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## The Art of International Law

Hilary Charlesworth

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## The Art of International Law

### Abstract

International lawyers study international law primarily through its written texts—treaties, official documents, judgments, and scholarly works. Critical to being an international lawyer, it seems, is access to the written word, whether in hard copy or online. Indeed, as Jesse Hohmann observes, “the production of text can come to feel like the very purpose of international law.”

### Keywords

International Law, Art Law, Jurisprudence, Judge, Legal Theory

# TWENTY-FOURTH ANNUAL GROTIUS LECTURE SERIES

*Grotius Lecturer Judge Hilary Charlesworth of the International Court of Justice and Distinguished Discussant Professor Karima Bennouna of the University of Michigan Law School provided the Twenty-Fourth Annual Grotius Lecture on Wednesday, April 6, 2022 at 5:00 p.m.*

## THE ART OF INTERNATIONAL LAW\*

HILARY CHARLESWORTH\*\*

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### I. INTRODUCTION

International lawyers study international law primarily through its written texts—treaties, official documents, judgments, and scholarly works. Critical to being an international lawyer, it seems, is access to the written word, whether in hard copy or online. Indeed, as Jesse Hohmann observes, “the production of text can come to feel like the very purpose of international law.”<sup>1</sup>

I will take a different tack in this lecture by considering how the

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\*\* Judge, International Court of Justice. I thank Cassandra Allen, Eirini Fasia, Emma Macfarlane, Emma Nyhan, and Nikiforos Panagis for their assistance with research for this paper and Alexandra Clifton-Bryant for securing permission to use the images.

1. Jessie Hohmann, *The Treaty & Typewriter: Tracing the Role of Material Things in Imagining, Realising, and Resisting Colonial Worlds*, 5 LONDON REV. INT'L L. 371, 371 (2017).

visual interacts with international law. I see this focus on visual art as one aspect of the theme of the 2022 Annual Meeting which is “personalizing international law.” My argument is that the visual is significant in framing how individuals both inside and outside the legal realm experience international law in their daily lives. Thus, I am using the idea of “the art of international law” in a specific way to mean visual images and representations and their relationship to international law.

The historian Anne Gulick has described international law as both an “institutional reality and an imaginative project.”<sup>2</sup> My claim in this lecture, drawing on a rich seam of scholarship on visuality and law generally,<sup>3</sup> is that the visual shapes both aspects of international law— institutional and imaginative. In other words, law has a material context; it is also a way of seeing the world.<sup>4</sup> The visual dimension does a lot of work in international law and can both shape and transform conceptions of the discipline. The visual and the aesthetic are integral to the authority of international law and deserve much greater attention and analysis.

International legal scholars who have written about art and aesthetics have tended to focus on two questions. The first is international law’s protection of freedom of artistic expression and cultural rights. The work of the UN Special Rapporteur on cultural rights exemplifies the richness of this type of enquiry.<sup>5</sup> International

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2. ANNE W. GULICK, LITERATURE, LAW, AND RHETORICAL PERFORMANCE IN THE ANTICOLONIAL ATLANTIC 1–2 (2016). According to David Kennedy, international law’s function is as a “vernacular of political judgment.” DAVID KENNEDY, OF LAW AND WAR 46 (2006).

3. *E.g.*, DESMOND MANDERSON, LAW AND THE VISUAL: REPRESENTATIONS, TECHNOLOGIES, CRITIQUE (2018); DESMOND MANDERSON, DANSE MACABRE: TEMPORALITIES OF LAW IN THE VISUAL ARTS (2019); Linda Mulcahy, *Eyes of the Law: A Visual Turn in Socio-Legal Studies?*, 44 J.L. & SOC’Y S111 (2017); RICHARD K. SHERWIN, VISUALIZING LAW IN THE AGE OF THE DIGITAL BAROQUE (2011).

4. MARGARET DAVIES, LAW UNLIMITED: MATERIALISM, PLURALISM, AND LEGAL THEORY 70–71 (Routledge 2017).

5. *E.g.*, Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *Report on the Right to Freedom of Artistic Expression and Creativity*, at 3–4, U.N. Doc. A/HRC/23/34 (Mar. 14, 2003); Karima Bennouna (Special Rapporteur in the Field of Cultural Rights), *Report on the Promotion and Protection of All Human*

criminal lawyers have also considered prosecutions for the destruction of cultural property.<sup>6</sup> The second question often addressed by international lawyers is what art can do *for* international law. For example, human rights scholars have turned to art as a way of exposing the nature of human rights abuses. This is illustrated in a study by the European Union’s Agency for Fundamental Rights on the arts and human rights, which called on artists to reinforce “the human rights message.”<sup>7</sup> The study argued that “perceptions . . . are more powerful than facts . . . [and] [a]rt is all about perceptions . . . . Art can [thus] transcend barriers, such as politics and language.”<sup>8</sup>

In a similar spirit, Mary Ellen O’Connell’s pathbreaking book *The Art of Law in the International Community* draws on aesthetic philosophy to renew the natural law tradition in international law.<sup>9</sup> O’Connell’s goal is to shore up the notion of a universal community in the face of the threat posed to it by the realist context of positivism. For her, aesthetic philosophy and the arts, particularly the performing

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*Rights, Civil, Political, Economic, Social and Cultural Rights, Including the Right to Development*, at 3, U.N. Doc. A/HRC/37/55 (Jan. 4, 2018); see also Eleni Polymenopoulou, *Does One Swallow Make a Spring? Artistic and Literary Freedom at the European Court of Human Rights*, 16 HUM. RTS. L. REV. 511, 511 (2016); Paul Kearns, *Freedom of Artistic Expression in International Law*, 25 ART & ANTIQUITY L. 99, 99 (2020).

6. E.g., Emma Cunliffe et al., *The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations*, 23 INT’L J. CULTURAL PROP. 1, 1 (2016).

7. Eur. Union Agency for Fundamental Rts., Report of High-Level Expert Meeting Exploring the Connection Between Arts and Human Rights, at 11 (May 29–30, 2017), [http://fra.europa.eu/sites/default/files/fra\\_uploads/fra-2017\\_arts-and-human-rights-report\\_may-2017\\_vienna.pdf](http://fra.europa.eu/sites/default/files/fra_uploads/fra-2017_arts-and-human-rights-report_may-2017_vienna.pdf) [hereinafter Arts and Human Rights Report]; see also Sarah Joseph, *Art and Human Rights Law*, in RESEARCH HANDBOOK ON ART AND LAW 389, 389 (Jani McCutcheon & Fiona McGaughey eds., 2020).

8. Arts and Human Rights Report, *supra* note 7, at 11–12.

9. MARY ELLEN O’CONNELL, *THE ART OF LAW IN THE INTERNATIONAL COMMUNITY* 9–12 (2019). See also the website of the ART AND INTERNATIONAL JUSTICE INITIATIVE, whose mission is described as “complementing international justice research and practice, with artistic exercise.” The INITIATIVE also promotes “different forms of arts as healing tools and as emotional channels on matters in the field of international justice.” *Mission*, ART & INT’L JUST. INITIATIVE, <https://artij.org/en/mission.html> (last visited Jan. 31, 2023).

arts, can help identify universally shared knowledge and can revive the notion of peace through law.<sup>10</sup> O'Connell writes:

Aesthetic philosophy reveals that contemplation of beauty and the experience of pleasure it generates is a universal experience. It is an experience that provides a philosophical basis for honouring law even in the absence of personal advantage or disadvantage. The insight provided by beauty is comparable to the insight of theologians in discerning divine law.<sup>11</sup>

For O'Connell, the arts can inspire us to support legal processes, for example, by encouraging engagement with international courts.<sup>12</sup>

I am using the idea of the art of international law in this lecture not to make a normative argument, as O'Connell and other scholars do, but in a descriptive way—as a means of investigating how the visual informs and shapes international law. This includes both the “official” imagery of international law that is carefully employed to shore up its status, as well as “unofficial” images that challenge the law, or point to its failures. Of course, just as the texts of international law can promote varying concepts of justice, the visual dimension of international law can have both progressive and regressive effects.

In this lecture, I begin with an overview of what attending to visuality might reveal about international law. I then explore two examples of such an investigation.

## II. VISUALITY AND INTERNATIONAL LAW

There are many overlapping ways in which the visual interacts with international law. One such interaction is the use of visual objects to symbolize or bolster the authority of the law. We can think of the official version of judgments of the International Court of Justice, where the resplendent red wax seal of the Court, and the original

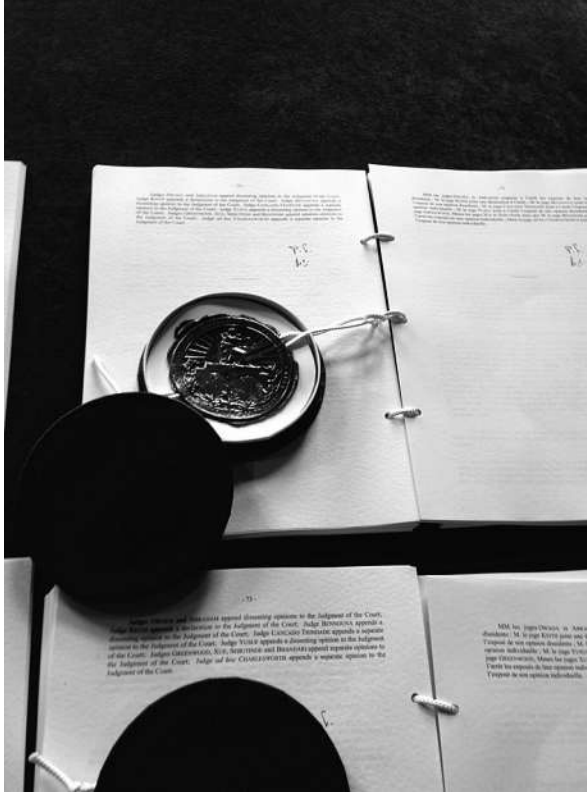
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10. O'CONNELL, *supra* note 9, at 6 (“Aesthetics draws on knowledge gained through reason applied to the universal human reaction of pleasure in the beautiful, perceived through the senses. . . . [It promotes] the good of empathy, selflessness, generosity, and love.”).

11. *Id.* at 297.

12. *Id.* at 8–9.

signatures of the judges, manifest the authority of the document.<sup>13</sup> Legal portraiture offers another example of visual emphasis of legal authority. Portraits of Grotius, for example, typically present him in the guise of “the father of international law,” with a serious mien and confident gaze.<sup>14</sup>



Source: Judge Hilary Charlesworth

A second intersection of art and international law lies in the way in

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13. *A Judgment of the International Court of Justice*, MUSEON OMNIVERSUM, [museon-omniversum.nl/en/knowledgebaseitem/een-uitspraak-van-het-internationaal-gerechtshof](https://museon-omniversum.nl/en/knowledgebaseitem/een-uitspraak-van-het-internationaal-gerechtshof) (last visited Apr. 20, 2023).

14. Illustration of Hugo Grotius, *in* GROTIUS, HUGO [HUGH DE GROOT] (1583-1645) DUTCH JURIST, ARMINIAN THEOLOGIAN, AND MISSIONS APOLOGIST, <https://www.bu.edu/missiology/missionary-biography/g-h/grotius-hugo-hugh-de-groot-1583-1645> (last visited February 1, 2023).

which images can illuminate the law or its limits. For example, international lawyers regularly use a reproduction of Pablo Picasso's 1937 painting *Guernica* on book covers.<sup>15</sup> The painting was a contemporary response to the Fascist fire-bombing of the Basque town. I assume that it is deployed by textbook authors to suggest that the shocking events in *Guernica* in 1937 demonstrate the need for international law to prevent similar atrocities. The relevance of the painting to international law received renewed attention in 2003. A tapestry version of *Guernica*, which had hung outside the Security Council Chamber in the United Nations building in New York, was covered up for a press conference in which Colin Powell, the United States Secretary of State, justified the United States invasion of Iraq.<sup>16</sup>

The "art and human rights" movement is another example of the use of imagery to galvanize or rationalize the use of international law. Artists such as Ai Weiwei regularly reference legal standards in their work, drawing attention to the plight of marginal groups. In a powerful reflection on the massive movement of refugees, Ai Weiwei's giant inflatable refugee boat stocked with hundreds of figures is entitled "Law of the Journey."<sup>17</sup>

The architecture of international organizations is a third way in which the visual informs international law. Scholars have examined how architectural style is connected to patterns of legal and political change, and vice versa. In this vein, Miriam Bak McKenna argues that the architecture of the massive buildings of the International Labour Organisation and the Palais des Nations in Geneva reflects tensions between the Westphalian era of state sovereignty and the move to internationalism.<sup>18</sup> By contrast, the United Nations building in New

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15. E.g., *Cover Illustration of Pablo Picasso's Guernica*, in GEOFFREY ROBERTSON, *CRIMES AGAINST HUMANITY: THE STRUGGLE FOR GLOBAL JUSTICE* (1999).

16. See Maggie Farley, 'Guernica' Cover-Up Raises Suspicion, L.A. TIMES (Feb. 6, 2003, 12:00 a.m.), <https://www.latimes.com/archives/la-xpm-2003-feb-06-fg-guernica6-story.html> (reporting that a UN spokesperson explained that the painting was covered to avert a "diplomatic incident").

17. *Law of the Journey/Ai Weiwei*, ARTPIL, <https://artpil.com/news/law-of-the-journey-ai-weiwei> (last visited Feb. 1, 2023).

18. Miriam Bak McKenna, *Designing for International Law: The Architecture*



York designed in the “international style” endorses European modernism as a universal language.<sup>19</sup> Bak McKenna observes that the sites and spaces of international law create law’s physical presence, as they both provide the material space in which international law is practiced, as well as an expression of the identity of the international legal community.<sup>20</sup>

Fourth, artistic images may be used to promote particular perspectives on international law. One manifestation of this is images of colonial treaty-making. Indeed, Kate Miles suggests that the “visual discourse” of international law was an important element in shoring up empires and presenting international law as a civilizing force and universally applicable.<sup>21</sup> She analyzes a work by Agostino Brunias depicting a 1773 treaty entered into between the British and the indigenous inhabitants of St Vincent in Caribbean.<sup>22</sup> Miles’s claim is that “image and art were . . . undoubtedly co-opted as a form of propaganda to promote international law as a universally applicable and profoundly ‘good’ or virtuous mode of governance.”<sup>23</sup>

A fifth intersection of art and international law is when a visual object itself constitutes the law. A good example is the “Two Row Wampum,” a beaded belt that embodied a treaty relationship between the Haudenosaunee Confederacy and Dutch settlers of the Hudson River in the early seventeenth century.<sup>24</sup> The Wampum’s carefully arranged pattern illustrates a relationship of non-domination and co-

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*of International Organizations 1922–1952*, 34 LEIDEN J. INT’L L. 1, 3 (2021).

19. *Id.* at 1.

20. *Id.* at 2.

21. Kate Miles, *Painting International Law as Universal: Imperialism and the Co-opting of Image and Art*, 8 LONDON REV. INT’L L. 367, 367, 398 (2020) [hereinafter Miles, *Painting International Law as Universal*]; Kate Miles, *Visuality of a Treaty: Reflection on Versailles*, 8 LONDON REV. INT’L L. 7 (2020).

22. Sarah Thomas, *Envisaging a Future for Slavery: Agostino Brunias and the Imperial Politics of Labor and Reproduction*, 52 EIGHTEENTH-CENTURY STUD. 117, 120–21 (2018); Miles, *Painting International Law as Universal*, *supra* note 21, at 369–73.

23. Miles, *Painting International Law as Universal*, *supra* note 21, at 368.

24. Jeffery G. Hewitt, *Certain (Mis)conceptions: Westphalian Origins, Portraiture and Wampu*, in ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW AND THE HUMANITIES 159, 167–68 (Shane Chalmers & Sundhya Pahuja eds., 2021).

existence based on respect between the Indigenous population and the European arrivals.<sup>25</sup>

These various intersections of the visual and international law often overlap with each other, so the categories I have outlined are fluid. I turn now to two examples of the art of international law that relate to the building and the work of the International Court of Justice.

### III. THE DESIGN OF THE PEACE PALACE

The idea of a permanent seat for international justice emerged from the Hague Conference on Disarmament in 1899.<sup>26</sup> Over the ten weeks of the Conference, work towards a planned Disarmament Convention quickly foundered because of political divisions.<sup>27</sup> A proposal made by the Belgian delegation for an international arbitral court emerged during the conference as a way of saving face and salvaging the hopes of the peace movement.<sup>28</sup> The Russian jurist, Frederic Martens, came up with an idea for a physical structure to house a permanent court of arbitration as well as future peace conferences.<sup>29</sup> Andrew Carnegie, who had made his fortune as a steel magnate, was persuaded to fund the building and announced a gift of 1.5 million U.S. dollars in April 1903 for a courthouse and a library of international law.<sup>30</sup> He established the Carnegie Foundation to supervise the construction of the building.<sup>31</sup> A ceremony for the laying of the foundation stone for the Peace Palace was held on 30 July 1907 during the Second Hague Peace Conference.<sup>32</sup> The Peace Palace was opened in a grand

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25. *Id.*

26. Tanja Aalberts & Sofia Stolk, *The Peace Palace: Building (of) the International Community*, 114 AM. J. INT'L L. UNBOUND 117, 118 (2020).

27. *Id.*

28. *Id.*

29. MARCO DURANTI, *THE CONSERVATIVE HUMAN RIGHTS REVOLUTION: EUROPEAN IDENTITY, TRANSNATIONAL POLITICS, AND THE ORIGINS OF THE EUROPEAN CONVENTION* 30 (2017).

30. See Randall Lesaffer, *The Temple of Peace: The Hague Peace Conferences, Andrew Carnegie and the Building of the Peace Palace (1898–1913)*, in *ONE CENTURY PEACE PALACE, FROM PAST TO PRESENT* 1, 31–33 (2013).

31. *Id.* at 30.

32. *Id.* at 32.

ceremony on 28 August 1913.<sup>33</sup>

The Peace Palace has attracted considerable scholarly attention, including illuminating discussions of its history and symbolism.<sup>34</sup> Scholars have considered the projection of visual identity and the encoding of ideals of international justice in the building, observing its resolutely Western forms and linear view of the history of international dispute resolution.<sup>35</sup> Marco Duranti has pointed out that the Peace Palace did not reflect any of the mass internationalist movements, such as Marx's idea of proletarian solidarity across national borders.<sup>36</sup> Instead, the Palace displayed "an older cosmopolitanism suited to European elites who saw themselves as impartial custodians of peace unmoved by mass politics."<sup>37</sup> The Peace Palace, according to Duranti, is "an exemplar of Christian and humanist iconography," reflecting how central religion was to fin-de-siècle internationalism.<sup>38</sup>

It is important to recall that there were alternatives to this design, submitted as part of the competition to build the Peace Palace, to emphasize the variety of models of international justice offered and the values underpinning the winning design. The Carnegie Foundation held an international competition for the design in 1905 through 1906, attracting 216 entries, which were numbered to make them anonymous for the international jury.<sup>39</sup> The drawings went on public display in the

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33. *Id.* at 5.

34. *E.g.*, DURANTI, *supra* note 29; Daniel Litwin, *Stained Glass Windows, the Great Hall of Justice of the Peace Palace*, in INTERNATIONAL LAW'S OBJECTS 463 (Jessie Hohmann & Daniel Joyce eds., 2018).

35. McKenna, *supra* note 18, at 6–9.

36. DURANTI, *supra* note 29, at 36.

37. *Id.*

38. *Id.* at 13, 29.

39. For details of the competition, see HILDE DE HAAN & IDS HAAGMA, ARCHITECTS IN COMPETITION: INTERNATIONAL ARCHITECTURAL COMPETITIONS OF THE LAST 200 YEARS 105–13 (1988); see also JOHAN JOOR & HEIKELINA VERRIJN STUART, THE BUILDING OF PEACE: A HUNDRED YEARS OF WORK THROUGH LAW: THE PEACE PALACE 1913–2013 51–57 (Bob Duynstee et al. eds., 2013). Twenty architects were invited to participate and received a fee of 2000 Dutch Guilders; the rest had to pay their own costs. See Fred A. Bernstein, *(Not) Going Dutch*, CARNEGIE MEDAL OF PHILANTHROPY (Mar. 14, 2019), <https://www.medalofphilanthropy.org>

Hague and the consensus was that there was little great architecture on view and almost no innovation.<sup>40</sup> A leading Dutch architect, KPC de Bazel, complained of the “veritable mountain of dull pretension, lacking in any living inspiration.”<sup>41</sup> He described the jury as comprised of “uncreative men of cramped spirit.”<sup>42</sup> The jury came to a decision within six days, raising the concern that its judgment had been rather superficial.<sup>43</sup>

The winning design by the French architect Louis-Marie Cordonnier, with its high-pitched roof and red brick, was regional rather than international in style, along the lines of medieval guildhalls in the Netherlands and Flanders.<sup>44</sup>



Source: Carnegie Foundation.

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/not-going-dutch.

40. Compare with the change in style witnessed at the Paris 1889 world exhibition. ARTHUR EYFFINGER, *THE PEACE PALACE: RESIDENCE FOR JUSTICE, DOMICILE OF LEARNING* 68 (1988).

41. KPC de Bazel, *quoted in* DE HAAN & HAAGMA, *supra* note 39, at 113.

42. *Id.*

43. *Id.* at 108.

44. DURANTI, *supra* note 29, at 31.

The prize committee noted that the design was “inspired by the architectural traditions of the Netherlands in the sixteenth century.”<sup>45</sup> It is sometimes called “Flemish Gothic” or “Dutch Renaissance,” a style associated with the era of Hugo Grotius. The design was strikingly close to the Dunkirk Town Hall that Cordonnier had designed years earlier.<sup>46</sup>

Carnegie himself was deeply disappointed in the chosen design of the building, as he had envisaged a neo-classical building in the style of the Parthenon.<sup>47</sup> Carnegie had imagined the Peace Palace as “the most holy building in the world because it has the holiest end in view,” adding “I do not even except St Peter’s.”<sup>48</sup> Indeed, he preferred the nomenclature of a “Temple of Peace.”<sup>49</sup>

British architects were upset that none of their number had made it into the 17 short-listed entries, complaining that “a building which was literally to turn the sword into a ploughshare . . . should be international in character and free as far as possible from local influence.”<sup>50</sup> In criticizing the provinciality of the design in 1907, the British Architectural Review nominated Italianate Renaissance style as “the undisputed style of the civilised world.”<sup>51</sup> Even the Dutch parliament debated the wisdom of the choice of Cordonnier’s design. Was it too backward looking, too Dutch and parochial, too overwrought and fussy with its many towers, gables and rooves? In 1913, *The New York Times* dismissed it as “wholly imitative of the architecture of another era, without the slightest effort at large

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45. *Id.* at 33. This description was disputed—*The New York Times* referred to it as Sicilian Romanesque. See Bernstein, *supra* note 39.

46. This was badly damaged by bombing in 1940. See Photograph of the Dunkirk Town Hall, in *L’Hôtel de Ville de Dunkerque*, DUNKERQUE, <https://www.ville-dunkerque.fr/decouvrir-sortir-bouger/histoire-patrimoine/dunkerque-aujourd'hui/lhotel-de-ville-de-dunkerque> (last visited Feb. 8, 2023).

47. DURANTI, *supra* note 29, at 31.

48. *Id.*

49. See Lesaffer, *supra* note 32, at 30.

50. J.M.W. Halley & E. Godfrey Page, *A Design for the Palace of Peace at the Hague*, 22 ARCHITECTURAL REV. 80, 81–83 (Mervyn E. Macartney ed., 1907).

51. *Id.* at 80, 83.

symbolism of modern life.”<sup>52</sup> It was “old and retardative” in style rather than “new and progressive.”<sup>53</sup>

There was litigation in the Dutch courts about whether the jurors had abided by the rules of the competition, brought by eight Dutch architects against the Carnegie Foundation.<sup>54</sup> The architects’ claim was that the jury had not selected a design appropriate for the site nor one that was consistent with the specified budget.<sup>55</sup> The claim was unsuccessful, with the Hague Tribunal deciding in 1909 that the Foundation’s only duty to competition entrants was to announce the results, and that the designated budget was only a guideline.<sup>56</sup>

Even the Carnegie Foundation Board, which had appointed the international jury, was concerned by the jury’s choice. Board members visited Cordonnier’s town hall in Dunkirk and were quite underwhelmed by what they saw.<sup>57</sup> In the end, the Carnegie Foundation insisted that Cordonnier work with a local Dutch architect, Johannes van der Steur, to refine his plans.<sup>58</sup> Cordonnier’s design was scaled back considerably to fit the budget; thus, for example, large towers on each corner of the building were abandoned and only one was constructed.<sup>59</sup>

Lille-based Cordonnier was in any event regarded as a second-tier, provincial architect, competent but without imagination. He was a

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52. JUDITH RESNIK & DENNIS E. CURTIS, REPRESENTING JUSTICE: INVENTION, CONTROVERSY, AND RIGHTS IN CITY-STATES AND DEMOCRATIC COURTROOMS 251 (2011) (quoting *The New York Times*). The English architectural press was condescending about Cordonnier’s design, describing it as “exuberant in detail and fantastic in massing” noting that it had “much of the vivacity and prettiness of the Low Countries in which it is to be built.” In its view, “English architects thought, surely rightly, that the style of the ‘Cockpit of Europe,’ dainty and debonair as is, was not the manner in which a building calculated to mark for all time the supreme arbitrament for all nations above and beyond the sword might best express its purpose.” Halley & Page, *supra* note 50, at 80.

53. Bernstein, *supra* note 39.

54. RESNIK & CURTIS, *supra* note 52, at 252.

55. *Id.*; EYFFINGER, *supra* note 40, at 74–75.

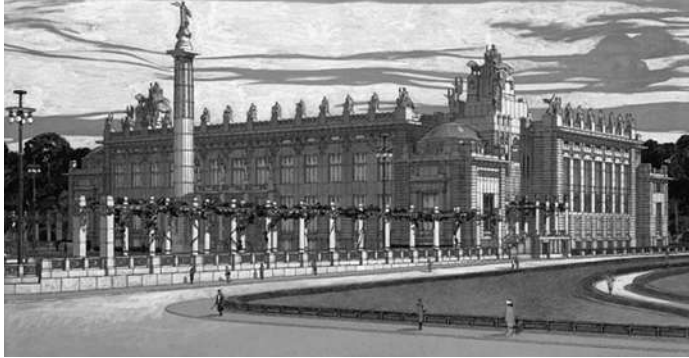
56. RESNIK & CURTIS, *supra* note 52, at 252.

57. JOOR & STUART, *supra* note 39, at 56.

58. *Id.* at 57.

59. RESNIK & CURTIS, *supra* note 52, at 251.

surprising choice given that much higher profile architects, such as the Austrian Otto Wagner, had entered the competition.<sup>60</sup> Wagner, a master of the Vienna Secessionist style, which embraced geometry and abstraction,<sup>61</sup> named his entry “The Art of the Age.”<sup>62</sup> It was awarded fourth prize.



Source: Carnegie Foundation.

Most of the entries harked back to historical styles, such as the Pantheon, or gothic halls of Anglo-Saxon colleges. The fifth-place winner by the American architects Howard Greenley and Herbert Olin was, for example, in neo-classical style.<sup>63</sup> There were exceptions to this trend, including that of the Italian architect G. Mancini, who produced a mausoleum-type structure. The design of Félix Debat of France evoked ancient Egypt by using a pyramid form.

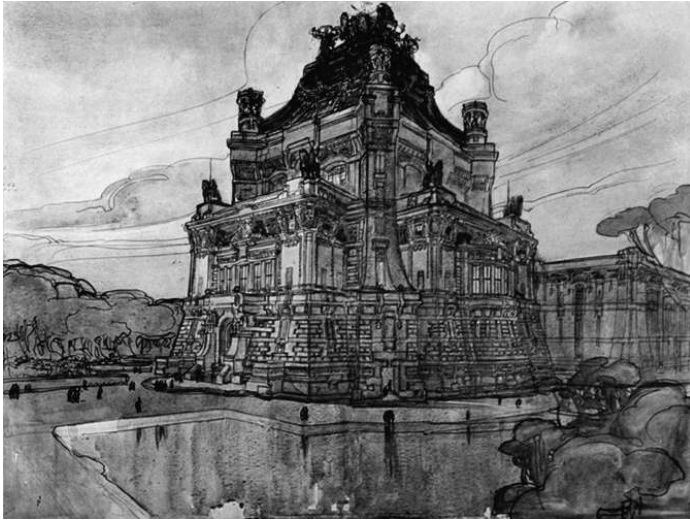
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60. *Id.*

61. *Vienna Secession*, DICTIONARY OF MODERN ARCHITECTURE (Nov. 16, 2015), <https://voices.uchicago.edu/201504arth15709-01a2/2015/11/16/vienna-secession>.

62. Though in fact his Peace Palace design is rather traditional. *See* Bernstein, *supra* note 39.

63. *Id.*



*Source: Carnegie Foundation.*



*Source: Carnegie Foundation.*



There was one resolutely modern design—that of the Finnish architect Eliel Saarinen who was then at the start of his career.<sup>64</sup> Saarinen called his striking design “L’Homme.”<sup>65</sup> It was almost sculptural with simple forms, avoiding historical references and elaborate detail. While the design was enthusiastically welcomed in the architectural press, it did not impress the competition jury and failed to be listed among the six top works.<sup>66</sup>



Source: Carnegie Foundation.

KPC de Bazel, the contemporary Dutch architect, praised Saarinen’s design. It was, he wrote, “throbbing with life.”

This building stretches out horizontally with a slender necked dome in the middle. The simplicity of this plan emanates a conscious and earnest conviction. Complete harmony is achieved in the main structure through a principle of balanced contrasts: repose and motion, the ground base of all

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64. See ALBERT CHRIST-JANER, *ELIEL SAARINEN: FINNISH-AMERICAN ARCHITECT AND EDUCATOR* 35 (1979).

65. Jörg Martin Merz, „De ongelukkige prijsvraag”—*Zum Architekturwettbewerb für den Friedenspalast in Den Haag 1905/06* [“The Unlucky Contest”—*On the Architectural Competition for the Peace Palace in The Hague in 1905/06*], 6 *INSITU: ZEITSCHRIFT FÜR ARCHITEKTURGESCHICHTE* [INSITU: J. ARCHITECTURAL HIST.] 213, 227 (2014).

66. Bernstein, *supra* note 39.

building. This gives the building, despite its solemnity and solidity, a sense of life and movement, and this serious energy is underlined by the delicacy of the decoration.<sup>67</sup>

The Carnegie Foundation indeed seriously considered overriding the decision of the jury to select Saarinen's design, but this plan was abandoned following a critical report on its technical and fiscal aspects.<sup>68</sup> In the end, Saarinen was able to recycle the design to win a competition for the Helsinki Central Railway Station, eventually constructed in 1910.<sup>69</sup>

Paying attention to the design of the Peace Palace highlights the limitations of its account of international adjudication. It suggests that membership of international society is based on adherence to Western ideals of statehood, peace and economic progress.<sup>70</sup> There is no recognition in the structure or décor, for example, of the connection between the international legal order and colonialism.<sup>71</sup> In this sense, the Peace Palace gives material expression to what Antony Anghie calls a “dynamic of difference”—the imagined gap between the civilized European world and the uncivilized non-Europeans could be bridged only through adherence to particular forms of politics and law.<sup>72</sup> Duranti has indeed proposed a reading of the Peace Palace as a guide to achieving civilization. On this analysis, non-European states “could gain admission to the society of civilized nations on the condition that their domestic and external affairs met certain . . . requirements, among them a legal system that guaranteed classical liberal freedoms.”<sup>73</sup> Gifts to the Peace Palace from states beyond Europe indeed manifest an eagerness to match European tastes. Japan

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67. KPC de Bazel, *quoted in* DE HAAN & HAAGMA, *supra* note 39, at 113.

68. *See* EYFFINGER, *supra* note 40, at 72.

69. *See* *Eliel Saarinen's Railway Station as Setting for New Eliel Competition*, HELSINGIN KAUPUNGINMUSEO, <https://www.helsinginkaupunginmuseo.fi/2020/12/09/eliel-saarinens-railway-station-as-setting-for-elielinaukio-competition> (last visited Apr. 24, 2023).

70. *See* DURANTI, *supra* note 29, at 36–37.

71. *See id.* at 39.

72. Antony Anghie, *Race, Self-Determination and Australian Empire*, 19 MELB. J. INT'L L. 423, 449 (2018).

73. *See* DURANTI, *supra* note 29, at 36.

contributed nine magnificent silk tapestries, for example, whose weaving incorporated French techniques.<sup>74</sup>

#### IV. PHOTOGRAPHY IN THE NAURU CASE

The second example of the interaction between visuality and international law I will examine is the use of images in international litigation. Legal institutions often work with photographs because such images are thought to provide objective information—cameras are “assumed to be a benign machine that merely records.”<sup>75</sup> Susan Sontag observed that photography allows us “to appropriate the thing photographed. . . . Photographed images do not seem to be statements about the world so much as pieces of it, miniatures of reality that anyone can make or acquire.”<sup>76</sup> Photographs can, however, be contested as partial and biased representations of a situation, capable of manipulation. There has been some scholarly discussion of photography in domestic court cases,<sup>77</sup> and in the context of international criminal tribunals,<sup>78</sup> but little attention has been paid to the role of images in the International Court of Justice.

Visual images are regularly used by parties in contentious litigation and advisory opinions. They frequently appear in the written pleadings of parties and are sometimes displayed during oral argument. I consider here the use of photography in the *Certain Phosphate Lands in Nauru* case.<sup>79</sup> Nauru’s legal arguments were intertwined with imagery, adding weight to its more arcane legal arguments.

Rich phosphate resources were discovered on the small Pacific island of Nauru at the start of the twentieth century. Nauru had been a German protectorate until the First World War. Following the War,

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74. See Aalberts & Stolk, *supra* note 26, at 121.

75. Leslie J. Moran, *Visual Justice*, 8 INT’L J.L. CONTEXT 431, 435 (2012).

76. SUSAN SONTAG, ON PHOTOGRAPHY 4 (1977).

77. *E.g.*, Glenn Porter & Michael Kennedy, *Photographic Truth and Evidence*, 44 AUSTL. J. FORENSIC SCIS. 183, (2012).

78. *E.g.*, Immi Tallgren, *Come and See? The Power of Images and International Criminal Justice*, 17 INT’L CRIM. L. REV. 259, 261 (2017).

79. *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Preliminary Objections, Judgment, 1992 I.C.J. 240 (June 26).

Australia, New Zealand, and the United Kingdom then became mandatory powers under the League of Nations, and later trustees under the United Nations.<sup>80</sup> As trustees, these states were able to create a corporate structure to exploit Nauru's phosphate deposits which were valuable as farming fertilizer.<sup>81</sup> The phosphate mining caused massive environmental destruction.<sup>82</sup> Nauru became an independent state in 1968.<sup>83</sup> In May 1989, it instituted proceedings against Australia in the International Court of Justice relating to a dispute over the rehabilitation of phosphate lands mined before Nauru's independence, as well as the historical calculation of royalty payments.<sup>84</sup>

In its pleadings, Nauru claimed that Australia had breached its obligations of trusteeship under Article 76 of the UN Charter and the Trusteeship Agreement of 1 November 1947.<sup>85</sup> Nauru also identified breaches of Australia's obligations under general international law, notably the principle of self-determination and the principle of permanent sovereignty over natural wealth and resources.<sup>86</sup> Australia contested both the admissibility of Nauru's application and the Court's jurisdiction, filing its Preliminary Objections in December 1990.<sup>87</sup> The oral arguments on the preliminary phase in November 1991 took eight days.<sup>88</sup>

Nauru commissioned a well-known Australian photographer, John

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80. *Id.*

81. *Id.*

82. *Id.*

83. *Id.*

84. For background on the case, see Antony Anghie, *The Heart of My Home: Colonialism, Environmental Damage and the Nauru Case*, 34 HARV. INT'L L.J. 445, 453, 461 (1993), and CAIT STORR, INTERNATIONAL STATUS IN THE SHADOW OF EMPIRE: NAURU AND THE HISTORIES OF INTERNATIONAL LAW 248–52 (2020).

85. Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, Judgment, 1992 I.C.J. 240, ¶ 5 (June 26).

86. Memorial of Nauru, Certain Phosphate Lands in Nauru (Nauru v. Austl.), 1990 I.C.J. Pleadings, ¶¶ 415–29 (Mar. 20, 1990)

87. For outline of these objections, see James Crawford, 'Dreamers of the Day': Australia and the International Court of Justice, 14 MELB. J. INT'L L. 520, 540–43 (2013).

88. Nauru v. Aust., 1992 I.C.J. at 243, ¶ 4.

Gollings, to take photographs in preparation for the court case.<sup>89</sup> Many were aerial shots, taken through “the open window of the pilot’s seat at 20,000 feet on oxygen in a Boeing 767.”<sup>90</sup> Some of Gollings’ photos were included in Nauru’s memorial (in black and white) to show Nauru’s unique topography<sup>91</sup> and to illustrate the devastation of the land by phosphate mining. Much of Nauru had been “mined out” such that when it was returned to the Nauruans, its ICJ Memorial stated it “was neither cultivable nor habitable and for all practical purposes useless.”<sup>92</sup>

Particularly striking was Nauru’s use of photos of pockets of forest surrounding the Buada Lagoon in the south-east of the island to “provide . . . some indication of the plateau’s appearance before mining.”<sup>93</sup>

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89. John Gollings, NAT’L PORTRAIT GALLERY, <https://www.portrait.gov.au/people/john-gollings-1944> (last updated 2019); John Gollings, *Nauru: Aerial Documentation of the Phosphate Mine*, <https://johngollings.com/cultural-projects/nauru> (last visited Feb. 8, 2023) [hereinafter Gollings, *Nauru: Aerial Documentation of the Phosphate Mine*].

90. See Gollings, *Nauru: Aerial Documentation of the Phosphate Mine*, *supra* note 89.

91. Memorial of Nauru, *supra* note 86, ¶¶ 200–01 referring to photographs 8 and 10, and *id.* at ¶ 211, referring to photograph 5.

92. *Id.* ¶ 96, referring to photographs 2–5. See also *id.* ¶ 212, referring to photographs 1, 2, 8, and 9.

93. *Id.* ¶ 212, referring to photographs 8 and 9.



Source: *Memorial of Nauru, Volume 2.*

This offered powerful support for the claims in Nauru's memorial that:

Before the island was mined, Nauruan landowners were able to identify their own areas of land through stone boundary markers. Various trees were grown on this land, such as pandanus and coconut which were much valued. But once mined, the areas became completely inaccessible and, without careful survey, almost unidentifiable.<sup>94</sup>

The Nauruan Memorial conceded that there was a substantial natural regenerative process that occurred on mined land, with ferns and other plants taking root in the pit bottoms, but that "owing to the

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94. See *id.* ¶¶ 214–19 on the social and cultural effects of phosphate mining, describing a rather bucolic life in a subsistence economy.

pinnacle proliferation, such land is inaccessible and completely unusable.”<sup>95</sup> It relied on the photographs to illustrate this claim.<sup>96</sup>

I have not been able to find any photographs used by Australia, although annexed to its Preliminary Objections was an article entitled “*This is the World’s Richest Nation—All of It!*” which had appeared in the *National Geographic* magazine in 1976.<sup>97</sup> In classic *National Geographic* style, the article included large and colorful photographs. It emphasized Nauru’s carefree lifestyle and affluence, quoting an Australian official saying enviously “[w]e die worrying; they die laughing.”<sup>98</sup>

In oral argument before the Court, Counsel for Nauru, Professor VS Mani, led the Court through the photographs. Professor Mani quoted the arresting verbal images in a 1962 report from a United Nations Visiting Mission: “it is impossible to imagine in advance the extraordinary picture which [the lands] present . . . acres of barren, sharp, coral pinnacles like huge, jagged, crowded gravestones.”<sup>99</sup> He then drew the Court’s attention to a photograph, an aerial view of the mined-out phosphate lands, to show the way that phosphate mining on Nauru was unlike other forms of mining because it left the limestone pillars (known as “coral pinnacles”) in its wake.<sup>100</sup> Professor Mani presented the photos as conclusive proof of environmental degradation. He took it that the Court would immediately “appreciate the problem” from the photos and did not need to engage in discussion of “any elevated environmental standard.”<sup>101</sup> Another member of

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95. *Id.* ¶ 213.

96. *Id.* annex 2, photographs 4–5.

97. Mike Holmes, *This Is the World’s Richest Nation—All of It!*, 150 NAT’L GEOGRAPHIC 344, 344–53 (1976).

98. *Id.* at 352.

99. Verbatim Record of Nov. 15 at 39, *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), Preliminary Objections, Judgment, 1992 I.C.J. 240 (June 26), CR 91/18 <https://www.icj-cij.org/public/files/case-related/80/080-19911115-ORA-01-00-BI.pdf>.

100. *Id.*

101. *Id.* at 44; *see also* Verbatim Record of Nov. 18 at 8, 10, 30, *Certain Phosphate Lands in Nauru* (Nauru v. Austl.), Preliminary Objections, Judgment, 1992 I.C.J. 240 (June 26), [https://www.icj-cij.org/public/files/case-related/80/080-19911118-ORA-](https://www.icj-cij.org/public/files/case-related/80/080-19911118-ORA-01-00-BI.pdf)

Nauru's team, Professor Barry Connell, in turn took the Court to photograph 1 to emphasize the unique nature of Nauru's situation, observing that "at the conclusion of the phosphate mining the usable territorial area of the country will be reduced by 80 per cent."<sup>102</sup>



Source: *Memorial of Nauru, Volume 2.*

Gavan Griffith, Australia's Solicitor-General, tried to counter Nauru's use of photographs, pointing out that "[t]o put this devastating view into perspective, we must remind the Court that some two-thirds of mined lands have been excavated by Nauru since independence. Thus, two-thirds of photograph 2 fairly depicts exploitation for which

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01-00-BI.pdf.

102. Verbatim Record of Nov. 15, *supra* note 99, at 35.



Nauru accepts responsibility.”<sup>103</sup>



Source: *Memorial of Nauru, Volume 2.*

In his summing up, Nauru’s Counsel, VS Mani, responded rather tartly saying that Nauru was well aware of its responsibility for two-thirds of the rehabilitation and that it had made clear that photograph 2 was not in fact from an area of Australian-administered mining operations. The photo of recent mining was shown, he said, “simply to demonstrate the method of mining and how one arrives at the situation shown in the so-called ‘devastating view.’”<sup>104</sup>

James Crawford, appearing for Nauru, pointed to photograph 2 to answer an Australian argument that, on Nauru’s independence, Australia’s obligation to rehabilitate the mined lands was devoid of object and thus extinguished:

One only has to look at photograph 2 . . . to see that the obligation was not

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103. Verbatim Record of Nov. 21 at 9–10, *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Preliminary Objections, Judgment, 1992 I.C.J. 240 (June 26), <https://icj-cij.org/public/files/case-related/80/080-19911121-ORA-01-00-BI.pdf>.

104. Verbatim Record of Nov. 22 at 14, *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Preliminary Objections, Judgment, 1992 I.C.J. 240 (June 26), <https://icj-cij.org/public/files/case-related/80/080-19911122-ORA-01-00-BI.pdf>.

and is not “devoid of object.” It is true that, after independence, Australia had no right simply to come onto the land and carry out its own rehabilitation scheme contrary to the wishes of Nauru. But that did not mean it was free of any obligation at all.<sup>105</sup>

It is striking that the photos in Nauru’s Memorial contain no human figures. Many of them are aerial shots, emphasizing Nauru’s small size and vulnerability. Others were images of a Pacific paradise which were contrasted with the moon-like effects of phosphate mining.

In 1992, the ICJ rejected most of Australia’s preliminary objections.<sup>106</sup> James Crawford later noted that the Court’s judgment “had exposed a certain sympathy towards Nauru’s argument.”<sup>107</sup> The ICJ’s narrow reading of the *Monetary Gold* principle allowed it to overrule Australia’s objection that the Court could not determine Australia’s liability to Nauru without having its co-administrators, the UK and New Zealand, being before the court.<sup>108</sup> Before oral argument on the merits in the case was heard, however, Nauru and Australia agreed to discontinue the case after reaching a settlement in September 1993.<sup>109</sup>

The Court’s judgment makes no reference to the photographs submitted by Nauru. And yet, the photos had considerable ethical power: they sent a strong message about the type of self-determination Australia had granted Nauru. In Antony Anghie’s words, Australia “hand[ed] over a devastated landscape to a people that were deliberately neglected and subordinated. . . . Mining was the only industry that Australia fostered on the island, and so Nauru[‘s] . . . only means of economic development was the continuation of the

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105. *Id.* at 32–33.

106. The ICJ upheld one that dealt with Nauru’s claim to the overseas assets of the British Phosphate Commissioners. *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Preliminary Objections, Judgment, 1992 I.C.J. 240, ¶ 72 (June 26).

107. Crawford, *supra* note 87, at 22.

108. Compare the ICJ’s broader reading of the principle, *id.*, with *Case Concerning East Timor (Port. v. Austl.)*, Judgment, 1995 I.C.J. 90, ¶ 29 (June 30).

109. *Certain Phosphate Lands in Nauru (Nauru v. Austl.)*, Order, 1993 I.C.J. 322, 322–23 (Sept. 13).

mining that was so damaging to the island.”<sup>110</sup>

Some Australian officials and politicians felt rather stung by the Nauruan action in coming before the International Court of Justice. Australia’s position generally was to emphasize the perceived profligacy of the Nauruan people, and Nauru’s own failure of responsibility for rehabilitation.<sup>111</sup> Others, however, recognized Australia’s continuing responsibilities to Nauru.<sup>112</sup> If the matter had reached the merits, Australia planned to argue that it had paid generously for Nauruan phosphate and that “the Nauruans have been more than adequately recompensed and that with prudent financial management since independence they could have provided for the future.”<sup>113</sup> These positions were undermined by the photos. Archival files show that, within the Australian government, there was a keen sense that Australia was unlikely to look good if it took a legalistic

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110. Anghie, *supra* note 72, at 434.

111. *Id.* at 432–33.

112. For example, in a report on a visit to Nauru in May 1990, MEK Neuhaus (DFAT) observed: “The case aside, while one might wish with mining over to forget about Nauru, it is a problem that will not go away. Having been a partner in the creation of the problem, we cannot unfortunately avoid the responsibility of being a partner in the solution. Ideally the 1968 independence settlement should have resolved the issue, but the reality is that it did not. While this may be the Nauruans’ fault, the consequences will affect not only them, but Australia and the region.” M.E.K. Neuhaus, Foreign Affairs and Trade Minutes Paper, *Nauru – Pits of the Pacific: Report of Visit 20–24 May 1990*, ¶ 16 (May 30, 1990) (on file with the National Archives of Australia, NAA: A9737, 1990/3276 Part 1), <https://recordsearch.naa.gov.au/SearchNRRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF>.

113. Department of Foreign Affairs and Trade, Record of Branch Heads Meeting, *POLMIL Capacity in DFAT International Court of Justice: Nauru and Timor Gap*, Attachment C, at 2 (Jan. 16, 1990) (on file with the National Archives of Australia, NAA: A9737, 1990/3276 Part 1), <https://recordsearch.naa.gov.au/SearchNRRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF>; *see also* Cablegram from PP Nauru/8332 to FM. Canberra/FA, *Nauru ICJ Case—Visit to Nauru*, ¶ 2 (May 11, 1990) (on file with the National Archives of Australia, NAA: A9737, 1990/3276 Part 1), <https://recordsearch.naa.gov.au/SearchNRRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF> (“For your information, our aim through the consultants’ report is to demonstrate that Nauru was left in a good economic position at independence and if properly managed the income from its resources would have provided for its long term economic security including providing sufficient money for land rehabilitation.”).

line.<sup>114</sup>

In June 1990, before the Court hearing and just after its Memorial had been filed, Nauru hosted an exhibition of John Gollings' photos at Nauru House in Melbourne—a building whose construction was funded by the sale of phosphate—during World Environment Week.<sup>115</sup> It was organized by a media consultant and entitled “Nauru 1990—The Stark Reality.”<sup>116</sup> A glossy exhibition brochure entitled “Nauru 1990: An environmental challenge for Australia and the Pacific” claimed that the photos “captur[ed] the results of ever-creeping devastation on a formerly lush tropic island . . . [as well as] the

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114. *E.g.*, Letter from Barry Wyborn, High Commissioner to Nauru, to Michael Thawley, Assistant Secretary of Australian Department of Foreign Affairs and Trade, at 1 (Feb. 21, 1990) (on file with the National Archives of Australia, NAA: A9737, 1990/3276 Part 1), <https://recordsearch.naa.gov.au/SearchNRRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF>. Thawley had written: “I’m not so keen on acknowledging colonial mistakes.” Letter from Michael Thawley, Assistant Secretary of Australian Department of Foreign Affairs, to Barry Wyborn, High Commissioner to Nauru (Feb. 7, 1990) (on file with the National Archives of Australia, NAA: A9737, 1990/3276 Part 1), <https://recordsearch.naa.gov.au/SearchNRRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF>. Wyborn replied: “I’m not too keen on carrying the sins of my fathers either but I guess what I had in mind was to draw upon the precedent set in our domestic approach to aboriginal policies. Where my recollection is that rarely is a speech made that some Minister or other doesn’t recognise the self evident fact that as late as the 1960s government policies and community attitudes were not always enlightened. Obviously there is a real problem in the particular context of the ICJ and Nauru in that any admission risks misinterpretation as acceptance of responsibility for rehabilitation. I’m not sure that has to be the case. On the other hand I wouldn’t like the job of arguing our colonial policies stood the test of time. They may well stand comparison with other of their era but that is a separate point. I guess it’s just my naive open honest manner: if it’s true why not acknowledge it? If we don’t volunteer the point I’m sure others will ram it down our throats.” Letter from Barry Wyborn to Michael Thawley, *supra*.

115. Bernard Dowiyogo, President of the Republic of Nauru, Opening Speech of His Excellency the President on the Occasion of the Photographic Exhibition by John Gollings: Nauru 1990—The Stark Reality (June 12, 1990) (on file with the National Archives of Australia, NAA: A9737, 1990/3276 Part 1), <https://recordsearch.naa.gov.au/SearchNRRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF>.

116. *Id.*; see also Helen Bogdan & Assocs., *Media Statement: Nauru 1990—The Stark Reality* (on file with the National Archives of Australia, NAA: A9737, 1990/3276 Part 1), <https://recordsearch.naa.gov.au/SearchNRRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF>.

extraordinary and all-pervasive intrusion of the phosphate industry into the lives of the inhabitants.”<sup>117</sup> It continued:

The powerfulx [sic] photographs display the desolation and consuming heat of the mined plateau in the aerial photograph displaying the ‘oven’ effect [the plateau being so hot that the updraft disperses clouds].

The delightful but sad photograph of the Australian rules football match amply demonstrates the intrusion of the industry as the game is played jammed up against the immense and all-embracing dryers.<sup>118</sup>

The opening speech by President Dowiyogo of Nauru described the photographs as:

[A] clear and potent reminder of the destructive nature of mining and the extraordinary manner in which an island industry can surround and seemingly overpower a community. In some ways, it also illustrates the comparative uncontrollability of such a powerful source. Once mining commenced, it was difficult to contain it.<sup>119</sup>

The Nauruan media campaign was strikingly successful. The case was covered by the national press and television and pitched as a David against Goliath fight.<sup>120</sup> The Australian Archives show that

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117. Helen Bogdan & Assocs., *supra* note 116, at 1.

118. *Id.* at 3.

119. Dowiyogo, *supra* note 115, at 7–8.

120. An Australian weekly magazine, THE BULLETIN, ran a feature article on the case using John Gollings’ photos. *Nauru—Island in Distress*, BULLETIN 45, 45–47 (June 19, 1990) (on file with the National Archives of Australia, NAA: A9737, 1990/3276 Part 1), <https://recordsearch.naa.gov.au/SearchNRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF>. The weekend supplement to the newspapers the *Sydney Morning Herald* and the *Melbourne Age* also ran an article with photos: Cameron Forbes & Sebastian Costanzo, *Poor Little Rich Island*, GOOD WEEKEND 45–50 (June 9, 1990) (on file with the National Archives of Australia, NAA: A9737, 1990/3276 Part 1), <https://recordsearch.naa.gov.au/SearchNRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF>; Interview by Darren Hinch with John Gollings (Channel Seven Network television broadcast June 6, 1990) 2–3 (on file with the National Archives of Australia, NAA: A9737, 1990/3276 Part 1), <https://recordsearch.naa.gov.au/SearchNRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF>. “Photographer [Gollings]: And then there is a series of really telling images of these enormous bulldozers literally ripping and raping and raking the earth to get the top soil off to expose the phosphate, and then a series of aerial

Australian officials were concerned about the media campaign and conscious that their position might be unappealing to the public. The head of the Australian government's "Nauru ICJ Task Force" reported that the Nauru media campaign was "quite sophisticated," and proposed a "low key" response, emphasizing that "in obtaining control of the phosphate resource at independence, the Nauruans also took on the responsibility for rehabilitation."<sup>121</sup>

The photographer, John Gollings, claimed that "these images proved the case."<sup>122</sup> While this statement is not accurate from a legal perspective, the images had a potent emotional and ethical impact, which may be why Australia sought to question their accuracy in oral argument. Australia seemed conscious that it was depicted in an unappealing role as an imperial power in this context.<sup>123</sup> Australia however was unable to marshal any images to counter the Nauruan ones, or to give affective power to its arguments. We can, then, understand Nauru's deployment of images in the World Court litigation as the visual effectively transmitting the voice of a marginalized actor in the international order.

Theorists of visual culture have questioned the notion of photographs as a record of facts, or as "miniatures of reality."<sup>124</sup> Moving beyond debates about the objectivity of photography, Ariella

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photographs which just show this extraordinary lunar effect at 20,000 feet. We went across in the island's own plane and it just showed this total devastation. It's amazing—you've actually got to look very closely at the photographs to realise that they are not a blank piece of grey photographic paper. It's that extraordinary. Journalist [Hinch]: Do you think photographs will hold the key to the emotion to sway a court case? Photographer [Gollings]: I actually think in this case that one picture really does do more than a lot of legal argument. There are one or two photographs in this exhibition which I think would win a court case." *Id.*

121. M.E.K. Neuhaus, Foreign Affairs and Minute Paper, *Nauru ICJ Case: Media*, ¶¶ 2–4 (June 18, 1990) (on file with the National Archives of Australia, NAA: A9737, 1990/3276 Part 1), <https://recordsearch.naa.gov.au/SearchNRRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF>.

122. Gollings, *Nauru: Aerial Documentation of the Phosphate Mine*, *supra* note 89.

123. See Anghie, *supra* note 72, at 425 (arguing that Australia's role as a colonial power "powerfully influenced the origins of Australian international law").

124. SONTAG, *supra* note 76, at 2.

Azoulay has argued that photography should be understood as a form of relations between individuals and the powers that govern them.<sup>125</sup> On this analysis photographs do not present a stable point of view; they are the result of an encounter between several actors, including the photographer, the photographed, and the spectator.<sup>126</sup> Photographs, then, are more than simply the photographer's point of view. They are images whose meanings and significance are shaped by social and cultural factors and are mediated by each observer.<sup>127</sup>

## V. CONCLUSION

Roland Barthes reminds us that images can have multiple levels of meaning.<sup>128</sup> They are informational and symbolic, as well as transmitters of a non-articulated meaning that lies beyond language and operates on the emotions.<sup>129</sup> Images not only shape but indeed constitute the world around us. As we can see in current conflicts, they can be used by all sides to construct "reality."<sup>130</sup> It is unsurprising, then, that the visuality of law can be as significant as its textuality. The written word provides a single dimension of law's power. Just as international law influences some aspects of the visual, visual objects can reflect, influence or even shape events in international law and sustain or undermine the law's legitimacy and authority.

Paying attention to the visual highlights two dimensions of international law which gain power precisely through being invisible. The first is the role of framing and representation in international law.

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125. ARIELLA AZOULAY, *THE CIVIL CONTRACT OF PHOTOGRAPHY* 137 (Rela Mazali & Ruvik Danieli trans., 2008).

126. See Ariella Azoulay, *What is a Photograph? What is Photography?*, 1 *PHIL. PHOTOGRAPHY* 9, 10–11 (2010).

127. See Alice Palmer, *Image and Art in the 'Whaling in the Antarctic Case,'* in *RESEARCH HANDBOOK ON ART AND LAW* 408, 409, 417 (Jani McCutcheon & Fiona McGaughey eds., 2020).

128. Roland Barthes, *The Third Meaning: Notes on Some of Eisenstein's Stills*, 11 *ARTFORUM* 46, 46 (1973).

129. *Id.* at 50.

130. Debbie Lisle, *Travel*, in *VISUAL GLOBAL POLITICS* 314, 315 (Roland Bleiker ed., 2018). For example, Debbie Lisle argues that the more that images depict Syria as "violent, dangerous and chaotic, the more everyone's encounters with, and responses to, Syria will reflect that assumption."

The art and architecture of the Peace Palace, for example, reinforces particular ways of seeing international adjudication and its practitioners. Visuality sheds light on the way the international community is represented, and the question of who belongs, and how. At the same time, visuality can be a formidable tool for those at the margins of international law to challenge its limits. Taking visuality seriously means asking whose frames, emotions, and subjectivities are made prominent and whose are silenced.

Second, attention to visuality underlines the creative, symbolic, and affective dimensions of the world of international law, as the use of photography in the Nauru case indicates. We accept that there is creativity, subjectivity and interpretation wrapped up in every artistic work. We observe the technical skills, insights, and imagination of the artist and look for signs of the artist's persona—their subjectivity. Indeed, often the greater the creativity and subjectivity, the more we appreciate the artistry. For example, we understand that Picasso's *Guernica* is not realism; it is one take on what happened, and we celebrate it for its emotional power. With law, by contrast, we assume that there is a single perspective on the facts and that the applicable principles are accessible through rational debate based on language.

Law, like art, is a meaning-making activity that has material effects. But while artists are conscious of the constructed nature of their work, lawyers are not.<sup>131</sup> Lawyers' focus on written texts can reinforce a sense of precision and objectivity, while bringing the visual into conversation with law reminds us that the law also requires creativity and interpretation. Despite its assertion of a global reach, international law emerges as more bound up with plurality and the personal than the textual routines we are bound up in suggest.<sup>132</sup> Taking visuality into account will generate a richer and more nuanced account of legal principles that responds to our multi-dimensional world.

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131. See, e.g., Sarah Sentilles, *Creation Stories: The World-Making Power of Art*, GRIFFITH REV. (Jul. 28, 2021), <https://www.griffithreview.com/articles/creation-stories>.

132. Desmond Manderson, *AD 2014: A Review of Eve Darian-Smith, Laws and Societies in Global Contexts—Contemporary Approaches*, 8 L. & HUMAN. 77, 86 (2014).