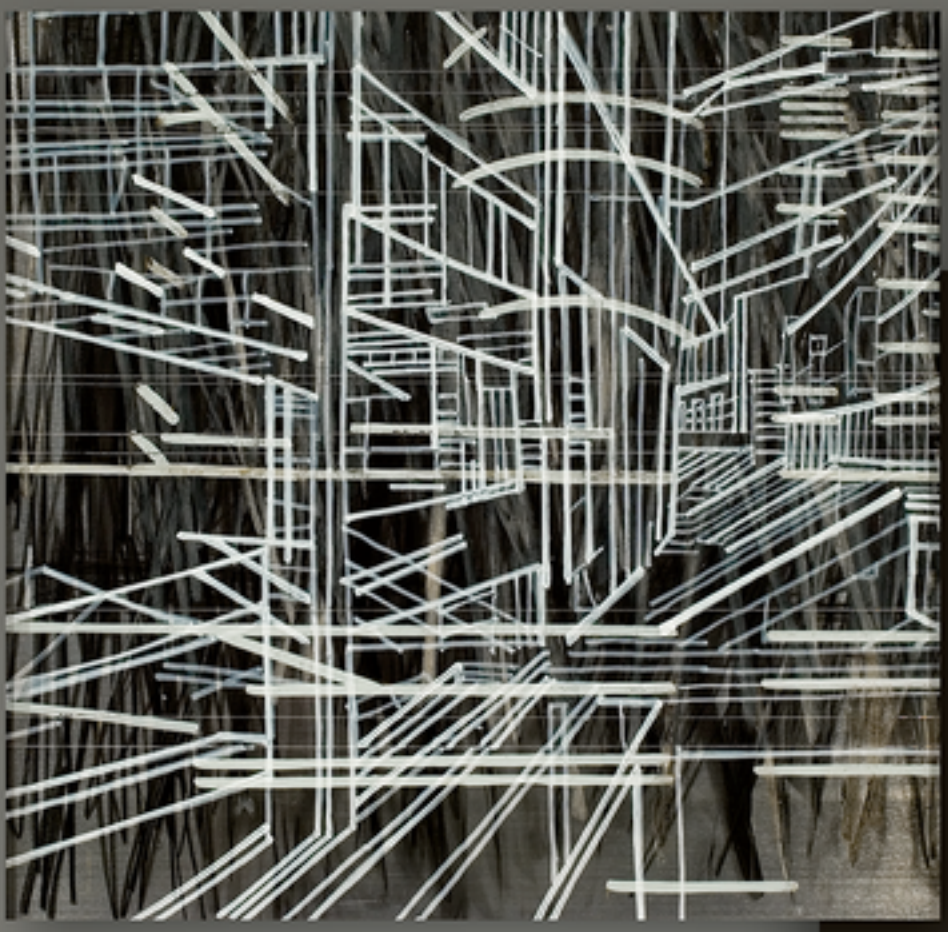

INTERNATIONAL LAW THEORIES

An Inquiry into Different Ways of Thinking

ANDREA BIANCHI

OXFORD

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To Ida, Victoria, Hélène

Preface

This book finds its roots in a course I have been teaching at the Graduate Institute in Geneva for the past few years, and at King's College London during my sabbatical leave in 2016. I never wrote a book out of my courses. Unlike many of my colleagues, I had never thought of capitalizing on the investment that one makes by teaching a course, sometimes reflecting on the materials for years and taking in whatever criticism or praise students may offer year in year out. Students may find it hard to recognize this work as one that has been prompted by the course they once took. In fact, the title of this book may be different from the title of the course they attended. The first year I entitled the course 'The Shaping of International Law by Its Scholars'. I intended to address the course primarily to PhD students, and have them reflect on the enormous influence that international law scholarship has always exercised on the making of international law. The result was not great. Barely a dozen students turned up despite the huge amount of work I had put into the preparation of the course materials. According to my assistant, the main reason for such a disappointing turnout was the rather uninspiring title I had chosen for the course. The title was far too dull and unsuitable for students who are trained to believe that scholarship is not a 'source' of international law and that all scholars can possibly shape is the size of the readers they impose on their students! Well, that was entirely my point and the reason for teaching the course! I wanted to show students that the way in which we think of international law and make use of it depends heavily on its scholarly representation. Furthermore, I intended to illustrate with a series of examples that one can think of and write about international law in many different ways. I had to concede, however, that, if I wanted to increase attendance at the course, I could not simply rely on some natural interest that advanced law students supposedly have or should have in thinking critically about what they are doing. I had to learn a thing or two about 'marketing'! Most of all I had to choose a different title …

I changed the title of the course into 'International Law Methods'. That choice marked a slight improvement in terms of attendance by students. At the same time, however, it created a deep misunderstanding regarding what the course was about. Reference to methods created the expectation that the course would provide students with a set of methodologies apt to be applied in the practice of international law. The lesson I learnt was that one needs be very careful about choosing words, particularly in the delicate context of the title of a course bearing on the fundamental aspects of international law! I would have never imagined that the term 'method' carried with it such clear and loaded connotations. I suspect, however, that the 1999 *American Journal of International Law* Symposium on Method is partly responsible for having spread the idea within the discipline of international law that

method stands in juxtaposition to theory as the 'applied' does to the 'abstract'.[1] In other words, method would concern 'the application of a conceptual apparatus or framework—a theory of international law—to the concrete problems faced in the international community'.[2] Even though the conclusion of the symposium organizers was that 'method is the message',[3] I feel that we have not really followed through on that commitment. Scholarly efforts to promote interest in method, or to foster sensibility to different theories or approaches to international law have been scant. This was one of the reasons that prompted me to consider writing a book that could be of use not only to students, but also to anyone who might have an interest in exploring different ways of thinking about international law.

As far as my course in Geneva is concerned the one-year experience with the 'method' in the title gave way, following consultations with my collaborators, to the more enticing title of 'International Law Theories'. 'International Law Theories' proved to be the most successful branding for the course. Many more students enrolled in the course, although some of them, I am afraid, for the wrong reasons. The hope to get easy and readily applicable theoretical takeaways provided many students with the motivation to sit the course. In the first class, however, I would set out to unambiguously and unceremoniously dispel their expectations about such easy takeaways. As a consequence of my incapacity to reassure those students who have a hyper-utilitarian approach to graduate studies, the numbers were brought down again. At the same time, I started thinking that perhaps I was approaching the right qualification for what I was doing, as 'theories' captures the idea of intellectual frameworks or ways of thinking about international law, which is precisely what I set out to teach and what I wanted to write about.

To write on theories elaborated by colleagues is no easy task. While any glaring error or omission should be blamed on me and taken as a deficiency on my part, I fully take responsibility for the personal account I offer of each and every theory I present in the book. What I wrote in each chapter reflects the way in which I have come to see a particular theory over time, by reading materials, talking to colleagues, interacting with students, and benefiting from their insights. Occasionally, scholarly interpretations and intellectual postures may have been inadvertently distorted or misunderstood, and I apologize in advance for any susceptibilities that my analysis might hurt. Overall, my goal (and my hope) is to spur further interest in reading about different theories of international law.

Although many people played a role in shaping up this project, I would like to mention the teaching and research assistants (strictly not in alphabetical order, but in chronological order of service) who have assisted me over the years: Melanie Wahl, Adil Hasan Khan, Julia Otten, Luca Pasquet, and Oana Ichim. Each and every one of them brought in their respective sensibilities and contributed to the effort of conveying to the students the importance of learning that there may be a

[1] *Symposium on Method in International Law* (1999) 93 *American Journal of International Law* 291.
[2] Ibid, 292.
[3] Steven R. Ratner and Anne-Marie Slaughter, 'The Method is the Message' (1999) 93 *American Journal of International Law* 410.

plurality of views and perspectives about international law. Julia encouraged me to take up the task of writing this book before she set sail for other seas. I am grateful for her support at the time the book was conceived and designed. Heartfelt thanks also to Fuad Zarbiev and to Thomas Schultz for their friendship and intellectual support; to Yves Corpataux, Head of the Graduate Institute's Library for his precious assistance; to Dan Peat for his feedback and affectionate encouragement; and to Emma Endean-Mills from OUP for a most pleasant collaboration in the preparation of the book. Finally, I would like to express my gratitude to Matt Windsor whose editing work and learned advice have been incredibly important to me in the late stages of the project.

Had I not fortuitously met Merel Alstein while going down the steep staircase of the Felix Meritis in Amsterdam, it is unlikely that this book would have been published by OUP. Happenstance always plays a role in life.

Andrea Bianchi

Geneva
May 2016

Table of Contents

1

Different Ways of Thinking about International Law

Two fish are swimming in a pond. 'Do you know what?' one fish asks. 'No, tell me,' the other fish responds. 'I was talking to a frog the other day. And he told me that we are surrounded by water. Apparently we live in it!' His friend looks at him with great skepticism: 'Water? What's that? Show me water!'[1]

Aim

This book is an attempt to get an increasing number of scholars, researchers, and students to realize that there are different ways in which one can think about international law. In other words, it seeks to stir up 'the water' that we, as international lawyers, swim in. By offering an account of several theoretical approaches to international law, the book is an extended invitation to engage with different ways of thinking about international law as a discipline and profession.

As Iain Scobbie aptly put it, 'international law does not exist in an intellectual vacuum'.[2] The way in which we understand what international law is and what it does, or should do, is based on a set of 'theoretical assumptions and presuppositions', which are not disclosed most of the time.[3] Unmasking or unveiling—or simply identifying—these theoretical assumptions and presuppositions helps us better comprehend the nature of our understanding of international law, and the biases that may accompany our own or others' vision of it. This venture is not merely academic. The way in which such theoretical presuppositions shape our

[1] The precise attribution of this story is uncertain. A variation of it was used to great effect in a commencement speech delivered by the late American writer David Foster Wallace. Wallace used the parable of the two fish (no frog involved) at the beginning of his speech, to convey the idea that 'the most obvious, ubiquitous, important realities are often the ones that are hardest to see and talk about': David Foster Wallace, *This is Water: Some Thoughts, Delivered on a Significant Occasion, about Living a Compassionate Life* (Little, Brown and Company 2009) 8.

[2] Iain Scobbie, 'A View of Delft: Some Thoughts About Thinking About International Law' in Malcolm Evans (ed), *International Law* (4th edn, OUP 2014) 53.

[3] Ibid.

understanding of the power structures and systems of authority that we know as international law is far from neutral.

If we take theory in international law to connote the particular way we look at and construe the legal world in which we operate, as well as the set of precepts, constraints, and beliefs that determine what we do in our profession and how we do it, it is obvious that there may be a myriad of different theories. Indeed, the 'mushrooming of theory' makes it difficult for even the most skilled reader to orient herself amongst countless theories and methods.

The idea, still entertained by many in the profession, that international law is a *lingua franca* through which we communicate and do things together at the international level is inaccurate and somewhat naive. As I have argued elsewhere, international law is not a truly universal language anymore, if it ever was; rather, it comprises a traditional way of thinking that goes hand in hand with multiple diverse approaches.[4] At times, the same dialect appears to be spoken; at others, it is as if entirely different languages were involved. Hence, in order to be a competent practitioner or a learned scholar, it is important to be familiar with the different dialects and languages in which international law is spoken nowadays.

The main aim of this book is to provide readers with an introduction to various international legal theories, their genealogies, and criticism raised against them. Readers are encouraged to heighten their sensitivity to these different approaches, and to consider how the assumptions made by each theory affect analysis, research, and practice in international law. Ultimately, the book aims to spur readers' intellectual curiosity, and cause them to reflect more generally on how knowledge is formed in the field.

Expanding one's knowledge in a field can be an unsettling experience. In teaching courses on international legal theory, I have seen the effect on students when they are exposed to new and alternative ways of looking at international law. After a moment of incredulity upon realization of the absence of immutable truths, their attitudes and reactions vary, ranging from utter disbelief, slowly spiralling into disillusionment (occasionally followed by a spell of depression), to verbal aggression and refusal to engage anymore. The exercise of considering alternative frames of knowledge in the discipline of international law certainly requires a degree of intellectual self-assurance. In a world that is naturally geared towards acquiring certainties, it is by no means obvious that doubt is the inevitable companion of the researcher, whatever his or her discipline. All the more so in a discipline like law in which the notion of authority is so powerful and ingrained in our mind since our early days in law school—and admittedly even before—that to call it into question and doubt its rule is immediately perceived as an intolerable act of professional disloyalty, and, more generally, of social insubordination.

[4] Andrea Bianchi, 'Looking Ahead: International Law's Main Challenges' in David Armstrong (ed), *Routledge Handbook of International Law* (Routledge 2009) 392, 407.

Reflexivity

In a very general sense, reflexivity refers to the capacity to critically evaluate the way in which our mode of thinking, including our beliefs and values, affects our research and work.[5] Reflexivity is a notion that turns on the relationship between the object and the subject of investigation. In this case, the object of investigation is law as a social phenomenon or social practice, where, to use the language of Pierre Bourdieu, the *homo scholasticus* or *homo academicus* is an observer who is 'placed outside the urgency of a practical situation' and is able to 'produce practices or utterances that are context-free'.[6] In contrast, the subject of investigation is the theoretical discourse on law. These two aspects are distinct, albeit interrelated in certain ways. By providing an intellectual framing for the complex factual matrices and social practices that we are investigating, each and every one of us is situated. As Stanley Fish put it, 'we are never not in a situation'.[7] This means that whenever we approach an object of intellectual inquiry, we carry with us our professional presuppositions, cultural biases, and personal experience. There is no such thing as a neutral 'view from nowhere' as traditional legal scholarship would have us believe.[8] The scientific observer's theoretical discourse about international law, or anything else for that matter, comprises what is said, as well as what is not said.[9] The 'scholastic bias',[10] or one's assumptions and presuppositions, stands out among the unsaid.

Far from being peculiar to the legal theoretical discourse,[11] the scholastic bias is also present in other sciences, and can be characterized by a reluctance to call into question the so-called 'scientific point of view'. The reason for this could be fairly banal, namely that the most conspicuous things often escape the observer's attention.[12] Moreover, to have a perspective on one's own point of view is no easy task.

[5] The following remarks are largely drawn from: Andrea Bianchi, 'Reflexive Butterfly Catching: Insights from a Situated Catcher' in Joost Pauwelyn et al (eds), *Informal International Lawmaking* (OUP 2012) 200.

[6] Pierre Bourdieu, 'The Scholastic Point of View' (1990) 5(4) *Cultural Anthropology* 381.

[7] Stanley Fish, *Is There a Text in This Class? The Authority of Interpretive Communities* (Harvard University Press 1980) 276, 284.

[8] Pierre Schlag, *The Enchantment of Reason* (Duke University Press 1998) 126.

[9] Michel Foucault, 'Le discours ne doit pas être pris comme…' in *Dits et écrits* (Gallimard 1994) 123.

[10] JL Austin, *Sense and Sensibilia* (OUP 1962) 3–4.

[11] In the area of literary studies, see Roland Barthes: 'Toute critique doit inclure dans son discours… un discours implicite sur elle-même.' Roland Barthes, 'Qu'est-ce que la critique' in *Oeuvres complètes* (Seuil 2002) 504.

[12] 'The aspects of things that are most important for us are hidden because of their simplicity and familiarity. (One is unable to notice something—because it is always before one's eyes). The real foundations of his enquiry do not shake a man at all. Unless that fact has at some time struck him. And this means: we fail to be struck by what, once seen, is most striking and most powerful': Ludwig Wittgenstein, *Philosophical Investigations* (Blackwell 1974) § 129, 50. Similarly, Martin Heidegger noted that what is 'ontologically closest and well known, is ontologically the farthest and not known at all; and its ontological signification is constantly overlooked': Martin Heidegger, *Being and Time* (Harper & Row 1962) 69. In the novel *The Purloined Letter* by Edgar Allan Poe, the principal character neatly explains this paradox: 'There is a game of puzzles … which is played upon a map. One party playing requires another to find a given word—the name of town, river, state or empire—any word,

As Bourdieu once said, 'a point of view is, strictly, nothing other than a view taken from a point which cannot reveal itself as such, cannot disclose its truth as point of view, a particular and ultimately unique point of view, irreducible to others, unless one is capable, paradoxically, of reconstructing the space, understood as the set of coexisting points … in which it is inserted.'[13] A similar concept was expressed by Friedrich Nietzsche, when he said that, however strong our sight may be, we can only see a certain distance, and within that distance we move and live. Like spiders sitting within their nets, 'we can catch nothing at all except that which allows itself to be caught in precisely our net'.[14]

Another obvious explanation for not being aware of the scholastic bias could be that the paradigms within which academic or scientific observers operate are not external paraphernalia but the constitutive elements of their own professional identity. To call one's identity into question is never an easy job. The opposite answers provided by a distinguished physicist and an eminent chemist, to the question of whether or not a single atom of helium is a molecule, is a stunning example, provided by Thomas Kuhn, of how scientific observers are embedded in their own disciplinary identity.[15] The dearth of interest in questioning disciplines also finds its roots in traditional disciplinary boundaries. Such questioning is perceived to be metadisciplinary and thus alien to the disciplinary enterprise.[16] As far as law is concerned, such investigations are considered as being *about* the legal science, but not *within* the legal science. This qualification triggers a sociological mechanism of exclusion, which allows one to avoid questioning the fundamental tenets of the discipline, leaving the presuppositions of those who do law unchallenged.

The usefulness of reflexivity is contested. For some scholars, self-critical consciousness and reflexivity are impossible tasks or useless aspirations, as we are always in a situation of constraint created by context and by our beliefs, which are impossible to transcend.[17] Others consider attaining an objective form of knowledge

in short, upon the motley and perplexed surface of the chart. A novice in the game generally seeks to embarrass his opponents by giving them the most minutely lettered names; but the adept selects such words as stretch, in large characters, from one end of the chart to the other. These, like the over-largely lettered signs and placards of the street, escape observation by dint of being excessively obvious; and here the physical oversight is precisely analogous with the moral inapprehension by which the intellect suffers to pass unnoticed those considerations which are too obtrusively and too palpably self-evident': Edgar Allan Poe, *Tales of Horror and Suspense* (Dover Publications 2003) 172–3.

[13] Pierre Bourdieu, 'Participant Objectivation' (2003) 9 *Journal of the Royal Anthropological Institute* 284.

[14] Friedrich Nietzsche, *Daybreak: Thoughts on the Prejudices of Morality* (CUP 1982) 73.

[15] Thomas Kuhn, *The Structure of Scientific Revolutions* (3rd edn, University of Chicago Press 1996) 50–1: 'Presumably both men were talking of the same particle, but they were viewing it through their own research training and practice. Their experience in problem-solving told them what a molecule must be. Undoubtedly, their experiences had much in common, but they did not, in this case, tell the two specialists the same thing.'

[16] Alan Ryan, *The Philosophy of the Social Sciences* (Macmillan Press 1970) 2; Stanley Fish, 'Truth and Toilets' in *The Trouble with Principle* (Harvard University Press 1999) 303.

[17] Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (Duke University Press 1989) 326, 455: 'Beliefs are not what you think *about* but what you think *with*, and it is within the space provided by their articulations that mental activity—including the activity of theorizing—goes on … [B]eing situated not only means that one cannot achieve

through reflexivity an impossibility, but regard a self-critical posture as a means to better understand human experience in order to modify the circumstances in which we are situated.[18] While Fish regards theory as an impossibility,[19] Steven Winter considers that awareness of the decisions and constraints that 'mark out our social field' might allow us 'to rework them from the very place we stand: situated not just in our cultural and historical tradition, but in a real physical and social world that we construct and reconstruct through acts of imagination and commitment'.[20]

Doing Law versus Thinking about Law

Even in the context of an advanced law curriculum, it is increasingly difficult to articulate a meaningful distinction between 'doing law' and 'thinking about law'. Many students believe that to do a doctorate in law, or write an article for a law review, simply requires the enhanced refinement of the set of skills and competences that they previously acquired in their basic law degree. Only rarely does it occur to them that one might also think about what it is that they do when compiling a list of recently decided cases, and reviewing the doctrinal rationalizations that appear in the most well-known and frequently cited law review articles, particularly those authored by renowned international lawyers. To call into question such a line of authority, represented by both the law review and its readership on the one hand and the author on the other, is neither a natural instinct nor a common professional reflex. This way of thinking is inculcated at most universities worldwide. What I term the traditional approach to international law, or the mainstream orthodoxy, continues to be the norm in legal pedagogy. Those who react with contempt and disdain, protesting that they were not educated like that, must remember that the world is a much larger place than the exclusive—and usually Western—institution where they studied.

In a recent editorial of the *Journal of International Dispute Settlement*, Thomas Schultz reminded the readers that it is both the task and the identity of the journal to help think about law, and not just to think about how to do law.[21] In particular, Schultz specified that the mandate was to spur further thought and reflection on dispute settlement rather than on how to do dispute settlement. The challenge is to ask who we are, where we came from, where we aim to go, and how we aim to get there. If one needs to go beyond the narrow boundaries of the analysis of legal materials and open up to insights from different disciplines in order to do so, this

a distance on one's beliefs, but that one's beliefs do not relax their hold because one "knows" that they are local and not universal.' (466; emphasis in original)

[18] Steven Winter, *A Clearing in the Forest: Law, Life and Mind* (University of Chicago Press 2001) 332–57.

[19] Stanley Fish, *Doing What Comes Naturally*, above n 17, 320.

[20] Steven Winter, *A Clearing in the Forest*, above n 18, 357.

[21] Thomas Schultz, 'Doing Law and Thinking about Law' (2013) 4(2) *Journal of International Dispute Settlement* 217.

should not be seen as an abdication of authority but rather as a necessary intellectual inquiry into the meaning and purpose of law and its application.

I am not sure the penny will drop easily, as most of the international legal scholarship published nowadays is focused on the technicalities of lawmaking, adjudication, and enforcement. The content and scope of rules are frequently discussed, and judicial interpretation is often taken as the ultimate authoritative determination of meaning, either to be praised or criticized. Why judicial interpretation is bestowed with so much importance, why a judicial body opts for a particular outcome when others would have been perfectly conceivable, what the underlying stakes of the decision are, or—even more radically—how the rule(s) and the system by which they are created and implemented actually work are less popular lines of inquiry for international legal scholarship.

Schultz suggests that one can go on as if 'the law were just a large engine, dispute resolution its explosive part with cylinders and valves. As if we, the academic lawyers, were but the lubricants to make it run smoother, faster, in a direction set by a rarely acknowledged driver.'[22] To think about law means to inquire about the driver and the navigation system as well. Who sets the destination and why and how one gets there are fundamental questions, which should not be eluded by scholars.

Pierre Schlag, commenting on Schultz's editorial, effectively explained why it is that doing law and thinking about law are two distinct *métiers*.[23] There are many more constraints attendant on the judge or practising lawyer's professional performance vis-à-vis the academic. What judges and lawyers may or may not do is 'scripted' to a much larger extent than is the case for academics.[24] Academics enjoy a great deal of freedom in the sort of projects they embark upon.[25] Their freedom of choice, however, should come with an enhanced sense of responsibility for questioning what it is that they are doing and why. Once again, greater introspection with respect to our own professional self-identification is necessary to understand who we are, what we want to accomplish, and by what means.

Finally, to relegate intellectual activities and thinking about the law to the realm of practical irrelevance is as much a corporate defensive attitude as it is a mechanism of social exclusion. Schlag argues that 'these questions do not just arise in select moments of broad-ranging theoretical reflection or existential angst. They can also arise at any time in the midst of writing the next argument, the next sentence.'[26]

[22] Ibid.

[23] Pierre Schlag, 'A Comment on Thomas Schultz's Editorial' (2014) 5 *Journal of International Dispute Settlement* 235.

[24] Ibid.

[25] This has to be taken with a grain of salt, as academics are subject to numerous constraints as well. It suffices to think of quality-evaluation mechanisms and the requirements of grant-awarding bodies to realize that acceptable parameters of scholarship are often set by these institutions' cultures and established practices. Schlag himself makes reference to the limits of academic freedom or, rather, the freedom of academics with reference to 'the corporatization of the university, the march of the quantitative metrics, the rule of the rankings, and the triumph of administration over faculty' (Ibid).

[26] Ibid, 237.

In other words, thinking about law should be made into an ordinary activity. This book is very much in keeping with the sentiment well expressed by Schlag.

Theory and Practice

Among the questions that emerge most regularly in teaching international law theories is the one regarding the relationship between theory and practice. The prevailing culture in which we operate clearly seems to give priority to activities that are geared towards practice. The choice by the editors of a symposium in the *American Journal of International Law* to focus on method in international legal scholarship was a reference to theories that are susceptible of a practical application, which is quite telling of the cultural constraints within the discipline. Theory is either looked down upon as an undue hindrance to professional activity to which it is of no immediate relevance or, at the opposite end of the spectrum, theory is idealized and thought of in direct juxtaposition to the practice of international law.

Such an extreme way of looking at things finds an explanation in two trends that are well established by both academics and practitioners. On the one hand, academics often have the bad habit of indulging in what I call 'armchair theorizing'.[27] By this expression, I mean the disturbing tendency of some academics to elaborate theoretical constructs that are far removed from the reality they purport to explain. This is often accompanied by a certain degree of self-assertiveness and intolerance towards other ways of looking at the same phenomenon. In many ways, this attitude is reminiscent of the one described and criticized by Bourdieu, who considered it a serious epistemological mistake 'to put a scholar inside the machine'.[28] Armchair theorizing contributes to the vilification of theory more generally, and to the denigration of theorists for allegedly deflecting attention from the real problems that practice faces. The other trend consists of denying the relevance of theory to practice. I have heard several times, from fellow academics unconsciously paraphrasing Richard Rorty, that whatever does not make a difference in practice should not make a difference in legal theory.[29] However, this attitude may conceal a conservative commitment to the status quo and indicate an unwillingness to exercise any critical self-evaluation.[30]

In fact, theory provides the framework for understanding and justifying practice. Sometimes its role consists in opening up a range of possible avenues, in which

[27] Andrea Bianchi, 'The International Regulation of the Use of Force: The Politics of Interpretive Method' (2009) 22 *Leiden Journal of International Law* 651, 653.

[28] According to Bourdieu, this has the undesirable effect of 'picturing all social agents in the image of the scientist, or, more precisely, to place the models that the scientist must construct to account for practices into the consciousness of agents, to operate as if the constructions that the scientist must produce to understand practices, to account for them, were the main determinants, the actual cause of the practices': Pierre Bourdieu, 'The Scholastic Point of View', above n 6, 384.

[29] 'Pragmatists think that if something makes no difference to practice, it should make no difference to philosophy': Richard Rorty, *Truth and Progress: Philosophical Papers* (CUP 1998) 19.

[30] Iain Scobbie, 'A View of Delft', above n 2, 54.

practice can be duly channelled. The simplistic representation that practitioners get the job done on the ground, while the theorists are caught up in useless debates, is misleading and ill-conceived. Practitioners, even when they are not conscious of it, presuppose and act on the basis of a 'theory' or 'method'; a set of presuppositions and beliefs that constitute the necessary background for the exercise of their professional skills. It is against the backdrop of theory and method that those who do law bolster their choices with the necessary level of credibility and persuasiveness. At the same time, theorists cannot afford to disregard the practical dimension of legal processes. As a form of theory bearing on a social practice, legal theory must take that practice into account in order to be credible and to provide a plausible explanation for such processes.

The fact that theory and practice are closely intertwined is confirmed by the nature of reality and the social processes that the law seeks to regulate. The physical world and data in general does not speak for itself. Let us take the distinction between 'brute facts' and 'institutional facts' made by John Searle and illustrated by the example of the game of American football. If one takes a group of observers and asks them to have a look at a game of football, they would describe the regular clustering, both linear and circular, of 'organisms in like-coloured shirts', occasionally followed by 'the phenomenon of linear interpenetration' (brute facts).[31] No matter how much data is collected, the observers would still fall short of describing what we know as the game of football. What is missing are concepts such as 'touchdown', 'offside', 'points', and 'first down' (institutional facts).[32] Unless one can rely on the institutional facts—facts framed against the backdrop of concepts, institutions, and constitutive rules posed by a social group or collective intentionality—brute facts permit only a limited understanding of what is going on in reality. By the same token, the way in which we understand international law depends on the institutional facts that are agreed upon by those who set the discursive policies of the discipline and determine the significance of international law as a social phenomenon.

The relevance of theory to practice is further emphasized by the psychical nature of the law. As Philip Allott has noted: '[s]ociety and law exist nowhere else than in the human mind.'[33] Paul Amselek is similarly convinced that law has no separate existence in nature, nor can one bump into it in the actual world; it only inhabits 'l'esprit des hommes'.[34] The acknowledgement of the psychological nature of the law brings with it important consequences. The way in which one thinks of international law varies in time and space. One of the reasons for such variations is the different manner in which it may be conceptualized, which is the scholar's main task. By altering the relevant actors' perception of their activities, theory may alter the way in which the legal world is constructed.[35] Scholars must be aware that

[31] John Searle, *Speech Acts: An Essay in the Philosophy of Language* (CUP 1969) 52.

[32] Ibid.

[33] Philip Allott, 'The Concept of International Law' in Michael Byers (ed), *The Role of Law in International Politics: Essays in International Relations and International Law* (OUP 2000) 69–70.

[34] Paul Amselek, 'Le droit des esprits' in Paul Amselek and Christophe Grzegorczyk (eds), *Controverses autour de l'ontologie du droit* (Presses Universitaires de France 1989) 29.

[35] Stanley Fish, *Doing What Comes Naturally*, above n 17, 208.

theory matters. Among new theoretical approaches to international law, there are movements that may have important practical effects on the functioning of the international legal system. If nihilistic or excessively sceptical approaches dominate, there is a risk of a significant impact on practice. [36] If movements such as law and economics, global administrative law, or legal pluralism succeed in establishing their tenets as the predominant and authoritative scientific discourse, practice would be dramatically affected.[37]

As I have argued elsewhere, if 'theory talk focuses on a social practice with a view to integrating it into its operational field, its practical relevance becomes self-evident'.[38] David Garland argues that theory uses rhetoric and persuasion in order 'to move people to action … by force of analysis, argument and evidence'.[39] In this respect, one could understand theory as a 'form of practice', as theoretical work can turn the symbolic action it evokes and analyses into something that changes the way in which 'people and institutions conduct themselves'.[40] It is precisely by changing the way in which 'people perceive things and the attitudes they take towards them' that theory can be successful as a form of action.[41] Theory and practice are often one and the same thing or, if you prefer, two sides of the same coin.

The Scientific Field

Perhaps a shift of focus to the sociological perspective of 'scientific fields' can shed further light on the difficulties that international law is currently experiencing and on the underlying stakes of theoretical debates. The scientific field of international law has undergone important changes in the past two decades. If 'normal science', to borrow from Kuhn's analysis, characterizes those periods in which there is general consensus on the nature of scientific problems as well as on their solutions,[42] then this is not such a period for the science of international law. The panoply of new approaches and methodologies that have emerged overtly challenge the prevailing formalist tradition.

It would be naive to believe that the different theories and approaches are simply submitted in the arena of theoretical debates by their proponents as if they were to compete fairly, with a view to persuading the social agents that their own theory is the one that better accounts for the reality of international law. In fact, the discipline

[36] For example, two authors have recently applied the law and economics approach generally, and the rational choice paradigm in particular, to international law, arriving at the conclusion that a general international law does not exist: Eric Posner and Jack Goldsmith, *The Limits of International Law* (OUP 2005) 40–43, 225.

[37] Along similar lines, see Susan Marks, 'Naming Global Administrative Law' (2004–5) 37 *New York University Journal of International Law & Politics* 995.

[38] Andrea Bianchi, 'Reflexive Butterfly Catching', above n 5.

[39] David Garland, *Punishment and Modern Society: A Study in Social Theory* (Clarendon Press 1990) 277–8.

[40] Ibid. [41] Ibid.

[42] Thomas Kuhn, *The Structure of Scientific Revolutions*, above n 15, 23.

of international law as a scientific field is currently engaged in a power battle, in which conflicting claims to academic authority and discursive control are being put forward. While a shift towards changing the vocabulary of traditional international law categories seems to be well under way, no new set of paradigms has yet achieved sufficient power to impose itself as the scientific paradigm synonymous with disciplinary identity.

In the scientific field, judgements are formed, and weigh more or less depending on the position of the speaker or writer in the academic hierarchy. Bourdieu has shed light on how the scientific field actually works, explaining what kind of strategies are adopted by the actors in the field.[43] Thorough coverage of his theories here would lead us astray. Yet I believe that anyone interested in theoretical debates about any scientific discipline, including international law, should be privy to the main tenets of Bourdieu's theory. Too often we regard scientific knowledge production as if it were uncontroversial, obvious, or something which goes without saying. We tend to ignore the fact that such knowledge is the product of a process in which many different factors intervene.

The irenic view of a scientific community is to be contrasted with the notion of the scientific field as a 'locus of competitive struggle', in which what is at stake is the legitimacy to speak authoritatively about the discipline.[44] Scientific authority is as much a matter of technical capacity as it is of social power.[45] The socially recognized entitlement of any given scholar or theory to represent the discipline of international law carries with it social and academic authority. The latter, always formally presented in the guise of technical knowledge or reason, is in fact the product of different factors that shape power relationships within the scientific field.

The politics of university appointments, publication strategies, career patterns, and the like determine the fate of theories. Undoubtedly, as cleverly spotted by many of the movements we are about to deal with, the key element to foster any change in disciplinary scientific paradigms is the educational system. It is by controlling the curriculum and 'conquering' chairs in prestigious institutions that schools of thought can proselytize and direct change. It is via the educational system that one can secure 'the permanence and consecration of official knowledge by inculcating it systematically (scientific habitus)', particularly upon newcomers to the field.[46] To take an interest in theory does not simply entail looking at different intellectual frameworks. It also denotes the realization that power struggles are at work. This is clearly one of the 'unsaid' features of academia—presumably a deliberate strategy to hide certain imperfect and unpleasant features of the academic world—but I do not see why these processes should not be mentioned or examined. To me, they are simply part of the big picture and readers should be aware of them.

The social cohesion of each and every academic group varies, and generalizations are often inaccurate in describing the actual dynamic within the different theories

[43] Pierre Bourdieu, 'The Specificity of the Scientific Field and the Social Conditions of the Progress of Reason' (1975) 14 *Social Science Information* 19.
[44] Ibid. [45] Ibid. [46] Ibid, 30.

and movements. By and large, however, the social mechanisms and corporate reflexes are similar amongst different groups. Three times in my career, I have made forays into particular theoretical approaches in a very amateur fashion, and always prompted by intellectual curiosity. Every single time, eminent representatives of such theories have made contact, with a view to recruiting me into their ranks!

At stake is the ability to lay claim to scientific authority. Whoever possesses this form of authority is perceived as being entitled to decide which issues, methods, and theories are to be treated as 'scientifically relevant' to the field. This is also a form of capital that can be put to use in many different circumstances.[47] If science—as Bourdieu maintains—has its sole foundation in the collective belief in its basis, which is generated by the dynamic of the scientific field,[48] it is hardly surprising that the fight among the various contestants can be fierce. They must occupy the field and have their claims to authority prevail over those put forward by others. This can be achieved by persuasive intellectual constructs, rhetoric, by thriving on the players' interests, by construing and taking advantage of academic power in its multifarious forms, including students' education, and so on.

Interdisciplinarity and Its Implications: International Law &…

The urge to go beyond received disciplinary wisdom, calling it into question and remaining open to other approaches and ways of thinking about international law, inevitably leads the scholar to interrogate the boundaries of the discipline. In this collection of essays, the reader will discover some theories that by definition entail the intellectual partnership of two disciplines. 'International Law & …' movements are becoming ever more frequent as international law associates itself with such diverse disciplines as international relations, economics, and literature. The reader should be warned that authentic and disinterested cross-fertilization among different disciplines is a fairly rare occurrence.[49] Stanley Fish once stated that when two disciplines come close to each other, 'it will be the case either that one is trading on the prestige or vocabulary of the other or one has swallowed the other'.[50] Many would readily identify the risk of the second option materializing, when some of the 'International Law & …' approaches are pushed too far.

As Kuhn explained, 'scientific education inculcates what the scientific community had previously with difficulty gained—a deep commitment to a particular way

[47] Ibid, 23. According to Bourdieu, the distribution of the different types of capital (economic, cultural, and social) is the main structuring factor of the social world (Pierre Bourdieu, 'The Forms of Capital', in John Richardson (ed), *Handbook of Theory and Research for the Sociology of Education* (Greenwood 1986), 241–58).

[48] Pierre Bourdieu, 'The Specificity of the Scientific Field', above n 43, 34.

[49] Jan Klabbers, 'The Bridge Crack'd: A Critical Look at Interdisciplinary Relations' (2009) 23 *International Relations* 119. See also Martti Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law' (2009) 15 *European Journal of International Relations* 395.

[50] Stanley Fish, *Professional Correctness: Literary Studies and Political Change* (Clarendon Press 1995) 83.

of viewing the world and of practicing science in it.'[51] Indeed, the extent to which disciplines may affect the way in which we look at the world is greatly affected by their alleged specialization.[52] This holds true not only for natural sciences, but also for social sciences in general, and law in particular. What disciplines do is interpret the world according to the paradigms and discursive policies that are prevailing within them at any given time. When their object of study overlaps, a competitive game is triggered, where each discipline will strive to impose its own way of looking at social realities, using its distinct intellectual categories and vocabulary.

Each and every discipline is engaged in providing a correct interpretation of its object of study and setting the parameters for its scholarly representation. In this context, it is useful to resort to the concepts of 'episteme' and 'epistemic community'.[53] I take the concept of 'episteme' to refer to the 'knowledge' we have of a given field, to the way in which we come to apprehend it theoretically, to use it practically, and to explain its operation. In other words, I mean the set of collective shared beliefs and presuppositions that characterize the field of international law, understood both as a scientific field of theoretical inquiry and as a social practice. The *ensemble* of the actors involved in the dynamic processes whereby our knowledge of international law—i.e. the understanding of what international law is and how it works—is formed and shaped can be properly qualified as an 'epistemic community'. It is the latter that provides the 'correct' understanding of the discipline, thus marginalizing alternative understandings and viewpoints.[54]

The primary function of epistemic communities is to fix the terms of the discourse and shape the way in which we look at and think of international law. As Michel Foucault famously put it, 'in every society the production of discourse is at once controlled, selected, organised and redistributed by a certain number of procedures.'[55] One of the 'procedures for controlling and delimiting discourse'[56] is

[51] Thomas Kuhn, 'The Function of Dogma in Scientific Research' in AC Crombie (ed), *Scientific Change: Historical Studies in the Intellectual, Social and Technical Conditions for Scientific Discovery and Technical Invention, from Antiquity to the Present* (Heinemann 1963) 349.

[52] Thomas Kuhn, *The Structure of Scientific Revolutions*, above n 15, 50–1.

[53] Andrea Bianchi, 'Epistemic Communities', in Jean d'Aspremont and Sahib Singh (eds), *Fundamental Concepts for International Law* (Edward Elgar 2017) (forthcoming).

[54] Stanley Fish uses the concept of 'interpretive communities' in a similar vein. Fish uses the notion of 'interpretive communities' not in the normative sense, but in the sociological sense. In other words, it is a concept that does not allow us to know—if we were to apply the concept to law—which norms are 'true' and which are not, but permits us to see by what institutional processes norms come to be regarded as such by international legal actors: Stanley Fish, 'One More Time' in Gary Olson and Lynn Worsham (eds), *Postmodern Sophistry: Stanley Fish and the Critical Enterprise* (State University of New York Press 2004) 277–9. Fish defines the concept of the 'interpretive community' as 'a point of view or way of organising experience that [shares] individuals in the sense that its assumed distinctions, categories of understanding, and stipulations of relevance and irrelevance [are] the content of the consciousness of community members who [are] therefore no longer individuals, but, insofar as they [are] embedded in the community's enterprise, community property.' (Stanley Fish, *Doing What Comes Naturally*, above n 17, 141). For further developments in relation to this concept, see Stanley Fish, *Is There a Text in This Class?*, above n 7, 167–73.

[55] Michel Foucault, 'The Order of Discourse' in Robert Young (ed), *Untying the Text: A Post-Structuralist Reader* (Routledge & Kegan Paul 1981) 52.

[56] Ibid, 56.

the culture of a discipline.[57] The members of the discipline are supposed to speak the same language and to share certain values.[58] In principle, their interests coincide, and they tend to establish and consolidate the monopoly over the legitimate interpretation and use of the discipline's fundamental tenets. This, in turn, spurs an attitude of mutual legitimization and support.[59] The more a discipline can demonstrate the cohesiveness and consistency of its discursive policies, the greater chance it will have to both preserve its distinctiveness in relation to other disciplines, and to affirm credibly its vision and interpretation of the object of investigation.

Nowadays international law's cohesiveness and its disciplinary autonomy are increasingly called into question. The 'mushrooming' of theories and approaches makes the fight to legitimately speak for the entire discipline a real challenge. The fight to impose one's paradigm over other concurrent ones has been touched upon above, when Bourdieu's theory of the 'scientific field' was examined. From the standpoint of autonomy, it is worth highlighting that the encounter of international law with other disciplines may entail the risk of a real loss of autonomy. In a similar context, Schlag emphasized the risks of law becoming indistinguishable from culture, society, economics, or politics.[60] The risk having been acknowledged, I believe that an exploration of the different ways of thinking about international law is worth pursuing, including those ways of thinking that have an interdisciplinary flavour.

Book Structure and Choices

Choices inevitably had to be made in selecting the different movements, schools of thought, and approaches to international law canvassed in this book. These choices are not grounded on any ultimate truth about, or particular taxonomy of, international law theories. Omissions will be noticed. There is no chapter on natural law theories, for instance. Some readers will consider such an omission as serious, almost unforgivable, as they would tend to regard the natural law theories as far more interesting than others I have chosen to include. Nor are there chapters on 'legalism' and 'realism', the two perspectives on world affairs that Gerry Simpson,

[57] Ibid, 61: '[O]ne is "in the true" only by obeying the rules of a discursive "policing" which one has to reactivate in each of one's discourses. The discipline is a principle of control over the production of discourse.'

[58] Jacques Chevalier, 'Les interprètes du droit' in Paul Amselek (ed), *Interprétation et droit* (Bruylant 1995) 20. In the same vein, Oscar Schachter considers an interpretive community to be 'a professional group (scholars and legal advisors) who share views on what is relevant and irrelevant to interpretation of legal texts. Generally they are the specialists and experts in the particular subject matter': Oscar Schachter, 'Metaphor and Realism in International Law' in *Studi di diritto internazionale in onore di Gaetano Arangio-Ruiz* (Editoriale Scientifica 2004) 213.

[59] Jacques Chevalier, 'Les interprètes du droit', above n 58, 120.

[60] Pierre Schlag, 'The Dedifferentiation Problem' (2009) 42 *Continental Philosophy Review* 35. According to Schlag, rather than retreating into particularism and localism or, worse, ignoring the problem, one should reckon with dedifferentiation. In particular, the dedifferentiation problem 'reprieves us, at least intellectually, from treating as knowledge and established truth, that which fundamentally, on its own terms, is not' (Ibid, 60). See also below Chapter 2, 'A Jurisprudence of Boundaries'.

inspired by Thomas Mann's novel *The Magic Mountain*,[61] considered as epitomizing the two main trends in international legal thinking.[62] Finally, I should add that this is not a book on philosophy of law, let alone philosophy *tout court*. Those who expect to see me dealing with eminent philosophers such as Dworkin, Fuller, Raz, Brandom, Rawls, or Habermas will be disappointed. Many people believe that one could not possibly understand the law unless he or she is well schooled in the concerns of the above-mentioned thinkers. I am sure they are all right and I encourage everyone to read and engage with philosophy and jurisprudence. However, I am afraid that for that particular purpose, there is no utility in reading this book.[63]

Ultimately, the choice of theories reflects my own preferences. It largely mirrors what I believe to be most relevant, in terms of intellectual contribution, to the contemporary theoretical debate in international law. It represents and accounts for my own sensibilities. While attempting to foster interest among readers about different ways of thinking about international law, the thirteen essays that follow represent my own inquiry, my personal journey into international legal theories. Inevitably, as I set out on the journey, I took my travel kit with me, including my personal history, academic background, and other personal belongings. After all, travelling requires serious reflection on what one's needs are and how one will cope with all the imponderables of a journey. In particular, one has to be careful about which kind of spectacles to bring along. What one sees very much depends on the pair of spectacles one puts on, or the paradigms and predispositions that one possesses. For Wittgenstein the main problem with spectacles is that we do not remember that we have them on, and it hardly ever occurs to us to take them off.[64]

I do not know whether my 'spectacles' also explain the particular order I have followed in the presentation of the chapters. I would like the reader to be aware that this order only occasionally finds a reasonable justification, and certainly does not reflect some sort of ranking of theories. The decision to write a first chapter on what I describe as traditional approaches is deliberate, as traditional approaches are still the 'water' that most international law 'fish' swim in. To draw the reader's attention to this type of approach is a little like talking to the frog straight away. Most of the time, however, the sequence is contingent on some chronological order or on particular circumstances. For instance, my treatment of critical legal studies and the New Stream comes before a discussion of the 'Helsinki School'—somewhat

[61] Thomas Mann, *The Magic Mountain* (Knopf 1995). The novel is set in a sanatorium in the Swiss mountains in the period before the First World War. Among the many characters and narrative strands, two are particularly relevant: Settembrini, who incarnates the legalistic (and idealistic) vision of international relations, and Naphta, an unconditional realist.

[62] Gerry Simpson, 'On the Magic Mountain: Teaching Public International Law', (1999) 10 *European Journal of International Law* 70. Ultimately, Simpson advocates an approach to teaching international law based on history and context, some sort of 'clinical legal education' coupled with 'critical theory', which could be an effective antidote against the main narratives traditionally used to represent international law, including a certain romanticized vision of it.

[63] My thoughts on the philosophy and theory of international law can be read in: Andrea Bianchi, 'On Asking Questions—Philosophy and Theory of International Law', in: Andrea Bianchi (ed), *Elgar Research Collection on the Theory and Philosophy of International Law* (Edward Elgar 2017) (forthcoming).

[64] Ludwig Wittgenstein, *Philosophical Investigations*, above n 12, § 103.

disingenuously named to avoid mention of a single individual in a chapter title—because I felt that one could not fully understand Martti Koskenniemi's scholarship without grasping the intellectual substratum from which—at least initially—he drew inspiration. Likewise, I thought that treatment of Marxism as a general intellectual current should precede the chapter on critical legal studies, not so much because the latter is based on or derived from the former, but simply because an understanding of the categories used in Marxist theory helps us better comprehend the reflection carried out by critical scholars. There is no particular reason why the other chapters stand in their current order, or why law and economics, and law and literature come at the end, after social idealism and legal pluralism. As I said the order implies no ranking or value judgment of any sort.

Another assumption or myth that I would like to dispel is that theories are interchangeable and can be used as alternative intellectual frames to account for the reality of international law. In fact, theories are different from one another. Most of the time, the differences between them are not that they provide different answers to the same questions. They often pose different questions and they tackle issues that are distinct from the ones broached by other theories. They emphasize aspects that are overlooked by other approaches or they share premises of other theories without embracing their fundamental tenets. For example, law and economics scholars do not seem to call into question the doctrine of sources or the doctrine of the subjects of international law. Yet, it would be difficult to maintain that law and economics and traditional approaches are similar movements. Along similar lines, the way in which such diverse schools of thought as critical legal studies, Marxism, and policy-oriented approaches deal with politics is so completely different that it would be simplistic to regard them as similar on the basis that they all pay attention to the political moment of decision-making.

This is the main reason why, after carefully considering the issue, I concluded that it was impossible to use the same analytical grid for all the theories I write about in this book. The sense of imbalance and inequality of treatment might have been even greater had I decided to subject each theory to the same type of inquiry. Having said that, I have attempted as much as possible to say something about the origin or genealogy of the theory, its main tenets, and the criticism raised within or outside the theory itself. As a matter of style, I have preferred to write fairly personal 'short stories', rather than purporting to write the intellectual history of any given theory. It is impossible to do justice to the complexity of some of the movements and schools of thought represented in this book. I am sure that if you were to ask ten different scholars adhering to the same school of thought, they would have a hard time agreeing on how to represent the main tenets of their common intellectual framework. I am also confident that many of the authors I squeezed into one or another category would object to my characterization. I beg for everyone's pardon and ask for forgiveness. Despite the interest I have recently taken in the theories of international law, I have not yet had sufficient time to discover and read all, or even most, of my colleagues' relevant writings.

Since theories neither necessarily respond to the same needs nor address the same questions, one temptation consists of discarding a theory simply because it does not

address an issue in the same way in which we are accustomed to deal with it. For instance, the approach to interpretation put forward by some proponents of the law and literature movement is not rule based. Those who are inspired by this movement are unlikely to accept that the codification in the Vienna Convention on the Law of Treaties has the ultimate say on the way in which interpretation of texts should operate in international law. 'Sameness' and 'equivalence' are powerful judgement-inducing factors that constantly challenge our capacity to accept other approaches to what we do and think. Unless such approaches are the same, or unless they can replace our own and operate according to almost equivalent modalities, we find it very difficult to consider them as equally valid or authoritative ways of looking at international law.

Theory as Worldmaking

Theories are ways of worldmaking, to draw inspiration from Nelson Goodman's famous book.[65] The worlds they construct are worlds of their own making. They do not offer subjective explanations of a reality that has a discrete and objective existence. They constitute the reality they intend to describe by representing it and constructing it on the basis of their own presuppositions and theoretical tenets. Hence, it is important to make the effort to understand these different worlds from their own internal perspective, from the premises they start from, and against the backdrop of their fundamental tenets. This is no easy task, as we are all 'positioned': we all look at international law from our own standpoint, which is the result of our intellectual upbringing, the set of presuppositions and beliefs we adhere to, as well as our personal history that makes us sensitive to some issues rather than others.[66] Yet I believe that mere awareness of this issue is a great advantage to anyone who would like to broaden his or her intellectual horizon. At the very least, knowledge of such diversity of theories and methodologies should bring about more humbleness, and tolerance for those who do not share our own beliefs.

Admittedly, the idea that one can look at reality in different ways is far from novel or peculiar to international law. It is often something that one acquires after an extended process of realization. For lawyers trained in a strictly traditional environment that permits no doubt about the nature and functioning of (international) law, this can be a difficult message to convey. My message, however, is to always try and engage with what is different, to constantly call into question what one does, and how one does it, even if after questioning one goes back to the initial point of departure. One of the most disturbing tenets that many theories develop over

[65] Nelson Goodman, *Ways of Worldmaking* (Hackett Publishing Company 1978).

[66] Outi Korhonen has shown a similar sensitivity to issues related to 'situationality' in her work: Outi Korhonen, *International Law Situated: An Analysis of the Lawyer's Stance towards Culture, History and Community* (Kluwer 2000). See also: Outi Korhonen, 'New International Law: Silence, Defence, or Deliverance?' (1996) 7 *European Journal of International Law* 1.

time is a tendency to exclude the 'other'.[67] To engage with the other is the necessary condition for renewing scientific disciplines and one's own way of thinking. However difficult this may be at the time, it is infinitely more honest and serious than simply refusing to engage with other ways of thinking about the discipline. Consideration of different ways of thinking is almost invariably enriching. It allows one to transcend one's limits, set by personal beliefs, professional training, and practical experience.

I personally found it useful to look at international law from the standpoint of other disciplines, and my interest in the epistemology of international law has been greatly enhanced by the reading of books completely unrelated to it. I already mentioned Goodman's *Ways of Worldmaking*, which I found extremely interesting in its constructive approach to epistemology. Goodman holds that our perception of reality depends on the interpretation of the symbols that characterize different fields, from the worlds of art and science to that of ordinary perception. The fact that certain interpretations prevail and certain symbols are projected into the construction of reality depends, not so much on any objective knowledge having been attained, but rather on the fact that they are entrenched in the community that has produced them via custom, practice, and widespread social acceptance. In Goodman's words, they simply fit the world better.[68]

Richard Rorty's *Philosophy and the Mirror of Nature* also proved to be a powerful antidote against any foundational representation of reality.[69] The book draws attention to the contingent character of the vocabularies we use to describe reality, whose success or failure depends on social conventions, and seeks to dispel the myth, deeply ingrained in Western philosophy, that it is the task of philosophy to objectively apprehend the nature of reality as if our mind could act as a mirror of sorts to reflect the very essence of nature. The point of the present book is not to uncritically adhere to Rorty's philosophical posture. I am just drawing some insights from one of his main works that I believe to be interesting and useful when applied to international law.

The difficulty in settling the relation between what we see and what we know, particularly in relation to art, is at the centre of the highly popular book by John Berger, *Ways of Seeing*.[70] Berger's inspiring analysis, largely supported by images, aims to demonstrate how much our knowledge and beliefs affect the way in which we look at things and what we see.[71] Based on a BBC show, Berger's book offers an astounding number of illustrations of the way in which cultural bias, presuppositions, and personal or societal assumptions exert a decisive influence on what we see when we look at images, whether they are oil paintings or publicity stills.

What Berger did with images, Wallace Stevens has done with poetry. The haiku-inspired poem 'Thirteen Ways of Looking at a Blackbird', published as part of a collection of poems entitled *Harmonium*,[72] is a very effective exercise in perspectivism.

[67] For a counterpoint to this trend see Anne Orford (ed), *International Law and its Others* (CUP 2006).

[68] On the notion of 'fit', see Nelson Goodman, *Ways of Worldmaking*, above n 65, 21, 138.

[69] Richard Rorty, *Philosophy and the Mirror of Nature* (Princeton University Press 1979).

[70] John Berger, *Ways of Seeing* (Penguin Books 1972).

[71] Ibid, 8.

[72] Wallace Stevens, *Harmonium* (Knopf 1923).

Thirteen different short stanzas in which blackbirds are mentioned show the variety of ways in which one can talk about the same object from different standpoints.

Since I mentioned perspectivism, I should perhaps also briefly recall Nietzsche's approach to knowledge. Indeed, Nietzsche is the philosopher traditionally associated with the term 'perspectivism', which is usually taken to mean that there cannot be any form of absolute knowledge, as knowledge is always biased and based on our personal interpretation of reality, which depends on our perspective. The latter, in turn, is determined by such factors as culture, language, history, and context.[73]

Although coming from vastly different backgrounds, the authors of all these works point in the same direction. They all move away from the idea that there is only one world, or one way of seeing, and endorse the view that intellectual representations are distinct from an objective reality or truth. At least, this is the way in which I 'see' their work and interpret their meaning. I may well have misunderstood some of the theories they put forward in their respective disciplines and activities, but I constructed my own meaning and later applied it to my own discipline. This helped me understand things I had sought to understand for a long time. Moreover, by foregrounding the way in which knowledge is produced, they made me interested in the way in which knowledge about international law is formed, and how different perceptions or representations of it may alter the way in which we look at the discipline, both intellectually and practically.

I have never doubted—not even once—that this could undermine the authority and the function of international law. The fact that there may be different ways of thinking about international law, and that each of us is differently situated in relation to her object of inquiry, does not necessarily lead to relativism. It is all too easy for those people who do not want to engage with theory to discard this plurality of intellectual frames as 'irrelevant' in so far as there is no way to consider one as preferable to the others, as they are all a matter of perspective. In fact, it is on these grounds that Stanley Fish, as previously noted,[74] seemed to consider that the very concept of theory is flawed as one is 'never not in a situation', and no universalization or generalization by way of a theory is ever possible.[75]

I do not share such a negative conclusion. First of all, it is not at all the case that 'anything goes'. Some of the theories enjoy more social acceptance than others. Some other intellectual postures are not meant to provide a comprehensive theory but only offer a set of interesting insights. The dynamic by which the different theories compete and prevail or fail to gather adherents is best understood in light of the sociological mechanisms described above when discussing Bourdieu's notion of the scientific field.[76] To ask which theory is more valid than the others is the wrong question to pose, as there is no benchmark of validity. That is why one should avoid being

[73] Friedrich Nietzsche, *The Will to Power* (Random House 1973) § 481.
[74] Stanley Fish, *Doing What Comes Naturally*, above n 17, 320.
[75] Stanley Fish, *Is There a Text in This Class?*, above n 7, 284.
[76] Pierre Bourdieu, 'The Specificity of the Scientific Field', above n 43.

too judgemental about the different theories, without overtly disclosing by what criteria or standard of judgement one should be considered better than the other.

Takeaways

Some readers will probably expect that, by reading this book, they will get some fundamental 'takeaways' that could easily be used in various professional contexts. It depends on what one means by 'takeaways'. If by this expression one means the possibility of distilling a set of simplistic propositions by which to reduce complex theoretical approaches to almost a caricature or, rather the expectation that, by showing familiarity with this or that approach, she may convince the managing partner of the law firm she works for to do things differently, I would advise her to stop reading this book now. The main aim of the book is to help develop certain 'sensibilities' to theories (in the plural) and to foster reflexivity amongst international lawyers. Inevitably, somebody who possesses the analytical capacity of discerning what he or she is doing on the basis of underlying theoretical premises or methodology will have a comparative advantage over those who do not question, and simply regard themselves as engaged in some technical craft.

The materialistic undertones that the word 'takeaway' connote are a symptom of a more widespread disease in contemporary culture, transcending the state of international legal scholarship. I am referring to the tendency to devalue whatever intellectual activity is unlikely to produce a material or economically valuable effect. In a recently published book on the 'usefulness of the useless',[77] Nuccio Ordine reminds us of the importance of learning for its own sake, of prioritizing values that can neither be weighed nor measured in economic terms 'by tools designed to evaluate quantity rather than quality', and of investing in intellectual activities that have no monetary returns. Drawing on an impressive number of sources from many different epochs, the author underscores the importance of (re)search without any practical utility, but rather for the sake of freeing humanity from the shackles of materialism and making the world more humane and ultimately more free. The polemic—hardly surprising as the book subtitle is *Manifesto*!—is slightly reminiscent of the debate triggered by a blog post by Stanley Fish in the *New York Times*, in which Fish candidly answered the question 'what use are the arts and humanities?' by saying 'none whatsoever'.[78] In fact, as he later explained, Fish meant simply that the refusal to provide a justification for an intellectual activity was tantamount to refusing to regard that same activity 'as instrumental to some larger good'.[79] Humanities are valuable for their own sake and there is nothing more to say, as anything that is said 'diminishes the object of its supposed praise'.[80] By the

[77] Nuccio Ordine, *L'utilité de l'inutile* (Les Belles Lettres 2013), translated into Italian as *L'utilità dell'inutile—Manifesto: Con un saggio di Abraham Flexner* (Bompiani 2013).
[78] Stanley Fish, 'Will the Humanities Save Us?', *New York Times*, 6 January 2008.
[79] Ibid. [80] Ibid.