

## *Editorial*

### **Editorial: Open Access: No Closed Matter; In This Issue; In This Issue – Reviews**

#### **Editorial: Open Access: No Closed Matter**

The move to Open Access publishing has been driven in large part by a desire to make research publicly available and to make knowledge less exclusive. The journals that we edit have long been committed to these objectives. Yet as emerging forms of Open Access publishing are gaining greater recognition, it is important to address some of their potential unintended consequences. These include: (1) a risk that certain groups of authors will no longer be able to publish their work because of a lack of access to funding or to institutions with funding; (2) a risk that editorial decisions may be perceived as being shaped by the author's affiliation, as such affiliation may influence the ability to pay publishing fees; (3) a risk that authors lose the freedom to decide where to submit their work due to their institutions' selective agreements with publishers or research council instructions; and (4) a risk that journals' financial viability becomes more and more dependent on the quantity of articles for which Open Access fees are charged, rather than the quality of curation. While the journals that we edit are moving towards full Open Access, we share these concerns to encourage a discussion with our authors, readers, publishers, fellow editors and academic communities about how best to address these risks. Understanding these concerns requires first addressing the rise of Open Access and its different forms, including the funding structures.

#### ***The Case for Open Access***

There has been a push for making research generally, and journal articles specifically, 'Open Access'; that is to say, freely accessible (and, often less relevant outside the hard sciences, freely reusable) to everyone on the internet, whether or not they have a subscription. The main push has come from public funding bodies: aiming to make access to knowledge less exclusive, they rightly insist that publicly funded research must be publicly available. Publishers have creatively responded to this political demand. It coincided with another driver for change in the publishing world: the internet has made it harder to enforce payment for access to the knowledge that publishers disseminate. Publishers were therefore interested in an Open Access world if Open Access came with alternative sources of income to cover their costs (and, in the case of commercial publishers, to generate profit).

The case for the aim of Open Access is strong, particularly due to fundamental inequalities in accessing academic literature. This bears most heavily upon scholars working in the Global South, but it is also an issue for scholars whose institutions in the Global North have library budgets that can acquire only a fraction of all scholarly work that gets published. Broader publics outside universities also struggle to access academic literature due to prohibitive paywalls. The push for Open Access is strong because many vectors converge: readers want access; authors want everyone who is potentially interested in their work to have access to their work; and editors want their journals to reach as many readers as possible.

### *Open Access: Three Clarifications*

Three clarifications are required upfront concerning how journals are structured and financed, the extent of their transition to Open Access and the different categories of Open Access publication.

First, the ownership, management structures and finances of journals, including those that we edit, differ. For instance, some journals are fully owned by the publisher, others are partially owned by the publisher and others are not owned by the publisher but the publisher manages the subscriptions, publication and distribution in exchange for annual payments that cover the expenses of running the journal. These differences in structures lead to differences in who is ultimately in control of, and financially responsible for, the journal. The points that we collectively raise in this editorial, however, apply irrespective of these differences. For ultimately, whether it is the editors who are responsible for a journal's finances or a publisher, the shifts in the funding structure due to the modalities of Open Access have an impact on a journal's financial viability and thus potentially its existence. (Unlike independent journals, publishers have bandwidth to cross-subsidize: using the revenues from a revenue-gaining journal to keep a smaller journal running. However, some of our discussions with publishers suggest that there is only a limited willingness to do so.)

Secondly, different law journals are in different phases of the 'transition' towards Open Access. Some still work entirely on the basis of subscriptions; others are 'hybrid', with some articles behind a paywall and others Open Access, and again other journals are fully Open Access. Our journals are currently 'hybrid', and while some of the darker sides of full Open Access may not exist for hybrid journals, the status of a hybrid journal comes with its own challenges, as we explain below.

Thirdly, of the so-called 'Green', 'Gold' and 'Diamond' Open Access, we focus on 'Gold' Open Access. Green Open Access is a form of self-archiving: a version of the manuscript becomes available in online repositories. Publishers often put restrictions on which versions of articles are allowed to be put in such repositories, and when. Funding bodies that insist on Open Access often do not accept such restrictions. The 'real Open Access', according to the publishers, is therefore Gold Open Access, which gives access to the published article beginning from the moment of publication. Gold Open Access depends on a fee being paid on behalf of the author(s), unless a fee waiver is in place. Diamond, or Platinum, Open Access gives immediate access to the published article without requiring such payment; instead, the journal's running costs

are covered by major funders (for instance, universities or science foundations) and voluntary contributions. Diamond Open Access is still relatively rare, but we will dedicate a few words to it towards the end.

### *No Such Thing as a Free Article*

The increase in online-only consumption of academic research has decreased the costs of publishing. Prices of subscriptions have nonetheless gone up. This cannot be attributed only to inflation and new services to enhance dissemination and discoverability of publications. At commercial publishers, the income has also gone to higher profits.

That said, even non-profit publishers cannot publish for free, as there are still costs involved in publishing. Each table of contents of the journals that we edit almost always features one or more ‘free’ articles – articles that the publisher makes freely available – but in practice there are no costless articles. Even when editors work entirely pro bono, as we all do, the administration of the editorial pipeline, copy editing and the infrastructure to make articles available, known and traceable require considerable financial resources.

In the old model, the reader or their institution paid for those costs. Individuals, and more often libraries, individually or collectively, took out subscriptions to a journal or to a package of journals. In the model of Gold Open Access, the author, or in practice often their grant or institution, pays an Article Processing Charge (APC, at the moment this is usually between US\$ 2000 and US\$ 3000) for each article they publish. In the currently prevalent hybrid model, publishers generate revenue through a combination of the two sources of income: subscriptions are still paid because of the existence of articles that are not published Open Access, while the Open Access articles generate income through APCs. This hybridity is also reflected in the ‘Read and Publish transformative agreements’: agreements between collectives of universities and publishers according to which the universities have the right both to read and to publish in certain journals. Yet as the name reveals, such agreements are meant to be temporary, because they allow publishers to double dip: taxpayers pay towards both the subscription and the APCs. The aim is that once a journal receives sufficient APCs to make the transition financially viable, they ‘flip’ to full Open Access. Then the Read and Publish transformative agreements are likely to become, in essence, Publish agreements.

### *Gold Open Access: Shifting the Paywall*

The dramatic shift that Gold Open Access entails is therefore not one from priced to priceless, but in the service that is being priced: access to read or access to publish. In essence, the Gold Open Access model redirects the bill from the consumers of knowledge to the producers of knowledge. Whereas in the reader-pays model the individual reader or their institutions would pay for access to journal articles, Gold Open Access is based on the author, or their institution, paying for the publication, either through the author’s grants or their university, or in some instances personally.

It may seem that little changes in practice, as (collective) agreements between universities on the one hand and a publisher on the other remain key: cash still flows from

the universities to the publishers. But the shift in the product being priced – access to reading or access to publishing – can have significant consequences.

### ***Potential Dark Side: Limiting Access for Authors***

Among these consequences, there is a risk that ‘open access for all readers’ ends up meaning ‘access closed for some authors’. These are the authors who do not belong to institutions that have either Read and Publish transformative agreements or the resources to pay the APC of an individual article. Currently, transformative agreements are far more prevalent in the geographic Global North than in the Global South. If left unaddressed, there is a high risk that the shift to Open Access may give people in the Global South more access to knowledge produced in the Global North while limiting their ability to participate in this knowledge production. In other words, rather than narrowing the Global North—Global South divide, Open Access could exacerbate inequalities. Publishers and editors are aware of this risk and are creating models according to which there are APC fee waivers, especially for scholars in specific ‘developing countries’.

However, studies have shown that even with such waivers in place, APCs can deter researchers from the Global South. One of the painful ironies of Open Access could thus be, as Emilio Bruna has observed, ‘that you grant authors around the world the ability to finally read the scientific literature that was completely closed off to them, but it ends up excluding them from publishing in the same journals’.

Moreover, based on specified metrics, the list of ‘developing countries’ for which APC-waiver schemes are in place is a limited one; it would leave many of our potential authors outside those countries unable to afford these charges. For instance, institutions in the Global North also may be unable to pay for (all) the transformative agreements or all the APCs. Scholars without institutional affiliations – those looking for an academic position, or never having had one, or having retired from one – may have to rely on personal finances to publish their work, irrespective of quality.

In the pre-Open Access world, less well-endowed institutions and independent scholars were also in a disadvantaged position, then in terms of access to reading. But individual authors could often find ways around that – emailing an author to ask for their work could provide an easy and quick remedy. Now that the hurdle has shifted from access to reading to access to publishing, it will be harder to overcome for individual authors without resources for APCs, whether institutionally or personally.

### ***Potential Dark Side: Authors Losing the Freedom to Choose Where to Submit***

Even in well-resourced universities, budgets for APCs will often be limited. This will lead to policies governing who can ask for APCs to be covered and what type of scholarship will be funded for publication. It could be that such policies affect certain people and certain types of scholarship more than others. For instance, if a university has a limited amount of money for APCs, will it look at who has authored the publication: a research associate, a temporary lecturer, a professor, a PhD student, an emeritus

professor? Will access to limited funds depend on whether the academic work is an article, a case note, a debate, a review essay or a book review? Or whether the article is submitted early in the year or later in the year (when the Open Access resources may have been exhausted)? Are some types of scholarship worth more than others? Thus far, different genres of academic work may have received different ratings in promotion evaluations or hiring committees, but authors themselves would not be prevented from submitting work in their favourite genres, for instance book review essays. If one can publish only if one pays APCs, the question becomes: What do those deciding on APC funds find worth paying for? Publishers are already suggesting that fund managers often consider only 'articles' worth their money, encouraging journals therefore to publish more articles and fewer book reviews, review essays and other types of scholarship. Such other types may be devalued due to the perception that they do not contribute to production costs.

Journals will want to keep attracting scholarship irrespective of whether an author has the resources to publish. One option would be to make the fee-waiver scheme available beyond the list of 'developing countries'. But once a journal is fully Open Access, and there are therefore no longer subscriptions while Read and Publish agreements are increasingly becoming Publish agreements, publishers will consider that too many fee waivers put the financial viability of the journal at risk, thus threatening the journal's existence.

### ***Potential Dark Side: Privileging Institutions That Can Pay?***

This brings us to the third risk: that an author's institutional affiliation may be perceived as relevant for the review process. Given that ultimately the balance sheet of a journal will be shaped by whether or not authors or their institutions can pay for Open Access, there would be a financial incentive for journals to publish articles by authors affiliated to universities that are known to have Read and Publish transformative agreements or the resources to pay APCs. Publishers are already sending notes to editors encouraging them, more or less explicitly, to be aware of the financial considerations of Open Access.

One could, of course, build a firewall between editorial decisions and financial considerations, but practically, this wall cannot be fully sealed – editors live in this world and are aware of the Read and Publish landscape. Unlike peer reviewers, editors see the name and affiliation of authors, and will at some stage know, whether they want to or not, which universities tend to have such agreements and resources and which do not. Processes will need to be developed to ensure that editors are not influenced by these financial considerations.

Yet the problem of perception remains: authors may fear that such links matter. This is mostly the case for journals at financial risk, when the publisher may begin to put pressure on publishing more APC-generating articles. We raise this point precisely because we think that, as a matter of principle, institutional affiliation should never be a relevant factor, however indirect, for editorial decisions on what to publish. We also raise it to commit that we have never taken and will not take institutional affiliation into account when taking editorial decisions.

### ***Potential Dark Side: From Curation to Mass Production***

A fourth risk is that Open Access undermines one of the key roles of academic journals: selection. As journal editors, we perceive our role as one of selecting excellent research and, as much as possible, helping to make it even better. Whether we succeed in this used to be assessed by the readership. In the recent past, publishers took subscription numbers as a key indicator of financial success. But in the full Open Access model, where there are no longer subscriptions for reading, the publisher's indicator of financial success could shift to APC revenue. One way to boost APC revenue is to increase the number of articles for which APCs are paid, either directly or through Read and Publish transformative agreements. In that case, journals are expected to publish *as much as possible*: every article published Open Access translates into a few thousand dollars more on the balance sheet of the journal. This may be particularly a concern for financially insecure journals, but the financial incentive structure suggests that what matters for journals is *how much* they publish (Open Access) rather than *what* they publish. Alternatively, or additionally, for-profit publishers may be tempted to augment the APCs, making publishing even more of an exclusive business, which would take us back to the first risk.

### ***The Hybrid Model Does Not Solve All Issues***

The currently prevalent hybrid model seems to address most of the first, second and third concerns, in that most people can still publish and that the income of a journal is not entirely dependent on APCs. However, some funding bodies are beginning to require their members to publish their work in fully (as opposed to hybrid) Open Access journals because they are unwilling to finance journals that benefit from double-dipping. Some universities are following in their wake, making resources for Open Access publishing available only if the article is published in a fully Open Access journal. Or universities strongly encourage their staff to publish only in journals with which they have Read and Publish transformative agreements and do not make resources available for Open Access publishing in other journals. These developments may affect the freedom of an author to choose a journal which they think best fits the submitted article. And it will also mean that the 'mailbox' of a journal will not be determined by its editorial policies and academic reputation, but rather by extraneous financial considerations.

### ***Diamond Open Access as the Panacea?***

In Diamond Open Access, the costs of publication are paid neither by the readers nor the authors, but by major funders and voluntary contributions. Whilst seemingly ideal, it comes with dependency on donors – unless the journal enjoys a significant endowment, editors must also become continuous fundraisers. With the current funding structures, it is questionable that there is sufficient sponsorship available for all existing law journals to make the move to Diamond Open Access without a race to the bottom to obtain funding. It could be feasible if research councils began to fund journals rather than the APCs of their grantees. Major donors are very welcome to contact us, as long as full editorial independence will at all times be guaranteed.

## *A Call for Further Discussion*

We are not disputing the objective of making research more widely available – the journals that we edit have long been committed to the premises of Open Access scholarship. The issues we have raised concern the forms it has taken. How can it be rolled out in a way that is least discriminatory and fairest for all, while unsettling existing patterns of advantage rather than further entrenching them?

In negotiating with publishers and as creators of academic presses, universities have special opportunities and responsibilities to engage in such debates. We have had open and constructive discussions with our publishers about the potential dark sides of Open Access, which they fully recognize. But they feel that they are part of a publishing landscape that they do not control. It is too easy to engage in a blame game and just to point, for instance, to commercial profit-greedy publishers. As Raffaella Kunz has argued, ‘it would be wrong to assume that in the digital age, the main threats to academic freedom come from the private sphere. Rather, public actors are, at different levels, very much involved and at least co-determine the direction the development currently takes. It is public universities and libraries that conclude problematic contracts with private publishers, rendering them at least co-responsible for possible rights violations’.

Scholarship must be public, as is the responsibility to ensure that the publishing infrastructure allows the production of knowledge to be inclusive, equitable and sustainable. We hope that this editorial fosters more debate in public law and international law circles so that we can avoid entering into an Open Access world that could work against its own objectives.

*European Journal of International Law (Editors in Chief)*

*International Journal of Constitutional Law (I•CON) (Editors in Chief)*

*London Review of International Law (Editorial Board)*

## **In This Issue**

The Articles section in this issue opens with a contribution by *Stewart Manley*, *Pardis Moslemzadeh Tehrani* and *Rajah Rasiah* on the non-use of African Law by the International Criminal Court. The authors argue that the ICC should be more open to citing materials from Africa and other countries of the Global South, especially, but not only, when it identifies general principles. In the next article, *Helga Molbæk-Steensig* and *Alexandre Quemy* ask what effects non-renewable terms have on the international judiciary’s independence and impartiality. The authors suggest that, following the introduction of non-renewable terms at the European Court of Human Rights in 2010, judges write more individual opinions overall, criticize their appointing state more often and defend it on fewer occasions. The Articles section concludes with a contribution by *Gus Waschefort*, who seeks to challenge the conventional wisdom that the arbitrariness of loss of life during the conduct of hostilities is always to be determined by reference to international humanitarian law.

Roaming Charges in this issue challenges conventional wisdom regarding Beauty Salons.

The issue continues with an EJIL: Debate!, which features two Replies to Stephen Humphreys' article 'Against Future Generations', published in issue 33:4 (2022), and a Rejoinder by Humphreys. *Margaretha Wewerinke-Singh*, *Ayan Garg* and *Shubhangi Agarwalla* agree with the main points raised by Humphreys, but reject his conclusion that future generations discourse should be dismissed altogether. For his part, *Peter Lawrence* argues that Humphreys' take underappreciates developing countries' deep concern for their own future generations as well as for addressing poverty in the present. Lawrence also remains sceptical about the idea that intergenerational justice cannot be channelled into workable legal rules, suggesting that even today climate litigation often goes beyond the present-day framings of classic human rights law. *Stephen Humphreys* responds in his Rejoinder. Pivoting on the mobilization of the concept by both rich and poor countries, Humphreys highlights the ways in which, despite its rhetorical appeal, the category of future generations can decay into farce.

In the Critical Review of Governance section, *Lena Riecke* focuses on the concept of 'dual use' in the 2021 EU Dual-use Regulation. She explains that the duality drawn by this concept not only controls but enables trade of technologies and argues that this duality is flawed in the spyware context and undermines human rights safeguards.

The Last Page closes the issue with a poem by *Else Lasker-Schüler* (1869–1945), considered by many to be the greatest of all German women poets and one of the finest Jewish poets. It is beautifully translated into English by *Franziska Wolf*.

ALB, OCT and WS

## In This Issue – Reviews

This issue features five book reviews – all of which our reviewers seemed to enjoy a lot. We begin with *Diane Desierto's* review of Tom Ginsburg's 'magisterial' *Democracies and International Law*. Desierto notes the urgency of Ginsburg's inquiry at a time when authoritarian powers 'repurpose, cherry-pick, and distort human rights for their private political ends, economic gain, and the entrenchment of their respective authoritarian regimes'. Next is *Tom Ruys*, who reviews Agatha Verdebout's *Rewriting Histories of the Use of Force*, which fundamentally challenges the assumption that 19th-century international law was 'indifferent' to the use of force by states – 'an eye-opener for those of us (all of us?) who have been repeating the mantra that, throughout the long 19th century, States could go to war "for a good reason, a bad reason, or no reason at all"'. In the third review, *Ramona Vijayarasa* asks whether gender constitutionalism can advance women's rights around the world and whether there is any hope for transnational action on this topic in her review of *Global Gender Constitutionalism and Women's Citizenship*. Vijayarasa applauds Ruth Rubio-Marín for her critical and insightful analysis and for addressing a tendency in comparative law scholarship to overrepresent the Global North. With *Chris Whomersley's* review, we move from gender constitutionalism to *German Practice in International Law 2019*, also starting with a G, but otherwise a rather different genre. Whomersley commends Stefan Talmon and his team for having brought to light Germany's engagement with international



law: he highlights the fact that the volume does not merely collect practice but offers critical comment ('indeed sometimes very critical comments'). Finally, *Cecily Rose* reviews Fulvia Staiano's *Transnational Organized Crime: Challenging International Law Principles on State Jurisdiction*, and while she questions some of the assumptions and conclusion of the book, this, too, is 'a rich resource for anyone interested in the legal tools' to fight transnational organized crime.

Five exciting books, then, to inform and open minds. Happy reading!

*GCL and CJT*

