of diversity within the IDI ultimately resulted in a heavy focus on principles derived from the Western legal tradition, while neglecting the perspectives and experiences of non-Western legal systems.

For example, Sienho Yee argued that the IDI's work on the issues of territorial acquisitions and status of territory endorsed colonial practices for the occupation of territories without considering the interests of states outside Europe.[16] One of the IDI's "founding fathers," James Lorimer, consistently insisted that European countries should not recognize "barbarous" states, as only states with cultural and administrative similarities could participate in international law.[17]

The political and legal thought of that time was based on the idea of the superiority of European legal tradition that mostly justified violent European interventions and occupation. The Eurocentrism of international law was claimed to be "integral to all mankind."[18] Yet, its integration to all mankind did not mean that the law would be applicable to everyone equally. As international law developed into a formal discipline, it separated itself from moral principles, which were supposed to be universal but the law—not necessarily. This formalization resulted in privileging certain nations over others. The "uncivilized" societies were not granted the same rights and protections as the "civilized" ones, leading to a hierarchical and exclusionary understanding of international law.[19] The (at least early) work of the IDI ranked civilizations on a scale, considering them as different stages of individual and social progress, instead of evaluating the diversity of human societies worldwide using a universal standard.[20] As Sinja Graf argued, "[w]hen the lawyers of the Institut conceived of themselves as the "conscience of the civilized world," their legal internationalism went hand in hand with the project of empire as a project of political progress . . . ."[21]

These critiques hold broader, even intersectional significance. The obsession with "civilization" coupled with the lack of geographic, gender, and class representation had the potential to result in a narrow range of perspectives on particular issues related to international law, such as laws governing armed conflict.

### *The IDI's Influence on the Development of Laws of War*

As discussed, the ethos of most members of the IDI in the nineteenth and early twentieth century was that civilized states shared a "gemeinsames Rechtsbewusstsein," a common legal conscience that validated

[13] Martti Koskenniemi, The Gentle Civilizer of Nations: The Rise and Fall of Modern International Law, 1870–1960, at 103 (2001).

[14] *Id.*

[15] *Id.* at 181.

[16] Sienho Yee, *Territory in the Work of the Institut de Droit International*, 21 Chin. J. Int'l L. 219, 254 (2022).

[17] James Lorimer, *Institutes of the Law of Nations (Edinburgh, 1883–1884)*, referenced in Alexander Orakhelashvili, *The Idea of European International Law*, 17 Eur. J. Int'l L. 315, 319 (2006).

[18] Sinja Graf, The Humanity of Universal Crime: Inclusion, Inequality, and Intervention in International Political Thought 94 (2021).

[19] *Id.* at 95.

[20] *Id.* at 106.

[21] *Id.* at 106–07.

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international legal rules.[22] The IDI's Rechtsbewusstsein concerning the laws of war was based on the premise of unstoppable and unavoidable wars. As Rolin-Jaequemyns argued, as long as independent states exist, there will be wars, and thus, the goal of international lawyers was not to promote eternal peace but to establish rules that would govern wars.[23] In their exploration of the IDI's early codification efforts, Eyal Benvenisti and Doreen Lustig found through the content of the 1874 Brussels Declaration that the document was heavily influenced by the work of the IDI members, who had had a specific vision of peace linked to free trade and protecting the wealthy class (the Brussels project).[24]

After the Brussels Declaration, the IDI continued working on the issues covered in the document. The IDI developed its 1880 *Oxford Manual of the Laws of War on Land*, the preface of which states: "The Institut . . . has contented itself with stating clearly and codifying the accepted ideas of our age so far as this has appeared allowable and practicable . . . [offering a manual] in accord with both the progress of juridical science and the needs of civilized armies."[25] The "ideas of that age" revolved around the questions of occupiers' rights and obligations. In short, the goal was to safeguard private and public property from misuse and to resist any attempts, whether domestic or external, to alter the existing laws of the occupied territory.[26] Even though the *Oxford Manual* contained rules that were more favorable to the people living under occupation, essentially, the occupation regime was still a pact between elites of powerful governments and weaker states. This pact was to ensure political stability and safeguard the wealth of the propertied class and foreign investors' confidence that their assets were secure from the enemy and from any potential threats by the working class who might seize the opportunity of the weakened local authorities to cause unrest.[27]

The *Oxford Manual*, together with the IDI's Brussels project, served as a foundation for the Hague Regulations of 1899 (amended 1907), whose legacy is still traceable in the modern *jus in bello* regime.[28] The preamble of the 1899 Hague Convention mentions the "principles of international law, as they result from the usages established between civilized nations, from the laws of humanity, and the requirements of the public conscience." Again, the focus on "civilization" shows that international law mainly revolved around the actions of these "civilized" countries, excluding contributions from "non-civilized" states in shaping these principles. The presence of IDI members behind the scenes during the negotiations of the Hague Conferences, coupled with the alignment between the conference outcomes and the IDI's perspectives, suggests a link between the "legal conscience of the civilized world" and the political motivations of that same "civilized world."

Even as the laws of war kept changing over time, the main focus of the IDI's codification efforts remained centered on safeguarding the European political order and the interests of European colonial powers. This was partly achieved by "discouraging civilians—at home or in the colonies—from taking up arms."[29] Nearly a century after the *Oxford Manual*, the Edinburgh Conference took place in 1969, at which the IDI's Edinburgh Resolution on the distinction between military and non-military objects was adopted by eighty-one experts, of which only six

[22] Koskenniemi, *supra* note 13, at 194.

[23] Gustave Rolin-Jaequemyns, *De la manière d'apprécier, au point de vue du droit international, les faits de la dernière guerre*, IV Revue de Droit International 181 (1872).

[24] Eyal Benvenisti & Doreen Lustig, *Monopolizing War: Codifying the Laws of War to Reassert Governmental Authority, 1856–1874*, 31 Eur. J. Int'l L. 127, 130–31 (2020).

[25] Institute of International Law, The Laws of War on Land: Manual Published by the Institute of International Law (Oxford Manual) (1880) (adopted by the Institute of International Law at Oxford, Sept. 9, 1880).

[26] Benvenisti & Lustig, *supra* note 24, at 161.

[27] *Id.*

[28] Project of an International Declaration Concerning the Laws and Customs of War, Brussels, Aug. 27, 1874.

[29] Eyal Benvenisti, *The Birth and Life of the Definition of Military Objectives*, 71 Int'l & Comp. L. Q. 269, 271 (2022).

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were of non-Western origin.[30] The resolution aimed to establish rules for what constitutes a lawful military target, making it harder for participants in modern warfare to distinguish between military and civilian objects. This favorably impacted those who could afford advanced and precise weapons.[31] Consequently, irregular combatants or national armies of weaker states using less sophisticated weapons that could not distinguish between targets would be considered lawbreakers under international law.[32] The 1969 resolution was subsequently broadly accepted by the UN General Assembly's Resolution on the Basic Principles for the Protection of Civilian Populations in Armed Conflicts.[33]

Throughout the IDI's resolutions concerning the laws of war, a discernible thread characterized by an anti-pacifist disposition and a favorable inclination toward the most influential actors becomes evident.[34] The resolutions advocate the notion that the "collective conscience of the civilized world" holds the authority to determine the framework for permissible combat. This recurring dynamic underscores the persistence of elitism within the IDI's endeavors, shaping the discourse on war and its regulation according to the perspectives of an entrenched and historically defined realm of "civilization."

### *Rethinking the "Elitist Club" Structure*

Despite the significant role that the IDI played in the development of the early laws of war, its influence has dwindled in recent years. The reference by the domestic and international tribunals to the IDI's work has been minimal, if not entirely absent. There could be multiple reasons for this, including the IDI's inability to keep up with the changing needs and dynamics of the international legal system. Perhaps, also the lack of cultural and geographical diversity among its members contributed to this inability.[35] By operating as a closed club, there is not much room for diversity and innovation. This perception of the closed elitist society could have damaged the organization's relevance in some respects and hindered its ability to achieve its ultimate goal of promoting the development of international law. It is, therefore, important for the IDI to acknowledge and address these criticisms in order to ensure that it remains a relevant organization that contributes meaningfully to the evolution of international law.

In the last few years, the IDI has partially and gradually (albeit too slowly and perhaps even too late) opened up for new members from marginalized groups, in particular female lawyers and lawyers from the Global South. But it has to do more in that regard. By embracing a more diverse range of voices and perspectives from unrepresented geographical, gender, and class groups, the IDI can aspire to reflect the evolving dynamics of international law. In doing so, the IDI would not only rectify historical biases but also tap into a wealth of expertise and experiences that have often been marginalized or overlooked. By electing members from these groups, the IDI could also enhance its credibility and ensure a fairer representation of the global legal community.

While electing diverse members is a crucial step toward fostering inclusivity, the IDI could reconsider its broader membership system. Perhaps the revision of the IDI institutional framework is the way to break free from this idea of the "elitist club" and "conscience of the civilized world" which would ensure that the IDI remains a preeminent forum for scholarly research and debate, fostering a robust exchange of ideas that resonates with both academia and the practical realities of international law.

[30] *The Distinction Between Military Objectives and Non-military Objectives, Resolution Adopted by the Institute of International Law, Edinburgh*, Sept. 9, 1969, 2 Annuaire L'institut de Droit International 375 (1969); Benvenisti, *supra* note 29, at 279.

[31] Benvenisti, *supra* note 29, at 272.

[32] *Id.*

[33] GA Res. 2675, Basic Principles for the Protection of Civilian Populations in Armed Conflicts (Dec. 9, 1970).

[34] Sir Gerald Fitzmaurice, *The Contribution of the Institute of International Law to the Development of International Law (Volume 138)*, *in* Collected Courses of the Hague Academy of International Law, 225 (1973).

[35] Macalister-Smith, *supra* note 4, para. 29.

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