

‘Something like the principles of British liberalism’: Ivor Jennings and the international and domestic, 1920–1960

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Abstract

While the relationship between domestic and international law provoked constant debate among European jurists in the interwar years, British thinking is remembered as orthodoxly dualist and practice-focused. Complicating this narrative, this article revisits W Ivor Jennings’ work, arguing that the domestic and international were central to his understandings of interwar legal change in the imperial and international communities. Part 1 examines Jennings’ seemingly forgotten 1920s works, which analysed constitutional and international interactions within the rapidly changing imperial system. Part 2 explores Jennings’ turn to international and domestic forms of the rule of law in the lead-up to war, emphasising their British liberal heritage. Part 3 shows how these conceptions, and their imperial connections, echoed in Jennings’ post-war projects: a European federation modelled on the empire; and lectures to decolonising states. This reveals both new angles to Jennings’ work and the importance of the domestic and international for constitutional legacies of empire.

Keywords: international law; domestic law; public law; imperial constitution; interwar period; W Ivor Jennings.

Introduction: the ‘insularity of Englishmen’

The relationship between domestic and international law provoked constant discussions for European jurists working in the interwar period. In the 1920s, the Italian jurist Dionisio Anzilotti’s new articulation of Heinrich Triepel’s dualist theory – that international and domestic laws formed separate systems – was endorsed and developed further by many jurists throughout Western Europe.¹ Against this view, the Austrians Hans Kelsen, Josef Kunz and Alfred Verdross revived and rearticulated the theory of monism, arguing that international law and domestic legal systems were not distinct, but instead elements of a

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1 See Giorgio Gaja, ‘Positivism and dualism in Dionisio Anzilotti’ (1992) 3 *European Journal of International Law* 123.

unified, universal legal system.² These debates have been read in various ways: as bolstering the normativity of law and emphasising its ability to restrain state power;³ as an interwar legal project to reject the power of sovereign states by affirming the primacy of international law over them;⁴ and as the centrepiece of a wider legal revolution that transformed national constitutions into global laws, turned state sovereignty into democratic sovereignty, and made rights a concern of and for all human beings as part of a global legal society.⁵

At the same time, British jurists seemed, at first glance, to be firmly and in a sense obviously dualist, with no real option for endorsing monism within their constitutional orthodoxy. A purportedly international system of laws or norms could hold no sway over the endlessly sovereign British Parliament, and the executive's foreign actions of signing treaties could never alter the law of the land. What Europeans saw as a debate about the nature of law, state and international community, the British saw as, at most, a question of what English courts would decide to do with the possible 'rules' of international 'law'. John Fischer Williams, a prominent UK legal adviser at the League of Nations (the League) since the 1920s, wrote in 1939 that 'however much it may be thought to be important for the formation of a true theory of international law', the 'problem' of the relation of domestic and international law 'is not very likely to cause embarrassment to the practitioner or to a court or even an arbitrator', all of whom will know and agree on the law to be applied.⁶ When Kunz addressed the Grotius Society in London on the theories of monism and dualism in 1924, the discussion began with the chair giving thanks for a 'wonderful discourse' and expressing two regrets: the small audience, and the 'insularity of Englishmen' when it came to continental theories – the latter probably explaining the former.⁷ British jurists seemed steadfastly and characteristically unengaged with the philosophical issues of state and law taking place as the League rose and fell.

Delving deeper than this first glance, this article argues that, far from being insular theoretical irrelevancies or confined to debates on monism and dualism, the domestic and international were central to juristic attempts to make sense of the enormous legal transformations at the League, throughout the Empire, and within the inauguration of 'modern' British constitutional government in the 1920s.⁸ They were used to formulate and announce general principles of government and ordering, internally and globally.

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- 2 See e.g. Jochen von Bernstorff, 'An "objective" architecture of international law: Kelsen, Kunz and Verdross' in *The Public International Law Theory of Hans Kelsen: Believing in Universal Law* (Cambridge University Press 2010). For a recent re-articulation of Kelsen's theory arguing for its applicability today, see Paul Gragl, *Legal Monism: Law, Philosophy, and Politics* (Oxford University Press 2018). On Verdross, see especially Natasha Wheatley, 'Making nations into legal persons between imperial and international law: scenes from a central European history of group rights' (2018) 28 *Duke Journal of Comparative and International Law* 481.
 - 3 Alexander Orakhelashvili, 'Scelle, Schmitt, Kelsen, Lauterpacht and the continuing relevance of their interwar debate on normativity' (2014) 83 *Nordic Journal of International Law* 1.
 - 4 Peter Langford and Ian Bryan, 'Hans Kelsen's theory of legal monism – a critical engagement with the emerging legal order of the 1920s' (2012) 14 *Journal of the History of International Law* 51.
 - 5 Hauke Brunkhorst, 'Critique of dualism: Hans Kelsen and the twentieth century revolution in international law' (2011) 18 *Constellations* 496.
 - 6 See e.g. John Fischer Williams, 'Relations of international and municipal law' in *Aspects of Modern International Law* (Oxford University Press 1939) 81–2.
 - 7 Josef Kunz, 'On the theoretical basis of the law of nations' (1924) 10 *Transactions of the Grotius Society* 115, 141.
 - 8 See further Guy Fiti Sinclair, *To Reform the World: International Organizations and the Making of Modern States* (Oxford University Press 2017); Susan Pedersen, *The Guardians: The League of Nations and the Crisis of Empire* (Oxford University Press 2015); Mark Mazower, *No Enchanted Palace: The End of Empire and the Ideological Origins of the United Nations* (Princeton University Press 2009);

Many British jurists examined the intertwining of domestic law, public law and international law as it related to problems of empire: Thomas Baty, Arthur Berridale Keith and Hersch Lauterpacht each published sustained examinations of these conjoint problems in the interwar years.⁹ This article focuses, however, on the influential and yet understudied constitutional theorist W Ivor Jennings. Writing and teaching at Leeds and then the London School of Economics from the 1920s, Jennings was a major figure critical of Diceyan constitutional theory and its orthodoxy, as part of a wider response to positivism in mainstream legal thought, advocating for functionalist and sociological accounts of legal doctrines that paid due regard to the ideological, material and normative elements of law and legal systems.¹⁰ Jennings is usually remembered as a foundational and prolific constitutional law theorist who radically reshaped views of parliamentary, cabinet and local government and later served as an architect of decolonisation-era constitutions.¹¹ But his earliest works were fixed on questions of international and imperial constitutional law, and his later appraisals of the constitutional laws of the British Commonwealth and post-war plans for Europe dealt extensively with the interactions of domestic and international laws.

Exploring this development, this article argues that questions of domestic and international law were central to Jennings' efforts to understand the legal aspects of the imperial and international communities in the interwar and decolonisation years. This argument unfolds in three parts.

Part 1 examines Jennings' seemingly forgotten earliest works from the mid-1920s: a series of French articles that dealt with the difficult mix of constitutional and international law in the rapidly changing British Empire through arguments that imperial constitutional law was the proper, global limit to the international personality of Britain's dominions and protectorates. In these pieces, Jennings examined international personality, gradual self-government grants, the retention of executive control over non-white possessions, and arguments about international limits to prerogative powers. These works grounded Jennings' treatment of the doctrinal issues of the relationship of domestic and international law in the constitution.

Part 2 shows how these early interests in empire moved towards a parallel emphasis on the 'rule of law', as a systematic link between domestic and international, with the British constitution providing a model for international and internal rules of law. In the

9 Thomas Baty, 'Sovereign colonies' (1921) 34 *Harvard Law Review* 837; Thomas Baty, 'Protectorates and mandates' (1921) 2 *British Yearbook of International Law* 109; Thomas Baty, 'The structure of the Empire' (1930) 12 *Journal of Comparative Legislation and International Law* 157; Thomas Baty, *International Law in Twilight* (Maruzen 1954) 2ff (calling the interwar debates on the relation of municipal and international law, 'all the most futile word-spinning'; at 3); Arthur Berridale Keith, 'The international status of the dominions' (1923) 5 *Journal of Comparative Legislation and International Law* 161; Arthur Berridale Keith, *Letters on Imperial Relations, Indian Reforms, Constitutional and International Law, 1916-1935* (Oxford University Press 1935); Arthur Berridale Keith, *Letters and Essays on Current Imperial and International Problems, 1935-6* (Oxford University Press 1936); Hersch Lauterpacht, *Private Law Sources and Analogies of International Law* (Longmans, Green & Co 1927) (applying theoretical reflections on municipal-international analogies and connections to the status of the mandates, and concluding, contra Jennings, that international law bound the Crown in mandatory administration, and that the League remained sovereign over them: 191-202); Hersch Lauterpacht, *The Function of Law in the International Community* (Oxford University Press 1933); Hersch Lauterpacht, 'Is international law a part of the law of England?' (1939) 25 *Transactions of the Grotius Society* 51.

10 On the LSE and especially the influence of Harold Laski's functionalism, see Martin Loughlin, *Public Law and Political Theory* (Clarendon 1992) 169-176.

11 See further A W Bradley, 'Sir William Ivor Jennings: a centennial paper' (2004) 67 *Modern Law Review* 716; Adam Tomkins, "'Talking in fictions": Jennings on Parliament' (2004) 67 *Modern Law Review* 772.

lead-up to and early years of the Second World War, Jennings turned to international and domestic limits on government power in changing conceptions of the rule of law, which were central to his arguments that re-establishing international law required not just attaining public order in occupied territories, but 'public order based on something like the principles of British liberalism'.

Part 3 examines the legacies of these theoretical commitments, examining how this concept of public order and British liberalism played out in two of Jennings' post-war intellectual projects: a European federation, whose constitution was based on the 'lessons' of the interwar imperial constitution, and a set of lectures to decolonising states urging them to hew to British parliamentarism against socialist international designs.

Jennings' work on the international and domestic involved a variety of efforts to theorise and justify new visions of law, government and ordering amid the rapidly changing and, later, dissolving, empire. This new emphasis also reminds us that the confluence and interactions between the fields of public and international law, as well as their joint imperial imbrications, are not new or recent, but rather built deeply into at least the early twentieth-century foundations of today's theory and practice; one important constitutional legacy of empire.

1 Jennings' empire: dominion and mandate, 1920–1938

The immediate outcome of the First World War was the collapse of the Russian, German, Austro-Hungarian and Ottoman Empires and their subsequent partitions into nation-states or new supervised colonial dependencies under the new 'mandate' system of the League. As the first international institution to harbour aspirations of global membership and influence, the League focused the attention of Western international lawyers and diplomats. It also formed the institutional point of 'inclusion' for new nations and was the place to debate pressing questions around the protection of minorities, the administration of former empires, the international economic system and the development of international law.¹² But the 1920s also inaugurated the rapid legal transformation of the British Empire through gradual cessions of self-government to the dominions and the establishment of the Irish Free State on an equal footing with them, combined with repression and continued Crown 'guidance' in parts of India and Africa, and in the new acquisitions of mandates taken from the empires of the defeated Central Powers in the Middle East, Africa and the Pacific. The vague questions about international personality and constitutional links between the politics of the British Empire that burned throughout the war were intensified by the establishment of the League. Which dominions could represent themselves at the League? Did they appear as part of the Empire or independently? Could they conduct independent foreign policy? These questions were gradually, partially resolved by successive imperial conferences in the 1920s and 1930s. This section explores how Jennings' examinations of changing ideas about the interaction of domestic and international were foundational in these wider transformations in empire, parliament, dominions and mandates.

The questions debated at the 1920s imperial conferences motivated Jennings' first academic works; a series of seemingly now-forgotten articles on international legal aspects of the British Empire and Commonwealth, based on London lectures, and translated for the major French international law journal *Revue Generale de Droit International et Legislation Comparée* (RDILC). These pieces explored the international personality of the dominions, arguing that their status was, ultimately, a matter of imperial

¹² See Pedersen (n 8).

constitutional law and not international law, but basing that argument on a subtle account of the interaction of principles from both of these fields. Jennings sought to explain the varieties of international personality throughout the Empire as stemming from its complex, various constitutional orderings and degrees of self-government possessed by the entities which formed it and the retention of executive control over non-white possessions. Jennings sought to convince readers that the Empire's juridical relations overrode international law and, in some cases, created new categories of polity previously unknown to international law. In a sense, his argument reflected both an internationalising and localising of the British constitution: making it relevant and resistant to new international law concepts, and binding and shaping the constitutional and international development of the Empire's constituent members. In the early 1930s, Jennings saw this imperial rule returning to influence government and the constitution at home.

The idea of international law constraining or shaping the powers of the Crown was the subject of Jennings' first published work, which built on his essay as the Whewell Scholar in International Law at Cambridge. Examining the right of angary, which related to the interaction of statutory, prerogative and international law rights to seize foreign property, Jennings examined two major decisions in which English courts held that international law doctrines on angary formed part of the law of England and, thus, corresponded to the prerogative right to requisition neutral goods for the defence of the realm.¹³ Jennings endorsed Westlake's view that English courts enforce rights in international or domestic law where they fall within jurisdiction, subject to the sovereign's incapacity to, in Westlake's words, 'divest or modify private rights by treaty' and that courts cannot question acts of state.¹⁴ Jennings noted, however, that:

[t]he word "rights" is here used in rather a peculiar sense. Rights are given by International Law only to States, whereas Municipal Courts usually invoke International Law in suits by an individual. What is meant, therefore, is that Municipal Courts must recognise a right where a rule of International Law gives an individual a benefit; as, for example, where an ambassador claims a diplomatic immunity.¹⁵

Jennings read this in a language of private law, as a coordination of benefits and compensation. A state's international law right to seize the property of neutrals within its territory rests in the Crown and executive government, and a right of compensation rests with the owner.¹⁶ Jennings thought that this should translate into English constitutional law as international law shaping the prerogative: there 'ought therefore to be a prerogative right of the Crown to seize the property in accordance with the rules of International Law ... there is nothing in the common law inconsistent with such a right, nor is there any statute to prevent such rights from taking effect'.¹⁷ The Crown's prerogative rights, then, are constrained or moulded by the rules of international law, though might be limited further by statute.

13 W Ivor Jennings, 'The right of angary' (1927) 3 Cambridge Law Journal 49. See *Commercial and Estates Co of Egypt v Board of Trade* [1925] 1 KB 271; *West Rand Central Gold Mining Co Ltd v King* [1905] 2 KB 391.

14 John Westlake, *The Collected Papers of John Westlake on Public International Law*, Lassa Oppenheim (ed) (Cambridge University Press 1914) 518, quoted in Jennings, 'The right of angary' (n 13) 57.

15 Jennings, 'The right of angary' (n 13) 57.

16 Ibid.

17 Ibid.

Jennings' next works delved much more deeply into the relationship of Crown, empire and international law. The first piece examined the international status of the dominions after the 1926 Imperial Conference, responding to articles by the influential Belgian jurist Henri Rolin and the more obscure Canadian political scientist C D Allin. Jennings rejected Rolin's argument that the dominions had no international personality and went further than Allin's contention that they had some degree of international personality, but not to the extent of full sovereign states. Jennings contended instead that following the 1926 Conference the dominions held, under international law, the same international status as the UK, and that this status was 'limited by the superior law of the community of states conventionally called, erroneously, the British Empire'.¹⁸

Jennings' argument built on a disagreement with Rolin's view of the meaning of 'state'. Whereas Rolin saw states as juridically distinct, supreme organs that gain their powers by expressing the will of a people, rather than from delegation by another higher body, for Jennings this did not reflect the reality of state formation and would make, for example, non-revolutionary emergences of states impossible: 'the *source* of the institution is immaterial. What is important is knowing whether the power is exercised by the institution for itself, yet on behalf of a third party.'¹⁹ Rolin, Jennings argued, had fallen into an error common to jurists unfamiliar with British juridical thought by confounding a theory of law with the facts of reality and the conventions of the British constitution. Put another way, Jennings placed the operation of the British imperial constitution over the concepts of international law.

Jennings' own view of the dominions' status moved between British imperial-constitutional law and international law. While the constitutional law of the British Empire was developed by judicial interpretations of law from an earlier era in which the King exercised governmental powers and the people were merely consulted, the contemporary reality was that Cabinet and the Prime Minister – not legal categories and 'unknown to English law' – possess and exercise those powers. Likewise, the full sovereign status of the dominions rested on their ability and permission to exercise those powers, most crucially for international personality, the ability to conduct foreign relations, which was granted to them by imperial constitutional law. British constitutional law theoretically made the dominions 'complete dependents' under the English government, but they are practically never subjected to that control.²⁰

Jennings emphasised that the international law analysis must not look to this 'theory of the Constitution' but instead to the 'real authority of the Dominion governments'.²¹ If they lack the 'necessary authority to accomplish international acts', they cannot be recognised as having a personality distinct from Britain, but if they do have 'the capacity to maintain international relations' then the only element missing from their full international personality is recognition of that fact by other states.²² Jennings thought that that recognition had been accorded to the dominions by most of the important states in Europe and America.²³ Moreover, this was the position of the Empire, evidenced by the report adopted by the 1926 Conference, which 'first established the general principle of independence' among the dominions, and 'then acknowledged that theories of law and

18 W Ivor Jennings, 'Le Statut des Dominions et La Conference Imperiale de 1926' (1927) 8 RDILC 397, 398 (translations of Jennings' French articles are my own).

19 Ibid 399 (emphasis original).

20 Ibid 400.

21 Ibid.

22 Ibid.

23 Ibid.

forms of government (but not practice) do not conform to this principle' and 'finally suggest[ed] means of attenuating this divergence'.²⁴ Jennings' emphasis, then, was on the practical operation of domestic and imperial law, over the theory-fixation of other international law jurists.

The remainder of Jennings' argument explored those practical operations in detail, though with some examination of the conceptual changes announced by the Conference. While, in keeping with British tradition, the Conference refused to countenance a written constitution for the Empire, it did seek to define the relationship of the UK and the dominions by a general proposition:

There are autonomous communities within the Empire, equal in their status, no one subordinate to another from the particular point of view of their internal affairs, although united by a common allegiance to the Crown, and freely associating as members of the British community of nations.²⁵

Jennings saw no contradiction between independence and membership of the Empire, insisting that it was 'in fact' a society of free nations, linked by common places and shared history, and 'a loyalism towards a shared sovereign and a tradition of liberty and democratic government, transmitted from generation to generation'.²⁶

While dominion parliaments remained theoretically subject to the laws of the British Parliament, in practice that was of little importance: contemporary British legislation did not apply generally to the dominions, and they made their own laws.²⁷ This independence followed into their international lives and was the basis of their juridical equality with Britain itself. After examining the international relations of the various dominions – their negotiation of treaties with foreign states outside the Empire, their modes of representation, their domestic ratifications, and their position in relation to wider conventions (as Jennings put it, those 'international acts between governments that generally do not necessitate legislative intervention, but have a purely political objective')²⁸ – Jennings concluded that the dominions and the UK held the same status in international law. But the particulars of that international status were still limited and shaped by the presence of imperial constitutional ties: 'the rights of different parts of the Empire are limited by the personality of the Empire, because from the point of view of questions of interest to a part of the empire, there is a unity'.²⁹ This unity meant treaties relevant to more than one part of the Empire bound the entirety, and that questions about the relations between parts of the Empire – 'conventions, disputes, etc' – 'are not regulated by international law, but by the constitutional laws and customs of the Empire'.³⁰

In his 1928 piece 'International personality in the British Empire', Jennings broadened his analysis to argue that the British arrangements had now reshaped international law, conceptualising dominion–imperial relations as a new upheaval and challenge to old outdated notions of international personality. Historically, all international legal persons were 'homogeneous States', and the nature of international personality was not a complicated question, with new states admitted not only by satisfying 'certain philosophical principles' but also because they appeared to be similar to current

24 Ibid 403.

25 Ibid 404 (quoting and translating the Report).

26 Ibid.

27 Ibid 414.

28 Ibid 429.

29 Ibid 433.

30 Ibid.

members.³¹ When international organisation and the state form became more complex, fundamental ideas about the nature of states became relevant to international personality.

As applied to the British Empire, Jennings argued that it was 'an organisation of a character so complex that it is impossible to examine the personality of its different parts' without first establishing the principles of international personality.³² Jennings now saw the British Empire as a formerly unitary state 'in transition', owing to the partial, somewhat unclear, international capacities of the dominions.³³ But the international implications of this transition was not a question of international law but one of imperial constitutional law:

We are now in a state of transition. But the principle is clear. No part of the Empire can be recognised as having an international capacity greater than that which it possesses constitutionally. To admit a British community to a power that it does not have constitutionally is to intervene in the internal government of the British Empire, and this is contrary to international law.³⁴

Here, Jennings raised the international law principle of non-intervention in internal affairs to place imperial constitutional law over the other ordinary principles of international law and give it an international and absolute effect. Jennings saw each dominion's constitutional capacities as the 'extreme limit' on any possible recognition by other states. This mixed and went beyond international and constitutional ideas of personality: 'The situation that has been examined here does not fit into the normal classifications of international law', he noted and concluded by stating '[t]he distribution of personality that is thus laid down does not fit within the classification seen so far in international law'.³⁵

By the mid-1930s, following the passage of the Statute of Westminster, the kinds of restrictions that Jennings had theorised as following from imperial conventions, the practical operations of the dominions, and the statements in the Imperial Reports, were solidified into clearer doctrines of imperial constitutional law.³⁶ Jennings theorised the legal structure of the British Empire as slowly disintegrating, moving from the 1914 foundation of a Parliament and Crown that could, in principle, legislate and govern in any part of the Empire, through a severe weakening in the 1920s that had, by the early 1930s, given way to a stark contrast between the constitution within the British Isles and that which barely bound what was now the Commonwealth. While the British constitution was 'a complex of institutions, laws, conventions and practices' that made it 'one of the most detailed and closely co-ordinated in the world', the 'Constitution of the British Commonwealth' had 'undergone a process of disintegration on the legal side which has not been met by any corresponding process of integration on the side of convention or practice. It does indeed exist, but its limbs are so weak that it seems that a breath would cause them to break'.³⁷ This weakness followed from the Statute of Westminster's

31 W Ivor Jennings, 'La Personnalité Internationale dans l'Empire Britannique' (1928) 9 RDILC 438, 438.

32 Ibid 438–439.

33 Ibid 440.

34 Ibid.

35 Ibid 493.

36 The Statute of Westminster 1931 marked the Imperial Parliament's recognition that self-governing dominions were now, effectively, fully sovereign states. For the classic contemporaneous treatment, see K C Wheare, *The Statute of Westminster, 1931* (Clarendon Press 1933), and for a recent revisiting that examines its effect on the Irish Free State, see Thomas Mohr, 'The Statute of Westminster, 1931: an Irish perspective' (2013) 31 Law and History Review 749.

37 W Ivor Jennings, 'The constitution of the British Commonwealth' (1938) 9 Political Quarterly 465, 465.

removal of the presumption that any UK Act of Parliament would extend or be deemed to extend to a dominion as part of its law, unless expressly stated in the Act and requested and consented to by the dominion.³⁸ Practically, Jennings thought, the connections and collaborations between Commonwealth nations were now questions of international cooperation akin to ordinary foreign affairs: 'neither an Imperial Federation nor a *Zollverein* [customs union] is practical politics. The question is now to secure collaboration among six or seven autonomous nations.'³⁹

Beyond the Commonwealth, however, Jennings argued that British Crown powers over protectorates and mandates remained shaped and limited by imperial constitutional law alone, even though the claim to govern those mandates originated in international law doctrines and the League's mandatory grants. This approach shows the endurance of aspects of Jennings' late 1920s views on imperial control, even as the Empire had turned to Commonwealth. In the 1938 *Constitutional Laws of the Commonwealth*, which relied more heavily on the judicial decisions compiled by his co-author C M Young⁴⁰ than on William Anson and A B Keith's treatises used in the earlier articles, Jennings contended that the earlier doctrine of incorporation from *West Rand* and *Commercial and Estates Co of Egypt* was now expressed too widely, an error partly stemming from changes in the Empire since those cases were decided. While there is a presumption that international law and English law are not incompatible, the jurisdiction of English courts to decide any dispute about which law applies flows from the jurisdiction of the Crown: 'The jurisdiction of the Crown, in which is included the jurisdiction of the Queen's Courts, has thus to be decided by English law. A jurisdiction may be lawful according to English law and yet unlawful according to international law'.⁴¹ These recent decisions had confirmed that jurisdiction was ultimately up to the Crown, subject to any statutory limits on that power, and this extended to international status and the government of protectorates.⁴²

This had effects for the status of mandate territories. Contra W E Hall and Henry Jenkyns, who in the late nineteenth and early twentieth century saw protectorate government as a question of international law, Jennings insisted it was one of constitutional law. Whereas they had begun with international law doctrines on when a state might exercise its powers within the territory of another state, for the 'English lawyer' the starting question is 'to determine what powers the Crown possesses by English law outside British territory': this was solely about constitutional law, and the Crown 'is not bound even by the treaty by which the jurisdiction is first acquired in the international sense'.⁴³ Governance of mandates was the same as the position over protectorates. The Crown's acceptance of the League's mandate was a grant of jurisdiction and, while British obligations to the League were 'international obligations' and the Crown's Orders in Council provided that the terms of the mandate should not be broken, this only reflected the Crown being 'anxious' that Britain's international obligations be kept.⁴⁴ As a matter of constitutional law the mandate did not bind the Crown.

38 Ibid.

39 Ibid 474.

40 See W Ivor Jennings, *Constitutional Laws of the Commonwealth* (3rd edn, Clarendon Press 1957) 'Preface' v.

41 W Ivor Jennings and C M Young, *Constitutional Laws of the Commonwealth* (Clarendon Press 1938) 16.

42 Ibid 16–17. See also W Ivor Jennings, 'Dominion legislation and treaties' (1937) 15 *Canadian Bar Review* 455.

43 Jennings and Young (n 41) 17, referring to W E Hall, *A Treatise on the Foreign Powers and Jurisdiction of the British Crown* (Clarendon Press 1894); Henry Jenkyns, *British Rule and Jurisdiction beyond the Seas* (Clarendon Press 1902).

44 Jennings and Young (n 41) 17.

This supremacy of imperial constitutional law over international obligations followed, for Jennings, from the absolute nature of the Crown's powers. Jennings was quick to clarify that this did not allow the Crown or governor to act as an 'uncontrolled despot': administration by the Colonial Office still took place through law, according to the local constitution and legal system and subject to appeals to the Privy Council.⁴⁵ The Crown was 'a legal abstraction', and government was essentially 'that provided by the local constitution' – though certainly still 'subject to the control of the Government of the United Kingdom'.⁴⁶ Imperial government was theoretically local, practically still subject to the control of Britain, and, either way, entirely freed of the international law that was the original basis of that claim to govern. In the parts of the world where it continued, British imperial government was legitimated by international law, but only constrained by British constitutional law.

2 Jennings' orthodoxies: internal and international rules of law, 1935–1941

This part examines how Jennings' early interests shifted towards a parallel examination of various forms of the 'rule of law'. For Jennings, it involved analysing the impact of imperial government on constitutional arrangements in the British Isles and his acknowledgment that Parliament was practically constrained by international law. These early points led him to use the British imperial constitution of the mid-1930s as a model for liberal international order, arguing during the Second World War that re-establishing international law and the domestic laws of occupied nations meant more than a simple vision of law and order, and instead a rule of law 'based on something like the principles of British liberalism'.

Jennings' late 1920s works on the difficulties of imperial–international law formed an early foundation for his later, wider rebuke to the gaps and inadequacies of Dicey's late nineteenth-century vision of the British constitution. This was partly about a change in the municipal. By the 1920s, these problems had become so glaring as to make Dicey's work, in Jennings' view, of little contemporary use, despite Dicey's thorough enduring influence.⁴⁷ As Jennings wrote in the preface to the 1959 edition of *Law and the Constitution*, if there were any heretics in 1930s English constitutional thought, 'they were to be found among those who regarded themselves as "orthodox"'.⁴⁸ That orthodoxy took Dicey as essentially correct but in need of qualification and updating. To Jennings, teaching and writing in the late 1920s, local government, cabinet conventions and the relations between the UK and the Commonwealth simply 'could not satisfactorily be fitted' within the Diceyan orthodoxy.⁴⁹

Jennings' other 1930s interest was in placing local government law within the ambit of public law teaching, scholarship and practice that reflected the new importance of the 'municipal'. What is significant about this shift in both policy and theory is that for Jennings it reflected a turning inward of both Parliament and the executive, away from their imperial functions and toward a domestic sphere now characterised by the provision of social services and the implementation of economic reform that reflected the new idea of 'administration' previously and famously rejected by Dicey as inapposite to the British

45 Ibid 18.

46 Ibid.

47 See the both laudatory and critical W Ivor Jennings, 'In praise of Dicey, 1885–1935' (1935) 13 *Public Administration* 123.

48 Ivor Jennings, *The Law and the Constitution* (5th edn, University of London Press 1959) vi.

49 Ibid v.

system. His own autobiographical writings insist that it was the importance of local government to the practice of his students at Leeds – rather than the influence of Harold Laski and left-wing politics – that set him on the path against Dicey and towards writing *The Law and the Constitution*.⁵⁰ Jennings saw the municipality as the place where urban life is regulated. Local government law was, as he put it in 1939, 'the means by which urban life becomes possible'.⁵¹ The rapid expansion of the legal powers of authorities responsible for delivering socially progressive policy and services was the 'municipal revolution', seeded in the 1835 establishment of the first municipal corporations.⁵² Jennings saw this as a shift from an old nineteenth-century imperial executive to a wider use of discretion in policy implementation at home. The nineteenth-century executive was tasked with domestic policing, government of the colonies, control of the armed forces and levying small taxes: "'Executive" was, indeed, the correct word. For the internal functions of the State were largely ministerial', and discretion was mostly afforded to judges, while executive officers had limited discretionary power, except for foreign relations and the military. The rise of public services – health, education, employment exchanges, housing, public transport – had expanded the administrative 'machinery' since the 1870s.⁵³ Jennings incorporated them into an account of the constitution not by their functions, which he saw as an unclear mix of policing, regulation and the 'general external functions of the old "executive"' – that is, its colonial role – but instead by their new institutional locations: the central government, independent statutory authorities and local governments.⁵⁴

Parliament was also changing. By the late 1930s, Jennings agreed that Parliament was constrained 'in practice' by the rules of international law, but that the incorporation of international law into British law – as 'part of the law of England' – meant only that British law is 'presumed not to be contrary to international law'.⁵⁵ Jennings expressed this as a series of assumptions about the territorial extent of laws, jurisdiction over the seas and the powers of the crown – as including those held by a government under international law, and not including powers which would be contrary to international law.⁵⁶ This amounted to the doctrine that English courts will give English law the meaning 'most consistent' with international law.⁵⁷ In a lengthy note, Jennings disagreed with Lauterpacht's 1935 view that customary international law was part of the common law. While Jennings agreed that courts would not presume a contradiction between custom and the common law, 'if it means that whatever is accepted customary international law is *per se* part of the common law, so that a modern rule of international law overrides principles already established by decisions of the courts, it cannot, in my opinion, be accepted', and, moreover, the cases quoted by Lauterpacht did not support his apparent view.⁵⁸ Instead, Jennings emphasised that the common law provided a superior source of protection for foreigners. In the

50 Bradley (n 11) 721–722.

51 W Ivor Jennings, *Principles of Local Government Law* (2nd edn, University of London Press 1939) 'Preface'.

52 W Ivor Jennings, 'The municipal revolution' in Harold J Laski, W Ivor Jennings and William Robson (eds), *A Century of Municipal Progress 1835–1935* (Allen 1936) 55.

53 Ivor Jennings, *The Law and the Constitution* (2nd edn, University of London Press 1938) 171–173.

54 *Ibid* 173ff.

55 *Ibid* 154.

56 *Ibid*.

57 *Ibid*.

58 *Ibid* 155–157 n 1, citing Hersch Lauterpacht, *Oppenheim's International Law* (5th edn, Longmans 1935) vol 1, 36.

absence of legislation and even if international law allowed it, the Crown could not abrogate common law rights of foreigners like assembly or due process.⁵⁹

Jennings conceptualised the constitutional position of international law, however, as a constitutional convention rather than firm law, and one that allowed Parliament to legislate itself into actions or internal laws that might constitute breaches of international obligations, though practically and normatively constraining it from doing so:

[A]ny breach of international law by the United Kingdom will give to the country injured a claim against this country which may be enforced by any means available by international law for the time being (such as consideration of the matter by the Council or Assembly of the League of Nations or by the Permanent Court of International Justice, or even, subject to the Kellogg Pact, war). This means that the United Kingdom, through legislation enacted by Parliament, may be liable to give redress to a foreign Power. This does not impose any legal obligation upon Parliament. But it means in fact that Parliament will not deliberately, and ought not to, pass any legislation which will result in a breach of international law. Consequently international law limits the power of Parliament through the operation of constitutional convention.⁶⁰

A second set of international-imperial conventions grew out of the constitutional relations with the dominions and the mandate territories. Regarding the mandates, however, Jennings maintained his earlier view that, as a matter of constitutional law, their government was 'within the entire discretion of the Crown' and, while the UK was bound by the terms of the mandates concluded and approved by the League Council, '[t]he fact that the obligations arise out of international law makes no difference' to this absolute constitutional discretion.⁶¹

Jennings' account of international law and imperial and mandate relations rested on a view of the rule of law that, innovatively for his time, held both internal and international forms. Beginning the chapter on English constitutional law with the rule of law, Jennings started not with England's constitutional history or the major principles, but instead with ideas of law and order in the context of instability at the international level. Jennings stated that the idea that it is 'necessary to establish "the rule of law" in international relations' is a recurring suggestion in contemporary discussions; that international law exists but is not obeyed, that diplomacy is based on force rather than law, and that establishing the 'rule of law' would lead to order, peace and the settlement of international disputes according to law.⁶² For Jennings, this appeal 'expressly or impliedly draws a parallel between international society and the internal society of a modern State'.⁶³ International society today, however, resembled feudalism, where 'lawless and law-abiding barons alike felt that their security rested primarily upon the number of their retainers and the impregnability of their castles'.⁶⁴ The difference is that the 'natural solution' to this problem, stemming from Roman imperial traditions, was to recognise 'the authority of an overlord, a king or an emperor'.⁶⁵ Jennings goes on to contend that the

59 Jennings, *Law and the Constitution* (n 53) 155–157 n 1.

60 Ibid 157. See also Jennings, *Law of the Constitution* (n 48) 175–176, identical save for updated references to the League and the Permanent Court of International Justice, reading 'Security Council of the United Nations or by the Court of International Justice, or even war'.

61 Jennings, *Law and the Constitution* (n 53) 95 n 9.

62 Ibid 41.

63 Ibid.

64 Ibid 41–42.

65 Ibid.

rule of law was largely established internally, despite civil unrest, in the simple sense of 'the existence of public order', which depended on the existence of a superior power to use force to stop lawlessness: 'One lawless man, like one lawless State, can destroy the peace of a substantial part of his world. Force is necessary only for the lawless and can be used only if the lawless are the exceptions.'⁶⁶ While this basic sense of 'law and order' has been established in most states and is a 'universally recognised principle', in Britain, Jennings insisted, this experience had been one of liberalism or liberal-democracy that is not necessarily shared by other nations.

In Jennings' final analysis, the rule of law in the simple sense of law and order is present in 'all civilised States' and encompasses a range of governmental forms, including non-democratic and aggressively expansionist states.⁶⁷ If it means something more than that, it must rest on a more comprehensive theory of government which usually 'includes notions which are essentially imprecise' – control of the executive, limited legislative powers, and so on – but which are besides the central requirement that it be based on the 'active and willing consent and cooperation of the people'; an anti-formalist, substantive account of democracy.⁶⁸

During the Second World War, Jennings revisited this vision of the rule of law and re-drew it as holding an essentially British – rather than generically democratic – substance that emphasised parliamentary control of the executive. He drew close parallels between domestic and international versions of the rule of law, contending that its conceptual content was fundamentally British, contained in British constitutional and parliamentary history 'and the works of publicists who consciously or unconsciously provide ammunition for political artillery'.⁶⁹ Moving beyond the contemporary view that Dicey's popularisation expressed its essence, Jennings instead traced the rule of law's history through Aristotle, Occam and the Revolutionary Settlement of 1688 to the contemporary discretionary government most clearly seen in the expansion of social services, which required 'a new technique of government and a new alignment of governmental powers'.⁷⁰ Arbitrariness, and not discretion as such, was where Jennings found the breakdown of the rule of law, and Dicey's failure was in missing the 'most fundamental element' in British controls of discretion, namely the control of government by Parliament, and the control of Parliament by the people.⁷¹ Seeing the rule of law as generally controls 'exercised by one governmental authority upon another'⁷² – neither necessarily by a court, nor necessarily total⁷³ – Jennings ultimately concluded that executive wartime powers, while 'as vast as those of any dictator', remained subject to parliamentary oversight and control, which he insisted would prevent any abuses.⁷⁴

Earlier in the piece, and more striking, was Jennings' treatment of the international aspects of the rule of law. Noting again that the phrase 'rule of law' has 'mainly' been used in the context of international affairs to mark its absence between states, the lack of recourse through the League, and the outbreak of the war to 're-establish the rule of law', Jennings saw it as holding here 'much the same meaning as "law and order"', implying that

66 Ibid 42–43.

67 Ibid 59–61.

68 Ibid.

69 W Ivor Jennings, 'The rule of law in total war' (1941) 50 *Yale Law Journal* 365, 365.

70 Ibid 371–372.

71 Ibid.

72 Ibid 372.

73 Ibid 374.

74 Ibid 386.

diplomacy should be regulated by international law not force.⁷⁵ But Jennings insisted on a more capacious meaning that linked international and internal concepts of the rule of law:

Yet, the rule of law has always meant more than order. International law should be re-established, not because it is law, but because it is good law. The Germans have re-established law and order throughout western Europe, but no British politician outside the internment camps has yet praised Hitler for establishing the rule of law. On the contrary, it is asserted that the law is the rule of the despot and the order the tyranny of the tyrant. In truth, it is the immediate aim of British strategy to create disorder in the occupied territories in order that the oppressed peoples may re-establish the rule of law. The rule of law means, therefore, not merely public order, but public order based on something like the principles of British liberalism.⁷⁶

This formulation, reminiscent of his 1938 account but applied to the realities of the war itself, saw Jennings unsurprisingly denying tyranny the character of the rule of law; as merely public order that lacks the substance of ‘something like’ British liberalism. In doing so he mixed international and domestic conceptions without much clarity about the content or basis of the international version. It seems to need not just law and order, but also to be based – at the very least – on whatever principles the ‘comity of nations’ has given to it, though ideally move closer to British liberal conceptions. Adherence to this British content seems, then, to be Jennings’ real prerequisite to ‘re-establishing’ the ‘good law’ of international law.

3 Jennings at the end of empire: new commonwealths, 1940–1960

This part turns to how Jennings used the conceptualisations of the domestic and international from Parts 1 and 2 in two projects for the commonwealths of the post-war world. Jennings’ wartime plans for a European federation modelled its laws on the British Empire’s international–imperial experience in the 1920s. His post-war theorising around the constitutions for decolonising states aimed to fit them into a renewed Commonwealth. Instead of ruminating on their new international legal personality or freedom in domestic law-making, Jennings urged them to stay with British parliamentary traditions and resist the scourge of international socialism.

In 1941, Jennings sketched a plan for a federation of Western Europe, including a draft of its constitution. This ‘federal union’ would improve on the failures of the League, but against those who thought international government only meant replacing sovereign states with a world order – an ideal of ‘insuperable’ difficulties – Jennings insisted that a Western European federation of democratic governments was the only true solution to many of the world’s problems.⁷⁷ Its practicability depended on persuading nations to send representatives to an international conference to draft a constitution, which meant persuading public opinion in these nations that this was both urgent and essential, which, in turn, depended on aiming at a constitution that would work to solve these problems without calling for ‘too great a sacrifice’ in the sovereignty of federating states.⁷⁸ For practical reasons, some flexibility in national forms of internal government would be allowed within the Federation, but in broad terms its constituent parts had to be democratic. Jennings insisted that centralising control over defence and foreign affairs for a single Western European bloc, which would attend the League of Nations in unity, was

75 Ibid 365–366.

76 Ibid.

77 Ivor Jennings, *A Federation for Western Europe* (Cambridge University Press 1940) 1.

78 Ibid 2.

fundamental to peace.⁷⁹ Some form of coordinated control over colonial possessions and economic relations within and beyond the Federation was central to avoid repeating the financial and military disasters of the interwar period.⁸⁰ These formed the pillars of Jennings' view. But he also insisted that it was not a utopian project. The 'empty sentiments' and 'vague Utopianism' that reflected a poor understanding of the practical and theoretical problems involved in such a union were a serious danger.⁸¹ To clarify these practicalities, and outline how powers over foreign affairs, defence and some controls on economic relations and colonies might operate, Jennings turned back to the only other international organisation he thought effective and guiding: the British Empire's interwar experience of global order.

Analogies with the Empire and illustrations from its successes and failures form much of the arguments that followed. Pleading for the practicality of the scheme and exhorting the anglophone world to advocate for it, Jennings argued that just as the 'systems' from the 'Mediterranean to the Arctic' are 'copies' of the British system adapted to national characters and 'conditions of national life', his plan was 'based essentially on the British tradition' as it was 'adapted by British people' to the conditions of North American and Australia and, thus, the 'initiative' for the scheme must come from those peoples.⁸² But the Commonwealth would also endure and be accommodated into the Federation. He insisted that nothing in the plan would formally detract from the King's powers or interfere with imperial–dominion relations – 'The Statute of Westminster of 1931 would not be amended even by the omission of a comma' – but practically it would significantly change Commonwealth intergovernmental relations: the UK could not defend the dominions except through the Federation's processes, and citizenship and immigration status would change, though this would not follow if the dominions were to join the Federation themselves.⁸³

Following this imperial guide, Jennings' vision for the interaction of domestic and international in his European Federation strongly resembled the imperial–dominion arrangements in their 1920s forms, albeit here solidified in a written international constitution, rather than the policy preferences of the Empire and its areas of disengagement with dominion governments. Major foreign policy decisions would be for a Council of Ministers and President, to the exclusion of any 'direct political relations' between individual federated states and outsiders.⁸⁴ But plenty of international questions would be reserved to the internal systems of these states. There are 'many subjects of international discussion' that would remain 'entirely within the jurisdiction of the federated States': public health, extradition, mutual enforcement of foreign judgments, bankruptcy, patents, trademark, copyright and communications.⁸⁵ Balancing this internal jurisdiction with the problems usually solved in single-nation federations by delegating all international powers to the Federation prompted Jennings to draft a 'limited treaty-making power', granted to the constituent states, but subject to the Federation's control.⁸⁶ The Federation would also hold a legislative power to implement major treaties it signed,

79 Ibid 6ff.

80 Ibid 6–15.

81 Ibid 3.

82 Ibid 156–157.

83 Ibid 34–40.

84 Ibid 105.

85 Ibid.

86 Ibid 107ff.

and Jennings contemplated a convention for the unification of laws between the constituent states.⁸⁷

In general layout, Jennings' Federation plan presaged many of the major elements of the post-war European integration projects and the eventual EU. Yet, Jennings' hope for a commonwealth with empire enduring alongside these European projects did not come to pass. Indeed, it is in the coda of Jennings' final works that his views on the international and domestic shift at the end of empire. They focused primarily on the kinds of domestic orders that the former colonies should aspire to adapt to their local conditions, mostly along the lines of the British constitution, though offering little guidance on their newly acquired rights and duties under international law. Jennings was extensively and personally involved in decolonisation as a constitutional architect.⁸⁸ His last works turned to vast statements of legislative authority and executive power – now asserted by newly decolonised states – but seeing new roots for them in the history of British colonial law-making.

In the 1961 second edition of *Parliament*, Jennings began now with Coke's early seventeenth-century vision of Parliament's authority as 'transcendent and absolute', not exactly rejecting it, but pointing to its clear functional limits while giving it theoretically global reach: 'The legislative authority of Parliament extends to all persons, to all places and to all events; but the only legal systems which it can amend are those which recognise its authority.'⁸⁹ Parliament is not subject to any 'physical' limitation, only those limits recognised by law. Law here meant simply the authority that peoples would practically accept and consent to; 'convenient general propositions' not entirely removed from social and political realities, but 'not necessarily bear[ing] any very close' relation to them.⁹⁰ Jennings noted that, regardless of the claims of statutes still on the books that purported to bind 'subjects of the Crown in America', this evidently could not include former colonial possessions over which the UK once exercised jurisdiction.⁹¹

As part of this view, Jennings once more contested Dicey's arguments that the rule of law prohibited wide discretionary authority and was not well served by delegated legislation. Jennings contended that this ignored the vast history of extra-parliamentary law-making outside the British Isles,⁹² which was, amidst decolonisation, in the process of being dismantled and transferred to new states. Jennings listed the range of Crown rights to legislate in conquered or ceded territories where no local legislature had been set up or the right to legislate reserved, the Crown's wide powers to 'act as [it] pleases outside British territory and against foreigners [which] follows from principles of the common law', orders binding even British subjects in protectorates, trust territories, and Crown rights to legislate for certain settled colonies.⁹³ Those powers, formerly exercised for empire, which excluded international law's application in favour of imperial constitutional law, were now to be held by these new sovereigns. Jennings' vision, then, was still for a world order that based its idea of the international on both 'something like the principles

87 Ibid 109–110.

88 See e.g. Mara Malagodi, 'Ivor Jennings's constitutional legacy beyond the occidental–oriental divide' (2015) 42 *Journal of Law and Society* 102; Ivor Jennings and Harshan Kumarasingham, *The Road to Temple Trees: Sir Ivor Jennings and the Constitutional Development of Ceylon: Selected Writings* (Centre for Policy Alternatives 2015) (Jennings' autobiographical reflections on Sri Lanka).

89 Ivor Jennings, *Parliament* (2nd edn, Cambridge University Press 1961) 1.

90 Ibid 2.

91 Ibid 1.

92 Ibid 474.

93 Ibid.

of British liberalism' as well as something like the principles – to him, practised and proven – of the British Empire.

As both of these foundational orthodoxies began to slip away in the 1960s, Jennings' focus turned to delivering lectures that buttressed and explained his work drafting new constitutions for decolonising states.⁹⁴ Amidst wide discussions of diversities in local populations, educational programmes, responsible government, the difficulties of constitution-making removed from local conditions, and the constitutional documents themselves, Jennings almost entirely eschewed any discussion of international law for these new states. Instead, Jennings' reflections on late 1940s Asian decolonisation concluded with an examination of Commonwealth (rather than international) relations, and the suggestion that the historical and economic ties of the Commonwealth ought to guide newly independent India, Pakistan and Sri Lanka, alongside the likely benefits of a general alignment with British views of the 'power politics' of the early 1950s Cold War.⁹⁵

By the 1960s and the era of African decolonisation, Jennings' (rather condescending) concluding suggestions would briefly note that new African states 'have a part to play in the international scene'.⁹⁶ But Jennings also thought that African leaders should treat their new international powers as carefully as their fledgling domestic governmental forms, given that control over external affairs had until independence been 'matters for the Government of the United Kingdom'.⁹⁷ The Commonwealth, Jennings suggested, might be a source of friendly advice, information and diplomatic connections.⁹⁸ The danger, however, was of African alignment with communist bloc states, determined to undermine democratic systems, and importing their ideologies alongside international aid and advice.⁹⁹ More abstractly, Jennings argued that the very existence of independent states necessarily led to international 'competition', and that each state tends to press its internal political organisation and culture as the mark of the ideal.¹⁰⁰ But despite all these international challenges, Jennings concluded that the greater ones remained internal. Constitutions could provide some solutions for self-government, but their success remained for the men – and, Jennings added, women – in public service.¹⁰¹

Conclusion: dissolutions

This article has shown how the transformations and fall of the Empire motivated Jennings' radical rethinking of the domestic and international in a range of projects around empire, administration and international community. What began as a focus on the interaction of imperial–constitutional law with the new international legal system, turned to the uses of the 'rule of law' to guide the development of international laws and, finally, post-war projects of European federation, decolonised independence and human rights. At that point, the dissolution of the British Empire in the 1950s and 1960s, its replacement with the Commonwealth, and the shift in Western hegemonic power from Britain to America had turned the Empire's global connections of power and law into

94 See e.g. the connected works of W Ivor Jennings, *The Commonwealth in Asia* (Clarendon 1951); W Ivor Jennings, *The Approach to Self-Government* (Cambridge University Press 1956); W Ivor Jennings, *Democracy in Africa* (Cambridge University Press 1963).

95 Jennings, *Asia* (n 94) chapter 8 ('Commonwealth Relations').

96 Jennings, *Africa* (n 94) 84.

97 *Ibid.*

98 *Ibid.*

99 *Ibid.* 85–87.

100 *Ibid.* 87.

101 *Ibid.* 88–89.

ones of imposed culture and inescapable history; the real power and law having gone elsewhere to the conflicts of the Cold War.¹⁰² British visions of the international and domestic did not cease so much as turn to a different field: general jurisprudence. While Jennings drafted new constitutions for the decolonising world and lectured Asian and African jurists and state leaders, H L A Hart's analytic legal positivist 'revival' of John Austin's perspective influentially contended once more that international law lacked the status of law, for lack of sovereign or command, and could not be analogised to domestic law, where these elements were central.¹⁰³ Hart's vision seemed aimed at the failures of the League, the internationalism of the decolonising world, and the apparent 'deadlock' of current international institutions that, in the midst of the Cold War, could neither lawfully command nor protect in service of any ideology, but instead operated only through force, if at all.¹⁰⁴ The complexities of the debates over the relationship of international and domestic law now came to be dominated more by the intricacies of linguistic usage. This dissolved into an analytic project that tried to abstract itself from the world events and the rise of public and international law and power, intimately connected to the Empire, that had made Jennings' attempts to understand and link or distinguish them so urgent and important. Those events and the new roles for the international and domestic in justifying intervention and internal legal rearrangements according to capitalism or socialism would come to burn through the Cold War unabated, amid the flexing of new imperial powers.

102 On law and the end of (British) Empire, see Charlotte Peevers, *The Politics of Justifying Force: The Suez Crisis, the Iraq War, and International Law* (Oxford University Press 2013) ch 3, 'The Suez Crisis'; Adom Getachew, *Worldmaking after Empire: The Rise and Fall of Self-Determination* (Princeton University Press 2019). On new global political ideologies in the war and its aftermath, see Or Rosenboim, *The Emergence of Globalism: Visions of World Order in Britain and the United States, 1939–50* (Princeton University Press 2017).

103 H L A Hart, *The Concept of Law* (3rd edn, Oxford University Press 1961) ch x.

104 On Hart, primitive law and decolonisation, see Coel Kirkby, 'Law evolves: the uses of primitive law in Anglo-American concepts of modern law, 1861–1961' (2018) 58 *American Journal of Legal History* 535. On Cold War, see further Luis Eslava et al (eds), *Bandung, Global History and International Law: Critical Past and Pending Futures* (Cambridge University Press 2017); Matt Craven et al (eds), *International Law and the Cold War* (Cambridge University Press 2019).