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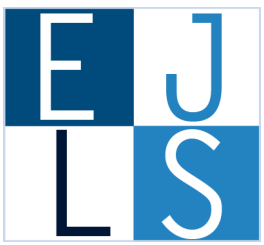

European Journal of Legal Studies
Network of Legal Empirical Scholars (NoLesLaw) Special Issue

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EDITORIAL

A METHOD OF (FREE) CHOICE

Urška Šadl*

I would like to thank the editors for the invitation to contribute this editorial to the special issue of the journal (EJLS). I use the opportunity to reflect on the making of the special issue and why it is important in the context of today's legal (empirical) thinking. I will be brief.

The special issue has been (too) long in the making, and it is finally here because of the dedication, the patience, and the intellectual curiosity of the editors and the authors.

The exact beginning is difficult to pin down and untangle from so many interrelated events of the time. There are several beginnings. One of them is the fortunate meeting of minds, wondering about and willing to explore the so-called empirical turn in contemporary legal scholarship. The European University Institute (EUI) in Florence has long stood for an approach to law that looked at law in its social, economic, and political context. So long that it had perhaps run out of steam.

To reinvigorate what were once an original idea and a novel approach is never easy. Many legal scholars feel uncomfortable and worse – bored – by computer code, transcripts of interviews, and regression tables. Some might even fear (and do, in fact, if Holtermann and Madsen are correct) that studying facts rather than principles is missing the most important element of law: its normative character.

* Professor of Law, European University Institute.

And yet, two editors bravely walked into the blizzard in Northern Sweden in March 2017, quite literally and metaphorically (intellectually), to participate in the first workshop organized by the NoLesLaw group.

NoLesLaw stands for the Network of Legal Empirical Scholars. It is an initiative of researchers from law, political science and philosophy, who seek to increase the quality, scale, and relevance of empirical legal research on European and international law and institutions.

More specifically, the primary goal is to promote scholarship which

- Explores legal questions in a comprehensive and systematic manner (is legal empirical as opposed to empirical legal),
- Is based on clearly articulated epistemological foundations,
- Adopts a wide range of empirical methods,
- Is transparent, and
- Is of societal relevance.

Johan Lindholm (University of Umeå), Suvi Sankari (University of Helsinki), and I manage the network jointly. It is funded by the Nordic Research Council.

That said, it was the editors of this journal who selected the articles which appear in this issue from the papers that were first presented at the workshop in Umeå. They were discussed in various forms and conference formats. They are methodologically diverse. They deal with European Union lawyers, international law, legal knowledge, human rights, and the epistemology of legal empirical research.

Korkea-aho and Leino open an important debate regarding the application (implementation) of qualitative methodology – in particular interviews. They make a case for interviews as a method of asking and answering legal questions.

They underline the specificity of interviews as a method and as a technique in the domain of legal expertise. How is interviewing legal experts different from interviewing experts in any other field?

However, they also open a different methodological question, on the so-called choice of methodology. At the EUI (and, I imagine, in many other institutions of higher learning) we ask every researcher to select the method that will best answer her research questions. She needs to make 'a choice.' I have often wondered what this choice is based on. Is this a choice in the sense of taking a longer maternity leave because the local preschool has a very limited number of spaces or because the baby seems prone to sickness? Or is the choice of research methods guided by intellectual interest and – as it should be – the research question? This is a question which I luckily do not have to answer here.

Korkea-aho and Leino submit that (EU) doctrinalism is not always a choice. I agree. Normative imprisonment (to use their term) is – by definition – not voluntary. One of the reasons is education. Law faculties do not teach methods and techniques. Graduates of most prestigious law schools in Europe even wonder what the term 'legal method' implies. The second reason is implicit in the article: law journals might not want to publish those articles. The return on the methodological investment is low (zero).

The article by Holtermann tells us why this is so. What are the stakes of methodological pluralism for the legal discipline? The typology of resistance to non-law is a helpful framework in which to understand the stakes and situate the discussions about the pressing philosophical questions relating to the status of the empirical findings. These will answer the question whether empirical studies should be pursued at a law faculty (and the findings published in law journals).

The article by Kjaer and Holtermann – with the evocative title *What If?* – should be read as a contribution to legal knowledge and legal science. The authors innovatively integrate computer driven corpus linguistics with the philosophy of law and the sociology of science to investigate the jurisprudence of the ICTY (International Criminal Tribunal for the Former Yugoslavia) and ICTR (International Criminal Tribunal for Rwanda). They make a case for why a significant change in the frequency of the use of a seemingly unimportant (if not bizarre) word, *if*, a conditional, is worthy of investigation, and relevant to the study of international case law.

Palmer Olsen and Frese argue, bluntly put, that new automated alternatives to traditional doctrinal approaches, which rely on manual information retrieval, can provide relevant input to legal analysis. They reveal – by looking at the case law through the eyes of the European Court of Human Rights and comparing it to the textbook knowledge about the case law – that scholarship relying on traditional doctrinal methods is more dependent on the authors' subjective outlook. This is expected. But they make an argument that the dependence is greater than needed (merited?). Is it – could it be – voluntary? Their contribution cuts deep into the legal methodological wound. It implies that doctrinalism might be a bad choice in the future. Let's hope that it won't be the only one left.

And reading the contributions – and the fact that a law journal is publishing them – gives me hope that it won't have to be.

General Articles

Philosophical Questions at the Empirical Turn

Jakob v. H. Holtermann*

Adopting a meta-perspective, this introductory contribution focuses on the ongoing empirical turn in legal scholarship as such. A recurrent issue of controversy and (self-) doubts has to do with understanding the intricate relationship between empirical findings and more traditional doctrinal approaches to law. This discussion centers on the following line of questions: i) In what sense do empirical studies form part of a legal science? ii) Why, if at all, should they be pursued at a law faculty? iii) What do empirical studies tell us about valid law? iv) What do they tell us about what obligations and rights people have? v) How do empirical findings relate to the kind of knowledge traditionally sought in the doctrinal study of law? Rather than attempting to give an answer to these questions, this contribution suggests a taxonomical framework within which discussion about them ought to take place. Based on an analysis of the different stances taken by prominent theorists on the relation between traditional doctrinal work and empirical work in the legal field, the author suggests that we should distinguish between the following three attitudes on the relation between traditional legal doctrinal studies and empirical studies of law: toleration, replacement, and synthesis.

Keywords: empirical studies of law, epistemology of law, international legal theory, the empirical turn

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I. INTRODUCTION

It has become commonplace to claim that legal scholarship has seen a boom in empirical approaches and even that empirical work 'has infiltrated the legal community'.[1] Even if the size of this boom is contested and may itself invite empirical scrutiny, it seems safe to say that the claim found widespread support among the people who gathered at Umeå University in March 2017 for the inaugural NoLesLaw workshop. One might even say that the participants were gathered to celebrate this successful infiltration of the legal community since hiding behind this particular academic acronym was the *Network of Legal Empirical Scholars*.

The present issue sees the fruits of this infiltration with a number of interesting contributions demonstrating the lasting value of empirical work in law. However, before getting carried away with all the wonderful new toys and the sophisticated tools suddenly available in the legal scholars' toolbox, this introductory contribution tries to take a step back and ask a few pressing philosophical questions at the empirical turn.[2] To do so, I first turn to another quote, this time with a somewhat more skeptical tone. The quote comes from Kenneth A. Armstrong who in 1998 asked the following question: 'Political science has discovered the European Court of Justice. But has it discovered law?'[3]

Of course, political science is only one among many empirical approaches to the legal field and it may not necessarily be representative of such approaches in a present day context.[4] However, I think Armstrong's question is interesting because it is one example of a generic question that I believe almost all legal empirical scholars have been asked at one point or another by some of their more traditional doctrinal colleagues. In its generic version, Armstrong's question runs as follows: 'Very well dear colleague, you may have

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[1] Lee Eppstein and Andrew D. Martin, *An Introduction to Empirical Legal Research* (Oxford University Press 2014) vii.

[2] In so doing, I shall be drawing extensively on work co-authored with Mikael Rask Madsen, in particular on the paper 'Toleration, Synthesis or Replacement? The 'Empirical Turn' and its Consequences for the Science of International Law' (2016) 29 Leiden Journal of International Law 1001-1019.

[3] Kenneth A. Armstrong, 'Legal Integration: Theorizing the Legal Dimension of European Integration' (1998) 36 Journal of Common Market Studies 155, at 155.

[4] For instance, this issue contains a number of big data empirical approaches that were not applied in 1998 including, for example, computer-based corpus linguistics (Holtermann & Kjær) and citation network analysis (Frese and Olsen).

discovered [insert your favorite empirical legal fact discovered with your favorite empirical method]. But have you discovered law?'

To illustrate, I can provide an example from my own experience. In the present issue, Anne Lise Kjær and I contribute the article 'What 'If'? Silent Prologue and Paradigm in the Emerging Epistemic Community of International Criminal Justice',[5] which is based on a computer-driven corpus linguistic study of all judgments from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) from 1996-2017. In this study, my co-author and I discovered that the frequency of the use of *if*s in all judgements issued over this period exhibited a steady annual decline from 93 per 100,000 words on average in 1996 to 34 in 2017.

As we argue in the article, my co-author and I take this particular discovery to be profoundly interesting, with the potential to deepen our understanding not only of international criminal law but of legal knowledge as such. Nevertheless, while working on the article we were countless times asked questions virtually identical to Armstrong's, i.e. along the lines of: 'Very well dear [Anne Lise and Jakob], you may have discovered [a statistically significant steady drop in the use of *if*s in the ICTY/ICTR case law across a 22-year period using computer driven corpus linguistics]. But have you discovered [international criminal] law?'

From what I hear from other legal empirical researchers, my co-author and I are not alone in being confronted with this kind of question. Whether engaged in citation networks analysis, interviewing judges or the like, empirical researchers very often report being asked, 'Armstrong-style', what their empirical results have to do with law. When asked this way, the question is often a rhetorical one. Starting from the assumption of a categorical difference between the empirical facts found and the law, the questioner rarely seems to expect that the empirical discovery does in fact have *any* significance for the study of law or for legal knowledge. As such, the question does not always mark the starting point of a fruitful discussion. However, when asked in earnest, it is actually a very good question and one that all empirically minded legal scholars ought to ask themselves, not only to be able to fend off their more combative traditional doctrinal law colleagues.

It is important to see that Armstrong's question can be posed and answered at different levels of abstraction. It can be answered concretely with

[5] Cf. this issue at 49-90.

reference to any given study, i.e. with a view to demonstrating the legal relevance of that particular study. Thus, in our article, my co-author and I have naturally tried to demonstrate the specific legal significance of our corpus linguistic findings. I imagine other legal empirical scholars routinely do the same regarding their own work. However, considering the high frequency of these skeptical questions and the commonalities between them, even when posed in relation to quite diverse empirical studies, it would be a mistake to approach it as if we were dealing with a new question every time. For the sake of thought economy, we should also reflect upon Armstrong's question at a more general level.

Conceived at this level, it remains a good question because it points to a larger set of equally good and challenging questions, including:

(1) In what sense do these new empirical studies form part of a *legal* science?

(2) Why, if at all, should they be pursued at a law faculty?

(3) What do the countless new empirical studies tell us about valid law?

(4) What do they tell us about what legal rules exist, what obligations and rights people have, etc.?

(5) How do empirical findings relate to the kind of knowledge traditionally sought in the doctrinal study of law?

These are all good philosophical questions, which ultimately address the epistemological foundations of legal science and the conditions of possibility of legal science.

As such, these are also questions which ought to be at the heart of European empirical legal scholarship, perhaps more so than has hitherto been the case in the US, where empirical legal studies have had a much longer and more influential history than on this side of the Atlantic. As I have argued elsewhere, philosophical concerns about the epistemological foundations of legal science seem historically to have played a less prominent role in American legal scholarship than in its European counterpart.[6] This difference is particularly evident if we directly compare the more pragmatic

[6] Cf. Jakob v. H. Holtermann, 'Getting Real or Staying Positive: Legal Realism(s), Legal Positivism and the Prospects of Naturalism in Jurisprudence' (2016) 29(4) Ratio Juris: An International Journal of Jurisprudence and Philosophy of Law 535 and Jakob v. H. Holtermann and Mikael Rask Madsen, 'European New Legal Realism and International Law: How to Make International Law Intelligible' (2015) 28 Leiden Journal of International Law 211.

and reform-oriented American legal realism with its 'scientistic' Scandinavian cousin. However, the (continental) European concerns regarding the philosophical foundations of legal science are manifest also in the long debates between the doctrinal scholar Hans Kelsen and the more sociological scholars Max Weber, Eugen Ehrlich and Alf Ross.[7] In line with this tradition, it seems that, unlike the Americans, present-day European empirical legal scholars cannot simply content themselves with pursuing empirical work. They have, in addition, to address the foundational philosophical questions directly.

II. Toleration, Replacement, and Synthesis: A Taxonomical Approach to the Empirical Turn in Legal Scholarship

At the same time, however, I should emphasize that the aim of this contribution is not to try to develop one unique reply to Armstrong's questions about how empirical findings *really* relate to law. While tempting, it simply does not seem fruitful or even feasible to try to outline, almost Vienna Circle style, one common philosophical program to which all European legal empirical scholars could sign up.[8] This group is simply too diverse, and this is perhaps as it should be.

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[7] Kelsen was deeply troubled by the challenge of empirical approaches to law and vehemently resisted recurring attempts by empirically minded scholars to make inroads into legal scholarship. Thus, over a period of more than 50 years, Kelsen confronted a series of empiricists starting with legal sociologists Eugen Ehrlich and Max Weber (in *General Theory of Law and State* (Law Book Exchange 2009), especially 'Part One, XII. Normative and Sociological Jurisprudence') and ending with Scandinavian legal realist Alf Ross (Hans Kelsen, 'Eine 'Realistische' und die Reine Rechtslehre. Bemerkungen zu Alf Ross: On Law and Justice' (1959–60) 10 Österreichische Zeitschrift für Offentliches Recht 1). For their part, Ehrlich, Weber and Ross all provided substantive reflections on the relationship between empirical and legal scholarship, each in their own distinct way and with quite different conclusions. Cf. e.g. Eugen Ehrlich, *Fundamental Principles of the Sociology of Law* (Transaction Publishers 2001), Max Weber, *Critique of Stammler* (Free Press 1977), and Alf Ross, *On Law and Justice* (Stevens & Sons Ltd 1958).

[8] Together with Mikael Rask Madsen, I have developed one reply to these questions. Drawing on inspirations from Weberian sociology of law, Alf Ross's Scandinavian legal realism and combining them with insights originating from Bourdieusian sociology, Madsen and I have outlined a research program for an empirical science of law that attempts to address the questions mentioned. To emphasize the European heritage and distinguish this approach from what we argue are less philosophically concerned American realist approaches, we have dubbed this approach *European New*

What does make sense, what in fact seems imperative, is to instead try to provide a framework within which to situate the necessary discussions about the pressing philosophical questions relating to the epistemological implications and status of the empirical findings that scholars of this sort might unearth.[9] In co-authored work, Madsen and I have tried to sketch out a taxonomy consisting of three basic ideal types in terms of the epistemological understanding of the interface of law and empirical studies, namely *toleration*, *synthesis* and *replacement*. I shall briefly outline each of these positions providing examples of characteristic scholarship. My goal here is twofold: to understand the underlying epistemological premises of different positions in relation to empirical legal scholarship and to explain how such ideas enable (or rule out) different forms of empirical legal scholarship.

1. Toleration

The first approach is perhaps also the one most commonly adopted in traditional doctrinal legal scholarship. This position is termed *toleration* since proponents accept the presence and even the legitimacy of empirical studies of law, but they do so only somewhat reluctantly and while simultaneously emphasizing the subordinate character of such studies vis-á-vis the mother discipline, i.e. doctrinal law. Armstrong expressed this attitude of toleration in his rhetorical question.

Toleration thus conceived is closely associated with the classic positivist theories of Kelsen and H.L.A. Hart but also includes present-day proponents of positivism like Jan Klabbers,[10] Jörg Kammerhofer,[11] Ino Augsberg,[12] and Jean d'Aspremont[13] – to mention just a few. Finally, the position is not

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Legal Realism. Cf. notably Holtermann and Madsen (n 6); and Jakob v. H. Holtermann and Mikael Rask Madsen, 'What is Empirical in Empirical Studies of Law? A European New Legal Realist Conception' [2016] *Retfærd. Nordic Journal of Law and Justice* 3-21.

9 The rest of this contribution relates closely to work co-authored with Madsen, cf. Holtermann and Madsen (n 2).

10 Jan Klabbers, 'The Bridge Crack'd: A Critical Look at Interdisciplinary Relations' (2009) 23 International Relations 119.

11 Jörg Kammerhofer, 'Hans Kelsen in Today's International Legal Scholarship' in Jörg Kammerhofer (ed), *International Legal Positivism in a Post-Modern World* (2014) 81.

12 Ino Augsberg, 'Von Einem neuerdings erhobenen empiristischen Ton in der Rechtswissenschaft' (2012) 51 Der Staat 117.

13 Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (2011).

confined to positivism but can be found also in the work of, for example, Ronald Dworkin.[14] Proponents of toleration base their reserved attitude to empirical work on two related but logically distinct arguments. First, they maintain that exclusively empirical approaches cannot capture the essential character of the legal field in its entirety. It bases this claim on the assumption of a categorical divide between *Sein* and *Sollen*, facts and norms, the descriptive and the normative, the external and the internal. Observing that law consists of legal rules which are normative phenomena, toleration infers that law as such necessarily remains categorically impervious to empirical studies.

This idea is reflected in Kelsen's idea that empirical science can only study the *Sein* and never the *Sollen* of law. It also recurs in Hart's equally well-known distinction between internal and external aspects of legal rules.[15] To both Hart and Kelsen, all identification of valid law in practice requires engagement in inter-normative reasoning beginning from a presupposed starting point and leading to the ascertainment of primary legal rules as parts of a given legal system. In other words, a pure, doctrinal study of law using the legal method.[16]

The second main argument, which is applied by at least some proponents of toleration,[17] is more radical. This argument holds that not only can empirical legal studies never exhaust the field, but they are also conceptually and epistemologically *dependent* upon doctrinal studies. Accordingly, the ambitions of some empirical scholars are fundamentally misguided because they fail to appreciate the asymmetric, inferior interrelation between their

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[14] Cf., for example, Ronald Dworkin, *Law's Empire* (Hart Publishing 1998).

[15] Hart applies this distinction to explain how a habit differs from a rule: 'A social rule has an 'internal' aspect, in addition to the external aspect which it shares with a social habit and which consists in the regular uniform behavior which an observer could record. This internal aspect of rules may be simply illustrated from the rules of any game. Chess players do not merely have habits of moving the Queen in the same way which an external observer, who knew nothing about their attitude to the moves which they make, could record. In addition, they have a reflective critical attitude to this pattern of behavior: they regard it as a standard for all who play the game. Each not only moves the Queen in a certain way himself but 'has views' about the propriety of all moving the Queen in that way'. H.L.A. Hart, *The Concept of Law* (Oxford University Press 2012) 56-57.

[16] For an extended argument for this claim, see Jakob v. H. Holtermann, 'A Straw Man Revisited: Resettling the Score between H.L.A. Hart and Scandinavian Legal Realism' (2017) 57(1) Santa Clara Law Review 1.

[17] Notably Kelsen (n 7, 2009) but cf. e.g. also Augsberg (n 12).

own approach and traditional doctrinal scholarship. The relationship is asymmetric because for the empirical legal scholar to even begin studying her preferred external aspect of legal rules, i.e. the *is* beyond the *ought*, she shall necessarily have to presuppose the validity of the discipline which studies this *ought* in the first place, i.e. doctrinal law. The latter constitutes the conditions of possibility of the former.

Whether applied individually or in concert, these two arguments lead proponents of toleration to maintain that the very notion of an *empirical turn* is misguided. Properly understood, for these proponents, the current boom in empirical approaches is simply a regrettable development taking time and resources away from the primary issues, which continue to require doctrinal approaches.

2. Replacement

At the opposite end of the spectrum, *replacement* represents the most radical challenge to traditional doctrinal approaches to law. Proponents of replacement take the idea of an empirical *turn* seriously, in the philosophical sense in which it is used in relation to Kant's Copernican revolution or the linguistic turn. This means seeing the turn to empirical approaches as a radical and irreversible scholarly reorientation based on the perception that a previously predominant approach to a given field has become obsolete.

In the context of empirical legal scholarship, then, the 'turn' refers to the replacement of doctrinal scholarship by empirical approaches (broadly understood). This approach is captured by Quine's description of a parallel empirical turn in general philosophy: 'But why all this reconstruction, all this make-believe? Why not just see how this construction really proceeds?'[18] Hence, Quine urges philosophers to get 'out of the armchair and into the field',[19] i.e. to adopt whatever empirical approaches are relevant to understand knowledge and science.

In philosophy proper, this maxim has led to an exodus from philosophy into an array of empirical disciplines, from neuroscience to social science studies, disciplines which all promise to inform us 'how this construction really proceeds'. Turning to the current development in legal scholarship, the

[18] Willard Van Orman Quine, 'Epistemology Naturalized', in Willard Van Orman Quine, *Ontological Relativity and Other Essays* (Columbia University Press 1969) 75.

[19] Although this particular slogan is due to Quine's former student Daniel C. Dennett, 'Out of the Armchair and into the Field' (1988) 9(1) Poetics Today 205.

parallels are clear. Among a number of proponents of empirical approaches, we find an ambition not only to do 'additional useful work', but to *replace* doctrinal approaches to law outright.

This ambition is generally expressed in a two-stage framework analogous to Quine's program: first, the replacement approach to law consists of a *negative* claim that traditional philosophical attempts to justify doctrinal scholarship on law have failed and, second, it contains a *positive* or *constructive* claim that the existence of law should therefore be studied and explained empirically.

A wide variety of studies in law seem to all fit this general description, including political science, Law and Economics, Empirical Legal Studies, European New Legal Realism, sociology of law, etc. But these schools also differ in a number of ways. Firstly, they differ in their perceptions of what kind of empirical study doctrinal scholarship should be replaced by. That is, borrowing a phrase from Wittgenstein, proponents of replacement differ in their perception of who should be the rightful 'heir to the subject that used to be called' doctrinal law.[20] These scholars also differ regarding which aspect of law they try to explain empirically. Is it law as such? Doctrinal scholarship on law? The professional identities of key agents? The institutions, e.g. international courts? And replacement theorists differ, finally, with regard to how reductionist their approach is, i.e. whether they recognize legal doctrine as an independently existing empirical phenomenon in its own right or whether, for instance, they focus exclusively on the external aspect of legal rules reducing doctrine to, for example, overarching societal structures.

As yet another example of the replacement approach, the hallmark of the European New Legal Realism developed by Madsen and myself is precisely that it attempts to approach law in a non-reductionist way, i.e. to define valid law in such a way that it can be recognized and studied as a genuinely empirical object of study without resorting to traditional doctrinal studies based on the legal method. This is an attempt to take law itself seriously as an empirical phenomenon and not to succumb in one's empiricism to facile reductionism.

3. Synthesis

The third position is referred to as *synthesis,* which denotes approaches which emphasize and seek to establish more peaceful co-existence where doctrinal law and empirical studies of law are seen as complementary. This position is

[20] Ludwig Wittgenstein, *The Blue and Brown Books* (Harper 1965) 28.

characterised by the notion that doctrinal studies can be enlightened by empirical studies and vice versa. Its methodological trademark is a form of transdisciplinarity, which is, however, rarely fully exposed and discussed. In short, this more 'moderate' programme assumes that both doctrinal and empirical work are to benefit from the current boom in empirical approaches. However, proponents of synthesis are often silent regarding the precise epistemological premises for this collaboration.

As a position, synthesis is difficult to outline systematically. In some versions, it has an element of eclecticism to it and can perhaps best be described through examples. One such example is provided by the opening of Brian Simpson's *chef d'oeuvre* on the European Convention, where he bluntly states his premise as follows:

> This book is indeed written in the spirit which inspires the journalist who features as the letter 'J' in Edward Gorey's illustrated alphabet. He, after contemplating the scene of some disagreeable yet attractively newsworthy disaster, consoles himself with a gin and water, and thus refreshed, wonders how it came about. So it is, for me, with the European Convention. I do, however, have a message, albeit a fairly obvious one, which is that political, legal, and institutional development is the product of extremely complicated interrelationships between individuals, institutions, and governments, with their varied ideological commitments and perceptions of reality, history and self-interest.[21]

From this point onwards, the book takes off without ever explaining how all this possibly relates to any given epistemological framework. Instead, these important epistemological considerations are tellingly relegated to the book's preface.

Another example is Gregory Shaffer who calls himself an American New Legal Realist. Shaffer curiously acts as a social scientist but never gives up entirely on doctrinal law.[22] He is thus strikingly close to the positions of US legal philosophers such as Leiter[23] and Schauer[24] who also argue that realism

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[21] A. W. Brian Simpson, *Human Rights and the End of Empire: Britain and the Genesis of the European Convention* (Oxford University Press 2001) viii-ix.

[22] Cf. Gregory Shaffer, The New Legal Realist Approach to International Law (2015) 28 Leiden Journal of International Law 189. For critical discussion, see Holtermann & Madsen (n 6, 2015).

[23] Cf. e.g. Brian Leiter, *Naturalizing Jurisprudence: Essays on American Legal Realism and Naturalism in Legal Philosophy* (Oxford University Press 2007).

[24] Cf. e.g. Frederic Schauer, 'Editor's Introduction', in Karl N. Llewellyn & Frederic Schauer (eds) *The Theory of Rules* (University of Chicago Press 2011) 1–28. .

and the associated empirical methods are relevant only on the rare occasions when law is underdetermined. This could be viewed as a variation of toleration, if not for the highly social scientific dimensions of Shaffer's studies. To conclude, under the heading of synthesis we often find some very competent studies of law, but when scrutinized on epistemological grounds they appear somewhat lacking.[25]

III. Concluding Remarks

As suggested by the descriptions of these three main groupings of attitudes toward empirical scholarship on law, as well as the differences within each of the positions, the taxonomy presents a broad framework. The three categories represent ideal types and in research practice it may sometimes be difficult to place specific approaches unambiguously in one of the three categories. For instance, it seems, perhaps somewhat surprisingly, that some of the approaches presented in this issue could be placed in the toleration category, despite their application of quite sophisticated quantitative machinery to the study of law. [26] In these cases, it seems that the enthusiasm for computer-assisted large n-data is tempered by a willingness to domesticate or instrumentalize empirical methods and to apply them strictly as a *science auxiliare* for more traditional doctrinal purposes.

Even if some of these approaches present challenging cases at the borderlines between the three categories, the taxonomy is presented with the ambition to exhaust the logical space of possible attitudes toward empirical approaches to law and to force legal scholars to openly take a stand. The framework is intended to provide the conceptual space for rethinking the *actual* interface between doctrinal law and empirical approaches on epistemological grounds. Admittedly, this has an element of wishful thinking as the actual practices in this regard stand in sharp contrast to the debate in the legal field on the place of empirical studies in law. While doctrinal lawyers have often been highly defensive, empirical legal scholars very often avoid direct debate with proponents of doctrinal scholarship.

Some may, of course, do this out of genuine agnosticism. They may simply do empirical work within each of their own specialized discipline and have no strong opinion about its relationship to doctrinal scholarship. Others, however, may secretly reject doctrinal approaches and do so because they

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[25] For extended argument, cf. Holtermann & Madsen (n 2).

[26] Cf. e.g. Frese and Palmer Olsen this issue.

consider them both epistemologically problematic and inadequate for explaining many current issues of law. Regardless of the position ultimately assumed, however, proponents of empirical approaches to law often tend not to openly state and defend but rather tacitly presuppose the view they hold. This makes epistemological debate highly difficult and leads to the mutually dismissive attitude between doctrinal and empirical scholars referred to earlier in this piece. This is clearly unproductive and renders legal scholarship incapable of really benefiting from some of the methodological and empirical revolutions currently taking place. It therefore seems preferable, especially for a network of European legal empirical scholars, to instead engage head-on with the pressing philosophical questions presented at the empirical turn, as set out above:

(1) In what sense do these new empirical studies form part of a *legal* science?

(2) Why, if at all, should they be pursued at a law faculty?

(3) What do the countless new empirical studies tell us about valid law?

(4) What do they tell us about what legal rules exist, what obligations and rights people have, etc.?

(5) How do empirical findings relate to the kind of knowledge traditionally sought in the doctrinal study of law?

Hopefully, the framework presented here has the potential to help promote engagement with these questions. Only in this way can we hope that findings such as the ones presented in this special issue will not be summarily dismissed with sceptical versions of Armstrong's question: but did they discover law?

INTERVIEWING LAWYERS: A CRITICAL SELF-REFLECTION ON EXPERT INTERVIEWS AS A METHOD OF EU LEGAL RESEARCH

Emilia Korkea-aho[*] and Päivi Leino[†‡]

Interviews are commonly used as a research method in social and political science, where they are considered an effective means to elicit information on political and social behaviour. Interviews are less frequently used in legal research outside characteristically 'socio-legal' or 'empirical legal' research, which is a type of legal research that relies on qualitative or quantitative methods. Drawing on the authors' own experiences from conducting and using interviews with legal professionals as a source of legal research in the context of EU law, this article offers both a theoretical contribution and some practical insights. Theoretically, it builds on the existing literature on 'expert' interviews by examining lawyer interviews as a particular form of 'expert' investigations. We argue that interviews with lawyers pose particular challenges, which have been ignored and overlooked in general discussions on expert interviews. These challenges relate to access, confidentiality and control of research data, each of which is discussed in detail.

Keywords: EU law, empirical research, interviews, experts, lawyers

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I. Introduction

Interviews are commonly used as a research method in social and political science, where they are considered an effective means to elicit information on political and social behaviour.[1] They are much less used in legal research outside of characteristically 'socio-legal' or 'empirical legal' research, which is a type of legal research that relies on qualitative or quantitative methods.[2] The narrative is a familiar one. Legal research, especially its doctrinal variant, has traditionally dealt with, and given priority to, normative material and written sources that are legally binding and enforceable in courts. The famous Nuffield report, taking stock of the state of empirical legal research in the UK, summarised over a decade ago that 'legal scholarship tends to be law-centred, conducted by lone researchers undertaking close textual analysis of legal material'.[3] Legal scholarship's focus on normative material has also manifested itself in the apparent reluctance of legal scholars to 'use non-legal documents as sources of data'.[4]

Preference for doctrinal research is not the only explanation for the normative imprisonment of legal scholarship. Lawyers receive little, if any, formal training in the use of empirical research methods and generally engage with questions of research methodology during their studies only to a limited extent. Doctrinal research has been the research methodology used most

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[1] Stefanie Bailer, 'Interviews and Surveys in Legislative Research' in Shane Martin, Thomas Saalfeld, and Kaare W Strøm (eds), *The Oxford Handbook of Legislative Studies* (Oxford University Press 2014).

[2] See, eg, Lisa Webley, 'Qualitative Approaches to Empirical Legal Research' in Peter Cane and Herbert M Kritzer (eds), *The Oxford Handbook of Empirical Legal Research* (Oxford University Press 2010); John Baldwin and Gwynn Davis, 'Empirical Research in Law' in Peter Cane and Mark Tushnet (eds), *The Oxford Handbook of Legal Studies* (Oxford University Press 2003); Paddy Hillyard, 'Law's Empire: Socio-Legal Empirical Research in the Twenty-First Century' (2007) 34 Journal of Law and Society 269, 270.

[3] Dame Hazel Genn, Martin Partington and Sally Wheeler, 'Law in the Real World: Improving Our Understanding of How Law Works' (2006) The Nuffield Inquiry on Empirical Legal Research 4 <www.nuffieldfoundation.org/sites/default/files/Law%20in%20the%20Real%20World%20full%20report.pdf> accessed 11 September 2017. The Nuffield report defined empirical legal research as 'the study through direct methods of the operation and impact of law and legal processes in society'.

[4] Webley (n 2) 938.

widely in European law faculties, where law students have traditionally been taught to view law as a closed system, and instruction has closely reflected traditional concepts of legal (judicial) reasoning. This is not a particularly European problem, but a characteristic of legal education more globally. In the US, two academics (both educated in political science and law) conducted a study of several hundred law articles using empirical research methods. They concluded that 'the current state of empirical legal scholarship is deeply flawed',[5] pointing out deficits in the methodology and analysis and identifying these as skills that should be introduced to students entering law faculties. Finally, legal scholars have also been hindered by the absence of a critical mass engaging with empirical research, although scepticism towards socio-legal research is slowly diminishing as a response to better material resources, as well as increased funding to interdisciplinary research that uses empirical research methods.[6]

Persistent, but diminishing scepticism also applies to EU legal research, which forms the core of our research. EU legal scholarship could in principle provide a welcoming environment for those interested in deploying empirical methods. It has traditionally adopted a less normative outlook than many national research traditions, and embraced law in its broader political, social and cultural contexts. Thus, empirical legal research enjoys more prestige in EU law than in national legal research.[7] At the same time, the 'instrumentalisation' of law – reflected in the slogans about the pivotal role of law as a key tool in furthering European integration – has been embraced by

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[5] Lee Epstein and Gary King, 'The Rules of Inference' (2002) 69 University of Chicago Law Review 6.

[6] For expectations of funding bodies at the EU level, see e.g. ALLEA, 'Embedding the Social Sciences and Humanities in Horizon 2020', <http://www.allea.org/wp-content/uploads/2015/09/2013-02-28-ALLEA-Roadmap-on-Embedding-SSH-in-Horizon-2020_final.pdf> accessed 11 September 2017. See also Science Europe's position paper where it was argued that 'A key to future scientific breakthroughs lies in interdisciplinary research', in Science Europe, 'Science Europe Position Statement Horizon 2020: Excellence Counts December 2012', 4 <www.scienceeurope.org/wp-content/uploads/2014/05/SE_H2020_Excellence_Counts_FIN.pdf> accessed 11 September 2017. See generally also Hans-W Micklitz and Rob van Gestel, 'Why Methods Matter in European Legal Scholarship' (2014) 20 European Law Journal 292.

[7] Graínne de Búrca, 'Rethinking Law in Neofunctionalist Theory' (2005) 2 Journal of European Public Policy 310.

EU lawyers, which could contribute to making the area even more attractive for empirical research.[8] Many research questions relating to various aspects of the role of law in resolving societal conflicts in the various areas of EU law necessitate empirical research. However, drawing on their years of experience in doctoral supervision, Hans-W Micklitz and Rob van Gestel establish that the PhD proposals that they have come across are largely policy-driven and overwhelmingly concerned with societal relevance. They note that,

> what is striking in most of the research proposals that we have studied in our methodology seminars over the last five years is the strong emphasis on issues concerning effectiveness, efficiency, impact, influence and so on, whereas usually these criteria are not operationalised, and *few of the proposals explicitly mention socio-legal or empirical-legal research methods*.[9]

The criticism expressed by these two authors does not seem to relate to the change in emphasis, but rather to the attempt to answer new questions concerning effectiveness, efficiency, impact, and so on, by utilising 'traditional' research methods, which seem ill-equipped for the task. They criticise especially the rise in popularity of 'case study' research that proceeds without rooting the relevant cases firmly in empirical methods. Without the counter-examples and agenda-upsetting factors of socio-legal research, there is a good chance that case studies could easily become a tool to entrench status quo practices. Those using empirical methods are not spared criticism from Micklitz and van Gestel, who claim that 'the most empirical-legal research projects concentrate on measuring legal consequences without being able to prove that the consequences are the direct result of the intervention or the changes in the legal regime'.[10] These concerns, together with the practice of EU and national research bodies to award funding to interdisciplinary research, emphasise the importance of exploring the use of empirical methods in EU scholarship.[11]

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[8] On the connection between instrumentalisation and empirical research, see Baldwin and Davis (n 2) 885.

[9] Micklitz and van Gestel (n 6) 301–302 (emphasis added).

[10] Ibid 303.

[11] See n 6.

The purpose of this article is not to provide yet another theoretical overview of research methods in law.[12] Neither is it intended, as a hands-on guide, to those interested in or contemplating using 'alternative' legal research methods. Rather, it is a mix of both, offering a theoretical contribution, as well as some practical insights which stem from our own experiences. Our ongoing and completed research projects include approximately 150 semi-structured interviews, half of which have so far been undertaken.[13] The projects involve the utilisation of multiple methods, with interviews forming one relevant data collection technique. Some of the data have already been used in publications.[14] The scope of this article is, nevertheless, limited in two respects. First, it is concerned only with interviews, leaving other types of qualitative research methods, such as small-scale surveys or action research,[15]

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[12] In addition to literature already referred to, see Dawn Watkins and Mandy Burton, *Research Methods in Law* (Routledge 2013); Reza Banakar and Max Travers (eds), *Theory and Method in Socio-Legal Researc*h (Hart 2005); Robert Lawless, Jennifer Robbennolt and Thomas Ulen, *Empirical Methods in Law* (Aspen Publishers 2010); Simon Halliday and Patrick Schmidt, *Conducting Law and Society Research: Reflections on Methods and Practices* (Cambridge University Press 2009); Special Research Issue, 'Law's Reality: Case Studies in Empirical Research on Law' (2009) 35 Journal of Law and Society.

[13] Academy of Finland projects in a chronological order: Korkea-aho (2013–2016): The politics of super laws: How third country actors shape the emergence and development of EU law, decision number 267302; Leino-Sandberg (2015–2020): The necessary evil – law, power and institutional politics in the European Union, decision number 307542; Korkea-aho (2016–2021): The Lobbyist? A Socio-Legal Inquiry of Interest Representation in the EU, decision number 306973 and Leino-Sandberg (2017–2021): Transparency in the EU – from reaction to a manifesto?, decision number 309305. Moreover, we are involved in Jean Monnet Network 'European Network on Soft Law Research' (2016–2019), decision number 2016-2397.

[14] See, eg, Päivi Leino, 'Competence as a framework of argumentation' in Sacha Garben and Inge Govaere (eds), *The Division of Competences between the European Union and its Member States: Reflections on the Past, Present and Future* (Hart Publishing 2017), and Deirdre Curtin and Päivi Leino, 'In Search of Transparency for EU Law-Making: Trilogues on the Cusp of Dawn' (2017) 54 Common Market Law Review 1673.

[15] Action research is, however, something that we also engage with. In the project plan for Leino-Sandberg's transparency project, it is described as follows: 'researchers will map, and where relevant, try to influence institutional practices. They will seek actively access to documents needed for their substantive research, and when necessary, initiate and participate in administrative and judicial proceedings. In

aside. Second, our analysis is limited to interviews with 'lawyers', by which we refer to those who have received legal education irrespective of whether or not they have remained in the legal profession or engaged in other occupations.

Two reasons justify limiting the scope of this contribution to interviews with lawyers. On the one hand, the existing research that is undertaken with the help of interviews is nearly exclusively concerned with judges, while other legal actors have been overlooked and remain understudied.[16] We have, on the other hand, personally administered dozens of interviews with both lawyers and non-lawyers in our research projects. In the light of these experiences, as well as during the preliminary analysis of the data, we have observed that interviews with lawyers pose particular challenges that are not sufficiently addressed in the empirical research literature. These can be defined as questions relating to *access*, *confidentiality*, and *control of the research process and data*. We address the issue of interviewing lawyers in this article by using examples from our empirical investigations, which gives us the opportunity to engage in methodological self-reflection. Theoretically, it builds on the existing literature on 'expert' interviews by examining lawyer interviews as a particular form of 'expert' investigation. We define 'experts' as people who have specialised knowledge and who can control or facilitate access to other people or institutions; and we define 'expert interviews' as interviews that are conducted with these experts.

Studies of a similar kind have previously been undertaken in national contexts.[17] Studying international law from the point of view of international lawyers and as a particular field of expertise has recently figured on the academic agenda, but to our knowledge these studies have built less on empirical work and more on personal accounts of legal advisors working in

addition to the substance of the document, the project researchers also analyse the practice of handling these requests and the normative framework that the institution relies on. In this respect, the method resembles earlier methods of participatory action research used in social sciences.'

[16] See Section II 'Empirical Research in EU Law: An Overview'.

[17] See in particular in the French context, Bruno Latour, *The Making of Law. An Ethnography of the Conseil d'État* (Polity 2010).

the field.[18] Many of these studies have been conducted by researchers affiliated with critical approaches to international law, whose focus is often on the exercise of power, the positioning of expertise in international legal debates and the identification of power relationships.[19] These considerations have also informed the development of our respective research agendas.

The article first describes a selection of works based on interview research in the area of EU law. It then offers a brief overview of the literature on expert interviews and explains how interviews with experts are conducted. Section 4 focuses on particular challenges that are raised as regards lawyer interviewees. The article concludes by offering lessons learned and presenting tools for addressing the challenges posed by interviews in future legal research.

II. Empirical Research in EU Law: An Overview

The roots of empirical legal research are in the gap between legal texts and the day-to-day reality of legal practice.[20] Academics embarking on empirical legal research who have surveyed, for instance, the operation of the civil justice system have been strongly influenced by the alleged gap, giving the emerging research tradition a distinct flavour and a strong critical edge. The central message of empirically-oriented research can be summarised by the slogan 'all is not what it seems in the law books'. Second, its research subjects have been what could generally be described as 'consumers' or 'end-users' of legal services, such as clients of divorce attorneys, crime victims, users of alternative dispute resolution mechanisms, and so on. Finally, empirical research has typically been interested in lower-level processes, such as practices of desk officers in administration, which are usually hidden from research focusing on what goes on officially.[21] The question one might ask is

[18] See eg *Collection of Essays by Legal advisers of States, Legal Advisers of International Organizations and Practitioners in the Field* (United Nations 1999) and David Kennedy, *A World of Struggle: How Power, Law, and Expertise Shape Global Political Economy* (Princeton University Press 2016).

[19] See, for instance, David Kennedy, *The Dark Sides of Virtue. Reassessing International Humanitarianism* (Princeton University Press 2004) particularly pages 111–146.

[20] Baldwin and Davis (n 2) 886.

[21] Ibid 887.

whether these features continue to apply to empirical legal research in general, or empirical legal research in EU law in particular?

This section presents an overview of both books published in EU legal scholarship in recent years, as well as articles published in the following major English-speaking refereed journals: *Common Market Law Review* (CMLRev), *European Law Journal* (ELJ), and *European Law Review* (ELRev). The overview is not meant to be exhaustive or complete, rather it serves to give a certain perspective and a sense of the scope of empirical research conducted in EU law in recent years. In keeping with the focus of the article, we discuss only those works that have invoked interviews as a data collection technique.

As far as monographs are concerned, in *Brokering Europe*, Antoine Vauchez, sociologist and political scientist by training, enunciates the early narrative of European integration by deploying 'a number of methodological moves and choices'.[22] His sources are manifold and have required years of work to uncover:

> the very diverse set of oft-unexplored empirical research that this research has dug up over the years – bibliographical data, in-depth coverage of European law scholarly or professional conferences, ECJ cases' documents and commentaries, forgotten doctrinal controversies, interviews with key legal practitioners, archival files from the Commission's Legal Service and secretariat-general, commemorative material from the ECJ (eulogies, Festschriften, jubilees, etc.), among others'.[23]

Hans-W Micklitz has also used interviews for three case studies in *The Politics of Judicial Cooperation in the EU: Sunday Trading, Equal Treatment and Good Faith*. Through a qualitative approach, Micklitz attempted to 'reconstruct the three series of cases to the fullest extent possible, that is, in their national and European legal contexts and in their social-political contexts'.[24] For him, reconstruction

> refers to more than a mere compilation of empirical data for a case study: in addition, it seeks to decipher the structure of meaning in the ongoing process

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[22] Antoine Vauchez, *Brokering Europe. Euro-Lawyers and the Making of a Transnational Polity* (Cambridge University Press 2015) 6.

[23] Ibid 10–11.

[24] Hans-W Micklitz, *The Politics of Judicial Cooperation in the EU: Sunday Trading, Equal Treatment and Good Faith* (Cambridge University Press 2005) 39.

> of argumentation which shapes a case. This type of legal-sociological analysis includes the interpretation of law, Directives, documents, interviews with parties concerned, and the results of discourse and bargaining processes in written or oral form.[25]

In *The Making of a European Constitution*, Michele Everson and Julia Eisner used both surveys and semi-structured interviews with judges and lawyers of the High Court of England and Wales in a bid, to shed light on the role of Member State lawyers in accepting the supremacy of EU law. They sent the survey to 166 lawyers and judges (receiving 44 replies) and conducted five semi-structured interviews. The survey and interviews were prepared to test the assumption that lawyers use 'a formalist legal idiom when narrating their experiences'.[26] Both direct questions and indicators were used. Whilst the former were used to test the main assumption, the indicators were developed to track more subtle changes in the language and instruments of legal argument, the changes in the use of non-legal and non-national material, as well as in the style of legal argumentation.

EU judges were also interviewed by the US scholar Ran Hirschl for his book *Towards Juristocracy,* which provides a comparative analysis of the role of judiciary in different jurisdictions.[27] Similarly, the book *The International Judge* was based on in-depth interviews of 32 judges between 2004 and 2006, among them representatives of the EU judiciary.[28] A range of highest court judges were also interviewed by Elaine Mak, who used interviews to conduct a comparative analysis of the changing practices of Western highest courts.[29]

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[25] Ibid.

[26] Michele Everson and Julia Eisner, *The Making of a European Constitution. Judges and Law Beyond Constitutive Power* (Routledge 2007) 98.

[27] Ran Hirschl, *Towards Juristocracy*: *The Origins and Consequences of the New Constitutionalism* (Harvard University Press 2004).

[28] Daniel Terries, Cesare P R Romano, and Leigh Swigart, *The International Judge. An Introduction to the Men and Women Who Decide the World's Cases* (Oxford University Press 2007) xvi-xvii. For the research on EU courts undertaken by political scientists, see, among others, R Daniel Kelemen, 'Talking about the European Court: Discourses of Judging in the European Union' in Austin Sarat (ed), *Special Issue: The Discourse of Judging* (Studies in Law, Politics and Society, Volume 58 2012) 139–157.

[29] Elaine Mak, *Judicial Decision-Making in a Globalised World: A Comparative Analysis of the Changing Practices of Western Highest Courts* (Hart Publishing 2013).

Deirdre Curtin has engaged actively in research invoking empirical methods, and encouraged PhD students to do so as well.[30] Two recently concluded PhD theses under her supervision build on extensive interview material with policy-makers. Vigjilenca Abazi's thesis lists forty semi-structured interviews that 'provide information for this research on issue that arise in day-to-day EU practice and insight into what the EUCI regulatory regime looks like to participants, what mechanisms and customs it employs and why it takes the forms that it does'.[31] Maarten Hillebrandt's thesis builds, in addition to quantitative data, on 68 interviews with experts 'in and around the Council', used to 'identify the development of (anomalous) implementation practices and informal norms, as well as to determine the relevant (combinations of) institutional factors from which explanatory mechanisms could be derived'.[32] Unlike in the examples of Everson and Eisner described above, the purpose of the interviews used by Abazi and Hillebrandt would not seem to relate to testing a thesis; instead they are a way of identifying core issues and mapping the ground.

It is more difficult to find policy-area specific research utilising interviews. The study of the implementation of the EU Directive on Integrated Pollution Prevention and Control in EU environmental law is a rare exception. Bettina Lange's study, published in 2008, is remarkable for its methodological approach. In the tradition of legal empiricists, the book challenged the idea of law as the formal law in the books and detached from its social and political contexts. The empirical research sought to 'question theoretical assumptions about the nature of law in EU integration by examining what law is generated in practice during the implementation of the IPPC Directive'.[33] To understand the law in action, Lange's study used three

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[30] See, eg, Maarten Hillebrandt, Deirdre Curtin and Albert Meijer, 'Transparency in the EU Council of Ministers: An Institutional Analysis' (2014) 20 European Law Journal 1.

[31] Vigjilenca Abazi, *Secrecy and Oversight in the European Union. The Law and Practice of Classified Information* (University of Amsterdam 2015) 25.

[32] Maarten Hillebrandt, *Living Transparency. The Development of Access to Documents in the Council of the EU and its Democratic Implications* (University of Amsterdam 2017) Section 5.3.3.

[33] Bettina Lange, *Implementing EU Pollution Control: Law and Integration* (Cambridge University Press 2008) 13.

qualitative case studies, each relying on semi-structured interviews with members of EU technical working groups and staff in national authorities. Qualitative data was also collected through analysis of background files.[34]

Despite these examples that we are aware of, interviews are still seldom used in EU legal research. This impression is strengthened by a basic search for the word 'interview' in three key EU legal journals (CMLRev, ELRev, and ELJ), which results in a limited number of hits between 1 January 2013 and now:[35]

	2013	2014	2015	2016	2017	Total
CMLRev	0	2	1	0	3	6
ELRev	2	1	2	0	0	5
ELJ	1(0)	2(1)	1	2	1	7(5)
						18

In the five-year period, the journals published altogether 1367 documents (CMLRev 746, ELRev 404 and ELJ 217).[36] In light of this, the modest figure of articles using interviews confirms our intuitive understanding that interviews are a rare sight in EU legal scholarship. The selected three journals are generalist journals that – with the exception of the ELJ, which adopts the 'law in context' approach – do not favour one method over the other[37] and

[34] Ibid.

[35] The search was conducted by a research assistant using available databases in September 2017. The figures presented only include those articles that used an interview or interviews as part of their legal research. The search naturally also included the plural term 'interviews', therefore double hits on the same article that occurred between the plural and singular searches were only counted once.

[36] Note though that these figures include all documents, including editorials, book reviews. It would have been too time consuming to filter them out from the aggregate figures.

[37] While CMLRev serves as the main doctrinal outlet, ELJ claims to represent 'an authoritative new approach to the study of European Law, developed specifically to express and develop the study and understanding of European law in its social, cultural, political and economic context'. The ELRev describes itself as the 'principal English-language journal covering the law relating to European integration and the

thus are in principle open to articles using empirical methods. Two articles, both published in the ELJ, were placed in brackets because they did not invoke interviews as a data collection technique, but generally discussed methodology of EU legal scholarship, including in this context also interviews. The articles covered many different aspects of EU law scholarship, and no particular topic emerged more frequently in articles using interviews. The only weakly discernible pattern seems to concern judicial function, for three articles, all published in the CMLRev, dealt with judicial appointments, openness and the reform of the EU's court system. One common observation is that in at least four articles (one in both CMLRev and ELRev respectively and two in the ELJ), the authors referred to only a single interview.[38] This suggests that the authors did not use interviews systematically, but instead relied on them to acquire specific information they know exists on the matter they are investigating.

This admittedly superficial overview of research conducted using interviews in the area of EU law in the past ten years or so yields the following observations. First, the critical stance of empirical research is still noticeable, and works seem to be driven by a desire to describe and understand the law in action. What has, however, changed from the early days of EU socio-legal scholarship is that the research has gone beyond the gap. Most recent empirical works in the area of EU law, such as those of Abazi and Hillebrandt, do not necessarily start from the premise that the 'law in action' exists and operates in the shadow of the 'law in the books' and that the primary purpose of research is to reveal and measure that gap between formal and empirical law.

Our own respective research projects fit this characterisation well: they study the role of legal expertise in EU policy-making (Leino-Sandberg) and the normative, political and constitutional frameworks of lobbying (Korkea-aho). We usually answer questions of the interpretation of the law and its adaptation to the realities of society with the help of legal and non-legal sources. However, in the context of our current research ventures, which

Council of Europe. While preserving the highest academic standards, the Review also caters for the needs of those involved in the practice and administration of the law'.

[38] The full list is available from authors on request.

focus on what lawyers think of and regard as law, such sources are nowhere to be consulted. There is no law, be that EU legislation or court rulings, that unambiguously guide the work of legal experts or lobbyists, suggesting that current empirically oriented EU socio-legal research operates with assumptions that are different from traditional socio-legal scholarship. The lack of traditional normative sources is a direct consequence of the research's attempt to probe and extend the limits of what we perceive as 'legal' (as in: relevant for an understanding of what the law is) in the first place. Instead, research projects, including ours, push the conceptual envelope, contesting, as the research proceeds, the conceptual identification on which formal and empirical law rests. The empirical data collected in such research projects will be important as a source of law.

Second, interview research in EU law differs from its predecessors and contemporaries in national settings in that that it is much less concerned with the 'end-users' of legal services. Instead, EU empirical legal research engages with 'high' law and legal practice, those doing the 'job' of interpreting, enforcing and administering the law. Little attention is devoted to people, organisations or economic operators that are the objects of its application. For long, judges have occupied a pride of place in empirically oriented research on EU law conducted by scholars of both law and social sciences. A related observation is that EU empirical legal research is not, primarily at least, conducted to produce high-quality data to inform policy-makers. Unlike in national contexts, little to no discussion in EU empirical legal scholarship has focused on intended audiences for the results produced by empirical legal research.[39] Who will read the work? Other academics? Practitioners? Policy-makers? At the national or EU level or both? In the absence of a more specific definition of target audience, the assumption is that the audience is the same as in 'general' EU legal research.

Third, despite the current focus of scholarship being on high-level subjects of EU law, modern researchers – just like their predecessors – attempt to

[39] As an exception see Lange who points out that the 'empirical data discussed in this book will be of interest to policy-makers seeking to understand the practical implementation of the IPPC Directive because the data illustrate a range of obstacles to the 'successful' implementation of the IPPC Directive in Member States'. See Lange (n 33) 17.

identify the emergence and development of implementation practices and informal norms, as well as to establish the relevant institutional factors affecting the performance of informal norms and practices. Research topics relate to the 'new' emphasis identified by Micklitz and van Gestel, concerning effectiveness, efficiency, impact and influence. The cited works do not conduct interviews to test specific hypotheses that they have identified prior to the project starting, nor do they seem interested in trying to disprove earlier work on the matter – something that for Micklitz and van Gestel constituted a point of criticism.[40]

With the exception of Everson and Eisner, none of the works cited above set a specific hypothesis to be tested through empirical work. However, the criticism of Micklitz and van Gestel of the rationales for conducting socio-legal research rests on unnecessarily limited premises: empirical research can also be used more directly to obtain information not otherwise available. Then its primary purpose is not to test the hypothesis (reform X results in changes Y and Z), but rather, as is in our respective projects, to develop an understanding, as the research proceeds, of how law functions and is represented within society.[41] In these instances, interviews or other quantitative or qualitative methods are used together with other data collection techniques. A selection of EU literature demonstrates that there are some on-going or recently completed research projects in the area of EU law (including ours) that focus on topics requiring information that is not simply available through a close reading of written sources.

III. Interviewing Lawyers: Expert Interviews as a Method

The debate on 'expert' interviews is part of a more general discussion on the methodology and methods of qualitative research. In Europe, the initial discussion was launched in 1991 by Michael Meuser and Ulrike Nagel, two German scholars.[42] The debate intensified and internationalised a decade

[40] See also Baldwin and Davis (n 2) 891.

[41] A good example of such approach is Bettina Lange's work in (n 33).

[42] Michael Meuser and Ulrike Nagel, 'ExpertInneninterviews – vielfach erprobt, wenig bedacht. Ein Beitrag zur qualitativen Methodendiskussion' in Detlef Garz and Klaus Kraimer (eds), *Qualitativ-empirische Sozialforschung. Konzepte, Methoden, Analysen* (Westdeutscher Verlag 1991) 441–471.

later when methodology handbooks introduced chapters on expert interviews. In the US, similar methodological debate has occurred under the label 'elite' interviews,[43] while in Europe the term 'expert' is commonly used to avoid negative connotations of the word 'elite'.

Discussion on expert interviews rests on the conceptual difference that is made between an 'expert' and a 'lay person', expert knowledge versus every day or common-sense knowledge. What constitutes an expert? One way to identify an expert is to emphasise the esoteric nature of expertise: 'an individual is addressed as an expert because the researcher assumes –for whatever reason– that she or he has knowledge, which she or he may not necessarily possess alone, but which is not *accessible to anybody in the field of action under study'*.[44] The expert has acquired access to a specific body of information or gained skills and professional knowledge through rigorous learning and training:

> Such superior knowledge is usually produced by designated process of learning and training ... Members of professions such as physicians, lawyers or architects are the best-known examples of 'trained' experts.[45]

However, specialised knowledge, the possession of which qualifies the interviewee as an expert does not have to be the outcome of formal training or education. Actors such as representatives of citizens' groups or non-governmental organisations (NGOs) can also be experts by virtue of their privileged access to information. The same information cannot easily be found on the internet or obtained from newspapers. To qualify as an expert, they must have acquired their knowledge of a particular issue through an activity which is aimed at analysing or helping to solve the problem in some way.[46] This criterion is highly subjective, unlike criteria relating to formal

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[43] See Jaber F Gubrium and James A Holstein (eds), *Handbook of Interview Research: Context and Methodology* (Sage Publications 2002) or Norman K Denzin and Yvonna S Lincoln (eds), *Handbook of Qualitative Research* (2nd edn, Sage Publications 2000).

[44] Michael Meuser and Ulrike Nagel, 'Experts and Changes in Knowledge Production' in Alexander Bogner, Beate Littig and Wolfgang Menz (eds), *Interviewing Experts* (Palgrave Macmillan 2009) 18 (emphasis added).

[45] Jochen Gläser and Grit Laudel, 'On Interviewing "Good" and "Bad" Experts' in Bogner, Littig and Menz (n 44) 118.

[46] Meuser and Nagel (n 44) 24.

verifiable training or education. However, it is necessary to keep in mind that 'every expert is also to some degree the "construct" of a researcher's interest'.[47]

This finding highlights the existence of a subjective element in defining an 'expert', which also has the potential to affect the outcomes of research. One way of mitigating the researcher's influence on the choice of participants is the 'snowball' technique, which is used in selecting interviewees more generally, but works especially well in expert interviews where uncertainty exists on who should be included.[48] This is a technique that we have both used and found useful. Snowballing means that the researcher begins with an individual or a group of individuals who are already known to her and asks them to name someone else whom they think would be a good interviewee for the purposes of the study, and in that way gradually build up a larger sample of participants.[49] Snowballing serves also to ensure the representativeness of interview sampling. The repetitious mentioning of certain experts strongly indicates that the researcher has managed to find the representative sample for the purposes of the research project. In addition to snowballing, we have sampled our interviewees through the preliminary analysis of the field, by studying information available on the internet and by contacting former colleagues and acquaintances.

Snowballing emphasises an important aspect of expert interviews: an institutional background. Although the initial focus may be on the interviewee's personal capacities, the 'expert is not interviewed as an individual; the interview context is organisational or institutional'.[50] Contexts of expertise vary, but usually they comprise occupational tasks, science or institutions. The institution does not have to be governmental, and a non-governmental organisation is an example of an institution that

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[47] Alexander Bogner and Wolfgang Menz, 'The Theory-Generating Expert Interview: Epistemological Interest, Forms of Knowledge, Interaction' in Bogner, Littig and Menz (n 44) 49.

[48] This particular technique also works in situations in which stigma is attached to the practice under investigations, such as lobbying.

[49] See also Webley (n 2) 934.

[50] Gabriele Abels and Maria Behrens, 'Interviewing Experts in Political Science: A Reflection on Gender and Policy Effects Based on Secondary Analysis' in Bogner, Littig and Menz (n 44) 140.

accumulates expertise.[51] As explained in detail below, this has important practical ramifications for access: it is often possible to extend the circles of interviewees either within the same organisation or institution or across institutional and organisational lines. This also means that the expert role is not only tied to the level of knowledge (the expert knows more than the average person or the researcher herself) but to the fact that they can either facilitate or control access to other people and institutions.[52] In other words, they act as gatekeepers.

The expert interview is not linked to the particular type of interview, but to the particular respondent,[53] and can include all forms of qualitative interviews that are conducted with experts.[54] Expert interviews are a challenging form of qualitative data gathering. Besides requiring interpersonal sensitivity and adaptability, the interviewer must be well-prepared and have sufficient, even detailed knowledge of the field in which the experts work. This is believed to generate trust and proximity, triggering the expert to respond in an open and non-defensive fashion.[55] In our research, as indicated above, expert interviews have also been used to map the ground; however, even then we have found that trust is difficult to gain, unless the interviewer can demonstrate adequate knowledge of the field that she is studying. However, sometimes naïve questions produce the most interesting answers: 'if the interviewee thinks she or he needs to explain the most basic elements of his or her ways of thinking and acting, this can be of great interest for analyses of interpretative knowledge because even simple patterns or argument that are not usually made explicit by the expert will be set out in detail'.[56]

Although the decision on research design is made in the beginning of the research process, choosing which particular technique works best must, however, often be made extemporaneously, sometimes even during the interview, depending on the interview situation and the type of expert

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[51] Gläser and Laudel (n 45) 118.

[52] See also Bill Gillham, *Research Interviewing: The Range of Techniques* (Open University Press 2005) 54.

[53] Similarly see Gläser and Laudel (n 45) 118.

[54] Ibid.

[55] Meuser and Nagel (n 44) 32.

[56] Bogner and Menz (n 47) 64.

interview. Indeterminacy leads to semi-structured interviews with open-ended questions, which are most often used in interviewing experts.[57] This is what we have also found valuable for interviews with experts. Interviewees often ask for some indication of the questions that will be asked prior to the interview in order to prepare. For this purpose, we sent an indicative list of the type of questions we would wish to discuss before the interview takes place. However, as the interviews advance, we often moved to cover other questions that either the researcher or the interviewee identified as relevant for the topic.

Expert interviews therefore lend themselves to very different types of research situations. One common situation identified above is 'exploratory expert interviews': interviews with experts are used to establish a preliminary understanding of a new or developing field, serving 'the researcher to develop a clearer idea of the problem or as a preliminary move in the identification of a final interview guide'.[58] Experts, in other words, offer background information and point to sources of further information, saving the researcher both valuable time and resources that would otherwise be devoted to data gathering processes. This model comes with a clear bias: the researcher might be tempted to rely too heavily on the sources identified by the interviewee, instead of mapping the ground herself.

The second way of using expert interviews is to conduct them with the aim of obtaining systematic and complete information: 'the expert is treated here primarily as a guide who possesses certain valid pieces of knowledge and information, as someone with a specific kind of specialized knowledge that is not available to the researcher'.[59] This variant, which is sometimes called the 'systematising expert interview', is most commonly used by those engaging in expert interviews.

The third alternative, the 'theory-generating interview', differs from the other two, because the expert is not the source (exploratory) or a tool through which the researcher gains useful information and organises it (systematising). In this kind of interview, the interviewer 'seeks to formulate

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[57] See Beth L Leech, 'Asking Questions: Techniques for Semistructured Interviews' (2002) 35 PS: Political Science and Politics 665.

[58] Bogner and Menz (n 47) 46.

[59] Bogner and Menz (n 47) 47.

a theoretically rich conceptualization of (implicit) stores of knowledge, conceptions of the world and routines, which the experts develop in their activities and which are constitutive for the functioning of social systems'.[60]

In the literature, several types of conversational interaction are reported. First, the 'paternalism effect' is manifested in the interviewee's condescending approach towards the interviewer and her research. Second, the 'catharsis effect' is used to describe the situation in which the interviewee uses the interview to express her feelings, including changing roles from expert to private individual. This effect is visible, for example, in the way in which respondents may report on private family events. Third, the 'iceberg effect' refers to an interviewee's unwillingness to, first, attend the interview and, secondly, to give information during the interview. Fourth, the 'feedback effect' means that the interviewee attempts to reverse roles with the interviewer, a common eventuation in situations where the topic is sensitive and conflict-laden. A typical example is the interviewee asking who else has been interviewed and commenting negatively on the questions and research in general. Finally, the 'profile effect' occurs where the interviewee uses the interview as a way to prove her capability and expertise and is eager to give information.[61] We have experience with all of these situations.

These interactive effects can be read to challenge the validity of interviews as a data collection technique. True, every interview is different, and sometimes securing access to good data depends on the charisma and personality of the interviewer or some other interpersonal factor affecting communication. However, the existence of interactions, or power asymmetry between the interviewer and the interviewee, do not as such dismiss the validity of interviewing as a method or suggest that interviewing is random as a method. Expertise is interactional and situational, and the expert is defined as part of the context within which expertise is assessed. This requires critical self-reflection from the researcher, who must reflect on and justify the choices and decisions made during the research process, taking into account her own role as an interviewer and expert. Interview sampling – where the interviewer must select interviewees who are likely to yield the most information and have the greatest impact on the development of knowledge – is a critical part

[60] Ibid 48.

[61] Abels and Behrens (n 50) 144–150.

of the research process. Despite the case-by-case nature of interviewee selection, it is not random.

From the perspective of a legal scholar, the discussion about expert interviews has so far remained on a general level and has not addressed the issue of interviews with lawyers or lawyers as experts. Nor does the literature mentioned above in section II include discussions of problems, setbacks or challenges during the implementation of research interviews. There is, to give an example, very little discussion of the problems faced by researchers interviewing judges. The little discussion we have managed to find on interviewing and talking to lawyers is by US scholars and mostly concerned with research on the legal profession as such.[62]

One might argue that there are no reasons to think that lawyers are different from other experts, and what is said of expert interviews generally applies to lawyers in particular. This is true, and the themes discussed below have been reported in the literature on 'general' expert interviews. In our experience, however, interviews with lawyers pose particular challenges, which have been ignored and overlooked in general discussions on expert interviews. These challenges relate to access, confidentiality and control of the research process and data.

We do not claim that these lawyer-specific challenges emerge only in interviews with those who work as lawyers or who have a legal background. It is certainly true that non-lawyer interviewees may also try to control the research data or require specific confidentiality assurances. However, in our experience, which involves both lawyer and non-lawyer interviews, the three above-mentioned challenges occur more often in lawyer interviews than in those conducted with non-lawyers. Our interview data does not give conclusive answers as to why these challenges seem to specifically relate to interviews with lawyers.

Does our own role as lawyers have something to do with it? As shown below, our own educational and professional backgrounds indeed play a role. As

[62] David B Wilkins, 'The Professional Responsibility of Professional Schools to Study and Teach About the Profession' (1999) 49 Journal of Legal Education 88; Susan Saab Fortney, 'Taking Empirical Research Seriously' (2009) 22 The Georgetown Journal of Legal Ethics 1473.

every profession, the legal profession also 'has its own technical language, a private terminology which can only be fully understood by the members of the profession', which both creates and affirms membership.[63] External assessment of professional competence is carried out by other members of the same profession, which leads 'professionals to have a powerful motive to be far more concerned with the way they are viewed by their colleagues than with the way they are viewed by their clients'.[64]

We believe that our own role as lawyers, and proficiency in the legal technical language spoken by the profession, for instance, conditions access in the sense that common background (lawyer interviewer – lawyer interviewee) makes it easier to ensure an interview with lawyers (see more in section IV.1. 'Access' below). Does the non-lawyer face more challenges in accessing lawyer interviewees? We do not know, but we suspect this to be the case. Most professions, including the legal profession, see themselves as 'an elect group by virtue of hard work and mastery of the mysteries of the profession'; professional training leads to a belief of being 'a special kind of person, both different from and somewhat better than those nonprofessional members of the social order. It is equally hard for the other members of society not to hold an analogous view of the professionals'.[65] Our claim is – although we are currently unable to verify it – that also non-lawyer interviewers notice these challenges as lawyer-specific, and in this respect, they are not wholly dependent on the interviewer being a lawyer herself.

IV. Access, Confidentiality and Control of Research Data: Insights from the Researcher's Reality

1. Access

Access refers to the preliminary stage in a research process where the researcher tries to get experts to agree to an interview. In general, it is considered easier to convince experts to agree to an interview than members of the general public since the former have a professional interest in their own

[63] Richard Wasserstrom, 'Lawyers as Professionals: Some Moral Issues' (1975) 5 Human Rights 17.

[64] Ibid 17.

[65] Ibid 18.

field and tend to be more open towards research.[66] Furthermore, those with experience of expert interviews often find that 'getting the interviewee to speak' usually does not constitute an obstacle, because experts are well-versed in reflecting on their work and the positions they adopt and defending those ideas to a critical audience.[67] Engaging in critical debate also constitutes a part of research training, which many experts have if they have gained a doctorate or a specialised masters' degree. We have experiences of experts who heard about our research from their colleagues or through other connections and subsequently volunteered to be interviewed. Many of these respondents have an academic background and therefore a personal interest in contributing to research. They may also consider academic discourse an additional channel for influence.

Access also has another side. Besides securing physical access to an institution or an expert, access can become an issue in the interview situation if the interviewee refuses to openly respond when confronted with certain questions. We have found especially with lawyers that they tend to repeat the same thing, institutionalising the truth as it were. We have attempted to pierce the veil and counter this by engaging in similar behaviour. In such instances where the interviewee mechanically repeated, for example, the information that can be accessed on the institution's website, we, in turn, asked the same question repeatedly, but phrasing it differently each time. Usually, the third time was the charm.

Difficulties in access may also arise from a choice of words. Especially in research relating to lobbying, the choice of correct and appropriate terminology has proven crucial, as words involving negative connotations feed into negative interview perceptions. For this reason, in Korkea-aho's research, preliminary communication with potential interviewees has steered clear of certain expressions such as 'lobbying' or 'lobbyist'.

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[66] Baldwin and Davis (n 2) 893. See, however, Aberbach and Rockmann in whose view, the fact that expert are often 'busy officials who are widely sought after' creates a major problem facing those wanting to interview experts. See Joel D Aberbach and Bert A Rockman, 'Conducting and Coding Elite Interviews' (2002) 35 PS: Political Science and Politics 673.

[67] Bogner and Menz (n 47) 71.

Our experience with lawyers is mixed and emphasises the role that the institution employing the expert plays in the availability of experts. What makes the lawyers forming the focus of our research (often working in the public sector) more available than other types of experts, is the fact that civil servants – depending on their employer – often have a duty to be approachable and available for researchers. However, we also have experienced the 'iceberg effect', even though most of the civil servants we have approached have either given the interview themselves or provided the contact information of a colleague available to interview. Institutional policies may differ in this regard – some institutions direct researchers to communication units and, instead of answering questions, provide materials intended for communicating institutional policies to the general public. However, and given that experts are interviewed in the institutional context, we have encountered situations where lawyers have declined the invitation to share their information on the grounds that they consider that participation would bring about undesirable consequences and negative publicity on their institution.[68] Lawyers working in and around non-governmental organisations, trade unions, and so on, have agreed to be interviewed nearly without exception. Difficulties in access have primarily been found in situations involving certain public-sector actors and lawyers in the private sector, especially those working in law firms.

A shared background may facilitate access to experts, and can increase the expert's motivation and willingness to participate. Such background can be a common scientific context, nationality, education or professional status. The researcher's specialist interest in the subject and her own expertise have a role to play as well.[69] In our experience, a similar educational pedigree and common colleagues makes it significantly easier to access experts. Nevertheless, an emphasis on shared background is not simply either good or bad. On the one hand, a common reference system ('common language') makes access easier and assists in gaining the confidence of your interviewees: you are both aware of the existence of certain ethical and professional norms, which many of our interviewees have also actively referred to. It therefore injects trust into the system, but it may also result in a number of 'between

[68] Wilkins (n 62) 91 and Saab Fortney (n 62) 1477.

[69] Bogner and Menz (n 47) 59.

the two of us, and I do not wish to be quoted on this'-type of comments. These kinds of results may assist in illuminating the research object, but will provide difficulties in determining the extent to which they can be used as a source. Overemphasis on shared values and experiences may also result in the feedback effect: the interviewee tries to turn the context 'upside down' and make the interviewer a co-expert, compromising her possibility to ask questions and analyse data.[70] Shared personal history obviously adds a different dimension to the interview, through, for example, sharing personal news, and produces elements that we have requested our research assistant in charge of preparing the transcripts to exclude.[71] These might count as 'interaction effects' described in literature, which refer to 'whatever endangers the interaction structure being striven for and the distortions of and deviations from the ideal kind of interview that is sought after'.[72]

Unlike other features of lawyer interviews (confidentiality and the control of research data), shared background is not simply a characteristic of lawyers as interviewees, but it is a characteristic of the specific interview situation where both the interviewer and the interviewee are lawyers, and thus speak the same language of the legal profession. In this way, shared background in the form of the same educational pedigree and similar professional career paths plays a role. Of course, general educational background is also important, and a higher education degree may make experts, including lawyers, more willing to contribute to and participate in research than those who do not have doctoral degree.

As far as our projects are concerned, shared professional background has been more a positive than a negative element. It has assisted in our gaining access to first-rank experts and also created and sustained a snowball effect: previous colleagues have actively sought new interviewees, simultaneously recommending the researcher and the credibility of her objectives. This might of course create a sense of loyalty obligations for the researcher. Shared background has also in many cases translated into interviews becoming semi-

[70] Abels and Behrens (n 50) 148.

[71] Expert interviews are not always transcribed in verbatim before the analysis. For discussion of transcription practices in expert interviews, see Meuser and Nagel (n 44) 35.

[72] Bogner and Menz (n 47) 56.

structured. Discussion has begun from shared experiences, and then moved to discuss matters that, in the interviewee's view, would be of most relevance for the research project.

In short, we as legal scholars might not be masters at deploying techniques but 'creativity lies in marrying some aspects of the insider's legal knowledge with the sociologist's ability to discern the wider themes underlying the individual dramas of the law'.[73] Such dramas become particularly visible in situations where the interviewee has seen the interview as a way to prove her expertise and – often as a consequence of snowball effect – insists on being interviewed as a part of the project, and subsequently volunteers to give information, often of a confidential nature (the 'between the two of us' situation described above).

2. Confidentiality

All experts are not equally accessible. In Littig's view, 'the higher the social class, the more difficult access becomes'.[74] Her view, and we agree here, is that the difficulty of access is related to the fact that often people in higher positions handle confidential material. Lawyers, especially those in private practice, may be unwilling to disclose information to researchers due to client or firm confidentiality concerns. Participation in research could potentially lead lawyers to breach their duties to keep confidential information that relates to the firm or its clients.[75] Our research is more related to experts that work in the context of adopting either legislation or public policy.

Researchers are usually well aware of the significance of confidentiality for undertaking empirical research. In literature, confidentiality discourse has been categorised into four groups: 1) concerns relating to protection from 'harm'; 2) concerns relating to 'privacy'; 3) concerns relating to the accuracy or integrity of research; or 4) concerns relating to ethical standards.[76] The

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[73] Baldwin and Davis (n 2) 890.

[74] Beate Littig, 'Interviewing the Elite' in Bogner, Littig and Menz (n 44) 104.

[75] Wilkins (n 62) 91.

[76] Benjamin Baez, 'Confidentiality in qualitative research: reflections on secrets, power and agency' (2002) 2 Qualitative Research 41. The discussion excludes cases where the interviewee may reveal criminal conduct.

first two relate to the interviewee and the other two primarily concern the researcher herself.

From the perspective of the lawyer respondent, protection from 'harm' and privacy are important. For them, harm would be lost reputation, other types of professional stigma or some economic effect that has resulted from the statements made during the interview. Privacy is less of a personal concern, but matters primarily at the level of the institution. It is not difficult to imagine that the lawyer working for one of the EU institutions is keen to ensure that her identity is not exposed within or outside the institution when the researcher reports her research results, especially if the interview is critically-oriented and brings to light matters that will be negatively assessed. To guarantee a broad basis for analysis, we have adopted the practice of interviewing several experts from the same institution. When properly anonymised, it should not be easy to identify individual respondents' positions. Data protection rules and nationality also play roles – in some EU Member States, only the highest officials are identified by name in public, while in other Member States the names of staff working in the public sector are generally public information. According to the current reading of EU data protection rules applied by the EU institutions, the publication of names is generally understood to require data subject's consent.[77]

For the researcher, confidentiality is premised on the tension between the two potentially conflicting demands (points 3 and 4 above): the need to protect respondents, on the one hand, and accurately report data, on the other.[78] The difficulty is that the value of data is often tied to the position and experience of the person being interviewed; therefore, providing full anonymity reduces the value of the gathered data. How is it possible to balance the conflicting demands in a manner that respects the respondent's

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[77] Case T-309/97 *Bavarian Lager v Commission* EU:T:1999:257. For a discussion, see Päivi Leino 'Just a Little Sunshine in the Rain: The 2010 case law of the European Court of Justice on Access to Documents' (2011) 48 Common Market Law Review 1215; Deirdre Curtin and Päivi Leino, 'Openness, Transparency and the Right of Access to Documents in the EU. In-Depth Analysis' (2016) Robert Schuman Centre for Advanced Studies Research Paper 63/2016 <http://cadmus.eui.eu/handle/1814/44204> accessed 6 October 2017.

[78] Baez (n 76) 36.

right to privacy and complies with ethical standards, but ensures that information gleaned from interviews is accurately reported?[79]

In Leino-Sandberg's research projects, the interviewees signed consent forms and simultaneously agreed to how they wish to be identified for the purposes of reporting the results. The interviewees chose between being identified by name, partial anonymity (position and institution but without name or nationality) and full anonymity, in which case only the institution for which the expert is working is disclosed. Most interviewees opted for the middle position, which, for the purposes of our research, has been satisfactory. While nationality would often offer additional avenues for analysis, especially in smaller units or institutions, it would effectively disclose the identity of the interviewee, which many feel uncomfortable with. In Korkea-aho's project, no consent form was used. The starting point was that interviews were fully anonymised, and information on the identity of the interviewee (including the institution or background organisation) was not made publicly available at any stage of the research process. Instead of a consent form, the researcher explained privacy and anonymity practices in the correspondence prior to interviews. The same information was repeated in the beginning of the interview situation.

In our preliminary attempts to obtain access to practising lawyers in the private sector, anonymity seems to be an insufficient guarantee to put lawyers at ease, especially when the information sought is potentially confidential. Much depends on the topic and, if the issue is highly sensitive, the researcher may be required to adjust her research design to obtain the information she is after. We have, for instance, used a multi-question survey targeting the institutional representatives as a preliminary step to create the necessary trust to continue with interviews. What has emerged in preliminary discussions with lawyers in private practice is not a need to protect client confidences. The greatest hindrance to interviews seems to be the fear that the respondents will somehow be identified within the profession, suggesting

[79] This is a policy that we have committed to in the data management plan required by our funder, the Academy of Finland, including provisions on ethical issues that concern data collection and research implementation.

that it is perhaps privacy and professional reputation, and not client confidentiality, that must be carefully considered.

Accuracy in reporting the results of research can be greatly improved by recording the interviews. In our experience, some lawyers – in particular lawyers working for the European Commission – have proved sensitive to recording the interview, even where the interviewee has been assured of full anonymity. From the interviewer's point of view, recording is in practice the only way to ensure the accuracy of transcripts, even though the interviewee would not be directly quoted. However, in some cases we have taken notes where recording would have effectively prevented the interview from taking place at all.

The tension between research ethics and rigorous research capacity is not the only factor to consider. An important issue that frequently surfaces in the researcher's deliberations concerns the potential consequences of a certain course of action. Especially in expert interviews, where experts are not only knowledgeable but also in the position to control or facilitate access, the researcher is always concerned with the continuation of the project. If she reports the data accurately, will she again be able to gain access, for the purpose of further interviews, to the same institution or even to other institutions?

3. Control of Research Process and Data

The final issue is control of the research process and data, by which we mean the interviewee's attempts to manage either the interview situation or the interpretation of the data. In research literature, the interview has been described as an instance of negotiating and enacting power relations.[80] In some interview situations, the interviewee may pose counter-questions, provide strategic comments or ask for the interviewer's own view of a problem. Another common issue in our experience is that the interviewee insists on knowing who the other interviewees are, irrespective of the fact that she agreed to participate on the condition that participants' identities are not revealed in any of the outputs of the projects.

[80] Sonja Kosunen and Jaakko Kauko, 'Valtasuhteet tutkimushaastattelussa' (2016) 58 Politiikka 27.

Control of research data has its most problematic manifestations after the interview has been conducted and the researcher proceeds to analyse and interpret the data. We have experiences from an interview situation with a group of individuals who all worked in the same institution. The interview was not tape-recorded, as the interviewees specifically requested the interviewer not to do so. Instead, notes were taken by hand. After the interview, the interviewees requested copies of the handwritten notes, a request that was agreed to. The notes were immediately typed-up after the interview and subsequently emailed to the interviewees. After three days, the notes were returned in a heavily edited form. Even the word-for-word transcripts were modified with remarks on the margins: 'this cannot be used', 'this was not said', and so on, with the result that two versions of the interview notes now exist, authorised and non-authorised. To ensure access to the institution in the future, the choice was made to use the authorised versions of the notes.

In situations where the interviewee refuses to cooperate, and the interviewer cannot resolve the conflict, a decision can be made to replace the non-cooperative interviewee. Change of an interviewee should not, however, be the primary way to manage conflicts in interviews. Expertise is considered a type of luxury good, in the sense that an expert is not easily replaced. The researcher may also end up in a situation where the 'gatekeeper expert' prevents the researcher from securing interviews with other experts in the institution. Selection also always influences the validity and credibility of findings.

Expert interviewees usually require pre-publication review rights, which extends the interviewee's influence to the research reporting stage. To allow the interviewees to review the information attributed to them before an article is published is a common practice (these rights were granted to the interviewees in the above example).[81] However, the manner in which this operates in practice is not always clear. This joint decision-making of course restricts the freedom to conduct a research process, but it can in certain circumstances be recommended, as it may be the only way to get people to agree to an interview. Furthermore, the joint-decision making mechanism can be expected to make respondents less cautious and more helpful. In our

[81] Gillham (n 52) 55.

experience, this mechanism should not be considered a problem, as the aim of empirical research is not to expose people or bring negative publicity on individuals, who in any case usually remain anonymous unless they have specifically requested the opposite. However, in most cases, the exercise of the pre-publication review rights does not impose unreasonable demands on the researcher's integrity and freedom to report research results. So far, we have no experience of situations where interviewees have objected to the publication of the data at this stage.

V. Conclusions

In this piece, we have reflected on our own experiences *vis-à-vis* the literature on expert interviews. It appears, broadly speaking at least, that our experiences with lawyer interviews follow those reported in methodology literature, but certain significant differences also emerged.

As regards access, shared background and fluency in the same professional language seem to play a larger than usual role with experts. However, shared background mostly works as a bonus, not only in terms of access but also in terms of the actual interview situation. Works on expert interviews report on the continuous need on the part of the researcher to verify that 'she knows what she's talking about'. We have not encountered this and in our view similar educational background may be an explanatory factor.

Confidentiality is not a particular issue for expert interviews more generally, and confidentiality has primarily been discussed in the context of interviews targeting 'vulnerable groups' such as patients, drug-users, or children.[82] However, confidentiality has a pronounced role when research subjects are lawyers, irrespective of their actual occupation. Lawyers are conscious of the confidentiality obligations they may have. In most cases, methods, ranging from anonymity to pre-publication rights, seem sufficient to protect the confidentiality of lawyer respondents. Practicing lawyers have, at least initially, proven slightly more inaccessible. Unlike civil servants, they are also used to being paid for their time, which is something that academic research is unable to provide, and which might in any case risk the objectivity of the results. As long as research remains unconnected from an individual pending

[82] Baez (n 76) 37.

file that the private sector lawyer is working on, she might see little reason to contribute to research ventures for the mere academic or societal benefit.

In our experience, lawyers are more inclined than others to require an active role in interviews and in editing the results. Early engagement and consultation of lawyers is also recommended in literature to secure participation and avoid potential confidentiality concerns,[83] even at the cost of compromising methodological integrity:

> Methodological experts caution researchers to guard against various types of bias. To avoid bias, a researcher may approach research subjects, maintaining a distant stance. Unlike some fields in which social scientists may seek to maintain objective distance from research subjects, researchers studying the legal profession generally recognize the importance of communicating with practitioners and various stakeholders.[84]

This may serve as a way of getting lawyers used to interviews but also demonstrates some of the dilemmas involved in balancing the interests of gaining access to expertise with the need to maintain objectivity.

The question that remains unanswered is whether interviewing lawyers is worthwhile. In our experience, the answer is positive. We find that the method has assisted us in reaching the research objectives aimed at. We have been able to both cover the ground in greater detail and depth than we would have managed to do without these interviews, in that they have identified normative sources – both legal and non-legal – necessary to further our research. This is largely due to respondents providing topical information, as well as inside information, that we would have had significant trouble gaining access to otherwise. But we have also gained access to valuable expert opinions that we will use as sources in their own right, some of them as direct quotations to illuminate how the expert thinks and how she understands her work and its influence. This is information that could not be accessed in any other way.

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[83] Saab Fortney (n 62) 1478.

[84] Ibid 1477. Also Hillyard argues that the 'crucial characteristic of the researchers [in social science] is that they are trained to reflect on the extent to which their insider/outsider position affects their understanding of the phenomenon under study'. See Hillyard (n 2) 275.

WHAT 'IF'?
THE EMERGING EPISTEMIC COMMUNITY OF INTERNATIONAL CRIMINAL LAW

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Using international criminal law as a case study, this article aims to demonstrate how computer-assisted corpus linguistics combined with philosophy of law and sociology of science can help improve our understanding of legal knowledge and science. The article is built on a computer-driven corpus linguistic study of all judgements from the International Criminal Tribunal for the former Yugoslavia (ICTY) and the International Criminal Tribunal for Rwanda (ICTR) from 1996 to 2017. To our surprise, this study revealed that the frequency of the use of 'ifs' in all judgements had exhibited an almost perfectly steady annual decline – from 93 per 100,000 words on average in 1996 to 34 in 2017. As a linguistic phenomenon, this contradicts how we would expect language to behave. In the search for an explanation, we move from linguistics into the philosophical and sociological study of (legal) knowledge and science. In the most general terms, the explanation links the disappearing of 'ifs' to the emergence of international criminal law as a distinct specialized legal science, a separate sub-discipline constituted by a professionally shared corpus of knowledge – or of 'a substantial body of jurisprudence on genocide, crimes against humanity, war

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crimes, as well as forms of individual and superior responsibility', as the ICTR put it upon its closure.

Keywords: international criminal law, corpus linguistics, epistemology, legal knowledge

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> With its sister international tribunals and courts, the ICTR has played a pioneering role in the establishment of a credible international criminal justice system, producing *a substantial body of jurisprudence* on genocide, crimes against humanity, war crimes, as well as forms of individual and superior responsibility.
>
> *The ICTR Remembers* website[1]

I. INTRODUCTION

This paper begins with a mystery. Or at least with a surprising finding. A few years ago, a computer-assisted pilot study of judgements from the International Criminal Tribunal for the former Yugoslavia (ICTY) revealed an unexpected fact about the Tribunal's use of language.[2] To our surprise, we noticed that at the time the ICTY's Trial Chamber had used the commonplace word *if* with a statistically significant lower frequency in the latter half of its existence as compared to its earlier years. Comparing judgements from 1996 to 2003 with judgements from 2004 to 2013 revealed that the tribunal had almost halved its use of *if*, from 86 to 45 *if*s per 100,000 words. This development was thrown into sharper relief in a more recent follow-up study which not only brought the corpus up to date but also expanded it to include judgements from both the ICTY's Trial and Appeals Chambers, as well as all judgements from the ICTY's sister tribunal, the International Criminal Tribunal for Rwanda (ICTR). A fine-graining of the comparison revealed that the frequency of the use of *if*s across both tribunals had exhibited an almost perfectly steady annual decline from 93 *if*s per 100,000 words on average in 1996 to 34 on average in 2017.

The question is why the two tribunals would use language in this way. At first glance, it might be tempting to simply dismiss this finding as a freak occurrence or, at best, a trivial puzzle. But this would be a mistake. Bearing in

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[1] 'The ICTR Remembers: 20th Anniversary of the Rwandan Genocide' <http://www.irmct.org/specials/ictr-remembers/index.html?q=ictr-remembers/index.html> accessed 8 November 2018.

[2] This study was carried out in 2014 by Anne Lise Kjær as an integrated part of a larger corpus linguistic research project on international courts.

mind that language use is not merely an epiphenomenon but should be taken seriously in its own right, this steep and steady decline of *if*s is a worthy object of inquiry. As a piece of linguistic behavior, this phenomenon contradicts how we would expect language to behave. There is simply no immediately plausible reason why all the different panels deciding all the different cases brought before the ICTY and the ICTR would collectively choose, as it were, to reduce their use of that particular conjunction by a margin of nearly two thirds. The fact that they did therefore requires explanation, which this contribution attempts to provide.

As we shall see, this is an explanation that takes us from linguistics into the philosophical and sociological study of (legal) knowledge and science, contributing to both these fields in interesting ways. In the most general terms, our explanation links the disappearance of *if*s to the emergence of international criminal law as a distinct specialized legal science, a separate sub-discipline constituted by a professionally shared corpus of knowledge – or, as the ICTR would express it shortly before its closure, of a 'substantial body of jurisprudence on genocide, crimes against humanity, war crimes, as well as forms of individual and superior responsibility'.[3]

In slightly greater detail, our explanation is twofold. First, reflection on the principles which pragmatics tells us govern cooperative discourse takes us from linguistics to the philosophy of law. Here, mainstream legal philosophers like Hans Kelsen, Joseph Raz and Ronald Dworkin have, each in their own way, defended what we call *the generic philosophical view of legal knowledge*. In spite of their theoretical differences, Kelsen, Raz, and Dworkin agree on a generic level that legal knowledge and science is *philosophically presuppositional* in nature. Legal scientific statements about valid law always *implicitly* or *tacitly* presuppose the validity of a set of *philosophical* or *theoretical* premises on the basis of which the validity of such statements is derived. We argue that a large part of these implicit premises can be reconstructed as conditionals, in which *if* works as a logical connective (*if* ..., *then* ...). This is particularly interesting when we take into account the wider context of the operation of the ICTY and ICTR and especially the fact that international criminal law was virtually nonexistent as a discipline in the mid-1990s, when

[3] Cf. n 1 above.

the tribunals were established.[4] In this light, we argue that the disappearing *if*s testifies to the gradual coming into being of international criminal law as a specialized kind of legal knowledge and expertise with its own distinct set of tacit philosophical premises constituting the field's 'substantial body of jurisprudence'. At the same time, however, the data seem to point to something beyond the strong internal epistemological focus on the ultimate justifiability of legal knowledge which is characteristic of the generic philosophical approach. The aforementioned patterns in the use of *if*s seem also to suggest the gradual emergence of an epistemic community in international criminal law *as an empirical institutional fact*. The steady decline in the use of *if*s testifies to the emergence of a new international criminal law field occupied by an increasingly specialized profession whose members gradually become masters and practitioners of this emerging sub-discipline. This framework gradually allows more conditionals to be tacitly presupposed through technical terminology within expert discourse. This process simultaneously creates new disciplinary boundaries and increasingly seals off the point of view of international criminal law from laypeople and even from other lawyers.

In order to better understand these dynamics, it therefore seems preferable to take a more external perspective, drawing on the sociology of knowledge and of science, rather than an *a priori* philosophical approach. Here we turn, in particular, to the theories of Thomas Kuhn and Pierre Bourdieu, who have developed certain conceptual tools that are helpful to understand the emergence of the kind of epistemic practice and community that we see in international criminal law. At the same time, however, the theories of these two prominent sociologists can at least be said to invite relativistic and ultimately quite strongly irrationalist readings that appear to be at odds with those found in the philosophy of law. It is therefore also necessary to consider the possible impact of our findings in this context. As we shall see, there is reason to believe that the study of *if*s can at least have the effect of moderating and nuancing some of the more relativistic claims of these influential sociological critiques of legal philosophy.

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[4] The ICTY was established by United Nations Security Council (UNSC) Resolution 827 (25 May 1993). The ICTR was established by UNSC Resolution 955 (8 November 1994).

We submit that this combination of philosophical and socio-epistemic notions provides the first building blocks for an overall framework that allows for a theoretical explanation of the fact that the tribunals' use of *if*s has been changing instead of remaining constant. In order to substantiate this claim, we shall proceed as follows. In section 2, we recapitulate the initial findings, requiring a brief introduction to the basics of corpus linguistics. In section 3, we present the generic philosophical view of legal knowledge. In section 4, we illustrate the general connection between this view and the *if*s through a case study of the ICTY's decision on jurisdiction in the *Tadić* case. In section 5, we further refine and expand our empirical analysis to include a diachronic study of the case law of the ICTY and the ICTR. In section 6, we turn to the sociology of knowledge and science both to better understand the disappearing *if*s and to criticize and nuance these sociological approaches themselves. In section 7, we summarize our findings and indicate promising avenues for further research.

II. The Initial Finding: Applying Computer-Assisted Corpus Linguistics to the ICTY Case Law

1. What is corpus linguistics, and how did we apply it in the pilot study?

As a first step, it is necessary to say a few words about our original findings, which in turn requires a few words more generally about computer-assisted corpus linguistics, through which these findings were made. In corpus linguistics, a corpus is usually defined as '[a] set of machine-readable texts which is deemed an appropriate basis on which to study a specific set of research questions. The set of texts [...] is usually of a size which defies analysis by hand and eye alone within any reasonable timeframe'.[5] Computers are capable of processing much larger amounts of text and also of 'reading' all these texts in a non-linear way. By submitting large numbers of digitally searchable texts to automated computer analysis, it is therefore possible to make language patterns visible, which no amount of manual analysis would

[5] Tony McEnery and Andrew Hardie, *Corpus Linguistics: Method, Theory and Practice* (Cambridge University Press 2012) 1-2.

discover if one were to read the collection of texts as individual, coherent texts.[6]

In corpus linguistic analysis, it is furthermore customary to distinguish between corpus-*driven* and corpus-*based* analyses.[7] Corpus-driven analysis is conducted 'blindly', so to speak, and from the bottom-up. A text corpus is fed to the computer more or less without preconceptions or hypotheses and the digital processing then allows the researcher to open up the corpus by revealing conspicuous linguistic patterns that the researcher may not have expected and may not have searched for. Corpus-based analysis, by contrast, starts with more substantive preconceived notions about what to look for in the corpus, and then uses the computer to check systematically for particular patterns. While this distinction is clear in principle, the two approaches will often mix in research practice, as the findings of corpus-driven analysis tend to give rise to the formation of hypotheses that subsequently require testing in a more targeted corpus-based analysis.[8]

Our study has followed this pattern in so far that it started as a corpus-driven analysis and subsequently switched to a corpus-based approach. More specifically, our study started out as a broad so-called corpus-driven *keyword* analysis. In corpus linguistics, keywords are words which occur with 'unusual frequency' in a given corpus, i.e. which are statistically significantly over- or underused in the text corpus in question.[9] This does not mean high frequency in absolute numbers but high relative frequency, i.e. compared to the frequency of the same words in another corpus.

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[6] Michael Stubbs, 'On Texts, Corpora, and Models of Language' in Michael Hoey et al. (eds), *Texts, Discourse and Corpora* (Continuum 2007) 130-131.

[7] The distinction between the two approaches was introduced by Elena Tognini-Bonelli, *Corpus Linguistics at Work* (John Benjamins 1997).

[8] For a discussion of the two approaches and their interplay, see McEnery and Hardie (n 5) 5-6. See also Amanda Potts and Anne Lise Kjær, 'Constructing Achievement in the International Criminal Tribunal for the Former Yugoslavia: a Corpus-Based Critical Discourse Analysis' (2016) 29(3) International Journal for the Semiotics of Law - Revue Internationale de Sémiotique Juridique 525.

[9] Mike Scott, 'PC Analysis of Key Words – and Key Key Words' (1997) 25(2) System 233, at 236.

In our case, the initial corpus-*driven* keyword analysis was conducted as a pilot study only on the case law of the ICTY, i.e. of the 71 trial judgements delivered in the period from 1996 to 2013. This corpus was divided into two corpora consisting of the judgements rendered from 1996 to 2003 (32 judgements) and from 2004 to 2013 (39 judgements). The aim of the pilot study was to establish whether a change in the tribunal's language use would be detectable over time. The guiding hypothesis was that if a change had in fact occurred, it would show in a simple comparison of the early case law (period 1 - pre-2003) and the late case law (period 2 - post-2003). The choice of 2003 as the divide was based on the fact that the two time periods cover approximately the same number of years and judgements. The keyword analysis revealed a number of more or less interesting facts about the 'keyness' of various words in the two corpora. Among the more puzzling was the 48% drop in the frequency of the word *if* from the 1996-2003 corpus to the 2004-2013 corpus (from 86 to 45 *if*s per 100,000 words) referred to above.

2. Explaining Corpus Linguistic Surprise: The Difference between Function Words and Content Words

From the point of view of corpus linguistics, this finding was quite surprising, more so than, for example, a parallel finding regarding the proper noun *Tadić*,[10] even though, with a 57% drop in frequency, the 'keyness' of this latter word was, statistically speaking, more conspicuous. The explanation of why we consider the relatively smaller decline in the use of *if*s as 'more surprising' hinges on the general distinction between *function words* and *content words*. Function words, such as *if*, include determiners, pronouns, auxiliary verbs, prepositions, conjunctions, and particles. These are all words which, unlike content words (nouns, lexical verbs, adjectives, and adverbs), have little lexical meaning and do not refer to extralinguistic concepts. Instead, their function is internal to language, serving to express grammatical relationships between words within a sentence.[11] They signal the structural relationships that words have to one another and are thus the 'glue' that holds sentences

[10] Duško Tadić was the first indictee to have his case brought before the ICTY.

[11] Michael Stubbs, *Words and Phrases. Corpus Studies of Lexical Semantics* (Blackwell 2001), 40, with reference to the original inventor of the distinction between content words and function words, Henry Sweet, *A New English Grammar. Logical and Historical* (Clarendon 1891) 22.

together. Unlike content words (such as proper nouns like *Tadić*, and nouns and phrases like *responsibility* and *joint criminal enterprise*), whose presence is strictly contingent upon the content of a text, function words are an omnipresent feature of all language use.

More generally, this is also the reason why when computer-assisted text analysis is applied in social sciences outside of linguistics proper, some researchers treat function words as *stop words*, i.e. as residual words constituting a kind of 'noise' to be removed from the corpus at the preprocessing stage before the analysis proper.[12] This is done on the assumption that widely present function words are unrelated to the specific field that the social scientist is interested in. Conversely, to the degree they are included, any conspicuous statistical variations in the use of such words are considered 'merely linguistic' and their study only of interest to linguists.

While disregarding function words may thus be useful for some research purposes, it would be a mistake to do so in all contexts where one's *Erkenntnisinteresse*[13] is not 'purely linguistic'. As noted above, the strength of corpus-*driven* analysis is that it allows the computer to identify striking linguistic patterns that would otherwise remain hidden because they do not fit a researcher's preconceptions or hypotheses. Our finding regarding the use of *if*s proves this point. The significant decline in the use of this particular connective constitutes a finding that would have remained hidden if we had proceeded on the assumption that function words are only of linguistic interest. Yet this is also a finding that does not seem to yield itself easily to a purely linguistic explanation, for example by reference to grammar, the specific genre of judgements, or personal style of the individual drafters. First, the time period covered by the corpus was too short for grammatical or genre-specific changes to manifest themselves in this way. Second, the corpus is composed of texts which were to a large extent produced by language users whose first language is not English and who would therefore not be the most likely primary bearers of significant grammatical or other linguistic change.

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[12] See e.g. Christopher Lucas et al., 'Computer-Assisted Text Analysis for Comparative Politics' (2015) 23 Political Analysis 254.

[13] The term derives from Habermas and is usually translated with 'knowledge interest' or 'cognitive interest'.

3. On Closer Inspection: The Disappearing ifs *as a Conditional Connective*

As a first step, it was therefore necessary to take a closer look at the particular role, or roles, which the function word *if* plays in the ICTY's judgements. In ordinary language, the most widespread use of *if* is as a logical connective expressing *if*..., *then*... conditionals.[14] In general, we would expect this tendency to be at least the same but presumably stronger with the *if*s in our study, since conditionals often constitute a central premise (sometimes called the major premise) in the syllogistic reasoning characteristic of argumentative texts. On closer scrutiny, therefore, it seems plausible that the phenomenon to be explained is, more specifically, the significant drop in the use of *if as a conjunction introducing a conditional clause*.

Before proceeding, however, we should observe a possible source of error in this preliminary interpretation of the data. More specifically, it is necessary to control for both false positives and false negatives. On the one hand, we should remember that the word *if* is ambiguous, and that not all instances are conjunctions introducing a conditional clause. For instance, *if* is also used in the meaning of *whether* introducing questions (*ask if, know if*)[15] and it is also used in certain set phrases (*if any*, *if only*, *if so*, and *as if*).[16] These uses are not conditional and detecting variations in their frequency would therefore require a different kind of explanation.[17] On the other hand, not all

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[14] 'A conditional is a two-clause structure in which one of the clauses is introduced by *if* (possibly preceded by *only, even* or *except*) or by a word or phrase that has a meaning similar to *if*, *only if* (e.g. provided) or *except if* (viz. *unless*). The only two-clause structures that we do not treat as conditionals are those in which the subordinate clause is introduced by *as if* or is a subject or object clause introduced by *if* (which is then equivalent to *whether*).' Renaat Declerck and Susan Reed, *Conditionals: A Comprehensive Empirical Analysis* (Topics in English Linguistics [TiEL]) (Mouton de Gruyter 2001) 9.

[15] E.g. 'That day he was taken for interrogation, a statement that he had given while at Keraterm was read to him, and he was asked if he had anything to add.' *Prosecutor v. Duško Tadić a/k/a 'Dule' (Opinion and Judgement)* ICTY-94-1-T (7 May 1997) para 248.

[16] E.g. '[S]oldiers on the hangar floor were behaving as if they were supporting a team at a football match.' *Prosecutor v. Duško Tadić a/k/a 'Dule' (Opinion and Judgement)* ICTY-94-1-T (7 May 1997) para 222.

[17] They do exhibit a decline, but their use is insignificant in terms of numbers and cannot account for the general decline that we have detected. According to a SketchEngine search *if any* declines from 41 to 27 per million words; *if only* from 5 to

conditionals are expressed with the conjunction *if*. Synonymous expressions include the phrases *as long as*, *on the condition that*, *provided that,* and *unless* (meaning *if not*). This means that, all else being equal, we should expect other conditional expressions to co-vary with the *if*s.

In general, these considerations call attention to the need to supplement computer-assisted corpus linguistics with in-depth manual analysis. In a corpus the size of ours, we therefore cannot conclusively control for all these factors. However, we believe we can confidently say that, by applying a combination of computer-assisted and manual analysis, we have controlled sufficiently in the present context.

In relation to the false negatives, it seems that the occurrences of these synonymous expressions are quantitatively too insignificant when compared to *if*.[18] Variation in their use can therefore safely be disregarded. In relation to the false positives, we have already mentioned that conditional use of *if* is generally the most common in ordinary language. In a well-defined corpus, it is in fact possible at least to further support this contention with the use of computers by identifying so-called *collocations*, i.e. 'the relationship a lexical item has with items that appear with greater than random probability in its (textual) context'.[19] Using this approach, we found that among the 20 words with which *if* had the strongest collocations in the ICTY database the word

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1 per million words; and *as if* from 19 to 7 per million words in the ICTY Trial Corpus 1996-2003 compared to the ICTY Trial Corpus 2004-2013. *If so* stays stable over time (7 per million words).

[18] *As long* as is used 214 times*, provided that* 131 times, and *on condition that* only 13 times across time in trial and appeals chamber judgements of the ICTY between 1996-2015. In comparison, *if* is used 7,899 times. *Unless* occurs 559 times and exhibits a clearly declining use over time in a preliminary corpus-based study. Please note that this analysis is based on an extended period of time compared to the pilot study. The reason for this is that the control for false negatives was carried out after our corpus had been extended by two additional years.

[19] Michael Hoey, *Patterns of Lexis in Text* (Oxford University Press 1991) 7. In the Glossary to Sketch Engine, the notion of collocation is further described as follows: 'A collocation, e.g. *fatal error*, typically consists of a node *(error*) and a collocate (*fatal*). Collocations can have different strength, e.g. *nice house* is a weak collocation because both *nice* and *house* can combine with lots of other words, on the other hand, *the Opera House* is a strong collocation because it is very typical for *opera* to occur next to *house* and, at the same time, *opera* does not combine with many other words.'

even was by far the strongest. By comparison, among the set phrases mentioned above only *any* and *only* made it to the top 20 (number two and four respectively). In other words, their connection was weaker, in particular since these may include *only if* (instead of *if only*), which is a conditional expression. Second, the set phrases (*if any*, *if only*, *as if*) seem to an even higher degree to belong to the category of function words from which it is simply very difficult to imagine why they should change significantly in the way detected. Finally, as we shall discuss below, we have observed in a subsequent, combined manual and computer-based study of the development of a specific doctrinal element (the Joint Criminal Enterprise-doctrine) across the ICTY's practice an even more significant drop specifically in the use of conditional *if*s.[20] This indicates that, if anything, the non-conditional *if*s in the corpus have the effect of smoothing out rather than contributing to the drop in the use of *if*s. On these grounds, we have found it justified to proceed on the assumption that the decline in *if*s primarily reflects a decline in its use as a conditional connective.

III. What 'Really Exists in the Juristic Consciousness': A Generic Philosophical View of Legal Knowledge

At this point, we found it fruitful to look outside the realm of linguistics to explain our findings. As a first step, we decided to seek insights from the philosophy of law. This allowed us to see how the disappearing *if*s testifies to the gradual emergence of international criminal law as a specialized kind of legal knowledge and expertise with its own silent philosophical prologue expressing a distinct set of tacit foundational premises.

1. 'Do Not Make Your Contribution More Informative Than Is Required': Grice's Maxim of Quantity

We were led in the direction of philosophy of law by recalling a general feature of language use, which provides an initial indication of why the frequency of *if* varied so strongly across the two corpora, even if function

[20] See note 61 below.

words generally do not. This feature was originally identified by the English philosopher of language Herbert Paul Grice.[21]

Grice observed that all contributions to discourse, even apparently monological contributions like judgements, do not merely constitute disconnected remarks. They are, at least to some degree, characterized by being *cooperative efforts*. When making discursive contributions each speaker 'recognizes, at least to some extent, a common purpose or set of purposes, or at least a mutually accepted direction'.[22] All else being equal, discourse participants will therefore generally be expected to observe what Grice calls the *cooperative principle*: 'Make your conversational contribution such as is required at the stage at which it occurs, by the accepted purpose or direction of the talk exchange in which you are engaged'.[23] Furthermore, Grice suggested spelling out this principle in a set of maxims, one of which is of particular importance for our purposes because it relates to the quantity of information in specific discourse contributions. According to this so-called *maxim of quantity*:

> 1. Make your contribution as informative as is required (for the current purposes of the exchange). 2. Do not make your contribution more informative than is required.[24]

This is important in light of the observed conditional character of the disappearing *if*s. As noted above, *if*..., *then*... conditionals often constitute the central premise (sometimes called the major premise) in the syllogistic reasoning characteristic of argumentative texts like judgements. However, unlike the so-called minor premise of syllogisms, which generally provides concrete information or data specific to the issue at stake in any given argument, the major premise constitutes background knowledge of a more general character. *Qua* background knowledge, it is widely acknowledged that in actual argumentation the major premise is generally not explicitly spelled

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[21] See generally Herbert Paul Grice, 'Logic and Conversation' in Peter Cole and Jerry L. Morgan (eds), *Syntax and Semantics*, vol3 (New York Academic Press 1975) 41.

[22] Ibid 45.

[23] Ibid.

[24] Ibid.

out if it is assumed to be shared by discourse participants.[25] For instance, we will usually leave out the uncontroversial conditional 'if the street is wet, then it has been raining' and merely say 'the street is wet, therefore it has been raining'. Conversely, if a conditional premise is assumed to be contested, we will tend to spell it out.

This variation in argumentation practice can be seen precisely as a manifestation of speakers' general obedience to the Gricean maxim of quantity. Attempting to make their arguments *as informative as but not more informative than is required*, speakers will either leave out or explicitly state the conditional premises of their arguments, depending on whether or not they assume that these conditionals constitute uncontroversial background knowledge shared with their audience. In other words, following Grice we have identified an initial indication of why our pilot study showed a significant drop in the use of *if*s: it seems plausible that the jurisprudence of the ICTY generally reflects a development where certain central assumptions of a conditional nature are no longer considered controversial, but rather have become part of a shared background knowledge, and thus no longer need to be explicitly stated.

2. The Generic Philosophical View of Legal Knowledge: Hans Kelsen, Joseph Raz and Ronald Dworkin

In virtue of the epistemic character of these considerations, we were then naturally led in the direction of philosophy of law. More specifically, we decided to look at the tribunal's use of *if*s in light of what, for present purposes, we have called the *generic philosophical view of legal knowledge*. By this notion, we are referring to an understanding of legal knowledge which, at the proper level of abstraction, can be identified across a variety of theories from a number of quite diverse influential legal philosophers.

First, we shall make an approximation of this generic philosophical view through the works of the Austrian legal positivist Hans Kelsen. However, since our motivations are tied to understanding the specific phenomenon at

[25] Cf. e.g. Stephen Toulmin uses a different terminology (where *data* refers to *minor premise* and *warrant* to *major premise*) but essentially makes the same point: 'data are appealed to explicitly, warrants implicitly.' Stephen Toulmin, *The Uses of Argument* (2nd edn, Cambridge University Press 2003) 92.

hand (the declining use of *if*s), we shall not attempt a comprehensive exposé of Kelsen's philosophy but approach it in a slightly indirect and somewhat eclectic fashion. More precisely, we shall approach Kelsen's version of the generic philosophical view of legal knowledge via his follower Joseph Raz's discussion of one of the central and most controversial issues in Kelsen's pure theory of law. This is the question of what exactly Kelsen means when, for instance in the *General Theory of Law and State*, he writes that the 'ought-statements [of the science of law] have a merely descriptive import; they, as it were, descriptively reproduce the 'ought' of the norms'.[26] Many have regarded this notion of *ought-statements in a descriptive sense* as a particularly enigmatic and problematic element in Kelsen's theory. Raz, however, finds the notion both meaningful and rewarding, and he sets out to defend it.

Raz suggests that the 'ought-propositions' of legal science do not generally tell people what they *really* ought to do. They are, as Raz says, *statements from a point of view* or *detached normative statements*. They merely state how things are *from the legal point of view*. Of the greatest importance in the present context, however, is a related feature of these ought-statements to which Raz draws attention in his further analysis. Thus, he adds that

> *such statements [cannot] be interpreted as conditionals*: 'If you accept this point of view then you should etc.' Rather they assert what is the case from the relevant point of view as if it is valid or on the hypothesis that it is – as Kelsen expresses the point – but without actually endorsing it.[27]

This point is important here because it expresses a general perception of legal knowledge claims that has broad philosophical traction also beyond the specific confines of Kelsen's pure theory of law, which we therefore call *the generic philosophical view* of legal knowledge. According to this view, the statements of legal science all share three main features. First of all, they have, as already remarked, the general formal feature that they are not conditionals ('*if* you accept this point of view *then* you should') but immediately express norms ('you should!'). Secondly, however, they are simultaneously tacitly *presuppositional*. By this we mean that even if individual scientific legal statements about valid law may not, as they stand, have a conditional character, they nevertheless always *implicitly* or *tacitly presuppose* the validity

[26] Hans Kelsen, *General Theory of Law and State* (Lawbook Exchange 2009) 163.

[27] Ibid 157, emphasis added.

of a set of such conditional premises on the basis of which their validity is derived. In Kelsen's words:

> By formulating the basic norm, we do not introduce into the science of law any new method. *We merely make explicit what all jurists, mostly unconsciously, assume*.[28]

The legal point of view therefore has a particular content that can be spelled out if pressed. Finally, and corresponding to the idea of *one unified point of view*, these tacit premises are not merely an arbitrary collection of atomized assumptions each justifying one or more mutually disconnected legal statements. Rather, they are *philosophical* or *theoretical* in the sense that they jointly constitute a comprehensive and systematic body of propositions that purport as a whole to provide deep justifications in a consistent and principled way for a whole range of first order legal statements.

As a legal positivist, Kelsen famously holds that these implicit or tacit philosophical premises are constituted by a comprehensive system of positive legal rules. This system of rules is structured hierarchically in such a way that the validity of each individual legal rule can be established only derivatively by regression through a chain of still higher order positive norms that ends ultimately in one so-called 'basic norm'. The tacit (hypothetical) presupposition of the validity of this basic norm constitutes the unique starting point and premise of the entire system of valid law.[29]

However, the claim that legal statements are thus philosophically presuppositional is a generic claim and, in the way we use it, it need not be tied to Kelsen's foundationalist-positivistic hypothesis. On the contrary, we would claim that many legal philosophers seem to hold some version of the generic philosophical view. We shall not attempt to demonstrate this claim exhaustively, but merely demonstrate its presence in the legal philosophy of Ronald Dworkin, who famously occupies a position at the opposite end of the theoretical spectrum. Thus, in spite of the profound differences between Dworkin and Kelsen, we find essentially the same point expressed in the

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[28] Ibid 116, emphasis added.

[29] Cf. e.g. Kelsen (n 26) 115-116 and *Introduction to the Problems of Legal Theory: A Translation of the First Edition of the Reine Rechtslehre or Pure Theory of Law* (Clarendon 1992) ch. V.

work of the former, as demonstrated by the following frequently quoted passage from Dworkin's *Law's Empire*:

> [A]ny judge's opinion is itself a piece of legal philosophy, even when the philosophy is hidden and the visible argument is dominated by citation and lists of facts. Jurisprudence is the general part of adjudication, silent prologue to any decision at law.[30]

As is well known, Dworkin disagrees strongly with Kelsen as to the specific content of this 'silent prologue to any decision at law'. In particular, he rejects Kelsen's assertion of a purely formal basic norm as the unique Archimedian point underlying the entire legal system. Instead, Dworkin maintains that the silent prologue consists of a more coherentist and substantively moral philosophical narrative constituted through a process of constructive interpretation that tries to show the legal system as a whole in its best light and to give the best philosophical justification of this practice.[31] However, and of key importance here, Dworkin does not dispute but rather affirms the fact that there is a silent philosophical prologue to legal statements. In other words, Dworkin too subscribes to the three tenets characterizing the generic philosophical view of legal knowledge, as presented above.

3. Disappearing if*s as a Sign of the Coming into Being of International Criminal Law as Tacit Specialized Legal Knowledge*

This is the generic philosophical view of legal knowledge, which we claim is helpful as a first attempt to understand the decline of *if*s in the ICTY's and ICTR's case law. This can best be seen if we take a few steps back and remind ourselves of why these two international criminal tribunals constitute such interesting objects of study to begin with. Thus, when *The ICTR Remembers* website proudly showcases the ad hoc tribunals' role in 'producing a substantial body of jurisprudence on genocide, crimes against humanity, war crimes as well as forms of individual and superior responsibility',[32] this serves to remind us not merely of the imminent surplus of competent international criminal lawyers seeking work following the closure of the ICTY and the ICTR. It reminds us also of the virtual absence of *any* such body of

[30] Ronald Dworkin, *Law's Empire* (Hart Publishing 1998) 90.

[31] Ibid.

[32] Cf. introductory quote, n 1.

jurisprudence during the mid-90s, when the two tribunals first came into being. At that time, there was simply no commonly agreed upon 'body of jurisprudence' on international crimes and forms of responsibility, not to mention on the fundamental legality and jurisdiction of these new legal institutions. This means that there simply was no *international criminal law point of view* readily available for the ICTY and ICTR judges to adopt. Apart from the rudimentary remnants of the Nuremberg and Tokyo tribunals and a statute based on one Security Council resolution, the whole 'body of jurisprudence', and thus in effect the entire international criminal law *point of view*, had to be constructed virtually from scratch.

In light of this historical context, and mindful of Raz's suggestion that legal statements from a point of view '[cannot] be interpreted as conditionals', as explained above, our tentative explanation for the significant decline in the use of *if*s in the ICTY judgements was that this finding could be evidence of the coming into being of the international criminal law *point of view*. In other words, the decreased frequency of *if*s could testify to the actual approximation, taking place directly among judges at the tribunals (and plausibly also indirectly among actors in the international criminal legal field more broadly), to something like the generic philosophical view of legal knowledge, i.e. to the notions i) that expressions of doctrinal knowledge *specifically about international criminal law* are unconditional; ii) that they are implicitly or tacitly presuppositional; and iii) that this presuppositionality is *philosophical* or *theoretical*. At the same time, however, this implies also that international criminal law did not conform to the generic view from the beginning. On the contrary, the relatively higher frequency of *if*s in the early corpus evidences a significantly greater tendency of the ICTY toward being explicit about the conditionals underlying its statements about the content of valid international criminal law on different issues. Put differently, our hypothesis is that the changes in the relative use of *if*s are caused by the coming into being in international criminal law of an epistemic community where the members come to share a *point of view*, to a certain degree, which renders it possible for them to make explicitly unconditional, yet tacitly philosophically presuppositional doctrinal normative statements from this point of view.

IV. An Illustration: The *Tadić* Decision on Jurisdiction

1. 'If the International Tribunal were not validly constituted...': A Challenge to the Foundations

Admittedly, this may sound somewhat abstract. Perhaps we can approach a clearer understanding of the general role of the *if*s in relation to the creation of the international criminal law *point of view* via a concrete example. This example is taken from the abovementioned case against Duško Tadić. We shall not, however, be looking at the ICTY's judgement in the *Tadić* case itself, which was part of the pre-2003 corpus in the pilot study. Instead, we start outside the corpus *of judgements* by looking at one of the tribunal's preliminary *decisions*, probably its most seminal one, namely its decision on the defense motion on jurisdiction.[33] As we shall see, there is an advantage in starting outside the corpus used in the pilot study.

Tadić was the first to be tried before an international war crimes tribunal created by the international community. By the time of the trial in 1995, the ICTY remained a hugely controversial institution in spite of having been established by a unanimous UN Security Council Resolution.[34] It was therefore not completely surprising that Tadić's first legal move was to file a preliminary motion on jurisdiction, in the broadest sense of that word. Thus, Tadić challenged the tribunal's very right to try him in the first place by challenging the fundamental legality of the entire ICTY as an institution. This meant that before even contemplating making the most modest contribution to 'the substantial body of jurisprudence on international crimes and modes of responsibility', the ICTY had to justify its very existence and its right to try individuals.

As is well known, the tribunal dismissed the defense motion and asserted its jurisdiction, thus allowing the trial against Tadić to commence.[35] At its most basic, therefore, the conclusion of the tribunal's decision amounted to the

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[33] The Trial Chamber issued its decision on 10 August 1995. Tadić immediately appealed and the Appeals Chamber issued its decision on 2 October 1995. The trial commenced on 7 May 1996.

[34] UN Security Council Resolution 827 adopted 25 May 1993.

[35] This formulation needs qualification. Cf. immediately below on the differences between the Trial Chamber's and the Appeal Chamber's decisions.

following normative statement: 'Yes, we have the right to try Tadić'. In isolation, this is indeed a legal statement in Raz's sense, i.e. an unconditional statement made from a point of view. Crucially, however, the tribunal said more than that. Taken as a whole, the tribunal's decision was not silent about, but rather explicitly stated all the presuppositions underlying this normative conclusion. In this sense, the tribunal's decision perfectly constituted Dworkin's philosophical 'prologue to any decision at law'; it stated what according to Kelsen 'all jurists assume'. In philosophical terms, the decision constituted the *conditions of possibility* for any future judgement by providing a fully-fledged argument for the fundamental legality of the institution and its right to prosecute individuals.

From the point of view of corpus linguistics, looking at both the Trial and the Appeals Chambers' decisions on jurisdiction, *Tadić* contains a very high frequency of *if*s with 101 occurrences per 100,000 words, thus confirming the general picture of the early ICTY case law.[36] Of particular interest here, however, is that several arguments in the tribunal's reasoning contained conditionals of the form *if* ..., *then* .... This is exemplified in the following passage in which the Appeals Chamber recapitulates the stakes of Tadić's challenge: 'In sum, *if* the International Tribunal were not validly constituted, it would lack the legitimate power to decide in time or space or over any person or subject-matter'.[37] As a whole, the reasoning thus constructed a

[36] *Tadić Case* (Decision on the Defence Motion on Jurisdiction) (10 Aug 1995), and *Tadić Case* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (2 October 1995).

[37] *Tadić Case* (Decision on the Defence Motion for Interlocutory Appeal on Jurisdiction) (2 October 1995), para 12, emphasis added. Other examples from the Appeals Chamber's decision, cf. e.g. paras 30 and 36. A few characteristic examples from the Trial Chamber's decision include:

'It is a matter of logic that *if* the Security Council acted arbitrarily or for an ulterior purpose it would be acting outside the purview of the powers delegated to it in the Charter.' (para 15)

'*If* the General Assembly has the authority to create a subsidiary judicial body, then surely the Security Council can create such a body in the exercise of its wide discretion to act under Chapter VII.' (para 35)

'*If* the Security Council in its informed wisdom, acting well within its powers pursuant to Article 39 and 41 under Chapter VII of the Charter, creates the International Tribunal to share the burden of bringing perpetrators of universal

hierarchy of norms which, legal technicalities aside, can be reconstructed in the following way: i) the ICTY has the right to try Tadić (and other indictees) *if* the ICTY has primacy and the case is within subject-matter jurisdiction; ii) the ICTY has primacy and the case is within subject-matter jurisdiction *if* the ICTY statute is valid; iii) the ICTY statute is valid *if* UN Security Council Resolution 827 is valid; iv) Resolution 827 is valid *if* it is made in accordance with Chapter VII of the UN Charter.[38]

2. From Explicit Decision to 'Silent Prologue to Any Decision at Law'

On this reconstruction, the reasoning of the court can be depicted in the following way:

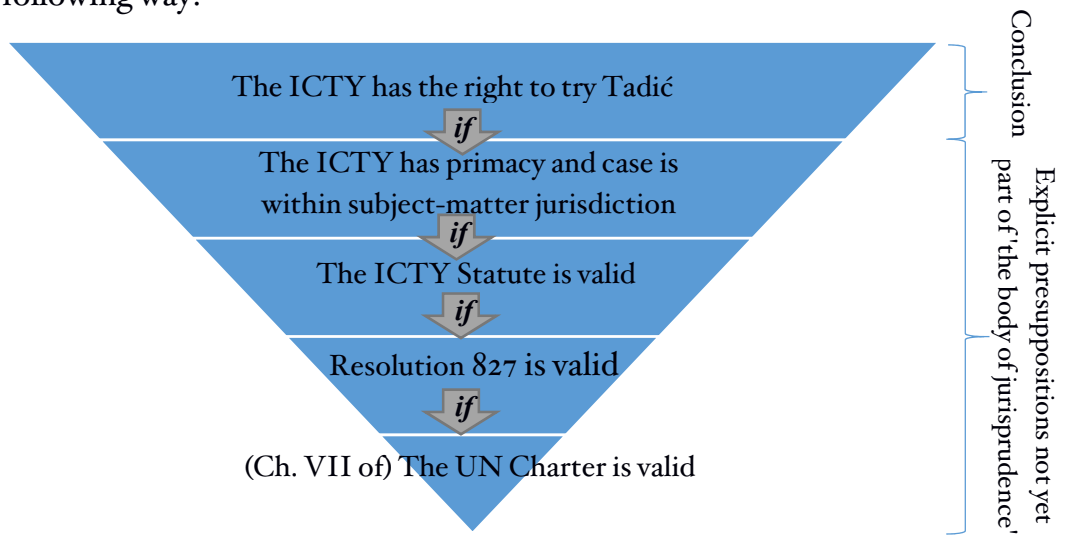

Figure 1. Reconstruction of the ICTY's reasoning in defense of its right to try Tadić

From this reconstruction, we observe two things. First, the reasoning of the ICTY in its very first decision closely resembles the philosophical presuppositions underlying every legal statement according to the generic view described above. In order to match these perfectly, the reasoning needed only to have been expanded slightly to include a final assumption regarding the validity of the UN Charter that this follows either *if*, following Kelsen, we presuppose that *pacta sunt servanda*, which in turn is valid if we

crimes to justice, the Trial Chamber can see no invasion into a State's jurisdiction because, as it has been rightly argued on behalf of the Prosecutor, they were never crimes within the exclusive jurisdiction of any individual State.' (para 44)

[38] We emphasize that the actual reasoning of the court is far richer and include many more conditionals at each step of this norm-hierarchy.

presuppose the basic norm of international law that 'the States ought to behave as they have customarily behaved',[39] or *if*, following Dworkin, this interpretation shows the system of international criminal law 'in its best light'.[40]

Secondly, we see how, following Dworkin more closely, this philosophical prologue is *silent* (or, following Kelsen, the assumption *mostly unconscious*) precisely in virtue of being a *preliminary* ruling and thus deliberately not intended as an explicit part of the Tadić judgement or of any other future judgement issued by the tribunal. In fact, in the case of the Trial Chamber, the decision can be said to be silent also in a wider sense. Although the Trial Chamber also argued in favor of the legality of the creation of the tribunal, and did so on largely the same grounds as the Appeals Chamber, the former, in contrast to the latter, decided that it was not legally competent to make a formal ruling on the motion on jurisdiction. The Trial Chamber therefore emphasized that its argument for jurisdiction was only 'a comment', which it felt obliged to make in light of the 'importance that a body that judges the criminality of [human] behavior should be viewed as legitimate.' In this way, the Trial Chamber's argument was a *silent* prologue also in the wider sense that even when pronounced it was *legally* silent.

What is crucial, however, is that *unlike* the generic philosophical view, the court manifestly did not stay silent about this 'prologue to its decision at law' in this very first decision; the assumption did not remain 'mostly unconscious'. On the contrary, before becoming 'silent'/'unconscious' it had to be stated explicitly. Only when this groundwork had been laid out – and this is particularly important with a view to understanding how logical connectives like *if* can disappear – this ceased to be necessary. Only then could the conditionals underlying this claim become tacit presuppositions and the court could henceforth simply assume – 'unconsciously' – for all future cases that it had the right to try indictees.[41] This gives the following picture post-*Tadić*:

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[39] Kelsen (n 26) 369.

[40] Dworkin (n 30) 90.

[41] If on a rare occasion the conclusion should be challenged, it need not even restate the tacit presuppositions but can refer to the previous statement of them. This happened on a few occasions in the ICTY practice.

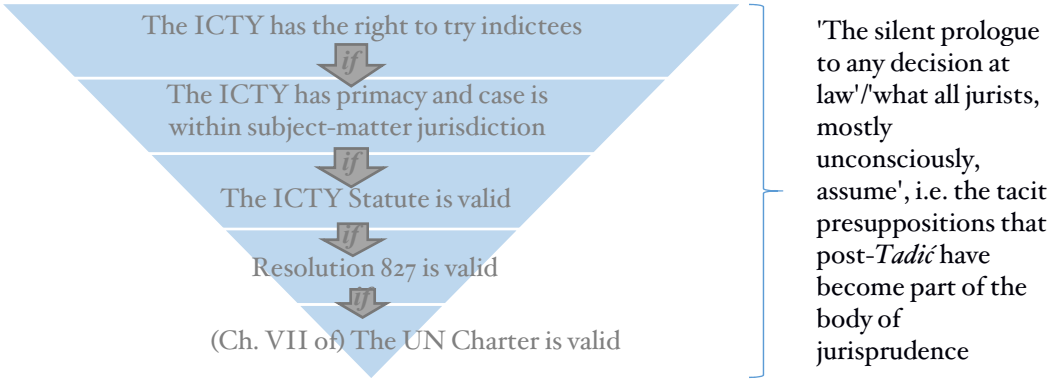

*Figure 2. Reconstruction of the ICTY's point of view post-*Tadić *decision*

V. A Steady Decline: Following Up on the Initial Finding

1. Expanding and Refining the Analysis of ifs *in Recent International Criminal Law*

This brief account of the ICTY's decision on jurisdiction in the *Tadić* case serves to illustrate the fundamental connection between 'disappearing' *if*s and the development of a legal point of view according to the generic philosophical view of legal knowledge. At the same time, however, the example does not explain the specific finding in the pilot study, i.e. the conspicuous drop in use of *if*s between the pre- and the post-2003 corpora. On the contrary, it illustrates how conditionals *had already disappeared* before the first judgement was issued by the ICTY.

A more nuanced explanation is thus required. In terms of the generic philosophical view, what the decision on jurisdiction tells us is how the most fundamental elements of the international criminal law *point of view* were already in place before the first judgement. Therefore, the observed drop in the tribunal's use of *if*s over time cannot strictly speaking be taken to signify the *coming into being* of that *point of view*. Instead, it must more accurately be taken as a sign of the *transformation* of the international criminal law *point of view* from an embryonic form and into a more mature and comprehensive one. Hypothetically, therefore, the observed drop in the use of *if*s must be tied to the transformation of the silent prologue of the international criminal law *point of view*, from a point where it merely included the assertion of the ICTY's jurisdiction to a point, upon its closure, where it included 'a

substantial body of jurisprudence on genocide, crimes against humanity, war crimes, as well as forms of individual and superior responsibility.'

This implies that the legal point of view has undergone consistent development, presumably through a more gradual process throughout the tribunal's existence. However, adequately tracking and documenting such a process requires a more refined dataset. As the next step, we therefore conducted a number of more targeted computerized analyses, supplementing these with close manual reading where computer-based analysis could no longer assist.

First, it was necessary to perform a much more fine-grained analysis of *if*s in the corpus over time. The division into a pre- and a post-2003 corpus is simply too crude if the aim is to establish a connection between the decrease in the use of *if*s and the establishment in the field of international criminal law of something like the generic philosophical view. We therefore first had to make sure that the decrease could not simply be ascribed to the periodization that we had made, for example as a result of an anomalous overuse of *if* in one particular year. In order to exclude this possibility, we divided the entire corpus of the ICTY into sub-corpora, grouping judgements by year from 1996 to 2017.

Second, it was necessary to make sure that the detected development was not a matter of idiosyncrasy in the way the ICTY Trial Chamber judges used language. We therefore expanded the corpora so as to include judgements from both the ICTY's Trial and Appeals Chambers, as well as all judgements from the ICTY's sister tribunal, the ICTR. As noted above, the ICTR came into existence under relevantly similar conditions and its judgements span almost the same time period (1998-2015). The results of an analysis of the relative frequency of *if*s per 100,000 words per year across these four chambers are shown in the figures below.

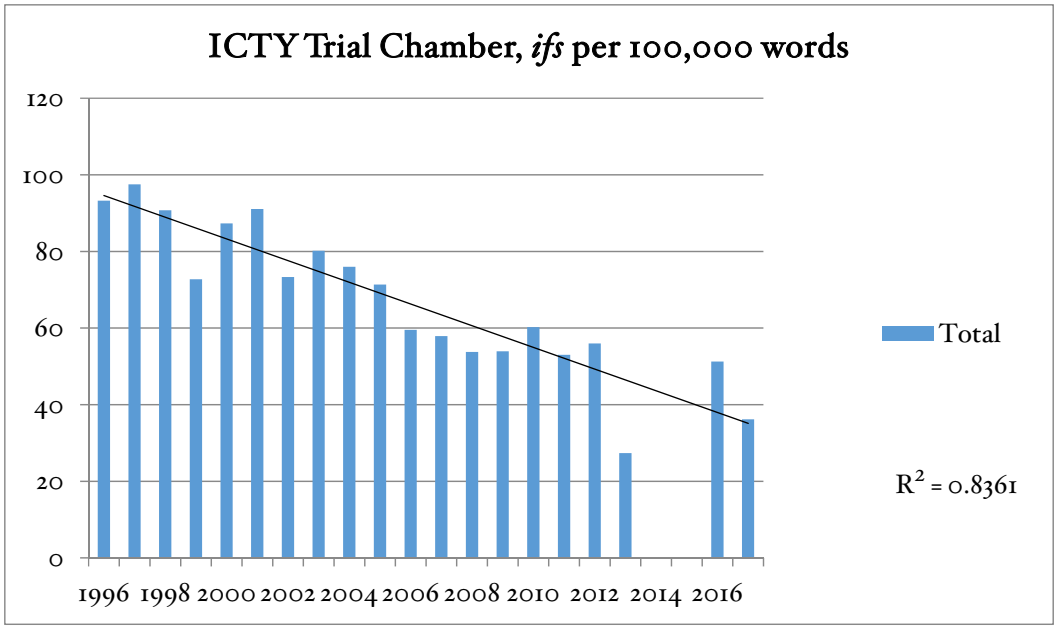

Figure 3. Relative frequency of ifs in ICTY Trial Chamber judgements 1996-2017

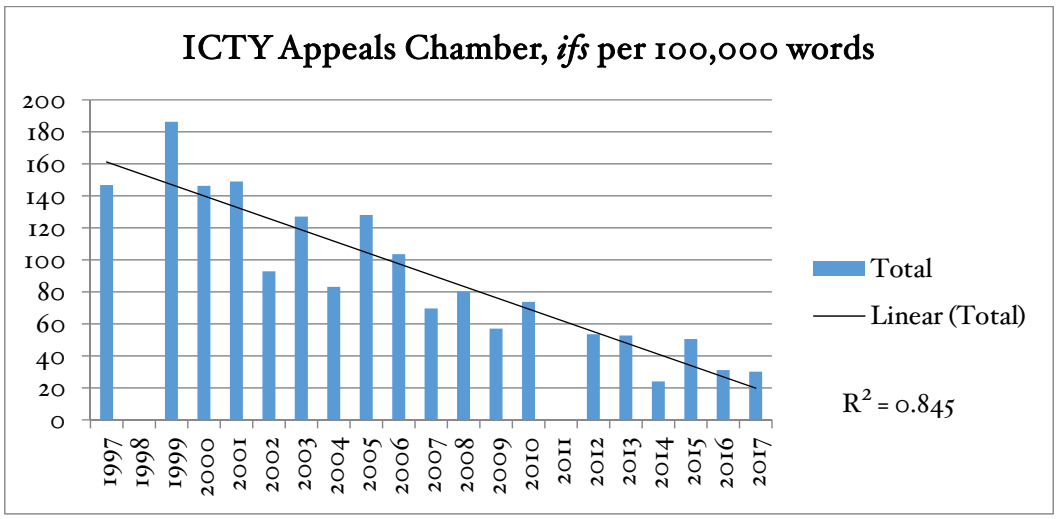

Figure 4. Relative frequency of ifs in ICTY Appeals Chamber judgements 1997-2017

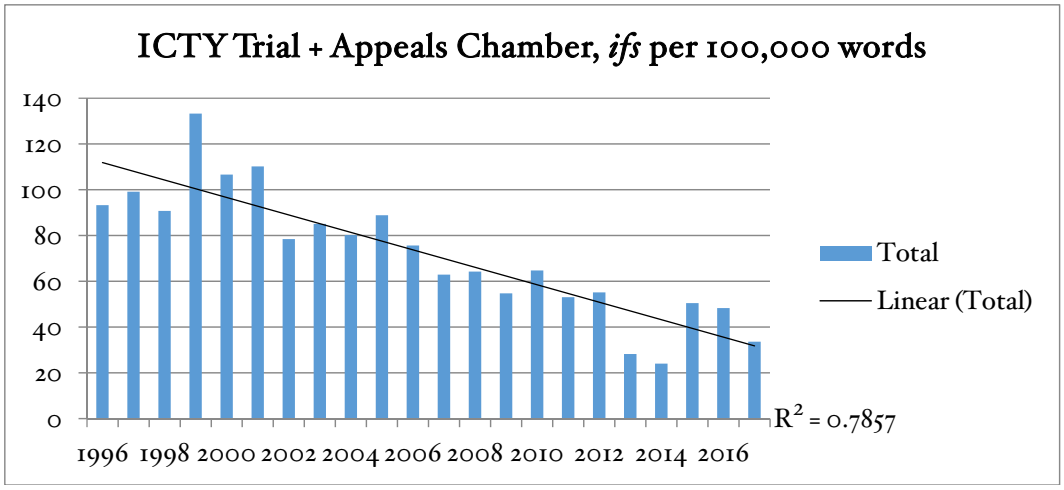

Figure 5. Relative frequency of ifs in ICTY Trial + Appeals Chamber judgements 1996-2017

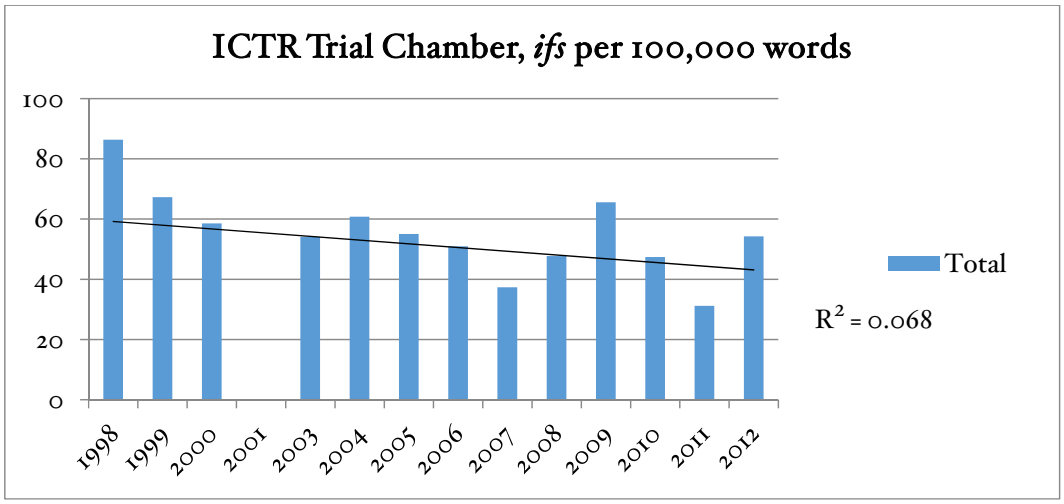

Figure 6. Relative frequency of ifs in ICTR Trial Chamber judgements 1998-2012

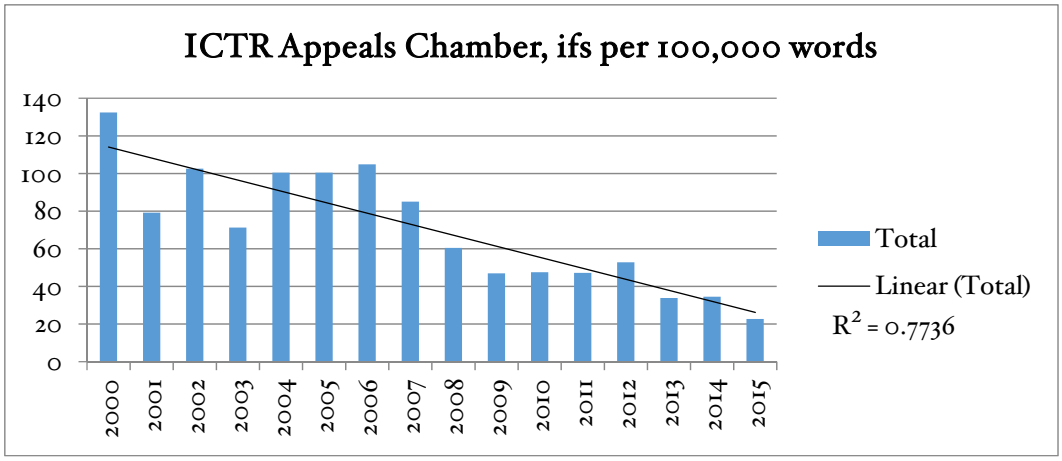

Figure 7. Relative frequency of ifs in ICTR Appeals Chamber judgements 2000-2015

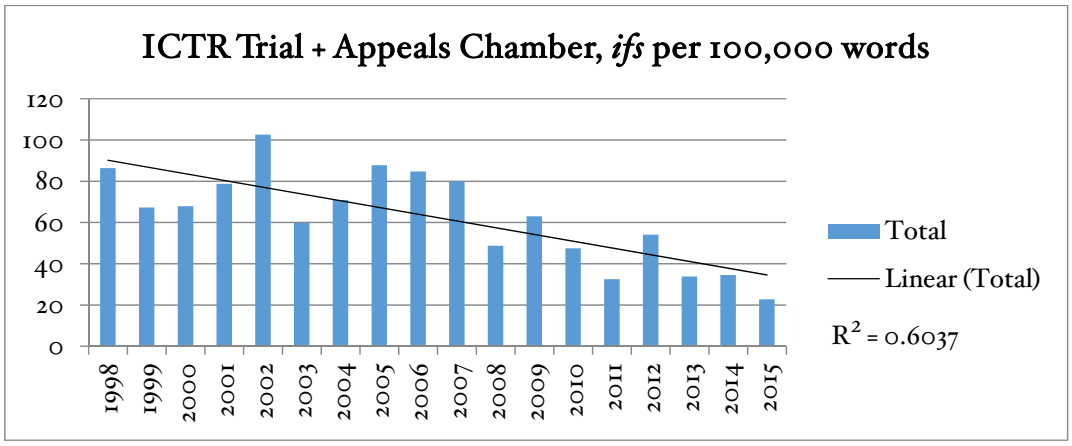

Figure 8. Relative frequency of ifs in ICTR Trial + Appeals Chamber judgements 1998-2015

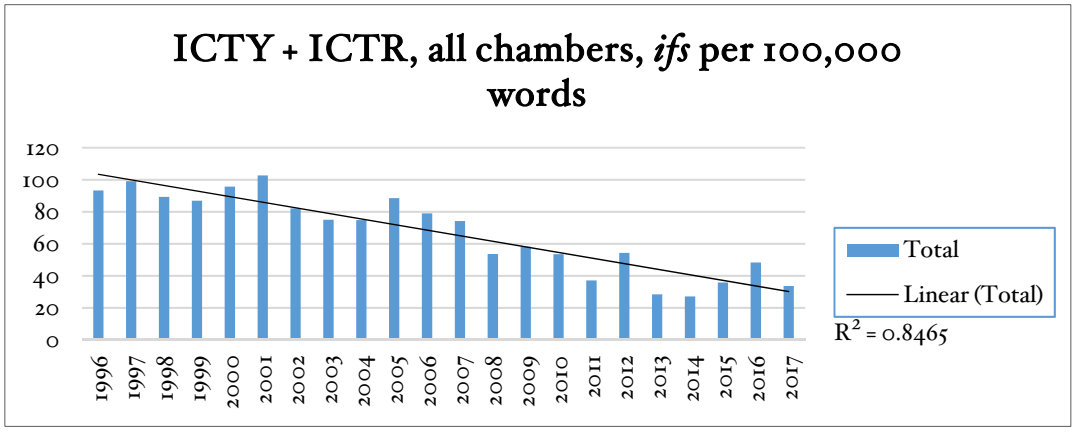

Figure 9. Relative frequency of ifs in ICTY + ICTR, all chambers judgements

Some variation notwithstanding, the general picture that emerges from these charts is very consistent and arguably provides further support for our hypothesis. As indicated by the trendlines, all the datasets exhibit a declining tendency in relative frequency of *if*s, with values generally falling across chambers and tribunals from around 100 occurrences per 100,000 words in the earliest judgements to around 50 in the latest. The trendlines of the ICTY Trial and Appeals Chambers and the ICTR Appeals Chamber in particular show a very good fit with the data, with R-squared values of 0.8361, 0.8465, and 0.7735 respectively.[42] By comparison, the picture of the ICTR Trial Chamber is somewhat murkier, with an R-squared value of only 0.068, but still indicates a decreasing trend. Bearing in mind the vagaries and contingencies of language use, the general fit of the falling linear trendlines is arguably as good as one could possibly expect of a corpus of this size and kind. This is especially emphasized in figures 5 and 8, where we have added the values of the Trial and Appeals Chambers (0.7857 and 0.6037 respectively), and in figure 9, which combines the data for both chambers of both tribunals (0.8465).

The overall picture that emerges from the case law is therefore remarkably consistent with our hypothesis and provides little support for other possible interpretations of the initial data. If we leave it at that, however, there is a danger of selecting on the dependent variable, in the sense that we have been looking only at corpora from tribunals whose case law coincides with the coming into being of the corresponding specialized legal discipline. So far, we do not know whether the disappearance of *if*s refers to a more general phenomenon in legal use of language. If we are correct, this should not be the case. Assuming we are right that the gradual disappearance of *if*s is connected with and provides evidence of the coming into being of a distinct international criminal law *point of view* in the sense described above, then we should expect not to be able to detect a similar linguistic development in the case law of courts which are long established and therefore make statements

[42] R-squared value is a statistical measure of how close the collected data are to the trend line. R-squared values fall between 0 and 1, and, in general, the higher the R-squared value the closer the fit. Although a rule of thumb suggests that R-squared values above 0.7 indicate a good fit there is strictly speaking no universal measure what is required for a 'good fit'. However, the measured values in this study are clearly very high, suggesting a very strong trend.

about law from already well-developed and commonly accepted points of view.

2. The US Supreme Court in comparison

It of course falls outside the scope of one study to control systematically and exhaustively for this possibility. However, a study of one carefully selected court can still be useful. Depending on the outcome, such a study can serve either to rule out the possibility that we are seeing a development that is exclusively characteristic of the field of international criminal law or, conversely, it can serve to rule out the possibility that what we are seeing is some sort of universal tendency in law. For these purposes, we have chosen to look closer at the case law of the US Supreme Court, which by the time the ad hoc tribunals were established had been issuing judgements for centuries.[43] This simultaneously provided an opportunity to look further back in time to the decades preceding the establishment of the ICTY and the ICTR. The scope of the analysis was expanded to include the period between 1935 and 2017. The results are shown in figure 10, below.

[43] As already mentioned, we have chosen the US Supreme Court instead of, for example, an international court in order to avoid selecting on the dependent variable. In order to verify our hypothesis that the declining use of *if*s is connected to the establishment of a specific legal point of view, a 'body of jurisprudence', we needed to control our findings against a court that has a very rich and long case law prehistory going far back before the case law of the ICTY and the ICTR. However, most international courts have developed most of their case law within the last two-four decades. If we are right, they would therefore be likely to display much the same development during that time. The only international court that does not fall prey to this is the International Court of Justice (ICJ). Unfortunately, using the ICJ would leave us with a problem of small numbers, as the Court generally passes much shorter and much fewer judgements – only 129 judgements in total since 1948 compared to the 280 ICTY and ICTR-judgements rendered since 1996.

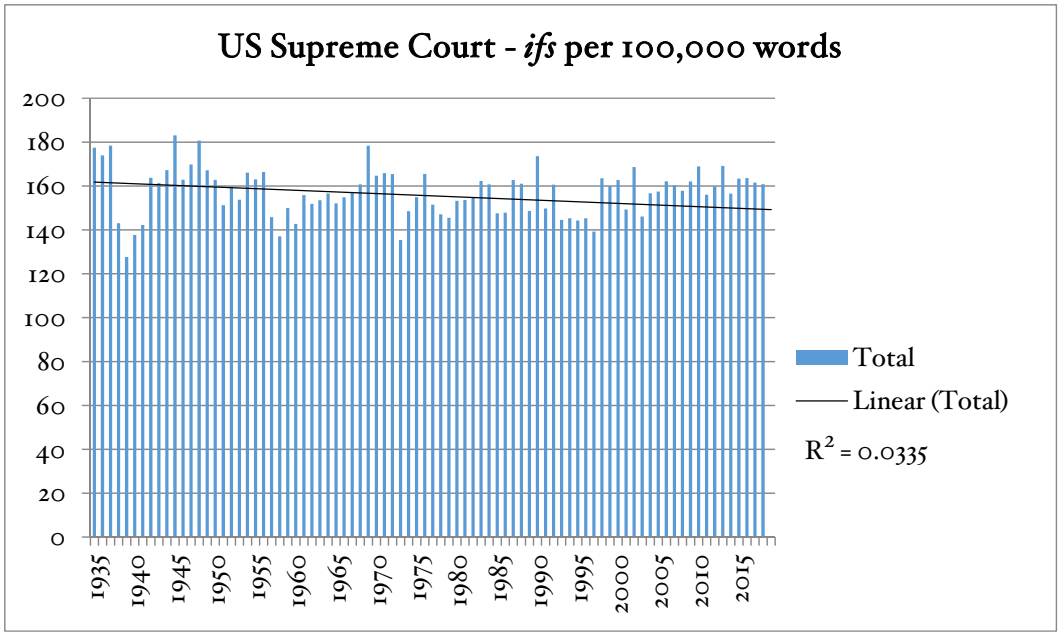

Figure 10. Relative frequency of ifs *in US Supreme Court opinions 1935-2017*

The general picture that emerges from these data is clearly different. First, even across a time span of more than 80 years we see much more limited fluctuations, with the lowest frequency only 30% lower than the highest frequency (as compared with the 74% difference between the highest and the lowest frequencies across the two decades of ICTY and ICTR case law). Second, unlike the quite steep and steady decline in the *ad hoc* tribunals, the US Supreme Court's frequency values oscillate much less consistently, resulting in a very weak declining tendency, with a very low R-squared value (0.0335 compared with 0.8465 for the *ad hocs*). The general picture is one of random oscillations around an equilibrium, as one would expect from a court that has firmly established its legal point of view in the course of its more than 200 year-long history.

Interestingly, however, while the US Supreme Court data can thus generally be said to support our hypothesis, the data also show one thing that at least superficially seems to contradict it. Across the entire time span, the US Supreme Court uses *if*s with a frequency that is almost twice as high as the highest frequency used *initially* by the ICTY and the ICTR. If the observed decline in the frequency of *if*s in the *ad hoc* tribunals' judgements to values around 34 per 100,000 words is meant to indicate an approximation toward the generic philosophical view, then it would seem reasonable to claim that a roughly constant level of *if*s at a much higher level would indicate the exact

opposite, i.e. an absence of the generic philosophical view. However, a preliminary study indicates that if we expand the analysis of US Supreme Court Opinions to cover all years from the origins of the Court, then the relative frequency of *if* over time exhibits a gradual decline just as evidenced in the case of the ICTY / ICTR.[44] Therefore, the higher frequency of *if*s in the Supreme Court Opinions must be explained by other factors, most likely by divergent genre conventions, i.e. differences between the ways in which US judges and the international criminal law community write judgements. Thus, as mentioned above, our initial formulation of the hypothesis is somewhat crude and in need of further refinement and nuance. We submit that the observation of this higher level of *if*s in the US Supreme Court motivates a(nother) refinement of the hypothesis rather than a rejection of it.

VI. From the External Point of View: Kuhn, Bourdieu, and the Disappearing *if*s

1. The Emerging Paradigm or Doxa of the New Epistemic Community of International Criminal Law

It generally seems that these data strongly support our hypothesis that the development in the two tribunals' use of *if*s is tied to the generic philosophical view of legal knowledge and that they document the gradual coming into being and further consolidation of an increasingly comprehensive and rich international criminal law *point of view*. In this sense, the analysis supports what Dworkin has described as the process of law 'working itself pure'.[45] At the same time, however, the data seem to suggest something more, something which is not directly touched upon by the philosophical approach with its strong internal epistemological focus on the ultimate justifiability of legal knowledge. More specifically, the data seem to describe also the gradual emergence of an epistemic community in international criminal law *as an empirical institutional fact*. This additional aspect might be better comprehended if we adopt an external perspective,

[44] We hope in a later study to be able to provide a full analysis of the *if*s in the entire US Supreme Court case law from the beginning of its existence.

[45] Ronald Dworkin, 'Law's Ambition for Itself' (1985) 71 Virginia Law Review 173.

applying notions and concepts from the sociology of knowledge and science, as developed by Thomas Kuhn and Pierre Bourdieu.

This additional perspective is further necessary in light of the fact that the theories of these two prominent sociologists do not merely address topics other than the philosophy of law, but also overlap and to some degree stand in opposition to it, presenting a challenge to the philosophical account of knowledge and science. It is therefore necessary to also consider the possible impact of our findings on this contrasting view. As we shall see, there is reason to believe that our findings might assist in nuancing some of the main claims of these influential sociological critiques of legal philosophy.

Looking closer at the steady gradual decline in the use of conditional *if*s, this pattern testifies to the emergence of a new field occupied by members of an increasingly specialized profession of international criminal lawyers who gradually become masters and practitioners of an emerging sub-discipline, sharing a body of highly specialized expert knowledge. At the same time, this is a process that can be said to create new disciplinary boundaries and, increasingly, to seal off the international criminal law *point of view* from those outside the discipline, not only laypeople but also lawyers specialized in other disciplines, such as national criminal law.

In the general context of international law, the term *autonomization* has been put forward to describe the gradual development in various international legal fields of a body of legal knowledge marked by common references, concepts, and principles and by methods of interpretation and of adjudication specific to international courts.[46] This notion can further be explored through key concepts developed in the sociology of knowledge and science, notably Pierre Bourdieu's '*doxa*' and Thomas Kuhn's 'paradigm'.

Bourdieu defines the concept of *doxa* as follows:

> All those who are involved in the fields, whether champions of orthodoxy or heterodoxy, share a tacit adherence to the same *doxa* which makes their competition possible and assigns its limits (the heretic remains a believer who preaches a return to purer forms of the faith). It effectively forbids

[46] Cf. Mikael R. Madsen, 'From Cold War Instrument to Supreme European Court: The European Court of Human Rights at the Crossroads of International and National Law and Politics' (2009) 32(1) Law and Social Inquiry 137-159.

> questioning of the principles of belief, which would threaten the very existence of the field. Participants have ultimately no answer to questions about the reasons for their membership in the game, their visceral commitment to it; and the principles which may be invoked in such a case are merely *post festum* rationalizations intended to justify an unjustifiable investment, to themselves as much as to others.[47]

This concept has been invoked, for example, by Mikael Rask Madsen in his analysis of autonomization in the emerging field of human rights.[48] Along similar lines, Frédéric Mégret sees in international criminal law the development and consolidation of *doxa* across the last couple of decades as the possibility-condition for the emergence of this new (sub)field:

> [I]nternational criminal justice relies on a series of shared 'common places' about its origins and finality [...]. For all the surface disagreement, part of the discipline's resilience can be explained by the existence of a deeply shared *doxa* [...].[49]

Turning to Thomas Kuhn, the notion of a 'paradigm' can be explained in close relation to so-called 'normal science' (the science that takes place between the unusual moments of scientific revolutions):

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[47] Pierre Bourdieu, *Pascalian Meditations* (Polity Press 2000) 86. Cf. also notably Pierre Bourdieu, *Outline of a Theory of Practice* (Cambridge University Press 1977) and Cécile Deer, 'Doxa' in Michael Grenfell (ed), *Pierre Bourdieu: Key Concepts* (Cambridge University Press 2013) 119-130.

[48] '[The Bourdieusian] approach [...] seeks an analysis of the gradual emergence of a more structured field of human rights on the basis of the practices of a series of agents and institutions, which, during different historical stages, have helped define this social space and its overriding logics. This becomes an analysis of the different *nomos* and *illusio* and eventual *doxa* of the field and the ways in which this influenced the logic of practice of the agents.' Mikael R. Madsen, 'Reflexivity and the Construction of the International Object: The Case of Human Rights' (2011) 5(3) International Political Sociology 265. Similarly, Jean D'Aspremont uses Bourdieu in his general analysis of international law as a belief system – although he avoids *doxa* and focuses instead on Bourdieu's closely related notion of *miscognition*, Jean D'Aspremont, *International Law as a Belief System* (Cambridge University Press 2017), especially ch. 1.

[49] Mégret, 'International Criminal Justice as a Juridical Field' [2016] Vol. XIII *Champ pénal/Penal field* <https://journals.openedition.org/champpenal/9284> accessed 8 November 2018.

> [N]ormal science can succeed in making progress only if there is a strong commitment by the relevant scientific community to their shared theoretical beliefs, values, instruments and techniques, and even metaphysics. This constellation of shared commitments Kuhn at one point calls a 'disciplinary matrix' [...] although elsewhere he often uses the term 'paradigm'.[50]

Although originally developed in relation to natural science, and in particular to physics, this notion of paradigm has travelled far into the social sciences and, as in the case of Bourdieu's *doxa*, also into international law, where, for example, Mark Weston Janis has suggested using it as the 'meta-theory' of international law.[51] David S. Koller has emphasized the role of paradigm specifically in relation to international criminal law.[52]

In the context of the disappearing conditional *if*s, it seems that our findings can actually provide (additional) empirical support for these claims about the

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[50] Alexander Bird, 'Thomas Kuhn' in Edward N. Zalta (ed), *The Stanford Encyclopedia of Philosophy*, Winter 2018 Edition, forthcoming) <https://plato.stanford.edu/archives/win2018/entries/thomas-kuhn/> accessed 6 November 2018. Kuhn's paradigm theory was originally developed in his main work, *The Structure of Scientific Revolutions* (Chicago University Press 1996 [1962]).

[51] Mark Weston Janis, 'Sources in the Meta-History of International Law: A Little Meta-Theory—Paradigms, Article 38, and the Sources of International Law' in Samantha Besson and Jean D'Aspremont (eds), The Oxford Handbook of the Sources of International Law (Oxford University Press 2018).

[52] David S. Koller, 'The Faith of the International Criminal Lawyer' (2008) 40 New York University Journal of International Law and Politics 1019, at 1032. Koller's use could be challenged in so far that Kuhn originally developed the notions of paradigm and normal science to explain scientific revolutions by which he understood transitions from pre-science to science or from one period of normal science to another (e.g. from Newtonian to Einsteinian physics). In the case of international criminal law, however, it seems that we are dealing with a paradigm and a normal science that came into being through specialization; a *branching out* from generic international law, or perhaps rather a *merger* between international humanitarian law (IHL), international human rights law (IHRL) as sub-disciplines of international law and criminal law as a sub-discipline in domestic law. However, it is commonly acknowledged that Kuhn's theory can also be used to understand specialization and in his later work, Kuhn himself focused increasingly on this phenomenon, cf. K. Brad Wray, *Kuhn's evolutionary social epistemology* (Cambridge University Press 2011), notably Chapter 7: Scientific Specialization.

existence of *doxa* and/or of a normal science paradigm in international criminal law. The steady decline in the use of *if*s suggests the increasing confidence felt by the international criminal law actors in the beliefs constituting the conditions of meaningful discourse. Through the Bourdieusian prism, the first decades of the ad hoc tribunals' life witnessed the emergence of international criminal law as a new (sub)field, with the corresponding development and consolidation of *doxa* as the possibility-condition of this field of opinion. Correspondingly, from a Kuhnean perspective, the decline of *if*s corresponds to the transition of international criminal law as a discipline from *pre-science* to *normal science* and thus to the emergence and consolidation of an international criminal law paradigm.

2. 'Law Was Once Introduced Without Reason, and Has Become Reasonable': The Charge of Irrational Relativism

At the same time, the disappearance of *if*s may also constitute an important challenge, or at least a corrective, to these sociological approaches, especially when it comes to an understanding of the epistemic micro-dynamics involved in the creation and consolidation of the paradigm/*doxa* of the emerging normal science/field. This point calls attention to some of the most contentious and debated exegetic issues in relation to the works of both Kuhn and Bourdieu.[53] More specifically, both theorists have been accused of implying an irrational and ultimately untenable relativism. Before returning to our findings, this subsection explains this contention.

The discussion starts from the observation that both Kuhn and Bourdieu can at least be read as emphasizing a sharp dichotomy between what constitutes a discipline's condition of possibility (i.e. the paradigm or *doxa* respectively) and what takes place on the surface and immediately presents itself as the discipline. On this reading, the paradigm/*doxa* is not only silent in the sense emphasized by the generic philosophical view of legal knowledge, i.e. as a prologue that is no longer articulated but now merely tacitly presupposed in any given occasion. The paradigm/*doxa itself* is also unapproachable through rational analysis. This is precisely what makes the discipline autonomous and

[53] For some references, cf. notes 62 and 63 and below.

what seals it off from other disciplines and makes it categorically inaccessible to outsiders.

In Kuhn's theory, this inaccessibility to outsiders is explained in relation to paradigm shifts in terms of the *incommensurability* of different paradigms:

> [T]he proponents of competing paradigms practice their trades in different worlds. [...] Just because it is a transition between incommensurables, the transition between competing paradigms cannot be made *a step at a time, forced by logic and neutral experience*.[54]

Koller emphasizes precisely this radical irrationality of the paradigm:

> Kuhn illustrated the critical role played by faith in underpinning paradigms such as that of international criminal law. Faith—in the sense of belief in the absence of a sufficient rational basis—has a natural and essential role to play in all human endeavors where science and reason have been exhausted, or have not yet become available. The fields of law and criminology are no exceptions.[55]

Again, we should observe that in international criminal law we are dealing with a new paradigm created through specialization; Kuhn's considerations about incommensurability explicitly relate to a shift between competing paradigms within the same science. However, as mentioned above (cf. note 52), it is common to extend Kuhn's considerations by analogy to the phenomenon of specialization, also in relation to incommensurability.[56]

Although admittedly a difficult interpretive issue, Bourdieu can at least be read in much the same vein, i.e. as highlighting the rational inaccessibility of *doxa*. In relation to *doxa*, Bourdieu thus emphasizes that 'what is essential *goes without saying because it comes without saying*: the tradition is silent, not least

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[54] Kuhn (n 50) 150, emphasis added.

[55] David S. Koller, 'The Faith of the International Criminal Lawyer' (2008) 40 New York University Journal of International Law and Politics 1019, at 1032.

[56] Cf. Wray (n 52) 127. One might add that this follows by implication. If incommensurability is due to the fact that commitment to a given paradigm is irrational in the sense that it involves a leap of faith, then this paradigm remains rationally inaccessible to all outsiders of the normal science which it supports, regardless whether these outsiders are placed in a competing paradigm within the discipline, or whether they stand outside the discipline entirely. (We are grateful to one anonymous reviewer for pressing us on this point.)

about itself as a tradition'. He continues to describe *doxa* as 'the aggregate of 'choices', whose subject is everyone and no one *because the questions they answer cannot be explicitly asked*', and as 'the sum total of the theses tacitly posited *on the hither side of all inquiry*'.[57] Bourdieu's illustration of the relation between the fields of *doxa* and of opinion is shown in figure 11.

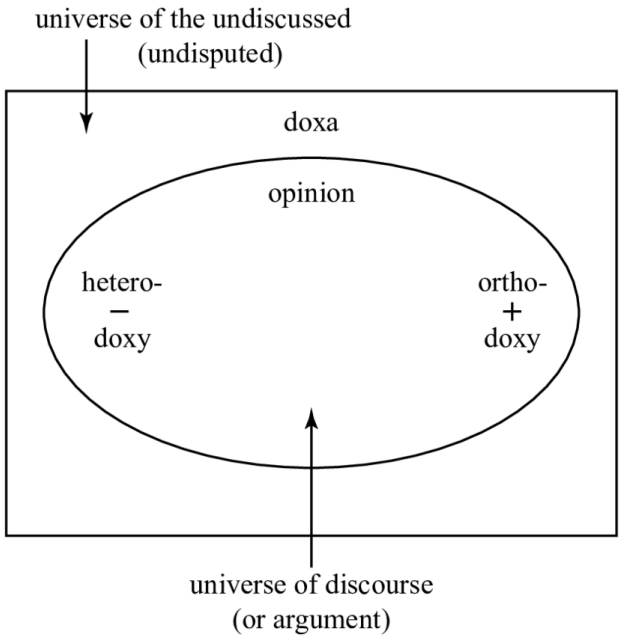

Figure 11. Relation between the field of doxa and the field of opinion according to Bourdieu.[58]

In his late work *Pascalian Meditations* (2000), Bourdieu developed these thoughts in relation to law, building in particular on the following statement by Pascal: '[The people] must not see the fact of usurpation; law was once introduced without reason, and has become reasonable.'[59] Bourdieu fully endorsed the anti-foundationalist, anti-Cartesian sentiments of these words:

> Thus the only possible foundation of law is to be sought in history, which, precisely, abolishes any kind of foundation. At the origin of law, there is nothing other than arbitrariness (in both senses), 'the fact of usurpation', violence without justification. Genesis amnesia, which arises from exposure to custom, masks what is spelled out in the brutal tautology: 'law is law, and

[57] Bourdieu (n 47, 1977) 167-168, first emphasis in the original.

[58] Bourdieu (n 47, 1977) 168.

[59] Pascal (from his *Pensées*), quoted in Bourdieu (n 47, 2000) 80.

> nothing more.' Anyone who wants to 'examine its motive', its *raison d'être*, and 'sound it even to its source', that is, ground it by going back to the first beginning, like philosophers, will never find anything other than this kind of principle of sufficient unreason.[60]

These passages from both Kuhn and Bourdieu invite a reading not only of the paradigm/*doxa* as impenetrable to rational argument but also of the explicit level, i.e. the day-to-day puzzle-solving of normal science/the ortho- and heterodoxy displayed in the field of opinion, as constituting the sole realm of reason or, in Bourdieu's words, the universe of discourse or of argument. The paradigm/*doxa* is that which renders rational discourse possible but which itself defies any rational contestation or reconstruction. Instead, the battle between competing paradigms/*doxas* is extra-rational, involving only pious faith and/or raw power.

3. Empirical Support for Armchair Philosophers?

Following this line of reasoning, one might naturally have expected the exact opposite development in the ICTY's and ICTR's language use from the one observed. Thus, going back to the beginning of the tribunals' existence, there was *ex hypothesis* no full-fledged paradigm/*doxa* of international criminal law. In their absence, one might have expected the early judgements to consist primarily of Bourdieu's 'brutal tautologies' – 'law is law, and nothing more' – or of Kuhnean exclamations of faith. Conversely, at the time of the tribunals' closure, when *ex hypothesis* the paradigm/*doxa* was more firmly in place as the condition of possibility of rational discourse and contestation, one might have expected to find more closely argued texts.

As documented above, however, we have instead seen the opposite development. We have seen that the earliest texts in the corpus – where the fundamentals of international criminal law were not yet in place and where the paradigm/*doxa* was still being negotiated – were eminently rational, containing a large number of explicit conditionals and chains of arguments that could be reconstructed all the way down to the most fundamental level. And we have seen the opposite in the later development of the case law: a greater unwillingness to spell out all the premises of one's reasoning.

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[60] Bourdieu (n 47, 2000) 80-81.

This observation challenges the strong relativism often associated with Kuhn and Bourdieu, not least by some of their proponents in international criminal law. It may be true that large parts of the discourse of the 'mature tribunals', i.e. the ICTY and the ICTR toward the end of their existence, are heavily 'truncated', in the sense that they do not make sense immediately as they stand but rather only against a backdrop (the paradigm or the *doxa* of international criminal law) which is unfamiliar to outsiders. However, according to our findings it simply seems *empirically* wrong to claim that this backdrop, understood as the most foundational beliefs of practitioners of international criminal law, should somehow reside in an extra-discursive universe and as such categorically escape rational reconstruction. On the contrary, and as exemplified most clearly in the *Tadić* decision on jurisdiction, which clearly states the foundational assumptions on which the field relies,[61] it seems that the early case law is to a very high degree accessible to outsiders, precisely in virtue of the high frequency of conditionals.

It should be emphasized that this foundational reasoning of the court does not go all the way to the absolute axiomatic foundational level. We are not

[61] This is of course is not to say that these foundational assumptions are argued flawlessly, or that they are uncontroversial. The point is only that the line of reasoning in the early case law is more easily accessible to outsiders than the late case law.
This point is further corroborated by a close combined automated corpus linguistic and manual reading of the case law relating to one of the most controversial aspects of the ICTY jurisprudence, i.e. regarding the introduction of Joint Criminal Enterprise as a mode of responsibility. Thus, the ICTY discusses this doctrine in a number of judgements in response to challenges against this mode of criminal responsibility raised by defendants at different times throughout the ICTY's existence. The relevant case law falls in three periods: i) 1999; ii) 2003-2008; and iii) 2014-2017. Interestingly, the frequency of *if*s used in these three period follows the general pattern closely although even more clearly with the following distribution per 100,000 words, i.e. 1999: 236 *if*s; 2003-2008: 123 *if*s; and 2014-2017: 54 *if*s. Corresponding to this computer-based reading, however, the first judgements are immediately readable for outsiders openly embracing the controversial issue and arguing in general language the pros and cons of the doctrine drawing on a wide variety of different and non-specialized sources. This contrasts sharply with a reading of the case law constituting the final group which is far more impenetrable to lay readers with its widespread use of specialized legal language, references to the doctrine in abbreviated form ('JCE'), and prolonged discussions of technical matters of detail rather than the doctrine's fundamental *raison d'être*.

claiming that the tribunal is searching, Cartesian style, for the Archimedean point of all knowledge. The tribunal only goes to the point where it can establish a solid connection between the controversial starting assumption inside the emerging field (jurisdiction over Tadić and other individuals) and the most closely related uncontroversial assumption in the world outside (*pacta sunt servanda*). This is sufficient to overcome the strong relativistic claim of incommensurability between paradigms.

In this sense, it seems, somewhat ironically, that the armchair philosophers referred to in the first sections of this paper do indeed seem to be closer than the sociologists to providing an empirically adequate understanding of the fundamental logic at play in the development of an epistemic community like the one constituted by international criminal lawyers. This by no means implies that it is not useful to invoke Kuhn's and Bourdieu's notions of paradigm or *doxa* to describe the autonomization and gradual emergence of a specialized field like international criminal law. However, in so doing, the temptation to infer strong relativism should be resisted.

As discussed above, the issue of strong relativism in Kuhn's and Bourdieu's respective theories remains contested and has inspired extensive commentary and critique.[62] Furthermore, both Kuhn and Bourdieu seem to have struggled with the question themselves, especially in their later work, in which they both exhibit a certain uneasiness and impatience to reassure the reader against the most radical interpretations.[63] Whether they have succeeded in doing so remains an open question. However, if our

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[62] Especially Kuhn's notion of incommensurability has occasioned heated debate and raised deep exegetic discussions, cf. e.g. Léna Soler, H. Sankey, and Paul Hoyningen-Huene (eds), *Rethinking Scientific Change and Theory Comparison* (Springer 2008) and Ipek Demir, 'Incommensurabilities in the Work of Thomas Kuhn' (2008) 39(1) *Studies in the History and Philosophy of Science* 133. For a useful overview and discussion of Bourdieu's notion of *doxa*, cf. Deer (n 48).

[63] For Kuhn, see notably his 'Postscript – 1969' in Kuhn (n 50) and Thomas Kuhn with James Conant and John Haugeland (eds), *The Road Since Structure* (University of Chicago Press 2000). For Bourdieu, see e.g. Pierre Bourdieu and Loïc J.D. Wacquant, *An Invitation to Reflexive Sociology* (Polity Press 1992) and especially Bourdieu (n 47, 2000), notably 91-93, and Pierre Bourdieu, *Science of Science and Reflexivity* (University of Chicago Press 2004) which constitutes his final lecture course at Collège de France, and is devoted to the subject of science.

interpretation of the results of the corpus linguistic study of conditional *if*s is correct, they might seem to suggest a Solomonic way out of the cul-de-sac of strong relativism. Incommensurability and autonomy are real phenomena, but the sociology of knowledge and science is most fruitful when these are conceptualized in relative and not absolute terms. The crucial assumptions of the practitioners in the field may indeed be unconscious but they are still *assumptions*; the prologue may indeed be silent, but it is still a pro-*logue*.

VII. Conclusion

The considerations presented in this paper were prompted by the findings in a computer-driven corpus linguistic study of all judgements from the ICTY and the ICTR from 1996 to 2017. To our surprise, this study revealed that the frequency of the use of *if*s in all judgements had exhibited a steady diachronic decline from 93 per 100,000 words on average in 1996 to 34 in 2017. We submit that the combination of the philosophical and the sociological perspectives applied here has brought us closer to an explanation of this phenomenon. This explanation ties the waning use of *if*s to the gradual emergence over the last couple of decades of international criminal law as a specialized kind of legal knowledge and expertise with its own distinct set of tacit philosophical premises constituting the field's 'substantial body of jurisprudence' and embedded in a distinct epistemic community as an empirical institutional fact. At the same time, the empirical findings also necessitate a reconsideration of our preexisting general theoretical understanding of the emergence of disciplinary knowledge and epistemic communities. In this way, the corpus linguistic study of the use of *if*s has proven useful not only for a deeper understanding of the field of international criminal law.

On the assumption that international criminal law is not completely unique but is representative of any emerging field of specialized knowledge, it seems warranted further to assume that this study has the potential to contribute in interesting ways to the philosophy and sociology of knowledge and science. On these grounds, we further submit that corpus linguistic studies of the legal use of conditionals deserve greater attention in future research. With the added resources available in philosophy and sociology, we believe that the systematic study of frequency patterns across time in the use of conditional

language in various epistemic fields constitutes a promising avenue of further study. In the first instance, we are thinking of (and have, in ongoing work, already partly begun) expanding the specific corpus linguistic approach applied here to other courts. Not only does it seem promising to look beyond judgements to decisions, as well as to other international criminal courts and tribunals, notably to the International Criminal Court. It would also seem obvious to look at the case law of other international and even national courts.

Furthermore, it could be interesting to expand the search for disappearing *if*s to scholarly literature including textbooks. It is still an open question whether these different literary genres exhibit analogous behavior or whether they develop independently. Kuhn claimed that there was a significant difference between research literature and textbooks, and it could be interesting to see whether empirical findings support this claim. Regardless of the results, these findings would require further theorizing.

Finally, it could also be interesting to expand the approach to other scientific fields. For instance, it could be interesting to carry out corpus linguistic studies of *if*s in science journals during periods of generally agreed paradigm shifts (e.g. before and after Einstein). Natural science is a perhaps completely different ball game to international criminal law and law more generally. However, keeping in mind the ramifications of Kuhn's study, which originally dealt only with the history of physics, it could be interesting to see whether this corpus linguistic study of the role of conditional *if*s in *legal* knowledge might have the potential conversely to enlighten our understanding also of other disciplines, including in the natural sciences.

CITING CASE LAW: A COMPARATIVE STUDY OF LEGAL TEXTBOOKS ON EUROPEAN HUMAN RIGHTS LAW

Amalie Frese[*] and Henrik Palmer Olsen[†‡]

Recent years have seen increased interest in data-driven methods in legal research. Technologies provide new automated alternatives to traditional doctrinal approaches, which rely on manual information retrieval. In this article, we address one aspect of this development. On the basis of a citation network containing judgments on Article 14 of the European Convention of Human Rights, we identify which cases are most frequently cited and explicitly used in the legal argumentation of the European Court of Human Rights. We subsequently compare our findings with presentations of Article 14 in German, French and British textbooks. We aim to demonstrate that 1) network analysis can provide relevant input to legal analysis by relying on objective measures of case importance and 2) scholarship relying on traditional doctrinal methods is more dependent on the authors' subjective outlook than necessary.

Keywords: network analysis, case citations, doctrinal legal analysis, textbooks, legal methodologies, human rights law, Article 14 ECHR

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I. INTRODUCTION: THE LEGAL METHOD VERSUS NETWORK ANALYSIS

What is valid law? The aim of legal doctrinal scholarship is to answer this question within some defined area of the law, at a defined point in time and in a defined jurisdiction. Identifying and interpreting relevant sources of law is what determines the content of valid law in doctrinal scholarship. Case law is generally one such recognised source of law, which must be taken into account where it is relevant. The role and use of case law vary both across jurisdictions and across fields of law, but generally case law represents the use of law in practice and therefore cannot be ignored. However, which methodological considerations justify the inclusion (or exclusion) of one judgment (or set of judgments) rather than another in a doctrinal account of law?

In this article, we discuss this question in the context of European human rights law, with a focus on the identification of which judgments of the European Court of Human Rights (ECtHR) should be included in doctrinal accounts of this field of law.[1] While it is commonly accepted that European

[1] In this article, we do not use the term 'precedent' because this is a highly theorised concept associated in quite a specific way with a status conferred upon certain

human rights law can only be properly and accurately understood by relying on the case law of the ECtHR, in most cases it remains unclear how the judgments that are included in accounts of this law are selected from the very large pool of case law available.

We aim to compare the use of case law citation in traditional doctrinal accounts of European human rights law to a case law citation network approach to law.[2] We illustrate what we consider shortcomings of the traditional doctrinal approach in comparison to a network-informed approach to law, in particular regarding the selection of cases that characterise and shape a specific area of that law.

Our data for this comparison are chapters in three different textbooks. These three chapters all seek to set out what the law is under Article 14 (prohibition of discrimination) of the European Convention of Human Rights (ECHR/the Convention). The textbooks are written in three different languages and published in three different countries, but all aim to present

judgments. Instead, we rely on the ECtHR's citation practice to identify explicit citations of its own case law when issuing new judgments.

[2] Network analysis is a relatively new method in legal science, but there is already research in the area. In the Nordic countries, there are two research groups using this method. At Umeå University, Mattias Derlen and Johan Lindholm have for several years been using network analysis and similar methods to conduct research on EU law; see their most recent article Mattias Derlen and Johan Lindholm 'Characteristics of Precedent: The Case Law of the European Court of Justice in Three Dimensions' (2015) 16(5) German Law Journal 1073. In Denmark, related research has been carried out at the Danish National Research Foundation's Centre of Excellence for International Courts (iCourts) at the University of Copenhagen. See for example Urška Šadl and Michael Rask Madsen, 'Did the Financial Crisis Change European Citizenship Law? – An Analysis of Citizenship Rights Adjudication Before and After the Financial Crisis' 2016 22 European Law Journal. The approach used in the present article is therefore mainly introductory and so does not use the very latest technologies. For an overview of the various research approaches in the area, see Urska Sadl & Henrik Palmer Olsen, 'Empirical Studies of the Webs of International Case Law – A New Research Agenda' 2015 8 iCourts Working Paper <http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2671678> accessed 9 August 2018.

the law of the ECHR as of 2014.[3] The textbooks are *Droit Européen Des Droits De L'homme*[4] by Jean-Francois Renucci (the French textbook), *Europäische Menschenrechtskonvention*[5] by Christoph Grabenwarter and Katharina Pabel (the German textbook) and Jacobs, White and Ovey's *The European Convention on Human Rights* (the UK textbook).[6] To our knowledge, they are widely used in university courses on European human rights in France, Austria and Germany, and the UK respectively.

We first identified all the textbooks' references to case law from the ECHR in their chapters on Article 14 ECHR and built three separate lists of cases. Then we built a citation-network consisting of all citations between all cases concerning Article 14 ECHR. We retrieved this information from ECtHR's own database, HUDOC, and fed it into software that could order and visualise the information, thus creating a network where cases receiving citations are 'nodes' and citations among them are 'ties'. We thus create an empirical basis for claims about which cases the ECtHR itself cites more often than others.

Our study proceeds in two steps. After introducing how network analysis can function as a tool for legal analysis and introducing the main characteristics of the Article 14 network in sections II and III respectively, we move on in section IV to compare the network's citations to the textbook chapters' references to case law. We look at which cases figure in both the network and textbooks and which cases only figure in one or none of the datasets. In section V, we then compare the references to case law in each of the textbook chapters both to the other textbooks as well as to the network.

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[3] The three textbooks are from respectively 2014, 2015 and 2016. It was not possible to obtain three textbooks from different jurisdictions from exactly the same year of publication. While this could pose a problem to the comparability of the three textbooks, none of the three are referring to case law after 2014, therefore this is not in practice a problem for our analysis.

[4] Jean-Francois Renucci, *Droit Européen Des Droits De L'homme* (6th edn, LGDJ 2015).

[5] Christoph Grabenwarter and Katharina Pabel, *Europäische Menschenrechtskonvention* (6th edn, C.H.BECK 2016).

[6] Bernadette Rainey, Elizabeth Wicks and Clare Ovey, *The European Convention on Human Rights*, (6th edn, Oxford University Press 2014).

Our study is guided by two hypotheses. One hypothesis is that when comparing traditional doctrinal accounts of European human rights law to a systematic network analysis of the case law, there will be significant discrepancies between the cases cited by the textbooks as illustrating the law and the cases that are actually cited by the ECtHR in support of their judgments. We attribute this discrepancy to the two different methods for identifying what is considered to be relevant practice. The citation network relies on the ECtHR's actual citation practice, whereas textbooks rely on the outlook and experience of the authors. Our second hypothesis is that when the textbook references are compared with each other, we can detect that the textbook authors' outlook and perception of case importance differ.

With this article, we also wish to demonstrate that where the law in a given field is determined to a large extent through case law, and where there is a lot of case law, a network analysis of case-to-case citations makes it possible to conduct doctrinal research in new ways. The use of this method means that it is not the researcher's subjective assessment, but the actual citation practice of a court that guides the selection of the judgments used to illustrate a legal problem. This creates a broader empirical basis for an analysis and account of the relevant law.[7] This new approach can have methodological implications for legal research more generally and constitute a progressive new approach to legal analysis which can be merged with and enrich traditional legal analysis.

We have chosen to focus on European human rights law because this area of law is particularly characterised by the on-going development of case law. The Convention dates back to 1950 and, with the exception of the addition of 16 protocols, no significant amendments have been made to the Convention since it was first agreed. On the other hand, there has been a very significant development of case law related to the Convention. The key to

[7] It should also be recognised that it is a separate issue to identify the underlying reasons why a court chooses to refer to an earlier judgment as a justification for its decision. To examine this in more detail would require a separate research project and we will not pursue this further in the current article. This article is based on the assumption that the ECtHR's citations of previous judgments are the general method by which it summarises the existing law in order to apply it to the case before it. This is of course also a way of justifying the decision reached in the case.

understanding current European human rights law is not the text of the Convention but the case law. This, then, is the reason why we have chosen European human rights law to illustrate how network analysis can be used as a legal research tool.

Furthermore, we limited the network by selecting only the judgments in which Article 14 of the Convention is referred to. The Article 14 network contains 636 judgments from the establishment of the ECtHR up to and including 2014. Article 14 ECHR prohibits discrimination. More precisely, it provides that the enjoyment of rights and freedoms in the Convention must be secured 'without discrimination on any grounds such as any ground such as sex, race, colour, language, religion, political or other opinion, national or social origin, association with a national minority, property, birth or other status'.[8] We chose Article 14 for practical reasons, rather than substantive legal reasons. There are enough cases (636), though it is not an area that gives rise to the biggest caseload at the ECtHR. 636 cases is a sufficient number for the purpose of building a network, with enough to clearly show some cases as being central and others as peripheral, which serves to illustrate our points about the advantages of using network analysis for legal analyses.

II. Network Analysis as a Legal Research Tool

1. General Definitions

Simply put, network analysis consists of a mapping and analysis of relations between nodes (for example individuals or as here judgments). In the present context, these elements are judgments delivered by the ECtHR and the relations between them created by the ECtHR's own citations of previous judgments. When a judgment cites a previous judgement, a relationship is created between the two judgments.

Network analysis thus facilitates analysis of large quantities of case law. However, the applicability of the method depends on one's ability to identify case-to-case citations. Since the ECtHR explicitly and frequently cites its own previous decisions and judgments, it seems uncontroversial to assume

[8] European Convention of Human Rights, Article 14 <https://www.echr.coe.int/Documents/Convention_ENG.pdf>.

that it thereby indicates that it regards these earlier decisions and judgments as relevant sources of law.[9] Citation-impact can therefore be associated with meaningful legal impact.[10] If the ECtHR cites a previous case as part of its reasoning in a subsequent case, then we assume that the cited case has relevance for the new decision. We call this phenomenon citation-impact.

Cases which are never cited have zero citation-impact. Cases which are frequently cited have high citation-impact. If one assumes that the ECtHR does not cite cases randomly, but rather consciously makes use of meaningful citations, then citation impact can be seen as a proxy for legal impact. That said, it is important to note that it is no more than a proxy. Cases might be cited many times simply because there are many cases dealing with the same, perhaps trivial, problem. Other cases may be legally more important, but cited much less, for instance if the problem dealt with does not occur frequently in other cases. One should not confuse a quantitative measure (number of citations) with a qualitative measure (legal impact), but the quantitative measure may nonetheless be used to guide the search for the qualitatively important cases, especially if one recognizes that it is the *active* use by the ECtHR of its own previous case law that determines the measure

[9] A citation network naturally only reveals how often a given judgment has been cited and which judgments have cited it. The number of citations cannot in itself say anything about how judgments have affected the development of the law to a particular degree, but it is natural to start from the assumption that a judgment that has been frequently cited will have had some level of influence.

[10] It should be noted that there exists another measure of importance, namely network centrality. This measure not only includes the number of times a case is cited, but also the 'in-degree' of cases that case cites, as well as the 'in-degree' of the cases that cite it. Case centrality then measures importance by showing how strong a case is in operating as an information hub. Centrality in this sense is a matter of how many connections between cases pass through a given node (case). There are many different mathematical models for measuring case centrality. See for example <https://en.wikipedia.org/wiki/HITS_algorithm> for an introduction. In our experience, while case centrality measures differ to some extent from in-degree measures, the most cited cases are generally also the most central cases. Since we wanted to make our point using a simple measure, we rely solely on in-degree in this article.

of legal impact.[11] Our proposition therefore is that citation analysis should be used in combination with a more qualitative approach, which identifies the most prevalent conceptual distinctions in the case law and presents them in a systematic manner. Hence, we do not argue that citation network analysis should replace traditional doctrinal approaches, but instead that citation network analysis should be used to empirically support and thereby enrich the traditional approach.

In the following sections, we use the metric 'in-degree rating' as a proxy for measuring case importance in the Article 14 network. In-degree measures how many times a reference is made to a particular judgment. The higher the in-degree number, the more important the case is assumed to be for the ECtHR's practice. For example, if a judgment has an in-degree rating of 10, this means that it has been referred to in 10 subsequent judgments and must accordingly be considered more important than a case that is only cited once and has in-degree rating 1.[12]

2. Specific Demarcations and Possible Sources of Error

As stated, the judgments in the network have been identified and selected by using the ECtHR's own search engine, HUDOC; the network only contains citations of judgments in the more restricted 'Article 14 network'. A number of issues should be mentioned in this regard.

First, not all the judgments in this network are necessarily decided on the basis of Article 14 of the Convention, even if the judgment mentions Article 14 at some point. This means that some cases included in the network have been decided primarily on the basis of another article and the ECtHR has thereafter ruled that it has not been necessary to decide whether the case involved an independent breach of Article 14. For example, while the case of

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[11] It should further be noted that there can be various reasons why the judgment has been cited. For example, an earlier judgment may be cited because the ECtHR wishes to distance its newer judgment from the earlier one, i.e. to cite, not as a way of founding the decision on arguments derived from previous cases, but to clarify that the new judgment marks a departure from or adds a new dimension to the previous case law. There is, however, a clear tendency for the cases cited in the network to be used to provide normative support for the decisions in the newer judgments.

[12] See footnote 11 above.

Ireland v. UK (1978)[13] has the highest in-degree rating in the Article 14 network, this judgment is mostly referred to for its Article 5 content. The judgment deals briefly with the alleged discrimination between two categories of terrorists (nationalists vs. Unionists in relation to Article 14 read in conjunction with Article 5) and did not find a violation of Article 14. Clearly many references to *Ireland v. UK* are therefore not related to Article 14. This illustrates a more general challenge for network approaches to case law analysis: at the quantitative level, we cannot see exactly what the citations, constituting the ties in the network, consist of and whether the citations are relevant to Article 14. At present, quantitative network analysis must therefore be supplemented with content analysis of all ties in the network. Network analysis so far lacks the necessary code for automated analysis, although initial attempts have been made.[14]

Nonetheless, we believe that our results are sufficiently robust for the purposes of this article. We have two reasons for this. First, the Article 14 network only includes citations between judgments in the Article 14 network. When we calculate the 'in-degree rating' of the judgments in the network, we rely solely on the citations that a given judgment receives from other judgments that are also in the network. This means that we do not include any citations a judgment may receive from judgments that are outside the Article 14 network. Consequently, Article 14 will always have been mentioned both in the citing and in the cited judgment. This does not mean that citations between cases are necessarily relevant to Article 14,[15] but it does

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[13] *Ireland v UK* App no 5310/71 (ECtHR, 13 December 1977).

[14] See for example Martin Lolle Christensen, Henrik Palmer Olsen and Fabien Tarrisan, 'Identification of Case Content with Quantitative Network Analysis: An Example from the ECtHR' in Floris Bex and Serena Villata (eds), *Legal Knowledge and Information Systems* (IOS Press 2016); and Amalie Frese, 'Judicial Incrementalism: Dynamics of decision-making and jurisprudence in the domain of discrimination law at the European Court of Human Rights and the Court of Justice of the European Union' (Ph.D. thesis, Faculty of law, University of Copenhagen, 2016).

[15] One systematic error in the automated network analysis should be mentioned here: If case A cites both Article 14 and, say Article 3, then case A is recorded in HUDOC as containing these two articles. The same may be true of another case, B. If case B cites case A, this citation may be related to some issue related to Article 3 and not to Article 14. Article 14 may not be dealt with in any substantial way in either A or B. The Article 14 network will still contain both A and B and will also show a citation

significantly enhance the chances that they are. Secondly, whenever we discuss our findings in regard to specific cases, we read these cases to qualitatively validate our findings (this is explained in greater detail below).

Another issue we want to flag is the changes that may occur in a case-to-case network over time. The network analyses we have carried out for the purposes of this article are based upon reading the whole network from the period from the establishment of the ECtHR up to and including 2014 at a single point in time. This means we look at the total calculated citations over the entire period. However, it is in principle possible to look at the citations on a year-by-year or decade-by-decade basis. This could show important and potentially useful nuances in citation patterns. As an example, we have found that the case of *Abdulaziz*[16] from 1985 is still being actively cited by the ECtHR. Conversely, *Incal*[17] appears as a leading case in the network because it has a high in-degree number, but in fact it has not been cited since 2007 (in cases included in the network). We acknowledge this potential error, but do not find that it significantly challenges our main point.

A third issue, also related to temporal change, is the following: what if the ECtHR has changed direction in its most recent judgments? It can be said that, in so far as network analysis is based on statistical results collected from past decisions, a new individual judgment that changes the case law will not be captured by this method. While we recognise this, we also think that from a scholarly point of view, it could be argued that there will always be some uncertainty associated with the issue of whether a new judgment will have a permanent effect on the ECtHR's practice. Hence, it is only when the ECtHR starts to actually cite the case that there will be sufficient certainty that the case actually has citation impact and thereby a proven legal impact beyond the individual decision itself.[18]

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from B to A. If A has a large in-degree, it will look like A is a very important case for Article 14, yet the large in-degree number may derive from citations mostly relating to Article 3 issues. We check for this error by manually reading the highest in-degree cases dealt with.

[16] *Abdulaziz, Cabales, and Balkandali v UK* App no 9214/80 (ECtHR, 28 May 1985).

[17] *Incal v Turkey* App no 22678/93 (ECtHR, 9 July 1998).

[18] A further issue should be mentioned: it could be argued that the judgments of the Grand Chamber are a superior source of law compared to the judgments of the

Overall, we conclude that we have taken sufficient steps to ensure that our data are sufficiently reliable to support the point we wish to make, namely that network analysis can be used to enhance the quality of legal analysis, as compared to traditional textbook approaches.

III. The Article 14 Network and its Visualisation

The complete network contains 636 ECtHR judgments relating to Article 14 from 23 July 1968 (*Belgian Linguistics case*[19]) to 16 December 2014 (*Chbihi Loudoudi and Others v. Belgium*[20]).

The visualisation in figure 1 (below) shows the entire Article 14 network and creates a new and unique way to examine the law of non-discrimination. The network is meant to provide an overview of the Article 14 network. The bigger nodes indicate highly cited cases.[21]

ECtHR's ordinary chambers. To clarify this, we assessed whether the judgments that have the highest in-degree ratings are judgments of the Grand Chamber. We did not find any correlation between Grand Chamber cases and high in-degree ratings. For example, *Willis* (2002) and *Smith and Grady* (1999) are not Grand Chamber judgments, but nevertheless have high in-degree ratings. Thus, it is not necessary that a judgment be decided by the Grand Chamber for it to be frequently cited by the ECtHR in subsequent judgments.

[19] '*Case relating to certain aspects of the laws on the use of languages in education in Belgium*', App no 1474/62 (ECtHR, 23 July 1968).

[20] *Chbihi Loudoudi and Others v. Belgium,* App no 52265/10 (ECtHR 16 December 2014).

[21] This figure can be accessed in colour as an interactive network at: http://icourts.dk/networks/sigma/article14/. It is possible to navigate around the interactive network in various ways. It is also possible to zoom in and out of the network in order to look more closely at individual judgments and their connections.

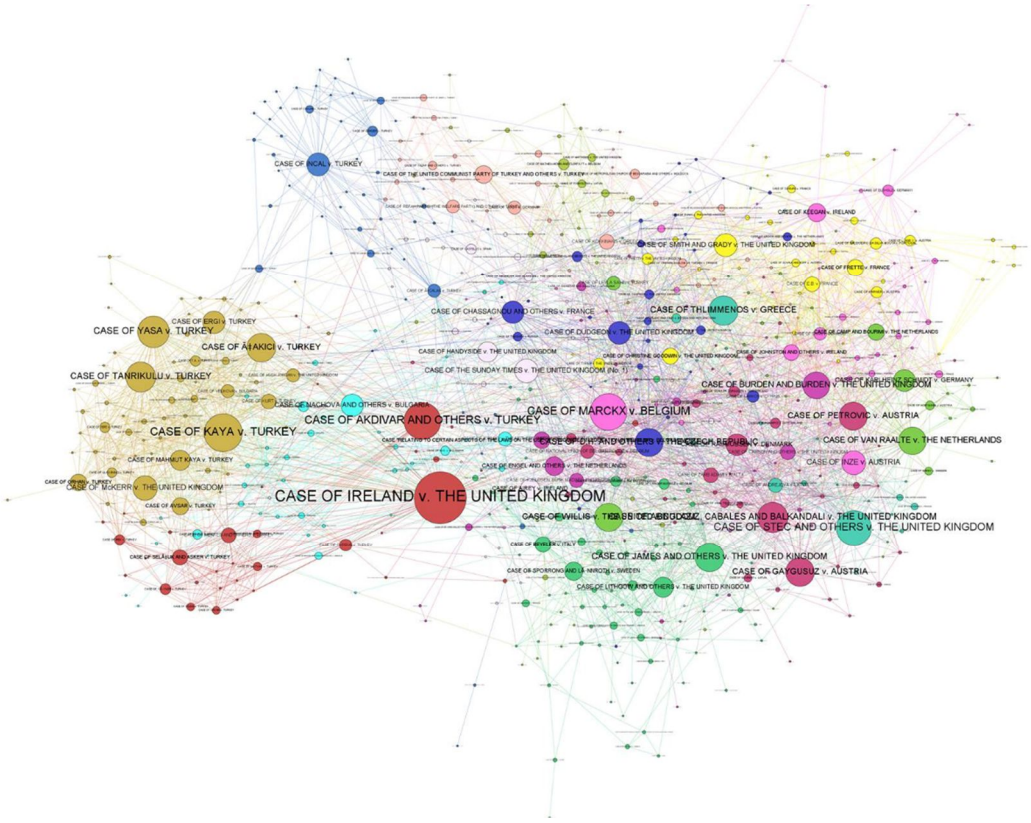

Figure 1. The complete Article 14 network

The judgments in the Article 14 network have an in-degree rating of between 0 and 86, with an average rating of 6 ingoing citations (i.e. citations a case receives from other cases) per case. *Ireland v. UK* (1978) is the most frequently cited case with 86 ingoing citations.

Since one of the interests motivating our analysis is the identification of judgments with the highest citation impact, we have decided to only focus on the judgments with the highest in-degree (i.e. the highest number of citations). Inevitably, there is a certain level of discretion involved in selecting a cut-off point. We found that we could get a manageable picture of the most cited judgments in the network by focusing only on judgments with an in-degree rating over 25. An in-degree filter of 25 leaves just 41 judgments (7.2%) in the network. Figure 2 shows the 41 judgments in the Article 14 network with an in-degree ranking over 25 ingoing citations.

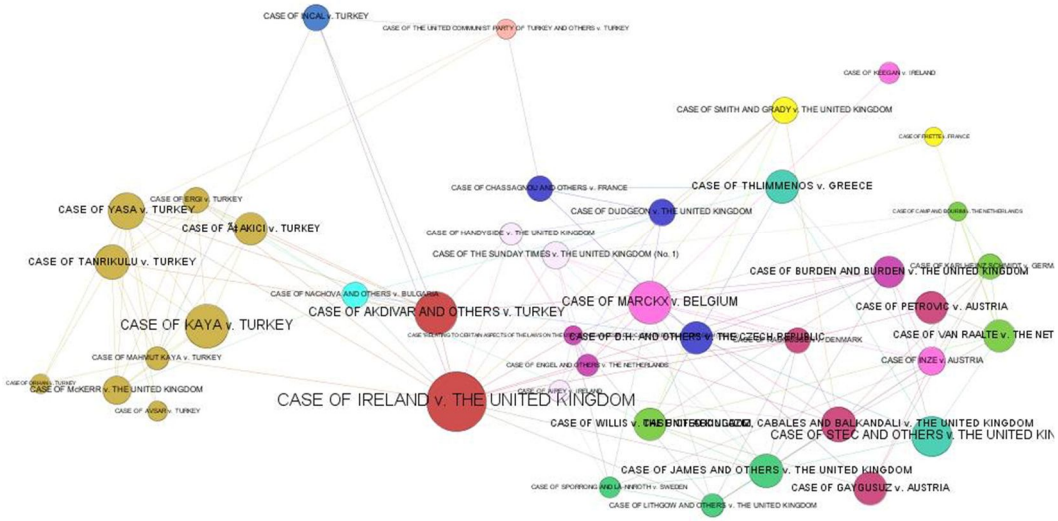

Figure 2. Judgments in the Article 14 network with an in-degree rating of 25+.[22]

IV. Comparison of Network and Textbook Accounts of Article 14 ECHR

In the following section we compare the results of the network analysis with the selected textbooks. The ambition is to assess the extent to which these accounts are based on the cases most cited by the ECtHR itself.

1. Textbook References to Case Law and Their In-degree Ratings

Figure 3 shows the number of references in each of the textbooks, how many of these references have a high in-degree rating when compared to the network, and the average in-degree rating of the references.

[22] This diagram can be accessed as a coloured interactive diagram at: http://icourts.dk/networks/sigma/article14/.

	Total number of references to cases	Number of references to cases with in-degree 25+	Average in-degree of references
Network	636	41	6
French Textbook *Droit Européen Des Droits De L'homme*	90	22	13
UK Textbook *The European Convention on Human Rights*	103	16	11
German Textbook *Europäische Menschenrechts-konvention*	144	18	8

Figure 3. Textbooks references and in-degree

As Figure 3 shows, the German textbook makes use of by far the greatest number of case references (144), 37% more than are found in the UK textbook. As the number of cases which the textbooks refer to with an in-degree of 25+ is between 16 and 22 there is a fair co-occurrence between the most cited cases in the network and the cases selected for the textbooks.

The average in-degree of cases cited in the textbooks is also higher than the average in-degree in the overall network. This is to be expected. If the average in-degree of cases cited was the same as the average in-degree in the overall network, this would suggest that cases are cited at random. In addition, 6.4% (41/636) of the cases in the network have an in-degree of 35+. The equivalent proportion in the textbooks ranges from 12.5 to 24.4%. This indicates that authors select a higher number of cases with high in-degree than if they had chosen cases as random. These numbers indicate that authors generally select cases with a higher-than-average in-degree and to a large extent also rely on

some of the most cited cases in the network. In the following, we will explore the cases used (or not used) by the textbooks in more detail. We will compare the textbooks with each other and with the network to better describe how the textbook authors use cases. We first identify use of cases with low in-degree rating (IV.2) and then we move on to identify cases with high in-degree that are omitted from the textbooks (IV.3).

2. Textbook References with a Very Low In-degree Rating

Not only do a number of the judgments referred to by the textbooks have a very low in-degree, but some do not even appear in the Article 14 network at all. While more than 90% of the cases referred to by all three textbooks are in the network, a few cases used by the textbooks in their chapter on Article 14 do not contain any reference to that article. Figure 4 presents the proportion of cases used in the three textbooks, which fall within and outside the Article 14 network. As figure 4 below shows, between 3 and 7% of the cases used in the textbooks' chapters on Article 14 are not part of this network.

	French textbook	German textbook	UK textbook
Cases in Article 14 network	93.4%	96.6%	94.2%
Cases <u>not</u> in Article 14 network	6,6% 2660/03 *Hajduova v. Slovakia* 57693/10 *Kalucza v. Hungary* 33234/07 *Valiulienè v. Lithuania* 7224/11 *Aghdgomelashvili and Japaridze v. Georgia* 21986/93 *Salman v. Turkey* 71127/01 *Bevacqua and s. v. Bulgaria*	3,4% 25159/94 *Hokkanen v. Finland* 3455/05 *A and Others v. The UK* 38590/10 *Efe v. Austria* 19508/07 *Granos Organicos Nationales SA v. Germany* 3681/06 *Moldovan and others v. Romania (no. 2)*	5,8% 18968/07 *V.C v. Slovakia* 13624/03 *Koky and Others v. Slovakia* 29518/10 *N.B. v. Slovakia* 15966/04 *I.G. and Others v. Slovakia* 61382/09 *B. v. The Republic of Moldova* 57345/00 *Budak and Others v. Turkey*
Total	100%	100%	100%
(N)	(90)	(144)	(103)

Figure 4. Distribution of textbook cases within and outside the Article 14 network

While the textbooks largely refer to cases which, according to the ECtHR, are relevant to Article 14, why are 3 to 7% of the cases cited not among the 636 cases which, according to the ECtHR, relate to Article 14? All three textbooks refer to cases outside the network as significant examples of the law and legal development under Article 14, either alone or as part of a series of cases, which the authors cite in support of their statements about what the law is. Reference to *Aghdgomelashvili and Japadridze v. Georgia*[23] can be explained by the fact that it is used in the context of explaining Protocol 12,[24] but we find it difficult to account for the importance of the remaining cases in the context of Article 14. Overall, all three textbooks include cases that may seem relevant because of their content, but which have not been cited by

[23] *Aghdgomelashvili and Japadridze v. Georgia* App no 7224/11 (ECtHR, 3 December 2013).

[24] It should be mentioned that the last section of all three textbooks account for the case law under Article 12, where some also involve Article 14 and other do not.

the ECtHR and which therefore have not had any obvious impact on the ECtHR's practice in the field.[25]

We turn now to the cases that do fall within the network, but have a very low in-degree rating. One such example is a case referred to by the French and the UK textbooks, namely *National & Provincial Building Society v UK*.[26] The *National & Provincial Building Society* case has an in-degree rating of 0 in the Article 14 network, meaning that from 1997 up to the closing date for the network in 2014, the ECtHR had not made a single reference to it when making a decision in this area. The *National & Provincial Building Society* case concerned tax legislation with retroactive effect combined with a differential effect of new law on different building societies depending on various circumstances. This legislation triggered consideration of, among other things, the 'relevantly similar' principle relevant to Article 14. The fact that an issue has been considered in a case, however, is not the same as saying that the judgment actively influences the ECtHR's case law in regard to the issue in question. Since the ECtHR almost always cites relevant previous cases as part of its legal reasoning, it is unlikely that *National & Provincial Building Society* has played any role in shaping the ECtHR's case law. A good reason why the case has not been cited in subsequent cases could well be that the case is atypical for issues of non-discrimination. Indeed, the domestic legislation in the case is very specific and not typical for the kind of issues that is normally dealt with under the prohibition against discrimination. This does not make the case wholly irrelevant of course, but it does seem somewhat inappropriate to include the case in a textbook presentation, whose aim is to capture the larger and more general picture of things.

We see further that each of the accounts refers to a substantial number of cases that have an in-degree number of 0, meaning that they have not been cited by the ECtHR a single time in its subsequent adjudication and consequently must be considered to have no citation impact and hence only a very questionable role in developing the ECtHR's case law. In the French textbook, 8 cases referred to have an in-degree score of 0, the UK textbook

[25] See footnote 1.

[26] *National & Provincial Building Society, Leeds Permanent Building Society and Yorkshire Building Society v. UK* App no 21319/93, 21449/93 and 21675/93 (ECtHR, 23 October 1997).

uses 7 such cases, and the German textbook refers to 30 cases that have in-degree 0, i.e. 20% of the total number of cases (144) to which the German textbook refers. In other words, if we assume that references to and citations of cases represent case-importance, 20% of the cases used by the German textbook have not been considered relevant for the ECtHR itself to cite.

3. Omission of Judgments with a High In-degree Rating

Another way of considering how useful a network approach is for legal analysis is to pose the following question: how do legal scientists as well as practitioners ensure that they grasp which cases are important within the jurisprudence of a court? In other words, how can we see the case law as a court itself sees it? One method is to consider those judgments that a court itself cites most frequently. We can capture this when we examine the data made available from the network and by studying all the cases with a high in-degree rating.

Omitting the most frequently used cases from an account of the law raises question about the accuracy of the account. There are examples of such omissions in the textbooks with which we are comparing the results of network analysis. Of the most frequently cited judgments in the overall Article 14 network, there are 17 with an in-degree rating of 40+. Of these, 8 are not included in any of the textbooks (two judgments are only included in one of the textbooks):

Judgment	In-degree rating
Ireland v. UK (1978)	86
Kaya v. Turkey (1998)	62
Akdivar and Others v. Turkey (1996)	69
Yasa v. Turkey (1998)	51
Tanrikulu v. Turkey (1999)	48
James and Others v. UK (1986) (only included in French textbook)	47
Cakici v. Turkey (1999)	46
Willis v. UK (2002) (only included in German textbook)	45

Figure 5. 8 high-degree omitted cases

A reading of the cases shows that they can be divided into two groups: those cases in which Article 14 was 'absorbed' by one of the primary provisions and those cases where there was a specific decision on whether there was discrimination. The first category includes *Ireland v. UK*[27], *Kaya*[28], *Akdivar*[29], *Yasa*[30], *Tanrikulu v. Turkey*[31] and *Cakici v. Turkey*[32]. These cases are of only peripheral relevance to the law on discrimination and their high in-degree rating is largely due to reciprocal citing within the clusters to which they belong.[33] Hence, the reason these cases are not included in the textbook

[27] *Ireland v. UK* App no 5310/71 (ECtHR, 13 December 1977).

[28] *Kaya v. Turkey* App no 22535/93 (ECtHR, 28 March 2000).

[29] *Akdivar and Others v. Turkey* App no 21893/93 (ECtHR, 16 September 1996).

[30] *Yasa v. Turkey* App no 63/1997/847/1054 (ECtHR, 2 September 1998).

[31] *Tanrikulu v. Turkey* App no 23763/94 (ECtHR, 8 July 1999).

[32] *Cakici v. Turkey* App no 23657/94 (ECtHR, 8 July 1999).

[33] These mainly concern breaches of Article 2 and primarily involve cases brought against Turkey. These cases often include claims of breaches of Article 14 but most of them are decided on the basis of Article 2. Still, the brevity with which the Article 14 is dealt with in these cases may be a point in itself. See in this regard Henrik Palmer Olsen and Aysel Kücuksu, 'Finding Hidden Patterns in ECtHR's Case Law: On How

accounts of discrimination law is that they mostly are considered to have little to do with Article 14.[34]

The two remaining judgments on the list above contain more detailed and substantive decisions on questions that are relevant for Article 14 and are therefore more significant for the development of the case law in this area. On the basis of the in-degree rating and their legal content, these judgments seem to be significant for the development of the law on discrimination but are nevertheless ignored by the textbook authors.

The first case is *James and Others v. UK* (1986)[35], which concerned a legislative reform providing tenants with long-term leases with a right to buy the property they leased. As the legislation only affected landlords who had granted long-term leases, the applicants alleged that the legislation was discriminatory and therefore a breach of Article 14 in conjunction with Article 1 of Protocol 1 (art 14+P1-1). While the ECtHR concluded that the legislation was sufficiently generally expressed not to be discriminatory, the ECtHR simultaneously and importantly approximated its stand on 'reverse' discrimination by holding that laws aiming at providing a higher level of social protection to more vulnerable groups of citizens are not discriminatory within the meaning of the Convention, even though such regulations might discriminate against better-off citizens. This principle serves as an important clarification of the meaning of Article 14.

The other case that is not included in the French and the UK accounts (only in *Europäische Menschenrechtskonvention*) is *Willis v. UK* (2002)[36]. This case concerned payment of a widower's pension where, under national law, a widower was not entitled to the same support as a widow. The ECtHR ruled

Citation Network Analysis Can Improve Our Knowledge of ECtHR's Article 14 Practice' (2017) 17 International Journal of Discrimination and the Law 4.

[34] This illustrates that while the judgments included in the network have been selected because there is a reference to Article 14 in the judgment, this does not mean that they have the same legal value in relation to Article 14; see section 2 above. It is necessary to combine the quantitative analysis of citations with a more qualitative analysis of the main points of the content of the judgments in order to obtain a more nuanced picture of the legal content of the individual cluster.

[35] *James and Others v. UK* App no 8793/79 (EctHR, 21 February 1986).

[36] *Willis v. UK* App no 36042/97 (ECtHR, 11 June 2002).

that there was discrimination based on sex. The French and the UK textbooks do not refer to the *Willis* case but refer instead to the *Van Raalte v. Netherlands* case (1997).[37] *Van Raalte* concerned a tax exemption for childless women over the age of 45, which was not available to men of the same age in the same situation. In *Van Raalte*, the ECtHR ruled that there was discrimination. Both cases were decided pursuant to Article 14 of the Convention and Article 1 of its Protocol No 1 and both cases concerned sex discrimination. Thus, if the intention was merely to give an example of the ECtHR's treatment of cases of sex discrimination under Article 14 of the Convention and Article 1 of Protocol No 1, it does not matter which case is referred to.

However, there is a more significant and principled difference between these two cases. While both are examples of sex discrimination in connection with Article 1 of Protocol No 1, they are not so similar that a reference to the one can in all circumstances be substituted by a reference to the other. There is a difference between whether Article 14 is applicable to the payment of welfare benefits (*Willis*) or to tax law (*Van Raalte*) and in this connection it is relevant that the ECtHR frequently considers the scope of Article 14 through the 'ambit' test. From this perspective, there is a question of whether the ECtHR has developed a rule and whether the same rule was applied in both cases. The textbooks do not elaborate on this point.

None of the accounts elaborate on how the judgments they use have been selected and what their status in the overall network is in terms of their role in the legal development of the ECtHR's case law; instead, the cases are generally presented as examples, seemingly all with an equal weight. In omitting information about the ECtHR's citation practice, one also omits relevant information about the different role various judgments may have in the ECtHR's case law as a whole. Furthermore, this may also introduce a degree of randomness into the account of what the law is. Omitting cases that are most used by the ECtHR is equivalent to disregarding the cases that the ECtHR itself considers the most relevant cases to cite in support of its decisions. Similarly, including cases with 0 or very low in-degree is equivalent to disregarding the fact that these cases have not ever been actively cited by the ECtHR, which indicates that they have not played any explicit role in the

[37] *Van Raalte v. The Netherlands* App no 20060/92 (ECtHR, 21 February 1997).

ECtHR's development of Article 14 law. Citing such low impact cases may at worst be misleading, because they could represent reasoning that has subsequently been abandoned by the ECtHR.

The general conclusion we can draw from the investigations above is that network analysis can enrich an account of the law by making ECtHR's use of its own case law visible. The data that form the basis for network analyses can both identify cases that are frequently applied by the ECtHR and reveal which cases have little or no significance in the ECtHR's case law practice, despite the references to them in the legal literature.

4. Interim Conclusion on In-degree Ratings

One of the ways in which network analysis can help enrich a legal analysis is by making it possible to identify the cases that are actively used in the practice of the ECtHR to support its judgments, rather than merely listing a range of judgments of variable relevance in practice. This is useful for any lawyer because it must be expected that, all else being equal, a legal argument will be more persuasive if it is based on references to cases which the ECtHR itself explicitly recognises as relevant in its judgments.

In an educational context, it will strengthen legal teaching if students learn to relate to knowledge about citation impact and network analysis, rather than learning about the ECtHR's decisions simply as a range of (random?) examples of how the Convention can be applied. This could sharpen the students' critical thinking skills and lead to a better and more dynamic understanding of how the ECtHR operates.

The European law on human rights is, to a high degree, based on case law. As case law is dynamic and constantly changing, it is important that accounts of human rights law are based on judgments that the ECtHR itself considers to be the weightiest cases to cite – based on its practice. If an account of the law relies on older judgments with low in-degree ratings and omits the cases with highest citation impact, there is a considerable risk that it will not give an accurate picture of the ECtHR's current view of the state of the law.

V. Comparing Legal Expertise

A problem of legal doctrinal accounts of law is that they can be seen as being subjective in the sense that they emphasise case law that appears important to one author but not to another. This subjectivity is displayed in the diversity of cases included in different textbooks that all cover the same area of law. In the following developments, we compare the three textbooks with each other and with the network, we look into which cases the authors do and do not agree on, and we discuss what may explain the divergences.[38]

1. Distribution of Cases

First, we look at the distribution of cases between the textbooks and the network in order to gain an overview of the extent of overlaps, consensus and discord between the three textbooks and the ECtHR's own citations. Figure 6 displays the actual number and percentages of cases that appear within only one of the textbooks and the number of cases that are shared by the three textbooks.

[38] In the following section we again deliberately avoid use of the term 'precedent'. It should be noted that when legal textbook authors cite cases, they presumably do so because they consider these cases to create precedent for the law they are cited for. Since, however, we avoid the term 'precedent' when describing citation patterns in our network, and instead use the term citation impact, we have decided to similarly avoid the term when analysing which cases our selected textbooks cite.

	Number of cases	Percentage within each textbook		
		French	German	UK
French textbook only	24	27%		
German textbook only	64		44%	
UK textbook only	23			23%
French + German	13	14%	9%	
French + UK	12	13%		12%
German + UK	27		18%	26%
All textbooks	41	46%	29%	39%
Total (N)		100% (90)	100% (144)	100% (103)

Figure 6. Distribution of cases in textbooks and network

The first three rows show the cases that appear only in one textbook (note that they can also appear in the network, but the interest here is where there is no overlap between the three textbooks). We see that 24 cases in the French textbook appear only in that textbook, equivalent to 27 % of all the cases referred to in the French textbook. In the German textbook, 64 cases appear only there, equivalent to 44% of all the cases referred to in that textbook. The UK textbook contains 23 cases that are not used by the two other textbooks, equivalent to 23% of the cases mentioned in that textbook.

In the following three rows (called French+German, French+UK, German+UK), we see the overlaps between the textbooks in actual numbers and in percentages. The French and German textbooks have 13 cases in common, the French and the UK textbook have 12 cases in common and the German and the UK textbook share references to 27 cases. Reading the table from the columns at the top (called French, German and UK textbooks), we can see that the French textbook shares 14% of its judgments with the German textbook and another 13% with the UK textbook. In the German textbook, 9% of the cases overlap with the French and 18% with the UK

textbook. Finally, in the UK textbook, 12% of the cases used are shared with the French textbook, while 26% of cases are shared with the German. It should be noted that the total number of cases varies between the textbooks and that this fluctuation of course influences the relative differences when we compare across the textbooks.

The German textbook has more cases in common with the UK than with the French textbook. Likewise, the UK textbook has more in common with the German than with the French. Nonetheless, from these overlaps it cannot be inferred that any of the textbooks is an outlier and that the others have significantly more cases in common.

While these numbers show the proportion of cases exclusive to each textbook, the opposite figures, i.e. the proportion of shared cases between all textbooks in *each* of the textbooks, are found in the row called 'all textbooks'. Here we see that the French textbook has the highest proportion (45%) of cases that also appear in the other textbooks. Of the cases referred to in the UK textbook, 39% are also found in both of the other textbooks. The German textbook has the lowest proportion of cases shared with the other two, namely 28% (again it should be remembered that absolute numbers differ).

This distribution of cases in the textbooks and the network, and the overlaps between these datasets is also illustrated in figure 7 (below).

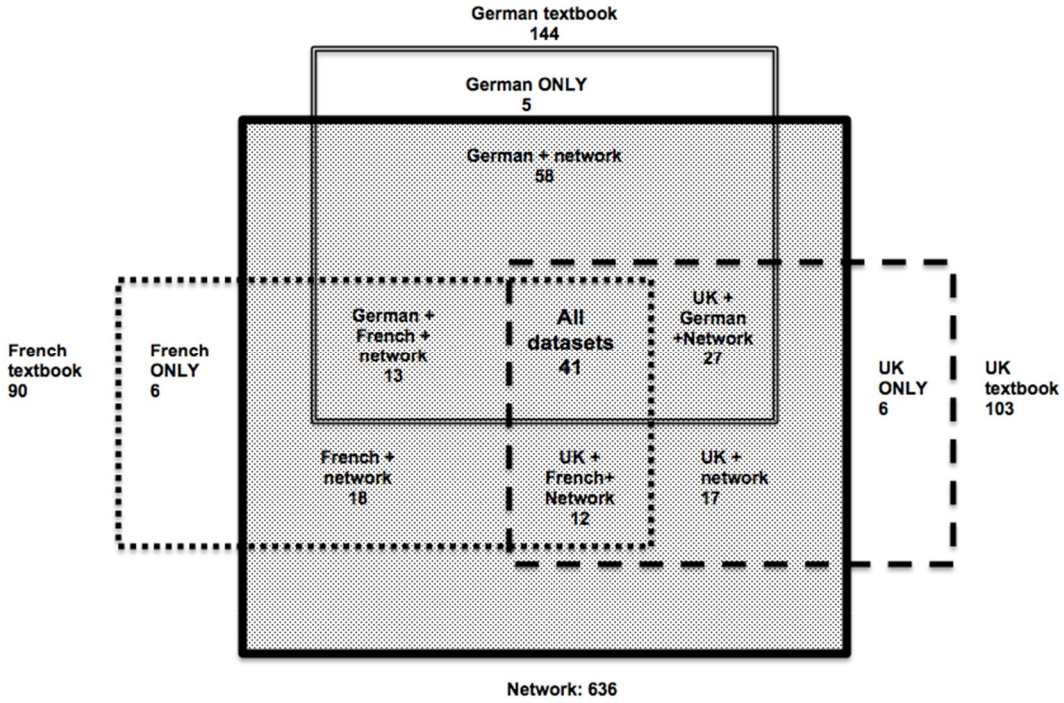

Figure 7. Proportion of case distribution

By drawing the distribution of cases in the textbooks, in the network, and the overlaps, it becomes clear that quite a large proportion of the referenced cases appear exclusively in one single textbook. In other words, there are some cases on which the textbooks do not converge, but which only appear in one of the textbooks (and the network). These are the cases, which in the graph are within the squares called, for example, 'French ONLY' (these are the cases outside the network) or French+Network. There are 24 such cases in the French textbook, 23 in the UK textbook and 64 in the German textbook.

The 41 cases in the box called 'All datasets' in the centre of the graph constitute the overlap between all three textbooks and the network. These cases represent agreement between all three textbooks and the network and we call these the 'consensus cases'.

2. The Consensus Cases

The 41 consensus cases that appear in *all three textbooks as well as in the network* are the following:

No.	'Consensus cases' in 3 textbooks + network	In-degree
1	5101/71 *Engel and Others v. the Netherlands*	29
2	6833/74 *Marckx v. Belgium*	60
3	7525/76 *Dudgeon v. The United Kingdom*	36
4	8695/79 *Inze v. Austria*	38
5	8777/79 *Rasmussen v. Denmark*	34
6	8919/80 *Van Der Mussele v. Belgium*	14
7	9214/80 *Abdulaziz and Others v. The United Kingdom*	49
8	11581/85 *Darby v. Sweden*	10
9	12875/87 *Hoffmann v. Austria*	12
10	13580/88 *Karlheinz Schmidt v. Germany*	34
11	14518/89 *Schuler-Zgraggen v. Switzerland*	15
12	16213/90 *Burghartz v. Switzerland*	14
13	17371/90 *Gaygusuz v. Austria*	46
14	20060/92 *Van Raalte v. The Netherlands*	44
15	22083/93 *Stubbings and Others v. The United Kingdom*	14
16	28369/95 *Camp and Bourimi v. the Netherlands*	25
17	33290/96 *Salgueiro da Silva Mouta v. Portugal*	16
18	36515/97 *Frette v. France*	25
19	34369/97 *Thlimmenos v. Greece*	47
20	40016/98 *Karner v. Austria*	16
21	43577/98 *Nachova and Others v. Bulgaria*	35
22	45330/99 *S.L. v. Austria*	9
23	53760/00 *B.B. v. The United Kingdom*	0
24	55523/00 *Angelova and Iliev v. Bulgaria*	2
25	57325/00 *D.H. and Others v. the Czech Republic*	45
26	68864/01 *Merger and Cros v. France*	5
27	65900/01 *Stec and Others v. The United Kingdom*	57
28	17209/02 *Zarb Adami v. Malta*	22
29	13102/02 *Kozak v. Poland*	5
30	18984/02 *P.B. and J.S. v. Austria*	3
31	15766/03 *Orsus and Others v. Croatia*	6
32	5335/05 *Ponomaryovi v. Bulgaria*	3
33	13378/05 *Burden & Burden v. The United Kingdom*	43
34	27996/06 *Sejdic and Finci v. Bosnia and Herzegovina*	12
35	30078/06 *Konstantin Markin v. Russia*	10
36	19010/07 *X and Others v. Austria*	6
37	7798/08 *Savez Crkava Rijec Zivota and Others v. Croatia*	3
38	29381/09 *Vallianatos and Others v. Greece*	3
39	48420/10 *Eweida and Others v. The United Kingdom*	4
40	16574/08 *Fabris v. France*	3
41	3564/11 *Eremia v. The Republic of Moldova*	2

Figure 8. List of consensus cases

What do all these cases have in common, apart from the fact that they all concern discrimination issues under Article 14 in one way or another?[39] Some data can be easily examined without going into the details of each case.

Firstly, in the table above, the cases are ordered according to time. This chronology shows that the 41 consensus cases are spread over exactly 40 years.[40] It appears that the number of consensus cases grows over the decades: there are 5 consensus cases from the 1970s, 6 from the 1980s, 11 from the 1990s and 18 from the 2000s. This growth can be read as an agreement on the inclusion of more recent cases as important for an accurate account of the development of the law under Article 14. Furthermore, the consensus cases are spread more-or-less evenly over the years from 1990 to 2011 with only few exceptions (there are no cases from 1991, 1994 and 2004). We consider this to indicate a shared logic among the legal experts concerning how to account for the law in a given legal domain, namely to portray the law through its incremental and temporal development as more and more cases are decided.

The fact that 5 cases lodged at the ECtHR in the 1970s are included, despite the fact that these cases are unlikely to represent the current state of the law under Article14, may be due to the fact that these cases are considered to have

[39] Among these are some cases that are very likely to form part of many human rights lawyers' knowledge of the law of the European Convention of Human Rights. The cases cover different aspects of Article 14 broadly, as represented by for example *Engel and Others v. The Netherlands* on discrimination on grounds of status (in the military), *Marckx v. Belgium*, which deals with Article 14 in relation to distinctions between legitimate and illegitimate family, *Rasmussen v. Denmark* on discrimination on grounds of sex in relation to paternity leave, *Abdulaziz, Cabales and Balkandali v. UK* finding a violation of Article 14 with Article 8 without a separate violation of a substantive article in the Convention, *D.H. and others v. The Czech Republic* on indirect discrimination with regard to the right to education (P1-2), *Frette v. France* on alleged discrimination on grounds of (homo)sexuality, *Thlimmenos v. Greece* on discrimination on the grounds of religion and *Stec and Others v. UK* on state pensions and discrimination between men and women.

[40] Note that the cases are identified by their application number in ECHR's database HUDOC, which means that the year therein denotes when the case was logged in the ECtHR's system and the year and date of the delivery of the judgment in the case is approximately 5 year later. While this is not optimal for an analysis of the temporality of the cases, it is the application number which is the identification metric of cases under ECHR and also how cases refer to other cases.

a somewhat emblematic status for Article 14. As very early cases they could be considered to have set the first and most important direction for the ECtHR and to have clarified basic meanings in the wording of Article 14. This can explain their presence in the textbooks.

The consensus cases also cover a broad range of different responding states against which the claims have been brought. Austria and the UK are the most prominent with 7 cases each, while France is only represented with 2 cases. This should be seen in light of statistics from the Council of Europe (CoE) on the ratio of cases establishing a *violation* of Article 14 for each CoE Member State. These statistics show that the UK has historically set the record and has been found to violate Article 14 in 44 cases in the years from 1959 to 2016.[41] Interestingly, Austria comes second with 26 judgments concluding a violation of Article 14, while Germany has only been found to violate Article 14 in 12 cases. Hence, even if these statistics only include violations and not all Article 14 cases as such, it appears that the statistics are reflected in the consensus cases.

If we turn to the case law citation network and the in-degree score, what can this ranking reveal about the agreement between the textbooks on the consensus cases? In-degree score is the network metric indicating the number of times the ECtHR itself has cited the case in later judgments. Therefore, the question here is whether the consensus cases reflect a shared understanding of case-importance between legal experts in academia and legal experts at the courts. Considering the in-degree ranking of the consensus cases, this does not appear to be the case, because the in-degree score varies considerably, from 0 to 60, between the consensus cases. Most of the cases from the early period have a relatively high in-degree and all cases until 1998 have an in-degree above 10, some up to 60. The average in-degree among the consensus cases in this period is 28. Around the turn of the millennium, the in-degree starts to decrease, the average degree being 11. Naturally, the earlier cases have longer to 'collect' references, which may partly explain their higher in-degree scores. Yet, the list also shows that an accumulation of references over a longer period of time is not always the

[41] Council of Europe, 'Violation by Article and by States (1959-2016)' <http://www.echr.coe.int/Documents/Stats_violation_1959_2016_ENG.pdf> accessed 9 August 2018.

explanation for a high in-degree. For example, the case of *Stec and Others v. The United Kingdom* (2001)[42] has an in-degree of 57, while *Burden v. UK* (2005)[43] has an in-degree of 43.

One of the most intriguing parts of our study is the finding that while there is agreement between the three textbooks on the judgments that are authoritative, from the earliest activity of the ECtHR until the end of the last decade, there is also agreement on the importance of some cases which have never or hardly ever been used by the ECtHR itself. For example, all three textbooks refer to the cases of *B.B. v. UK* (2004)[44], *Anguelova and Iliev v. Bulgaria* (2007)[45] and *Eremia v. The Republic of Moldova* (2013)[46], all of which have in-degree scores between 0 and 2. We will take a closer look at these cases and how they are used in the textbooks.

In all three textbooks, *Eremia v. The Republic of Moldova* is used as a primary example of the ECtHR's practice with regard to gender-based violence as a form of discrimination against women. The case of *Anguelova and Iliev v. Bulgaria* is used in the French and UK textbook as one of a number of examples to show the particular demand by the ECtHR for contracting states to effectively investigate offences or attacks involving racial hatred. The same case is used in the German textbook to illustrate the ECtHR's practice of examining Article 14 even if a violation of a substantive article has already been found, in this case discrimination based on ethnicity (Article14+Article2), and, in addition, to demonstrate the ECtHR's method for determining discrimination as also involving the consideration of different situations that are treated the same (as opposed to relevantly similar situations that are treated differently). *B.B. v. UK* is used in both the French and the UK textbook as one of several cases illustrating the practice that very weighty reasons are required for justification of discrimination on grounds of sexual orientation. In the German textbook, it is referred to in regard to sex

[42] *Stec and Others v. UK* App no 65900/01 (ECtHR, 26 May 2006).

[43] *Burden v. UK* App no 13378/05 (ECtHR, 29 April 2008).

[44] *B.B. v. UK* App no 53760/00 (ECtHR, 10 February 2004).

[45] *Anguelova and Iliev v. Bulgaria* App no 55523/00 (ECtHR, 26 July 2007).

[46] *Eremia v. The Republic of Moldova* App no 3564/11 (ECtHR, 28 May 2013).

and age discrimination and the scope of the margin of appreciation the state has in relation to age discrimination.

The textbooks seem to agree that these cases are relevant to Article 14 case law, even if they have hardly ever been cited by the ECtHR. This raises the question of whether the textbooks give wrong or biased information about the law or whether it shows the limitation of citation network analysis as a legal method. In our view, there is no clear answer to that question, but as we shall argue below, we believe there are good arguments to be sceptical of the textbooks.

In regard to *Eremia*, the case is so recent[47] that it has scarcely had time to be cited by subsequent cases. As discussed earlier (see section 2.2. above), it therefore remains unclear whether this case will become an important case in regard to Article 14 in conjunction with Article 3 (as judged in 2014). Moreover, a qualitative analysis of the case shows that there is an earlier case – *Opuz v. Turkey*[48] issued in 2009 – which has essentially the same legal content and which is cited in a way that suggests that that case is (still) the leading reference for Article 14 in conjunction with Article 3 in relation to domestic violence against women.

In regard to *Anguelova*, a separate study has identified a whole series of cases that deal with Article 14 in conjunction with Article 2 in relation to racially/ethnically motivated crime and the investigation of such crimes.[49] That study found 28 judgments in this serie of cases, many of which were cited more than *Anguelova* and several which were more recent (*Anguelova* was issued in 2002). *Nachova and others v. Bulgaria*[50] for example is both more recent (from 2005) and more highly cited.

Finally, in regard to *BB v. UK*, it is worth noting that this case is atypical in that the UK government conceded to having violated Article 14 in conjunction with Article 8, as already established in an earlier case (*Sutherland*

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47 The judgment is from 2013. The network analysis contains judgments until the end of 2014; the textbooks are published in 2014, 2015 and 2016 respectively.

48 *Opuz v. Turkey* App no 33401/02 (ECtHR, 9 June 2009).

49 Palmer Olsen and Kücuksu (n 33).

50 *Nachova and others v. Bulgaria* App no 43577/98 and 43579/98 (ECtHR, 6 July 2005).

v. UK[51], issued in 2001). It therefore seems quite obvious why the ECtHR would not cite *BB*: the case is essentially about what kind of compensation the applicant should receive, not about Article 14 as such.

In sum, the study of the cases on which there is consensus among the three textbooks makes it possible to infer two points. Firstly, we see agreement about the importance of cases from the earliest period of the ECtHR's activity to the present. Hence, looking at the references of the textbooks shows that legal experts seem to have an understanding of the law based on the temporal development of case law and that some cases appear to be perceived as emblematic in this development under Article 14 ECHR. Secondly, comparing the consensus cases to the network measures also shows that legal experts sometimes cite the same cases even though those cases have a very low in-degree. In the following section we look into the opposite, the cases about which the textbook authors do not agree.

3. The Discord Cases

There is a surprisingly large number of cases which are used by only one of the textbooks. As mentioned above, these cases can be termed the 'discord cases'. The question in regard to the discord cases is whether the difference between the textbooks can be explained, for example through a nationality bias of the authors or some other such difference between the authors or their audience. The discord cases are presented in figure 9 (below).

[51] *Sutherland v. UK* App no 25186/94 (ECtHR, 27 March 2001).

French textbook only		German textbook only		UK textbook only	
4464/70	*National Union and Belgian Police v. Belgium* (20)	6538/74	*The Sunday Times v. The UK (No. 1)* (3)	5095/71	*Kjeldsen, Busk Madsen and Pedersen v. Denmark* (21)
6289/73	*Airey v. Ireland* (30)	9562/81	*Monnell And Morris v. The UK* (3)	9063/80	*Gillow v. The UK* (8)
8793/79	*James and Others v. The UK* (47)	12742/87	*Pine Valley Developments Ltd v. Ireland* (37)	16163/90	*Eugenia Michaelidou Developments Ltd v. Turkey* (1)
9006/80	*Lithgow v. The UK* (31)	19823/92	*Hokkanen v. Finland* -	25088/94	*Chassagnou. France* (35)
12849/87	*Vermeire v. Belgium* (4)	31417/96	*Lustig-Prean And Beckett v. The UK* (14)	25186/94	*Sutherland v. The UK* (4)
21794/93	*C. v. Belgium* (1)	34045/96	*Hoffmann v. Germany* (0)	25781/94	*Cyprus v. Turkey* (18)
21439/93	*Botta v. Italy* (6)	30943/96	*Sahin v. Germany* (18)	27824/95	*Posti and Rahko v. Finland* (4)
21986/93	*Salman v. Turkey* -	36677/97	*S.A. Dangeville v. France* (3)	36983/97	*Haas v. The Netherlands* (1)
24746/94	*Hugh Jordon v. The UK* (19)	34462/97	*Wessels-Bergervoet v. The Netherlands* (0)	42949/98	*Runkee and White v. The UK* (7)
28135/95	*Magee v. The UK* (3)	36042/97	*Willis v. The UK* (45)	71156/01	*Members of Jehovas Witnesses v. Georgia* (4)
43208/98	*Perkins and R v. The UK* (1)	41488/98	*Velikova v. Bulgaria* (19)	42949/98	*Runkee and White v. The UK* (7)
74832/01	*Mizigarova v. Slovakia* (1)	40892/98	*Koua Poirrez v. France* (8)	13624/03	*Koky and Others v. Slovakia* -
70665/01	*Rainys & Gasparavisius v. Lithuania* (2)	40825/98	*Religionsgemeinschaft Der Zeugen Jehovas And Others v. Austria* (8)	12050/04	*Mangouras v. Spain* -
71127/01	*Bevacqua v. Bulgaria* -	42967/98	*Löffelmann v. Austria* (2)	4149/04	*Aksu v. Turkey* (2)
42722/02	*Stoica v. Romania* (7)	46720/99	*Jahn And Others v. Germany* (8)	15966/04	*I.G. and Others v. Slovakia* -
2660/03	*Hajduova v. Slovakia* -	49686/99	*Gutl v. Austria* (2)	21906/04	*Kafkaris v. Cyprus* (6)
44803/04	*Petropoulou – Tsakiris v. Greece* (1)	58453/00	*Niedzwiecki v. Germany* (3)	26266/05	*Raviv v. Austria* (0)
24768/06	*Perdigao v. Portugal* -	59140/00	*Okpisz v. Germany* (7)	6339/05	*Evans v. The UK* (10)
9106/06	*Genderdoc-M v. Moldova* -	63684/00	*Hobbs, Richard, Walsh And Geen v. The UK* (3)	34848/07	*O'Donoghue v. The UK* (1)
4916/07	*Alekseyev v. Russia* (1)	63106/00	*Vasil Sashov Petrov v. Bulgaria* (2)	18968/07	*V.C. v. Slovakia* -
33234/07	*Valiulienė v. Lithuania* -	77782/01	*Luczak v. Poland* (3)	44814/07	*Budak and Others v. Turkey* -

29617/07	*Vojnity v. Hungary* (1)	67336/01	*Danilenkov And Others v. Russia* (0)	37359/09	*H. v. Finland* (0)
57693/10	*Kalucza v. Hungary* -	28490/02	*Begheluri And Others v. Georgia* (0)	61382/09	*B. v. Moldova* -
7224/11	*Aghdgomelashvili and Japaridze v. Georgia* -	2346/02	*Pretty v. The UK* (16)	29518/10	*N.B. v. Slovakia* -
12060/12	*M and C v. Romania* (0)	26111/02	*Mizzi v. Malta* (7)	17153/11	*Vuckovic v. Serbia* -
		23960/02	*Zeman v. Austria* (0)		
		42735/02	*Barrow v. The UK* (0)		
		37614/02	*Ismailova v. Russia* (1)		
		25379/02	*Twizell v. The UK* (3)		
		15197/02	*Petrov v. Bulgaria* (2)		
		33001/03	*Koppi v. Austria* (1)		
		5920/04	*Šekerović And Pašalić v. Bosnia And Herzegovina* (0)		
		2033/04	*Valkov And Others v. Bulgaria* (0)		
		37222/04	*Altinay v. Turkey* (0)		
		14717/04	*Berger-Krall And Others v. Slovenia* (0)		
		28079/04	*Green v. The UK* (0)		
		3545/04	*Brauer v. Germany* (1)		
		22028/04	*Zaunegger v. Germany* (5)		
		3976/05	*Şerife Yiğit v. Turkey* (6)		
		40094/05	*Virabyan v. Armenia* (0)		
		10699/05	*Paulik v. Slovakia* (2)		
		3455/05	*A. And Others v. The UK* -		
		20739/05	*Gineitiene v. Lithuania* (1)		
		37060/06	*J.M. v. The UK* (2)		
		31950/06	*Graziani-Weiss v. Austria* (0)		
		9134/06	*Efe v. Austria* (0)		
		10441/06	*Pichkur v. Ukraine* (0)		

1828/06	*G.I.E.M. S.R.L. v. Italy* -
44614/07	*Milanovic v. Serbia* (1)
5123/07	*Rangelov v. Germany* (0)
19508/07	*Granos Organicos. v. Germany* (0)
31913/07	*E.B. And Others v. Austria* (22)
49151/07	*Muñoz Díaz v. Spain* (2)
41615/07	*Neulinger And Shuruk v. Switzerland* -
14480/08	*Tarkoev And Others v. Estonia* (0)
6268/08	*Andrle v. The Czech Republic* (0)
46286/09	*Maggio And Others v. Italy* (2)
53124/09	*Genovese v. Malta* (0)
23338/09	*Kautzor v. Germany* (0)
45071/09	*Ahrens v. Germany* (0)
7552/09	*The Church Of Jesus Christ v. The UK* (1)
17966/10	*Manzanas Martin v. Spain* (0)
38590/10	*Biao v. Denmark* (1)
19391/11	*Topčić-Rosenberg v. Croatia* (0)
64320/01	*Moldovan and others v. Romania (no. 2)* -
37359/09	*Hämäläinen v. Finland (judgment from 2015 not in network)*

Figure 9. List of discord cases

The table displays the discord cases in chronological order. The cases for all three textbooks are spread more or less evenly over time. For all three textbooks, the first discord cases are in the 1970s; about half are from before 2000 and the other half from after 2000. It can quite quickly be confirmed that the discord cases cannot be explained on the basis of a different temporal focus in any of the textbooks.

Can the discord cases be explained through a nationality bias in the textbooks, in the sense that the French textbook, for example, refers to more cases with France as the responding state? Or can other patterns regarding the states in the different discord cases be traced?

The French textbook's 25 discord cases involve 15 different states. Of these the UK appears most frequently, namely five times. This reflects the leading position of the UK as the state with most cases brought against it and, as France does not appear once in the French textbooks' list of discord cases, a nationality bias favoring the cases brought against France as illustrative for legal development can be ruled out.

The UK textbook contains references to 25 'discord' cases. These are distributed across 13 states and again we see that the UK appears most frequently (6 times). Nonetheless, the fact that 6 out of 25 cases are against the UK is not sufficient to infer that this reveals a nationality bias, since the UK is the state with most cases and violations found under Article 14.

The German textbook contains 66 discord cases, which is substantially more than the 25 discord cases in both the French and UK textbooks; moreover, these 66 discord cases represent 45% of the German textbook's total of 144 case references. Hence, 45% of the cases in the German textbook do not appear in either of the other two textbooks. The 66 discord cases concern 27 different states. However, there are certain states which are referred to frequently, namely the United Kingdom, with 12 references, as well as, interestingly, Germany, 11 times, and Austria, 7 times (27% of the 66 discord cases together). This means that cases involving Germany and Austria are used more frequently in the German textbook than the two others. While it may be exaggerated to talk of a nationality bias in the German textbook, the weight of certain cases for a legal textbook raises questions concerning the purpose of the book. If the purpose of the textbook is to train lawyers in the German-speaking countries (Germany and Austria) to work within these jurisdictions, it may be reasonable to include in the textbook the history of the cases brought before the ECtHR *from* these jurisdictions. On the other hand, a deliberate overrepresentation of German cases may give a biased view of the ECtHR's practice. If accounts of law aim to show the law as it is *practiced for all*, not the law as it is *to us*, then overrepresentation may not be helpful.

Turning to the in-degree score of the discord cases between the three textbooks, a few in each textbook stand out. Among the discord cases in the French textbook, five cases have a high in-degree. These are used to illustrate Article 14 as having no independent existence, the ambit test and statistical discrimination under Article 14. Concretely, *Airey v. Ireland*[236] together with *National Union and Belgium Police v. Belgium*[237] are used to illustrate that Article 14 is an accessory article to the other substantive articles in the Convention. When the author explains the ambit test, *James & Others v. UK* and *Lithgow and Others v. UK*[238] are cited to show that Article 14 has increasing autonomy in the sense that the facts of the case must fall under the ambit of one of the substantive articles in the Convention, while it is not necessary for the substantive article to be violated.[239] Finally, *Hugh Jordan v. UK*[240] is used to illustrate statistical discrimination under Article 14, when the ECtHR reasoned that despite the fact that statistically more Catholics or members of a nationalist community were killed by the security forces in the conflict in Northern Ireland, these statistics were not considered to provide evidence for discriminatory practice by the secret service.[241]

The German textbook's 66 discord cases, of which 4 have a particularly high in-degree ranking, illustrate 4 aspects of Article 14: the non-exhaustive list of discrimination grounds in Article 14, the special role of gender discrimination, discrimination on the grounds of ethnic origin and justification of discrimination on the grounds of birth or social origin requiring very weighty reasons.

Pine Valley Developments Ltd v. Ireland[242] is used in the German textbook to illustrate that the list of discrimination grounds in Article 14 is not exhaustive but that distinctions such as in *Pine Valley* on the nature of a temporary building permit, are acknowledged by the ECtHR. *Willis v. UK*, concerning

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[236] *Airey v. Ireland* App no 6289/73 (ECtHR, 9 October 1979).

[237] *National Union and Belgium Police v. Belgium* App no 4464/70 (ECtHR, 27 October 1975).

[238] *Lithgow and Other v. UK* App no 9006/80 (ECtHR, 8 July 1986).

[239] Renucci (n 4) 130-131.

[240] *Hugh Jordan v. UK* App no 24746/94 (ECtHR, 4 August 2001).

[241] *Hugh Jordan* (n59) 128.

[242] *Pine Valley Developments Ltd v. Ireland* App no 12742/87 (ECtHR, 29 November 1991).

discrimination against a man in regard to social security benefits in the form of a widower's pension, is used twice to illustrate the central role of gender as a prohibited ground in Article 14.[243] *Velikova v. Bulgaria* is used to show that Article 14 is an accessory right in the Convention, as the ECtHR found that the alleged discrimination on the ground of (Roma) ethnic origin needed to be proved beyond reasonable doubt to conclude that the treatment was also discriminatory. Finally, *Sahin v. Germany*[244] is used to explain the ECtHR's practice concerning discrimination on the grounds of birth or social origin and in particular the practice of requiring very weighty reasons for differential treatment between legitimate and illegitimate children, i.e. those born to unmarried parents.

Three discord-cases with high in-degree are used in the UK textbook to illustrate three aspects of Article 14: Article 14's non-exhaustive list of prohibited grounds, the burden of proof for discrimination under Article 14 and a procedural aspect of Article 14 as an independent claim. The case of *Kjeldsen, Busk Madsen and Pedersen v. Denmark*[245] is used in the UK textbook in relation to Article 14's non-exhaustive list of prohibited grounds and in particular as an example of a line of case law that indicates that the criterion for 'other status' is that of a personal characteristic. Here, the textbooks seem to agree on emphasising the lack of Article 14's independent existence, but the discord cases show that they consider different cases to be illustrative for this aspect of Article 14.

The Chassagnou[246] case is used to illustrate the practice of the ECtHR regarding the burden of proof in Article 14 cases, where the applicant must show a difference in treatment and the respondent state must demonstrate that such treatment serves a legitimate aim. Finally, Cyprus v. Turkey[247] sheds light on a line of reasoning adopted by the ECtHR with regard to whether an Article 14 claim forms a complaint separately from the complaint under the

[243] Among several other references many of which are shared by the other textbooks.

[244] *Sahin v. Germany* App no 30943/96 (ECtHR, 8 July 2003).

[245] *Kjeldsen, Busk Madsen and Pedersen v. Denmark* App no 5095/71 (ECtHR, 7 December 1976).

[246] *Chassagnou and Others v. France* App no 25088/94 (ECtHR, 29 April 1999).

[247] *Cyprus v. Turkey* App no 25781/94 (ECtHR, 12 May 2014).

substantive article and therefore whether the ECtHR must examine the case under Article 14.

The discord cases seem to be an indication of the textbook authors' different outlooks and different choices from among the known cases, i.e. those known to the authors. While our focus has only to a limited degree been aimed at those discord cases with a high in-degree, because we consider that these cases represent true value as representative statements of the law, since they are both frequently cited by the ECtHR itself and by one or more of the textbooks, the discord cases with a low in-degree represent the real disparity: the low in-degree cases display discord both among the textbooks and with the ECtHR. As the low in-degree cases take up the vast majority of all the discord-cases, it can be inferred that in each textbook there are a number of cases, about twenty in the French and the UK textbooks and about 60 in the German textbook, which are not referred to either by other legal experts or by the ECtHR itself when accounting for which cases illustrate the law under Article 14. We consider this to be evidence that the textbooks do to some extent rely on the author's subjective outlook, but do so without explicating the basis for this outlook despite the fact there exist measures (network analysis and comparison with other textbooks) that could provide a platform for qualifying that outlook. We can furthermore conclude from our comparison that textbook authors do not, through their more qualitative approach, reach significant agreement about which cases are the most representative and/or illustrative of the law under Article 14 of the ECHR.

4. Interim Conclusions of Comparison of Textbook Analyses and Network

From the analysis of the distribution of cases, consensus cases and discord cases, what can we infer about the extent of overlap or disparity among the textbooks, compared to a network approach? The distribution of the textbooks' cases across cases outside the network, consensus, discord cases and overlaps between the individual textbooks shows that the textbooks have less than 50% of their total reference cases in common, despite the fact that the textbooks (chapters) presumably have a shared purpose, namely to describe the law and practice under Article 14 ECHR. However, the number of consensus cases (41) is more than the number of discord cases in the French

and UK textbooks (24 and 25 respectively), yet it is substantially less than the number of discord cases in the German textbook (66).

The 41 consensus cases indicate that a predominant logic of legal expert knowledge in textbook accounts of Article 14 is the chronological order of cases illustrating the development of the ECtHR's practice through emblematic cases from the start of the ECtHR's activity to the present. The study of the consensus cases revealed agreement among the textbooks on 41 cases and, furthermore, that several of these were also highly cited and can therefore be considered highly relevant in the eyes of the ECtHR too. Nonetheless, consensus cases account only for 12% of all the references from the three textbooks (342) and 6% of all cases in the network (636).

VI. Conclusions: The Benefit of Using Network Analysis in Legal Research

In this article, we have tried to link quantitative data with mainly hermeneutically-oriented research methods by combining network analysis of the ECtHR's citations of its own judgments with qualitative examinations of selected judgments in the network. Our main aim in doing so has been to generally highlight how an empirical basis of legal research that involves case law practice can add a new dimension to the traditional textbook approach used in legal education and scholarship.

To test both the quality of our own results and to assess whether there are special advantages in using this new approach compared with established legal doctrinal research, we have made a comparison with and across three generally recognised textbooks in our chosen area of human rights law. We believe these comparisons have shown that a systematic use of network analysis in structuring legal research in areas where case law is an important source could improve the overall quality of doctrinal analysis. It can do so by more clearly showing which cases are explicitly used in the legal reasoning of the ECtHR and when they are so used. More generally, a change of the methodological approach to the analysis of law so as to include a greater quantity of empirical information, for example about case citations as the basis for a more qualitative analysis, could strengthen the scientific quality of these accounts and hence their value in teaching and in practice.

Our results also show a clear divergence on a number of points between the different textbooks we have compared; we have found no good reasons for this divergence. We think that it will therefore strengthen the overall objectivity and quality of study in the field if there were some common point of reference for arguing about the importance and relevance of specific cases. Although network analysis does not in and of itself provide a legally rich analysis, it does give a measure of real-world use, which at least yields some standard of objectivity against which one can argue in a particular direction. At least in areas of the law where case citation is frequently used and where case law is generally seen as important, such as in European human rights law and EU law, we find it could generally improve the quality of debate between researchers on which cases are important and hence strengthen awareness of what is 'found' to be the law. Network analysis can help in advancing transparency in legal argumentation by making more explicit whether a specific legal argument deriving from a specific case is also employed consistently in legal practice. As regards scientific gains, using network analysis as a supplementary research tool can enhance the empirical embeddedness of legal research and thereby also advance more informed critical discussions about this practice.