International Lawyer: Towards Conceptualization of the Changing World and Practice

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A. Introduction

This journal alone provides a strong indication that there is a growing need to find avenues of conceptualization and dialogue between all legal professionals to tackle the complex problems brought on by the high tide of rapid globalization.[1] This article introduces situationality analysis as a theoretical framework adept to deal with complex and varied problems in a meaningful way. Situationality analysis does not proceed from hypotheses or blueprints of juridical methodologies, but motivates the lawyer to examine her profession from her individual and unique standpoint in a systematic way. Situationality analysis entails the tracing of the contextual co-ordinates of the lawyer's work as it is in practice and relating them back to the structure of constraints provided by the law in all its different facets, from managerial and technical, to epistemological. By so doing, a truly realistic account of the everyday advisory and consultative functions of the lawyer can be brought under examination. As commentators have recently suggested there may be good reason to re-examine the profession from the lawyer's perspective and thus a 'turn to the person of the lawyer' may be at hand.[2]

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1 See, e.g., the proclamations of rapid globalization by the G-8 Foreign Ministers' Meeting, Conclusions, Miyazaki, 13 July 2000.

2 See, A. Paulus, 'International Law After Postmodernism, Proceedings, Workshop on New Scholarship in Public and Private International Law' (The Hague, 22–23 July, 2000), *Hague Yearbook Int'l L* (forthcoming); see also, Peter Murray and Jens Drolshammer, 'The Education and Training of the New International Lawyer' above, p. 505.

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B. The International Commercial Lawyer

The international commercial lawyer's occupation and identity comprise a fascinating multiplex. The importance of the international commercial lawyer's work to the globalization process of our times cannot be underestimated in the cutting edge fields of mergers and acquisitions, capital markets, tax planning, IT, international litigation and arbitration. On the other hand, the global environment, the commercial world, the structures of changing international legal frameworks, the linguistic and other idioms influence the lawyer in her work. The World Trade Organization (WTO) and the debates surrounding it have, for example, spurred a whole range of subject fields known not as sub-fields of trade law, but as so-called 'trade and' fields, not to mention the focus on the freedom of services of lawyers that will have extensive effects on all fields of global commercial activity. The designation of 'trade and' rather highlights that questions of trade and trade rationales are not sufficient too deal with all issues influencing the WTO-universe. Good examples are for instance such public goods as employment and environment. We simply cannot do with mere trade law based on trade rationales and take the ensuing environmental and employment consequences as givens. Instead, it is quite evident that we have to consider the priority orders of environmental protection and the maintenance of socially (not only economically) optimal employment rates. Thus jurists speak of trade *and* environment and trade *and* labour issues. These dual fields are reflected in institutional structures and their bodies, which have to labour under the pressure of these sometimes highly incompatible sets of values, priorities and incentive structures.

Although many an international environmental lawyer may suggest that the incompatibility between the trade and the environmental regimes is only a question of time-perspective; i.e., given a long time span trade can only benefit from, for example, the improvement of the quality and quantity of the environmental resources, yet a 50 or even a ten year perspective does not easily fit into the dynamics of modern trade calculations and may seem quite paradoxical to those making their decisions based on such data. The international lawyer, however, has to negotiate the norms and demands of these incompatible rationales and perspectives while catering for her clients and, more widely, anticipating the normative architectures that will continue to stand in the cross-tides of these competing regimes. A good example is, for example, the work of an in-house lawyer in a fast-growing Internet or satellite communications provider company: one does not yet know what the technical possibilities and decisions will be, yet one has to anticipate how regulators will react to their effects; for example the uncontrolled flow of entertainment industry products across satellite coverage spans and the resulting public policy or, on the other hand, intellectual property protection or financial management issues.

In short, a complex interaction and reciprocal influencing between different fields in international law and global life has emerged in a way that is difficult to master or analyse. Therefore, new modes of analysis are needed to make sense of the recent

development and equally to assess their benefits, risks, and generally the state of the practice today. The new modes thus have to be susceptible to the multiplicity, extreme dynamism, and complex nature of the lawyer's situation in the world as it is today – according to some, a chaotic system consisting of global fluxes of different sorts and new emergent technologies of government. Situationality analysis is susceptible to such circumstances, which it treats as the situational co-ordinates of the lawyer's work. I have produced a detailed account of situationality and international law in general elsewhere and its elaboration is the subject of on-going work.[3]

C. The Importance of the Lawyer's Craft and the Incidence of Unpredictability

Situationality analysis suggests that through inquiring into the hypotheses and counter-hypotheses of the most important situational elements their future influence can better be accounted for. Thus, situationality analysis rejects the view that in new and unforeseen situations, the lawyer's craft has little to offer. Take, for instance, the planned BA-KLM merger in which the aviation interests and access questions of both the US and the UK are intervening on the proposed merger agreement in the most problematic ways. The government as well as the company lawyers on both sides of the Atlantic have a tremendous task of negotiating the US-UK 'open skies' policies, i.e., their respective air travel market access, as aspects of a complex European company merger.[4] It is not that lawyers are at a loss in these types of complex public/private interest involving international situations. On the contrary, the point is to examine how this uncharted legal work in new contexts is done when it is done best.

Therefore, situationality analysis aims at a description of the practice as it already exists at its best rather than at an artificial formula to be applied on it. The starting point is that existing modes of work can be analysed, further developed, and generalized into guidelines, which will increase our understanding of what happens in these complex legal transactions and how they influence our common working environment in the future. In this sense, it aims to profit from the *avant-garde* nature and innovation which is constantly occurring in the international commercial lawyer's work, and to bring together this practice and a theoretical way of making sense of it.

In stylistic terms, the situationality analysis is akin to, for example, non-linear systems analysis in science: although in both cases final determinations are not the

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[3] Outi Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance towards Culture, History and Community* (Kluwer, The Hague, 2000).

[4] See, e.g., Kevin Done, 'US Threat to BA-KLM Merger, White House Official Demands Open Skies Deal with Britain as Price of Acceptance' (2000) *Financial Times*, Thursday 20 July.

objective, the analyses expose the nature of certain dynamic processes in a way that provides guidelines for those attempting to manage and negotiate them.

Therefore, situationality analysis addresses legal structures rather than rules and doctrines, for it takes the function of law as the backbone of complex architectures, which entails sophisticated argumentation modes, rhetorical conventions, epistemic, linguistic and behavioural idioms, in addition to the rules, doctrines, codes, and court decisions. These have certain co-ordinates and modes of operation which recur across cultural, historical and communal variations. The working of this structure resembles a non-linear system rather than a determinate structural whole. In other words, the openings and closures of the legal *Gestell* have to be taken into account in a way that increases the possibilities of producing sound, distinctly legal, and resilient outcomes for changing situations.[5]

D. The Analysis of the Situational Co-ordinates Today

The idea of situationality is an expanding one at its theoretically largest: it points to all the biological, anthropological, social, cultural, historical, traditional, political, economical, etc conditions that influence an actor-subject and, thus, yield its ever-changing limits and potentials.[6] One can think of it as a Gadamerian *dialogical situationality* where the subject and its *other*[7] question themselves, each other, the world, and their relationships, indefinitely. The situationality concept has been analysed in structural terms by Karl Jaspers who has divided its contents into three parts:

(1) the factual realities of economic, sociological, and political world;
(2) the epistemic possibilities; and
(3) the personal development of the human agent through a variety of personal and ideological affiliations.

These make out the structural co-ordinates of a particular individual's situation in Jaspers' hermeneutical theory.[8] A situationality analysis proceeds from the fact that

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[5] See, e.g., Jens Drolshammer, 'The Future Legal Structure of International Law Firms – Is the Experience of the Big Five in Structuring, Auditing and Consulting Agencies Relevant?' below, p. 713; Jens Drolshammer, Bausteine einer Internationalisierung der Rechtsausbildung – Eine Agenda fur eine Interdisziplinär ausgerichtetete Ausbildung und Forschung zum internationalen Wirtschaftsjuristen, Beiheft (2000) *Zeitschrift für Schweiz. Recht*.

[6] A more defined account on situationality in theoretical terms is provided in another article: see, Outi Korhonen, New International Law: Silence, Defence or Deliverance? (1996) 7:1 *Eur J Int'l L*, pp. 4–9.

[7] The use of the terms *subject* and *other* should be taken here to connote only a primary' bargaining position', i.e,. be understood as minimalistically as possible; by this I mean that it can and should always be bargained who is who and whether either is needed or justified. Immense theoretical controversy surrounds these terms.

[8] Karl Jaspers, 'Die geistige Situation der Zeit' 24, 26 (5th ed. 1979, orig. 1932).

the lawyer's role, actions, decisions, functions – her work – cannot be determined in a shorthand way as in conventional theories. The most significant aspect of the international commercial lawyer's work, as it seems, is to manage to come up with something distinctly 'legal' and constraining in a situation where the available law is:

(1) under-determining;
(2) the legal systems and governance technologies implied are many;
(3) the end results of particular commercial developments are yet unclear;
(4) the economic conditions can only be anticipated in terms of multivariable forecasts; or
(5) all of these at once. In such a situation, the lawyer's work is utterly different from that of a judge or of simple law-finding, and any analysis aiming to contribute to it has to proceed from this difference.

Taken one at the time the above conditions entail the following:

(1) The law is underdetermining at the cutting edge of new globalized phenomena. There is simply no way to have a global normative coverage of fast-developing (commercial) phenomena such as, e.g., e-commerce, new media, advanced intellectual protection (e.g., the exploitation of gene technology or biodiversity) or off-shore financial or other multinational enterprises, to name but a few. There is no law in the books, nor legal principles, that would avail themselves easily to the regulation and design of complex regulatory frameworks, contracts and business architectures in such fields. The absence of rules does not entail, however, the absence of law. Nor does it make law undesirable in such circumstance. Quite the contrary.

    In a legally underdetermined situation there is even more need to safeguard interests, foster reliance and cement agreement in advance in respect to future eventualities and in the face of, e.g., increasingly varied (business and governance) cultures whose co-operation is necessary in the realization of a particular transnational or even global project. Otherwise such activity inevitably loses its (economic and/or social) sense. Whether one prefers to see the economic globalization and demanded business strategies from the Porterian cluster-perspective or looks at the structural conditions of competition the law as a stabilising systemic component provides the backbone of the strategies and designs.[9]

    It follows logically from the above that even though the law may be underdetermining:

(2) there may simultaneously be many legal systems and various governance technologies which are more or less directly implied and somehow involved in

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[9] For the 'classic' elaborations of these, see, Michael Porter, *The Competitive Advantage of Nations* (London, 1990); OECD, *Technology and the Economy. The Key Relationship* (Paris, 1992); and, OECD, *Towards a New Global Age: Challenges and Opportunities – Policy Report* (Paris, 1997).

the planning of the strategies and designs. In fact, rather than an absence or even a shortage of law, one may face a jungle of law and legal systems to orient oneself within. This is equally an inevitable consequence of the transnational and global framework of influences that most international activities have to account for even, if they did not directly set out to exploit or operate within them. They all have their cultural, historical and communal backgrounds and answer to different epistemic communities. Similarly, the governance technologies have to be considered. Following Rose and Miller, one has to ascertain the following: how and to what extent the state is articulated into the governance of the activity; what relations exist between political and other governing authorities; what funds, forces, persons, knowledge or legitimacy are involved; and by means of what devices and techniques are these made operable and relevant to the desired activity?[10] Again, any activity related to the new financial markets, e-commerce, media, biotechnology, IT, cyberspace, etc, would have to at least monitor and prepare for forecasts, taking these situational co-ordinates into account. The wide coverage of potential effects of the Y2K phenomenon, as moderate as it turned out to be, is a good example of the eventualities that the global environment entails for every actor in it. The jurists, whether advisers or regulators, need to develop enough of an orientation sense to be able to find a workable path through the different, potentially conflicting normative systems and frameworks, which are often only in the planning phase when the legal advice is already due and the commercial prospects at their most lucrative.

While all legal systems and regulatory frameworks cannot be mastered by any single lawyer or even a single firm, one can approach them through situational co-ordination which reveals certain recurring patterns of systemic organization and structures on a more general level.

Relatedly:

(3) The end results of particular commercial developments are often quite unclear at the stage where legal advice and design has to play its most significant role. A recent example includes the bidding for the mobile phone frequencies in the UK. The bidders basically registered for the process which then took a course of its own – prices, different socio-economic risks and criticism, both on the inside and outside of the companies involved, rose far above what was expected. It is important to be able to quickly appreciate the new situation and this is possible through a thorough sense of the table of co-ordinates with which one is working legally and commercially.

Further, given all the above characterizations, it is quite clear that:

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[10] I have applied Rose and Miller's analysis of new technologies of government to the perspective of the commercial actors. See, N Rose and P Miller, 'Political Power Beyond the State: Problematics of Government' (1992) 43 *Brit J Sociology,* pp. 173–205, 177.

(4) The economic conditions can only be anticipated in terms of multivariable forecasts. The multivariables attempt to include on the basis of relevance, significance and required simplicity those variables in the global scene that are likely to influence the given activity. However, what one wins on the side of simplicity and clarity of guidelines is always bought at the expense of excluding yet further multiple variables that may, in the final analysis, prove to be of the highest relevance. For example, in certain circumstances, giving relatively little weight to public opinion in comparison to governmental will, has proven fatal. The example of the failed Millennium Round and the MAI demonstrate the momentum of such unexpected variables. Again, the new situation has to be appreciated and analysed quickly without getting stuck on endless retrospective analyses of political and social change.

E. The Charting of Complex Co-ordination Tables and Variables

The architecture of a complex international contract, the advice relating to possible litigation, the choice of fora, the choice of situs, the long-term resilience of agreements and designs, are questions in which the lawyer has to exercise legal judgment, but also judgment of the present, past, and future conditions in the world taking into account a multitude of situational factors herself being one among them. She must, to a certain extent, be able to anticipate shifts in traditional conventions, business practices, politics, the hybrid space of government, the policies of various international actors, influential financial transactions, and to be able to appreciate in which ways the new 'realities' can and will be constructed, although she cannot in any way stand outside the situation or look upon it from an ivory tower. A sound assessment of such a complex web of influences proceeds simply through the charting of the following questions:

(1) The lawyer charts where she stands:
- in terms of the client;
- in terms of the law, the regulatory frameworks, and the governance structures;
- in terms of situational elements: i.e., her own, the client's, and the law's embeddedness in economic, political, social, general cultures etc.

(2) The lawyer charts the inter-relatedness of the above elements:
- i.e., how do the different elements of the situation influence her own and the client's view of the law, and how does the law influence the understanding of the different elements?

(3) Upon completing her task (e.g., contract drafting or advice), the lawyer has to chart its reliance on the above elements and check:
- whether it is sound given her own, the client's and the possible adversaries' situational elements;

- whether it will work even given some of the situational indeterminancies (all situational information can never be obtained).

A systematic elaboration of these co-ordinates produces better and more workable results in the short and the long run, even in the face of unexpected eventualities.

The points of interest for a closer situational inquiry into various practical tasks of the international commercial lawyer include the following:

- what are the most conspicuous frames of the commercial lawyer's work?
  - i.e., the legal context, the firm context, the global economic context, or epistemic, linguistic and other idiom-related contexts;
  - what are the conditions produced by them?
- what are the secondary situational frames and their impact?
- i.e., is it justified for instance not to include ethical inquiry or public interests in the primary frames?

By frames I mean those clusters of situational elements that any lawyer's occupation as a lawyer (in a certain firm, in a particular country, within a certain Bar, with particular linguistic, economic, etc conditions) entails. Situational analysis focuses on the potentials and limitations as they appear within these frames and how they bear on particular tasks and functions in the international commercial lawyer's work. It is suggested that certain limitations and potentials remain unused or are only randomly benefited from because of other situational blinders and unchecked presuppositions. These problems can be remedied with a practice informed of its own situationality, an analysis describing such practice and charting its legally innovative modes. The starting questions into the potential benefits and risks include in the case of the primary frames:

- what benefits/risks the existence of a comprehensive legal framework (e.g., the WTO) entails; and what is the desired degree of coverage for a particular frame?
- what benefits/risks the collective nature of the firm context entails?
- what benefits/risks an ever-more mono-lingual (English) international legal practice entails; to what degree such mono-lingualism exists and what degree should it attain?
- what are the other idioms at work (e.g., Bar rules of conduct, Westernism, patriarchy etc) and what are their beneficial/constraining functions?

When analysing these questions, the limitations of the benefits and risks needs to be noted. As a result of these inquiries, the production of a more informed opinion becomes more well-based, such as, on the issue of which language a particular contract should be drafted and what will be its future pros and cons. For even if some of the frame-forming elements cannot immediately be seen as directly affecting the legal task at hand, at a point when there has been a change in public opinion, the majorities have shifted, or new economic developments occur, the frames change and the legal artefact produced within them is simultaneously affected.

Such frame shifts in the WTO-context, for instance, include the failing of the MAI and the rise of the 'trade and' fields, especially the WTO-litigation on the trade and environmental disputes as already discussed above. Similarly, the rise of the e-business and e-commerce has shifted the frames of international trade, sales, contract, financing, etc, in an unprecedented and speedy way. More generally, the complementarity (problems) of regulatory frameworks on a transnational and increasingly global scale will continue to produce the shifting effects of 'neutralization' (i.e., one institution diluting the effects of another), 'catalysis' (i.e., an institution or instrument initiating a reaction between two others), 'inhibition' (e.g., a particular law of libel deterring criticism of an actor and thus inhibiting the influence of adverse public opinion), 'redundancy' (i.e., an institution duplicating the activities of another), 'synergy' (i.e., an instrument or an institution enhancing the effects of another), and 'complementarity' (i.e., an institution filling the gaps left by the absence or inactivity of another).[11] The more global the frame, the more of these shifts there are to be anticipated.

F. General Hallmarks

International legal work occurs in a situation that is both limited in various ways and also endowed with a wealth of potential approaches to problems. Roland Barthes declared the emergence of an intellectual *pax culturalis,* within which everything and anything can be subsumed under the notion of cultural constructs.[12] There nothing seems uncontrollable or unmakeable by the human subject and nature has lost its controlling function. On the other hand, globalization, and the shake it has given to positivistic ideas of science and also of law, demands a firmer, stronger, unchangeable grounding – we are on the look-out for necessities and 'realities'.

Clearly, the rudimentary economic needs, common interests, communication, and community building are the *conditio sine qua non* of international life, simultaneously they entail a set of constraints of a general kind. Through the very creation of the community and the emerging definition of its common language, interests, and communication, a set of systemic *rules of the game* emerge. Those who do not share the interests, the language(s), or the benefit from the communication structure, are closed outside of the reach of the potentials offered by it. Yet even though the

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[11] Rose and Miller, supra.

[12] Expression borrowed from Roland Barthes' essay in the Times Literary Supplement in 1971. Roland Barthes, 'Pax Culturalis' reproduced in *The Rustle of Language* (1989) p. 100; criticising contemporary culture for hiding social conflict behind a unified mass culture, ignoring intercultural dispersion, and the ensuing banalization of the intellectual effort. Barthes' contention summarises many trends in the so-called *Kulturkritik* of the 20th century and beyond the famous representatives of which include such names as Georg Simmel, Willem Dilthey, TS Eliot, Otto Spengler, Edmund Husserl, Jose Ortega y Gasset and others.

exclusionary character of any international system is always a fact, at the same time such a system is never purely homogenous, completely autonomous, invincibly hegemonic, nor naturally stable, although it may at times seem so when maintained through indoctrination, economic might or other such device. The dynamic shifts of the global system can been taken as testifying to its tolerance and flexibility as much as to its 'chaotic' nature. It is more a question of harnessing the benefits and enabling the potentials.

The stabilization through any alleged necessities is thus extremely problematic today. The gurus of economics, politics or finance have been proven wrong time and time again. No-one predicted the economic crises of the Asian tigers, no-one saw the coming down of the Berlin wall, no-one has a determinate explanation of the (US) economic boom that does not come to a stop.[13]

People, however, tend to shift from the assumption of natural necessities to automatically ensuing cultural, economic and political differences, including those between legal systems and governance technologies. Such shifts are frequently alleged without adequate justification. One may ask, for instance, what are the characteristics of the Asian tigers that led to the boom/the recession? Their 'oriental' culture? What is it in the American economy that keeps driving the growth? 'American consumerism'? The mysticism involved in these appreciations defies solid sense. It is not easy to pinpoint what precisely are those necessities and their characteristic qualities that make them more so than other alternative explanations, constructs and architectures. There is no 100 per cent proof nor prediction of future eventualities even in science. The lawyer's situation implies the awareness of this problem and the ability to manage the uncertainty effectively and legitimately.[14]

The lawyer also knows that international legal problems do not arise unproblematically or automatically from trans-boundary movements, economics or any such external factors. Indeed complicated and cross-national forms of agency are present in the constitution and framing of all these issues. Situationality analysis reveals that the optimistic lawyer often forgets that an international legal situation, out of which a world is looked upon by any particular lawyer engaged with a particular design, is always a singular perspective that needs to be developed in order to properly appreciate the cross-work of globalization. While the pessimist sees this singularity too eagerly as a prison cell. Co-ordination of multiple variables requires only the 'demystification' of the international commercial lawyer's 'intuition' in managing them in the everyday international practice.

To achieve such co-ordination of the present and the future in the most general terms, one must also problematise a simplistic attitude towards the past; one must give up a naive realism, according to which there is one past reality that can be reproduced and represented like a photograph in the present time and to which all

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[13] For an overview, see, e.g., OECD, *The Future of Global Economy: Towards a Long Boom*? (1999)

[14] See, e.g., Drolshammer, *Recht und Management*.

negotiation partners have to agree to – by necessity. No-one is a photographer of history. There is, however, no way to understand and agree in the present without having some kind of narrative for how the present conditions and circumstances have come about. Without arriving at some settlement about the facts it is impossible to arrive at a normative settlement because the norms only operate on settled fact patterns. To discredit the legal outcome of one's opponents, one first discredits the fact pattern, and indeed, several different versions of the impact and meaning of the very same facts, key events and legal texts at issue. The settlements concerning historical facts are but 'conventions' about (past) reality. They are attempts to stabilize a particular set of disputed perceptions, narratives, constructions, ideas, interpretations, and viewpoints. In this sense, knowledge of past facts appears to be construed very similarly to legal outcomes, although the latter sometimes refers to the former as if it mastered a photographic freeze. Yet neither of them is but a stabilization of co-ordinates. According to situationality co-ordinates, one should be aware of the way in which this effect emerges in legal discourse and global communications, to be able to negotiate the past alongside the present and the future.

There is ambivalence among international lawyers concerning how to operationalize such an accumulative process of finding situational co-ordinates to best serve international legal thought and practical outcomes. International legal work is seen sometimes as:

(1) the fixing of certain points in the continuum of time as hooks for law (*freeze* positions); and at other times as
(2) the creativity, interpretative effort, and ability to change stances that is needed to make sense of and to manage the dialectics, disruptions, and shifts in the socio-economic paradigms.

If the latter position is accepted, in addition to understanding law as caught in some sort of a dialectic between stability and change, the situationality analysis adds that the lawyer's, her customer's, and the views of the wider reference community are also in a continuous flux. What is required is thus less deference to settled 'realities' and more continuous analysis of the situational co-ordinates of her work on the part of the 'new international lawyer'.

None of these generalized observations is surprising. They should not be, for the point of tracking the general or even the particularized situational co-ordinates is not to invent new situational influences, nor to advocate additional complications to the lawyer's work. The point is to show what *is* there in the international lawyer's everyday problems and how such problems can be analysed to uncover more potentials and to reduce blind-spots to enable us to co-ordinate and design even better architectures.