

The Global Groove of Harvard Yard –  
Personal aspects of the person in the “Globalization and Anglo-  
Americanization of law and the legal professions”

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**Keywords:** Globalised legal world; Americanization of law and the legal professions; law in relation to the legal professions; the New International Lawyers as professional key players; a personalistic approach to the conceptualization of the New International Lawyer; the seductive power and “soft power” of the knowledge base of American academic culture on the development of the New International Lawyer.

**Prologue and overture**

Having been *exiled into contextual study*, and having spent some time as an *émigré in the United States*, I will in ten days’ time also become a *titular professor emeritus of this university* who has spent over 30 years “moonlighting” at the University of St. Gallen as a kind of fellow traveler, as though in a sidecar or a trailer. The university regulations provide that I have no right to give a valedictory lecture. So I am speaking to you now, in a manner akin to the soliloquies in the “Loneliness of the Long-distance Runner”, only because I have obtained administrative approval to do so. This is also my first lecture for ten years. So I am not exactly what you might call a good “university lecturer”.

I am speaking here of a thematic beginning, not an end.  
I am in fact conducting an experiment with you.

The best is yet to come.

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## **Part 1: Staging the process of exploration in the “reflection space” using the artistic form of a “play”**

### **I. An American project – an American beast – An elephant too big to chew. A play that represents an attempt at a personalistic conceptualization of the New International Lawyers and their networks as legal players in the globalised legal world – from the perspective of the Anglo-Americanization of law and the legal professions – the representation and the style of the exploration themselves forming the theme**

#### *1. Prologue to the play*

We move straight into a “*free narrative*” – a journey over nearby Lake Constance – where I throw a kaleidoscopic glance into the “Brave New World” of the globalised legal world! I have prepared three items to assist you: a detailed contents list of the lecture, a poster design by TOMI UNGERER, and a flyer for my essay collection. Right from the very first word we stand at the epicenter of things, for we are opening up our theme “from the inside towards the outside”. The mode of presentation for the exploration of our approaches to the theme takes on the artistic forms of a “play”, an “exhibition” and “speech sentences”, and over the whole one can hear the sound of a “groove” - in this case the “music” of the Global Groove of Harvard Yard. Indeed this does justice to the theme of globalization, for art often manages to say more and different things with fewer resources, and will generally engage in and complete advances towards globalization decades before economics, politics and the associated academic subjects.

So let me first of all place the “reflection space” of the New International Lawyers and their networks within the frame of reference of a “play”, and then transform this in abbreviated form as a display into an “exhibition space” illustrated with posters. I am acting here as the dramatist or playwright of this “play”, and I will lead you, as a kind of curator, to the “finissage”, through an “exhibition” curated by me. Just take a look at the walls of this senate room. The painter and sculptor Martin Disler used his bare hands to create diagrams and figures on the stark exposed concrete in the course of one night. Perhaps it can happen that in jurisprudence – as in literature – interesting juristic texts are interesting not just because of their “subject matter”. The style of writing of a juristic text may be equally important [*\*enteidend – entscheidend?*]. There may be juristic texts where themes only really become interesting through the way in which they are put into words – or the way in which words are put into the themes.<sup>1</sup>

Now, my Norwegian grandfather was the inventor of the so called “Drolshammer brake” – *an invention* -, and my father who was an engineer and held a doctorate from the Swiss Federal Institute of Technology [ETH], designed and built machines –

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<sup>1</sup> Cf. on this point the closing part of MARTIN ZINGG’s review of Jörg Laederach’s “Despeschen nach Mailand” in NZZ 15 July 2009, no. 161, p. 39

*constructions*. I, as a jurist, am probably unable actually to invent anything. At best I might discover something, possibly develop and reconfigure something else. One thing, however, to which a jurist does also have access, is *imagination*. So I am guided here by a principle formulated by the violinist ALBERT EINSTEIN:

“I am enough of an artist to draw freely upon my imagination. Imagination is more important than knowledge. Knowledge is limited. Imagination encircles the world.”<sup>2</sup>

I am taking you on a tour through a “reflection space” from a variety of perspectives, in which access to the complex globalised legal world will be effected on the basis of a new kind of personalistic concept of the understanding of law and the legal professions – as we will see, of law on the basis of legal professions and their networks. *The imagined starting point is a personalized conceptualization, proposed for the first time in the book, of these legal players*. The end point in view is an as yet to be completed operationalization of this conceptualization on the basis of a *situational and activity-based analysis* of the principal professional roles of legal professionals as key players in the globalised legal world.

The law and the legal professions have fundamentally changed in the globalised legal world. This globalised legal world has also been significantly influenced by American law, by American legal culture, and by American academic culture. I want to show you that the studies of the future operationalizations of this conceptualization of the New International Lawyers and their networks constitute an approach that does justice to globalization; and above all – and this is a key point – I want to show you that in a truly global competitive academic environment the inclusion (both at the outset and in the execution) of certain American knowledge bases is both desirable and essential. The all-important reference to “America” relates to an extract from the basic theme of the Americanization of the globalised legal world, and is limited to this extract.

Just to clarify: I am deliberately not speaking of European legal and academic culture in the sphere of the theme we are dealing with here, i.e. the theme of the internationalization of the key roles of International Lawyers. I am not drawing any comparisons here, and I am certainly not making any value judgments. The gulf that separates the legal cultures on the two sides of the Atlantic in this sphere is both wide and profound.

You may wish to note before we go any further that the subtitle of this valedictory lecture refers to “Personal aspects of the person”.

The spheres of the “personal” and the “person” are connected and interwoven in a number of ways with my approach to and my method of dealing with the globalised legal world and the United States. The centrality of the person as professional, and of the legal and academic culture of the United States, is evident.

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<sup>2</sup> The Impossible Takes Longer: The 1000 Wisest Things Ever Said by Nobel Prize Laureates, compiled by David Pratt, New York 2007, p. 82

I am what is referred to in “neo-German” as a “secondo”. My father had a mixed parentage of a Norwegian Viking and a woman from racially pure German cavalryman stock – as we should now call it. And my mother was a pure Swiss Indian. In my life I have had a uniquely close connection with the United States: through an exchange year with the American Field Service, graduate studies at Michigan and Harvard Law Schools, working as a partner at Baker McKenzie, an international US law firm, international work as a lawyer as a founding partner with Homburger Rechtsanwälte, activities as a military officer in the strategic division within the Chief of Staff for Strategic and Operational Training, within the General Chief of Staff and in the International Institute for Strategic Studies, teaching and designing courses of study in the sphere of American legal culture, and for the last 10 years through my work as Visiting Research Professor at the European Law Research Center of the Harvard Law School, and now – in what in football terms is the “extra time” of the game of one’s professional life – on a committee of experts and as an adviser to the Swiss Federal Council, after the long arm and the baseball bat of American law delivered a powerful and effective blow to Switzerland and to UBS. Time to don our helmets!

As an emissary from what may be termed “practice”, I have myself also undertaken all of the professional and academic activities that form our subject here. “Turning theory into action” has to a certain extent been my self-imposed mission. It was both what I did professionally as an attorney-at-law and also, essentially, what I as a university lecturer have taught as my academic subject, and devised courses of study for, and have thought and written about.

In the professional and the academic spheres, as a result of the “Personal aspects of the person” connection, I have paradoxically always – and for the most part simultaneously – acted as subject and object in the role of professional as a pivotal element for specific access to the globalised legal world. Behind this lies a strange real and personal combination and interweaving of “subject and object” in the subject I have chosen.

So there are a number of ways of looking at “personal aspects of the person”. In this valedictory lecture, I intend this neither as an exercise in hagiography nor in any “necrological” sense.

2. *The basis of the play: The book “A Timely Turn to the Lawyer? – Globalization and the Americanization of law and the legal professions – Essays”*

The basis of what I have to say – the script, as it were – is the collection of essays<sup>3</sup> that appeared in December 2008, in particular the lengthy theoretical closing text “The Path to a Turn to the Lawyer(s) – American concepts and ideas for a blueprint to ‘take it global’”. These 20 essays stem from the period between 1998 and 2008, and were mainly written not in the often remote and detached realms of Switzerland but in my annual periods of research as Visiting Research Professor at the European Law Research Centre of Harvard Law School. The essays largely deal with my own observations and experiences in the context of my professional activities – client instructions as an attorney, “academic” teaching events and the planning of international study programs. In terms of the Anglo-Saxon method, they were written on a “bottom up” and “facts and issues driven” basis. They are texts that in terms of the traditional understanding of law and academic study (and this too forms part of the “stage setting” of this representation) would not be regarded as scholarly or academic, at least not in Switzerland. But neither were the texts conceived and written in the context of any funded research program, nor at a university chair with the help of assistants and administrative staff, nor yet in the context of a university subject that forms part of the canon of a traditional syllabus. Much like many elements of the now defunct Swiss militia system they came about “as a sideline” and “unofficially” and “at my own expense” in my “agency for migrant legal work”.

The “mindset” of the so called “prevailing” legal doctrine and of the *in situ* practice of law associated therewith is beset with systemic, institutional and conceptual limitations and restrictions of which we are often unaware. It is certainly noteworthy that my late school friend Professor Alfred Kölz, in his posthumously published *Observations*, points out that at universities the fundamental academic debates in law are being primarily conducted between the holders of university chairs.<sup>4</sup>

So what we have here is something that I have done for myself and thought out on my own. If I had not had the creative time as Visiting Research Professor at the European Law Research Centre of the Harvard Law School over the past ten years, the texts and the book would never have come about, and the idea being presented here, of the conceptualization of the New International Lawyer, would never have been developed.

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<sup>3</sup>JENS DROLSHAMMER, *A Timely Turn to the Lawyer? Globalisierung und die Anglo-Amerikanisierung von Recht und Rechtsberufen*, Zurich/St. Gallen/Baden-Baden 2008, 1154 p.

<sup>4</sup> ALFRED KÖLZ (1944-2003), *Beobachtungen*, edited by Monika Kölz, Zurich/St. Gallen 2008 p. 18

3. *The main title of the play: The Global Groove of Harvard Yard – a metaphor*

The main title “*The Global Groove of Harvard Yard*” refers – against the background of the thematic focus, and restricted to this as a *metaphor* – not just to the localized shrine of the central building of the *College of Harvard University* and the globalised academic and teaching communities of the People’s Republic of Cambridge. I am referring not just to *Harvard Law School* as a place of teaching and research, which in the history of the American law school in the 19<sup>th</sup> century was largely responsible for the professionalization of the study of law in the United States, and which has the largest private law library in the world, and which allegedly counts among its alumni more CEOs in the Fortune 500 than Harvard Business School. Similarly, I am referring only as an aside to the fact that Barack Hussein Obama and the First Lady studied there, that he was the first non-white Editor in Chief of the Harvard Law Review, and to the fact that Chief Justice Roberts, who stumbled over Obama’s constitutional oath at the Inauguration, and a further four of the nine Justices of the Supreme Court were educated there.

I am thinking here, over and above the world of appearance and reality, of the life of the elite, of something else that goes beyond this, that manifests itself in a mysterious way in American legal and academic culture in its dealings with the subject.

Thus the main title, “The Global Groove of Harvard Yard” sets out to address the spell being cast by the “soft power” of American legal and academic culture over our subject area. Our subject here is the force of attraction and the power of the devil mischievously playing on a set of pan pipes with the American flag painted on them. You also have in front of you the poster design by Tomi Ungerer for the National Park Office.<sup>5</sup>

But the main title is also intended to refer to those who are observing and representing the subject, a *metaphor for something that goes even further*. Thus PETER BICHSEL wrote that at the centre of Max Frisch’s love of New York, where he had emigrated as a man and as a writer, there stood the expression “Utopia”. I quote: “Manhattan promised this Utopia, perhaps not the reality of this city, but its consciousness of itself. The city provided a backdrop to a Utopia. A city as Utopia, as poetry, as longing, in and for itself”. This illusion of Utopia, in PETER BICHSEL’s view, was a poetic illusion, with its origins in Romanticism. Here in the backdrop provided by New York one has a sense that Utopia could actually come about.<sup>6</sup> In “The Global Groove of Harvard Yard”, I am speaking, at another American location – in similar spheres of life and work – about something that is mysteriously American, something that at times may inspire the participating observer and researcher, personally, professionally and academically.

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<sup>5</sup> TOMI UNGERER, Posters, Zurich 1994, p. 30; it is an example of a series created for the US National Park Office, comprising eight motifs; rejected in 1966, no. 62

<sup>6</sup> PETER BICHSEL, Einmal muss das Fest ja kommen, an epilogue in: MAX FRISCH, Schwarzes Quadrat, Frankfurt a.M., pp. 83 ff., p. 91

Thus the “stage setting” for our exploration is concerned with more than merely factual knowledge about “hard science”, without – in my view – anything important being lost, or going unnoticed, in our dealings with the subject.

4. *The play and its principal actor – yesterday: Citizen of the world Peer Gynt in America – today: The New International Lawyer – “theory tuned into action”*

In Act 4 scene 1, which bears the title “*The Yankee in the Desert*”, Peer Gynt, having become rich in America, and now to be found on the coast of Morocco with a bottle of wine in his hand, presents himself in the following manner to his companions, a group of polyglot desperados: in the (for me) unforgettable seminal 1971 performance at the Theater am Halleschen Ufer in Berlin, directed by Peter Stein, with Bruno Ganz playing Peer Gynt<sup>7</sup>; on the back page of the book you can see a theatre photograph of this scene. Peer Gynt is dancing on the table:

**“v. Eberkopf**

How elevating to see here  
*Theory turned into action,*  
Freed from its grey night,  
Despite all that has gone against it!

**Peer Gynt**

*We people from the north, we understand  
How to win through! In the confusion  
Of life just one thing really matters:  
Keeping your ears closed! If you do this  
No little snake can make you lose your way.  
And one thing you must be sure to avoid:  
Never decide entirely in favor of any one thing.*

**M. Ballon**

*You are Norwegians?*

**Peter Gynt**

*We are Norwegian by birth!  
But in our outlook we are citizens of the world.  
Whatever good has come to me so far  
I owe it mostly to America.  
With heavy laden shelves of books  
My German cousins seek to edify me.*

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<sup>7</sup> Peer Gynt, A Drama from the 19<sup>th</sup> century, documentation for the 1971 stage production in Berlin, 6<sup>th</sup> text version, pp. 139 ff.; all text passages in rhyme and verse are from the German translation by CHRISTIAN MORGENSTERN (translated into English for this publication only).



*From France I obtained my waistcoat,  
My clear head for thinking and my refinement,  
From England I got my business sense  
And an acute feel for my own best interests."*

HENRIK IBSEN wrote Peer Gynt in 1867 while in "voluntary exile" on Ischia and in Sorrento, Italy.

Peer Gynt is speaking here, over 150 years ago (note that I was using the German translation by Christian Morgenstern, which in turn has been translated into English for the purposes of this publication) as a person who has become a *citizen of the world* through his travels and his work in the New World of that time. To some extent he speaks "to the outside world from the inside" and "from something small – himself – to something 'greater' – the world. In this scene, Peer Gynt tells of his sadness and his emotion evoked in particular by America. He speaks with a *different, new and cosmopolitan identity*.

The transformation of people and the forging of new relationships between them – people who are exposed to internationalization and who manifest themselves professionally in internationalization – is our subject here today. Our subject is existential life and the work situations of professionals and of the associated international networks as key players in the globalized legal world. I place these International Lawyers at the epicenter, as post-modern Peer Gynts and voyagers on the ocean of globalization, and I call them *New International Lawyers*. For it is they who in the globalized legal world essentially turn "theories" into "action". The dimensions here are *Person – Situation – Position and Profession*. In the subsequent operationalization, we will be dealing with a "college of international lawyers" and their networking potential in the networks under the aspects of "comparability", "compatibility" – and to some extent also "competitiveness" – and above all of "interoperability".

*I am suggesting as the principal thesis the fact that, by analogy with Justice Holmes' statement that "law is what the judges say it is", it is true to say in the globalized legal world that "law is what the international lawyers do".*

One can also see from a little *issue spotting* that other arts subjects and social sciences are similarly employing personalistic approaches, in sociology, psychology, and economics, in the theory of "social networks", management studies and the philosophy of the "political sciences". This is something our present ahistorical zeitgeist is inclined to overlook.

Particular emphasis should be given here to the groundbreaking work undertaken by Max Weber in *sociology* over 100 years ago. In his sociology of law, he states that "jurists and the juristic profession exercise a central function in the constitution and development of law". The same applies to the work of Eugen Ehrlich, who in "Fundamental Principles of the Sociology of Law" makes a categorical distinction

between on the one hand the “living law” that regulates social life and jurists’ law and state law, with jurists’ law exercising a system-constitutive function.

I recall here, in St. Gallen, personalistic approaches in *economics*, above all, for example, the fundamental approach of Schumpeter based on the “*entrepreneur*” or in the studies carried out in Switzerland by Gebhard Kirchgassner and above all by Bruno Frey and Ernst Fehr with their approaches based on a *more advanced form of economic man* as a pivotal element of economic analysis.

I would also mention, here in St. Gallen, *management theory* that adopts personalistic approaches, particularly in those elements of its work that address the subject of the manager as an individual. These would include studies under the headings of “*leadership*” and “*entrepreneurship*”.

5. “*Stage setting*” for the play in the context of the globalized legal world today – note from the playwright – from the presentation of access to the “*reflection space*” in an “*exhibition*” on the leitmotif “*Play me the song of Pan*”

It is true to say that in the United States work is being done on the process of the internationalization of persons and professionals in globalization, on a “*bottom up*” and topical basis, but also on a theoretical foundation, from very different perspectives, in very different forms and in different academic spheres. This is being done with interdisciplinary diversity, with a curiosity rooted in reality, and with a focus on the theme that is also strongly anchored in the various academic disciplines. The academic exploration of globalization, and of people and professionals in globalization, is mainly being carried out in Anglo-America and primarily in the English language. The asynchronicity and above all the asymmetry of the process of inquiry, research, teaching and professional implementation in professional reality are remarkable.

The eight statements that follow in Part 2 all relate to predispositions of American legal and academic culture that facilitate and drive the pursuit and formulation of an appropriate blueprint for this path of discovery of the personalistic conceptualization of the New International Lawyers. This will manifest itself in the concretization (to be undertaken predominantly in the future) of the “*situationality and activity analysis*” of these *New International Lawyers* in the context of the ambition “to take it global”. Above all, there exists at the present time an attractive body of knowledge that has an important and also seductive power. Thus American legal culture, in the context of this exploration, has a greater and more vital tradition in doctrine, in academic disciplines, in the professions, and in the professional organizations – a clearly emancipatory visualization of this development of a personalistic perspective is emerging.

Let me give some examples by way of illustration:

*Legal professions in books*

A stroll through a library will reveal a wide variety of books in American legal culture about the legal professions, about lawyers as professionals, and individuals and lawyers in the globalised world. Let me just name a few titles: *A Nation under Lawyers*, *A Crisis in the Legal Profession is transforming American Society*, *The Lost Lawyer*; *Failing Ideals of the Legal Profession*, *American Lawyers*, *Lawyers: A Critical Reader*, *Lives of Lawyers*, *Journeys of the Organization of Practice*, *Professionalism and the Culture of Practice* – and two recent titles which may please you, *Life without Lawyers* and even *The End of Lawyers*, and so on and so forth.

The subject is being approached from a variety of perspectives. Thus there are interesting overviews of the phenomenon of globalization written with the characteristic ability of American academics for communicating major themes that cut across subjects to a wider public in easily understood overviews. There are books on “*international social networks*” that also include lawyers in professionally relevant social networks; books and texts on the influence of globalization on the law and on the changed position of lawyers and law firms; books and texts on the new phenomenon of “*professional service firms*” that are also relevant with regard to law firms as professional service firms; and finally also books from the sphere of the consultancy services provided by professional service firms.

#### *Legal Professions as a university subject and in special programs*

“Legal Professions” is on its way to becoming an established university subject at American law schools. For example, the lecture list for the Fall Term 2007 at Harvard Law School contains about 15 relevant teaching events. In addition to books and teaching events, there are specialized programs and centers, such as the Harvard Law School Program on Legal Professions, and as part of this the Center on Lawyers and the Professional Service Industry. Despite a reflexively defensive response by academics that would like see Harvard Law School turned into an academic Graduate School along the lines of the Schools of Arts and Sciences, there are many other professionals who have turned theory into action in the globalized legal world that are playing an active part in the life of Harvard Law School. The Global Groove of Harvard Yard is naturally also served by easy access to the multi-faceted events being organized by the various graduate schools, institutes, interdisciplinary programs and forums happening all around Harvard Yard, all of which represent institutional predispositions of a special kind.

This evidence of the academic and professional thematic representations of lawyers as professionals would certainly make it seem that anyone interested in this subject cannot get away from these facts, and that a failure to take account of them, for whatever reason, will render the path to the conceptualization of the New International Lawyer – either longer and more difficult – or indeed shorter and easier. Let me say that this is not to imply any value judgment on what has been described. Nor has there yet been any judgment on or outcome of any subsequent operationalization of the

conceptualization of the competing ideas and values that flow from the various international legal and academic cultures.

Why should that be so? Why is it desirable and essential for the subject of the operationalization and the conceptualization of the New International Lawyer to take account of the American body of knowledge? Why, then, do we have the leitmotif “Play me the song of Pan”?

## **Part 2: The staging of the investigation in the “reflection space” in the art form of an “exhibition”**

### **II. American academic minds, melodies and rhythms – “Play me the song of Pan” – The seductive power of the American knowledge base in developing a methodology to conceptualize the New International Lawyers and their networks – Eight statements from a globalization-led mindset and motivation and a curiosity-inspired motivational drive as ways of accessing the “reflection space”.**

A statement is a compressed assertion that partially transcends the subject to which it relates. It highlights the characteristic typology of possible reasons for the attractiveness of American knowledge bases. The most important aspect of this section is that the statements following a globalization-inspired motivational drive deal with the specific features and opportunities of the “other”, the American. They are a collection of characteristics of American legal and academic culture that facilitate understanding and discussion of the theme. Remembering Tomi Ungerer’s poster design, we should be seduced by the powerful allure of the whimsical devil playing the pan pipes painted on an American flag: the leitmotif here is *Play me the song of Pan*.

In the discussion that follows, I am obviously seeing myself reflected in the depiction of the other with the resources available to me, and to an extent I am projecting and compensating. Everything is sketchy, fragmentary, temporary, falsifiable, inconclusive and deliberately undogmatic. So please look beyond the writer and focus on the writing.

#### *1. “See it fresh – see it whole – see it as it works”<sup>8</sup> – facts first*

In American legal culture, the theoretical discussion of law and legal practice is a *reality science* as defined by MAX WEBER. The specific features of thought and action in legal practice are often dependent at the meta-level on a mindset open to globalization; we find a *motivational position* that favors the exploration of legal practice and a *motivational drive* inspired by curiosity.

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<sup>8</sup> KARL LLEWELLYN, cited in: DANIEL THÜRER, *Perspektive Schweiz, Übergreifendes Verfassungsdenken als Herausforderung*, Zurich 1998, introduction p. 7.

In this respect, the leitmotif of KARL LLEWELLYN'S essay collection helps us as a specific American appeal to the participating observer:

*"See it fresh"* challenges us to see it in an open, undisguised and new way. *"See it whole"* means we should see it impartially and holistically, and – this is the key to the whole issue – *"See it as it works"* calls on us to understand the functional requirements and operation of the legally relevant social reality in a personalistic perspective based on the New International Lawyers' role as key actors.

KARL LLEWELLYN'S challenge has a central frame of reference: facts.

In this respect, the key aspect of American legal culture is that there is normally no distorting separation between the view of law as consisting of concepts and institutions expressed through legal doctrine, and seeing issue-relevant legal practice as a social reality. This lack of separation includes a theoretical and factual priority of juristic dealing with the legally relevant reality. In this priority-based approach, the descriptive and prescriptive procedure is bottom-up and essentially facts- and issue-driven. American legal culture combines access to theory and to social reality from a holistic perspective, creates relationships between these areas and normally includes them in the implementation of an undivided legal process; in creating and implementing law, its central focus lies in observing and investigating facts as both the starting point and central focus. *Facts first*.

It is also very important to note that this challenge can be used as an incentive for "American lawyers" who, in theory and practice and based on a different motivational position, are often inspired by unusual curiosity and treat the things they observe and investigate in a professional, persistent and sustainable way.

So the American Pan plays a seductive tune.

This basic realization is therefore interesting and attractive when it comes to observing and investigating the situationality and activity of legal professions in the globalization process, in which the New International Lawyers play a key role as "legal actors". This is because it relies on the operational requirements and mechanisms of legal practice, since at the outset we know little or nothing about the subject, and also because it places the focus squarely on social reality which we wish to observe and investigate as international lawyers.

2. *The nobilitating shift to "Behavior" and "Effect" – and the special liaison between "Knowledge" and "Activity"*.

Access to the investigation and observation of the New International Lawyers is facilitated by an equivalent comprehension, alongside the "being", of the "behavior" of these individual legal actors. This is associated with an important additional "consequentialistic" shift of focus to the "effects" of the legal actors' "behavior".

These shifts of emphasis in access to social reality, which are specific to American legal and academic culture, are predispositions relevant to our theme and facilitate discussion of the New International Lawyer's professional behavior.

I would like to explain this with a related quotation from ALFRED NORTH WHITEHEAD that has played an important part in my teaching. It makes a specific connection between "knowledge" and "activity", and relates primarily to academic teaching. Whitehead taught at Harvard University, and is best known for his co-authorship with BERTRAND RUSSELL of the groundbreaking work "Principia Mathematica"; he was also a philosopher and educational and scientific theorist.

"What the faculty has to cultivate is activity in the presence of knowledge. What students have to learn is activity in the presence of knowledge.

This *discussion* rejects the doctrine that students should first learn passively, and then, having learned, should apply knowledge. It is a psychological error. In the process of learning there should be present, in some sense or other, a subordinate activity of application. In fact, the applications are part of the knowledge. For the very meaning of the things known is wrapped up in their relationship beyond themselves. This unapplied knowledge is knowledge shorn of its meaning. The careful shielding of a university from the activities of the world around us is the best way to chill interest and to defeat progress. Celibacy does not suit a university. It must make itself with action."<sup>9</sup>

I believe that this fundamental refusal to separate "knowledge" and "activity" in university teaching also applies to science, particularly the theoretical discussion of the legal professions as "legal actors" in the legal aspects of globalization. This is because in this legal process, they are the most important transformers and realizers of "knowledge" and "activity".

Here again, "Play me the song of Pan".

### 3. *"Take it Global" – a deliberate and self-understood choice of perspective on a meta-level*

In my opinion, the question of whether globalization and globalised legal practice are primarily regarded as capable of observation and description, and whether they are indeed observed and described, is once again primarily a question of basic mindset. This plays an important part in determining the conditions for observation and understanding, taking account of one's own specific intellectual and emotional abilities to analyze and synthesize.

The drive and curiosity to "take it global" faces particular difficulties in terms of the globalization of legal practice. *This world of law and lawyers is not flat*. Tellingly, even in the United States, these qualities have so far been less developed in legal theory and culture, unlike in related social sciences and humanities. Differing national laws and

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<sup>9</sup> ALFRED NORTH WHITEHEAD, *Essays in Science and Philosophy*, New York 1947, p. 218-219.

legal cultures, some of which play an important role in globalization, are, with a few exceptions, still the basis of the way we see internationalization. They make this task more difficult – this, too, represents a hegemonistic and inward-looking focus to American legal culture.

With its globalization-compatible mindset, the “Global Groove of Harvard Yard” powerfully facilitates access to globalization; this is reflected in the contents of some graduate schools’ libraries, the diversification of their teaching and their essentially international culture, with cross-faculty programs and research by individual institutions and, most importantly, individual researchers. Just look at the several meters of shelves in the big COOP bookstore on Harvard Square headed “*New Publications of the Harvard Faculty*”.

The biotope is such that globalization has become an enduring research topic in its own right, explored in detail from many different perspectives. What is often overlooked is that although legal theory finds it so difficult to “take it global” this difficulty is offset by the consistent focus on the factual connections of globalization and by a different approach to interdisciplinarity.

The important thing about this statement is that the “Song of the American Pan” is rooted in a mindset that allows or at least facilitates two insights. One is that observation and description *are located on a meta-level compatible with globalization*. The other is that observation and description at the meta-level *take place from a global perspective*. We underestimate the effect of these predispositions in favor of globalization on the mindset; this conscious choice of level and perspective creates other, wider conditions for access to the globalization process. These two steps represent a deliberate move away from more traditional and limited perspectives. In my view, this makes it easier for the phenomena of globalization to be seen and discussed in a global context. This is particularly important because the New International Lawyers can be seen to operate in so many different areas.

#### 4. “*The Times They Are A-changing*” – *Tackling the Challenges of Change*

When Bob Dylan wrote and performed this song, his finger was firmly on the pulse of contemporary events. Most of the old guard of lawyers have been caught unawares by change, and were seen as having a “dyslexic attitude to progress”. Because of the separation I mentioned above, they had an underdeveloped relationship both to social reality as it relates to law and with changes to these *topoi* of reality.

In the wonderland of the American Pan, this is often different.

American legal and academic culture discusses changing social reality, and that discussion occurs alongside the change itself. The main emphasis is on change that occurs in the present and anticipated change in the near future.

This follows from the mindset I have described, and the temporal and factual priority given to discussion of the legally relevant facts. It also follows from the topical approach to the “issues” and the associated involvement of all relevant areas of knowledge in observing and investigating this social reality.

There is a specific difference in legal culture in the relationship to time and the future, and also to the roles of law and jurists, not only in observing and investigating social reality relevant to our subject, but also in shaping it.

Given the absence of academic competition between different areas of the humanities and social sciences, which is curtailed by efforts to achieve autonomy for legal theory, it is this “*mindset*” which, precisely because of the competitive pressures in discussion of these issues, leads to the early inclusion of change itself.

This “*mindset*” also often results in bold and academically accepted scientific statements which, although they may be provisional and falsifiable. It also results in greater transparency and participation in the creation of new legal knowledge as part of an early and open exchange of ideas between people of like minds and interests – mostly in multiple dialogues between those present – long before the result of the thinking is, as it were, published.

This close, direct relationship with the present brings changing social reality into the foreground and makes it an issue for debate.

In this respect, the American Pan is playing polyphonously and almost symphonically.

This is important for the purposes of observing, investigating and subsequently conceptualizing the New International Lawyers, because their professional situationality and activity takes place within a context of dynamic change in globalised legal practice.

5. *The “Issue-Driven Use of Theory” – the example of the “Situationality and Activity Analysis” of a New International Lawyer as a theoretical platform for a conceptualization of a New International Lawyer*<sup>10</sup>

Together with RONALD DWORKIN, the American judge and academic RICHARD POSNER is probably the most cited American jurist, an extraordinary one-man think-tank. He has stated that American jurists and jurisprudence are less good at theoretical thinking, and in some cases are averse to theory altogether. I believe this to be simply courting controversy and that it does an injustice to American legal studies. The need to demand a “turn to the lawyers” from the point of view of an investigative methodology for the conceptualization of the New International Lawyer can only be effective if carried out on a theoretical basis. For me, the song of Pan has demonstrated that a situational and issue-related use of theory is essential in underpinning any conceptualization of the New

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<sup>10</sup> This section was not read out in the valedictory lecture due to a shortage of time.



International Lawyer from a global perspective. I observed this at Harvard Law School in my work with the Finnish doctoral candidate and now law professor and philosopher OUTI KORHONEN under the guidance of professors DUNCAN and DAVID KENNEDY.<sup>11</sup>

We begin our methodological investigation with some observations on the New International Lawyers as a construct, which then lead to the *person, position* and *profession*, and to the central *situation* of a specifically American theoretical view in the form of a so-called “*situationality and activity analysis*”.<sup>12</sup>

a) *The New International Lawyer as a Construct*

Even where personalistic access to legal practice is “*facts- and issue-driven*”, “*bottom-up*”, and reality-based, and the relevant observations show a high degree of realism and selective concretization, the person of the *New International Lawyer*, with a view to the much sought-after partial generalizations, becomes a *construct*. This construct is achieved by deconstruction and reconstruction, and displays a limited degree of abstraction and generalization. It is an objective that is enriched with content using a specific method of exploration in a selective and situationally aware manner. Defining the content is subject to specific objectives, achieved using a “*situationality and activity analysis*” and also determined by often interdisciplinary contributions from other areas of social science. Ultimately, the result is a flesh-and-blood view of the *New International Lawyer* who complies with my key quotation from KARL LLEWELLYN’S essay collection: “*See it fresh – see it whole – see it as it works.*”

“We argue that already the formation of language from the international perspective at which we are aiming would of course need to take account of the cognitive, emotional and cultural differences of national or supranational origin and the different pragmatic content that it might imply. We are not talking here of a Faustian construction of a technocratic homunculus, but an open process of forming definitions and instructions with the purpose of the ongoing incorporation of the growing internationalism and multiculturalism of these new phenomena. In postulating the vision of a New International Lawyer we do not mean to replace what already exists, but supplementing what exists with something new.

Internationalized thinking about this new lawyer also means a mindset and an attitude of willingness to engage with these new realities, even if, in the process of change some areas – also linguistic or conceptual – are still unclear. It further implies a willingness to change the existing realities in so far as this is justified intellectually, emotionally and culturally on the basis of state-of-the-art knowledge and opinions.

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<sup>11</sup> OUTI KORHONEN, *International Law Situated; an Analysis of the Lawyer’s Stance Towards Culture, History and Community*, The Hague, 2000, and *International Lawyer: Toward Conceptualization of the Changing World and Practice*, in: JENS DROLSHAMMER/MICHAEL PFEIFFER, *The Internationalization of the Practice of Law*, The Hague 2001, p. 373 ff.

<sup>12</sup> Since the situationality and activity analysis is the theoretical platform for the proposed conceptualization and the basis for its differential operationalization, it is important to discuss this American theory in outline at this point. A detailed treatment can be found in JENS DROLSHAMMER, *The Path to a Turn to the Lawyer(s) – Amerikanische Konzepte und Ideen für einen Blue Print «to take it global»*, in particular p. 905, IV, p. 945 ff. and IV. p. 965 ff.

We propose to embark on an inductive and modular generalization in this multilevel and multidimensional task leading to knowledge and opinions on a meta-level, corresponding to the state of internationalization. We shall propose to do this based upon a new approach focusing on the individual lawyer and the law firm, contrary to traditional approaches which are focused on legal systems. This elevates as an option of analysis the individual persons and organizations as pivotal actors shaping this new reality, leaving open the necessary complimentary contribution of an approach focused on systems. Thereby we would like to take the former thinking one step further (...)."

The new and important addition of this person-centered construct is achieved by the network-related legal facts associated with this person. The *blueprint* for a conceptualization of the "*New International Lawyer*" also requires further constructivist additions, such as the creation of a specific culture of the *New International Lawyer* and international networking through the construct of a "*Visible College of International Lawyers*". What matters is that all these processes of construction do not lead to a theory. This does not mean that components of the construction phase cannot be "theoretical". It should be emphasized that this access is not intended to conceptualize the whole of legal practice in globalization: on the contrary, it is a special form of access to the current varied and non-homogeneous generation of knowledge about the effects of globalization on legal practice.

b) *The appropriate expansion of the "construct" of the New International Lawyer to the sphere of the person, situation, position and profession*

The construction of the *New International Lawyer* relates to phenomenologically discrete persons or organizations. The observational, investigational and descriptive structure relates to "*facts- and issue-driven*" individuals who practice as international lawyers alone or in organizations within a globalised environment. As part of the personalistic approach, the "*construct*" of the *New International Lawyer* must be expanded by designing an appropriate method at an international meta-level to include other professional roles. From the methodological viewpoint, it makes sense to include the "*construction*" of the "*International Lawyer*" in the context both of the individual "*being*" and "*action*" of their professional situation. The next step is to see the construct of the *New International Lawyer* as a *person*, exercising their profession as an actor in the globalization of legal practice. This person is allocated a *position* commensurate with this approach. These international legal actors can then be seen in a special position as members of a *profession*, to the extent that "*legal professional organizations*" have been formed at all through the "*International Practice of Law*". The next step is incorporation into a series of *professional organizations*. The central requirement is that the expansion of the construct of the *New International Lawyer* including the *person, situation, position* and *profession* takes place in a synopsis of the integration of the *social networks* within which the *New International Lawyers* exercise their profession.

c) *A theoretical explanation of the "situationality and activity analysis" of the New International Lawyer's situation*

The following example of an issue-driven use of theory is used to describe and define a framework for the observation, investigation and description of the *New International*

Lawyer's "being" and "acting". The discussions are based on the statements concerning the international lawyer as a construct in the "situation". This involves formulating a tool that is compatible with globalization as the basis for further concretization. We do this using a minimal text collage. The main focus is then on determining the procedure and the framework for the concretization of content. These are initially focused on the lawyer as a "person".

In a working document written at the end of a four-month research period at Harvard Law School in 1999, we discussed the idea of the "*situationality analysis*" that is briefly outlined here. We later expanded this into a "*situationality and activity analysis*", and incorporated it into a methodological investigation of the concept study of the *New International lawyer* as follows:

"[...]

The text in a fourth step turns to the question as to how one could conceptualize the function of the «international lawyer» in the context of adequately describing and explaining the «International Practice of Law», taking into account the why? And the for what purpose? as addressed above.

The author proposes to use as a starting point the hermeneutical «*situationality*» analysis developed among others by OUTI KORHONEN, based upon a Gadamerian approach describing and explaining «international law» by starting from the «situation» of the «*lawyer*» and by drawing on the situational clusters of limitations and potentials such as «*Culture*», «*History*» and «*Community-Ethics*». The essay starts from the basic assumption that the process of globalization needs or leads to an order, the nature of which is yet to be defined, in which «*law*» plays a role yet to be defined as well. It further starts from the assumption that the «*international lawyer*» as «*actor*» plays a pivotal role at this stage of the development of the internationalization of the «international legal process», other actors contributing to that process and from the assumption that «*law*» has as a function to influence and shape societal reality and that this process is being effected through «*lawyers*» involved in the «*International Practice of Law*». The activity of the «*lawyers*» in that context would have to be subjected to a «*situationality analysis*». This analysis would start from the «*situationality*» of the lawyer and the «*topicality*» of the facts to be influenced as reference points. The «*situationality analysis*» would have to be specified, taking into account particularities of the purpose of the conceptualization. The essay argues, for instance, that the concept of «*situationality analysis*» should be extended to encompass the «*acts*» of the «*activity*» of the «*international lawyers*» as well as the «*topoi*» as objects of the reality to be influenced. It further argues that this extension should encompass the «*process*» in which the «*acts*» manifest themselves as well as the specific results of the «*acts*» as «*works*», the «*work*» being a specific result of applying legal concepts. The situational general clusters «*culture*», «*history*» and «*community-ethics*» developed in an international public law context, according to the essay, would have to be determined and specifically adapted to the specific subject of the «*International Practice of Law*». The specific «*situationality*» of the position of the «*international lawyer*» would have to allow for the taking into account of legal, cultural, racial, religious, as well as analytical and emotional dimensions of the «*position*» of the «*international lawyer*» as well as the various dimensions of the «*activity*», such as planning, structuring, monitoring, litigating etc. and various modes of such «*activity*», such as artistic or scientific or creating or executing etc. All those issues, according to the essay, are presently not addressed in the traditional theoretical legal concepts dealing with the «*international legal process*» connected with globalization. The author is of the opinion that such a conceptualization would be

fruitful, again the basic ambition of the endeavor rather being to improve the adaptability, compatibility and interoperability of the «*international lawyer*» as actor and the informal network and to dislodge certain traditional concepts than to reconstruct a presumably complete and coherent legal order ..”

Here, in a verse from the song of Pan, we have used an example of an American issue-driven use of theory by way of demonstration.

d) *The theoretical basis of the American “situationality analysis”*

The following section of an abstract was presented on the occasion of OUTI KORHONEN being awarded an SJD at Harvard Law School in 1999. Her dissertation was published in 2000 under the title: “International Law Situated: an Analysis of the Lawyer’s Stance Towards Culture, History and Community”. It is essentially a theoretical grounding of situationality analysis in international public law.

KORHONEN describes the jurist’s *situationality* as follows:

“The present study looks at international law from the perspective of situationality theory as formulated in continental hermeneutics. It can be characterized as a basic study of international law which, however, regards the interrelationship of lawyer-law-world as a triangle instead of as a line. In other words, the focus is on the fact that the international lawyer is not only influenced by and not only influences the world through law but stands in a more complicated and simultaneous triangular relationship with both. This study tracks the reciprocal flows of influences and their impact on some basic questions in the discipline.

The concept of situation represents a standpoint that limits the possibility of vision (GADAMER). Our situations and, consequently, our imaginative freedom are conditioned by the factual realities of economic, sociological and political world, the human epistemic abilities, and a variety of personal and ideological affiliations and developments (JASPERS). This study investigates some basic questions of international legal work taking into account the situational potentials and limitations derived from such broad notions as culture, history, and community as they appear both in the discipline and more generally. The three main chapters of the study (2, 3, 4) question culture, history, and community-ethics in three senses; as «realities», as «epistemic» and as «ideological objects». For example: what is a «cultural reality», what does it mean epistemically, and ideologically, and how do the various stances that the lawyer can take towards such questions influence her work?”

The theoretical grounding developed in detail in the dissertation has its roots in international public law. However, as we will see, its methodology can be transferred into other areas of globalized legal practice in person-centered conceptions of lawyers. The dialogue led to the following attempt to transfer this method to the international practice of law.

e) *The transfer of “situationality and activity analysis” to New International Lawyers*

The basic suitability of situationality and activity analysis in describing the key role of the International lawyer was to have been examined in a joint publication by the author and OUTI KORHONEN, which at the time was in the process of being written. The introduction, which KORHONEN published in the book, “The Internationalization of the Practice of Law” (2001) shows how the role of situationality analysis could be defined in this specific area:

“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. 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. In short, a complex interaction and reciprocal influencing emerges in a way that is difficult to master or analyze. Therefore, new modes of analysis are needed to make sense of the recent development and 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. Situationality analysis is susceptible to such circumstances.

A situationality analysis proceeds from the fact that 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 law is (1) underdetermining, (2) legal systems 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 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. 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, are questions in which the lawyer has to exercise legal judgement but also judgement 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, policies of various international actors, financial transactions, and 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 is impossible but for the following:

The lawyer has to realize where she stands in different ways: in terms of the client, in terms of the law, in terms of situational elements: i.e. her own, the client’s, and the law’s embeddedness in economical, political, social, general cultures etc. (1).

The lawyer has to realize the interrelatedness 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 the law influences the understanding of the different elements (2).

Upon completing her task (e.g. contract drafting or advice), the lawyer has to reflect on its reliance on the above elements and check: whether it is sound given her, the client’s and the possible adversaries’ situational elements and whether it will work even given some of the situational indeterminacies (all situational information can never be obtained) (3).

The situationality analysis gives the guidelines for performing this inquiry, which produces better and more workable results in the short and long run.

Situationality analysis suggests that through inquiring into the hypotheses and counterhypotheses 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. On the contrary, situationality analysis explains how this uncharted legal work in new contexts is done when it is done best. Therefore, it is rather a description of the practice as it already exists at its best rather than an artificial formula applied on it. The starting point is that existing modes or work can be analyzed, 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, the situationality analysis aims to profit from the avant-garde nature and innovation which is constantly occurring in the international commercial lawyer's work and bring together this practice and a theoretical way of making sense of it.

The points of interest for a closer situationality 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 linguistic and other idiom-related contexts ...)? What are the secondary situational frames and their impact (i.e. is it justified e.g. not to include ethical inquiry or public interests in the primary frames)?

By frames we 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. The situational analysis will explain 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 blinder 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, e.g., 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 evermore 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 ...) and what is their beneficial/constraining function?

When analyzing these questions, the limitations of the benefits and risks will also be argued. As a result of these inquiries, the production of a more informed opinion, e.g. on the subject in which language a particular contract should be drafted and what will be its future pros and cons, becomes more well-based. 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 produces within them are simultaneously affected.

The situationality analysis is very akin to for instance non-linear systems analysis in science; although in both final determinations are not the objective, the analyses expose the nature of certain dynamic processes in a way that provides guidelines for those attempting to manage and negotiate them. Situationality analysis will also discuss legal structures rather than rules and doctrines, for it aims to regard law as a complex subject of argumentation structures, rhetorical conventions, linguistic and behavioral idioms, in addition to the rules, doctrines, codes, and court decisions. The working of this structure is, however, seen as resembling a non-linear system rather

than a determinate structural whole. In other words, the openings and closures of the legal frame are taken into account in a way that increases the possibilities of producing sound, distinctly legal, and resilient outcomes for the changing situations.”

The American contribution to an explanation of “*situationality and activity analysis*” of individual legal actors as the focus at the meta-level of the New International Lawyer is the basic theoretical module of the methodological blueprint in the more theoretical concluding text of this book. Situationality and activity analysis must obviously be expanded to include the different professional roles of the corporate lawyer and general counsel, justice, legislative and regulatory jurists and judges, and operationalized and concretized in many different situations and dimensions; this is a task for the future.

The Global Groove of Harvard Yard affected the participating observer personally, because he was able to follow the development in dialogue and later to contribute to the expansion of “*situationality analysis*” into “*situationality and activity analysis*”. In this area, American minds, melodies and rhythms have a special polyglot swing in the song of the American Pan. The authors are Europeans, and situationality analysis was based on the work of the German philosophers KARL JASPERS and HANS GEORG GADAMER. Since the Second World War, defining what is “American” – assuming this is a meaningful question at all – has been a complex task. In our opinion, however, it is notable that in jurisprudence, the new body of thought has also come from European jurists and leading United States law schools based on their European education and experience. I therefore suggest, with tongue in cheek, that my work over the last ten years be added to the knowledge base of American legal culture.

From St. Gallen bratwurst and Zürigschnätzelten to clam chowder, Maine lobster and beyond – with postmodern ingredients to Caribbean Cajun – Swiss Creoleness?<sup>13</sup>

6. *The free jazz of “anything goes” in the Interdisciplinary Competition and Cooperation of the Social Sciences in Constructing the International Lawyer in Globalization*

The song of the American Pan opens up a fundamentally different view of the relationship between different areas of knowledge, and in particular the competition between various relevant areas of the humanities and social sciences and a less autonomy-seeking or isolated legal theory and culture, and completely new areas of knowledge for the conceptualization of the person of the New International Lawyer and their networks.

I will illustrate this aspect of the American knowledge business with the following *list* of approaches from various areas of the social sciences and humanities whose appropriateness for consideration in operationalizing the concept within the framework of a situationality and activity analysis I considered in the final essay of the collection. All

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<sup>13</sup> PASCALE CASANOVA, *The World Republic of Letters*, Cambridge, Mass., London, England, 2004, p. 296 ff

of these approaches are global and personalistic and deal with various aspects of globalised professionals or cosmopolitans. Unfortunately, in this ritual of a valedictory lecture, all that remains is a brief summary – 100 pages in the book become one page in the manuscript.

We are talking about a random selection of text and books made as part of a “*book- and author-spotting session*” with an amused nod to PIERRE BAYARD’S book, “How To Talk About Books You Haven’t Read”. The choice is from the author’s personal library, and is selective and non-representative, not corresponding to any particular model or academic canon. The books are of more recent date with a view to the conceptualization of the New International Lawyer at an international meta-level. They are the work of authors mainly in related disciplines and written from a global and interdisciplinary perspective, recognized experts in their fields who are in close touch with contemporary events and globalization, including that of legal practice.

So what are these approaches and key publications?<sup>14</sup>

- The *professionalism approach* of ELIOT FRIEDSON is explained in *Profession and Power – a Study of the Institutionalization of Formal Knowledge* (1986), in *Professionalism Reborn, Theory, Prophecy and Policy* (1994) and in *Professionalism, the Third Logic, on the Practice of Knowledge* (2001).
- RICHARD SENNETT’S *craftsmanship approach* was mainly developed in *The Craftsman* (2008).
- The *expert approach* of DAVID KENNEDY, which is described in a later book, centers on the concept of the international expert. This philosophy was first discussed publicly in the 2004 Julius Stone memorial address under the title *The Challenging Expert Rule – the Politics of Global Government*.
- ANNE-MARIE SLAUGHTER’S *network approach* is founded in *Governing the Global Economy through Government Networks in: Michael Byers (ed.), The Role of Law and International Politics* (2000), and examined in greater breadth and depth in *a New World Order* (2004).
- The *educational* and psychological approach of HOWARD GARDNER is described after many important works in *Five Minds for the Future (The disciplinary mind, the synthesizing mind, the creating mind, the respectful mind and the ethical mind)* (2006).
- The *occupational sociological* approach of BRYANT GARTH and YVES DÉZELAY has been developed in many essays and books over the past 20 years based on surveys of the internationalization of the professions and professional service firms.

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<sup>14</sup> Concerning the citations from the key publication, see the beginning of the relevant sections in *V The Path to a Turn to the Lawyer(s) – Amerikanische Konzepte und Ideen für einen Blue Print «to take it global»*, p. 965–1075 in JENS DROLSHAMMER *A Timely Turn to the Lawyer? Globalisierung und die Anglo-Amerikanisierung von Recht und Rechtsberufen*, Zürich/St. Gallen/Baden-Baden 2008.



- The *pragmatic philosophical approach* is based on works by JOHN DEWEY, RICHARD RORTY and, in our context, by RICHARD SENNETT in *The Craftsman* (2008).
- The *globalization philosophy approach* of KWAME ANTHONY APPIAH is detailed in *The Ethics of Identity* (2005) and in *Cosmopolitanism, Ethics in a World of Strangers* (2006).
- The *globalization ethics* approach of HANS KÜNG is explained in *Global Responsibility, in Search of a New World Ethics*, originally published in German in 1990 and published in English in 2001.
- The narrative approach is described by, among others, JEROME BRUNER in *Making Stories, Law, Literature, Life* (2002).

This interdisciplinary “anything goes” – the expression comes from PAUL FEYERABEND, an Austrian scientific theorist, who previously taught simultaneously at the University of Berkeley and at ETH in Zurich – uses creative unrest in the competition of ideas to create knowledge which can be taken into account in operationalizing the conceptualization of the new international lawyer.

#### 7. *The inclusion of Postmodernism into the Brave New World of Law and Lawyers in Globalization*

An interesting thesis is currently being discussed in the history of the mind and of ideas that is legal thought in the age of globalization, This may have unexpected and unusual ramifications for traditional legal thought which go beyond the open interdisciplinarity referred to above. We refer to a thought expressed by a friend, the German comparatist MATHIAS REIMANN, who has taught at Michigan Law School for 20 years, a year ago at one of the author’s “salons”.<sup>15</sup>

REIMANN believes (and this is controversial) that American jurists, or rather jurists trained at American law schools, deal more effectively with the current legal world, and particularly the effects of globalization, than their continental European colleagues. This is said to be mainly because the whole structure of American legal thought is a better “fit” for present-day law, at least in the western industrialized nations.

The trend towards pluralization, digitization, loss of autonomy and the collapse of the system is characteristic of the “Brave New World” of law in the age of globalization, and conflicts with the continental European legal tradition. At least since the beginning of the modern age, this tradition has emphasized the unity of the legal order as portrayed in textbooks for example, the autonomy of law in the face of politics and business, clear definitions and systematic thinking. These trends in the “Brave New World” of law in the age of globalization reflect the current legal situation in America, which almost from the

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<sup>15</sup> The passage contains quotations in indirect speech from a handout distributed at the meeting. Pages 869-1072 of the final essay in the collection *The Path to a Turn to the Lawyer(s) – Amerikanische Konzepte und Ideen für eine Blue Print «to take it global»* describe the approaches selected at a book spotting. The quotations from the authors’ key publications are at the beginning of each of the ten sections concerned.

outset has been dominated by pluralism, a more associative organization of the material, a highly politicized understanding of the law and a focus on concrete problems.

Because American legal thinking is said by him to be in harmony with today's world, rather than in conflict with it, REIMANN believes that American jurists have a head start on their continental European colleagues and others brought up in the civil law tradition. The differences between American and continental European legal thought could be seen as differences between the "modern" and "postmodern" world views. On both sides of the Atlantic, this is not about current trends but long-term structures with deep historical roots. In other words, a jurist who thinks of themselves as "postmodern" is more at home in the postmodern legal world than one who is still straitjacketed by "modern" thought processes. To quote (and this, too, is controversial): "If these considerations are true, then they also help to explain, no more and no less, why international legal practice today – almost worldwide – is primarily American."

The inclusion of these somewhat tectonic shifts is a further characteristic of KARL LLEWELLYN'S key quotation, "*See it whole*". The willingness to include this in an analysis of the concept of the new international lawyer – "*See it fresh*" may also lead to a deep-seated Americanization in the concept of the New International Lawyer in globalization because of the observed facts of international legal practice – "*See it as it works*".

#### 8. *The Vision of a "Visible College of International Lawyers"*

The other thing we need in order to conceptualize the New International Lawyers is ideas, in the form of guiding visions that allow us to understand the existing and future social capital of the New International Lawyers and their networks. This is an important part of any forward-looking construction of the New International Lawyer.

The song of the American Pan sings of such a vision. I call it "*A Visible College of International Lawyers*".<sup>16</sup>

In 1977, the well-known international public lawyer OSCAR SCHACHTER wrote the seminal article, "*The Invisible College of International Law*". He described a small, exclusive and elite group of committed specialist academics, largely Anglo-Saxon and male, and mostly internationalists, academics working in universities, some in practice and some in government service. They were the invisible standard bearers of international public law, originally a *club* and eventually a *college*.

In 2001, the American Society of International Law held its annual meeting in Washington on the theme of "*The Visible College of International Law*". The adjective

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<sup>16</sup> See JENS DROLSHAMMER, A College of International Lawyers in a Networked Society. The Need for Conceptualization of the «New International Lawyers» from a Global Perspective, essay no. 15 in: JENS DROLSHAMMER A Timely Turn to the Lawyers? – Die Globalisierung und die Anglo-Amerikanisierung von Recht und Rechtsberufen, p. 611–636 ff.

“visible” referred to the increased role of communication concerning law and the legal professions in a globalized legal practice. The use of the expression “College” refers to the professional academic position and profession roles of the New International Lawyers, which transcended what we have previously referred to as “Craftsmanship”.

These glimpses of the future requiring a targeted objective in the form of a vision are, in my opinion, another characteristic of American law and academic culture. This is not to advocate an old-fashioned romantic and nostalgic professionalism. Rather, it is about a forward-looking construction of a new and globalized virtual community of lawyers in international legal practice in the widest sense. Turning theory into reality means in this context developing a professional culture and a professional association that lives up to the name of a “*Visible College of International Lawyers*”. Originally confined to international law, the college would become globalized by incorporating all relevant roles of the profession of New International Lawyer.

These eight statements are about specific characteristics of American law and academic cultures that attractively influence the conceptualization and subsequent operationalization and make possible an understanding and discussion of this issue.

This treasure hunt guided by the melody of Play Me the Song of Pan ultimately lead to the following findings and fragments from American legal and academic culture:

- Legal thought and action which are motivated by exceptional curiosity and openness, which are bottom-up and facts-and issue-driven, and which focus on legally relevant realities and are persistent in their observation and investigation – “see it as it works”. (1)
- The equally valid incorporation of “behavior” and “effect” alongside the “being” of legal actors – all embedded in a special connection between “knowledge” and “activity”. (2)
- A conscious positioning on a meta-level, a deliberate choice of a global perspective and, associated with this, an implicitly academic discussion of globalization. (3)
- An understanding of legal practice as soon as possible after the event as a legal process, and a striving to tackle and describe change in this legal process as early as possible. (4)
- A situational and issue-related use of theory as the foundation of a theoretical conceptualization of New International Lawyers from a global perspective – situation analysis in the form of a situationality and activity analysis as a platform for a conceptualization and operationalization of the New International Lawyer. (5)
- An unbiased relationship with an appropriate and contemporary interdisciplinarity between different areas of the humanities and social sciences in the concretization of person, situation, position and profession of the New International Lawyer – a dizzying “anything goes”. (6)

- An academic openness to raising the issue of change from “modern” to “postmodern” in the history of ideas, including the effects of globalization on law and the legal professions, and to including this within an overall perspective. (7)
- A imaginative and optimistic “mindset” concerning other key ideas and visions for the future roles of “international lawyers” in globalised international practice –
  - from the “invisible college of international law” to the “visible college of international law” and the “visible college of international lawyers”. (8)

These eight findings and fragments are specifically American in their staging of the investigation of the conceptualization and operationalization of the New International Lawyers. They are rooted in a globalised, open “mindset”, a motivational position that favors the exploration of legal practice, and a motivational drive inspired by curiosity. They relate to the origin and causes of the powerful attraction of American soft power in the song of Pan. These eight findings and fragments are sources that facilitate access to the “reflection space” of the personalistic conceptualization of the New International Lawyer.

### **Part 3: The staging of the investigation in the “reflection space” in the art form of “language sentences”**

#### **III. An American promise and vision – The Global Groove of Harvard Yard on a Walk on the Sunny Side of the - American - Street Nine quotations and nine guiding principles as signposts for a discursive approach to the postmodern “reflection space” of the personalistic conceptualization of the New International Lawyer**

Having provided an approach through a number of statements to the “exhibition of the reflection space”, there now follow nine guiding principles and nine key quotations as important signposts for a discursive approach to the exploration of a personalistic approach to the understanding within the “reflection space” of legal practice in the context of globalization. With one interesting exception, I have deliberately chosen key quotations from Anglo-American writers, mainly from the United States. They are also masters of compression whose sentences are an art form in their own right, guiding us on our journey through the “exhibition space” and serving as “signposts” to the “reflection space”. They follow a descriptive and thematically inspired dramaturgy and adopt central approaches and perspectives to this personalistic approach.

##### *1. Suspicion towards new ideas*

###### *Guiding principle:*

This approach to the personalistic conceptualization of the New International Lawyers and their networks as key actors in globalised legal practice is hindered by certain preconceptions about globalised legal practice:

*Key quotation:*

JOHN LOCKE (1632-1704), an Englishman, said:

“New opinions are always suspected, and usually opposed, without any other reason, but because they are not common.”

2. *Perseverance and stagnation in law*

*Guiding principle:*

This personalistic approach discusses the *evolution of law through legal practice in the course of globalization from a global perspective.*

ROSCOE POUND (1870-1967), who for a long time was Dean of Harvard Law School, wrote, sitting shaded from the sun at his bespoke round furniture:

*Key quotation:*

“The law must be stable, but it must not stand still.”

3. *From principles to personalities to be motivated*

*Guiding principle:*

This personalistic approach is about the “actions” of active individuals who, as legal actors, play a key role in globalised legal practice.

*Key quotation:*

OSCAR WILDE (1854-1900), an Irishman, wrote the following while staying on Lake Geneva:

“It is *personalities*, not principles, that move the age.”

4. *The dishonesty of striving for systems*

*Guiding principle:*

This personalistic approach is an American-style, issue-related and topical way of dealing with new realities that seeks to avoid systematization and dogmatization.

*Key quotation:*

FRIEDERICH NIETSCHE (1844-1900), who collaborated with JACOB BURCKHARDT in Basle at a time of anti-American sentiment, and is a German who is currently enjoying an unprecedented revival in the United States, wrote in *Sils Maria* in the Engadine:

"Distrust all systematizers and avoid them. The will to a system shows a lack of honesty."

5. *Common sense as the foundation of the scientific*

*Guiding principle:*

This personalistic approach is also a matter of pragmatic, cosmopolitan philosophical common sense, and not simply dry, dogmatic hard science.

In the words of OLIVER WENDELL HOLMES SR. (1809-8094), professor of medicine at Harvard Medical School, father of Justice OLIVER WENDELL HOLMES JR, and a member of the Metaphysical Club together with WILLIAM JAMES and CHARLES S. PIERCE, who were the fathers of American philosophical pragmatism:

*Key quotation:*

"Science is a first-rate piece of furniture for a man's upper chamber, if he has common sense on the ground floor."

6. *Finding the essential in what is small-scale and concrete*

*Guiding principle:*

This personalistic approach is about observations, investigations and descriptions that are outward-looking and seek to transform something "small" into something that may be "larger". In the words of the Indian author and most of all film maker SATYAJIT RAY (1921-1992).

*Key quotation:*

"It is the presence of the essential thing in very small detail which one must catch in order to expose larger things."

7. *Recognition as looking from the outside to take an active part in the process of change*

*Guiding principle:*

This personalistic approach is about active participation in the form of observation, investigation, description and shaping of evolving legal life in the context of globalization.

*Key quotation:*

The American philosopher, educationalist, sociologist and legal expert JOHN DEWEY (1852-1952), who brought American philosophical pragmatism to its first flowering, wrote:

“From recognition as looking in from outside to recognition as taking an active part in the drama of an ever-changing world – that is the historical transition whose history we have followed.” (Use English original if available)

8. *Imaginatively devising interesting alternatives to current beliefs*

*Guiding principle:*

This personalistic approach is about incentives to the observation, investigation and description of globalised legal practice as something new and different. RICHARD RORTY (1931-2007), was a close friend of JÜRGEN HABERMAS. After the revival of pragmatism, he left his post as professor of philosophy at Princeton University in 1982, was professor of humanities at the University of Virginia from 1983 to 1998 until he became an emeritus, and then served as professor of comparative literature at Stanford from 1998 to 2004.

*Key quotation:*

“People should stop worrying about whether what they believe is well founded, and instead should worry about whether they have managed to summon up enough imagination to think of interesting alternatives to current beliefs.” (Use English original if available)

9. *Answers to questions*

*Guiding principle:*

Ultimately, the theme of the personalistic conceptualization of New International Lawyers and their networks as key actors in complex globalised legal practice is a rejection of hasty, non-analytical opinions and values to undertaking questioning with an inquisitorial mindset – a seemingly simple process which as jurists we often fail to adopt, be it through complacency or ignorance.

*Key quotation:*

The American author GERTRUDE STEIN (1874-1946) wrote in Paris:

“ What is the answer?... In that case, what is the question?”

These nine guiding principles and nine key quotations are important signposts in investigating the conceptualization and operationalization of the New International Lawyer. They reflect various standpoints, from which the multidimensional “reflection space” can be measured and triangulated, and are strategic viewpoints in investigating the personalistic approach. The approach to this investigation strategy is to be found largely outside the realms of traditional continental European legal thought. This methodology results from taking account of the ruinous state of pluralization, digitalization, loss of autonomy and systemic collapse as a characteristic of the Brave New World of law in the age of globalization. It is inspired by relevant legal factors of an American pluralist order, a more associative organization of material, a politicized understanding of law and of the order in concrete problems, and can be seen as a postmodern mode of thought. As with the investigative methodology itself, we believe this also applies to the description chosen here in the form of a staging of the investigation in the “reflection space” through art forms. Here again, we hear the seductive song of the American Pan.

#### **Part 4: The happy end of staging the investigation in the “reflection space” in art forms – a joyful end**

##### **IV. The Global Groove of Harvard Yard -- the Utopia of the Individual, the Professional and the Academic for a Homecoming to one’s better self – and a personal experience**

I want to be sure that you do not misunderstand my discussion of this subject undertaken with the empathy and enthusiasm of an overenthusiastic lover:

After over 40 years, I believe I recognize many dark sides, ambivalences and dissonances in the devilish song of the American Pan, and in law, legal culture, the legal professions and legal thought which go beyond the specific theme I have chosen. I have experienced these ambivalences throughout my personal and professional life, for example in my current role on the expert commission of the Swiss Federal Council and as an adviser to the EJPD.

In all personal dedications I made of the book before Christmas, I wrote "Oh, America".

I think I am also well aware of laments about the dark side of globalization.

Equally I think I am familiar with the dark side of, for the initially deliberately chosen and beguiling orientation to the sunny side of the (American) street of the description of the theme.



I believe I am also conscious of the long shadows of the fading American century, and the much-heralded dawn of the “Asian century”.

Lastly, I think I am aware of premonitions about the dark sides of the possible historical discontinuities of the current world recession, for which America bears much of the responsibility. This will call into question much of the globalization of legal practice and probably turn it on its head — and this includes the role of “international lawyers” as actors in legal events.

Most importantly, I believe I recognize the inherent limitations of the future operational conceptualization of the new international lawyer in the centre and the unresolved questions about the personalistic approach.

*But now to the happy end and the happy event:*

The land of milk and honey of “eggheads” that is the People’s Republic of Cambridge still has something very special about it, something that gives wings to the academic Icarus, a thermal upcurrent in our life and work, a moving groove:

In the dramaturgy of the description, and with deliberately Brechtian distance, I return to the metaphor of the main title, The Global Groove of Harvard Yard, and its meaning for the individuals who follow their academic vocation by observing and investigating this subject at a leading American university.

As PETER BICHSEL wrote of MAX FRISCH’S love of New York: Manhattan makes itself available as the stage set for a utopia. All other things being equal, Cambridge and the metaphor for the Global Groove of Harvard Yard do this too.

In the three areas of life, the personal, the professional and that of the academic teacher, this groove can mediate a moving feeling about life and, most importantly, work, what GEORGE STEINER described as a “homecoming to one’s better self”. The Global Groove of Harvard Yard also lives up to the promise made in a poem by INGEBORG BACHMANN entitled: “The festival must come some time”. The mysterious, global groove that is so difficult to encompass and that PETER BICHSEL described with reference to New York also applies to Harvard Yard. It is a profoundly American musical phenomenon that sometimes also moves this speaker to invent new ideas. It is a part of the American dream. I mean this in a wholly unpretentious way.

You may think it is about American “fun” or American “happiness”.

No, it is about American “joy”, expressed through the song of Pan, and inspired by the Global Groove of Harvard Yard.

Returning to TOMI UNGERER’S little book, Die Hölle ist das Paradies des

Teufels,<sup>17</sup>

“Everyone always talks about happiness, happiness, happiness. I find joy much more important than happiness.”

And so the “swing” of devilish joy of the American Pan has also brought drive and elation with its Global Groove of Harvard Yard to this exploration of the concept of the New International Lawyers in globalised legal practice.

So what is its call to the explorer?

There is the Anglo-American pessimism of SAMUEL BECKETT, an Irishman:

“Ever tried. Ever failed. No matter – try again, fail better.”

Or there is the more American optimism of KARL LLEWELLYN, the great American jurist:

“See it fresh – see it whole – see it as it works.”

The happy end is therefore a joyful end: the possible intermediation of an affective state and sensibility embracing the whole person and their personality, that enables and encourages utopias and a “homecoming to one’s better self” in the personal, the professional, and the academic.

No, ladies and gentlemen, you who have accompanied me through this “exhibition space”, I would like to close with a simpler example of the continuing American dream based on a personal experience that speaks for itself and beautifully expresses what I have said.

At the end of March, I was sitting in the reading room of the Harvard Law School’s Langdell Library, working on this speech, as it were *in situ*. I took a break, went to Newbury Comics in the so-called Garage on Harvard Square, and bought two folding life size cardboard figures that were being used as displays at the entrance to the shop. Even when folded, there was nowhere near enough room for them in my large suitcase. I carried them together with all my other overweight luggage in a plastic bag to Boston, to the taxi, to the check-in, through security, to the stewardesses, to a hotel in Washington and then through all the various intermediate stops to outside my front door in Zurich. I have brought one of the cardboard figures here to the Senate Room, without unwrapping it, in the very same black plastic bag.

Every time I meet someone, whether or not they ask me about the bag, I say:

“Watch it, be careful, President Obama is inside.”

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<sup>17</sup> TOMI UNGERER, *Die Hölle ist das Paradies des Teufels, Gedanken und Notizen*, Zurich, 2008, p. 27.

The spontaneous joy, the laughter and optimism on everyone's faces, the humor, the joyful conversations and the expressions of sympathy by people on the way home – not some unexpected eggheads from Harvard Yard – were to me a direct and incredible expression of the revival of the swing of global groove of the United States as a country.

While students at my last annual event unpack and display the poster:

*Long may it remain that way, for the benefit of us, the Swiss people.*

“That’s all, folks!”