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Discussant Commentary on the Twenty-Fourth Annual Grotius Lecture

Abstract

I express my sincere thanks to the American Society of International Law and the International Legal Studies Program at American University Washington College of Law for the invitation to be this year's commentator. It is indeed an honor to respond to Judge Charlesworth's erudite Grotius Lecture: "The Art of International Law."

Just getting to say Judge Hilary Charlesworth alone is very meaningful. She is only the fifth woman judge out of 110 total judges on the International Court of Justice (ICJ) so far. Thanks to hard work by feminist international lawyers like her, there is finally an uptick in women's inclusion in the field of international law. That is great news, but there is a long way to go. The progress being made has to be nurtured, expanded, and protected. I want to start off by congratulating the 2022 Grotius lecturer and thanking her personally, and her whole generation of feminist international lawyers around the world, for working so hard to increase the representation of women in international law and for creating space for many of us within the discipline.

Keywords

Commentary, International Law, International Court of Justice, ICJ, United Nations, UN

DISCUSSANT COMMENTARY ON THE TWENTY-FOURTH ANNUAL GROTIUS LECTURE*

KARIMA BENNOUNE**

I express my sincere thanks to the American Society of International Law and the International Legal Studies Program at American University Washington College of Law for the invitation to be this year's commentator. It is indeed an honor to respond to Judge Charlesworth's erudite Grotius Lecture: "The Art of International Law."

Just getting to say *Judge* Hilary Charlesworth alone is very meaningful. She is only the fifth woman judge out of 110 total judges on the International Court of Justice (ICJ) so far. Thanks to hard work by feminist international lawyers like her, there is finally an uptick in women's inclusion in the field of international law. That is great news, but there is a long way to go. The progress being made has to be nurtured, expanded, and protected. I want to start off by congratulating the 2022 Grotius lecturer and thanking her personally, and her whole generation of feminist international lawyers around the world, for working so hard to increase the representation of women in international law and for creating space for many of us within the discipline.

Turning to the topic of Judge Charlesworth's lecture, as a former United Nations Special Rapporteur in the field of Cultural Rights, I am delighted she has chosen to focus on the intersection of art and international law, and to consider how images and the visual sphere affect our discipline. We are seeing ever-greater international legal engagement in this area. Another example is the March 2020

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symposium in *AJIL Unbound* on “Art, Aesthetics and International Law.”¹ That symposium and this lecture are evidence that art and international law are becoming more acquainted.

I will consider this interplay of international law and culture from a cultural rights perspective. Judge Charlesworth suggests that international lawyers have mainly focused on “what art can do for international law.”² This is certainly true in some areas of international law scholarship. However, I would add, as a friendly amendment, that in the cultural rights field, we have also looked at what international law can do for art and for artists. International law protects artistic expression, even as artistic expression can help advance international law agendas.³

Cultural rights—including the right to take part in cultural life without discrimination, and freedom of artistic expression—are prerequisites for communicating visually. These rights are a core part of the universal human rights framework grounded in the Universal Declaration, including in Article 27, and guaranteed by both international covenants on human rights.⁴

Cultural rights are vital in and of themselves, but have also been increasingly recognized as important elements of accessing justice, and as “fundamental to creating and maintaining peaceful and just societies and to promoting enjoyment of other universal human rights.”⁵ As I noted in a 2018 report to the UN Human Rights Council

1. See Symposium, *Art, Aesthetics, and International Law*, 114 AM. J. INT'L L. UNBOUND 103, 103 (2020) (providing a general framework for consideration of art and international justice).

2. See generally Hilary Charlesworth, *24th Annual Grotius Lecture Series: The Art of International Law*, 38 AM. U. INT'L L. REV. 609, 612–16 (2023) (discussing the potential positive implications of art on international law).

3. See Farida Shaheed (Special Rapporteur in the Field of Cultural Rights), *The Right to Freedom of Expression and Artistic Creativity*, ¶¶ 1–6, U.N. Doc. A/HRC/23/34 (Mar. 14, 2013) (discussing legal protections for what the Special Rapporteur called the right to freedom of artistic expression).

4. See G.A. Res. 217 (III) A, Universal Declaration of Human Rights art. 27 (Dec. 10, 1948).

5. See Karima Bennoune (Special Rapporteur in the Field of Cultural Rights), *The Contribution of Artistic and Cultural Initiatives to Creating and Developing Right-Respecting Societies*, ¶ 2, U.N. Doc. A/HRC/37/55 (Jan. 4, 2018) (discussing how arts and culture can make significant contributions towards developing and maintaining societies in which human rights are increasingly realized).

on socially engaged cultural initiatives, “humanity dignifies, restores and reimagines itself through creating, performing, preserving and revising its cultural and artistic life Cultural practices and the arts are resources for marshalling attention to urgent concerns . . . and imagining and giving substance to a more rights-friendly future.”⁶

Despite these contributions, international lawyers only rarely engage directly with culture and the cultural dimensions of their discipline, making it all the more important that an ICJ judge is highlighting these aspects. Pablo de Greiff, former UN Special Rapporteur on the Promotion of Truth, Justice, Reparation and Guarantees of Non-Repetition, has argued that “transitional justice has generally and systematically ignored claims of culture,” and has insisted on the importance of recognizing the “unparalleled potential of cultural interventions” and the critical roles they can and should play in transitional justice processes.⁷

Unfortunately, there are numerous obstacles to achieving such recognition of the potential of cultural initiatives and analyses across the field of international law. One stumbling block is that culture is often seen as less important—a luxury item even—by some international lawyers and human rights defenders. For example, the International Criminal Court’s decision to hear the *Al Mahdi* case,⁸ the first ever stand-alone international prosecution for the war crime of destroying cultural property, provoked ill-informed criticism of the Court by some. The critics overlooked the meaning that these acts of cultural heritage destruction had for many locals, which I found out first-hand when working with victims during the reparations phase of the case.⁹ These violent acts of cultural engineering had grave impacts on a range of their human rights. As the International Criminal Court itself described the crimes in question, they aimed at “breaking the

6. *Id.*

7. See Pablo de Greiff, *On Making the Invisible Visible: The Role of Cultural Interventions in Transitional Justice Processes*, in TRANSITIONAL JUSTICE, CULTURE, AND SOCIETY 12, 20–21 (Clara Ramírez-Barat ed., 2014).

8. Prosecutor v. Al Mahdi, ICC-01/12-01/15, Judgment and Sentence, ¶ 2 (Sept. 27, 2016).

9. Brief by Karima Bennouna, UN Special Rapporteur in the Field of Cultural Rts., as an Expert Appointed by the Int’l Crim. Ct., Prosecutor v. Al Mahdi, ICC-01/12-01/15-214AnxI-Red3, annex I, 5–6 (Apr. 27, 2017), https://www.icc-cpi.int/sites/default/files/RelatedRecords/CR2017_05022.pdf.

soul of the people of Timbuktu” and were of “significant gravity.”¹⁰

Judge Charlesworth herself notes that the power of arts and culture is ambiguous.¹¹ There can be many negative aspects and usages of images and other forms of culture, cultural expressions, and art itself. Arts and images can be used to celebrate human rights violations, or to promote problematic narratives about conflicts, or to incite discrimination and violence. This is all the more reason to take arts and culture seriously as a sphere of analysis in international legal scholarship. Judge Charlesworth’s powerful lecture is a significant step in that direction, and will hopefully be built upon in future international legal scholarship.

A visually conscious international law can help us more fully engage with the human reality of our theoretical debates. As Sandra Ristovska writes, “incorporating the visual and imagining with and beyond it could strengthen the ability of human rights frameworks to respond to global injustice”¹² That is true for international law more generally. However, such an approach raises some methodological challenges and calls upon us to explore the ethics of visual praxis.¹³ I do not have time to fully develop this here but would at least mention the following key elements:

(1) We need to engage with the complexity of images—a problem magnified by contemporary technology—and ethical dilemmas associated with using them, involving security, privacy, and dignity.

(2) We need to consider ways of using international law to protect

10. *Al Mahdi*, ICC-01/12-01/15, ¶¶ 80, 82.

11. Charlesworth, *supra* note 2, at 612–16.

12. See SANDRA RISTOVSKA & MONROE PRICE, *Images and Human Rights, in VISUAL IMAGERY AND HUMAN RIGHTS PRACTICE* 1, 11 (Sandra Ristovska & Monroe Price eds., 2019)

13. See Annalisa Ciampi, *Images and Customary International Law, or the Destruction/Construction of International Norms Through Images*, 13 *PÓLEMOS* 25, 28–31 (2019); Roland Bleiker et al., *Imaging Catastrophe: The Politics of Representing Humanitarian Crises, in NEGOTIATING RELIEF: THE POLITICS OF HUMANITARIAN SPACE* 47, 49 (Michele Acuto ed., 2014); Aoife Duffy, *Bearing Witness to Atrocity Crimes: Photography and International Law*, 40 *HUM. RTS. Q.* 776, 781–82 (2018); *Using Audiovisual Evidence in International Proceedings: A Handbook for All Practitioners*, TRIAL INT’L (May 12, 2019), <https://trialinternational.org/latest-post/using-audiovisual-evidence-in-international-proceedings-a-handbook-for-all-practitioners>.

the human rights of those who produce images, which can be a highly dangerous task.

(3) We need to develop further interdisciplinary relationships with our colleagues in art, art history, and related disciplines.

(4) When visuals emerge so powerfully in international legal debates, as we are seeing now with the illegal invasion of Ukraine, we also need to think about the effect of the images we do not see.

In my remaining time, I want to engage with a few ideas springing from the lecture. I especially appreciate the conclusion of Judge Charlesworth's talk, and in particular the way she frames the possibilities of "bringing the visual into conversation with law" so as to remind us that law also is a meaning-making activity with material effects and one which requires creativity and interpretation.¹⁴ Her reminder of the power of visuality can also be used to call into question the UN human rights system's refusal to allow UN Special Rapporteurs or treaty bodies to use images or graphics or artwork of any kind in their often turgid, exactly 10,700-word reports. The policy on images and graphics is not an accident. It is, in part, a recognition of the power of visuality and manifests the fear of unleashing that very power.

In thinking about the power of images, as I already mentioned, it is also critical to underscore the creativity of image-makers and the dangers they so often face. This was a reality I confronted throughout my time in the UN cultural rights mandate. An illustrative example is Afghanistan's Art Lords, headed by the "activist" Omaid Sharifi.¹⁵ His organization painted murals against war and for human rights on the very blast walls of Kabul that were needed to protect from Taliban suicide attacks, remaking those structures as fields of reflection.¹⁶ Sadly, most, if not all, of their murals have been painted over, and the Art Lords have been forced into exile since the international community handed the country over to the Taliban.¹⁷ Yet, the Art

14. Charlesworth, *supra* note 2, at 637.

15. See *Meet ArtLords' Team*, ARTLORDS, <https://www.artlords.co/our-team> (last visited Feb. 11, 2023).

16. See *About: Who We Are*, ARTLORDS, <https://www.artlords.co/about> (last visited Feb. 11, 2023).

17. See Nabih Bulos, *The Bursting 'Ka-Bubble': Taliban Extremism Is*

Lords and other displaced Afghan artists continue working to sustain Afghans and support human rights in Afghanistan.¹⁸

Another example is the seventy-six-year-old Russian artist Elena Osipova who has been painting against the illegal invasion of Ukraine, and has been arrested carrying her paintings in public.¹⁹ How can our field do more to sustain cultural rights defenders like them?²⁰ As we embrace the power of visuality in international law more broadly, we must also find more effective ways to use that law to defend those who create and preserve images—photographers, artists, cartoonists—who face human rights violations for their work. This too must be a core component of our visual practice of international law.

Today's lecture has me thinking about how much it would change international legal debates if we were regularly confronted with images of those about whose lives we theorize, just as Nauru in Charlesworth's words "intertwined [legal arguments] with imagery" of its devastated landscape to advance its case.²¹ Images can also complexify our arguments if we engage with them holistically. For example, perhaps when debating the merits of the Libya intervention, a debate that has resurfaced since Russia invaded Ukraine, it can help us to remember what is at stake by looking at images such as a photograph of Libyan human rights lawyer Salwa Bughaighis.²² This requires a complex reading of image and context. Salwa supported international intervention because she was from Benghazi and a long-standing opponent of Qaddafi who feared his troops would decimate

Remaking a Once-Cosmopolitan Kabul, L.A. TIMES, (Sept. 24, 2021, 4:00 AM), <https://www.latimes.com/world-nation/story/2021-09-24/taliban-extremism-remaking-kabul-afghanistan>.

18. See *Meet ArtLords' Team*, *supra* note 16.

19. See Steve Rosenberg, *Ukraine-Russia: The 76-Year-Old Artist Taking on Putin*, BBC NEWS (Mar. 24, 2022), <https://www.bbc.com/news/world-europe-60866283>.

20. See Karima Bennoune (Special Rapporteur in the Field of Cultural Rights), *Cultural Rights Defenders*, ¶¶ 2, 77, UN Doc. A/HRC/43/50 (Jan. 20, 2020) (discussing how to protect the rights of those human rights defenders who defend cultural rights in accordance with international law).

21. Charlesworth, *supra* note 2, at 625.

22. *After 8 Years of Assassination of Salwa Bugaighis, Lack of Justice and Impunity for the Perpetrator*, DEFENDER CTR. FOR HUM. RTS. (June 25, 2022), <https://defendercenter.org/4758>.

her hometown.²³ Whatever one's own view, Salwa's story clarifies the consequences of the lack of international follow-up after the intervention. Given her work for women's rights and democracy, she was forced into exile after Qaddafi's fall.²⁴ She later returned home to vote and was assassinated by an Islamist militia inside her house on June 25, 2014.²⁵ When I look at Salwa's image, I am reminded of how much is at stake, so much more than our personal commitment as international lawyers to our own paradigms and positions. Images can infuse our debates with a greater sense of responsibility for the arguments we make.



Source: Karima Bennoune

23. See Jon L. Anderson, *A Death in Benghazi: Salwa Bugaighis*, NEW YORKER (June 26, 2014), <https://www.newyorker.com/news/news-desk/a-death-in-benghazi-salwa-bugaighis>.

24. See Lindsey Hilsum, *Desolation and Despair in Libya: The Murder of Salwa Bugaighis*, OPEN DEMOCRACY (July 3, 2014), <https://www.opendemocracy.net/en/5050/desolation-and-despair-in-libya-murder-of-salwa-bugaighis>.

25. *Id.*

In conclusion, I hope we will take up Judge Charlesworth's challenge in her Grotius Lecture to imagine a richer visual, and even artistic, practice for our discipline. This is essential given that, to paraphrase Shoshanna Felman, sometimes precisely what needs to be heard in the field of international law cannot be articulated in legal language alone.²⁶

26. *See generally* SHOSHANA FELMAN, THE JURIDICAL UNCONSCIOUS: TRIALS AND TRAUMAS IN THE TWENTIETH CENTURY 4 (2002).