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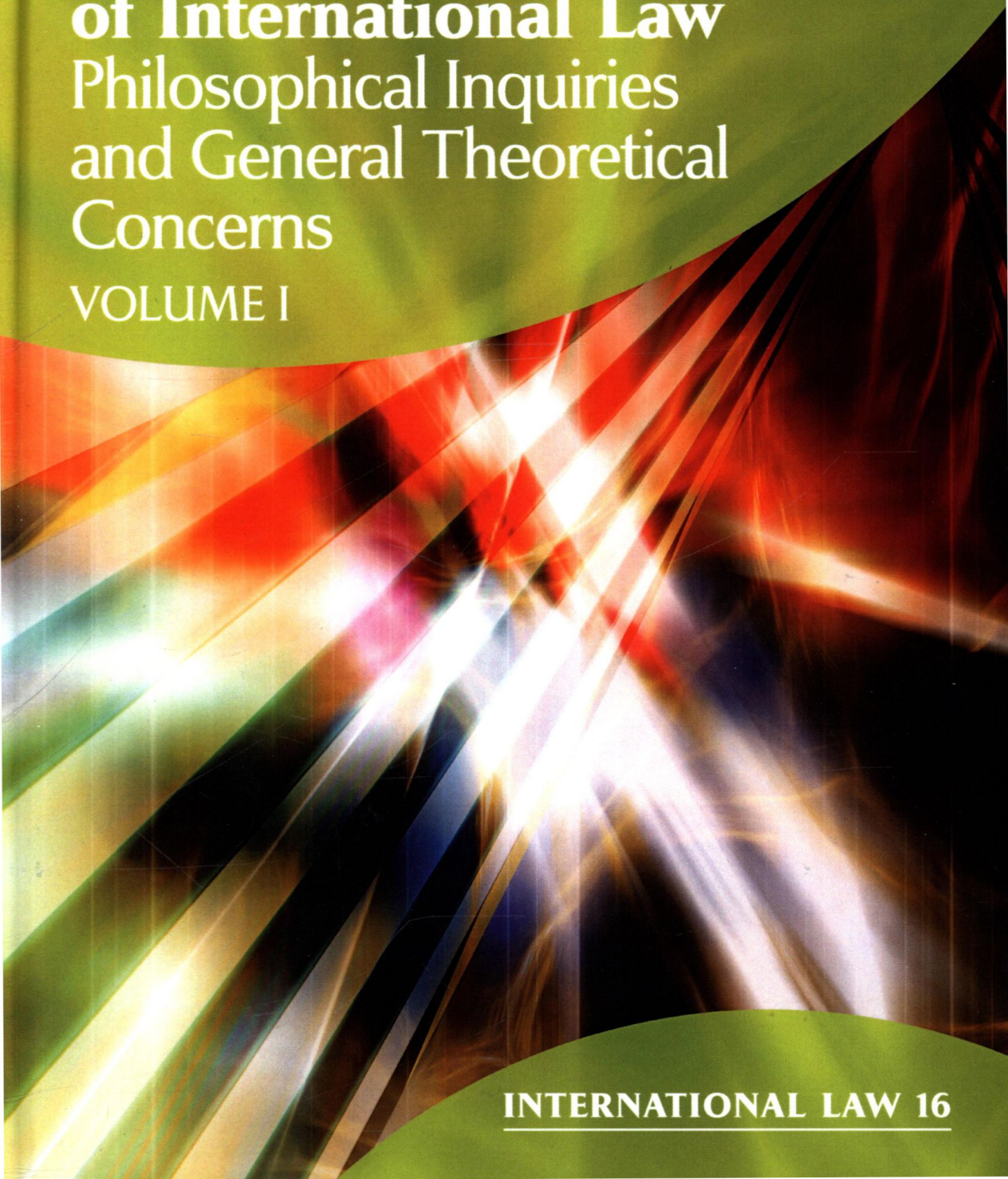
Theory and Philosophy of International Law

Philosophical Inquiries and General Theoretical Concerns

VOLUME I



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Theory and Philosophy of International Law I

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Volume I

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INTERNATIONAL LAW

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On Asking Questions

*Andrea Bianchi**

1. Introduction

Other than examining witnesses in the courtroom, lawyers are not particularly inclined to ask questions. They are more accustomed to being asked about who is right and who is wrong, or about who is innocent and who is guilty, and, last but not least, about their hourly fee. Of course, the answer given to the last question may have a huge impact on the way that the lawyer responds to the preceding ones. While this may sound like a fairly trivial incipit for a collection on the philosophy and theory of international law, it might in fact be highly apt. The scarcity of 'questioning' about what type of questions could be, or should be, asked about international law was, for a long time, a distinct trait of the profession and discipline. To the black-letter positivists, the law is the law and one does not question it; the law springs from the sources; and rules, most of the time, are to be 'found' by judges. Depending on their professional role and other contingencies, every actor lays claim to ascertain authoritatively what the law is. Nobody really wants to doubt, let alone ask questions about, the theoretical foundations and intellectual presuppositions that inspire their vision of the (legal) world.

Admittedly, this sobering appraisal is a caricature. But the idea that the average black-letter lawyer does not like asking questions that challenge, and potentially destabilise, her professional routine is not far from the truth. In other words, there is hardly any awareness of the discipline's theoretical presuppositions among practising international lawyers.[1] Most depressingly, international law as an academic discipline has also been lacking in reflexivity and intellectual questioning for a long time. Truth be told, this state of affairs seems to have changed lately, with the younger generations of international lawyers being more prone to intellectual inquiries and less deferential towards doctrinal rituals. Exercises in the rationalisation and justification of case law are still widespread in mainstream scholarship, but the scope for critical inquiry and the development of alternative theoretical approaches to international law has widened. It is no easy task for the international lawyer to orient herself in relation to the proliferation of discourses that has resulted.[2] Interdisciplinary incursions remain episodic and there are few philosophers who dare to venture into the murky waters of the law. Even philosophers of law have a distinct taste for domestic rather than international law, most likely due to their lack of familiarity with the international dimension of their object of investigation, and also to the absence of a tradition of philosophical inquiry in the field.[3] This could have provided an incentive for further investigation, but it seems to have worked the other way round, with philosophers of law shying away – with a few exceptions[4] – from theoretical investigations of international law.[5]

Be that as it may, it does not come naturally to the average international lawyer to engage with theoretical questions, even less so when these are presented as philosophical ones. In fact, the charge of being philosophical should not be taken lightly. If proffered by a colleague

it is most likely intended as criticism. In a discipline where the official discourse frequently vilifies theoretical inquiries,[6] and advocacy before international courts and tribunals is perceived as the consecration of one's academic accomplishments, it is not surprising to find little interest for theory and intellectual lucubration about the nature of the law one practices. Indeed, as Pierre Schlag once put it, lawyers have 'a stunningly selective sense of curiosity'.[7] By and large, the professional dream world of international lawyers is scarcely inhabited by intellectual figures. The successful practitioner telling anecdotes about her latest case is an image far more appealing to most international lawyers than the independently minded scholar writing books and articles,[8] and asking questions – and occasionally providing answers – about what international law is, how it works, and why its rules and principles are shaped in a certain way rather than another.

2. Is International Law Undertheorised?

If the above largely speculative remarks were to be tested against some set of empirical data – as if they were a research hypothesis – one would no doubt find exceptions to the scarce propensity of international lawyers to ask theoretical questions. The research hypothesis might thus be empirically unsubstantiated. Yet, I remain convinced, even in the absence of conclusive empirical findings, that international law is 'undertheorised' (one of the most elegant and effective euphemisms I have encountered). The computer's spell checker does not accept the word, but you can be assured that it exists. And even if it did not exist, I would be delighted to coin it for the occasion. To suggest that international law is undertheorised is not to conclude that the profession is replete with ignorant people who have no clue about theory and are not interested in philosophy or intellectual speculation of any kind. Rather, the expression simply conveys the idea that there is potential to enhance the status of theoretical inquiries in the discipline, which at the moment are not as developed as they could be. If I continue to advance the claim that international law is, or has been, undertheorised for a long time, it is because I believe that there are clear and obvious reasons why this has occurred. However irritating this claim may sound to international lawyers, let us consider the arguments.

First and foremost, the aversion to theoretical inquiries on the nature of law – and its moral foundations and political presuppositions – has been prompted by the predominance of the positivist paradigm.[9] As is well known, the tradition of legal positivism tends to exclude these sorts of investigations, fostering the belief that all the answers can be found within the system. Most law students are still trained to believe that law should not be contaminated by external considerations of a non-legal character. The dissenting opinion by Judge Spender and Judge Fitzmaurice in the *South-West Africa* case before the International Court of Justice epitomises a view that is still widely held among international lawyers.[10] In fact, the official discourse of international law is still largely imbued with an ideology that conceives of the law as distinct from other disciplines, with which it can have no contact. It is completely alien to the traditional positivist to consider that one might need to look well beyond law and make investigations into anthropology, sociology and other disciplines in order to ascertain where respect for the law derives from.[11] So is the idea that there may be moral considerations at play in advancing or refuting an argument or in undertaking or omitting an action in the name of international

law. The law is objective and neutral and its theoretical presuppositions and operational modalities do not lend themselves to being called into question.[12]

Another reason why thinking about international law might be less easy than thinking about domestic law relates to the former's 'uncertainty'. This famously caused Sir Gerald Fitzmaurice to say that international lawyers are often concerned not just with the usual question of 'what the law is' on a given matter, but also, and more disconcertingly, with the question of 'what is law' and how to ascertain it in international law.[13] The great deal of uncertainty surrounding the sources and the myth of Article 38 of the ICJ Statute,[14] the endless discussions about the requirements of custom and the alleged existence of principles of international law make conceptual systematisation and analysis difficult, or at least more difficult than in a domestic law setting, where law-making, adjudication and enforcement processes are well established and fairly straightforward. I suppose the argument can be made that what is uncertain is more difficult to theorise. At the same time, this could function as a catalyst to seize the intellectual challenge of systematizing what is uncertain, turning it into something easier to grasp and explain.

Some commentators have put forward other reasons that might account for the undertheorised character of international law. The lack of sufficient empirical materials to facilitate engagement with international law and to foster theories likely to have an impact on extant realities has been adduced as a reason.[15] Alternatively, realist international relations theorists have been blamed for their aversion to normative questions and morally sensitive issues.[16] This has continued to this day, given the influence of social science methodologies that allegedly foster an objective methodology, as opposed to what social scientists would regard as the ideologically charged premises of any philosophical inquiry. I should perhaps add that the ideological character of this presupposition is so self-evident that no further comment is warranted!

Finally, others have rather matter-of-factly emphasised that international law is marginal to public debate, and it should not come as a surprise that it does not attract much attention from thinkers and philosophers.[17] For example, Peter Goodrich acknowledges that, contrary to their domestic counterparts, international lawyers in the United States are conspicuously absent in public debate, and that their capacity to steer public opinion is almost non-existent.[18] There are obviously exceptions. It suffices to think of the role that international lawyers had in the public debate in the United Kingdom concerning the war in Iraq, as well as the anxiety generated in some of them by their public exposure.[19]

The circumspection of the lawyerly world vis-à-vis theory might more convincingly be explained against the deeply rooted conviction that law – and international law alike – is a practical craft and professional vocation that demands no particular theoretical, let alone philosophical, background. In many law schools – fortunately with some exceptions – courses involving philosophy, sociology and the general theory of law are not particularly popular. Many law schools do not even include these subjects in their curriculum, as they are widely looked down on as either having no obvious practical utility or as being irrelevant to the profession. Similarly, many members of the profession would concur that whatever time is spent asking questions of a philosophical nature is time wasted. I have even heard some international law professors say that whatever does not make a difference to legal practice should not occupy them. In a twist of fate, the same words were used by the philosopher Richard Rorty to precisely explain what philosophical investigation should be about.[20] I doubt

such law professors are aware of this, but it is a strange reversal of perspective when the words of a philosopher are used to dispense with philosophy!

This attitude is more worrisome than one might think. To hold that practice is the only thing that matters and is worthy of lawyerly engagement remains oblivious to the simple fact that any practice presupposes a theory, a way of thinking and a mindset, which are formed, developed and used to the detriment of other theories, ways of thinking and mindsets. Ignoring the psychological frames that govern the way in which we think and do law carries with it non-negligible normative consequences.

Whether the arguments expounded above may satisfactorily account for the undertheorisation of international law is ultimately a matter of opinion and preference. However, they should not be easily discounted if one wants to understand the reasons why intellectual inquiries and theoretical or philosophical questions are not the bread and butter among the members of the international law profession.

3. The Difficulty with (any) Theory

As stated above, one of the peculiar features of the official discourse of international law is to look down at theory. The fact that international practice seems to be considered by many as the ultimate form of disciplinary recognition is reflective of a profession that denigrates intellectual inquiries that go beyond the mere systematisation and rationalisation of legal materials. I once heard a colleague say that the Faculty should hire more 'hard' lawyers and fewer 'soft' lawyers. I reacted with bewilderment at such a novel qualification, asking what he meant by the categorisation. He said that hard law was the real law that is practised in courtrooms and for which there is a high demand in the market, particularly trade, investment and intellectual property law. All those people dealing with soft law, such as 'theory, human rights and the like', should only have a secondary role in a serious legal curriculum. Rather than a peculiar interpretation of the well-known legal category of soft law, my colleague's statement hardly hid a conspicuous cultural bias against theory and intellectual activities such as thinking about the law. By the same token, not long ago, yet another colleague of mine lay claim to be in need of more assistants compared to his other colleagues on the basis that he taught 'hard black letter law courses' and not some 'wishy-washy' theory ones. Admittedly, the opposite can also be true. I can perfectly well envisage a sectarian group of international law theorists looking down with contempt at all those practitioners who have not read Foucault, Marx and Koskenniemi. (Please do not attach any particular significance to this random choice of names!) Yet, I submit that in the mainstream or official discourse of international law, the traditional attitude is to vilify theoretical and philosophical questions and to consider as relevant only the doctrinal conceptualisation of existing concepts and categories.

This posture of anti-intellectualism is clearly traceable to most law schools and to many professional circles. Recently, two French academics overtly criticised this by submitting that the bias against intellectual activities is maintained by the vested interests of the power structures that benefit from the current state of affairs.[21] To call into question the way in which things are done is tantamount to questioning the balance of power existing in the profession, the perception of entitlements that govern professional relations as well as the empowerment of different categories of people working in the field. Proof that their critique was right on

target was that their article was refused for publication by several journals in France and only saw the light because a Belgian journal eventually accepted to publish it.[22]

To be fair, the presupposition that theoretical inquiries into law are useless and irrelevant to the profession is not totally unfounded. In other words, I believe that a certain way of producing the academic discourse has almost certainly contributed to the bias against theory. A certain habit to conceive of fancy intellectual frames removed from the underlying social realities, which I have termed 'armchair theorising' in another context,[23] is deleterious to theory. The unreasonable attempt to project one's preconceived theoretical frameworks into the practice of social agents, or to impose an ideal of absolute and rational coherence in an otherwise highly heterogeneous practice, are widespread reflexes in academia. Pierre Bourdieu's famous epistemological error of 'putting a scholar inside the machine' comes to mind, with its 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'.[24]

Yet, the failure to perceive the theoretical frameworks at work in practice indicates a considerable degree of shortsightedness. Most of the time theory also provides the framework for justifying practice. Sometimes its role consists of opening up a range of possible avenues, into which practice can be channelled. At the same time, the widespread belief that the practitioners do the job on the ground without bothering too much with the theoretical aspects of the matter is simply false.[25] Practitioners, even when not conscious of it, always presuppose a 'theory' or 'method'. Certain theories and methods help provide players of the interpretive game in international law with the necessary level of credibility and persuasiveness.[26]

The widespread aversion to theory in international law can also be understood against the backdrop of contemporary cultural trends. We live in a culture that encourages specialisation, where knowledge is conceived as an incremental process of acquisition of additional skills in a given domain. To be an expert means to possess an in-depth knowledge of a (frequently) tiny field. To look at the 'big picture' is often derided as demonstrating a lack of focus that a given specialisation would quickly ameliorate. To zoom out from one's field of specialisation or to ask questions of an epistemological or philosophical character is perceived as highly questionable. The occasional incursion into this type of general questioning may be forgiven as a fancy, but it would often be regarded as an undue distraction in a professional itinerary. Standardisation prevails in terms of methodology – increasingly in international law also – and even in terms of language. If you write for some of the leading law journals or law publishers, you will notice that the editing goes well beyond the correction of grammar, syntax and typographical errors. One is expected to conform to the standard language of the discipline. Any stylistic variation is mercilessly struck out and its reinstatement requires either a painful negotiation with the editor or even threatening to withdraw the manuscript.

Recent trends in contemporary scholarship allow for some degree of optimism that this state of affairs may be changing.[27] Many scholars in the younger generations appear to be more sensitive to theoretical issues than their predecessors. They have been brought up in the context of a discipline that was rapidly changing and that was challenging the fundamental tenets of the official discourse. To be formed as a professional in an environment in which critical scholarship is no longer anathema, but something that is practised regularly by a group

of people, is certainly different from being brought up in a culture of deference towards received notions of authority that education in a positivist legal curriculum inevitably entails.[28] This variety of approaches and the steady advance of critical scholarship in a broad sense have fostered the vision of international law as a 'socially constructed practice', as a process rather than merely a set of rules.[29] This has gone hand in hand with societal changes that have brought international law to the forefront of our daily lives. International law issues are increasingly discussed in the media and are frequently subjected to public scrutiny. International law is no longer perceived as a game of high politics or as a particular form of diplomatic discourse. It is seen as a social practice affecting people's lives, which is liable to be called into question, particularly as regards its legitimacy and consistency with moral standards.

Why is international law not providing adequate solutions to such compelling international issues as terrorism or the flow of refugees from the Global South to the North? How is it that it cannot prevent the weekly massacres of hundreds or even thousands of refugees fleeing from extreme poverty or endemic conflict and trying to make it into some wealthier country? Why does it let such bloodshed occur without intervention in Syria? Who is or should be accountable for the many evils of the world, ranging from environmental degradation and the outbursts of contagious diseases to the countless human rights violations that occur every day in the world? Why is international law conspicuously absent from the regulation of international finance, thus exposing the world to recurrent calamitous financial crises?

These questions can no longer only be answered by technical skills. One has to ask questions of a more general character and to understand what international law is for, how it is made and by whom, and what goals it purports to pursue. These are questions that go well beyond the purview (and competence) of those whom we consider the experts of international law: trade and investment lawyers, human rights lawyers and so on and so forth. These are questions that need be answered against a wider background, in which the rules of the different regimes are part of the context but do not necessarily provide the answer. A look at the big picture is warranted if one wants to make sense of what is going on in international law nowadays. Hence, there is a need to ask good questions that can help us to reflect constructively as well as provide sound answers.

4. The Difficult Distinction between Philosophy and Theory: Juxtaposition or Hendiadys?

When I was asked to edit this collection, my immediate reflex was to ask what was meant by these two heavily loaded words: philosophy and theory. On second thoughts, however, I realised that I should not ask for clarification from the publisher. To solve the riddle and to explain the difference between the philosophy and the theory of international law was almost certainly part of my mandate as editor. I thus set out to read a good number of essays and books, drawing heavily from other disciplines, to try and grasp the quintessential elements of, and the distinction between, philosophy and theory and the intellectual contours of their respective definitions. I must say I failed miserably to understand, let alone find an answer to my query.

I suspect one can define either term in many different ways. A recurrent distinction would emphasise that philosophy is taken up with more abstract and conceptual questions concerning

the nature of law and its relation to morality, whereas theory would connote more neutral and less morally charged questions on how international law is done, on the fundamentals of the discipline and on the main concepts and categories that are used in it.[30] A cursory review of the existing literature reveals that the description of the respective fields is heavily dependent on the writer's background, predisposition or personal preferences.[31] What to ask and how to phrase the relevant questions appears to be a highly subjective exercise. For instance, to focus on moral philosophy and the role of values in the international legal system, or to be taken up with the issue of distributive justice, or to indulge a discussion on the legitimacy of human rights are choices one makes about which questions are most relevant to the foundations and functioning of international law. To accurately classify them on the basis of distinct traditions in the different disciplines of philosophy or philosophy of law would be a time-consuming and possibly very arbitrary exercise, something that I have no intention of doing.

To think of philosophy and theory in juxtaposed terms seems to me fairly artificial. The contention has been put forward that the philosophy of any given discipline, such as international law, usually connotes an analytical inquiry from 'outside' the discipline, most noticeably one that is carried out by professional philosophers or by scholars who use some form of philosophical methodology.[32] This would be done either by asking general questions about international law and suggesting and justifying answers thereto, or by expressing criticism as regards solutions to general problems within the discipline proposed by others. Theory, on the other hand, would be grounded 'inside' the discipline and would primarily refer to inquiries undertaken by international law scholars about the general concepts and categories used within the discipline, finding connections or examining critically the nature and functioning of particular principles or rules. The inside–outside divide is attractive for the relative certainty it seems to provide, but only apparently so.[33] In fact, one often finds certain philosophical questions being asked and critically evaluated in light of 'internal' standards and benchmarks. Is humanitarian intervention legitimate? Is the international criminal justice system adequate to the needs of the international community? Can the way in which the International Criminal Court functions be morally justified? These and other similar questions leave little doubt that the contours of the inside–outside distinction are destined to be blurred.

A distinction between philosophy and theory based not so much on what questions are asked, but rather on *who* formulates them and carries out the inquiry, appears to be more reliable, if only slightly. To differentiate on the basis of disciplinary affiliation comes in handy for practical purposes, even though it may occasionally prove inaccurate. In fact, some international law scholars who have a background in philosophy are perfectly prepared to adopt a philosophical vocabulary or sensitivity in dealing with the questions they raise. At the same time, theorists within the discipline often indulge philosophical questions and deploy modes of argumentation that are akin to philosophical methodologies. Whatever criterion one tries to use to construe the two terms in either a juxtaposed or complementary way, 'in fact the distinction between the two is evanescent'.[34]

The radical alternative is to look at 'philosophy and theory' as if it were some sort of hendiadys, a figure of speech consisting of two terms used to express just one idea or concept, for the purposes of emphasis. Any question relating to the nature and function of international law, its relationship not only to morality and politics but also to other disciplines and ways of thinking, as well as any inquiry into the way in which its parts relate to the whole, or into the consistency of its rules and principles with notions of legitimacy and justice, would thus be

relevant to the 'philosophy and theory' of international law, the two terms being used jointly. This may possibly raise – or even offend – professional or disciplinary susceptibilities, as philosophers and international law scholars would admittedly feel less empowered, but it might not be such an eccentric solution to the otherwise insoluble problem of how to objectively distinguish between philosophy and theory.

At the end of the day, I am not convinced that it would make a big difference to pursue the exact characterisation of the two terms, at least from the perspective I have decided to deal with the matter. If the purpose of the inquiry and the interest in the subject matter can be epitomised by the idea of 'asking questions', the emphasis is on which questions are asked or should be asked, and not so much about how the questions should be characterised for the purposes of distinguishing between philosophy and theory. Whether the invocation of moral grounds for the use of force is admissible, and if so within what limits, seems to me to be a question worth addressing regardless of whether you consider the inquiry to be philosophical or theoretical. After all, you would need to consider the rules and principles within international law to assess the question and to provide and justify a tentative answer. By the same token, the debate about the right of future generations to inherit the earth in an ecologically sound condition and the problem of intergenerational equity is an issue that is equally pertinent for a philosopher, a theorist of international law and an international environmental lawyer to tackle. Ultimately, what seems to me to be important is that such questions are raised.

5. Philosophical Inquiries and General Theoretical Concerns (Volume I)

Keeping in mind the difficulties I highlighted above in distinguishing between philosophical and theoretical inquiries about international law, and consistent with my previous reflections, the selection of articles included in the first volume of this collection is the product of a series of considerations. First, I adopt a broad distinction on the basis of disciplinary affiliation between professional philosophers and international law scholars, reflecting different sensitivities, if not a distinct object of inquiry or intellectual methodology. I therefore begin by including in the first section, entitled 'Philosophical Perspectives', a handful of works by professional philosophers of law, who clearly look at international law from the 'outside', and who have little in-depth familiarity with the international legal order. It is somewhat stunning to realise that there have been relatively few contributions by philosophers to the study of international law. Given its peculiarities as compared to domestic law, I would have thought that international law would be an interesting intellectual laboratory to ask questions of the kind philosophers deal with. Yet this has not often been the case. Besides the posthumously published essay by Ronald Dworkin on international law,[35] I also included articles by Allen Buchanan and John Tasioulas, who are among the few philosophers of law to have devoted considerable time and energy to thinking about international legal issues.[36] In particular, Buchanan has attempted to develop a theory of morality in international law,[37] whereas Tasioulas has extensively dealt with issues of legitimacy and human rights.[38]

Although Rorty's essay does not directly address international law, his remarks on human rights and the need to develop a culture of empathy and sentimentality against any foundational account is a powerful claim that anyone interested in the subject should carefully consider.[39] Thomas Nagel's political conception of distributive justice can also be seen as an incentive to