2022 Grotius Lecture*

The Lecture was convened at 5:00 p.m., Wednesday, April 6, 202, by the Distinguished Discussant, Karima Bennoune of University of Michigan Law School, who introduced the 2022 Grotius Lecturer, Judge Hilary Charlesworth of the International Court of Justice.

The Art of International Law

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*By Hilary Charlesworth***

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."[1]

I will take a different tack in this Lecture, considering how the 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 quite 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."[2] My claim in this Lecture, drawing on a rich seam of scholarship on visuality and law generally,[3] is that the visual shapes both the aspects of international law—institutional and imaginative. In other words, law has a material context; it is also a way of seeing the world.[4] 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.

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** I thank Cassandra Allen, Eirini Fasia, Emma Macfarlane, Emma Nyhan, and Nikiforos Panagis for their assistance with research for this Article.

[1] Jessie Hohmann, *The Treaty 8 Typewriter: Tracing the Roles of Material Things in Imagining, Realising, and Resisting Colonial Worlds*, 5 London Rev. Int'l L. 371 (2017).

[2] Anne W. Gulick, Literature, Law, and Rhetorical Performance in the Anticolonial Atlantic 2 (2016). According to David Kennedy, international law's function is as a "vernacular of political judgment." David Kennedy, Of War and Law 46 (2006).

[3] *See, 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 111 (2017); Richard Sherwin, Visualizing Law in the Age of the Digital Baroque: Arabesques and Entanglements (2011).

[4] Margaret Davies, Law Unlimited, ch. 4 (2017).

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 inquiry.[5] International criminal lawyers have also considered prosecutions for the destruction of cultural property.[6] 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."[7] It 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."[8]

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. 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 arts, can help identify universally shared knowledge and can revive the notion of peace through law.[9] 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.[10]

And, for O'Connell, the arts can inspire us to support legal processes, for example by encouraging engagement with international courts.[11]

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

[5] For example, Report of the Special Rapporteur in the Field of Cultural Rights: The Right to Freedom of Artistic Expression and Creativity, UN Doc. A/HRC/23/34 (Mar. 14, 2013); Report of the Special Rapporteur in the Field of Cultural Rights, UN 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 (2016); Paul Kearns, *Freedom of Artistic Expression in International Law*, 25 ART ANTIQUITY & L. 99 (2020).

[6] *See, e.g.*, Emma Cunliffe, Nibal Muhesen & Marina Lostal, *The Destruction of Cultural Property in the Syrian Conflict: Legal Implications and Obligations*, 23 INT'L J. CULTURAL PROP. 1 (2016).

[7] European Union Agency for Fundamental Rights, *Exploring the Connections Between Arts and Human Rights: Report of High-Level Expert Meeting, Vienna 29–30 May 2017*, at 11 (Publications Office of the European Union, 2017). *See also* Sarah Joseph, *Art and Human Rights Law*, *in* RESEARCH HANDBOOK ON ART AND LAW (Jani McCutcheon & Fiona McGaughey eds., 2020).

[8] MARY ELLEN O'CONNELL, THE ART OF LAW IN THE INTERNATIONAL COMMUNITY 11–12 (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. Art and International Justice Initiative, *at* https://artij.org/en/mission.html.

[9] "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." O'CONNELL, *supra* note 8, at 7.

[10] *Id.* at 298.

[11] *Id.* at 8–9.

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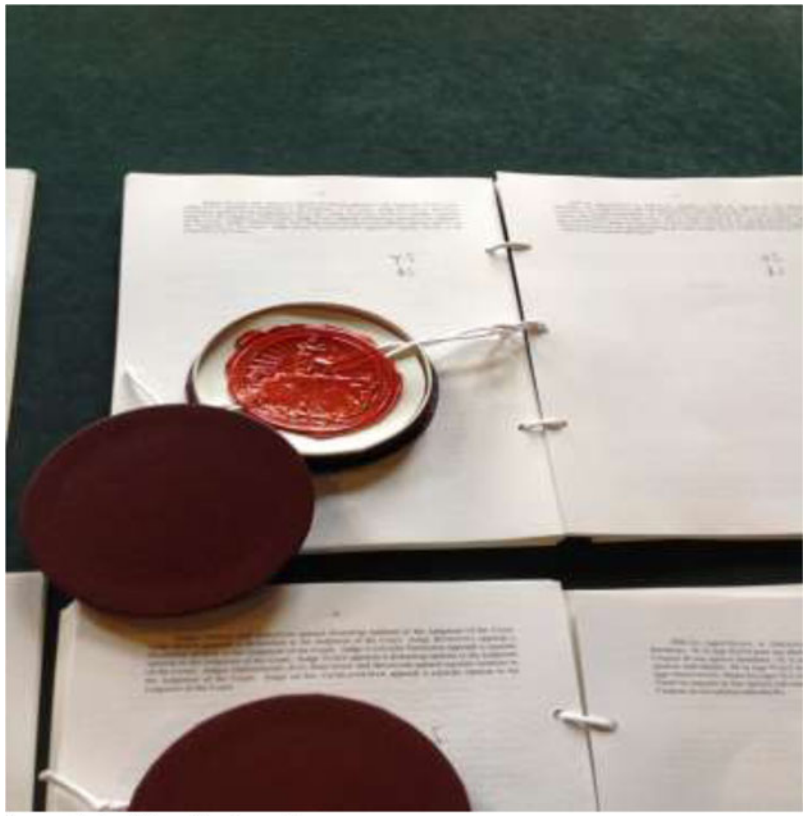
promote varying concepts of justice, the visual dimension of international law can have both progressive and regressive effects.

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 (ICJ) where the resplendent red wax seal of the Court, and the original signatures of the judges, manifest the authority of the document. 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.



Source: Judge Hilary Charlesworth.

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

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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.[12]

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 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."[13]

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 Labor Organization and the *Palais des Nations* in Geneva reflects tensions between the Westphalian era of state sovereignty and the move to internationalism. By contrast, the United Nations building in New York designed in the "international style" endorses European modernism as a universal language.[14] 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.[15]

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 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."[16] She analyzes a work by Agostino Brunias depicting a 1773 treaty entered into between the British and the Indigenous inhabitants of St. Vincent in the Caribbean. 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."[17]

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 Haudenosaunne Confederacy and Dutch settlers of the Hudson River in the early seventeenth century. The Wampum's carefully arranged pattern illustrates a relationship of non-domination and co-existence based on respect between the Indigenous population and the European arrivals.[18]

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.

[12] Maggie Farley, *"Guernica" Cover-Up Raises Suspicions*, L.A. TIMES (Feb. 6, 2003), *at* https://www.latimes.com/archives/la-xpm-2003-feb-06-fg-guernica6-story.html (a UN spokesperson explained that the painting was covered to avert a "diplomatic incident").

[13] *Law of the Journey/Ai Weiwei*, ARTPIL, *at* https://artpil.com/news/law-of-the-journey-ai-weiwei.

[14] Miriam Bak McKenna, *Designing for International Law: The Architecture of International Organizations 1922–1952*, 34 LEIDEN J. INT'L L. 1 (2021).

[15] *Id.* at 2.

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

[17] Miles, *Painting International Law as Universal*, *supra* note 16, at 368.

[18] Jeffery G Hewitt, *Certain (Mis)Conceptions: Westphalian Origins, Portraiture and Wampum*, *in* ROUTLEDGE HANDBOOK OF INTERNATIONAL LAW AND THE HUMANITIES 167–68 (Shane Chalmers & Sundhya Pahuja eds., 2021).

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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. Over the ten weeks of the Conference, work toward a planned Disarmament Convention quickly foundered because of political divisions. 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.[19] 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. 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 in April 1903 for a courthouse and a library of international law.[20] He established the Carnegie Foundation to supervise the construction of the building. A ceremony for the laying of the foundation stone for the Peace Palace was held on July 30, 1907 during the Second Hague Peace Conference. The Peace Palace was opened in a grand ceremony on August 28, 1913.

The Peace Palace has attracted considerable scholarly attention, including illuminating discussions of its history and symbolism.[21] Scholars have considered the projection of visual identity and the encoding of ideals of international justice in the building,[22] observing its resolutely Western forms and linear view of the history of international dispute resolution. 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. Instead, the Palace displayed "an older cosmopolitanism suited to European elites who saw themselves as impartial custodians of peace unmoved by mass politics." The Peace Palace, according to Duranti, is "an exemplar of Christian and humanist iconography," reflecting how central religion was to *fin-de-siècle* internationalism.[23]

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 that were on offer and the values underpinning the winning design. The Carnegie Foundation held an international competition for the design in 1905–06, attracting 216 entries, which were numbered to make them anonymous for the international jury.[24] The drawings went on public display in The Hague and the consensus was that there was little great architecture on view and almost no innovation.[25] A leading Dutch architect, KPC de Bazel, complained of the "veritable mountain of dull pretension, lacking in any living inspiration." He described the jury as comprised of "uncreative

[19] Tanja Aalberts & Sofia Stolk, *The Peace Palace: Building (of) the International Community* 114 AJIL Unbound 117, 118 (2020).

[20] *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 31–33 (2013).

[21] *See, e.g.*, Marco Duranti, The Conservative Human Rights Revolution: European Identity, Transnational Politics, and the Origins of the European Convention (2017); Daniel Litwin, *Stained Glass Windows, the Great Hall of Justice of the Peace Palace*, *in* International Law's Objects (Jessie Hohmann & Daniel Joyce eds., 2018).

[22] McKenna, *supra* note 14, at 2.

[23] Duranti, *supra* note 21, at 29.

[24] For details of the competition, see Hilde de Haan & Ids Haagsma, Architects in Competition: International Architectural Competitions of the Last 200 Years 105–13 (1988); *see also* Bob Duynstee, Daan Meijer & Floris Tilanus, The Building of Peace: A Hundred Years of Work on Peace Through Law: The Peace Palace 1913–2013, at 51–57 (2013). Twenty architects were invited to participate and received a fee of 2000 Dutch Guilders; the rest had to pay their own costs. *See also* Fred Bernstein, *(Not) Going Dutch*, *in* Carnegie Medal of Philanthropy, *at* https://www.medalofphilanthropy.org/not-going-dutch.

[25] Compare the change in style witnessed at the Paris 1889 world exhibition: Arthur Eyffinger, The Peace Palace: Residence for Justice, Domicile of Learning 68 (1988).

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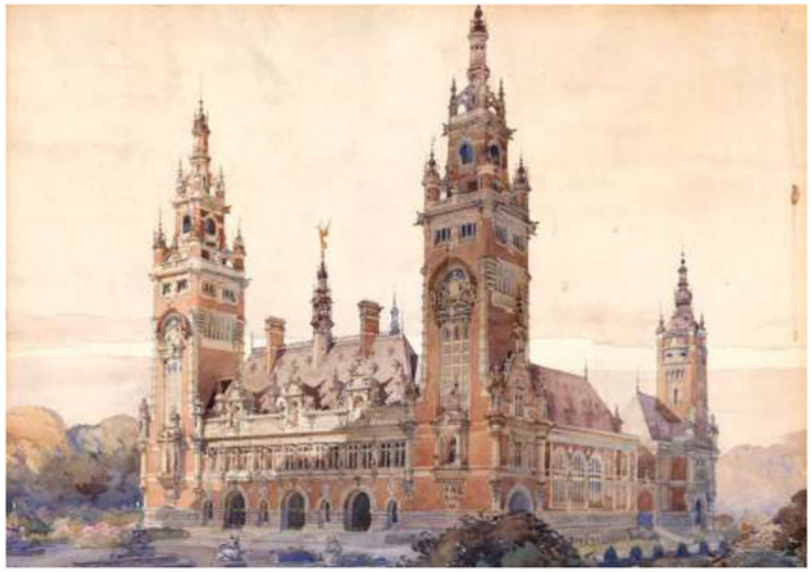
men of cramped spirit."[26] The jury came to a decision within six days, raising the concern that its judgment had been rather superficial.

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.[27] The prize committee noted that the design was "inspired by the architectural traditions of the Netherlands in the sixteenth century."[28] 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.[29]



Source: International Court of Justice.

Carnegie himself was deeply disappointed in the chosen design of the building, which he had envisaged a neoclassical building in the style of the Parthenon. 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."[30] Indeed, he preferred the nomenclature of a "Temple of Peace."[31]

British architects were upset that none of their number had made it into the seventeen 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."[32] In criticizing

[26] KPC de Bazel, *quoted in* DE HAAN AND HAAGSMA, *supra* note 24, at 113.

[27] DURANTI, *supra* note 21, at 31.

[28] Quoted in *id.* at 33. This description was disputed—*The New York Times* referred to it as Sicilian Romanesque. Bernstein, *supra* note 24.

[29] This was badly damaged by bombing in 1940. *L'hôtel de ville de Dunkerque*, *at* https://www.ville-dunkerque.fr/decouvrir-sortir-bouger/histoire-patrimoine/dunkerque-aujourdhui/lhotel-de-ville-de-dunkerque.

[30] Quoted in DURANTI, *supra* note 21, at 31.

[31] Lesaffer, *supra* note 20, at 31.

[32] *A Design for the Palace of Peace at the Hague*, XXII ARCHITECTURAL REV. 80, 81–82 (1907).

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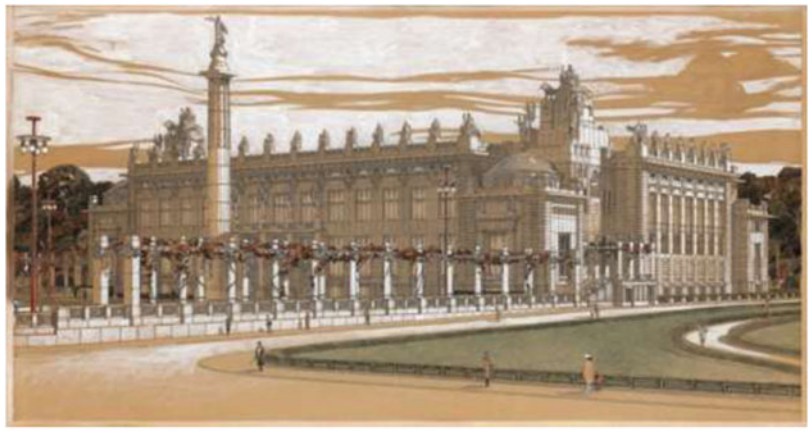
the provinciality of the design in 1907, the British *Architectural Review* nominated Italianate Renaissance style as "the undisputed style of the civilised world."[33] Even the Dutch parliament debated the wisdom of the choice of Cordonnier's design. Was it too backward looking; too Dutch and parochial; too overwrought and fussy with its many towers, gables, and roofs? In 1913, *The New York Times* dismissed it as "wholly imitative of the architecture of another era, without the slightest effort at large symbolism of modern life."[34] It was "old and retardative" in style rather than "new and progressive."[35]

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. 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.[36] 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 a guideline only.

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.[37] In the end, the Carnegie Foundation insisted that Cordonnier work with a local Dutch architect, Johannes van der Steur, to refine his plans. 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.



Source: International Court of Justice.

[33] *Id.* at 83.

[34] September 7, 1913, *quoted in* Judith Resnik & Dennis E. Curtis, Representing Justice: Invention, Controversy, and Rights in City-States and Democratic Courtrooms 251 (2011). 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." *A Design for the Palace of Peace at the Hague*, *supra* note 32, at 80.

[35] *Quoted in* Bernstein, *supra* note 24.

[36] Resnik & Curtis, *supra* note 34, at 252; Eyffinger, *supra* note 25, at 74–75.

[37] Duynstee, Meijer & Tilanus, *supra* note 24, at 56–57.

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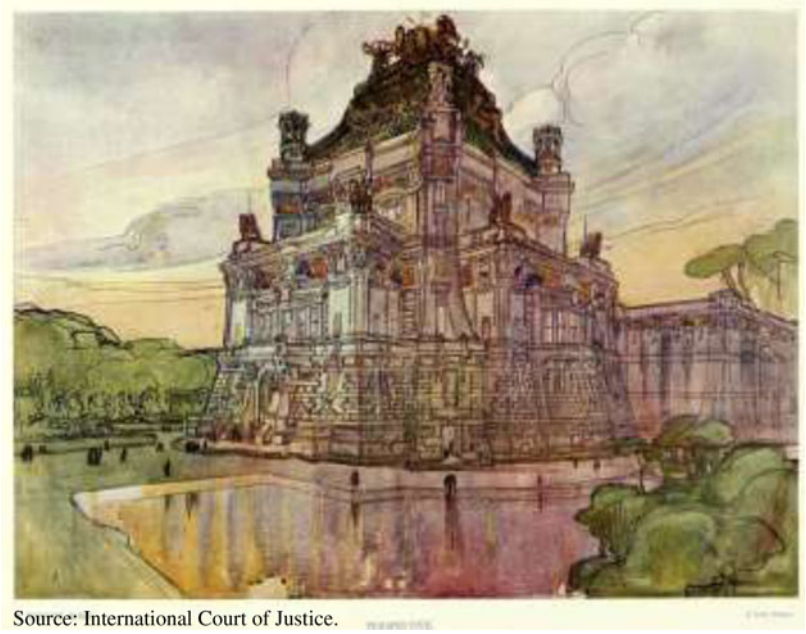
Lille-based Cordonnier was in any event regarded as a second-tier, provincial, architect, competent but without imagination. He was a surprising choice given that much higher-profile architects, such as the Austrian, Otto Wagner, had entered the competition. Wagner, a master of the Vienna Secessionist style, which embraced geometry and abstraction,[38] named his entry "The Art of the Age."[39] It was awarded fourth prize.

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 Greenley and Olin was, for example, in neoclassical style. There were exceptions to this trend, including that of the Italian architect G. Mancini who produced a mausoleum-type structure.



Source: International Court of Justice.

The design of Félix Debat of France evoked the ancient world by using a pyramid form.

There was one resolutely modern design—that of the Finnish architect Eliel Saarinen who was then at the start of his career. Saarinen called his striking design "L'Homme."[40] 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 among the forty-four short-listed works.

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,

[38] *Vienna Secession*, *in* A Dictionary of Modern Architecture, *at* https://voices.uchicago.edu/201504arth15709-01a2/2015/11/16/vienna-secession.

[39] Though in fact his Peace Palace design is rather traditional. Bernstein, *supra* note 24.

[40] Albert Christ-Janer, Eliel Saarinen 174–76 (1948).

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Source: International Court of Justice.

Source: International Court of Justice.

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> the ground base of all 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.[41]

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.[42] In the end, Saarinen was able to recycle the design to win a competition for the Helsinki Central Railway Station, eventually constructed in 1910.

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.[43] There is no recognition in the structure or décor, for example, of the connection between the international legal order and colonialism.[44] 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.[45] 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."[46] Gifts to the Peace Palace from states beyond Europe indeed manifest an eagerness to match European tastes. Japan contributed nine magnificent silk tapestries, for example, whose weaving incorporated French techniques.[47]

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."[48] 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."[49] 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,[50] and in the context of international criminal tribunals,[51] 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 opinion cases. 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*

[41] KPC de Bazel, *quoted in* de Haan and Haagsma, *supra* note 24, at 113.

[42] Eyffinger, *supra* note 25, at 72.

[43] Duranti, *supra* note 21, at 36.

[44] *Id.* at 39.

[45] Anthony Anghie, *Race, Self-Determination and Australian Empire*, 19 Melb. J. Int'l L. 423, 449 (2018).

[46] Duranti, *supra* note 21, at 36.

[47] Aalberts & Stolk, *supra* note 19, at 121.

[48] Leslie J Moran, *Visual Justice*, 8 Int'l J. L. in Context 431, 435 (2012).

[49] Susan Sontag, On Photography 4 (1977).

[50] *See, e.g.*, Glenn Porter & Michael Kennedy, *Photographic Truth and Evidence*, 44 Australian J. Forensic Sci. 183 (2012).

[51] *See, e.g.*, Immi Tallgren, *Come and See? The Power of Images and International Criminal Justice*, 17 Int'l Crim. L. Rev. 259 (2017).

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Nauru case.[52] 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 World War I. Following the War, Australia, New Zealand, and the United Kingdom then became mandatory powers under the League of Nations, and later trustees under the United Nations. As trustees, these states were able to create a corporate structure to exploit Nauru's phosphate deposits, which were valuable as farming fertilizer. The phosphate mining caused massive environmental destruction. Nauru became an independent state in 1968. 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.[53]

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 November 1, 1947.[54] 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.[55] Australia contested both the admissibility of Nauru's application and the Court's jurisdiction, filing its Preliminary Objections in December 1990.[56] The oral arguments on the preliminary phase in November 1991 took eight days.[57]

Nauru commissioned a well-known Australian photographer, John Gollings, to take photographs in preparation for the court case. Many were aerial shots, taken through "the open window of the pilot's seat at 20,000 feet on oxygen in a Boeing 767."[58] Some of Gollings's photos were included in Nauru's memorial (in black and white) to show Nauru's unique topography[59] and to illustrate the devastation of the land by phosphate mining. Much of Nauru had been "mined out": when it was returned to the Nauruans, its ICJ Memorial stated, it "was neither cultivable nor habitable and for all practical purposes useless."[60]

Particularly striking was Nauru's use of photos of pockets of forest surrounding the Buada Lagoon in the southeast of the island to "provide[] some indication of the plateau's appearance before mining."[61] This offered powerful support for the claims in Nauru's memorial that "[b]efore 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."[62]

[52] Certain Phosphate Lands in Nauru (Nauru v. Austl.), Preliminary Objections, Judgment, 1992 ICJ Rep. 240 (June 26).

[53] On the background to the case, see Antony Anghie, *"The Heart of my Home": Colonialism, Environmental Damage and the* Nauru *Case*, 34 HARV. INT'L L.J. 445 (1993); CAIT STORR, INTERNATIONAL STATUS IN THE SHADOW OF EMPIRE: NAURU AND THE HISTORIES OF INTERNATIONAL LAW 248–52 (2020).

[54] Certain Phosphate Lands in Nauru (Nauru v. Austl.), *supra* note 52, para. 5.

[55] Certain Phosphate Lands in Nauru (Nauru v. Austl.), Memorial of Nauru, paras. 415–29 (Int'l Ct. Just. 1990).

[56] *See* James Crawford, *"Dreamers of the Day": Australia and the International Court of Justice*, 14 MELB. J. INT'L. L. 520, 540–43 (2013) (for outline of these objections).

[57] Certain Phosphate Lands in Nauru (Nauru v. Austl.), *supra* note 52, para. 4.

[58] *See* John Gollings, *Nauru: Aerial Documentation of the Phosphate Mine*, *at* https://johngollings.com/cultural-projects/nauru.

[59] Memorial of Nauru, *supra* note 55, paras. 200–01 (referring to photographs 8 and 10), para. 211 (referring to photograph 5).

[60] *Id.*, para. 96 (referring to photographs 2–5), para. 212 (referring to photographs 1, 2, 8, and 9).

[61] *Id.*, para. 212 (referring to photographs 8 and 9).

[62] *Id.*, paras. 212, 214–219 (on the social and cultural effects of phosphate mining, describing a rather bucolic life in a subsistence economy).

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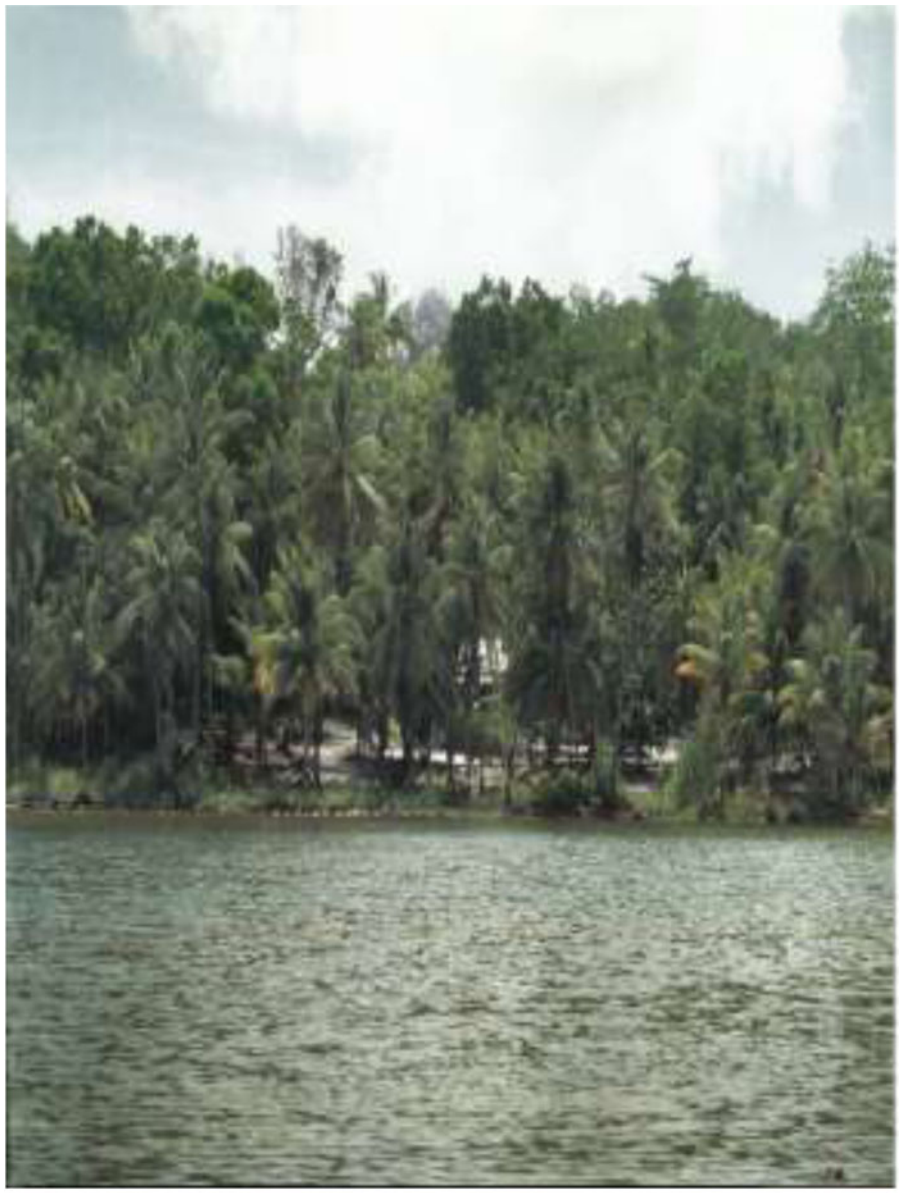

Source: Nauru Memorial, Vol. 2.

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 pinnacle proliferation, such land is inaccessible and completely unusable."[63] It relied on the photographs to illustrate this claim.[64]

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

[63] *Id.*, para. 213.

[64] *Id.* (photographs 4 and 5).

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Source: Nauru Memorial, Volume 2.

appeared in the *National Geographic* magazine in 1976.[65] 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 "We die worrying; they die laughing."[66]

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

[65] 150 Nat'l Geographic 344 (1976).
[66] *Id.* at 352.

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gravestones . . . ."[67] 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.[68] 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."[69] Another member of 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."[70]

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 Nauru accepts responsibility."[71]

Source: Nauru Memorial, 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.'"[72]

[67] Certain Phosphate Lands in Nauru (Nauru v. Austl.), Verbatim Record, 39 (Nov. 15, 1991), *at* https://www.icj-cij.org/public/files/case-related/80/080-19911115-ORA-01-00-BI.pdf.

[68] *Id.*

[69] *Id.* at 44; *see also* 8, 10, and 30 (Barry Connell).

[70] *Id.* at 35.

[71] *Id.* at 9–10.

[72] Certain Phosphate Lands in Nauru (Nauru v. Austl.), Verbatim Record, 14 (Nov. 22, 1991), *at* https://icj-cij.org/public/files/case-related/80/080-19911122-ORA-01-00-BI.pdf.

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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 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.[73]

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.[74] James Crawford later noted that the Court's judgment "had exposed a certain sympathy towards Nauru's argument."[75] 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.[76] 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.

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 mining that was so damaging to the island."[77]

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.[78] Others however recognized Australia's continuing responsibilities to Nauru.[79] 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."[80] These positions were undermined by

[73] *Id.* at 32–33.

[74] 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.), *supra* note 52, para. 72(3).

[75] Crawford, *supra* note 56, at 541.

[76] *Id*. Compare the ICJ's broader reading of the principle in *East Timor (Port. v. Austl.)*, Judgment, 1995 ICJ Rep. 90, 102 (June 30).

[77] Anghie, *supra* note 45, at 434.

[78] *Id.* at 432–33.

[79] 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." MEK Neuhaus to A. Brown, P. Shannon, H. Burmester, and J. Trotter, *Nauru—Pits of the Pacific: Report of Visit 20–24 May 1990*, para. 16, May 30, 1990, Foreign Affairs and Trade Minute Paper, *in* National Archives of Australia, NAA: A9737, 1990/3276, Pt. 1, p. 125, *at* https://recordsearch.naa.gov.au/SearchNRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF.

[80] Department of Foreign Affairs and Trade, *Record of Branch Heads Meeting*, at 3–5 (Peter Shannon), Jan. 16, 1990, *in* National Archives of Australia, NAA: A9737, 1990/3276, Pt. 1, p. 273, *at* https://recordsearch.naa.gov.au/SearchNRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF; *Briefing Note on Nauru ICJ Case*, *in* National

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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 line.[81]

In June 1990, before the Court hearing and just after its Memorial had been filed, Nauru hosted an exhibition of John Gollings's photos at Nauru House in Melbourne (a building whose construction was funded by the sale of phosphate) during World Environment Week. It was organized by a media consultant and entitled "Nauru 1990 – The Stark Reality." 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 extraordinary and all-pervasive intrusion of the phosphate industry into the lives of the inhabitants." It continued:

> The powerful[] 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.[82]

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."

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.[83] The Australian Archives show

Archives of Australia, NAA: A9737, 1990/3276, Pt. 1, p. 280, *at* https://recordsearch.naa.gov.au/SearchNRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF; *see also* Cable from DFAT Canberra to PP Nauru, *Nauru ICJ Case — Visit to Nauru*, May 11, 1990, *in* National Archives of Australia, NAA: A9737, 1990/3276, Pt. 1, para. 2, *at* https://recordsearch.naa.gov.au/SearchNRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF ("For your information, our aim through the consultant's 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.").

[81] E.g., the High Commissioner to Nauru, Barry Wyborn, writing to Michael Thawley, Assistant Secretary DFAT on 21 February 1990. Thawley had written (letter of February 7, 1990): "I'm not so keen on acknowledging colonial mistakes." 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." National Archives of Australia, NAA: A9737, 1990/3276, Pt. 1, pp. 232, 237, *at* https://recordsearch.naa.gov.au/SearchNRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF.

[82] Helen Bogdan and Associates, *Media Statement*, *in* National Archives of Australia, NAA: A9737, 1990/3276, Pt. 1, p. 37, *at* https://recordsearch.naa.gov.au/SearchNRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF.

[83] An Australian weekly magazine, *The Bulletin*, ran a feature article on the case, using John Gollings's photos. *Nauru—Island in Distress*, BULLETIN (June 19, 1990), *in* National Archives of Australia, NAA: A9737, 1990/3276, Pt. 1, pp. 103–05, *at* 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 (June 9, 1990), *in* National Archives of Australia, NAA: A9737, 1990/3276, Pt. 1, pp. 117–21, *at* https://recordsearch.naa.gov.au/SearchNRetrieve/NAAMedia/ShowImage.aspx?B=8260120&T=PDF. A popular talk-show host, Darren Hinch, interviewed John

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that 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."[84]

The photographer, John Gollings, claimed that "these images proved the case."[85] While this statement is not of course 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.[86] 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."[87] Moving beyond debates about the objectivity of photography, Ariella Azoulay has argued that photography should be understood as a form of relations between individuals and the powers that govern them.[88] 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.[89] 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.[90]

V. Conclusion

Roland Barthes reminds us that images can have multiple levels of meaning. They are informational and symbolic, as well as transmitters of a non-articulated meaning that lies beyond language and operates on the emotions.[91] Images not only shape but indeed constitute the world around us.

Gollings on television. *Transcript Title: Nauru to Take Australia to Court Over Phosphate Mining Damage*, Channel 7's Hinch (June 6, 1990), *in* National Archives of Australia, NAA: A9737, 1990/3276, Pt. 1, pp. 112–14, *at* 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 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.").

[84] Foreign Affairs and Trade, Minute Paper, para. 4, June 18, 1990, *in* National Archives of Australia, NAA: A9737, 1990/, Pt. 1, p. 58.

[85] Gollings, *supra* note 58.

[86] *See* Anghie, *supra* note 45, at 425 (arguing that Australia's role as a colonial power "powerfully influenced the origins of Australian international law").

[87] Sontag, *supra* note 49.

[88] Ariella Azoulay, The Civil Contract of Photography (2008)

[89] Ariella Azoulay, *What Is a Photograph? What Is Photography?*, 1 Philosophy of Photography 9, 11 (2010).

[90] Alice Palmer, *Image and Art in the* Whaling in the Antarctic *Case*, *in* Research Handbook on Art and Law, *supra* note 7, at 9, 15.

[91] Roland Barthes, *The Third Meaning: Notes on Some of Eisenstein's Stills*, Artforum (Jan. 1973).

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As we can see in current conflicts, they can be used by all sides to construct "reality."[92] 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. 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 of the artist, their insights, and imaginations 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. So, 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.[93] 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.[94] Taking visuality into account will generate a richer and more nuanced account of legal principles that responds to our multidimensional world.

Commentary on the 2022 Grotius Lecture

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*By 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."

[92] Debbie Lisle, *Travel*, *in* Visual Global Politics 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."

[93] Sarah Sentilles, *Creation Stories: The World-Making Power of Art*, 73 Griffith Rev. (2021).

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

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