1. Introduction to the international legal system as a system of knowledge

1. THE TOPIC AND OBJECTIVE OF THIS BOOK

International law is an instrument of sorts. It is a tool used to accomplish practical tasks, many of which are the bread and butter of international lawyers. Thus, the relevance and importance of international law is inextricably tied to activities such as: the negotiation and conclusion of international agreements; the adoption of resolutions and decisions; the making of declarations and the issuing of statements and instructions; the publication of reports; the adjudication and arbitration of international disputes; and the pleading of parties before a court or tribunal. Henceforth in this book, we will refer generically to these activities as ‘the practice of international law’.

The practical orientation of international law has implications for international legal research. While research postulates that international law has an existence separate from the beliefs of those who use it, those beliefs are still relevant, as every instance of legal practice inevitably presupposes the intervention of a mind capable of mentally processing evidence of whatever international norm might be relevant at the occasion. Ultimately, it is not international law that international lawyers put to use, but rather their knowledge of it.

This observation emphasizes the importance of the interplay of the human mind with legal facts. To be able to understand and assess any element of the practice of international law, legal researchers must have some idea of the conditions for the formation of knowledge about international law. The authors of this book insist that every such idea presupposes a notion of an international legal system. In a later section of this chapter, we will explain the finer details of this suggestion, which builds on four premises:

1. In a minimal sense, knowledge can be described as a justified true belief.¹
2. The epistemic justification of a belief held by an individual is dependent on the structure of the entire system of beliefs that this same individual

¹ See Chapter 2, Section 1.
The international legal system as a system of knowledge possesses. The fact that single beliefs are not arbitrarily pieced together, but arranged as a unitary whole (‘a system’), presupposes the existence of two kinds of beliefs. Not only do people hold first-order beliefs, thinking, for example, that a certain legal state of affairs obtains; they also hold second-order beliefs: they have a certain idea of how first-order beliefs fit together. Hence, it is a first necessary condition for the justification of a first-order belief relative to any person that the second-order beliefs held by that same person allow it.

3. The justification of a belief is also dependent on factors that are external to a believer’s mind. These factors vary with the context in which knowledge is being sought, as, for example, international legal discourse. Hence, if, for some individual, the internal justification of a single belief about international law depends on the second-order structural beliefs held by that same person, these second-order structural beliefs will have to enjoy recognition by other participants in international legal discourse, or else the belief will not classify as a piece of knowledge. Put differently, international legal discourse presupposes some notion of how single pieces of knowledge of international law should be fitted together. We will refer to this as a ‘notion of an international legal system’.

4. The notion of an international legal system is an ideal. It is the belief that some precise way of organizing single pieces of knowledge about international law is desirable and worth aspiring to.

There is hardly any more fundamental issue for international legal research than the conditions for the formation of knowledge about international law. Still, further engagement with this issue remains precarious, since there is no one single notion of an international legal system. In fact, international legal discourse accommodates several different such notions. These different notions tend to reveal themselves in the occurrence of irreconcilable legal opinions and dispute. To illustrate, consider the heated debate that arose among international lawyers in the aftermath of the famous *Pinochet (No. 3)* Case.

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2 See Chapter 2, Section 2.
3 See Chapter 2, Section 2.
4 See Chapter 2, Section 2.
5 See Chapter 2, Section 2.
6 See Chapter 2, Section 2.
7 See Chapter 2, Section 3.
8 See Chapter 2, Section 3.
9 *R v Bow Street Metropolitan Stipendiary Department Magistrate, ex parte Pinochet Ugarte (No 3)*, United Kingdom House of Lords. For some of the debate rel-
This case raised an important general question concerning the legal effects of the *jus cogens* status of the prohibition of torture: Does this status of the prohibition imply that charges for the perpetration of torture can be brought in domestic courts against the former Head of State of another country, irrespective of the immunity enjoyed by that person under rules of international law? To answer this question, in one way or another, discussants had to engage with the rule which affords priority to rules of *jus cogens* over rules of ordinary international law. This rule applies on the condition of the existence of a normative conflict. Obviously, if a conflict between a rule of *jus cogens* and a rule of ordinary international law had not existed, then priority would not have been an issue in the first place.

On the face of it, the proper application of the rule which affords priority to rules of *jus cogens* over rules of ordinary international law would seem to require consideration of two obligations. First, there is the obligation of states not to allow charges for the perpetration of torture to be brought in domestic courts against the former Head of State of another country. Second, there is the obligation of states and individuals not to perpetrate torture. General opinion confers on the former obligation the status of ordinary international law; it confers on the latter obligation the status of *jus cogens*. These two obligations, however, do not relate to the same conduct, which is a condition for the existence of a normative conflict, irrespective of one’s preferred definition of this tricky concept. Understandably, the focus of lawyers’ debate soon shifted – from the obligation of states not to allow charges for the perpetration of torture to be brought in domestic courts against the former Head of State of another country, to the obligation of states not to absolve perpetrators of torture of criminal responsibility.

To reach the conclusion that this third obligation existed, and that the obligation should be afforded priority over the rule of immunity for foreign Heads of State, discussants had to find some argument which suggested that
it derived from a *jus cogens* norm. The often used argument reads something like the following:

The obligation of states not to absolve perpetrators of torture of criminal responsibility derives from the same norm as the obligation of states and individuals not to perpetrate torture. If the latter of these two obligations has the status of *jus cogens*, then consequently, the former obligation has that status, too.

This argument entails a structural claim. More precisely, it entails a claim of how lawyers should separate individual norms of international law from other individual norms belonging to the same legal system. Interestingly, the argument used by discussants on the opposing side entails a different structural claim:

The obligation of states not to absolve perpetrators of torture of criminal responsibility cannot possibly derive from the same norm as the obligation of states and individuals not to perpetrate torture. Hence, the *jus cogens* status of the one obligation does not explain anything about either the status of the other obligation, or even its existence.

What is it that causes international lawyers to entertain different notions of an international legal system? To enable a sound response to this question, we will have to start with basic legal theory. As legal theorists have argued, different notions of a legal system derive from different conceptions of law. We endorse this idea. We will apply it for the purpose of an analysis of the relationship between different theories of the concept of international law and competing structural claims similar to those made in the consideration of the *Pinochet Case*.

As often described in international law textbooks, international lawyers belong to one of three schools of thought, depending on how they define the concept of international law. These schools of thought can be referred to as ‘legal positivism’, ‘legal idealism’ and ‘legal realism’, respectively. Each of these terms is of course only shorthand for what are in reality a great number of mutually different theories. Nevertheless, as we will explain in Chapter 2, the tripartite classification works well for the purpose of this book – simplification being a necessary means to a more intelligent consideration of the relationship between competing structural claims and different theories of the concept of international law. We will use this classification throughout. Thus, as we

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12 See e.g. Raz (1980); Penner.
13 See e.g. Van Hoof, pp.29 *et seq.*
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will contend, depending on whether international lawyers presuppose a legal positivist’s, a legal idealist’s or a legal realist’s universe of thought, they will entertain different notions of an international legal system. The objective of this book is to establish this claim and to explore how these different notions play out in the context of a series of issues of great importance to legal practice.

This objective ties in with the reason that motivates the writing of this book. This reason is essentially a belief in the good of rational international legal research. As this book will demonstrate, the great divide among lawyers’ notions of an international legal system has far-reaching practical implications. This is evident from the controversy that some legal issues tend to provoke, as, in the example, the occurrence of a normative conflict. What eventually causes contention are the different understandings of lawyers of the concept of international law. Lacking a clear perception of this relationship, legal researchers will be unable to communicate about issues of international legal structure at anything other than a superficial level. Even more, they will be unable to form an internally coherent position, running at all points of the debate the risk of arguing irreconcilable propositions. The way to eliminate or ameliorate these effects, and to improve conditions for more rational international legal research, is to clarify the precise relationship between competing structural claims and competing theories of the concept of law. This is precisely what this book will do. We will comment on the significance of its findings in Chapter 15, where we will also explain in greater detail both the concept of rational international legal research and our suggestion that rational research of international law is a good.

The organization of the book will follow the logic of the inquiry. Section 2 of this chapter will lay out the fundamental assumptions upon which the writing of this book will be based. These assumptions represent our understanding of issues that should be key to any study of the concept of international legal knowledge. They include: the general concept of knowledge (Section 2.1); the relevance of international legal discourse for the formation of international legal knowledge (Section 2.2); and the notion of an international legal system (Section 2.3). Some of these issues have been briefly touched upon already. Indeed, it has proven impossible to write this introductory section without assuming at least some rough understanding of fundamental concepts. Section 2 will explain these concepts in more detail. In so doing, it will provide this book with a more solid theoretical foundation.

Chapter 2 will engage more closely with the divide between the different understandings of legal positivism, legal idealism and legal realism in the concept of international law. It will briefly delineate the tenets of each of these schools of thought. Founded on this basic outline, more importantly, the chapter will identify the precise notion of an international legal system that is
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The outcome of this exercise will be referred to as ‘a theory of the conditions for the formation of international legal knowledge’.

The great bulk of this book – Chapters 3 through 14 – will be written with a focus on legal practice. Any study of a knowledge system raises a crucial epistemological question: What can we know about this system? As we take for granted, although some notion of an international legal system is indispensable for the formation of international legal knowledge, no such notion can itself be observed. What researchers can observe are its many manifestations. This being our point of departure, in Chapters 3 through 14 we will use the theory developed in Chapter 2 for the analysis of a series of themes in legal practice. In an attempt to gain a fuller understanding of the various notions of an international legal system accommodated by international legal discourse, in each of these chapters we will engage with a different kind of legal relationship. They are, in order of appearance: the relationship between international legal discourse and the formation of international law; the relationship between rules and principles; the relationship between norms considered as norms; the relationship between norms considered as elements of a legal hierarchy; the relationship between norms that conflict with one another; the relationship between different spheres of international regulation; the relationship between law and language; the relationship between law and time; the relationship between international and domestic law; the relationship between law and subject; the relationship between different international judicial bodies; and the relationship between international law and claims of legitimacy. This part of the inquiry will demonstrate the wide practical implications of our theory of the conditions for the formation of international legal knowledge. It will help to build a bridge between legal practice and the more philosophical aspects of our topic.

The methodology that we will be using is rational reconstruction. In practical terms, the book will theoretically systemize and make explicit some of the inescapable logical conditions for making certain legal arguments. As assumed, by logical necessity, every legal argument entails an idea of the proper definition of the concept of international law, and *a fortiori* a notion of an international legal system. In the reverse, whatever a lawyer’s definition of the concept of international law, he or she is committed to the several propositions that can be logically inferred from that definition. This should not be misunderstood to mean that this book will provide a description of the actual universes of thought or mindsets of any single international lawyer. In reality, individual lawyers rarely lend themselves to easily found categorizations such as legal positivist, legal idealist or legal realist. This is so because,

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14 See e.g. Bankowski & others, pp.9–27.
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when lawyers engage in legal discourse, they typically give only fragments of a logically complete argument, and they frequently express or imply logically inconsistent propositions. What this book aims to do is come to grips with the respective viewpoints of legal positivism, legal idealism and legal realism as such.

2. THE CONCEPT OF INTERNATIONAL LEGAL KNOWLEDGE

2.1 The JTB Test

People acquire knowledge about international law in various ways, depending on the sources of information available and their learning preferences: they listen to lectures and oral presentations; they read legal work, such as textbooks and legal commentaries, monographs, academic articles and judicial decisions; they think about the application of international law to real or fictitious cases; they discuss the application of international law with others; they write legal briefs and academic papers; and so forth.

People have different motives for doing any of this. We cannot categorically exclude that there are at least some people who seek international legal knowledge for the mere pleasure of just knowing. More importantly, however, international legal knowledge (like knowledge of all law) has an unmistakable practical value, since, ultimately, legal knowledge is knowledge about norms, and norms serve as guidance for human behaviour. Say that you know, for example, that according to a rule of customary international law, all states have an obligation to prevent criminal charges from being brought in their domestic courts against foreign ministers of other countries. If you are a legal advisor to a government, this knowledge may prompt you to recommend the withdrawal of a bill. If you work for an NGO, it may prompt you to launch a campaign proposing an exception to the rule granting foreign ministers immunity. If you are a judge, it may prompt you to try to interpret domestic law so as to prevent your country from acting inconsistently with its international obligations.

Legal knowledge is a cognitive achievement. It is the result of a mental process of sorts, manifested in a specific kind of attitude of an individual to either a proposition or a set of propositions. Epistemologists refer to this atti-

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15 Compare Kvanvig.
16 Importantly, this is so also for the legal realists. On the legal realists’ conception of a legal norm, see Chapter 2, Section 4.
17 See e.g. Steup & Neta, p.6.
To possess a piece of legal knowledge is to believe that some certain legal state of affairs obtains. A person may believe, for example, that international law imposes on states the obligation to prevent criminal charges from being brought in their domestic courts against foreign ministers of other countries. If an individual does not believe that this legal state of affairs obtains, as epistemology takes for granted, he cannot know it. That said, belief is of course not a sufficient condition for knowing. A person cannot claim to know, for example, that the Earth is flat just because he or she believes this. The question is what further qualifications should be added to our definition of a piece of knowledge.

In textbook accounts of the concept, it is standard to begin with ‘the JTB test’, which suggests that a piece of knowledge be defined as a Justified True Belief (hence the abbreviation).  According to this definition, a person (S) knows something (p) if and only if: (i) p is true; (ii) S believes that p; and (iii) S has good reason for believing that p. If p is made to stand for the proposition that the Earth is flat, for example, then this proposition will for S represent a piece of knowledge if and only if: (i) S believes that the Earth is flat; and (ii) it is true that the Earth is flat; and (iii) S has good reasons to believe that the Earth is flat.

The requirement that a proposition must be true derives from the mere character of what we would like to think that the proposition represents – a fact. For the same reason that a false proposition cannot represent a fact, so no belief in false propositions can be defined as knowledge possessed by any person. Another way of putting this is to say that people cannot know things about which they are wrong. It is primarily because of the requirement of truth that no person can be said to know that the Earth is flat.

True can itself mean many different things. Depending on the theory of truth that people adopt, a belief can be thought of as true if: it corresponds to a fact; it is part of a coherent system of beliefs; or it is useful to believe. In this book we see no reason to delve further into this issue, which is one of the more contended in philosophy. We will be content with simply acknowledging that

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18 It is commonplace among epistemologists to distinguish between knowing facts (or knowing that), knowing how, and knowing individuals. Ibid, pp.6–8. We are assuming throughout that legal knowledge is a matter of knowing facts.
19 See e.g. Ichikawa & Steup, p.3.
21 Ibid, p.2.
22 Ibid, pp.2–3.
23 See e.g. Glanzberg.
24 Ibid.
legal propositions have truth-value, and that, consequently, the requirement of truth applies to them as to any other piece of propositional knowledge.

The requirement that a person must have good reason to believe whatever he or she happens to believe would seem to be necessary to fill the gap that would otherwise be left between knowledge and the truth. Truth is a matter of how things are and not of how they can be established to be. Thus, when we say that only belief in true propositions can be referred to as knowledge, we are not saying anything about how anyone can access that truth. If knowing something means to have a certain access to the truth – which is what the terminology assumes – a definition of knowledge must include an element that can (at least tentatively) guarantee that access. This is what the requirement of justification supposedly does.

Hence, a lucky guess can never represent a piece of knowledge for any person. Assume, for example, that a university professor – we can call him John – was just awarded a huge research grant. This is an event which John thinks calls for some celebration, such as the sharing of a bottle of champagne with his wife and family. Nevertheless, John does not bother to buy a bottle of champagne on his way home from work, since he believes that they have already a bottle of champagne stored in their kitchen fridge. John holds this belief because he is convinced that his wife (Jane) is a psychic, and that she has already bought a bottle of champagne to celebrate his grant, although she has no information from him about either the success of his grant application or that he had even submitted it. Now, because Jane is meeting with some friends later this evening, she has indeed bought a bottle of champagne and placed it in their kitchen fridge. This means that John is certainly right in believing what he does. Nevertheless, we cannot say that John knows that they have a bottle of champagne stored in their kitchen fridge, since he holds this belief for the wrong reason. Phrased in the terminology of the JTB test, ‘he does not have good reasons to believe’ that they have a bottle of champagne stored in their kitchen fridge.

While the JTB test may be an appropriate point of departure in an account of the concept of legal knowledge, it cannot be the end of such an account. As epistemologists have shown, there are particular cases for which the JTB test would seem to be insufficient. The proper solution to this problem, they

25 See e.g. Steup & Neta, pp.7–8.
26 See e.g. Ichikawa & Steup, p.3.
27 Because of luck, a belief can be unjustified yet true; and because of human fallibility, a belief can be justified yet false. This is why truth and justification are two separate conditions of knowledge.
28 See e.g. Engel.
29 See e.g. Ichikawa & Steup, p.5.
argue, is to revise our understanding of its three elements, or to reinforce them by a fourth element.\textsuperscript{30} Much of the discussion of this issue revolves around the element of epistemic justification. We will deal with it in Section 2.2, which engages more closely with this precise element.

2.2 Legal Knowledge and the Element of Epistemic Justification

In order for a belief to represent a piece of legal knowledge for a person, according to the JTB test, that person must have good reason for holding this belief. What does this requirement mean precisely? What does it mean to say, for example, that some individual knows that international law imposes on states the obligation to prevent criminal charges from being brought in their domestic courts against foreign ministers of other countries? This question is indeed fundamental for the writing of a book such as this. Yet, it impresses on us the need to engage with one of the most contentious of issues dealt with in epistemology. In this section, we will briefly describe how we position ourselves relative to some of the contentious points.

Let us begin by recalling the context in which pieces of knowledge are formed. As epistemologists generally acknowledge, single pieces of knowledge do not exist in isolation. They are always part of a greater body of knowledge – a set of beliefs.\textsuperscript{31} In this set of beliefs, single beliefs are epistemically dependent on other single beliefs. As one philosopher puts it, ‘knowing some things is a condition for knowing other things’.\textsuperscript{32} Stated the other way around, if some things are not known by a person, then, as a result, there will inevitably be a whole series of other things that he or she cannot possibly know. This dependence of single beliefs on other single beliefs is reflective of the existence, in a body of knowledge, of a certain structure. Structure being a characteristic feature of a system, there are reasons to think of a body of knowledge as a ‘belief system’ – and, by extension, as a ‘system of knowledge’.\textsuperscript{33}

The interdependence of the single beliefs in a knowledge system affects not only the process of knowledge formation but also the understanding of epistemic justification. If a person’s acquisition of a piece of knowledge is conditional upon his or her previous (or simultaneous) acquisition of other

\begin{itemize}
  \item \textsuperscript{30} Ibid, p.6.
  \item \textsuperscript{31} See e.g. Steup & Neta, p.11.
  \item \textsuperscript{32} Ibid.
  \item \textsuperscript{33} This is not to say that our entire corpus of knowledge forms one single system of knowledge. Depending on such things as topic, there seems to be a closer relationship between some propositions than between others. Our entire corpus of belief should probably be seen as consisting of several systems of knowledge, with very loose connection or none at all. On this topic, see e.g. P Murphy.
\end{itemize}
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pieces of knowledge, then this goes to show that it is somehow by reference to the structure of the engaged system of knowledge that the requirement of justification must be explained. In the context of the previous example, if a person believes that international law imposes on states the obligation to prevent criminal charges from being brought in their domestic courts against foreign ministers of other countries, it is only if the engaged system of knowledge allows this belief that it takes on the character of a piece of legal knowledge. This observation is reason for us to turn our attention to the structure of a knowledge system, which is obviously in want of further clarification. More specifically, we need to know more about its particular nature. In what sense does the structure of a knowledge system exist? More specifically, in what sense should we be thinking about the existence of a system of knowledge about international law?

Epistemologists conceive differently of the ontology of a knowledge system, but for the purpose of this book there is no real need to delve into the details. We can be content with just noting that theories of epistemic justification generally take one of two distinctly different approaches to the issue. Epistemologists refer to these two approaches as ‘internalism’ and ‘externalism’, respectively. Internalism is the idea that epistemic justification depends solely on factors internal to a believer’s mind. Belief is undeniably a mental state, and belief-formation is a mental process. Internalists argue, on this basis, that also the justification of a belief must reside in the belief-forming processes of the person who holds it. That is to say, not only do people hold first-order beliefs of whether or not a certain factual state of affairs obtains, as, for example, the belief that international law imposes on states the obligation to prevent criminal charges from being brought in their domestic courts against foreign ministers of other countries; they also hold second-order beliefs of how first-order beliefs fit together. According to internalism, it is by reference to these second-order structural beliefs, and to them only, that we determine whether first-order beliefs are justified or not. Hence, internalists see epistemic jus-

34 Knowledge may be acquired by a person belief by belief, but also in chunks of beliefs. See ibid.
35 See e.g. Steup & Neta, p.11.
36 See ibid, pp.11–17.
37 See e.g. Truncellito, pp.7–11.
38 See e.g. Poston.
39 See e.g. Truncellito, p.8.
40 Ibid.
41 Ibid.
tification strictly from the perspective of a believer: what the requirement of justification implies is that a belief must be justified for him or her.\textsuperscript{42}

Externalists gather around the idea that internalism is wrong.\textsuperscript{43} In its minimal form, consequently, externalism is the view that at least some features external to the mental life of a person play a necessary role in epistemic justification.\textsuperscript{44} Externalism does not imply that all justification of a proposition is external. It accepts that some parts of the necessary justification may be internal whereas other are external. In contrast to the internalists, who focus all their attention on a person’s subjective perspective on his/her beliefs, typically, externalists would also be interested in knowing whether beliefs derive from a reliable source or a reliable belief-forming process.\textsuperscript{45} Ultimately, externalists ground this position on the intuition that the relations between one’s beliefs and the truth matter throughout the entire process of knowledge formation – and hence not only to the formation of first-order beliefs, but also to their incorporation into a system of knowledge.\textsuperscript{46} People sometimes do not reflect on the way in which their first-order beliefs fit together, in which case they will obviously lack the internally accessible second-order structural belief that internalism requires. As externalism sees it, it would be odd to discard these first-order beliefs as something other than knowledge if formed on the basis of reliable evidence,\textsuperscript{47} such as that provided by a good textbook or an informed teacher, for example.

In this book we prefer to think of knowledge in the sense of externalism, for two reasons. First, externalism helps to deal with so-called Gettier cases,\textsuperscript{48} named after the American philosopher Edmund Gettier, who in 1963 published an article with the provocative title ‘Is Justified True Belief Knowledge?’\textsuperscript{49} As Gettier’s article showed, there are particular cases in which a person’s belief cannot be described as a piece of knowledge, although it may be both true and justified and thus satisfy the JTB test. Below is David Truncellito’s example. We will refer to its main character as ‘the University Professor’:

Suppose that the clock on campus (which keeps accurate time and is well maintained) stopped working at 11:56 pm last night, and has yet to be repaired. On my way to my noon class, exactly twelve hours later, I glance at the clock and form the belief that the time is 11:56. My belief is true, of course, since the time is indeed

\textsuperscript{42} Ibid.
\textsuperscript{43} See e.g. Steup & Neta, p.10.
\textsuperscript{44} See e.g. Poston, p.1.
\textsuperscript{45} See e.g. Watson, p.28.
\textsuperscript{46} See e.g. Poston, pp.11–12.
\textsuperscript{47} Ibid, pp.12–13.
\textsuperscript{48} On Gettier cases generally, see e.g. Hetherington.
\textsuperscript{49} Gettier, pp.121–3.
11:56. And my belief is justified, as I have no reason to doubt that the clock is working, and I cannot be blamed for basing beliefs about the time on what the clock says. Nonetheless, it seems evident that I do not know that the time is 11:56. After all, if I had walked past the clock a bit earlier or a bit later, I would have ended up with a false belief rather than a true one.50

It is one of the important points of this story that the University Professor thinks of justification in the sense of internalism.51 Among epistemologists at the time of the publication of Gettier’s article, internalism was predominant,52 and so Gettier can be excused for attributing to the Professor this particular understanding. However, it can be asked whether, in cases such as the one described, it is not precisely this understanding of epistemic justification that makes the JTB test insufficient.53 Externalists may argue that the University Professor should have accounted for the possibility that the clock may not be working accurately, and since he apparently did not, he cannot be justified for believing that the time is 11.56 – at least not if the exact time is of importance to him (which it is, if he is expected at 12.00 by a class of students). For externalism, consequently, Gettier cases do not show that the JTB test is insufficient. They show that internalism is wrong.

Second, externalism helps to explain the intuitive understanding that many people have of the concept of knowledge as being in some way relative to the particular context in which knowledge is sought. In the previous example of the University Professor, we noted that, in the sense of externalism, the Professor may not be justified for believing that the time is 11.56 if it is important to him to know the exact time. We indicated that perhaps we would have drawn a different conclusion had the exact time been of lesser importance – if the Professor had had no upcoming class, for example, and no scheduled appointments. In making these suggestions, we are siding with a branch of epistemology called ‘contextualism’.54 As contextualism argues, different contexts set different standards of epistemic justification.55 If I believe, for example, that my colleague Sven Svensson had a myocardial infarction, I would normally be justified for holding this belief if Sven’s doctor ventured this precise opinion. The doctor herself, however, cannot be justified for believing that a patient had a myocardial infarction until she has run certain tests suggesting this conclusion, such as an electrocardiogram or an ultrasound scan. Apparently, if

50 Truncellito, p.6.
51 See e.g. Poston, p.1.
52 Compare Truncellito, p.8.
53 Compare Truncellito, p.8; Watson, p.27; Poston, p.1.
54 See e.g. Black.
55 Ibid.
the standards that apply to me demand comparatively little in terms of reliable
evidence and belief-forming processes, the standards that apply to the doctor
are more demanding. The explanation to this difference would seem to reside
in the two characteristic features of medical practice:

- Unlike my belief, the doctor’s belief will form a basis for the further treat-
  ment of Sven.
- Unlike me, the doctor is accountable for her opinion under the legal and
  ethical responsibility systems established by the law and the community of
  medical practitioners, respectively.

To understand contextualism’s further implications for this book, it is suf-
cient to recall the particular features of international legal discourse – the
context in which international lawyers and scholars form their beliefs about
international law.56 International legal discourse bears some of the same distin-
guishing marks as medical practice. Say that an international lawyer or scholar,
who finds himself in a conference with colleagues, expresses: ‘I know that the
occupation by Russia of Crimea is illegal.’ There is always the chance that this
opinion will be acted upon by other conference attendants, and by participants
in international legal discourse more generally. Similarly, the lawyer or scholar
is accountable for his opinion: if conference attendants or other participants in
international legal discourse challenge his opinion, he would have to defend it.
The context is markedly different from when a layman, in an everyday situa-
tion, expresses the exact same opinion: ‘I know that the occupation by Russia
of Crimea is illegal.’ This opinion will have little practical consequence, just
like my belief that Sven Svensson has had a myocardial infarction.

This observation suggests that the knowledge of international law held
by international lawyers and scholars is relative to other (more demanding)
standards of epistemic justification than those applied to other people. These
standards appear to be specific to international legal discourse.57 Assume, for
example, that I am reading Articles 19 and 21 of the 1969 Vienna Convention
on the Law of Treaties, trying to understand the effect of invalid reservations
to a treaty. When a certain reading resonates with me, I can say that I know
the meaning of the Convention in the sense of internalism. I may believe, for

56 In this book, ‘legal discourse’ refers simply to any collection of verbal exchanges
of legal propositions. So understood, ‘international legal discourse’ refers to the sum of
all utterances in oral or written form expressing a proposition about international law.
For further considerations of the concept of international legal discourse, see Chapter 3,
section 1.

57 Indeed, they appear to derive from it – just as standards of medical ethics derive
from the activities of the community of practice of which the doctor, in our previous
example, is herself a member.
example, that if a state makes an invalid reservation to a treaty, as a general rule, and regardless of the particular treaty considered, the treaty will not enter into force with respect to the reserving state. In the context of international legal discourse, colleagues will hesitate to describe this belief as a piece of knowledge, since it does not cohere with the practice of some international courts, such as the European Court of Human Rights\(^{58}\) and the work of the International Law Commission.\(^{59}\) Outside of international legal discourse, people will not be acquainted with the practice of the European Court, nor with the work of the International Law Commission. Even less will they be able to assess the relevance and importance of these authorities for the formation of international legal knowledge.

Consequently, as the authors of this book insist, the characterization of a single belief about international law as a piece of knowledge depends on constraints placed by international legal discourse on all its participants. If, for some individuals, the internal justification of a single belief about international law depends on the second-order structural beliefs held by that same person, then these second-order structural beliefs will have to enjoy recognition by other participants in international legal discourse, or else the belief will not classify as a piece of knowledge.

With this approach to epistemic justification, the concept of international legal knowledge takes on a nature that we find both interesting and intuitively attractive. For internalists, knowledge is determined from an internal point of view, as something achievable for each individual within her own belief system. The formation of international legal knowledge remains for them an individualistic project, in which an individual engages alone, for a purpose that is his and his only. For us, international legal knowledge is determined not only from an internal point of view, but also from the point of view of a social practice. Thus, international legal knowledge is something which all individuals operating within the context of international legal discourse can achieve, and which several individuals can hold simultaneously. In contrast to internalists, we conceive of the formation of international legal knowledge as a collective project. We conceive of it as a project in which individuals engage together, for a jointly held purpose. Indeed, it is because of this precise understanding of the concept of international legal knowledge that we find the writing of this book worthwhile. With this book, obviously, we are not just trying to impart a set of beliefs to its future readers. We are trying to contribute to what we conceive to be a jointly held purpose – the rationality of international legal research.

\(^{58}\) See e.g. *Belilos v Switzerland*, paras 51–60.

2.3 The Notion of an International Legal System

In Section 2.2, we began an inquiry into the issue of epistemic justification by noting the importance of the structure of a knowledge system. If a person believes that \( p \), it is only if the engaged system of knowledge allows this belief that it takes on the character of a piece of knowledge. We moved from this observation to enquiring into the nature of the structure of a belief system. In the choice between the fundamentally different approaches of internalism and externalism, we declared a preference for the latter. We do not accept that the epistemic justification of legal propositions is a matter concerning only the second-order structural beliefs held by a person. As we insist, whether an individual has good reason for holding a belief is an issue that also prompts consideration of factors that are external to the mental life of this individual. In the context of international legal discourse, more specifically, the characterization of a single belief about international law as a piece of knowledge about international law depends on whether the supporting second-order structural beliefs held by an individual enjoy recognition in this same discourse. Put the other way around, international legal discourse presupposes some notion of how pieces of international legal knowledge fit together – ‘a notion of an international legal system’. To complete the task that we began in Section 2.2, we must now add a few words on how we understand this particular concept. Until we have done this, we will not have given a complete answer to the question with which we began: In what sense should we be thinking about the existence of a system of knowledge about international law?

As we insist, the notion of an international legal system is an ideal. It is a belief that some precise way of organizing single propositions about international law is desirable and worth aspiring to.\(^60\) Depending on which philosophical tradition one wishes to affiliate with, one can conceive of this ideal in two fundamentally different ways.\(^61\)

According to the one approach, the notion of an international legal system is something ingrained in international law. This is to say that international law provides itself an idea of how lawyers and scholars should be thinking when fitting legal propositions together in a knowledge system. For any person who adopts this approach, the notion of an international legal system will exist in the same sense as the many rules and principles of which international law consists. It will derive from the same sources of origin. We will refer to this approach as ‘the innate conception of an international legal system’.

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\(^60\) Compare Taekema, p.4.

\(^61\) Ibid, pp.17–45.
According to the other approach, the notion of an international legal system is an abstraction. It is a necessary element in any thinking about international law and a pre-condition for the acquisition of international legal knowledge. For any lawyer or scholar who adopts this approach, the notion of an international legal system does not exist in the sense of an integral element of international law. It exists only as a construction of the human mind and as an implicit aspect of the standards of epistemic justification that participants in international legal discourse bring to bear on their many structural claims. We will refer to this approach as ‘the transcendent conception of an international legal system’.

For the purpose of this book, we will not adopt the innate conception of an international legal system. We find this conception unattractive, as it forces us to think of the competing structural claims made by international lawyers as reflective of a multitude of beliefs about the precise notion of an international legal system ingrained in international law. As a result, it similarly forces us to adopt either of two equally unacceptable assumptions. According to a first assumption, international law provides several notions of an international legal system. We find this assumption unacceptable, since it ultimately implies a rejection of our idea of international law as a single legal system. According to a second assumption, some lawyers’ beliefs about the precise notion of an international legal system ingrained in international law are simply incorrect. We find this assumption unattractive because it disagrees with our motives for writing this book. As we see it, the value of this book is not that it enables critical assessment of the various existing notions of an international legal system and facilitates the forming of an opinion as to which notion is correct and which is not. The significance of the book lies elsewhere. We believe it creates a better understanding of international legal discourse and improves conditions for rational research of international law.

For the purposes of this book, consequently, we will adopt the transcendent conception of an international legal system. We will conceive of the notion of an international legal system as simply a construction of the human mind. As we will assume throughout this book, international lawyers have different ideas of how pieces of international legal knowledge fit together because they assume the use of different standards of epistemic justification. No one of these standards is any more, or any less, correct than the others; they are all equally correct, each in its own conceptual universe. We cannot see anything inherently problematic about this assumption, which squares well with our

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experience of international legal discourse. It also helps to justify the writing of this book, which aims to create a better understanding of the relationship between different structural claims and different conceptual universes. If the reconciliation of competing structural claims could have been accomplished by simply discarding some of these claims as incorrect, the topic of this book would certainly be less interesting.