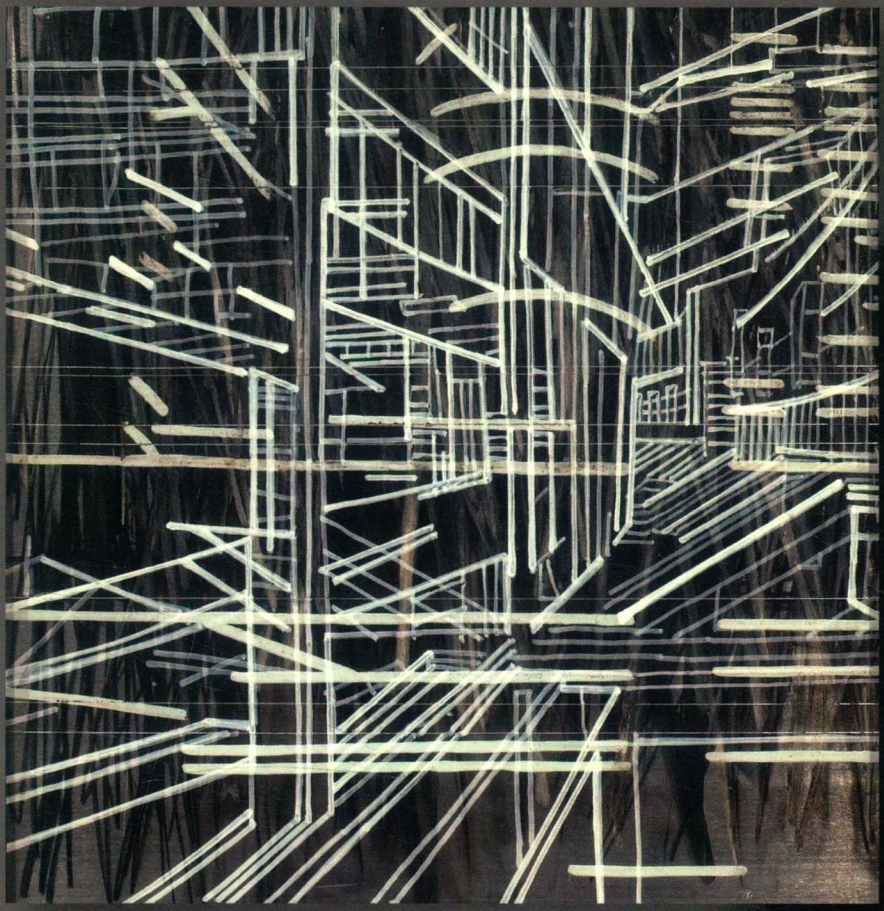

INTERNATIONAL LAW THEORIES

An Inquiry into Different Ways of Thinking

ANDREA BIANCHI

OXFORD

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INTERNATIONAL LAW THEORIES

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

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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.