

THE PRACTICE OF INTERNATIONAL LAW: A THEORETICAL ANALYSIS

JENS MEIERHENRICH*

The tragedy of the world is that those who are imaginative have but slight experience, and those who are experienced have feeble imaginations. Fools act on imagination without knowledge, and pedants act on knowledge without imagination.¹

Alfred North Whitehead

Out of the conjunction of activities and men around the law-jobs there arise the crafts of law, and so the craftsmen. Advocacy, counseling, judging, law-making, administering—these are the major grouping of the law-crafts. . . . At the present juncture, the fresh study of these crafts and of the manner of their best doing is one of the major needs of jurisprudence.²

Karl Llewellyn

I

INTRODUCTION

The academic literature on the International Criminal Court (ICC) has been burgeoning for the past fifteen years, since the delegates of 160 states and scores of nongovernmental organizations assembled at the so-called Rome Conference in 1998. In the decade since the establishment of the ICC, in 2003, at its current Voorburg site in The Hague, an equally important set of writings has added to the already-tremendous burden facing any researcher seeking to comprehend the workings of international criminal law. As a consequence of the gradually expanding role of the ICC in international politics, a steadily growing number of filings and decisions, including the first judgment, has begun to coalesce into a jurisprudential library that only the most ardent observers stand any chance of ever mastering in all of its technical and substantive complexity. Whereas most scholars are liable to ensnare themselves in the maze of practice, most practitioners are prone to lose track of the latest contributions to scholarship. The developing intellectual risk, to borrow from Alfred North Whitehead, is that most of those who are theoretically imaginative about the

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* Associate Professor, Department of International Relations, London School of Economics and Political Science.

1. ALFRED NORTH WHITEHEAD, *Universities and Their Function*, in *THE AIMS OF EDUCATION AND OTHER ESSAYS* 93 (1967).

2. K. N. Llewellyn, *My Philosophy of Law*, in *MY PHILOSOPHY OF LAW: CREDOS OF SIXTEEN AMERICAN SCHOLARS* 181, 188 (1941).

ICC have but slight experience, and most of those who are experienced with its operation have but feeble theoretical imaginations.

In an effort to ward off the twin dangers of “imagination without knowledge” and “knowledge without imagination” in the study of international law, I provide theoretical tools designed to enable the advanced study of practices of international criminal law. By identifying empirically—and analyzing theoretically—a whole array of such everyday practices of the ICC, the symposium issue this article frames is designed to bring the logic of practices to the forefront of knowledge production in the study of international law.³ It is geared toward building an intellectual foundation on which scholars and practitioners can deliberate more fruitful ways of engaging each other’s very different lifeworlds than currently exist.

By taking practices seriously in the study of international law, I seek to accomplish three objectives. First, I hope to draw attention to the fact that the ICC, like most other international courts, is not a black box. Although this insight is hardly revolutionary, the bulk of existing scholarship in International Law (IL) and International Relations (IR) alike has failed, in assessments of the effectiveness of the permanent international court, to factor in the causal and constitutive significance of institutional and organizational facets of bureaucratic life, whether they manifest themselves formally or informally.⁴ To be sure, I am *not* suggesting that the international politics of adjudication play no role in the determination of judicial outcomes in the international system. In the case of the ICC in particular, the preferences and strategies of states—and also of nonstate actors—have had a considerable effect on the initiation, nature, funding, progression, and outcomes of international legal efforts addressed toward the punishment of international crimes. From the UN Security Council to the Assembly of States Parties to the informal group of diplomats known as “friends of the court,” governmental representatives have exercised power—sometimes successfully, sometimes not—over the operation of the ICC during the first decade of its operation.⁵ The complementarity regime governing the operation of the ICC further underscores the considerable leverage of states in

3. On the current state of International Law and International Relations scholarship more generally, see *INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART* (Jeffrey L. Dunoff & Mark A. Pollack eds., 2013).

4. For a recent and important IL perspective that glosses over the significance of social practices inside international courts, see, for example, Yuval Shany, *Assessing the Effectiveness of International Courts: A Goal-Based Approach*, 106 *AM. J. INT’L L.* 225 (2013). Suggestive of the neglect in IR is *GOVERNANCE, ORDER, AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN REALPOLITIK AND A COSMOPOLITAN COURT* (Steven C. Roach ed., 2009), in which analyses of macrodynamics stand in for theoretically driven and empirically grounded analyses of the microdynamics of international justice. The practice approach is *one* way of helping to address this unfortunate imbalance in the study of the ICC by scholars of IR, where—rather problematically—desk research continues to be seen as an adequate substitute for in-depth field research.

5. On role(s) of power in the international system, see, for example, *POWER IN GLOBAL GOVERNANCE* (Michael Barnett & Raymond Duvall eds., 2005).

the pursuit of international justice.⁶

And yet it would be analytically shortsighted to ignore the inner workings of international courts. As the contributors to this issue make clear, what goes on inside the ICC is of immediate relevance for making sense of the development and outcomes of international adjudication. I suggest that international courts such as the ICC can be profitably studied as *both* bureaucracies with varying degrees of autonomy—and occasionally even power—and agents controlled by principals, specifically the States Parties.⁷ Seeing that the latter perspective has dominated the study of international courts,⁸ I make a case for a complementary approach, namely one that places the agent in the foreground of the analysis, and places the principals directing the agent in the background. Once at the center of the analysis, the agency of international courts requires careful unpacking. Whether from the vantage point of practice theory⁹ or

6. For a comprehensive analysis, see the two-volume study *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE* (Carsten Stahn & Mohamed M. El Zeidy eds., 2011).

7. For this argument, made in the context of international organizations more generally, see IVER B. NEUMANN & OLE JACOB SENDING, *GOVERNING THE POLITY: PRACTICE, MENTALITY, RATIONALITY* 137 (2010).

8. Exemplary of the principal-agent approach to the study of international courts are Manfred Elsig & Mark Pollack, *Agents, Trustees, and International Courts: The Politics of Judicial Appointment at the World Trade Organization*, *EUR. J. INT'L REL.* (forthcoming), available at <http://ejt.sagepub.com/content/early/2012/09/05/1354066112448201>; Geoffrey Garrett, *The Politics of Legal Integration in the European Union*, 49 *INT'L ORG.* 171 (1995); Geoffrey Garrett, Daniel Kelemen & Heiner Schulz, *The European Court of Justice, National Governments and Legal Integration in the European Union*, 52 *INT'L ORG.* 149 (1998); Paul B. Stephan, *Courts, Tribunals and Legal Unification—The Agency Problem*, 3 *CHI. J. INT'L L.* 333 (2002); and Erik Voeten, *The Politics of International Judicial Appointments: Evidence from the European Court of Human Rights*, 61 *INT'L ORG.* 669 (2007). A collection of applications to international organizations more generally can be found in *DELEGATION AND AGENCY IN INTERNATIONAL ORGANIZATIONS* (Darren G. Hawkins, David A. Lake, Daniel L. Nielson & Michael J. Tierney eds., 2006). For a discussion and critique of this approach's dominance, see Karen Alter, *Agent or Trustees?: International Courts in their Political Context*, 14 *EUR. J. INT'L REL.* 33 (2008); and Karen Alter, *Delegating to International Courts: Self-Binding vs. Other-Binding Delegation*, 71 *LAW & CONTEMP. PROBS.* 37 (Winter 2008).

9. I use “practice theory” in this article interchangeably with “practice-based reasoning,” “practice-based approach,” “practice thinking,” and related terms. Although the term practice theory has wide currency in social theory, it is, in many respects, a misnomer because no unified theoretical perspective exists—or is even desired by those who have adopted this general approach to studying social life—in the social sciences. Moreover, it is worth pointing out that practice theorists are not interested in developing theories as conventionally understood in positivist social science, that is, as testable propositions that explain classes of events in the pursuit of generalization. Rather, the theoretical purview of virtually all practice theorists extends to all kinds of abstract endeavors, whether they are short-range, mid-range, or long-range in nature. As one scholar writes,

A theory is of the practice variety . . . when it either (1) proffers a general and abstract account of practices, either the field of practice or some subdomain thereof, or (2) refers whatever it offers a general and abstract account of to the field of practices. . . . Systems of generalization (or universal statements) that back explanations, predictions, and research strategies are theories. But so, too, for example, are typologies of social phenomena; models of social affairs; accounts of what social things (e.g., practices, institutions) are; conceptual frameworks developed expressly for depicting sociality; and descriptions of social life—so long as they are couched in general, abstract terms.

Theodore R. Schatzki, *Introduction: Practice Theory*, in *THE PRACTICE TURN IN CONTEMPORARY*

otherwise, the contributors to this issue engage in such an unpacking, collectively attempting to disaggregate the first permanent international criminal court by scrutinizing various socially meaningful or otherwise significant aspects of its everyday life. When considered in conjunction, these analytic narratives enable us to paint a more nuanced picture than currently exists of one of the most innovative—and contested—international organizations ever created.

Second, and more broadly, I seek to chart a path in-between objectivism and subjectivism when it comes to making sense of the practice of international law. All too often, accounts of international organizations veer toward one or the other of these analytical extremes. As Matthew Eagleton-Pierce rightly points out,

[O]bjectivist accounts, such as those produced in the rational actor tradition, often project images of agents engaged in purposeful calculation when it may be more accurate to define their behaviours as experimental or non-intentional. At the same time, purely subjective accounts also have problems, such as often over-emphasising the individual as a category of analysis to the expense of groups and structures.¹⁰

Likewise the study of the ICC is hampered by an artificial divide between IR and IL accounts of the international organization's operation. More often than not, IR accounts are objectivist in the sense just described. Whether explicitly or implicitly, the preferences of collective agents (for example, the ICC, the Office of the Prosecutor, or judges) are taken as a given (that is, exogenous) rather than as the product of institutional dynamics (that is, endogenous) and thus not separable from them.¹¹ IL accounts, by contrast, are often so preoccupied with the technical minutiae of prosecution and adjudication in The Hague that the structured contingency of individual action is not noticed, let alone studied.¹²

Third, I am hoping to inspire an interpretive turn in the study of practices in international law. On the foundation of my own ethnographic work on the ICC,

THEORY 3–4 (Theodore R. Schatzki et al. eds., 2001) [hereinafter Schatzki, *Introduction: Practice Theory*]. My conception of the nature of “analytic narratives”—the term I choose to classify the empirical analyses collected in this issue—is grounded in this understanding of what constitutes theoretical work in the social sciences. Consequently, my conception of the term departs rather fundamentally from the narrow definition pioneered by Robert Bates, Avner Greif, Margaret Levi, Jean-Laurent Rosenthal, and Barry R. Weingast in their coauthored volume *ANALYTIC NARRATIVES* (1998). I will return to this methodological issue in part VI below.

10. Matthew Eagleton-Pierce, *Examining the Case for Reflexivity in International Relations: Insights from Bourdieu*, 1 J. CRITICAL GLOBALISATION STUD. 111, 112 (2009).

11. See, e.g., DAVID BOSCO, *ROUGH JUSTICE: THE INTERNATIONAL CRIMINAL COURT IN A WORLD OF POWER POLITICS* (forthcoming 2014); STEVEN C. ROACH, *POLITICIZING THE INTERNATIONAL CRIMINAL COURT: THE CONVERGENCE OF POLITICS, ETHICS, AND LAW* (2006). For a very similar approach, though adopted by a lawyer, see BRUCE BROOMHALL, *INTERNATIONAL JUSTICE AND THE INTERNATIONAL CRIMINAL COURT: BETWEEN SOVEREIGNTY AND THE RULE OF LAW* (2004).

12. See, e.g., CONOR MCCARTHY, *REPARATIONS AND VICTIM SUPPORT IN THE INTERNATIONAL CRIMINAL COURT* (2012); WILLIAM A. SCHABAS, *AN INTRODUCTION TO THE INTERNATIONAL CRIMINAL COURT* (4th ed. 2011); *THE INTERNATIONAL CRIMINAL COURT AND COMPLEMENTARITY: FROM THEORY TO PRACTICE*, *supra* note 6.

and inspired by Bourdieu's indefatigable commitment to ground-level empirical research on social practices in nonlegal domains, I am keen to alter the ratio of *field research* to *desk research* in the study of international law, in which both IL and IR scholars have arguably been rather too content with observing international adjudication from afar, with predictable consequences for the depth and subtlety of resultant observations.

The remainder of the article is organized into six parts. In part II, I consider the significance of practice theory for the study of international law. I make a case for a practice turn in IL by situating the methodological approach in the context of alternative approaches for the analysis of international legal phenomena. In part III, I set out the conceptual parameters for the study of practices in international law. I introduce key attributes regularly associated with practice-based reasoning in the social sciences. I offer an initial, simplifying account of what practices are and how they work. With this theoretical baseline in place, I advance a working definition of social practices that is usable for the study of international law. In part IV, I take a step back and introduce more complexity. I present an overview of noteworthy advances in classic and contemporary practice theory in order to accomplish two goals: first, to show that practice-based reasoning has a long pedigree such that it ultimately cannot—and therefore should not—be reduced to one integrated account of what practices are and how they work and, second, to showcase the considerably diverse intellectual oeuvre that is available for adoption and reconfiguration by entrepreneurial IL and IR scholars intrigued to think more theoretically about the many visible—and hidden—practices that constitute international law. In part V I demonstrate the significance of studying practices, as defined in part III, with particular reference to empirical scholarship from IR and IL respectively. In a first step, I use the example of the macrophenomenon of diplomacy to illustrate the importance of taking the logic of practices as seriously as other logics of social action. I then complement the discussion, again by way of example, with IL scholarship on the practice of legality (which is representative of an international practice) in the international system and on the practice of human rights at the World Bank (which is representative of what I call an organizational practice). Against the background of this necessarily abbreviated reading of the existing literature, I use part VI to advance methodological guidelines for the study of practices in international law. With specific reference to the broad universe of practices pertaining to the operation of the ICC, I delineate concrete strategies of inquiry. I illustrate the utility of these methodological guidelines by drawing selectively on the contributions to this issue of *Law and Contemporary Problems*. The international legal practices that I will discuss encompass both *international practices* and *organizational practices*, and thus exemplify the application of practice theory at both the micro- and macrolevel of social analysis. I conclude in part VII, and consider implications for the practice of international law.

II

THE SIGNIFICANCE OF PRACTICES

The dearth of institutionalist scholarship on the ICC, which I bemoan in this article, is not altogether surprising. For neither graduate school nor law school, with a few notable exceptions, prepare Ph.D. or J.D. students for what international courts are *really* like.¹³ In IL, a variant of what social scientists would call “old institutionalism” continues to hold sway. Its prevalence vitiates against the kind of analytically sophisticated empirical scholarship that is lacking in, but that would immeasurably advance, the study of international law, and in particular the study of its practice. The vast majority of courses in law schools on international criminal law (ICL), to the extent that they are more than mere survey classes, are doctrine-driven and jurisprudence-heavy. By and large, this is a good thing, because a deep familiarity with the tangible, everyday products of international law is a *sine qua non* of *both* leading IL scholarship *and* practice—although most IR scholars strain to appreciate this.

This doctrinal and jurisprudential immersion often comes, however, at the expense of a more holistic and more rigorous study of international law, especially of ICL. There, little attention has thus far been paid to questions of institutional design, institutional development, and institutional effects, that is, analytical questions around which a considerable chunk of scholarship in the social sciences, and especially in political science, has revolved in the past thirty years, whether in the subfields of American politics, comparative politics, or IR.¹⁴ I put it thus, several years ago, in a review of William Schabas’s important yet rather conventional volume on adjudication in ICL, *The UN International Criminal Tribunals*:

International legal scholarship is ignoring, at its own peril, the significance of qualitative research for the study of international criminal courts and tribunals. It is crucial to appreciate in this context that the kinds of ideographic reasoning at which the social sciences excel are qualitatively *different* from—and more sophisticated than—the descriptive (although often technically compelling) accounts of international legal institutions, processes, and outcomes typically produced by international lawyers. This is so because international legal scholarship continues to be dominated, in the words of Jack Goldsmith and Eric Posner, by an improbable combination of doctrinalism and idealism.¹⁵

To combat both doctrinalism and idealism, a turn to practice theory may be useful. For the vast majority of international legal scholarship is reminiscent of the old institutionalism in law and the social sciences. That approach (now virtually extinct in the social sciences) consisted primarily of detailed

13. The same holds true for countries in which the study of law is an undergraduate degree.

14. For an overview of the breadth and sophistication of this research agenda, see, for example, *THE OXFORD HANDBOOK OF POLITICAL INSTITUTIONS* (R. A. W. Rhodes, Sarah A. Binder & Bert A. Rockman eds., 2008).

15. Jens Meierhenrich, Book Review, 102 *AM. J. INT’L L.* 696, 699 (2008); see also JACK L. GOLDSMITH & ERIC POSNER, *THE LIMITS OF INTERNATIONAL LAW* (2005) (arguing that international law matters but that it is considerably less powerful and less significant than the majority of scholars and practitioners believe).

configurative studies of different institutional (administrative, legal, and political) structures. “This work,” according to Kathleen Thelen and Sven Steinmo, “was often deeply normative, and the little comparative ‘analysis’ then existing largely entailed the juxtaposed descriptions of different institutional configurations in different countries, comparing and contrasting. This approach did not encourage the development of intermediate-level categories and concepts that would facilitate truly comparative research and advance explanatory theory.”¹⁶

In the early 1980s, this approach, which grew out of the public-law tradition, was beginning to give way to a “new institutionalism,” first in economics (pioneered by Nobel Laureate Douglass North), then in sociology and political science.¹⁷ In contrast to the behavioralism of the 1960s and 1970s, when institutions were viewed as epiphenomenal, that is, as not more than the sum of individual-level properties, this new institutionalist movement was built around a series of interlocking ideas:

The ideas deemphasize the dependence of the polity on society in favor of an interdependence between relatively autonomous social and political institutions; they deemphasize the simple primacy of micro processes and efficient histories in favor of relatively complex processes and historical inefficiency; they deemphasize metaphors of choice and allocative outcomes in favor of other logics of action and the centrality of meaning and symbolic action.¹⁸

What is the significance of any of this for the study of international criminal courts and tribunals? Let me make the connections clear. The International Criminal Tribunal for the former Yugoslavia (ICTY), the International Criminal Tribunal for Rwanda (ICTR), and the Special Court for Sierra Leone (SCSL), to name but a few, are organizations (just like the U.S. Treasury, firms, or rebel movements). Thus, they can be studied as such. The very *same* questions about institutional design, choice, and development that we have deemed worthy of investigation in the domestic context (and in the context of such supranational organizations as the North Atlantic Treaty Organization (NATO) or the European Union¹⁹) can be profitably explored in The Hague,

16. Kathleen Thelen & Sven Steinmo, *Historical Institutionalism in Comparative Politics*, in *STRUCTURING POLITICS: HISTORICAL INSTITUTIONALISM IN COMPARATIVE ANALYSIS* 3 (Sven Steinmo et al. eds., 1992); *see also* Mark C. Suchman & Lauren B. Edelman, *Legal Rational Myths: The New Institutionalism and the Law and Society Tradition*, 21 *LAW & SOC. INQUIRY* 903, 909–10 (1996) (evaluating analytical advances of, and similarities between, the sociology of law and the sociology of organizations).

17. Overviews of these trends are contained in PAUL PIERSON, *POLITICS IN TIME: HISTORY, INSTITUTIONS, AND SOCIAL ANALYSIS* (2004); MALCOLM RUTHERFORD, *INSTITUTIONS IN ECONOMICS: THE OLD AND THE NEW INSTITUTIONALISM* (1994) and *THE NEW INSTITUTIONALISM IN ORGANIZATIONAL ANALYSIS* (Walter W. Powell & Paul J. DiMaggio eds., 1991).

18. James G. March & Johan P. Olsen, *The New Institutionalism: Organizational Factors in Political Life*, 78 *AM. POL. SCI. REV.* 734, 738 (1984).

19. *See, e.g.*, INTERNATIONAL INSTITUTIONS AND SOCIALIZATION IN EUROPE (Jeffrey T. Checkel ed., 2007); JOSEPH JUPILLE, *PROCEDURAL POLITICS: ISSUES, INFLUENCE, AND INSTITUTIONAL CHOICE IN THE EUROPEAN UNION* (2004); WALLACE J. THIES, *WHY NATO ENDURES* (2009); Robert B. McCalla, *NATO's Persistence after the Cold War*, 50 *INT'L ORG.* 445 (1996).

Arusha, and Freetown. The next generation of international legal scholars studying international criminal courts and tribunals must “decenter” these international organizations—that is, they must analyze the multiple ways in which the ICTY, ICTR, SCSL, or any other such institution is produced, reproduced, and reconfigured as a result of the particular and contingent beliefs, preferences, and strategies of the individuals (as well as collectivities) acting *within* them as well as *upon* them.

In IR, by contrast, old institutionalism was banished in the early 1980s, when it also began to disappear in other subfields of political science as well as in the disciplines of economics and sociology. Yet the relative neglect of the inner workings of international courts in general and of the ICC in particular is surprising nevertheless, especially because IR scholars in other contexts successfully disaggregated the bureaucracies of international organizations.²⁰

These important advances notwithstanding, still largely missing from the empirical turn in international legal scholarship are treatments of international courts as bureaucracies. More specifically lacking are studies that focus, to invoke Karl Llewellyn, on the “law-crafts” of international law.²¹ The focus on everyday practices of the ICC that I promote in this article is one of several ways of deepening—and broadening—the empirical turn in international legal scholarship. It is noteworthy because it can be used to foreground aspects of international law not commonly subjected to analytic scrutiny. I begin this article from the premise that a considerable portion of what international lawyers and other actors contributing to the making of international criminal law do is *not* the result of conscious deliberation or thoughtful reflection. Rather, I assume, with Vincent Pouliot, that “practices are the result of inarticulate, practical knowledge that makes what is to be done appear ‘self-evident’ or commonsensical. This is the logic of practicality, a fundamental feature of social life that is often overlooked by social scientists.”²²

This omission is particularly glaring in the domain of international law. Despite a veritable cottage industry of quantitative scholarship on the determinants and effects of international law emanating from the social sciences, the majority of scholars, most of whom are inexorably embedded in the knowledge structures of IR, have shown a considerable disregard for the really existing worlds of international law. In addition to the “widespread

20. A notable exception is BENJAMIN N. SCHIFF, *BUILDING THE INTERNATIONAL CRIMINAL COURT* (2008), though this treatment is not theoretically motivated or otherwise driven by a progressive social ontology. Having said that, it contains numerous interesting observations that suggest the author is cognizant of the importance of (also) scaling down in order to make sense of the ICC.

21. On the notion of the “social lives” of international justice, see *PATHS TO INTERNATIONAL JUSTICE: SOCIAL AND LEGAL PERSPECTIVES* (Marie-Bénédicte Dembour & Tobias Kelly eds., 2007). See also Sally Engle Merry, *Anthropology and International Law*, 35 *ANN. REV. ANTHROPOLOGY* 999 (2006) (examining the contributions of anthropological and ethnographic research to understanding the development and sources of international law).

22. Vincent Pouliot, *The Logic of Practicality: A Theory of Practice of Security Communities*, 62 *INT’L ORG.* 257, 258 (2008) [hereinafter Pouliot, *The Logic of Practicality*].

ignorance of legal theory and epistemology among political science and IR scholars,” recently diagnosed by Jeffrey Dunoff and Mark Pollack,²³ most social scientists betray a very weak understanding of how international law *really* works. By opening the black box of the ICC, which most IR scholars (and also many IL scholars) continue to treat as if it were an undifferentiated whole, the contributors to this issue seek to help close the considerable methodological gap that still divides the disciplinary approaches of IR and IL scholarship. This is more necessary than ever, for, if we believe Dunoff and Pollack, the much-touted rapprochement between the two disciplinary subfields that Kenneth Abbott, Anne-Marie Slaughter, and others envisaged has not been as harmonious as many had hoped it would be when it commenced some twenty years ago:

On the IR side, caricature and ignorance of international legal scholarship is, if anything, more widespread. It appears that many political scientists are concerned that legal scholarship is overtly normative and fails to generate predictive, testable hypotheses; is highly formalistic, overly technical, and inaccessible to those who lack legal training; and ignores issues of fundamental interest to IR scholars, such as the role of power asymmetries in producing international outcomes.²⁴

Dunoff and Pollack might have added that many IR scholars also hold an outdated view of contemporary international law as practice. For in addition to regularly downplaying the explanatory significance of IL approaches to the study of international law, IR scholars have but a scant understanding of what international legal practitioners *actually* do on a daily basis. Unlike most scholars of comparative politics who have an intimate understanding of their research sites, IR scholars of international law have tended to stay well clear of fieldwork. Analysts who study international legal actors, institutions, organizations, and processes on the ground—where things are considerably more complex than they appear from a few thousand miles away—are rare. As a result, many IR scholars have a very simplistic sense of what makes international law hang together. International legal goings-on are regularly reduced to factors that can be reflectively isolated. By this I mean that the vast majority of IR scholars gloss over explanatory factors that cannot be objectively studied.²⁵

23. INTERDISCIPLINARY PERSPECTIVES ON INTERNATIONAL LAW AND INTERNATIONAL RELATIONS: THE STATE OF THE ART, *supra* note 3, at 11.

24. *Id.* at 13. Among the first calls for interdisciplinary collaboration between international and the social sciences (with a particular focus on IR) was Kenneth Abbott's 1989 article, *Modern International Relations Theory: A Prospectus for International Lawyers*, 14 YALE J. INT'L L. 335 (1989). For an early symposium on the beginnings of a rapprochement, see THE METHODS OF INTERNATIONAL LAW (Steven R. Ratner & Anne-Marie Slaughter eds., 2004). The contributions previously appeared in the pages of the *American Journal of International Law. Symposium on Method in International Law*, 93 AM. J. INT'L L. 291 (1999).

25. For a recent and influential example, see BETH SIMMONS, MOBILIZING FOR HUMAN RIGHTS: INTERNATIONAL LAW IN DOMESTIC POLITICS (2009). For a foundational collection of articles, see also Special Issue, *Legalization and World Politics*, 54 INT'L ORG 385, *reprinted in* LEGALIZATION AND WORLD POLITICS (Judith Goldstein, Miles Kahler, Robert O. Keohane & Anne-Marie Slaughter eds., 2003).

In recent years, Yves Dezalay and a number of largely Europe-based scholars from across law and the social sciences have begun to pay theoretical attention to the practice of international law.²⁶ Unfortunately, the bulk of this scholarship has been centered on the process of legal integration in Europe.²⁷ It remains for the general approach of Dezalay and others to make inroads in the study of ICL. In this article I make a foray into this uncharted terrain.

III

THE LOGIC OF PRACTICES

“Practice theory”—by which I mean the entire universe of perspectives that have sought, since the late 1970s, to incorporate practice-based reasoning into social theory, and more recently into legal theory—defies easy articulation. Though the term practice theory is widely used, it would be more accurate to speak of practice theories, in the plural. For one is hard-pressed to extract from the many contending perspectives on the nature and logic of practices easily comprehensible tenets that *all* of the scholars who have contributed to theorizing the phenomenon would readily accept, although I will attempt to do so nonetheless. I begin by taking a brief look at the intellectual juncture at which practice theory—at least in its contemporary variant—emerged, and in response to which rival strands of thought. Doing so is useful in order to appreciate what is at stake in adopting—or rejecting—a focus on practices in international law.

In the social sciences, theorists like Pierre Bourdieu, Anthony Giddens, and Marshall Sahlins, in particular, responded to the intellectual supremacy of what Sherry Ortner has usefully described as “theories of ‘constraint.’”²⁸ Most influential among these theories of constraint were interpretive (or symbolic) anthropology (invented by Clifford Geertz), Marxist political economy (advocated by Eric Wolf), and French structuralism (by Claude Lévi-Strauss).²⁹ Within anthropology in the 1970s, the advocates of these divergent intellectual responses to the previously widespread dogma of functionalism all espoused the ontological priority of structures over agents. This is to say, they all believed that the behavior of individuals and collectivities is ultimately reducible to the

26. See, e.g., Yves Dezalay, *Les courtiers de l'international: Héritiers cosmopolites, mercenaires de l'impérialisme et missionnaires de l'universel*, ACTES DE LA RECHERCHE EN SCIENCES SOCIALES [ARSS], Mar. 2004, at 5 (Fr.) (exploring the ways in which international professional elites—experts, consultants, and so on—have invented, promoted, engineered, and otherwise shaped various facets of globalization); Guillaume Sacriste & Antoine Vauchez, *The Force of International Law: Lawyers' Diplomacy on the International Scene in the 1920s*, 32 LAW & SOC. INQUIRY 83 (2007) (tracing the multiple and often antagonistic roles of international lawyers in the interwar years).

27. Representative publications are EUROPEAN WAYS OF LAW: TOWARDS A EUROPEAN SOCIOLOGY OF LAW (Volkmar Gessner & David Nelken eds., 2007); LAWYERING EUROPE: EUROPEAN LAW AS A TRANSNATIONAL SOCIAL FIELD (Antoine Vauchez & Bruno de Witte eds., 2013).

28. Sherry B. Ortner, *Updating Practice Theory*, in ANTHROPOLOGY AND SOCIAL THEORY: CULTURE, POWER, AND THE ACTING SUBJECT 1, 1 (Sherry B. Ortner ed., 2006).

29. *Id.*

manifold social structures—from kinship to families to bureaucracies to beliefs to world systems—in which agents are embedded. Ortner puts it thus:

Human behavior was shaped, molded, ordered, and defined by external social and cultural forces and formations: by culture, by mental structures, by capitalism. . . . But a purely constraint-based theory, without attention to either human agency or to the processes that produce and reproduce those constraints—social practices—was coming to seem increasingly problematic.³⁰

In sociology, Erving Goffman, Harold Garfinkel, and others, drawing on ideas of Max Weber, George Mead, and Herbert Blumer, introduced what became known as “symbolic interactionism” and (subsequently) “ethnomethodology” into the debate in order to counter what they considered the excessive influence of structuralism in social theory.³¹ Putting agents front and center, the advocates of these relatively marginal approaches were preoccupied with the microdynamics of social interaction. By erring on the side of agents, these advocates often let structures fall entirely by the wayside. The result was a methodological individualism that was as inadequate in capturing social complexity as the methodological structuralism that symbolic interactionism had sought to replace.³² It is this intellectual logjam that practice theorists (as they later came to be known) set out to break.³³

Although there is considerable variation among practice-based theories, what unites all practice theorists, self-declared and otherwise, are two important intellectual commitments, as perceptively identified by David Stern: first, a commitment to “holism about meaning” and, second, an “emphasis on the importance of close attention to particular practices and the context within which they are located.”³⁴ At the inception of practice theory, three particular works were marshaled in support of the discipline’s twin commitments. Together the works encapsulated much of practice-based theorizing in the 1970s. Two of them were sociological, the third anthropological, in disciplinary orientation. Arguably the most important was Bourdieu’s *Outline of a Theory of Practice*, followed by Giddens’s *Central Problems of Social Theory* and Sahlins’s *Historical Metaphors and Mythical Realities*.³⁵ Each in its own way, these works

set out to conceptualize the *articulations* between the practices of social actors ‘on the ground’ and the big ‘structures’ and ‘systems’ that both constrain those practices and yet are ultimately susceptible to being transformed by them. They accomplished this

30. *Id.* at 1–2.

31. *Id.* at 2.

32. *See id.*

33. *Id.*

34. David G. Stern, *The Practical Turn*, in *THE BLACKWELL GUIDE TO THE PHILOSOPHY OF THE SOCIAL SCIENCES* 185 (Stephen P. Turner & Paul A. Roth eds., 2003).

35. PIERRE BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE* (1977) [hereinafter BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE*]; ANTHONY GIDDENS, *CENTRAL PROBLEMS OF SOCIAL THEORY: ACTION, STRUCTURE, AND CONTRADICTION IN SOCIAL ANALYSIS* (1979); MARSHALL SAHLINS, *HISTORICAL METAPHORS AND MYTHICAL REALITIES: STRUCTURE IN THE EARLY HISTORY OF THE SANDWICH ISLANDS KINGDOM* (1981). For a brief discussion of the first two books and their relation to practice theory, see *infra* Parts IV.B.4, IV.C.1.

by arguing, in different ways, for the *dialectical*, rather than *oppositional* relationship between the structural constraints of society and culture on the one hand and the ‘practices’—the new term was important—of social actors on the other. They argued as well that ‘objectivist’ perspectives (like Wolf’s political economy) and ‘subjectivist’ perspectives (like Geertz’s interpretive anthropology) were not opposed ways of doing social science but represented ‘moments’ in a larger project of attempting to understand the dialectics of social life.³⁶

By offering a promising way to transcend the so-called agent–structure problem in social theory—that is, the long-standing, unresolved question of whether agents or structures are ontologically prior when it comes to explaining the social world around us—Bourdieu, Giddens, Sahlins, and the practice-oriented scholarship they inspired “restored the actor to the social process without losing sight of the larger structures that constrain (but also enable) social action.”³⁷

Against this background, it is no wonder that practice theory is gradually finding adherents among IR and (though more rarely) IL scholars. Largely inspired by Alexander Wendt’s seminal 1987 article on the agent–structure problem in the study of international politics,³⁸ IR theorists in the 1990s spilled much ink on questions of epistemology and ontology and the relation of each to explanation and understanding in their field of study.³⁹ Because empirical scholarship on questions related to the constitution (to borrow Giddens’s term) of international phenomena is now more common (and sophisticated) than twenty years ago, the grounded approach first advocated by practice theorists for making sense of domestic goings-on is increasingly being adapted for the study of the international system. In IR, this tendency is illustrated, most recently, by work on so-called international practices such as diplomacy and deterrence.⁴⁰ The introduction of practice theory into IL can be traced back to Yves Dezalay, whose work on international commercial arbitration and related international phenomena, often undertaken in collaboration with Bryant Garth, has, for the last twenty years, endeavored to inspire a similar “practice turn” in the study of foreign, comparative, and international law.⁴¹ More recently,

36. Ortner, *supra* note 28, at 2 (internal citation omitted).

37. *Id.* at 3.

38. Alexander E. Wendt, *The Agent-Structure Problem in International Relations Theory*, 41 INT’L. ORG. 335 (1987).

39. For an influential collection, see INTERNATIONAL THEORY: POSITIVISM AND BEYOND (Steve Smith, Ken Booth & Marysia Zalewski eds., 1996). See also MARTIN HOLLIS & STEVE SMITH, EXPLAINING AND UNDERSTANDING INTERNATIONAL RELATIONS (1991). For the most sophisticated and coherent restatement of conventional IR theory at the time, see ALEXANDER WENDT, SOCIAL THEORY OF INTERNATIONAL POLITICS (1999).

40. For more detailed accounts of these studies and other IR scholarship employing the tools of practice theory, see *infra* Part V. For an overview, see INTERNATIONAL PRACTICES (Emanuel Adler & Vincent Pouliot eds., 2011).

41. Representative of their practice-oriented scholarship are their three award-winning books, namely YVES DEZALAY & BRYANT G. GARTH, ASIAN LEGAL REVIVALS: LAWYERS IN THE SHADOW OF EMPIRE (2010); YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER (1996) [hereinafter DEZALAY & GARTH, DEALING IN VIRTUE]; YVES DEZALAY & BRYANT G. GARTH, THE INTERNATIONALIZATION OF PALACE WARS: LAWYERS, ECONOMISTS, AND THE CONTEST TO TRANSFORM LATIN AMERICAN STATES (2002).

Antoine Vauchez and others have taken up the Bourdieusian mantle and contributed to spreading practice-based scholarship on international legal phenomena, with particular reference to the legal integration of the European Union and related developments.⁴² Entirely missing from this fledgling IL trend, however, is the study of ICL, where practice theory has made no discernable inroads. But before I turn to ICL, I will elaborate on the essentials of practice theory and then reconstruct its genealogy—all for the purpose of providing the intellectual building blocks for the sophisticated, and diverse, study of practices in international law.

A. What Are Practices?

The nature of practices, like that of most categories of analysis, is contested. Alternative conceptions abound. Notwithstanding this richness in conceptual imagination, the essence of practices is stable across the multitude of existing definitions as almost all conceptions of practices, and the theories constructed around them,

foreground the importance of activity, performance, and work in the creation and perpetuation of all aspects of social life. Practice approaches are fundamentally processual and tend to see the world as an ongoing routinized and recurrent accomplishment. This applies even to the most durable aspect of social life—what scholars call social structures. Family, authority, institutions, and organizations are all kept in existence through the recurrent performance of material activities, and to a large extent they only exist as long as those activities are performed.⁴³

But what exactly are practices? Consider the following four contending conceptions from the late twentieth century: Michael Oakshott's procedural conception, Alasdair MacIntyre's cultural conception, Theodore Schatzki's agentic conception, and Pierre Bourdieu's "subjectivist" conception. Although in the present analysis I very deliberately simplify the nature of practices, in part IV I take a step back and, also very deliberately, introduce uncertainty into the discussion. Hopefully, this additional layer of complexity will be useful when I eventually turn, in part VI, to contemplating methodological guidelines for the study of practices in international law. The variety of theoretical approaches will serve, in part IV and also in the immediate analysis, as a useful reminder that there is more than one way of defining—and thus of studying—the practice of international law.

To begin with, the philosopher Michael Oakshott as part of advancing his theory of action referred to a practice as

a set of considerations, manners, uses, observances, customs, standards, canons, maxims, principles, rules, and offices specifying useful procedures or denoting obligations or duties which relate to human actions and utterances. It is a prudential or an authoritative adverbial qualification of choices and performances, more or less

42. For an overview of this decidedly Europe-oriented research agenda, see Antoine Vauchez, *Introduction: Euro-Lawyering, Transnational Social Fields and European Polity-Building*, in *LAWYERING EUROPE*, *supra* note 27.

43. DAVIDE NICOLINI, *PRACTICE THEORY, WORK, AND ORGANIZATION: AN INTRODUCTION* 3 (2013).

complicated, in which conduct is understood in terms of a procedure.⁴⁴

As compelling—and recognizable from our everyday lives—as this definition of a singular practice is, it falls short in key respects. Most important, because it is excessively steeped in methodological individualism, Oakeshott's take on practice glosses over the feedback loop—that is, the mutually constitutive relationship—that usually exists between agents and the structures surrounding them.⁴⁵ Notably, he does so by conceptually separating practices from the actions they are said to govern. As one critic has it,

Oakeshott sunders them because, as a good conservative, he wants the identity of action to derive solely from features of individuals. This he achieves by tethering what someone does to his or her understandings and motives. Once, however, the identity of action is pegged⁴⁶ to the individual, practices (i.e., sociality) can only pertain to the how of action.

One remedy adopted by practice theorists has been to make sociality a defining attribute of practice. For example, Alasdair MacIntyre, also arguing from philosophy, defines practices as

coherent and complex form[s] of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence,⁴⁷ and human conceptions of the ends and goods involved, are systematically extended.

Unpacking this abstract definition, one is left with three defining attributes that a form of activity must possess in order to justify calling it a practice on this account: It must be complex, it has to have internal goods, and it has to be enacted in the pursuit of standards of certain societal values, such as excellence.

In this same analysis, MacIntyre gives a series of real-world examples to illustrate his definition:

Tic-tac-toe is not an example of a practice in this sense, nor is throwing a football with skill; but the game of football is, and so is chess. Bricklaying is not a practice; architecture is. Planting turnips is not a practice; farming is. So are the enquiries of physics, chemistry and biology, and so is the work of the historian, and so are painting and music.⁴⁸

The definitional requirement of “internal goods” is best illustrated by reference to one of MacIntyre's preferred examples: the practice of chess. Internal goods

44. MICHAEL OAKESHOTT, ON HUMAN CONDUCT 55 (1975).

45. The classical statement remains ANTHONY GIDDENS, THE CONSTITUTION OF SOCIETY: OUTLINE OF THE THEORY OF STRUCTURATION (1986) [hereinafter GIDDENS, THE CONSTITUTION OF SOCIETY] (critiquing orthodox social science and calling for a combination of insights from functionalism and naturalism). For a recent exploration in the context of international politics, see COLIN WIGHT, AGENTS, STRUCTURES AND INTERNATIONAL RELATIONS: POLITICS AS ONTOLOGY (2006) (arguing that epistemological and methodological differences in the study of international politics are insignificant and that the only differences worth investigating are ontological, that is, they relate to our understanding of how the world is constituted).

46. THEODORE R. SCHATZKI, SOCIAL PRACTICES: A WITTGENSTEINIAN APPROACH TO HUMAN ACTIVITY AND THE SOCIAL 97 (1996) [hereinafter SCHATZKI, SOCIAL PRACTICES].

47. ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 187 (1981).

48. *Id.*

are the (more or less) unique products derived from the act of playing chess, for example, the attainment of particular analytical skills or the ability to reason strategically, as illustrated by the ability to predict an opponent's moves. External goods are products that the practice of chess may well help produce—money, power, fame—but that are not uniquely related to the activity.⁴⁹

For MacIntyre, practices are fairly stable, long-lasting phenomena related to what he calls “living tradition.” As he writes,

[T]he history of a practice in our time is generally and characteristically embedded in and made intelligible in terms of the larger and longer history of the tradition through which the practice in its present form was conveyed to us; the history of each of our own lives is generally and characteristically embedded in and made intelligible in terms of the larger and longer histories of a number of traditions.⁵⁰

MacIntyre, unlike other theorists who have attempted to capture and define the nature of practices in our lives, has a rather optimistic outlook. In his moral philosophy, being part of a tradition (and, by implication, its practices) is an important ingredient of the good life. As a consequence, practices, for MacIntyre, tend to be marked by coherence and cooperation. This is an assumption not shared by all practice theorists—a difference that manifests itself conceptually. Take, for example, the definition of practice by Theodore Schatzki, to which I now turn.

For Schatzki, a practice refers to “a temporally evolving, open-ended set of doings and sayings” constituted and maintained by “practical understandings, rules, teleoaffective structures, and general understandings.”⁵¹ This definition offers an analytical, rather than normative, take on practices. What is more, unlike his predecessors, Schatzki, by way of the definitional qualifier “open-ended,” emphasizes that practices “entail irregularities and unexpected elements.”⁵² It follows from this that practices, thus understood, are not an inherently desirable logic of social action, as the definitional accounts of Oakeshott and MacIntyre would have us believe. Whether discrete actions combine to a unified practice in Schatzki's account is determined solely by the presence or absence of four mechanisms—“*practical understandings, rules, teleoaffective structures, and general understandings.*”⁵³ The worthiness or meaningfulness or effectiveness of practices is an entirely separate, empirical question.

Schatzki has made a valuable contribution to specifying the nature of practices by suggesting that the nexus between doings and sayings is brought about and shaped by the interplay among understandings, procedures, and engagements that vary independently from one another depending on context,

49. *Id.* at 187.

50. *Id.* at 222.

51. THEODORE R. SCHATZKI, *THE SITE OF THE SOCIAL: A PHILOSOPHICAL ACCOUNT OF THE CONSTITUTION OF SOCIAL LIFE AND CHANGE* 87 (2002) [hereinafter SCHATZKI, *THE SITE OF THE SOCIAL*].

52. NICOLINI, *supra* note 43, at 164.

53. *Id.* at 165.

and that determine the kinds of performances that some theorists say are part and parcel of all forms of “praxis,” by which is meant the world of human action (in contrast to the world of human reflection). One implication of Schatzki’s concretization of the nature of practices is that, on his conception, “practices can easily overlap and the same doing can be part of two practices.”⁵⁴ This is of immediate relevance for understanding the practice of international law because it opens up an analytical space in which *multiple* interpretations of the social meaning of legal behavior can coexist. Methodologically, this means that a practitioner’s interpretation of “doing” in an applied international legal setting—such as the ICC—could be entirely compatible with an analyst’s conflicting interpretation of the same “doing.” For example, an explanatory account that holds a particular adjudicative way of doing things to be representative of a *bureaucratic practice* could be as valid as—and entirely compatible with—an alternative account that points to the same conduct as constituting a *stigmatizing practice*.⁵⁵ It is precisely in this sense, as Davide Nicolini points out, that “authors operating within this tradition [of practice-based reasoning] insist that practices are not just what people do, and that adopting a practice approach is distinctly different from simply providing more accurate, or more detailed or ‘thicker’ descriptions of people’s conduct.”⁵⁶ To push this agenda, Schatzki distinguishes between “integrative practices” and “dispersed practices.” Because the former are easier to understand, let me start with them.

Schatzki defines integrative practices as “the more complex practices found in and constitutive of particular domains of social life. Examples are farming practices, business practices, voting practices, teaching practices, celebration practices, cooking practices, recreational practices, industrial practices, religious practices, and banking practices.”⁵⁷ For the province of social life with which I am concerned in this article, an example of what Schatzki understands by an integrative practice is the totality of legal practices in domestic politics and international affairs. Dispersed practices, on the other hand, refer to “a set of doings and sayings linked primarily by an understanding they express,” according to Schatzki, who further notes that “[e]xamples of dispersed practices are the practices of describing, ordering, following rules, explaining, questioning, reporting, examining, and imagining.”⁵⁸ Without going into technical detail, what Schatzki’s very demanding treatment of the conceptualization of practices affords us is an analytical toolkit with which to begin to dissect the social lives of international law. Regardless of whether we subscribe to his particular theoretical perspective, Schatzki’s definitional efforts

54. *Id.* at 168.

55. An article on adjudicative practices that was scheduled to appear in this issue was not received in time for publication. On stigmatizing practices, see Frédéric Mégret, *Practices of Stigmatization*, 76 LAW & CONTEMP. PROBS., nos. 3–4, 2013 at 287.

56. NICOLINI, *supra* note 43, at 168.

57. SCHATZKI, SOCIAL PRACTICES, *supra* note 46, at 98.

58. *Id.* at 91.

promise to help with demarcating the boundaries of practices that are integral to the making of international law.

A final author to introduce in this discussion of definitions is Bourdieu, whose practice theory did not convince Schatzki. Schatzki faulted the French sociologist for an excessively structural account centered on the concept of “habitus,” a concept that I specify in part IV when I engage in more detail with Bourdieu’s influential perspective on the nature and meaning of social practices. Yet Bourdieu is important to briefly introduce here because his conception of what practices are has featured so prominently in recent IR theory.⁵⁹ Pouliot not long ago came up with the awkward—yet apt—notation of “subjectivism” to convey the ontological position taken up by Bourdieu across most of his oeuvre.⁶⁰ According to this position, *both* subjectivism *and* objectivism are required for making sense of social life.⁶¹ Indeed Bourdieu deemed them “equally indispensable to a science of the social world that cannot be reduced either to a social phenomenology or to a social physics.”⁶² It is for this reason that, in this preliminary definitional analysis, I speak of Bourdieu’s as a subjective conception of practices. What does this conception entail?

Sidestepping for now the dense theoretical substance of Bourdieu’s treatment, it is worth noting that the French sociologist devoted inordinate amounts of space to explicating and fine-tuning his concept of habitus, but neglected almost entirely the careful conceptualization of practices, even though they feature centrally in several of his most important books. Despite this conspicuous gap in Bourdieu’s scholarship, we can deduce a definition from his many more general statements, and from some of his empirical work on the topic. At one point, Bourdieu speaks of behavior that is “[o]bjectively ‘regulated’ and ‘regular’ without being in any way the product of obedience to rules” and that is “collectively orchestrated without being the product of the organizing action of a conductor.”⁶³ In Bourdieu’s language, practices are sometimes referred to, not much more helpfully, as activities or “games” that are played in the context of particular “domains of practice,” which he calls “fields.”⁶⁴

Alan Warde has remarked that Bourdieu “does not conceive of a practice as a coherent entity and is especially intent on emphasizing the importance of praxis.”⁶⁵ Linked to this was a strong concern with corporeality, or the bodily

59. For an extended discussion of the Bourdieusian variant of practice theory, see Part V.C.1 below.

60. Vincent Pouliot, “*Subjectivism*”: *Toward a Constructivist Methodology*, 51 INT’L STUD. Q. 359, 359 (2007).

61. *Id.*

62. PIERRE BOURDIEU, *THE LOGIC OF PRACTICE* 25 (1990) [hereinafter BOURDIEU, *THE LOGIC OF PRACTICE*].

63. *Id.* at 53.

64. *See infra* text accompanying notes 174–177.

65. Alan Warde, *Consumption and Theories of Practice*, 5 J. CONSUMER CULTURE 131, 133 (2005).

dimensions of practices. This focus, influenced by Maurice Merleau-Ponty's *Phenomenology of Perception*,⁶⁶ is more pronounced in Bourdieu's practice theory than in some of the others in existence. Yet Bourdieu was less concerned with capturing the essence of practices definitionally. Arguably, this was owed to his penchant for inductive reasoning, notably his extensive ethnographic work.⁶⁷ It stands to reason that he did not want to exclude *ex ante* from his purview human conduct that may not stand up to a well-crafted definition of practices. Bourdieu may also have been reluctant to advance such a definition because of his—rather paradoxical in light of his theoretical ambition—skepticism toward all efforts at explaining and understanding social practices. As he wrote in *The Logic of Practice*, “[T]he language of overall resemblance and uncertain abstraction is . . . too intellectualist to be able to express a logic that is performed directly in bodily gymnastics, without passing through explicit apprehension of the ‘aspects’ chosen or rejected.”⁶⁸ He went on to contemplate the nature of real-world practices (and the related category of rites), pointing to

the fallacy of seeking to contain in concepts a logic that is made to do without concepts; of treating practical manipulations and bodily movements as logical operations; of speaking of analogies and homologies (as one has to in order to understand and explain) when it is simply a matter of practical transfers of incorporated, quasi-postural schemes.⁶⁹

What remains is a conception of practice that, though underspecified, opens up a broader space for empirical exploration than some of the contending definitions. By highlighting the importance of habitus, and the significance of corporeal schemas, Bourdieu's subjective conception draws our attention to yet another way of talking about social practices.

What practices are taken to *be* varies across the numerous theorists who have discovered them and across the various theories that have been constructed around them. In this part, I illustrated this theoretical variety and the considerable difficulty associated with capturing the nature of practices. This conceptual challenge, however, should not cause us to dismiss the analytical significance of practices, or to equate practices with mere behavior, as some critics are wont to do. As Andreas Reckwitz writes, “There is a certain danger of trivializing practice theory. At first sight, its approach might seem relatively close to everyday talking about ‘agents’ and their behaviour. In fact,

66. See MAURICE MERLEAU-PONTY, *PHENOMENOLOGY OF PERCEPTION* (1962) (critiquing the objective thought of Descartes and Kant and arguing, against the “phenomenological reduction” of Husserl and others, that the body, rather than consciousness, is the most important determinant of human perception).

67. Aside from southwestern France, Bourdieu's ethnographic work centered on the Kabyle region of Algeria. For an account of his motivations, aims, and circumstances for doing fieldwork in that country, see Pierre Bourdieu, *Algerian Landing*, 5 *ETHNOGRAPHY* 415 (2004). More recently, see also PIERRE BOURDIEU, *ALGERIAN SKETCHES* (2013). For a critical engagement with Bourdieu's ethnographic work in Algeria, see Jane E. Goodman, *The Proverbial Bourdieu: Habitus and the Politics of Representation in the Ethnography of Kabylia*, 105 *AM. ANTHROPOLOGIST* 782 (2003).

68. BOURDIEU, *THE LOGIC OF PRACTICE*, *supra* note 62, at 89.

69. *Id.* at 92.

this is not the case.”⁷⁰ Simply put, practices are “body/knowledge/things-complexes.”⁷¹ What all definitions of practices have in common is the conceptual foregrounding of “non-instrumentalist notions of conduct,” as Warde helpfully puts it.⁷²

Although theorists who take practices seriously deny that individuals have *active agency*, by which I mean the capacity to fully determine their own behavior, these theorists do not believe in holism either. “As carriers of a practice,” Reckwitz notes, individuals

are neither autonomous [as rationalists assume] nor the judgmental dopes who conform to norms [as constructivists tend to argue]: They understand the world and themselves, and use know-how and motivational knowledge, according to the particular practice [under investigation]. There is a very precise place for the “individual”—as distinguished from the agent—in practice theory.⁷³

Because, according to Reckwitz, “there are diverse social practices, and as every agent carries out a multitude of different social practices, the individual is the unique crossing point of practices, of bodily–mental routines.”⁷⁴ What this means is that practice theory retains the idea of agents (unlike, say, textualism or mentalism), but significantly complexifies this idea, thereby overcoming one of the major shortcomings associated with methodological individualism, namely its crude, automaton-like characterization of really existing individuals.

The preceding discussion juxtaposed a number of the more prominent conceptions of practices currently available. This conceptual variation notwithstanding, it is possible to tease out commonalities. On the foundation of my preliminary concept analysis, I take practices to refer to *recurrent and meaningful work activities—social or material—that are performed in a regularized fashion and which have a bearing, whether large or small, on a social phenomenon*, in our case, on the operation of international law. I suggest that practices, thus defined, result from the noninstrumental and often spontaneous interplay of doing, saying, and knowing by groups of individuals. Implicit in my definition and qualifier is the assumption that “practices are inherently contingent, materially mediated, and that practice cannot be understood without reference to a specific time, place, and concrete historical context.”⁷⁵

Reckwitz offers further elaboration:

A ‘practice’ (*Praktik*) is a routinized type of behaviour which consists of several elements, interconnected to one [an]other: forms of bodily activities, forms of mental activities, ‘things’ and their use, a background knowledge in the form of understanding, know-how, states of emotion and motivational knowledge. A practice—a way of cooking, of consuming, of working, of investigating, of taking care

70. Andreas Reckwitz, *Toward a Theory of Social Practices: A Development in Culturalist Theorizing*, 5 EUR. J. SOC. THEORY 243, 250 (2002).

71. *Id.* at 258.

72. Warde, *supra* note 65, at 136.

73. Reckwitz, *supra* note 70, at 256.

74. *Id.*

75. Davide Nicolini, *Zooming In and Out: Studying Practices by Switching Theoretical Lenses and Trailing Connections*, 30 ORG. STUD. 1391, 1394 (2009).

of oneself or of others, etc.—forms so to speak a ‘block’ whose existence necessarily depends on the existence and specific interconnectedness of these elements, *and which cannot be reduced to any one of these single elements.*⁷⁶

For Reckwitz, studying practices means identifying and interpreting the many ways “in which bodies are moved, objects are handled, subjects are treated, things are described and the world is understood.”⁷⁷ After all, all of these forms of behavior combine to make up what most practice theorists understand by practices.

B. How Do Practices Work?

In the most general sense, practices are “meaning-making, identity-forming, and order-producing.”⁷⁸ Because this tripartite distinction captures the logic of the vast majority of practice-based approaches to social explanation, I adopt it here to organize this preliminary sketch. I will illustrate its analytical value with passing reference to international law.

Practices are *meaning-making* in the sense that they generate and disseminate knowledge about the social world. By participating in a practice, individuals become acquainted, for better or worse, with a recurrent pattern of socially recognized behavior. Such participation can bestow purpose on an otherwise mundane everyday activity. In the case of international law, the contribution of an individual to a given practice such as the investigation of international crimes can go a long way toward validating that individual’s choice of vocation especially when practices reference the discourses, representations, and other “symbol systems” that are meaningful in the life of the individual in question. This is so, as Wilhelm Dilthey, the influential historian and philosopher observed, because “the parts of a life have a meaning according to their relation to that life, its values and purposes, and according to the place they occupy in it.”⁷⁹

But practices in international law are meaning-making in a second sense as well, as Yves Dezalay and Bryant G. Garth have shown in the case of international commercial arbitration:

Lawyers (assuming that the term even has the same meaning in different countries) come from very different national legal traditions and from different parts of the profession (judiciary, academy, [private] practice, government), and they respond to different clients and constituencies. . . . The abstraction of international law is therefore closely tied to the activities of individuals and groups, who thereby give concrete meaning to the abstraction.⁸⁰

This means that individuals engaged in recurrent performances of a legally relevant practice—such as international commercial arbitration—invariably

76. Reckwitz, *supra* note 70, at 249–50 (emphasis added).

77. *Id.* at 250.

78. NICOLINI, *supra* note 43, at 7.

79. WILHELM DILTHEY, *MEANING IN HISTORY: WILHELM DILTHEY’S THOUGHTS ON HISTORY AND SOCIETY* 148 (1961).

80. DEZALAY & GARTH, *DEALING IN VIRTUE*, *supra* note 41, at 3.

also give meaning to said practice due to the interests, preferences, norms, and values that they embody and with which, consciously or otherwise, they infuse the activities that constitute the practice. Or, as Bourdieu put it in a foreword to Dezalay's and Garth's important study,

The national members of this new international elite, a *noblesse de robe*, by exercising their talents in the major transnational entities, humanitarian organizations, or even great legal multinationals, help to bring juridical forms to a higher level of universalization in and by a confrontation of different and at times opposed visions.⁸¹

The work of Dezalay and Garth is useful for our purposes because it powerfully illustrates the utility of reasoning in terms of a logic of practices. Without delving too deeply into the substance of their rich and nuanced analysis, we learn a considerable deal about the nature and determinants of international commercial arbitration because of their focus on “the people who are *recognized* as having authority to handle these high-stakes, complicated disputes,” and the multiple conflicts among them.⁸² Dezalay and Garth, for example, find that the kind of international justice that is meted out in the context of competition for transnational business disputes is, in key respects, a function of social cleavages that exist within the field of international commercial arbitration. It appears that the path of socialization that arbitrators take on their way into the profession, and the kind of legal setting from which they end up operating, have a considerable effect on the type of arbitration that they pursue as well as the kind of outcome that we can expect from their involvement.⁸³

One major battle line, say Dezalay and Garth, revolves around what they call “grand old men” and “technocrats.” In the civil-law tradition of continental Europe, the former cast of arbitrators is comprised of eminent professors and high-ranking judges, in the Anglo-American common-law world by senior barristers, Queen's Counsel, and senior partners in U.S.-style law firms.⁸⁴ The technocratic set, by contrast, is less exclusive and more sizable, not to mention younger. Its emphasis is not on charisma but on technical competence, notably in the economic analysis of law, as increasingly favored by large international law firms.⁸⁵ The emergence of this vocational cleavage about the conduct of arbitration is not only interesting, it began to complicate the settlement of business disputes by way of international arbitration. That is at least what Dezalay and Garth found.⁸⁶ But other cleavages mattered as well, they noticed. There was the divide between “academics” and “practitioners.”⁸⁷ And in a case study of the International Chamber of Commerce of Paris, for example, Dezalay and Garth point out additional cleavages that, on their argument, have

81. *Id.* at viii.

82. *Id.* at 29.

83. *Id.* at 33–57.

84. *Id.* at 35–36.

85. *Id.* at 36–38.

86. *Id.* at 38.

87. *Id.* at 41–42.

a more than random structuring effect on arbitration outcomes, namely the difference between those who continue to see arbitration as a mode of guided settlement (of “auxiliary justice”) and those who have come to see it as just another form of litigation.⁸⁸ Dezalay and Garth trace the emergence of these contending practices of international commercial arbitration to the mergers and acquisitions of enterprises on the one hand, and to increased anti-trust litigation on the other. Both trends, they claim, created a demand for a new kind of legal knowledge, “that of specialist in taking charge of conflict situations.”⁸⁹ If we believe Dezalay and Garth, in the administration of disputes, these specialists “consider judicial recourse not as an end in itself but only as an argument and a means of pressure. The negotiators consider judicial recourse as one of the weapons that can be deployed in a conflict that will almost surely end prior to trial.”⁹⁰ Dezalay and Garth use this example of the rationalization of arbitration practices in international law, in conjunction with many others, to account for the gradual decline of the *lex mercatoria*, that is, the general principles of international commerce, as the principal structuring device of international commercial arbitration.⁹¹

Although the empirical veracity of this conclusion need not concern us here, it is immediately apparent that the aforementioned findings, and others like it, were possible only because Dezalay and Garth, drawing on Bourdieu, decided to take seriously the everyday life of international arbitrators, that is, the practice of international law. Unlike so many other legal scholars of international arbitration, they did not assume that practitioners of the law of dispute settlement were identical to one another or were defining and acting on the same self-interests in similar ways, and thus not worthy of theoretical or empirical explication. Instead, they argued, and showed, that it was important to study arbitrators in context, as structurally mediated individuals. The term is mine, not theirs, but it serves to relate their take on international commercial arbitration to the subjectivist ontology that is germane, as we have seen, to all theories of practice.

Whatever one makes of the practical significance of Dezalay and Garth’s findings in the study of international commercial arbitration, it is undeniable that their methodological approach generated insights that neither the discipline of IL, nor the profession of international arbitrators, previously possessed, at least not at the level of systematicity evidenced by *Dealing in Virtue*.

By homing in, for the first time, on locally situated examples of legal contention over the form and function of international dispute settlement, they were able to substantiate a professional shift in the late twentieth century “toward more procedurally elaborate and factually based approaches” in the

88. *Id.* at 54–57.

89. *Id.* at 56.

90. *Id.*

91. *Id.* at 39.

conduct of international commercial arbitration, thereby providing “a convincing account of the internal dynamics of this hitherto virtually inaccessible world.”⁹² Having said that, inasmuch as Dezalay and Garth’s work on international commercial arbitration, and more specifically the peculiar social world of arbitrators that they describe in such rich detail, shows the value of a practice-oriented approach to international law, a closer, more ethnographic, exploration of the international legal practices to which they alerted us, would substantially complement their pioneering approach and further deepen IL’s understanding of the nature and determinants of the international arbitration of business disputes. For as one reviewer of the book observed, admirably, “This is an unusual and intriguing book . . . because its authors have embarked upon a study based principally upon the development of international commercial arbitration and the practice and practitioners of arbitration without the benefit of any extensive empirical experience of their own upon which to draw.”⁹³ One can only imagine the kind of fine-grained contribution about the practices of international commercial arbitration that an ethnographic immersion might produce.

It is the task of the practice-oriented researcher to unearth all of the aforementioned aspects of meaning-making, successful and otherwise. Or, to paraphrase the historian R. G. Collingwood, the object to be discovered in the study of practices is not the mere activity, but the thought expressed in it. To discover that thought is already to understand a practice’s meaning.⁹⁴

Next, practices are *identity-forming* in the sense that they regularly shape the self-understandings—in whatever direction—of individuals who are engaged in their performance. To return to the example of the international criminal lawyer, continued exposure to, and participation in, the practices of international prosecution or international adjudication may result in a moral identification with the project of international justice (or, alternatively, a rejection thereof). Importantly, this self-identification can work at both the individual and collective levels. Familiarity with bureaucratic practices at, say, the ICC, may foster individual socialization on the part of lawyers and other practitioners. It may lead to an increased (or decreased) identification with the values commonly associated with the permanent international court. As David Koller points out, for example, “At its most ambitious, faith in international criminal law manifests a hope for a new political reality—both in terms of the decisions made by policymakers and in terms of an underlying globally shared cosmopolitan identity.”⁹⁵ The sustained participation in ICC practices can

92. Ruth Buchanan, *Constructing Virtual Justice in the Global Arena*, 31 LAW & SOC’Y REV. 363, 364 (1997) (reviewing DEZALAY & GARTH, *DEALING IN VIRTUE*, *supra* note 41).

93. John Beechey, Book Review, 24 J.L. & SOC’Y 569, 569 (1997).

94. In the original formulation, “[T]he object to be discovered is not the mere event, but the thought expressed in it. To discover that thought is already to understand it.” R. G. COLLINGWOOD, *THE IDEA OF HISTORY* 214 (1961).

95. David S. Koller, *The Faith of the International Criminal Lawyer*, 40 N.Y.U. J. INT’L L. & POL. 1019, 1023 (2008).

strengthen—or weaken—this faith, with predictable effects for individual identity formation. But sustained exposure to an international legal way of doing things can also set in motion collective identity formation among states.⁹⁶

Alastair Iain Johnston explored the logic of international socialization in a least likely case, that of China.⁹⁷ He found that increasing social interactions in international security institutions by Beijing's diplomats in the post-Mao era led to their becoming more cooperative and willing to self-bind in treaty negotiations over arms control and disarmament.⁹⁸ Put differently, the routinization of legalism (and the practices concretely associated with it) can leave a mark on a state's collective identity. I have elsewhere explored the identity-forming consequences of practices of legality in a domestic context.⁹⁹ On the international stage, postwar Germany's expanding commitment to international law, which culminated in that country's important role in the negotiations over the Rome Statute of the International Criminal Court, exemplifies, one could say, the identity-forming consequences of practices of legality in an international context.

Of course, the identity-forming consequences of legal practices will not always be inclusive. As several critical IL scholars have shown in the last decade, international legal practices also give rise to exclusionary identities.¹⁰⁰ Consider the principle of extraterritoriality, which formed a pervasive international practice in the expansion of international society in the nineteenth century. The classification of countries like China and Japan, to name but two, as culturally inferior at the time has had long-run consequences for identity formation in the developing world, leading to what Rogers Brubaker and Frederick Cooper termed “external identification,” that is, “formalized, codified, objectified systems of categorization developed by powerful, authoritative institutions.”¹⁰¹ External identification courtesy of the practice of extraterritoriality and other imperialist legal practices provoked in some parts of the developing world a century later what Balakrishnan Rajagopal has described as “international law from below,” marshaled by agents who defined themselves in opposition to the prevailing international legal order, and who derived a part of their collective identities from nineteenth- and twentieth-

96. See generally Alexander Wendt, *Collective Identity Formation and the International State*, 88 AM. POL. SCI. REV. 384 (1994) (arguing that the interaction among states in the international system can change their identities and interests, which means that both are endogenously derived, not exogenously given, as contending theories of IR assume).

97. ALASTAIR IAIN JOHNSTON, *SOCIAL STATES: CHINA IN INTERNATIONAL INSTITUTIONS, 1980–2000* (2007).

98. See generally *id.*

99. JENS MEIERHENRICH, *THE LEGACIES OF LAW: LONG-RUN CONSEQUENCES OF LEGAL DEVELOPMENT IN SOUTH AFRICA 1652–2000* (2008).

100. Foundational texts include ANTONY ANGHIE, *IMPERIALISM, SOVEREIGNTY AND THE MAKING OF INTERNATIONAL LAW* (2005); INTERNATIONAL LAW AND ITS OTHERS (Anne Orford ed., 2006); BALAKRISHNAN RAJAGOPAL, *INTERNATIONAL LAW FROM BELOW: DEVELOPMENT, SOCIAL MOVEMENTS AND THIRD WORLD RESISTANCE* (2003).

101. Rogers Brubaker & Frederick Cooper, *Beyond “Identity,”* 29 THEORY & SOC’Y 1, 15 (2000).

century practices of international law.¹⁰²

Finally, practices are *order-producing*. Unlike theoretical accounts of order founded on a commitment to methodological individualism, practice-based accounts insist that social order is the result of more than the mere interaction of self-interested agents.

Practice thinkers usually acknowledge the structuring and coordinating import of agreements, negotiations, and other interactions, as well as the undergirding significance of skills and interpretations. They treat these phenomena, however, as features of or as embedded in practices, hence as subject to or as constitutive of the latter. As a result, interactions, skills, and interpretations determine orders (and are themselves ordered) *qua* features of practice. Practice approaches also tend to reduce the scope and ordering power of reason. They do this by abandoning the traditional conception of reason as an innate mental faculty and by reconceptualizing it as a practice phenomenon.¹⁰³

On this perspective, practices produce order by facilitating a particular understanding of the world on the part of those agents who participate in it. Order comes about per force of the stable reproduction of socially significant activities. On this account, shared knowledge is an ingredient in the cement of society, enhanced by way of routinization.

From the direct effects of practices, let me briefly turn to their interaction effects. Emanuel Adler and Vincent Pouliot, in a recent attempt to theorize the logic of international practices, have distinguished among four types of relationships that can obtain between or among individual practices.¹⁰⁴ For the purpose of this discussion of order-producing effects of practices, I will only touch on the fourth type of relationship, which they call “subordination.”¹⁰⁵ Under this tightest of constellations, practices are arranged in a hierarchical manner. Some practices are said to “anchor” other practices by making them possible. The example that Adler and Pouliot give, and that is of immediate import for the study of international law, is the practice of sovereignty

102. See RAJAGOPAL, *supra* note 100. Exemplary of the growing literature on nineteenth century practices are PÅR KRISTOFFER CASSEL, *GROUNDINGS OF JUDGMENT: EXTRATERRITORIALITY AND IMPERIAL POWER IN NINETEENTH-CENTURY CHINA AND JAPAN* (2012) (showing how extraterritoriality emerged, how its practice evolved in Japan and China, and why both territories were affected rather differently) and TURAN KAYAOĞLU, *LEGAL IMPERIALISM: SOVEREIGNTY AND EXTRATERRITORIALITY IN JAPAN, THE OTTOMAN EMPIRE, AND CHINA* (2010) (theorizing and exploring in relevant cases the rise and fall of extraterritoriality as an instrument of colonial rule).

103. Schatzki, *Introduction: Practice Theory*, *supra* note 9, at 5.

104. They distinguish among “parallel existence,” “symbiosis,” “hybridization,” and “subordination.” Emanuel Adler & Vincent Pouliot, *International Practices: Introduction and Framework*, in *INTERNATIONAL PRACTICES*, *supra* note 40, at 3, 20–21.

105. *Id.* at 20. On their argument, parallel existence points to a relationship that is superficial. In this constellation, “practices are linked in space and/or time but they do not significantly interfere. This may be because these practices belong to different registers of social life, because they perform unlike functions, because they make use of unrelated tools, etc.” *Id.* A symbiotic relationship among practices exists, next, when “practices remain distinct but they form a coherent whole in which the parts . . . are united in a mutually reinforcing relationship.” *Id.* Hybridization, third, describes a constellation in which interacting practices combine to form an entirely new practice, that is, “[e]lements of different practices are rearranged into a hybrid new form that replaces past ways of doing.” *Id.*

anchoring the practice of diplomacy.¹⁰⁶ Theoretically speaking, “[i]n these hierarchical bundles, one practice may become the dominant form of a set of subordinated practices, which may nonetheless continue to be practiced.”¹⁰⁷ With further reference to international law, some might say that subordination has begun to characterize the relationship between the long-standing practice of juridical statehood and the newer practices associated with the “new humanitarianism.” If we believe the more optimistic observers of international politics, the doings and sayings that were observable under the banner of the so-called responsibility to protect (R2P) in particular have inaugurated a new hierarchy of international practices.¹⁰⁸ It is worth reiterating here that practices require agents to exist in the first place. Absent any agentic input, practices will have no meaningful effect. As Adler and Pouliot write,

[W]e want to insist that agency is front and center in the interplay of practice, if only because it is practitioners who, ultimately, are the performers. Put in simple terms, the reason why a given bundle of practices follows a particular scenario and not others has less to do with how it fits together—a functional argument—than with how it is *fitted* together as a result of political struggles. The politics of practice concern the ways in which agents struggle to endow certain practices with political validity and legitimacy.¹⁰⁹

Yet contrary to Adler and Pouliot’s formulation, not every practice follows the logic of political struggle. Some constellations of practices will form for reasons *other* than contentious politics. Adler and Pouliot’s instrumental take on the logic of practices overlooks the spontaneous emergence of routinized ways of acting on the social world. International law is full of such spontaneous practices. This is an important insight in a time when “the politics of international law” are the preferred point of departure for IR scholars, which causes them to neglect a large swath of what international lawyers actually do. Though politics informs a great deal of international law, it does not govern all of it, and certainly not all of the time. It is this latter slice of reality, located at the intersection of the political and the mundane, that deserves closer scrutiny than it has attracted thus far.

In the foregoing, I have provided an overview of the logic of practices *as if* there were such a thing as a unified practice theory. Maintaining this fiction was necessary in order not to get bogged down in the abstract technicalities that have accompanied the practice turn in contemporary theory.

After these preliminaries, however, a few caveats are in order. Barry Barnes put them so well that there is no need to paraphrase. In deploying practice theory, writes Barnes,

106. *Id.* at 20.

107. *Id.*

108. On the idea of R2P, see, for example, *THE RESPONSIBILITY TO PROTECT: THE PROMISE OF STOPPING MASS ATROCITIES IN OUR TIME* (Jared Genser & Irwin Cotler eds., 2011). For a more sophisticated and critical account, see ANNE ORFORD, *INTERNATIONAL AUTHORITY AND THE RESPONSIBILITY TO PROTECT* (2011).

109. Adler & Pouliot, *supra* note 104.

it must be recognized that: (a) no simple either/or contrast can be made between 'theory' and 'practice;' (b) no indefeasible distinction can be made between visible external practices and invisible, internal states; (c) any attempt to give a satisfactory description of social life must make reference to much else besides¹¹⁰ practice; and (d) practice does not account for its own production and reproduction.

Finally, although this article, and the issue that it frames, make a case for a practice turn in the study of international law, I am nonetheless cognizant of the limitations, and of the potential dangers, associated with doing so. It is therefore worth echoing the cautionary note sounded by Jörg Friedrichs and Friedrich Kratochwil in another effort at theorizing about practically embedded knowledge. Addressing the recent practice turn in IR, they rightly insist that this analytical reorientation "should not preclude more conventional research into power, interest, preferences, and so on."¹¹¹ As they put it, "After 'culture' and 'discourse,' we should beware of 'practice' as yet another totalizing ontology that aspires to encompass everything social."¹¹² In the same vein, my argument for more theoretically sophisticated and empirically grounded scholarship on legal practices in the international system should be understood as a plea for complementing the methodological toolkit currently available to IL and IR scholars of international law, *not* as a clarion call intended to rally support for supplanting conventional perspectives on international law. My overriding analytical objective is to make the study of international law *more* diverse—not less so. With a preliminary understanding in place of both what practices are and how they work, we are in a position to delve more deeply into the theory of practices.

IV

THE THEORY OF PRACTICES

Although the focus on practices as discrete units of analysis is relatively new, practice-based ontology has a long pedigree. In this part of the article, I trace the genealogy of practices—and with it the uneven development and mixed fortunes of practice-oriented reasoning in the humanities and social sciences—from ancient to postmodern times. This intellectual history, though necessarily abbreviated, is essential for clarifying what stands to be gained from relating practical knowledge to scientific knowledge in explanations of international legal phenomena such as the adjudication of international crimes at the ICC. Moreover, by exploring the universe of practice-based reasoning across space and time, we gain a better appreciation of the promise—and limits—of alternative routes for bringing practices into the study of international law.

110. Barry Barnes, *Practice as Collective Action*, in *THE PRACTICE TURN IN CONTEMPORARY THEORY*, *supra* note 9, at 17, 19.

111. Jörg Friedrichs & Friedrich Kratochwil, *On Acting and Knowing: How Pragmatism Can Advance International Relations Research and Methodology*, 63 *INT'L ORG.* 701, 713 n.56 (2009).

112. *Id.*

My goal in this part of the article is to encourage the pursuit of all kinds of practice-based research designs by IL and IR scholars, whether they take their cue from Aristotle's idea of *phronesis*, Heidegger's notion of *Dasein*, Bourdieu's concept of *habitus*, or any other member in the "large family of terms . . . used more or less interchangeably with 'practices.'"¹¹³ The upshot, then, is this: In order to truly grasp international law, in the Weberian sense of achieving an "empathetic understanding" thereof, we have no choice but to enter, as deeply as we can, the webs of significance that practitioners spin.¹¹⁴ Being able to choose the methodological and theoretical tools most appropriate to the twin tasks of immersion and disentanglement, in turn, requires comprehensive knowledge of practice theory, broadly conceived. Before turning to the ICC, I will therefore rehearse alternative perspectives for illuminating the reality of international law, all of which fall under the broader rubric of practice theory. All of these practice-oriented approaches are in principle compatible with other theories of social action, yet each would need to be reconfigured for the study of international law. It is here where the potential for analytical innovation lies—in the adaptation of highly abstract, and not infrequently purely philosophical, theories of practice for the empirical study of international legal phenomena.

A. Ancient Perspectives

What Martha Nussbaum has called "the controlling power of reason" dominated the classical Greek approach to knowledge.¹¹⁵ A quest for certainty, and thus universal principles of life, united much classical thought. In the ancient world, the philosophy of Plato was responsible for establishing a hierarchy of knowledge. In his writings, notably in *The Republic*, his famous Socratic dialogue, he developed a theory of universals that put a premium on a representational epistemology. It is Plato to whom we owe the widespread belief in the superiority of scientific knowledge because "Plato effectively cast practice, materiality, and performativity beyond, or more precisely *below*, the scope of theory of knowledge."¹¹⁶ The assignment of low value to practical knowledge stemmed from the assumption that "good practice" could *only* be derived from eternal principles.¹¹⁷ As a consequence, the willingness of most Greek philosophers to accord analytical significance to the particularities of life,

113. STEPHEN TURNER, *THE SOCIAL THEORY OF PRACTICES: TRADITION, TACIT KNOWLEDGE, AND PRESUPPOSITIONS* 2 (1994).

114. I am here paraphrasing *both* Weber, for whom man was an animal suspended in webs of significance he himself has spun, *as well as* Clifford Geertz, who took culture to represent those webs. What both had in common was an unshakable belief in the necessity of an interpretive rather than scientific search for meaning. See CLIFFORD GEERTZ, *THE INTERPRETATION OF CULTURES: SELECTED ESSAYS* 5 (1973).

115. MARTHA C. NUSSBAUM, *THE FRAGILITY OF GOODNESS: LUCK AND ETHICS IN GREEK TRAGEDY AND PHILOSOPHY* 3 (1986).

116. NICOLINI, *supra* note 43, at 25.

117. *Id.* at 24.

including its everyday practices, was very limited. After all, only Plato's philosopher kings were deemed worthy of governing his utopian city of Kallipolis.¹¹⁸ One exception proved the rule—Aristotle, who, as it turns out, put considerably more stock in the value of practical knowledge than his teacher.

Although it is sometimes said that Aristotle, by distinguishing theory and practice as two distinct epistemic objects, “laid the foundation for the historical demise of practice in the Western tradition,” a closer reading of his philosophical oeuvre reveals a thinker who was far more comfortable with different ways of knowing than Plato, to much of the rest of whose belief system he stayed true.¹¹⁹ In his *Nicomachean Ethics*, Aristotle established what he called “praxis” as a separate form of knowledge. For him, praxis was a phenomenon without moral qualifications.¹²⁰ At the same time, he thought it relevant for making sense of life.

Aristotle's interest in practical knowledge is apparent in his distinction, developed in the *Nicomachean Ethics*, among three kinds of knowing: *episteme*, *phronesis*, and *techne*. Moving beyond Plato, for whom scientific knowledge (*episteme*) was the only relevant activity of the human mind, Aristotle thought practical wisdom (*phronesis*) and what we might call art or craft or skill (*techne*) were also deserving of philosophical reflection. In his philosophy, “[t]he aim of *phronesis* is to produce praxis or action informed by knowledgeable value-driven deliberations; the aim of *techne*, instrumental rationality, is *poiesis*, i.e. the creation or production of material or durable artefacts.”¹²¹ Aristotle's introduction of praxis as an independent form of knowledge has had a far-reaching effect on the philosophy of knowledge. It gave credence to the argument that theory and practice are incommensurable, that practical knowledge cannot be reduced to theoretical universals. Practical wisdom on Aristotle's account cannot be fully summed up in rules and guides for action without its essential attribute—contingency—becoming lost in the translation. As he put it,

It is obvious that practical wisdom is not deductive scientific understanding (*episteme*). . . . [P]ractical wisdom is of the ultimate and particular, of which there is no scientific understanding, but a kind of perception—not, I mean, ordinary sense-perception of the proper objects of each sense, but the sort of perception by which we grasp that a certain figure is composed in a certain way out of triangles.¹²²

In other words, Aristotle, like contemporary practice theorists, took exception to the assumption, as widespread then as now, that all comprehension of the world was rational and intentional. For Aristotle, as Nussbaum noted,

118. See generally PLATO, *THE REPUBLIC* (R. E. Allen trans., 2006).

119. NICOLINI, *supra* note 43, at 23–24.

120. Elizabeth Belfiore, *Aristotle's Concept of Praxis in the Poetics*, 79 *CLASSICAL J.* 110, 110–11 (1983).

121. NICOLINI, *supra* note 43, at 26; see also NIKOLAUS LOBKOWICZ, *THEORY AND PRACTICE: HISTORY OF A CONCEPT FROM ARISTOTLE TO MARX* (1967).

122. ARISTOTLE, *NICOMACHEAN ETHICS* bk. VI, ch. VIII, l. 1142a (Sarah Broadie & Christopher Rowe eds., Oxford University Press 2002).

“[p]ractical insight is like perceiving in the sense that it is non-inferential, non-deductive; it is, centrally, the ability to recognize, acknowledge, respond to, pick out certain salient features of a complex situation.”¹²³ It follows from this that praxis “cannot even in principle be adequately captured in a system of universal rules—and hence cannot be the subject of *episteme*, because it has to do with mutability, indeterminacy, and particulars.”¹²⁴ This rendering in the classic tradition of praxis as a nondeductive and nonrepresentational form of knowledge had profound consequences for modern perspectives on the nature and meanings of social practices.

Bent Flyvbjerg, more than anyone, has popularized the idea of *phronesis* in the social sciences. Indeed, he has developed, during the last decade or so, a sustained case for a “phronetic social science,” which recently culminated in the publication of a policy manifesto of sorts.¹²⁵ Flyvbjerg’s scholarship, the latest Aristotelian twist in the so-called practice turn in contemporary social theory, is an amalgam of insights from Alasdair MacIntyre, Richard Rorty, Michel Foucault, Clifford Geertz, and a few other twentieth century thinkers who displayed an analytical preference for practical over epistemic knowledge in the study of the social world. “Phronetic research,” Flyvbjerg writes,

focuses on practical activity and practical knowledge in everyday situations. It *may* mean, but is certainly not limited to, a focus on known sociological, ethnographic, and historical phenomena such as “everyday life” and “everyday people.” What it *always* means, however, is a focus on the actual daily practices which constitute a given field of interest, regardless of whether these practices take place on the floor of a stock exchange, a grassroots organization, a hospital, or a local school board.¹²⁶

Or in an international court, for that matter.

At the same time, it is important to note that *phronesis*, or prudence, in the original Aristotelian formulation was imbued with a deep ethical imperative. *Phronesis* was a virtue to be striven for, part of the recipe for a good life. It was a moral position, *not* a methodological one, as it would subsequently become for Bourdieu and other twentieth-century theorists of practice. As Chris Brown usefully reminds us,

Aristotle is not a social scientist in any modern sense of the term, even in a sense of the term that could incorporate Bourdieu; his concern in the *Nicomachean Ethics* is with the living of a good life rather than with a desire to understand social practices. . . . [T]he Aristotelian notion of *phronesis* is always about the exercise of the faculty of reason, which is not the case with Bourdieu’s formulation.¹²⁷

123. NUSSBAUM, *supra* note 115, at 305.

124. NICOLINI, *supra* note 43, at 27.

125. REAL SOCIAL SCIENCE: APPLIED PHRONESIS (Bent Flyvbjerg, Todd Landman & Sanford Schram eds., 2012).

126. BENT FLYVBJERG, MAKING SOCIAL SCIENCE MATTER: WHY SOCIAL INQUIRY FAILS AND HOW IT CAN SUCCEED AGAIN 134 (2001).

127. Chris Brown, *The ‘Practice Turn,’ Phronesis and Classical Realism: Towards a Phronetic International Political Theory?*, 40 MILLENNIUM 439, 446 (2012).

B. Modern Perspectives

Modern perspectives are worth contemplating because they allow us to gain greater clarity about the intellectual contributions that can potentially flow from practice-driven knowledge. Importantly, despite the Aristotelian focus on praxis as an inherently valuable—and independent—form of knowledge, it took until the late nineteenth century for practice to be taken seriously again. In the intervening two thousand years, the notion of praxis came to be reinterpreted as merely a dependent category, “the practical application of a-practical, purely theoretical insights.”¹²⁸ The rise of rationalism, from Galileo to Descartes to Kant, led to the degradation of practical wisdom. Practices were deemed irrelevant to the ontology of being in the world.

1. Marx

A daring philosophical challenge to this mind-over-matter view of the world came in 1845 from Karl Marx, at the time a young revolutionary intent on making a case for the all-important structuring effect of what he called “historical materialism.”¹²⁹ In *The German Ideology*, Marx, together with Friedrich Engels, raised the analytical status of the practices of everyday life. Whatever one makes of the ideological content of early and subsequent variants of Marxism, it is undeniable that Marx and Engels created the first modern template for recognizing practices and for subjecting them to rigorous analysis:

The production of ideas, of conceptions, of consciousness, is at first directly interwoven with the material activity and the material intercourse of men, the language of real life. . . . In direct contrast to German philosophy which descends from heaven to earth, here we ascend from earth to heaven. That is to say, we do not set out from what men say, imagine, conceive, nor from men as narrated, thought of, imagined, conceived, in order to arrive at men in the flesh. We set out from real, active men, and on the basis of their real life-process we demonstrate the development of the ideological reflexes and echoes of this life-process. . . . Life is not determined by consciousness, but consciousness by life. . . . As soon as this active life-process is described, history ceases to be a collection of dead facts as it is with the empiricists (themselves still abstract), or an imagined activity of imagined subjects, as with the idealists. Where speculation ends—in real life—there real, positive science begins: the representation of the practical activity, of the practical process of development of men.¹³⁰

This is still a far cry from practice theory in the twenty-first century, but *The German Ideology*, perhaps more than any other work in the modern world, encouraged and theoretically motivated the analytical preoccupation with ostensibly mundane aspects of social life, thereby bringing back, albeit in a

128. NICOLINI, *supra* note 43, at 28.

129. On the concept of historical materialism, see, most importantly, KARL MARX & FRIEDRICH ENGELS, *THE GERMAN IDEOLOGY* (1846), as reprinted in *Karl Marx: Selected Writings* (David McLellan ed., Oxford Univ. Press 2d ed. 2000). For an influential and sophisticated contemporary restatement, see G. A. COHEN, *KARL MARX'S THEORY OF HISTORY: A DEFENCE* (expanded ed. 2000).

130. MARX & ENGELS, *supra* note 129, at 175, 180–81.

different guise, the discarded idea of praxis. Although Aristotle and Marx were interested with radically different questions of substance, they shared a belief in the epistemological value of practical knowledge. Whereas Aristotle's effort in the ancient world to spread the word about the centrality of practice ultimately failed, "[o]ne enduring legacy of Marx's work is the successful attempt to challenge centuries of Western rationalist and mentalist tradition, and to legitimate real activity, what 'sensuous' people actually do in their everyday life, as an object of consideration and as an explanatory category in [the] social sciences."¹³¹ As a consequence of Marx's attention to the interconnectedness of social life, and especially his unprecedented focus on individuals as corporeal beings, practice in the late nineteenth century was "becoming the ontological principle of being in the world."¹³²

2. Heidegger

Recent interpretations of the phenomenological tradition in Western philosophy, especially of Heidegger's writings, have led observers to conclude that the German's existentialist writings contributed in major ways to the recovery of practice as a worthwhile object of study in the twentieth century. Starting with Friedrich Nietzsche, who is often seen as the main impetus behind the rise of phenomenology, philosophers began to question the contrived separation of theory and practice that had survived virtually intact since Plato's reflections on the topic in the ancient world. Nietzsche, for one, imagined a primordial unity of theory and practice. As one commentator writes, "Nietzsche posited at the centre of the activity of philosophy a 'human, all-too human subject' that is not only a thinking subject but an initiator of action and a centre of feeling."¹³³ Philosophical inquiries into the nature and boundaries of existence were at the heart of the phenomenological tradition, as encapsulated most famously in Heidegger's 1927 magnum opus, *Being and Time*.¹³⁴ In it, he gave extensive space to the contemplation of what he called *Dasein*, which translates literally as "there-being" but was meant to draw attention to the activity of existing, the state of being-in-the-world.¹³⁵ The intricacies of this notoriously difficult concept need not concern us here.¹³⁶ Relevant for our purposes is the fact that Heidegger's interest in the nature of being gave credence to the investigation of practices, or the inner structure of normality. Because the fact of existence is not reducible to any a priori logic, Heidegger sought to come to terms with the essence of what he called "everydayness" (*Alltaglichkeit*).¹³⁷

131. NICOLINI, *supra* note 43, at 29.

132. *Id.* at 29.

133. *Id.* at 33–34.

134. MARTIN HEIDEGGER, *BEING AND TIME* (John Macquarrie & Edward Robinson trans., 1962).

135. NICOLINI, 43, at 36.

136. For the leading interpretation of Heidegger's classic, see HUBERT L. DREYFUS, *BEING-IN-THE-WORLD: A COMMENTARY ON HEIDEGGER'S BEING AND TIME, DIVISION I* (1991).

137. NICOLINI, *supra* note 43, at 34.

He thought the ordinariness of everydayness was essential to try to grasp analytically because it was “constantly overlooked in its ontological significance” and yet inherently inescapable as a constant of our existence.¹³⁸ Everydayness, in turn, was comprised of all kinds of social practices.

One’s everyday world is meaningfully structured by these practices which can remain untaught and yet which we more or less share in common. Practice therefore implies an individual’s social and historical relation to the world, where one’s own concrete practices are themselves set up and made meaningful within this wider background system of intelligibility. Mundane everydayness thus becomes the received, yet necessarily indeterminate, cultural manifold within which we are all immersed, and which meaningfully discloses¹³⁹ our world by way of our own un-theorized, everyday practical coping strategies.

From this flows the theoretical argument that the totality of practices that make up everydayness is so manifold that it usually escapes our attention, and therewith representation. Practices are seen as nonrepresentational aspects of social life because even though they affect behavior meaningfully, they tend to do so in unreflective ways. Practices are the unarticulated underbelly of our social lives. Because they are part and parcel of our being, we fail to appreciate their centrality.

Even though Heidegger never developed a coherent account of practical knowledge, his philosophical writings were essential to the subsequent development of theories of practice. “[B]y reversing the Cartesian tradition and making the individual subject dependent on a web of social practices, he made it possible for others to develop one.”¹⁴⁰

3. Wittgenstein

Ludwig Wittgenstein, the Austrian philosopher of language, had a similar, perhaps an even more important effect on the practice turn in contemporary social theory. As one protagonist of the latter remarked, “Wittgenstein is the philosopher to whom nearly all theorists of practice defer.”¹⁴¹ As might be expected, Wittgenstein’s reflections on practice largely emanated from his theory of language. In the process of developing his all-important concept of “language games,” he theorized, among other things, the nature of rule following. The substance of Wittgenstein’s philosophical writings on the meaning of rules is not of relevance for our discussion. Yet it is important that his larger theoretical effort led him to think of rule following in terms of practical knowledge. As he put it in *Philosophical Investigations*, a collection of 693 numbered paragraphs of theoretical reflections that were published posthumously in 1953, “‘obeying a rule’ is a practice. And to *think* one is obeying a rule is not to obey a rule.”¹⁴² He continues, “When I obey a rule, I do

138. HEIDEGGER, *supra* note 134, at 43.

139. NICOLINI, *supra* note 43, at 35.

140. *Id.* at 37.

141. H. M. Collins, *What Is Tacit Knowledge?*, in *THE PRACTICE TURN IN CONTEMPORARY THEORY*, *supra* note 9, at 107.

142. LUDWIG WITTGENSTEIN, *PHILOSOPHICAL INVESTIGATIONS* § 202 (G. E. M. Anscombe

not choose. I obey the rule *blindly*.”¹⁴³ Wittgenstein introduces the example of a signpost to elucidate the distinction between thinking behavior (what we might call choice) and nonthinking behavior (what he thinks of as practice):

Let me ask this: what has the expression of a rule—say a sign-post—got to do with my actions? What sort of connexion is there here?—Well, perhaps this one: I have been trained to react to this sign in a particular way, and now I do so react to it. But that is only to give a causal connexion; to tell how it has come about that we now go by the sign-post; not what this going-by-the-sign really consists in. On the contrary; I have further indicated that a person goes by a sign-post only in so far as there exists a regular use of sign-posts, a custom.¹⁴⁴

Or, as Wittgenstein argued elsewhere, “rules leave loopholes open, and the practice has to speak for itself.”¹⁴⁵ I will draw out the implication of this for the study of international law below, but for now it is important to appreciate that Wittgenstein’s concern with the nature and meaning of unreflective behavior, that is, with the nonrational responses of individuals to their surroundings, echoes Aristotle’s reflections on *praxis*, Marx’s interest in practical activity, and Heidegger’s concept of everydayness.¹⁴⁶

Like his predecessors, Wittgenstein found it difficult to fully grasp, conceptually and theoretically, the logic of this “inherited background” due to the fact that practical knowledge is just that: practical, not theoretical.¹⁴⁷ Consequently, its unarticulated nature poses limits to representation. This restriction notwithstanding, Wittgenstein was convinced that the rationalist assumption according to which all action was preceded by thought was untenable. The philosopher Charles Taylor has interpreted Wittgenstein’s argument thus: “[M]uch of our intelligent action in the world, sensitive as it usually is to our situation and goals, is carried on unformulated. It flows from an understanding that is largely inarticulate.”¹⁴⁸ Like Heidegger before him, Wittgenstein believed that “the source of intelligibility of the world is the average public practices through which alone there can be any understanding at all.”¹⁴⁹ Making these practices visible in the area of international law—and encouraging practitioners to reflect on and articulate them—is my purpose in this article. Some philosophers have called for “embodied understandings” of the world around us to facilitate such an interpretive analysis. As Taylor writes,

Background understanding, which underlies our ability to grasp directions and follow rules, is to a large degree embodied. . . . As long as we think of understanding in the old intellectualist fashion, as residing in thoughts or representations, it is hard to explain how we can know how to follow a rule, or in any way behave rightly, without

trans., 1953) [hereinafter WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS].

143. *Id.* § 219.

144. *Id.* §198.

145. LUDWIG WITTGENSTEIN, ON CERTAINTY §139 (Denis Paul & G. E. M. Anscombe trans., 1969) [hereinafter WITTGENSTEIN, ON CERTAINTY].

146. I should note that I reserve the term “behavior” for unintentional and the term “action” for intentional doings.

147. WITTGENSTEIN, ON CERTAINTY, *supra* note 145, § 94.

148. CHARLES TAYLOR, PHILOSOPHICAL ARGUMENTS 170 (1995).

149. DREYFUS, *supra* note 136, at 155.

having the thoughts to justify this behavior as right. . . . [I]ntellectualism leaves us only with the choice between an understanding that consists of representations and no understanding at all. Embodied understanding provides us with the third alternative we need to make sense of ourselves.

At the same time, it allows us to show the connections of this understanding to social practice. My embodied understanding doesn't only exist in me as an individual agent, but also as the coagent of common actions. This is the sense we can give to Wittgenstein's claim that obeying a rule is a practice.¹⁵⁰

In the context of language, with which Wittgenstein was concerned in his reflections on the logic of rules, Wittgenstein insisted that the meaning of a word could not be determined, at least not fully, by only *acquiring* the rules according to which the word is used.¹⁵¹ He argued that there was more to the construction of meaning. "And this additional element is brought out with the help of the concept of practice."¹⁵² On Wittgenstein's argument,

[i]t follows that rules are *necessarily* related to the established ways of following them. That has as a consequence that rules actually get their *identity* from the very practices in which they are embedded. As such they can never be fully understood except by those who can successfully *perform* the practices in question.¹⁵³

Although Wittgenstein was focused on *linguistic* practices, it is possible to derive valuable insights from his reflections about the relationship between meaning and language for the study of other social practices. Simply put, Wittgenstein sensitized scholars to the possibility that social meaning "cannot be properly conceived of as properties of individual consciousness," as rationalist accounts of the world will have us believe, "and instead should be conceived relationally as the result of the practical activity of sensuous and engaged agents."¹⁵⁴ This perspective has not only ontological but also important methodological implications for the study of practices in international law, as I shall discuss in detail below, most notably because "[i]n all determination of sense there does seem to be involved an element of *skill* as well as an element of *familiarity* with the actual phenomena concerned."¹⁵⁵ If we take this to be true, ethnographic research is a *sine qua non* for exploring the really existing practices of the ICC and other sites of international law. But before I turn to the study of international law, I must sketch in more of the theoretical background necessary for grasping the potential of treating practices as both *explananda* and *explanans*—as things *to be explained* and as things that *do* the explaining.

150. TAYLOR, *supra* note 148, at 173.

151. WITTGENSTEIN, ON CERTAINTY, *supra* note 145, § 139; WITTGENSTEIN, PHILOSOPHICAL INVESTIGATIONS, *supra* note 142, § 202.

152. Kjell S. Johannessen, *The Concept of Practice in Wittgenstein's Later Philosophy*, 31 INQUIRY 357, 365 (1988).

153. *Id.*

154. NICOLINI, *supra* note 43, at 40.

155. Johannessen, *supra* note 152, at 365.

4. Giddens

The emphasis in Wittgenstein's philosophy of language on the practical activity of "sensuous and engaged agents," as Nicolini put it, reappears in Anthony Giddens's sociology, which set out, in the late 1970s, "to promote *a recovery of the subject*," without lapsing into subjectivism.¹⁵⁶ In this endeavor, Giddens, too, turned to the idea of practice. Giddens is also worth mentioning because his account of structuration—a particular solution to the so-called agent–structure problem in the social sciences—went on to influence the construction of (important strands of) constructivism in IR theory, which represents the most important paradigmatic development in the subfield since the emergence of neoliberal institutionalism in the late 1970s and the concomitant rise of rationalism as the dominant perspective from which to approach the study of international politics (including international law).

In *The Constitution of Society*, an abstract treatment of ontology, Giddens presented the building blocks of his theory of structuration.¹⁵⁷ To begin with, in his influential theory Giddens argued against favoring either microlevel or macrolevel analyses of empirical phenomena. Rather than prioritizing agents over structures or structures over agents in explanations, he sketched a third ontological way.¹⁵⁸ Traveling down this route required a belief in the mutual constitution of agents and structures. Through action, so the argument goes, agents produce structures. Although agents, by operating within structures and as a consequence of what Giddens termed "reflexive monitoring," at some point will transform structures, they also are bound by them.¹⁵⁹ This structural embeddedness can enable agents or constrain them. Either way, agents will, on Giddens's argument, draw upon the knowledge—practical and otherwise—that they continuously acquire in the structural context in which they find themselves when they act.¹⁶⁰ Elsewhere, Giddens summarized the essence of his theory as follows: "I argue that neither subject (human agent) nor object ('society,' or social institutions) should be regarded as having primacy. *Each is constituted in and through recurrent practices.*"¹⁶¹

156. ANTHONY GIDDENS, CENTRAL PROBLEMS IN SOCIAL THEORY: ACTION, STRUCTURE, AND CONTRADICTION IN SOCIAL ANALYSIS 44 (1979) [hereinafter GIDDENS, CENTRAL PROBLEMS IN SOCIAL THEORY].

157. GIDDENS, THE CONSTITUTION OF SOCIETY, *supra* note 45.

158. As has been pointed out many a time, Giddens was, for better or worse, chiefly concerned with ontology, *not* with epistemology or methodology.

159. For a more detailed explanation of "reflexive monitoring," see GIDDENS, CENTRAL PROBLEMS IN SOCIAL THEORY, *supra* note 156, at 53–59. *See also* GIDDENS, THE CONSTITUTION OF SOCIETY, *supra* note 45, at 5–14, 41–45, 78–83.

160. For recent assessments of Giddens's contribution and its critical reception, see GIDDENS' THEORY OF STRUCTURATION (Christopher Bryant & David Jary eds., 2012) and ROB STONES, STRUCTURATION THEORY (2005).

161. Anthony Giddens, *Hermeneutics and Social Theory*, in PROFILES AND CRITIQUES IN SOCIAL THEORY 1, 8 (Anthony Giddens ed., 1982) [hereinafter Giddens, *Hermeneutics and Social Theory*].

Interestingly, Giddens draws a straight line from Marx to Wittgenstein to himself:

I take the significance of Wittgenstein's writings for social theory to consist in the association of language with definite *social practices*. . . . I do want to propose that there is a direct continuity between Marx and Wittgenstein in respect of the production and reproduction of society as *Praxis*.¹⁶²

The operative “theorem” in his theory of structuration is the “duality of structure,” by which Giddens means “the essential recursiveness of social life, as constituted in social practices: structure is both medium and outcome of the reproduction of practices. Structure enters simultaneously into the constitution of the agent and social practices, and ‘exists’ in the generating moments of this constitution.”¹⁶³

In contradistinction to other theorists of practice we have encountered thus far, Giddens starts from the premise that agents are *both* knowledgeable *and* reflexive.¹⁶⁴ Although these agents behave in part on the basis of tacit, practical knowledge, Giddens thinks them nevertheless capable of formulating aims, contemplating reasons, and monitoring choices.¹⁶⁵ Put differently, although agents are not always self-aware, they sometimes are. “Although human actors usually proceed unhampered in their daily business they are by no means structural dupes. . . . Giddens’ pressing task is that of reversing the conceptual elimination of the subject and promoting its recovery without lapsing into subjectivism.”¹⁶⁶ Theodore Schatzki has provided the most lucid—if dense—representation of the place of practices in Giddens’s theory of structuration. Schatzki’s summary is worth reproducing at length, because it also relates the phenomenon of practices to all of the other moving parts in Giddens’s complicated account of the duality of structure in the constitution of society:

[S]tructures are sets of rules and resources, which are at once the medium in which practices are carried out and the renewed result of their execution. Since practices compose systems, the structural properties of social systems are likewise sets of rules and resources . . . that are both medium and result of system practices. What’s more, since practices and systems are composed of actions, the ultimate reason why rules and resources structure practices and systems is that actors draw on rules and resources in their interactions. In doing so, they perpetuate the practices of whose structure the rules and resources are elements, and thereby also help reproduce the social system composed by these (and other) practices.¹⁶⁷

The above sketch of logical entanglements illustrates what recursiveness is all about for Giddens. The recursive reproduction of the social is eased to the extent that practices are routinized, which is the case whenever they are taken for granted: “Routines provide both cognitive economy and anxiety reduction

162. GIDDENS, CENTRAL PROBLEMS IN SOCIAL THEORY, *supra* note 156, at 4.

163. *Id.* at 5.

164. NICOLINI, *supra* note 43, at 47.

165. *Id.*

166. *Id.*

167. SCHATZKI, SOCIAL PRACTICES, *supra* note 46, at 146.

and control.”¹⁶⁸

Central to Giddens’s account of the logic of practices are two additional concepts: rules and resources. The former refer to norms and codes that describe the generalized procedures involved in the constitution of practices; the latter connote the material and symbolic capabilities that enable—or disable—opportunities for action.¹⁶⁹ Practices, according to Giddens, “‘happen’ and are ‘made to happen’ through the application of resources in the continuity of daily life.”¹⁷⁰ In explicating this continuity, Giddens puts a premium on what he calls “practical consciousness,” or tacit modes of knowing that come about without reflection, let alone deliberation. As he remarked with reference to linguistic practices,

A double occlusion occurs if the area of practical consciousness is left unexplored, as has characteristically been the case in much research work in sociology. If what actors are able to say about the conditions of their activity appears slight, or unconvincing, the researcher begins to cast about for other factors which determine why they behave as they do. To adopt such a tactic is to blank out the very grounding of human knowledgeability in the continuity of skilfully reproduced practices. It is like supposing that what the speakers of a language can articulate about the rules and procedures they use in speaking or writing is all they “know” about the language.¹⁷¹

It is important to appreciate in this context that Giddens, in a major intellectual departure, advanced practice theory by relating representational to nonrepresentational aspects of action, making a case for the co-constitution of action. He insisted that social practices should be viewed as a “conjunction of intended and unintended outcomes of conduct.”¹⁷² One consequence of Giddens’s self-proclaimed recovery of the subject, in other words, was the creation of a locus for rationality in practice theory. Previous theorists, as we have seen, felt compelled to equate all practical action with a nonrational way of doing things.

What does this understanding of practices have to offer the study of the practice of international law? The problem with Giddens, as many of his critics have pointed out, is his unwillingness or inability (perhaps both) to translate his abstract ideas about the constitution of society into viable research designs for empirical inquiry.¹⁷³ As one observer recently noted, “Giddens not only did not put his theory to the test of empirical research, he also failed to provide any exemplification of his approach, and explicitly refrained and even resisted putting his theory into a methodological package for pursuing empirical

168. NICOLINI, *supra* note 43, at 48.

169. GIDDENS, CENTRAL PROBLEMS IN SOCIAL THEORY, *supra* note 156, at 65–69.

170. Giddens, *Hermeneutics and Social Theory*, *supra* note 161, at 9–10.

171. Anthony Giddens, *Comments on the Theory of Structuration*, 13 J. THEORY SOC. BEHAV. 75, 76 (1983).

172. *Id.* at 77.

173. Giddens initially appears to have tried, however. See GIDDENS, THE CONSTITUTION OF SOCIETY, *supra* note 45, at 327–43 (reflecting on the implications of structuration theory for empirical research, notably the “hermeneutic aspects” of both quantitative and qualitative research and the interrelationship between these two forms of social inquiry).

inquiry.”¹⁷⁴ For now it is sufficient to note that the idea of practice is the linchpin in Giddens’s theory of structuration, as a result of which it gained greater currency in the social sciences. The notion is so central in fact that Giddens, together with Pierre Bourdieu, is sometimes thought to be a figurehead of a research program known as “social praxeology.”¹⁷⁵

C. Postmodern Perspectives

1. Bourdieu

It is sometimes said that Bourdieu, a French sociologist, left a greater mark on practice theory than Giddens. The reason for this perceived contribution is usually attributed to the former’s willingness to conduct empirical research, ethnographic and otherwise:

Bourdieu always believed in the fundamental importance of starting the study of human conducts from the appreciation and representation of real-time practices. However, one of his key theoretical points was that representing practice is not enough: practice needs to be explained, and this is what makes sociologists different from anthropologists and other social scientists. While the object of the work of the latter is what practices are and how they behave, the former need to address the issue of why practices are the way they are and why they are not different. To this end, he developed over the years a theory of both practice and “practice-based theorizing” that has fundamental implications for any attempts to extend practice thinking to new domains such as organization studies.¹⁷⁶

Because I am concerned in this article with just such an endeavor—the extension of practice theory to the study of international law—a closer look at Bourdieu’s writings is essential.

In *Distinction*, his famous book on the judgment of taste, Bourdieu captured the essence of his logic of practice thus:

$$[(\text{habitus}) (\text{capital})] + \text{field} = \text{practice}^{177}$$

Although space constraints disallow an in-depth discussion of Bourdieu’s theoretical concepts, a brief primer is in order. In Bourdieu’s parlance, the concept of habitus refers to a deeply inscribed—and internalized—way of knowing that individuals acquire in passing as a by-product of all forms of socialization, whether at home, at work, or at play.¹⁷⁸ As the theoretical linchpin

174. NICOLINI, *supra* note 43, at 50. The disinterest in empirical explication is germane to most of the philosophers and social theorists whose ideas I have brought into the fold of this theoretical contribution to the study of international law. In response to this general predicament, I will, below, outline a concrete, if tentative, agenda for making empirical contributions to the practical study of international law in the form of what I refer to as analytic narratives. *See supra* Part VI.

175. The term was coined by Loïc Wacquant. *See* Loïc Wacquant, *Toward a Social Praxeology: The Structure and Logic of Bourdieu’s Sociology*, in AN INVITATION TO REFLEXIVE SOCIOLOGY 1, 11 (Pierre Bourdieu & Loïc J. D. Wacquant eds., 1992).

176. NICOLINI, *supra* note 43, at 53.

177. PIERRE BOURDIEU, *DISTINCTION: A SOCIAL CRITIQUE OF THE JUDGMENT OF TASTE* 101 (1984) [hereinafter BOURDIEU, *DISTINCTION*].

178. NICOLINI, *supra* note 43, at 55.

of his far-ranging writings, the presence of habitus, Bourdieu argued, is knowledge-producing in the sense that its structural properties constitute a particular type of social environment, which, in turn, enable—and delimit—practical action by individuals in and on the world. Put differently, for Bourdieu, the irrepressible force of habitus serves at all times as a parameter to individual choice, usually without being noticed. Here is how the French sociologist put it himself, if a tad obscurely:

[Habitus is a] system of durable, transposable dispositions, structured structures predisposed to function as structuring structures, that is, as principles which generate and organize practices and representations that can be objectively adapted to their outcomes without presupposing a conscious aiming at ends or an express mastery of the operations necessary in order to attain them.¹⁷⁹

Though, on Bourdieu's account, the concept of habitus is indispensable to the production of practices, it is not alone sufficient for constituting social practices. Rather, practices are produced by the interaction of habitus with two related concepts—namely, *capital* and *field*. Again, both terms come with a great deal of theoretical baggage, which I am sidestepping for ease of presentation. Simply put, the concept of capital connotes all material and nonmaterial forms of currency that are suitable for and used in the pursuit of a given interest, from accumulation to domination. The definition of a given interest is governed by one's habitus, which has a strong relationship to group and class membership. The concept of the field, finally, captures the constellation of forces that, semiautonomously, generate the rules by which positions of authority, power, legitimacy, and influence are defined and allocated in a given society. Most societies are comprised of numerous fields, many of which coincide with major spheres of life, including art, education, law, politics, and religion, to name but a few. Bourdieu's logic of practice assumes that a mutually constitutive relationship exists between habitus and field, facilitated by the circulation of capital: "[I]nvolvement in a field shapes the habitus that, once activated, reproduces the field. On the other hand, habitus only operates in relation with the state of the field and on the basis of the possibilities of action granted by the capital associated with the position."¹⁸⁰ On this conceptual foundation, we can return to the schematic formula of Bourdieu's "general science of practices" with which we began.¹⁸¹

179. BOURDIEU, THE LOGIC OF PRACTICE, *supra* note 62, at 53. For an example of readings critical of Bourdieu's concept of habitus, see Raymond W. K. Lau, *Habitus and the Practical Logic of Practice: An Interpretation*, 38 SOC. 369 (2004).

180. NICOLINI, *supra* note 43, at 60. For an incisive critique of what he calls Bourdieu's "conceptual morass," especially as it pertains to the interacting concepts of field and practice, see Alan Warde, *Practice and Field: Revising Bourdieusian Concepts* (Ctr. for Research on Innovation and Competition, Univ. of Manchester, Discussion Paper No. 65, 2004), available at <http://www.cric.ac.uk/cric/pdfs/dp65.pdf>.

181. For a sustained critique of Bourdieu's effort to develop a "general science of practice," see Theodore Richard Schatzki, *Overdue Analysis of Bourdieu's Theory of Practice*, 30 INQUIRY 113 (1987).

The simple formula conveys *both* the theoretical unity *and* diversity at the heart of Bourdieu's practice theory. On the one hand, his formulaic depiction suggests that the logic of practices is a constant feature of social interaction; on the other hand, it also makes plain that the logic of practices differs with context. Accordingly, Bourdieu speaks of "the unity hidden under the diversity and multiplicity of the set of practices performed in fields governed by different logics and therefore inducing different forms of realization."¹⁸² In other words, practices are pervasive and constantly involved in the construction of social reality. Yet their *precise* effect is a function of the interplay between habitus and capital and the characteristics of a particular field. For much of his intellectual life Bourdieu was intrigued by the relationship between induction and deduction. With his imperfect and reductionist formula, he may well have intended to strike a balance between the tenets of subjectivist and objectivist modes of knowledge, both of which he rejected in their pure forms.

Although Bourdieu was not always as subtle and consistent in articulating the distinction between subjectivism and objectivism as he could have been, one of his enduring contributions to practice theory was to attach individuals *relationally* to the social and historical contexts in which they dwell. His relational method was founded on a deep-seated suspicion of all attempts to reify the attributes of individuals and groups. It therefore comes as no surprise that he deemed descriptive accounts by practitioners analytically worthless. One of Bourdieu's leading interpreters explains why:

This epistemological stance is necessitated by the very nature of insider accounts of their own practices. Insider representations reflect the practical logic of getting along in their social world, and hence are to be understood as instruments of struggle for practical accomplishments rather than attempts to draw a coherent and objective picture of actor behavior. While scientific representations are constructed out of the representations of everyday practices, the latter cannot be substituted for the former.¹⁸³

What follows from this for the study of practice in international law? It follows that purely descriptive accounts of any international legal practice will not be enough to render comprehensible its social logic and effects, especially in organizational settings. The Bourdieusian analysis of practices "involves the construction of the fields where they occur and the habitus of the agents brought to those fields" as well as the kinds of capital under their command.¹⁸⁴ This explicitly theoretical approach to practice is immediately relevant to this issue on the ICC. With Bourdieu I believe that "theory must be used to recover the practice of the agents about which it theorizes and, in doing so, becomes itself a practical, engaged social activity."¹⁸⁵ At the same time, it is noteworthy that Bourdieu was averse to speaking of "praxis," a term that he detested

182. BOURDIEU, *DISTINCTION*, *supra* note 177, at 101.

183. DAVID SWARTZ, *CULTURE AND POWER: THE SOCIOLOGY OF PIERRE BOURDIEU* 56 (1997).

184. *Id.* at 142.

185. Derek Robbins, *Theory of Practice*, in PIERRE BOURDIEU: KEY CONCEPTS 37 (Michael Grenfell ed., 2008).

because it “tends to create the impression of something pompously theoretical.”¹⁸⁶ This semantic preference is suggestive of Bourdieu’s most important contribution to practice theory, namely the striking of a third way between purely nomothetic and purely ideographic modes of reasoning about the everyday.

For Bourdieu, neither deduction nor induction is sufficient for making us comprehend the logic of practice. As he put it, “science has a time which is not that of practice” and “practice has a logic which is not that of the logician.”¹⁸⁷ In other words, only reflexivity—another key concept that I must largely sidestep—can help us avoid the intellectual pitfalls that are associated with *both* metatheory *and* microhistory. “Practice theory is in this perspective to be understood as an ontological sensitivity and a set of epistemic preferences; that is, a way of theorizing, instead of a corpus of universally valid normative statements.”¹⁸⁸ From my perspective, Bourdieu’s “general science of practices” is an ambitious—yet still relatively modest—theoretical framework for explicating how agents and structures constitute one another in everyday organizational life. Notwithstanding inconsistencies in his approach—and the conceptual confusion to which he also contributed—it is eminently helpful for thinking about the practice of international law because it “destabilizes the boundaries between general abstraction as theory and fact-finding as methodology.”¹⁸⁹ At a time when the study of international law continues to be driven by either data or doctrine, a deliberately scientific view of practices, along the lines sketched by Bourdieu, holds the promise for an improved understanding of the reality of international law.

In designing the issue of which this article forms a part, I have, not unlike Bourdieu, been cognizant of the twin dangers of what we might call, for lack of better terms, “excessive theorizing” and “excessive empiricizing” when it comes to the study of the ICC. Excessive theorizing is easily grasped. It refers to metatheoretical waffling about the nature of international adjudication, devoid of empirical grounding. This resembles Bourdieu’s methodological stance. As Didier Bigo writes,

Bourdieu opposes any “social theorist” speaking about state and society in generalized abstract terms and avoiding the difficult empirical work of in-depth investigation about how many individuals or groups think or speak the same way as the “analyst,”¹⁹⁰ and how many social universes share this so-called academic reading of their lives.

186. PIERRE BOURDIEU, *Fieldwork in Philosophy*, in *IN OTHER WORDS: ESSAYS TOWARDS A REFLEXIVE SOCIOLOGY* 3, 22 (Pierre Bourdieu ed., 1990).

187. BOURDIEU, *OUTLINE OF A THEORY OF PRACTICE*, *supra* note 35, at 9; PIERRE BOURDIEU & JEAN-CLAUDE PASSERON, *REPRODUCTION IN EDUCATION, SOCIETY AND CULTURE* 86 (1990).

188. NICOLINI, *supra* note 43, at 66.

189. Didier Bigo, *Pierre Bourdieu and International Relations: Power of Practices, Practices of Power*, 5 *INT’L POL. SOC.* 225, 231 (2011).

190. *Id.* at 234.

What I call excessive empiricizing, next, refers to the production of nonanalytical narratives, that is, descriptions of international legal processes that fail to bring any form of abstract reasoning to bear. Excessive empiricizing, as I conceive of it, comes in two variants: “excessive doctrinalism” and “excessive description.” The first refers to the important, yet analytically sometimes very partial, accounts of technical considerations pertaining to international legal proceedings. The second connotes the “old institutionalist” tendency, alluded to in part II above, of many international legal scholars to merely describe the developments in international courts, usually with detailed reference to institutional rules and case law, without trying to theoretically and systematically inquire into the determinants of what I have elsewhere called legal contention.¹⁹¹ Bourdieu is a useful ally in the quest for more rigor in the study of international law. His practice theory is particularly helpful for our purposes because his concept of habitus, as Nicolini points out,

becomes a viable alternative to the idea of organizational culture, the catch-all blanket concept introduced in the 1980s. Not only is habitus analytically more precise and convincing, it is also historically situated, open to contestation, and sensitive to power conflicts, all aspects that the functionalist concept of organizational culture is unable to capture.¹⁹²

Not everyone agrees. Stephen Turner, in an important challenge to Bourdieu’s practice theory, sought to burst the Frenchman’s bubble about the explanatory potential of social practices:

The idea of ‘practice’ and its cognates has this odd kind of promissory utility. They promise that they can be turned into something more precise. But the value of the concepts is destroyed when they are pushed in the direction of meeting their promise. New objects—*habitus* instead of norms, norms instead of *mores*—are proposed. New explanatory successes, usually restricted to a small range of phenomena, occur. . . . So the project itself is never challenged, but it never succeeds either, at least in the way it would succeed if the structure of the beast [that is, the thing to be explained] were gradually being revealed. Instead we get, so to speak, different kinds of scans of the beast, each of which cannot be improved beyond a certain level of fuzziness, and each of which gives somewhat different and inconsistent or difficult-to-integrate pictures.¹⁹³

Turner’s cautionary note is well-taken. One of the challenges of developing methodological guidelines for the interpretive study of international law is precisely related to the difficult task of operationalizing fuzzy concepts derived from metatheory, which is why I began this article with an overview of conceptual similarities and differences across a number of important practice theorists. This limitation notwithstanding, Bourdieu’s account of the logic of practice is undoubtedly a major contribution. This being so, it deserves close scrutiny in the outline of a theory of international law as practice. Here, then, is the rub:

Bourdieu’s theory of practice can be seen as an attempt to transform static, one-dimensional views of social space into a larger differentiated, stratified, and

191. JENS MEIERHENRICH, *LAWFARE: THE FORMATION AND DEFORMATION OF GACACA JURISDICTIONS IN RWANDA, 1994–2012* (forthcoming 2014).

192. NICOLINI, *supra* note 43, at 67.

193. TURNER, *supra* note 113, at 116.

multidimensional view. By appealing to homologies existing both between habitus and social fields and between different social fields, Bourdieu claims to account for social stability, order, and reproduction. Conversely, by emphasizing both that the habitus allows for continuous improvisation, and that social structures, as products of history, contain tensions, oppositions, and contradictions, he provides for history, change, resistance, and social transformation.¹⁹⁴

2. De Certeau

Notwithstanding Bourdieu's significant contribution to theorizing the nature and logic of practices, critics have bemoaned the comprehensive—and expansive—nature of his practice theory. They have shone light on the totalizing tendencies that the social theorist, in their eyes, shared with another French sociologist, Michel Foucault. Foremost among these critics was the French Jesuit and interdisciplinary scholar Michel de Certeau. In his view, Bourdieu's all-encompassing empirical accounts, especially of the Kabylia region of Algeria, where the latter conducted ethnographic fieldwork, fall significantly short. "Bourdieu's texts are fascinating in their analyses and aggressive in their theory," writes de Certeau.¹⁹⁵ But Bourdieu's argument, he notes,

is concerned less to indicate . . . reality th[a]n to show its necessity and the advantages of his hypothesis for the theory. Thus the *habitus* becomes a dogmatic place, if one takes dogma to mean the affirmation of a "reality" which the discourse needs in order to be totalizing. No doubt it still has, like many dogmas, the heuristic value of displacing and renewing possibilities of research.¹⁹⁶

On the foundation of this critique, which de Certeau supports with ample evidence, he develops an alternative practice theory, albeit one that is considerably more modest in its ambition than Bourdieu's, and one that zooms in on the mundane of everyday life, especially practices of consumption.

Inasmuch as the mundane aspects of social behavior also play a role in other practice theories, notably Bourdieu's, de Certeau brought an entirely new dedication to their analysis. His focus and that of his collaborators was on "minor practices," as he called them:

A society is . . . composed of certain foregrounded practices organizing its normative institutions *and* of innumerable other practices that remain "minor," always there but not organizing discourses and preserving the beginnings or remains of different (institutional, scientific) hypotheses for that society or for others. It is in this multifarious and silent "reserve" of procedures that we should look for "consumer" practices.¹⁹⁷

Iver Neumann rightly points out that de Certeau must be considered a post-structuralist in that he considered "the hunt for latent structures as ahistorical and asocial."¹⁹⁸ For de Certeau, social life was "contingent, not anchored in

194. KEITH TOPPER, *THE DISORDER OF POLITICAL INQUIRY* 170–71 (2005).

195. MICHEL DE CERTEAU, *THE PRACTICE OF EVERYDAY LIFE* 59 (1984).

196. *Id.*

197. *Id.* at 48 (emphasis added).

198. Iver B. Neumann, *Returning Practice to the Linguistic Turn: The Case of Diplomacy*, 31 *MILLENNIUM* 627, 633 (2002) [hereinafter Neumann, *Returning Practice to the Linguistic Turn*].

something outside itself.”¹⁹⁹ Emerging in the context of a much broader corpus of French scholarship on the meaning of the quotidian (everyday)—most notably in the writings of Henri Lefebvre, Roland Barthes, and Georges Perec—de Certeau’s account pushed the boundaries of practice theory in remarkable ways, not least by giving a novel account of action. Through his focus on consumption—an activity often said to be undertaken by docile subjects rather than tactical agents—he sought to challenge conventional wisdom about the determinants of everyday behavior.²⁰⁰ More specifically, by imagining consumers as “producers” in their own right, de Certeau helped elevate the profane to a level worthy of serious theoretical reflection.

Furthermore, by thinking of practices in terms of “tactics,” he linked Foucault’s (at the time of de Certeau’s writing, rather recent) insights about disciplinary power to the study of practices.²⁰¹ And yet, parting ways with Foucault, his aim was

not to make clearer how the violence of order is transmuted into a disciplinary technology, but rather to bring to light the clandestine forms taken by the dispersed, tactical, and make-shift creativity of groups or individuals already caught in the nets of ‘discipline.’ Pushed to their ideal limits, these procedures and ruses of consumers compose the network of an antidiscipline which is the subject of this book,²⁰²

as he put it in *The Practice of Everyday Life*, the first volume of what was supposed to be a multivolume analysis.²⁰³ This theoretical point requires unpacking, because it cuts to the heart of de Certeau’s principal contribution to practice theory, which revolves around the conceptualization of practices as *tactics*, by which he meant “calculated action which is determined by the absence of a proper place.”²⁰⁴ Tactics, according to de Certeau,

has no place except in that of the other. Also it must play with the terrain imposed on it, organized by the law of a strange force. It does not have the means of containing itself in itself, in a position of retreat, of anticipating, of gathering itself . . . It profits from and depends upon “occasions” without a base in which to stock supplies, to augment a proper space, and to anticipate sorties. What it gains cannot be held. This non-space doubtless permits mobility, but requires amenability to the hazards of time, in order to seize the possibilities that a moment offers. It must vigilantly utilize the gaps which the particular combination of circumstances open in the control of the proprietary power. It poaches there. It creates surprises. It is possible for it to be where no one expects it.²⁰⁵

199. *Id.*

200. For the justification of his focus on consumption (or “usage”) as object of study, see DE CERTEAU, *supra* note 195, at vii–xiv.

201. For an engagement with Foucault’s writings on disciplinary power, see, for example, *id.* at 45–48.

202. *Id.* at xiv–xv.

203. Due to de Certeau’s untimely death, only the first volume of *L’invention du quotidien*, as the project is called in French, appeared during his lifetime. A second volume was published posthumously. See MICHEL DE CERTEAU, LUCE GIARD & PIERRE MAYOL, *THE PRACTICE OF EVERYDAY LIFE, VOLUME 2: LIVING AND COOKING* (1998).

204. Michel de Certeau, *On the Oppositional Practices of Everyday Life*, 3 SOC. TEXT 3, 6 (1980) [hereinafter de Certeau, *On the Oppositional Practices of Everyday Life*].

205. *Id.*

What this opaque formulation means is that the choice of tactics (as opposed to what de Certeau calls “*strategies*”) is generally the domain of agents who *lack* power, not those who possess it. “Cracks, glints, slippages, brainstorming within the established grids of a given system: such are the style of these tactical practices, which are the equivalent in the realm of action of wit and the witticism in the realm of language.”²⁰⁶ Making explicit reference to Carl von Clausewitz, the Prussian military strategist, de Certeau likened the practices of consumption to weapons of the weak.²⁰⁷ De Certeau’s use of the term “antidiscipline”²⁰⁸ was deliberate and programmatic in that it encapsulated his lifelong faith in the ability of ordinary men—and women—to evade the strictures of their disciplined lives, if only intermittently. From his perspective, everyday practices—including the seemingly innocuous practices of consumption—afforded otherwise marginal individuals the power to occasionally resist domination. He coined the term “oppositional practices” to capture the power that he believed attached to such “tricks of the ‘weak’” as “[d]welling, walking, spelling, reading, shopping, cooking,” all of which activities, de Certeau claimed, “present many of the characteristics of tactical ruses and surprises.”²⁰⁹ As he put it elsewhere,

Many everyday practices (talking, reading, moving about, shopping, cooking, etc.) are tactical in character. And so are, more generally, many “ways of operating”: victories of the “weak” over the “strong” (whether the strength be that of powerful people or the violence of things or of an imposed order, etc.), clever tricks, knowing how to get away with things, “hunter’s cunning,” maneuvers, polymorphic simulations, joyful discoveries, poetic as well as warlike. The Greeks called these “ways of operating” *mētis*.²¹⁰

For de Certeau, then, “[t]he tactics of consumption, the ingenious ways in which the weak make use of the strong . . . lend a political dimension to everyday practices.”²¹¹ He conceived of them as artistic interventions in the space structurally delimited by the operation of the modes of production, which is why he once described them as “the most normative institutions of modern times.”²¹² But unlike other social theorists, including Bourdieu, de Certeau is more optimistic about the role of individual agency. As Michael Sheringham writes,

For [de] Certeau, there is a glaring opposition between Bourdieu’s account of the way practices work in the space between subjects and systems, an account which has many affinities with [de] Certeau’s account of tactical play, and the way Bourdieu ultimately denies any freedom or control to individual subjects by his insistence on the way they

206. *Id.* at 7.

207. DE CERTEAU, *supra* note 195, at 37–38 (describing tactics as an “art of the weak”).

208. *See supra* text accompanying note 202.

209. de Certeau, *On the Oppositional Practices of Everyday Life*, *supra* note 204, at 8.

210. DE CERTEAU, *supra* note 195, at xix.

211. *Id.* at xvii. This is reminiscent of what the anthropologist James C. Scott, several years later, would famously come to call “weapons of the weak” in his study of rural resistance to formal authority in Malaysia. *See* JAMES C. SCOTT, *WEAPONS OF THE WEAK: EVERYDAY FORMS OF PEASANT RESISTANCE* (1985).

212. de Certeau, *On the Oppositional Practices of Everyday Life*, *supra* note 204, at 4.

act out their *habitus* unconsciously and passively—in ‘*docta ignorantia*’—Bourdieu’s logic of practices is based on reproduction rather than production.²¹⁵

The agentic focus on production is relevant to the study of practices of international law because it encourages us to look for tactical behavior in even the unlikeliest of places. As a theoretical insight, it has the potential to upend conventional ways of thinking about *where*, exactly, power is located in the international legal arena, *who* wields it, and *how*. De Certeau indirectly sensitizes scholars of IL and IR to take seriously the power of the mundane. This is not to say, for example, that every low-level bureaucrat in, say, an international court exercises power in a manner that is either noticeable or significant for understanding international legal outcomes, but it does suggest that something analytically worthwhile *could* be gained by ceasing to ignore the mundane aspects of international law. More specifically, de Certeau is interesting because he, unlike any other practice theorist of note, is sensitive to those on the margins of life. In an era in which IL and IR scholarship is becoming more sensitive to those on the margins of international law, de Certeau’s oeuvre may offer useful insights for studying these lifeworlds.

3. Schatzki

Schatzki, whom we already encountered, ranks among the most sophisticated and philosophical of contemporary practice theorists.²¹⁴ In addition to having been at the forefront of popularizing the so-called practice turn in the social sciences, notably with the publication, in 2001, of the coedited collection *The Practice Turn in Contemporary Theory*, Schatzki has left his mark by vocally pushing back against the supremacy in practice theory of the ideas of Bourdieu and Giddens. More specifically, he has reintroduced into the conversation Wittgenstein’s ideas about practice. For Schatzki, Wittgenstein’s ideas are preferable to those developed by either Bourdieu or Giddens, notably because the Austrian–British philosopher did not “overintellectualize practices” as they are said to have done.²¹⁵

In his quest for an “anti-theoretical” position toward practice, Schatzki has taken particular issue with Bourdieu and Giddens because he claims they—by virtue of their integrated models of society emphasizing the centrality of structuration and habitus respectively—have smuggled objective rules into their theories of practice, thereby undermining the ethos of practice-based reasoning.²¹⁶ Here is how Raymond Caldwell succinctly summarizes the most important of Schatzki’s critiques:

213. MICHAEL SHERINGHAM, *EVERYDAY LIFE: THEORIES AND PRACTICES FROM SURREALISM TO THE PRESENT* 215 (2006).

214. SCHATZKI, *THE SITE OF THE SOCIAL*, *supra* note 51; *see supra* notes 51–58 and accompanying text.

215. Theodore R. Schatzki, *Practices and Actions: A Wittgensteinian Critique of Bourdieu and Giddens*, 27 PHIL. SOC. SCI. 283, 285 (1997) [hereinafter Schatzki, *Practices and Actions*].

216. *See id.* at 297–300.

Schatzki criticizes Giddens and Bourdieu for misconceiving rule-following in an overly intellectual and deterministic manner. Giddens incorporates rules into his conception of practical consciousness as a mode of tacit knowledge that defines how actors know how to go on in practical situations without reference to intentionality. This idea is then incorporated into Giddens's broader theory of agency and structure: rule-following agents appear to produce and reproduce the "virtual order" of structuration. In contrast, Bourdieu argues that practices are not the outcome of rule-following by individuals, but are instead the pre-reflective enactment of various schemes of rule governed behaviour that occupy or reside within the "habitus" of individuals. These pre-reflective schemas within individual habitus cause actors to execute or carry out actions Schatzki objects to both of these positions because they appear to assume that implicit rules have objective effects in that they order social action.²¹⁷

This is unacceptable to Schatzki, for whom the most appealing aspect of practice-based reasoning is precisely the contingent nature of action, what he calls "the unformulability of practical understanding."²¹⁸ For example, for him "Bourdieu's account (and to a lesser extent Giddens's) too strongly portrays actions as proceeding out of mastery and control: knowing how to go on, the sense of this and that."²¹⁹

In another respect, Schatzki's theory of practice is noteworthy for its downplaying of the linguistic dimensions of practices. As he writes, "Intelligibility is ultimately and (one presumes) originally a practical phenomenon that is not entirely recouped in language."²²⁰ This positioning was in part a response to the prevalence of linguistics and discourse theory in late twentieth-century social theory. Influenced by Wittgenstein, Schatzki rejected the preoccupation with language and signification. As one interpreter of Schatzki's practice theory writes, "Schatzki has to keep language firmly in check if he is to partly justify the primacy of practice and a practice-oriented view of agency. If language (I speak) takes priority over practice (I do) then agency can dissolve into discourse, signification, talk, text or conversation."²²¹

The IR scholar Iver Neumann not long ago engaged the relationship between practice and discourse, presumably inspired by Schatzki's critique. Yet unlike the philosopher, Neumann has sought to find an analytical place for both discourse and practice, which he sees as standing in a dynamic relationship mutually constituting culture. Though he shares some of Schatzki's discontent about some methodological excesses associated with the linguistic turn, Neumann concedes that "practice cannot be thought 'outside of' discourse."²²² At the same time, he bemoans the tendency toward "armchair analysis," by which he means "text-based analyses of global politics that are not complemented by different kinds of contextual data from the field, data that may illuminate how foreign policy and global politics are experienced as lived

217. Raymond Caldwell, *Reclaiming Agency, Recovering Change? An Exploration of the Practice Theory of Theodore Schatzki*, 42 J. FOR THEORY SOC. BEHAV. 283, 293–94 (2012).

218. Schatzki, *Practices and Actions*, *supra* note 215, at 300.

219. *Id.* at 301.

220. SCHATZKI, *SOCIAL PRACTICES*, *supra* note 46, at 128.

221. Caldwell, *supra* note 217, at 287.

222. Neumann, *Returning Practice to the Linguistic Turn*, *supra* note 198, at 628.

practices.”²²³

Inasmuch as Schatzki’s critique of overemphasis on language and discourse in practice theory is well-taken, it remains to be seen whether his de facto dismissal of Bourdieu (and to a lesser extent of Giddens) will leave a mark on the adaptation of practice theory for the study of international law. Thus far the handful of IL and IR studies of international practices that currently exist have invoked Bourdieu’s theory of practice more than that of any other social theorist, notwithstanding Schatzki’s fundamental disagreement.

4. Wenger

Lastly, Etienne Wenger, not unlike the aforementioned Flyvbjerg with his project of a phronetic social science, pushed practice theory more self-consciously in the direction of policy application. In an attempt to better understand—and ultimately affect—the determinants of learning in postmodern society, Wenger, an education specialist, began to investigate the social dimensions of knowledge acquisition.²²⁴ In his effort to complement biological, cognitive, linguistic, and other dominant theories of learning, he coined the evocative term “communities of practice.” The novel, and by now hugely influential (at least in policy circles) concept was meant to capture the inherently—and inescapably—collective logic of learning. “Over time,” according to Wenger,

this collective learning results in practices that reflect both the pursuit of our enterprises and the attendant social relations. These practices are thus the property of a kind of community created over time by the sustained pursuit of a shared enterprise. It makes sense, therefore, to call these kinds of communities *communities of practice*.²²⁵

For Wenger, the three defining attributes of a community of practice were the existence of (1) a community of mutual engagement, (2) a negotiated enterprise, and (3) a repertoire of negotiable resources accumulated over time.²²⁶ The communitarian ethos (and strong policy orientation) that undergirds this most recent theory of practice sets it apart from the more critically minded practice theorists that we have encountered thus far. In this sense Wenger, like Flyvbjerg, has more in common with Aristotle than with Bourdieu or Schatzki when it comes to thinking about the logic of practices. Whereas Wenger and Flyvbjerg are primarily interested in making a *managerial*

223. *Id.*

224. On the policy imperative in Wenger’s work, see, for example, Etienne C. Wenger & William M. Snyder, *Communities of Practice: The Organizational Frontier*, HARV. BUS. REV., Jan.–Feb. 2000, at 139, and, in expanded form, ETIENNE WENGER, RICHARD MCDERMOTT & WILLIAM M. SNYDER, *CULTIVATING COMMUNITIES OF PRACTICE: A GUIDE TO MANAGING KNOWLEDGE* (2002). For a tentative assessment of the concept’s salience in the policy domain, see, for example, Masoud Hemmasi & Carol M. Csanda, *The Effectiveness of Communities of Practice: An Empirical Study*, 21 J. MANAGERIAL ISSUES 262 (2009).

225. ETIENNE WENGER, *COMMUNITIES OF PRACTICE: LEARNING, MEANING, AND IDENTITY* 45 (1998).

226. *Id.* at 73.

contribution, Bourdieu and Schatzki are more concerned with making a *methodological* one. This nontrivial difference notwithstanding, ontological similarities are immediately observable. Consider Wenger's definition of practice, which bespeaks his intellectual debt to virtually all of the practice theorists who preceded him, notably to their declared objective of transcending the distinction between agents and structures. Though less parsimonious than other theories, Wenger's amounts to an integrated compilation of salient (and instantly recognizable) attributes of practice:

The concept of practice connotes doing, but not just doing in and of itself. It is doing in historical and social context that gives structure and meaning to what we do. In this sense, practice is always social practice. Such a concept of practice includes both the explicit and the tacit. It includes what is said and what is left unsaid; what is represented and what is assumed. It includes the language, tools, documents, images, symbols, well-defined roles, specified criteria, codified procedures, regulations, and contracts that various practices make explicit for a variety of purposes.²²⁷

But, says Wenger, his concept of the *Background* also includes

all the implicit relations, tacit conventions, subtle cues, untold rules of thumb, recognizable intuitions, specific perceptions, well-tuned sensitivities, embodied understandings, underlying assumptions, and shared world views. Most of these may never be articulated, yet they are unmistakable signs of membership in communities of practice and are crucial to the success of their enterprises. Of course, the tacit is what we take for granted and so tends to fade into the background. If it is not forgotten, it tends to be relegated to the individual subconscious, to what we all know instinctively, to what comes naturally. But the tacit is no more individual and natural than what we make explicit to each other. Common sense is only commonsensical because it is sense held in common. Communities of practice are the prime context in which we can work out common sense through mutual engagement. Therefore, the concept of practice highlights the social and negotiated character of both the explicit and the tacit in our lives.²²⁸

One is reminded in this context of what the philosopher John Searle, in his famous writings on intentionality, termed "the thesis of the Background."²²⁹ On this argument, "Intentional states function only given a set of Background capacities that do not themselves consist in intentional phenomena."²³⁰ What Searle means is that many of our everyday activities are governed by unconscious mental states that must be factored into explanatory accounts if we are serious about figuring out why we act in the ways that we do. Accordingly, he theorizes what he calls "Background causation" in contradistinction to "decision theoretic models of rationality."²³¹ Here is one of numerous, real-world examples upon which Searle relies to persuade:

Suppose I am driving to work, or suppose I am sitting in a restaurant looking at the menu and trying to decide what to eat. In such cases it seems implausible to say that I am performing a set of calculations to try to get myself on a higher indifference curve,

227. *Id.* at 47.

228. *Id.*

229. JOHN R. SEARLE, THE CONSTRUCTION OF SOCIAL REALITY 129 (1995) (capitalization in original).

230. *Id.* at 129.

231. *Id.* at 137–39.

given an antecedent set of well-ordered preferences.²³²

Although the practice of international law will almost always involve far greater levels of complexity than are commonly associated with driving and meal times, the overall insight applies: Not all international legal practices are based on deliberation or calculation. Rather, as in every other professional sphere, a substantial portion of everyday lawyering rests on habitual, routinized, ritualistic, repetitive, or mundane behavior. It is therefore plausible to assume that in the study of international law, as elsewhere, “a conception of rationality as a set of specific, well-defined operations over sharply delineated, explicit intentional contents is inadequate.”²³³ Instead, with Searle, we ought to want to be able to marshal accounts “that will explain the intricacy, the complexity, and the sensitivity of our behavior as well as explaining its spontaneity, creativity, and originality.”²³⁴

Though not rejecting “intentionalistic explanation” per se, Searle carves out analytical space for a path right down the middle between behaviorism and structuralism.²³⁵ It is here that his argument about “Background” causation comes into play. In addition to serving other so-called functions, Searle’s Background facilitates linguistic interpretation, provides motivational dispositions, and enables the narrative (and dramatic) construction of experience.²³⁶ Couched in these terms, the connecting points between his philosophy of mind and various iterations of practice theory are remarkable indeed.

Interestingly, Searle explicitly acknowledges the definitional overlap between the conceptual hinge of his theory of intentionality and some of the terms that I have herein associated with practice theory:

My discussion of the Background is related to other discussions in contemporary philosophy. I think that much of Wittgenstein’s later work is about what I call the Background. And if I understand him correctly, Pierre Bourdieu’s important work on the “habitus” is about the same sort of phenomena that I call the Background. In the history of philosophy, I believe [David] Hume was the first philosopher to recognize the centrality of the Background in explaining human cognition, and Nietzsche was the philosopher most impressed by its radical contingency.²³⁷

But let me get back to Wenger, who ultimately contributed more to practice theory than Searle. (Searle’s contribution was important but incidental, Wenger’s, integral.) Wenger developed his theory of learning by quadrangling insights from what he termed theories of social structure, of identity, of situated experience, and of social practice, all of which, on his argument, are located at the intersection of four broader intellectual

232. *Id.* at 138.

233. SEARLE, *supra* note 229, at 139.

234. *Id.* at 141.

235. *Id.* at 138–39.

236. *See id.* at 130–37.

237. *Id.* at 132.

traditions.²³⁸ As with some of the other theories of practice, the details need not concern us. What *does* bear emphasizing is Wenger's pragmatic (in all senses of the word) attitude toward empirical research. As a consultant on issues of learning, Wenger is arguably more results-oriented than most other practice theorists. By this I mean that he is clearly intent on bringing about change in the way we learn; but he also appreciates the need to gather data in support of his theoretical (and normative) argument. This is useful for our purposes because Wenger, as a result, thinks about questions such as the operationalization of concepts, a methodological concern that was entirely alien to Bourdieu and other more critically inclined theorists of practice in the twentieth century. To illustrate the point, here are *some* of the indicators that Wenger thought helpful for researchers to be able to identify the existence of communities of practice: "sustained mutual relationships—harmonious or conflictual," "substantial overlap in participants' descriptions of who belongs," "the ability to assess the appropriateness of actions and products," "jargon and shortcuts to communication as well as the ease of producing new ones," and "a shared discourse reflecting a certain perspective on the world."²³⁹

Though it is not essential, for our purposes, to know about the remaining seven indicators developed by Wenger, a passing familiarity with the partial list reproduced above is enlightening because it throws additional light on the *kinds* of things that could become "data points" (to borrow the language of positivism) in practice-based reasoning about international law. As such, Wenger, intentionally or otherwise, offers more guidance on the practical challenge of studying practices than some of his contemporaries. Relatedly, given the vagueness—or, rather, the lack of concreteness—of most existing conceptions of practice, the exemplary list of what might count as "the explicit" and "the tacit" in Wenger's aforementioned definition fills a void. For absent concrete, empirical applications à la Bourdieu (think *Distinction*, his doorstopper of a book), Wenger's all-encompassing definition goes a long way toward showing researchers interested in identifying, isolating, and interpreting practices of international law to what *types* of evidence to be attuned in times of practical immersion.²⁴⁰

In this part of the article, I have placed practice theory in context, tracing its development from Aristotle to the present. By acquainting readers with the entire universe of practice theories, I have sought to present a menu of options for the development of practice-oriented research designs in the area of international law. The study of practices in international law could conceivably proceed on the basis of any of these theoretical articulations of practice-based

238. These traditions are what he refers to as "theories of collectivity," "theories of subjectivity," "theories of power," and "theories of meaning." WENGER, *supra* note 225, at 12–15.

239. *Id.* at 125–26.

240. I explain below, in part VI, why practical immersion in international law, as I conceive of it, would ideally involve ethnographic immersion or, at a minimum, field research that *approximates* the experience of participant observation.

reasoning. In the next part, I continue the contextual analysis of practice theory by examining its recent application in the domains of IR and of IL respectively.

V

THE HISTORY OF PRACTICES IN THE INTERNATIONAL SYSTEM

Taking a leaf from one or more of the aforementioned thinkers, IR and IL scholars in the last decade began to look for practices in the international system. In this part of the article, I engage with the existing scholarship, with particular reference to select *international practices*. I elucidate both the promise and limits of practice theory and conclude with a call for more fine-grained research on *organizational practices*, which have largely, and for no good reason at all, escaped the practice turn in IR.

A. Practices in International Relations

The gradually growing literature on international practices in IR largely emerged out of the so-called linguistic turn in the humanities and social sciences. As a result of the linguistic turn, discourse analysis moved front and center in the interpretive study of international politics.²⁴¹ It was often a method of first resort for constructivists intent on emphasizing the constitutive role of social meanings, whether they manifested themselves in the form of language, identity, culture, or a combination thereof.²⁴² The fact that the vast majority of constructivist IR scholarship was, until very recently, not grounded in field research, properly understood, contributed to the centrality of discourse analysis in the interpretive study of international politics.²⁴³ Yet, as Neumann, an early advocate for careful practice-based scholarship in IR, argued more than a decade ago,

in IR we have to remind ourselves that the linguistic turn and the turn to discourse analysis involved from the beginning a turn to practices. For IR this means the linguistic turn is not just a turn to narrative discourse and rhetoric, but to how politics is actually [a]ffected. The analysis of discourse understood as the study of the preconditions for social action must include the analysis of practice understood as the study of social action itself.²⁴⁴

More recently, Adler and Pouliot, as already mentioned, brought together a number of scholars to think more systematically about select international

241. For a foundational and leading text, see NICHOLAS ONUF, *WORLD OF OUR MAKING: RULES AND RULE IN SOCIAL THEORY AND INTERNATIONAL RELATIONS* (1989). For a collection dedicated to linguistic approaches to international politics, see *INTERNATIONAL/INTERTEXTUAL RELATIONS: POSTMODERN READINGS OF WORLD POLITICS* (James Der Derian & Michael J. Shapiro eds., 1998).

242. For a comprehensive review of pertinent scholarship from a discursive point of view, see Jennifer Milliken, *The Study of Discourse in International Relations: A Critique of Research and Methods*, 5 *EUR. J. INT'L REL.* 225 (1999).

243. For an assessment of constructivist empirical research, see Martha Finnemore & Kathryn Sikkink, *The Constructivist Research Program in International Relations and Comparative Politics*, 4 *ANN. REV. POL. SCI.* 391 (2001).

244. Neumann, *Returning Practice to the Linguistic Turn*, *supra* note 198, at 627–28.

practices.²⁴⁵ The focus of the assembled cast was, among others, on the World Bank's Country Policy and Institutional Assessment (CPIA) as a "bundle of interwoven practices"²⁴⁶ and the Performance Based Allocation System (PBAS) as a specific practice, all of which shed light on the logic of bargaining between the international organization and its member states;²⁴⁷ on the practice, in the context of international bargaining, of what the rational-choice theorist William Riker called heresthetics, or political manipulation;²⁴⁸ and on the international practice of security privatization.²⁴⁹

The turn to international practices for this handful of IR scholars, positivist and postpositivist alike, represents an alternative way of making sense of the pursuit of power politics in all of its guises and in a radically altered international system. Neumann, for one, by synthesizing insights from Hans Morgenthau—the most important representative of classical realism in IR theory—and Foucault, began to conceive of certain international practices as quintessential instruments of power, insisting that

there does exist a rationality of government with matching principles that adds up to government over governments. Sovereignty may remain as an ordering principle among states, but the practices that constitute it are permeated not only with the mode of power that is sovereignty, but also with other modes of power, notably governmentality.²⁵⁰

He subsequently turned to studying the practice of diplomacy to help illuminate the history of international practices. I will use this particular example of international political practice to shed light on the promise—and limits—of IR's turn to practice theory.

1. The Practice of Diplomacy

Neumann's application of practice theory is rather straightforward. His emphasis is on the empirical, not the theoretical, study of everyday life in the international system. In his attempt to make sense of diplomacy as "quotidian policy-making," as he calls it, Neumann starts from the premise that international practices, generally speaking, are integrative ("they nudge social agents into relationships"), reflective ("they relate to the actions of others"), and performative (they are stylized).²⁵¹ His work owes to a number of scholars examined in my genealogy of theories of practice, notably to de Certeau,

245. INTERNATIONAL PRACTICES, *supra* note 40; see also Cornelia Navari, *The Concept of Practice in the English School*, 17 REV. INT'L STUD. 611 (2010).

246. Ole J. Sending & Iver B. Neumann, *Banking on Power: How Some Practices in an International Organization Anchor Others*, in INTERNATIONAL PRACTICES, *supra* note 40, at 231, 232.

247. *Id.*

248. Erik Voeten, *The Practice of Political Manipulation*, in INTERNATIONAL PRACTICES, *supra* note 40, at 255.

249. Rita Abrahamsen & Michael C. Williams, *Privatization in Practice: Power and Capital in the Field of Global Security*, in INTERNATIONAL PRACTICES, *supra* note 40, at 310.

250. NEUMANN & SENDING, *supra* note 7, at 164–65.

251. Neumann, *Returning Practice to the Linguistic Turn*, *supra* note 198, at 637–38.

although his reliance on the Frenchman is ultimately slight.²⁵² This does not mean, however, that Neumann's contribution to the study of practices in the international system is negligible. Quite the contrary: What sets his writings on diplomacy apart from those of virtually everyone else in IR who is involved in the study of international practices is their empirical depth. Unlike the vast majority of constructivist (or otherwise critical) scholars with a pragmatic bent, Neumann is not content with what he calls, as already noted, "armchair analysis."²⁵³

Cognizant of constructivism's weak empirical track record when it comes to tracing and substantiating such processes as socialization, Neumann delved into the everyday life of international politics. Wondering whether the seemingly anachronistic world of diplomacy still mattered in the twenty-first century, he set himself the task "to understand what diplomats and diplomacy do and what they believe they are doing."²⁵⁴ In order to find out what it means, and what it takes, "to be a diplomat," he chose to become one.²⁵⁵ Between 1997 and 1999, and again from 2001 until 2003, he immersed himself in Norway's Ministry of Foreign Affairs, where he worked as a planner and later as senior adviser on European politics.²⁵⁶ One impetus that persuaded him to join the diplomatic corps was the realization that "very little seems to be known about the standard operational procedures and everyday routines of diplomacy, even by many of those who make their living as political insiders."²⁵⁷ Yet if we believe Neumann, "[i]t is the hands-on work of diplomats—their reports from abroad, their desk analyses, their drawing of all this information into recommendations for state policies and priorities—that make up the substance of what has for some 150 years been known as 'foreign' policy making."²⁵⁸

Across a series of publications, Neumann affords us a number of terrific glimpses into the lifeworld of his onetime colleagues in the Norwegian foreign-policy establishment. In keeping with the tenets of practice theory, broadly defined, he singles out for interpretation a number of activities that he considers to be constitutive of the practice of diplomacy, as experienced in Norway. Among them are the more obvious activities of mediation and negotiation as well as the kinds of activities that often remain hidden unless one goes inside bureaucracy, namely the activities of self-administration, textual production in general, and speech writing in particular.²⁵⁹ In his book, Neumann

252. *Id.* at 632–38 (commending de Certeau's theory of action and his decision to treat practices, and not just utterances, as discursive).

253. *Id.* at 628.

254. IVER B. NEUMANN, *AT HOME WITH THE DIPLOMATS: INSIDE A EUROPEAN FOREIGN MINISTRY 2* (2012) [hereinafter NEUMANN, *AT HOME WITH THE DIPLOMATS*].

255. See Iver B. Neumann, *To Be a Diplomat*, 6 *INT'L STUD. PERSP.* 72 (2005).

256. NEUMANN, *AT HOME WITH THE DIPLOMATS*, *supra* note 254, at ix.

257. *Id.* at 3.

258. *Id.*

259. See generally NEUMANN, *AT HOME WITH THE DIPLOMATS*, *supra* note 254. For a more detailed account of the practice of speechwriting, see Iver B. Neumann, "A Speech That the Entire

unpacks each of these activities at great length, relying extensively on interviews and observations collected during his years as a participant observer. On the basis of a comprehensive rendering of a particular European foreign ministry, made around the turn of the millennium, Neumann shows that the organizational culture that he found in the Norwegian Ministry of Foreign Affairs is “highly ritualized” and self-perpetuating.²⁶⁰ He relates this in passing to Foucault’s notion of governmentality, while also observing a “diplomatization” of other spheres of international activity, a process that he suggests will have a lasting effect on the practice of diplomacy in the twenty-first century.²⁶¹ But what exactly is significant, if anything, about Neumann’s analysis? The question should be easy to answer, but is not: Neumann, apparently on account of a general disillusionment with the conventions of political science, largely fails to tie his findings together and relate his ethnographic vignettes to a clearly articulated argument about the relationship between diplomatic practice and international outcomes. The reader is left wondering whether the analytical whole that Neumann created is worth more than the sum of its parts.

Compared to Neumann’s closely observed (if sometimes meandering) descriptions of diplomatic life in Norway, Ian Hurd’s application of practice theory to the study of diplomacy is refreshingly parsimonious.²⁶² He advances a clearly articulated argument about the role of diplomacy in relation to international law on the basis of a reasonable conceptualization of diplomatic practice.²⁶³ On the downside, Hurd’s treatment has little to do with practice theory as defined here. It is one thing to bring metatheory to the empirical world by way of operationalization; it is quite another to elide theoretical complexity and sidestep what many consider the methodological essence of empirically motivated practice theory. For example, Hurd’s contention that “[a]s a social practice, diplomacy has . . . three formal qualities: sociality, statecentrism, and a productive effect,”²⁶⁴ although arguably useful in the context of a conventional constructivist analysis of rules and norms in the international system, betrays a misunderstanding of the nature and purpose of practice theory, as outlined in some detail above. The point of practice-based reasoning, in whatever theoretical incarnation, is to foreground activity, and, even more important, to do so in a specific time, place, and concrete historical context. The point is to get readers to understand, first and foremost, the particularity of practices. Universalizing statements about the nature of

Ministry May Stand For,” or: Why Diplomats Never Produce Anything New, 1 INT’L POL. SOC. 183 (2007).

260. NEUMANN, AT HOME WITH THE DIPLOMATS, *supra* note 254, at 188–89.

261. *Id.* at 182.

262. See Ian Hurd, *Law and the Practice of Diplomacy*, 66 INT’L J. 581 (2011) (advancing the twin arguments that diplomacy is a social practice of states, and that this practice consists of reconciling state behavior to international law).

263. See *id.* at 582–88.

264. *Id.* at 588.

diplomacy run counter to the ethos of practice theory, which as we have seen, is all about the discovery of social meanings.²⁶⁵ In the context of an analysis of the practice of diplomacy, close attention should be paid to the doings and sayings of practitioners in a localized setting of “the diplomat’s world.”²⁶⁶

To be sure, my criticism here is *not* directed at the substance of Hurd’s argument about diplomacy’s role in relation to international law, but rather to his claim that the analysis has much to do with a practice-oriented way of studying international politics. Hurd’s approach, although not dissimilar from other recent work on international practices in IR, and although constructivist in orientation, is (1) not inductive, but deductive, (2) not focused on the patterned activities that comprise the practice of diplomacy in a specific setting, and (3) not founded on any observational research on the “corporeal knowledge” that is associated with doing. Hurd’s analysis stays at a fairly general level of argumentation. We do not get a sense, as we certainly do from Neumann due to his long-standing immersion in Norway, that diplomats are more than automatons. In fact, contrary to what practice theory would require, we learn nothing new about the meaning and logic of social action in relation to diplomatic practice. States are presented as unitary actors, and diplomacy as a phenomenon that is seemingly coherent across space and time.

Interestingly, Pouliot’s analysis of diplomacy’s practice in the context of NATO’s security community suffers from similar flaws.²⁶⁷ Based on an empirical analysis of the practical logics at work in the NATO–Russia Council (NRC) in the 1990s, Pouliot found that the dynamics of Russian–Atlantic diplomatic relations in the post–Cold War world were not primarily driven by the preexisting collective identities that had emerged on both sides in the four decades prior, but far more so by daily cooperation “[o]n the ground of international politics” between Russian and NATO security practitioners in such venues as the NRC.²⁶⁸ Although “latent mistrust of mutual intentions,”²⁶⁹ not to mention problems in the “larger political relationship between Moscow and the West,”²⁷⁰ had a negative effect on the ease with which the Russian–Atlantic relationship developed, Pouliot insists that practical knowledge is more important an explanatory factor than any other in accounting for the initial opening toward the Western alliance that was observable in Russia’s diplomatic circles as well as for the limits of this rapprochement,²⁷¹ notably at the moment

265. On the importance of context, conceptual and historical, in the study of diplomacy, see IVER B. NEUMANN, *DIPLOMATIC SITES: A CRITICAL ENQUIRY* (2013).

266. For a macrohistorical overview of this world’s transformation, see Markus Mösslang & Torsten Riotte, *Introduction: The Diplomat’s World*, in *THE DIPLOMAT’S WORLD: A CULTURAL HISTORY OF DIPLOMACY, 1815–1914* (Markus Mösslang & Torsten Riotte eds., 2008).

267. See Pouliot, *The Logic of Practicality*, *supra* note 22, at 278–83. An empirically better treatment is VINCENT POULIOT, *INTERNATIONAL SECURITY IN PRACTICE: THE POLITICS OF NATO–RUSSIA DIPLOMACY* (2010) [hereinafter POULIOT, *INTERNATIONAL SECURITY IN PRACTICE*].

268. POULIOT, *INTERNATIONAL SECURITY IN PRACTICE*, *supra* note 267, at 1.

269. *Id.* at 104.

270. *Id.* at 119.

271. See *id.* at 231.

when NATO embarked on its policy of double enlargement. This latter policy had the effect of complicating international security in practice and ultimately reversing the nature of diplomatic relations between the Western alliance and Russia from tentative cooperation back to outright confrontation.²⁷² Leaving aside the veracity of the empirical argument, which challenges much of the conventional wisdom, Pouliot challenges a core assumption of constructivist reasoning in IR, namely the claim that identities drive behavior:

[I]t is not only who we are that drives what we do; it is also what we do that determines who we are. By starting with the concrete ways in which state representatives handle disputes in and through practice, I reverse the traditional causal arrow of social action—from ideas to practice—and emphasize how practices also shape the world and its meaning.²⁷³

He has certainly done so, and his book illustrates well, in certain respects at least, the explanatory power of a practice-based approach. But the book also has limits.

Aside from the obvious criticism that the NRC was responsible for enacting only a small slice of NATO–Russian diplomacy, it is surprising that Pouliot reveals very little about the daily grind at the NRC. As one critic noted,

Pouliot might . . . have devoted more attention to the specific practices of the security professionals he interviewed. His interviewees are identified in only the vaguest of terms and there is relatively little discussion either of their day to day experiences or of their precise role within the policy-making process. . . . Pouliot’s argument that international security emerges “in and through practice” would be more persuasive had he provided a detailed analysis of the precise role played by his “security professionals” within the machinery of foreign and security policy-making. It is conceivable that the way diplomatic and military officials at the coal face of international relations represent issues and frame policy options plays a vital role in shaping the parameters of high policy. To make this argument, however, requires a carefully considered analysis of the various policy-making fields under consideration. The book does not do this and the argument is less persuasive than it might have been as a result.²⁷⁴

Like Hurd, Pouliot is chiefly interested in the macrodimensions of diplomacy rather than in the microdimensions thereof, which is unfortunate, for as Neumann has shown, a lot can be gleaned about what it diplomacy is, and is not, by working from the inside out. Although Pouliot conducted several dozen interviews in capitals around the world, this is not quite the same as getting an unvarnished look at the interior of the lifeworld of those with whom he is concerned—diplomats. The point is an important one, of great methodological significance, because, if we are serious about the study of practice, we must be careful not to mistake representations of practice for the real thing. In this context, one reviewer of Pouliot’s book made the important point that the measured responses from NATO and Russian diplomats on the question of the use of force that Pouliot takes as evidence of a diplomatic rapprochement may

272. *See id.* at 107–18.

273. *Id.* at 5 (emphasis in original).

274. Peter Jackson, Book Review, 2 H-DIPLO/ISSF, no. 5, 2011 at 14, 18–19, *available at* <http://www.h-net.org/~diplo/ISSF/PDF/ISSF-Roundtable-2-5.pdf> (internal citation omitted).

not be as genuine as the latter thinks:

On one level, all of this could be interpreted as compelling evidence that the use of force has indeed disappeared from the conceptual horizons of policy elites. Yet it might also be argued that diplomats are always likely to give the kind of measured and reassuring responses that Pouliot quotes. This is the way members of the diplomatic profession are trained to express themselves (particularly to outsiders). There are good reasons for this. Recourse to the language of force necessarily limits the scope for negotiation and compromise. Introducing military considerations into discussions of political relations, moreover, tends to increase the influence of soldiers at the expense of diplomats. Stressing the potential of negotiations, conversely, protects the space for diplomatic manoeuvre. The use of measured language and an emphasis on the need for conversation is therefore a pivotal disposition in the habitus of the professional diplomat. . . . [D]iplomatic professionals tend to avoid overt references to the need for military options, not least because their influence tends to diminish dramatically once this threshold has been crossed. Some consideration of this issue might have added greater nuance to Pouliot's analysis of his interview data.²⁷⁵

A different way of putting this is to say that Pouliot might have benefitted from complementing his conventional qualitative methodology of choice—interviews—with a more unconventional one—namely participant observation. Even if done sparingly, immersion trumps standing on the outside looking in, especially if it is the daily work of diplomacy one hopes to study. With this background in mind, Neumann's genuinely ethnographic approach to studying a most salient practice of international politics, and his concerted effort to understand the many concrete (and often mundane) work activities at the heart of diplomatic work, despite shortcomings, some of which I have detailed above, has brought us considerably closer to what we can reasonably expect to achieve from making practice theory usable for the study of the international system.

B. Practices in International Law

In the study of international law, practice theory has not yet left much of a mark. Dezalay and Garth, as mentioned, have brought Bourdieu to the study of international law, but the application of the sociologist's oeuvre in their books and articles revolved more around his field theory than his writings on practice. This being so, the IL landscape is rather barren of practice-oriented analyses. It is therefore worthwhile to consider an example of leading scholarship that *has* singled out patterned activity for a practice-oriented analysis of international law. An international practice upon which I rely to exemplify the promise—and limits—of IL's turn to practice theory is that of legality, as analyzed by the legal scholar Jutta Brunnée and the political scientist Stephen Toope, whose book, *Legitimacy and Legality in International Law*, won the 2011 Certificate of Merit of the American Society of International Law “for a preeminent contribution to creative scholarship.”²⁷⁶ Next, I showcase important work on organizational

275. *Id.* at 18.

276. JUTTA BRUNNÉE & STEPHEN J. TOOPE, *LEGITIMACY AND LEGALITY IN INTERNATIONAL LAW: AN INTERACTIONAL ACCOUNT* (2010) (arguing—on the basis of a novel theoretical approach to international law that integrates insights from the legal theory of Lon Fuller and constructivist scholarship in IR—that the legitimacy of international law is a function of the international practice of

practices, as I conceive of them, coming out of IL. Among the very few scholars who have embarked on genuinely ethnographic work is Galit Sarfaty, who, in a handful of publications, notably in her book *Values in Translation: Human Rights and the Culture of the World Bank*, has unearthed, both comprehensively and in a very specific context, important insights about the everyday practice of human rights.²⁷⁷

1. The Practice of Legality

As part of the aforementioned project on international practices, Brunnée and Toope sought to come to terms with the phenomenon of legal obligation in international law, which, on their account, requires us to move beyond conventional reasoning in IL, especially in the context of global climate change with which Brunnée and Toope are particularly concerned. As they write, “[R]ather than simply treating state practice as behavioral regularities, or as the day-to-day application of a pre-existing construct called ‘law,’ we posit that a distinctive practice of legality is required for law, and legal obligation, to exist and to be sustained over time.”²⁷⁸ In order to answer the question of why states obey international law, maintain Brunnée and Toope, scholars ought to pursue a technical analysis of formal sources of international law alongside an interpretive analysis of the interactions between and among states that make, remake, or unmake international law. On their argument, “[t]he hard work of international law is never done—legal obligation must be built and continuously reinforced by communities of legal practice.”²⁷⁹

The term “communities of practice,” as we have seen, is Etienne Wenger’s. Brunnée and Toope do not spend much time operationalizing the concept for their purpose. In fact, their analysis of the international practice of legality is more conventionally constructivist in focus than practice-oriented. Drawing on the legal philosophy of Lon Fuller, notably his work on the so-called inner morality of law, they argue that governments’ sustained adherence, in their international legal dealings, to Fuller’s criteria of legality,²⁸⁰ will persuade those governments to habitually obey international law:

Fidelity is generated and, in our terminology obligation is felt, because adherence to the eight criteria of legality in the creation of norms and in their continuing application (a ‘practice of legality’) produce law that is legitimate in the eyes of the persons to whom it is addressed. Legal obligation, then, is best viewed as an internalized commitment and not as an externally imposed duty matched with a

legality).

277. GALIT A. SARFATY, *VALUES IN TRANSLATION: HUMAN RIGHTS AND THE CULTURE OF THE WORLD BANK* (2012).

278. Jutta Brunnée & Stephen J. Toope, *Interactional International Law and the Practice of Legality*, in *INTERNATIONAL PRACTICES*, *supra* note 40, at 108, 109 [hereinafter Brunnée & Toope, *Interactional International Law and the Practice of Legality*]. For a more comprehensive treatment, see BRUNNÉE & TOOPE, *supra* note 276.

279. Brunnée & Toope, *Interactional International Law and the Practice of Legality*, *supra* note 278, at 110.

280. See LON FULLER, *THE MORALITY OF LAW* 39 (1969).

sanction for non-performance.²⁸¹

The internalized commitment is created and maintained by the continued performance of shared understandings of what constitutes appropriate legal norms and institutions, internationally and otherwise.

On this foundation, Brunnée and Toope advance the interesting claim that “it is possible for communities of legal practice to emerge in the absence of strongly shared substantive values, on the basis only of a shared commitment to the enterprise of legal interaction.”²⁸² I find this theoretical argument eminently plausible, not least because I advanced a very similar claim—though without reference to practice theory—about the institutional effects of legality in a domestic context.²⁸³ This notwithstanding, I think conspicuously lacking from the analysis is an explicit engagement—both theoretical and empirical—with the concrete patterned activities that constitute the practice of legality. The authors lean too much on their “interactional law framework,” which, though innovative, leaves the reader wanting to hear more about the everyday life of legality in international law than about the broad-strokes argument that fidelity to international law is contingent on reciprocity, which, in turn, “is created and maintained collectively through continuing practice.”²⁸⁴ Put differently, the account offered by Brunnée and Toope is insufficiently specific about the mechanisms and processes of community building, that is, about what *exactly* is involved when legality is being practiced in the international system.

Therefore, inasmuch as the theoretical argument, rooted in an application of Fuller’s procedural concept of law to the international stage, is compelling, its incorporation of practice theory is less convincing. Although the empirical analysis of the global climate regime,²⁸⁵ which they undertake in both the book and the chapter at issue here, is illuminating, it is more conventionally constructivist in nature than reminiscent of a sophisticated analysis of practice. They show, though not exhaustively, that the strong procedural elements of the recurring climate-change negotiations, combined with a steady supply of law-minded government representatives, “has helped generate a sense of commitment of the participants to the climate regime and accounts at least in part for its resilience.”²⁸⁶ Although this may be so, a genuinely practice-based analysis would have pushed harder to acquaint us in substantially more detail with the everyday life of legality’s practice in Kyoto, Copenhagen, and the

281. Brunnée & Toope, *Interactional International Law and the Practice of Legality*, *supra* note 278, at 115.

282. *Id.* at 113.

283. See MEIERHENRICH, *supra* note 99 (advancing an argument about the long-run consequences of law in South Africa, according to which continuous and concurrent practices of legality by contending adversaries over a period of 350 years contributed to the emergence of law as common knowledge, thereby crucially attenuating commitment problems in the transition from apartheid to democracy).

284. Brunnée & Toope, *Interactional International Law and the Practice of Legality*, *supra* note 278, at 116.

285. See *id.* at 123.

286. *Id.* at 127.

many other sites of international bargaining. For as we have seen, practice theorists, regardless of theoretical persuasion, foreground the importance of activity, performance, and work in the creation of social phenomena. This attention to the minutiae of legality's practice in the international system is, unfortunately, missing from Brunnée and Toope's work. It could be relatively easily incorporated, however, especially if the authors embarked on observational research in the world of international environmental law. Such a turn to up-close and personal inquiry *inside* some of the domestic and international institutions that comprise the international environmental regime would enable scholars to know with more certainty how legal ideas *truly* move in the international system. It would allow for a more careful—and concrete—tracing of the mechanisms involved in the socialization of states.²⁸⁷ For as IR scholars such as Alastair Iain Johnston have pointed out, we still know very little about the microfoundations of socialization in the international system.²⁸⁸

What remains interesting about Brunnée and Toope's application, if imperfect, of practice theory to an important topic in the study of international law—legal obligation—is their contribution to our understanding of a perennially challenging construct of public international law, namely the concept of *opinio juris*, famously defined by the International Court of Justice as the “belief that [a] practice is rendered obligatory by the existence of a rule of law requiring it.”²⁸⁹ Though their method and argument can be challenged in multiple ways, what they do indeed provide is, as they put it, “a more objective, less mystical, account of how customary legal norms become binding.”²⁹⁰ By offering a constructivist—rather than rationalist—perspective on legal obligation, Brunnée and Toope give more substantive meaning to the international legal requirement of *opinio juris*. They do so by providing a theoretically plausible and empirically verifiable account of how, and why, states may feel the pull of international law qua law. By linking legal obligation to the identity of states, not just their interests, as well as to the institutions of international life, Brunnée and Toope manage to render less mysterious the concept of *opinio juris* and its operation in international law. If practice theory, even without field research, has the ability to help us illuminate the empirical (as opposed to the doctrinal) logic of one of the principal tenets of international law, it is not unreasonable to expect that a fair amount could be gained by applying insights from any of the many theories of practice also to other international legal questions of importance.

287. On the topic of socialization in international law more generally, see, most recently, RYAN GOODMAN & DEREK JINKS, *SOCIALIZING STATES: PROMOTING HUMAN RIGHTS THROUGH INTERNATIONAL LAW* (2013), which turns their previous published articles on the topic into an integrated and updated “theory of influence.”

288. See Alastair Iain Johnston, *Treating International Institutions as Social Environments*, 45 INT'L STUD. Q. 487, 488 (2001).

289. North Sea Continental Shelf (Ger. v. Den., Ger. v. Neth.), 1969 I.C.J. 3, ¶ 77 (Feb. 20).

290. Brunnée & Toope, *Interactional International Law and the Practice of Legality*, *supra* note 278, at 121.

2. The Practice of Human Rights

As already mentioned, Sarfaty has made a valuable contribution to understanding the practical dimensions of international law by way of her in-depth treatment of one important collective actor in this realm—the World Bank. Relevant to IL scholarship on international law, the international financial institution in Washington, D.C. proves an ideal setting in which to explore what I have elsewhere called the logic of legal contention. Sarfaty initially demonstrates that, and why, human rights are of marginal significance in the daily work of the World Bank. That finding, however, at the aggregate level at least, is neither surprising nor new. Far more important than is Sarfaty's account of the various mechanisms and processes by which human rights have been marginalized at the World Bank, and the temporal dimension of what Sarfaty says amounts to a cultural logic of marginalization. As she puts it,

I demonstrate that human rights has been a taboo topic within parts of the institution, but the type and extent of the taboo has changed over time and in different contexts. Moreover, when the concept of human rights has been incorporated into Bank discourses and practices, it has often been in a partial or inconsistent manner.²⁹¹

Studying shifting patterns of marginalization and changes in type and extent is not easy. It is a sensitive, time-consuming, and methodologically challenging proposition for any researcher. A practice-based approach is well-suited to the task because it foregrounds the importance of interpreting work activity, of doing. Though she does not ground herself theoretically or methodologically in any theory of practice, Sarfaty comes close to embodying the approach in her work on the World Bank.

Intrigued by the question of why the World Bank, despite the increased salience of human-rights concerns on the part of other international organizations involved in poverty reduction and fostering development—from the United Nations Development Programme to the United Nations Children's Fund—has not adopted a deliberate and integrated human-rights strategy, Sarfaty began to look for answers in IL scholarship. To her chagrin, “[t]his literature primarily focuses on legal arguments for binding the Bank and its member countries to international human rights obligations. It does not investigate the internal workings of the bureaucracy so as to understand why the Bank has yet to adopt and internalize human rights norms.”²⁹² Sarfaty's dissatisfaction with IL scholarship mirrors my own: The conventional and widespread disregard in the discipline for studying the microfoundations of IL developments has had the unfortunate effect of rendering international legal scholarship unable to address—theoretically, methodologically, and empirically—the question that Sarfaty posed: Why is the World Bank not serious about human rights?

291. Galit A. Sarfaty, *Measuring Justice: Internal Conflict over the World Bank's Empirical Approach to Human Rights*, in *MIRRORS OF JUSTICE: LAW AND POWER IN THE POST-COLD WAR ERA* 132 (Kamari Maxine Clarke & Mark Goodale eds., 2010).

292. Galit A. Sarfaty, *Why Culture Matters in International Institutions: The Marginality of Human Rights at the World Bank*, 103 *AM. J. INT'L L.* 647, 649 (2009).

Although it is not inaccurate to suggest that “the” World Bank is not serious about human rights, this statement conceals more than it reveals. For Sarfaty’s research makes plain that a number of committed World Bank employees have been pushing the human-rights agenda inside the organization for almost two decades, ever since James Wolfensohn became president of the Bank in 1995, and with particular vigor from 2002 onward, following the creation of an organization-wide task force on human rights. However, without going into much detail, these high-level initiatives achieved little. Human rights are hardly less marginal now than before Wolfensohn’s tenure. Conventional IL scholarship is unable to explain this rather unexpected outcome. After all, as we have seen, other international organizations appear to have embraced, even internalized, legal human-rights norms and institutions. If we believe Sarfaty, the only way to understand the “marginality,” as she terms it, of human rights at the World Bank is to stop treating the Washington-based bureaucracy as if it were a unitary actor. Similarly to the proposals I have articulated in this article, Sarfaty believes in the importance of opening the “black box” of international organizations, be they international financial institutions or international criminal courts and tribunals:

I have found that the ways norms become adopted and ultimately internalized in an institution largely depend on their fit with the organizational culture. When a new norm is introduced, employees from different professional groups within the Bank often have distinct interpretive frames that they use to define the norm, analyze its relevance to the Bank’s mission, and apply it in practice. Proponents of a norm must take internal conflict over competing frames into account when trying to persuade staff members to accept it. They must also consider the operational procedures, incentive system, and management structure of the organization when determining the most effective strategy of implementation. Thus, to bring about internalization, actors must adapt norms to local meanings and existing cultural values and practices—that is, they must “vernacularize” norms.²⁹³

Sarfaty knows all of this because practice theorists, especially those who have been studying organizational dynamics, have been saying as much for years. But then again Sarfaty also knows her way around the World Bank because of her ethnographic immersion there. In addition to knowing things about bureaucracy in general, she saw fit to learn something about bureaucracy in particular, and to do so concretely, as a participant observer. It is this experience, the partaking in the everyday life of the World Bank, that has sensitized her to the peculiar logic of contentious politics surrounding the persistent nonadoption of human-rights norms over the course of two decades. Absent this, she would neither have been privy to, nor recognized the causal significance of, the “battles between Bank lawyers and economists over defining human rights norms.”²⁹⁴ For it turns out that, more than anything, it was “a clash of expertise,” coupled with irreconcilable ways of seeing the world, that caused—and allowed—economists to outmaneuver the comparatively small number of lawyers intent on reconfiguring World Bank strategy. As

293. *Id.* at 649.

294. *Id.* at 650.

Sarfaty writes, “The dominant subculture within the organization consists of economists because their expertise is considered the most valuable to the Bank’s core work of promoting poverty reduction and economic growth.”²⁹⁵ Economists, in other words, were victorious when it came to marginalizing human rights at the World Bank because the organizational culture of the international financial institution considers arguments from international law to be alien to the practice of international development as understood at the World Bank. Lawyers, one might say, have been treated as “the other” at the World Bank.

Needless to say, the story that Sarfaty tells is more nuanced and worth reading in full. More relevant for the purpose of this article than her substantive findings, however, is her participation in, and close reading of, all kinds of daily goings-on inside the World Bank bureaucracy. It is worth including verbatim her summary of the methodological approach that she took in researching the social meanings of human rights at the World Bank not only because her approach is broadly in line with my guidelines for studying the practice of international law, which I elaborate in part VI, but also because the description she offers might aid future researchers in deciding whether or not deeply interpretive field research on the practice of international law is feasible for them—whether financially, intellectually, or in terms of the substantial time commitment that is required. Here, then, is Sarfaty with details about her ethnographic study of the World Bank:

As part of the research for my doctoral dissertation in anthropology, I worked and conducted fieldwork at the Bank’s headquarters in Washington, D.C., for approximately two years over a period of four years, from 2002 to 2006. During the summers of 2002 and 2004, I served as a consultant and intern in the Legal Department and the Social Development and Environment Departments of the Latin America and Caribbean Region. My two summers as an intern afforded me the trust to gain access for a full year of fieldwork, from September 2005 until July 2006. . . . My methods included interviews with more than seventy staff members (from project manager to a former president), executive directors, U.S. Treasury officials, and NGO representatives; participation at Bank training sessions and seminars; and analyses of Bank projects and documents. . . . Conducting ethnographic research on the Bank enabled me to uncover the formal and informal norms and the decision-making processes within the institution that shape state behavior. I examined the institution from both the top down and the bottom up, focusing not only on its leadership and administrative structure, but also on the tasks and incentives of the staff. I analyzed the informal practices and unspoken assumptions held by employees that may be misinterpreted by or hidden from external observers, as well as the employees themselves. The application of these techniques reveals the competing subcultures and other internal contestations that may impede norm internalization.²⁹⁶

The duration of Sarfaty’s ethnographic immersion at the World Bank was in keeping with professional anthropological standards. From the vantage point of IL and IR, where ethnographic research is the exception, her time spent working alongside the World Bank’s economists and lawyers looks even more impressive. However, given the dearth of analytical—rather than merely

295. *Id.* at 673.

296. *Id.* at 652.

descriptive—accounts of international legal settings, *any* carefully planned immersion will likely contribute to our knowledge about how international law works in practice. Not every excursion into the field to make sense of the everyday life of international law need necessarily last years, as Sarfaty's did. Much can be gleaned, especially by an experienced field researcher, from considerably shorter stints inside the many bureaucracies attending, in whole or in part, to questions of international law. The only thing that could have improved Sarfaty's otherwise flawless research design is a theoretical engagement not only with the sizable literature on socialization, which she touches upon in passing, but with one or more of the many theories of practice that can be made usable for the study of international law, at the World Bank and elsewhere.

So much for the practice of human rights as an *organizational* practice. Of course, the practice of human rights can also be fruitfully studied as an *international* practice, by which I mean a practice that is not primarily enacted inside one bureaucratic entity, but rather on the stage of the international system as a whole, with a multitude of international agents playing a role—from individuals to NGOs to states to international organizations. The sociologist Fuyuki Kurasawa, for example, recently relied on insights from practice theory to understand the “social labor” involved in the making of five transnational forms of advocacy in pursuit of human rights—namely, bearing witness, forgiveness, foresight, aid, and solidarity.²⁹⁷ On Kurasawa's argument, these five international practices are jointly constitutive of what he calls the work of global justice, by which he means the entire universe of struggles on behalf of progressive goals, from the campaign to end of poverty to the fight against impunity. Global justice is theorized as a “constellation of practices,” held together by social glue made from intersubjectivity, publicity, and transnationalism.²⁹⁸ Kurasawa's analytical goal is to specify the everyday “work” that the task of “realizing utopia,” to borrow a phrase from the late Antonio Cassese, requires.²⁹⁹ Kurasawa asks readers to appreciate the limits of purely formalist understandings of human rights—which dominate the field of IL—and to embrace in their stead

a substantive conception of human rights, whereby the latter function as more than ontological attributes which we enjoy as members of humankind or entitlements that are legislated on our behalf by states or international organizations; they are, just as significantly, capacities that groups and persons produce, activate and must exercise by pursuing ethico-political labour.³⁰⁰

The work of global justice, finds Kurasawa, is “perpetually difficult, even

297. FUYUKI KURASAWA, *THE WORK OF GLOBAL JUSTICE: HUMAN RIGHTS AS PRACTICES* 16–17 (2007).

298. *Id.* at 18.

299. See generally *REALIZING UTOPIA: THE FUTURE OF INTERNATIONAL LAW* (Antonio Cassese ed., 2012).

300. KURASAWA, *supra* note 297, at 14.

flawed and aporetic.”³⁰¹ Because most human-rights practitioners would readily agree, what does practice theory have to offer that we do not already know?

A practice-based analysis of human rights, properly understood, has the advantage of transcending mere description. Rather than elevating anecdote to the level of fact, locally situated analyses of human-rights work, when grounded in eye-level research, make visible previously unknown connections as well as pathways of both power and pathology. This is possible because modes of practice are “the lynchpins of the work of global justice, the points of contact, transmission and mutual influence between national and global institutions (transnational corporations, states, international organizations, etc.), at one level, and civil society struggles (protests, public claims and campaigns, demands for prosecution, etc.), at the other.”³⁰² Although Kurosawa’s scholarship is undergirded, rather problematically from an analytical perspective, with a normative belief in the desirability of all work on behalf of global justice, he does succeed in looking at human rights not in the abstract but in everyday life.³⁰³

This brief review of a number of representative, if eclectic, contributions to the existing literature on practices in IR and IL was designed to convey three things: (1) practice-oriented scholarship on developments in the international system is gradually growing, (2) the exploration of all kinds of topics of international significance can potentially benefit from practice-based reasoning, and (3) several research designs in IR and IL claiming to be practice-based are less theoretically sophisticated, methodologically rigorous, and empirically grounded than one would expect based on the intellectual foundations on which they were erected.

VI

METHODOLOGICAL GUIDELINES FOR THE STUDY OF PRACTICES IN INTERNATIONAL LAW

Having explored in some depth the theory and history of practices, I am now in a position to draw on this intellectual tradition to develop guidelines for the relational study of international law. By making insights about the logic of practices usable for the study of international criminal law in particular, I hope to provide an impetus for more *rigorously descriptive* work in international law, by which I mean theoretically driven interpretive work that is firmly grounded in really existing locations of international law.³⁰⁴ To the extent that I have

301. *Id.* at 15.

302. *Id.* at 197.

303. As evidence of Kurosawa’s normative belief, and thus of his potentially diminished capacity for analytical judgment, consider this statement, one of many in defense of his particular brand of cosmopolitanism: “[T]he performance of modes of practice of global justice would help to foster an alternative world order based on principles of participatory democracy and oversight, as well as a major North–South and domestic redistribution of symbolic and material resources.” *Id.* at 198.

304. On the question of “locations” in field research, see ANTHROPOLOGICAL LOCATIONS: BOUNDARIES AND GROUNDS OF A FIELD SCIENCE (Akhil Gupta & James Ferguson eds., 1997)

emphasized in this article the importance of detecting the social meaning(s) of international law, mine is ultimately an argument for integrating aspects of rationalism *and* doctrinalism *and* interpretivism in the study of international legal phenomena. It goes without saying that many agents acting on the world of international law will on many occasions make decisions in response to a calculation of means and ends. It is also fairly obvious, at least to anyone who knows the practice of international law from the inside, that the norms and values undergirding international legal doctrine constitute behavior. Yet only by closely observing goings-on in really existing locations of international law do we stand to gain a “subjectivist” sense of the nature and salience of the law-crafts, what I have begun to theorize in this article as the practice of international law. On my argument, the reality of international law is *not* represented, at least not fully, by the macroprocesses of international legal transactions (as in the doctrine of “state practice”). Nor is it fully captured by instrumentalist accounts of microprocesses. Rather, the ontological essence of international law reveals itself only if, and when, we integrate knowledge about *both* the representational *and* nonrepresentational aspects of this vexing of international phenomena. For as I have argued elsewhere, international law, like international politics, is what actors make of it.³⁰⁵

Accordingly, in this part of the article I am concerned with the future of practice-based research on international law. I make a particular case for the interpretive study of practices in international law. Needless to say, the interpretive pursuit thereof is but *one* of several ways to advance the study of practices in international law. As Stern reminds us, “Taking practices as a point of departure does not require a commitment to any particular method, or any specific destination.”³⁰⁶ I single out interpretive methodology because it is so rarely adopted in the study of international law yet uniquely suited to help researchers meet the two minimum requirements of all practice-oriented work discussed above: a commitment to holism about meaning *and* the willingness to pay close attention to particular practices and the specific contexts in which they are performed. The methodology is particularly helpful for the study of the ICC and comparable international organizations.

My discussion revolves around concrete strategies of inquiry that promise to improve the identification, investigation, and interpretation of practices. Before I turn to my methodological prescriptions, it is useful to briefly differentiate the logic of practices from the two other major logics of social action, namely the

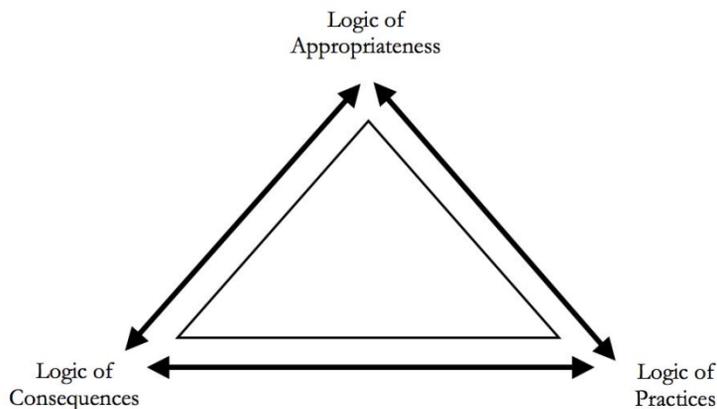
(proposing “a reformulation of the anthropological fieldwork tradition that would decenter and defetishize the concept of ‘the field,’ while developing methodological and epistemological strategies that foreground questions of location, intervention, and the construction of situated knowledges”).

305. Jens Meierhenrich, *International Law Is What States Make of It*, Paper Presented at the Annual Meeting of the International Studies Association (April 3, 2013) (on file with author); *see also* Jens Meierhenrich, *Explaining and Understanding Compliance with International Law*, in *THE OXFORD HANDBOOK OF INTERNATIONAL LEGAL THEORY* (Anne Orford & Florian Hoffmann eds., forthcoming 2014).

306. Stern, *supra* note 34, at 186.

so-called logic of consequences and what is known as the logic of appropriateness. Figure 1 offers a depiction of these logics, which, per the visual rendering, should be thought of in real life as interdependent, though usually are not. Any serious student of the social sciences will be intimately familiar with the latter two perspectives on why agents, individual or collective, choose to act on the world. First explicitly theorized in 1989 by James March and Johan Olsen, the logic of consequences, on the one hand, and the logic of appropriateness, on the other, draw attention to two rival accounts of the determinants of choices about action.³⁰⁷ Arguments from the logic of consequences, regardless of the substantive question or topic at hand, posit that agents opt to behave in a particular way in response to the expected consequences of their actions, which they calculate prior to taking action. On this logic, social behavior is driven, first and foremost, by considerations about means and ends. Rationality and interests are taken to be central motivating factors. Arguments from the logic of appropriateness, by contrast, hold that agents act in response to very different stimuli. The stimuli are often expressed in terms of the social force of obligation. On this second logic, social behavior is driven, first and foremost, by considerations about norms and values. Emotion and identity are thought to be the principal motivating factors. In IR and IL scholarship, arguments from the logic of consequences are widespread in rationalist explanations of international phenomena. Arguments from the logic of appropriateness are commonplace in constructivist scholarship.

Figure 1: The Logics of Social Action



As I have explained throughout this article, the logic of practices, regardless of its specific theoretical articulation, departs radically and fundamentally from

307. See JAMES G. MARCH & JOHAN P. OLSEN, *REDISCOVERING INSTITUTIONS: THE ORGANIZATIONAL BASIS OF POLITICS* (1989). For an application to the international system, see James G. March & Johan P. Olsen, *The Institutional Dynamics of International Political Orders*, 52 *INT'L ORG.* 943 (1998).

both of the aforementioned logics of social action.

The logic of practice jettisons the idea that agents take decisions, or can be treated ‘as if’ they take decisions, in such a reflexive, logical, and analytical way. . . . This practice-based logic of action is offered to compliment, rather than to replace, existing theories, which hold that agents engage in conscious deliberation about consequences and/or obligations.³⁰⁸

Given this significance of practice theory—as a unique methodology that seeks to come to terms with an increasingly popular way of seeing the world—the interpretive turn that I am hoping to help advance with this article is opportune for the study of international law. Whereas the logic of expected consequences leads us to derive actions from preferences and the logic of appropriateness leads us to derive actions from identities, the logic of practices—although analytically mindful of the roles of *both* rationality and emotion—tells us to start our account of actions with *actions*, the assumption being that the unselfconscious doings of specific individuals in “particular circumstances” (Aristotle’s concept) are not always reducible to either preferences or identities and may even be ontologically prior to both.³⁰⁹

I should note, in an aside, that Pouliot, like many other IR theorists drawing on Thomas Risse’s argument to this effect,³¹⁰ includes the logic of communicative action as a fourth logic of social action.³¹¹ I depart from this depiction, sticking with a tripartite distinction. I propose that communicative action, depending on its empirical manifestation, usually combines elements from each of the three logics of social action. I would make a similar claim for the “logic of habit” that Ted Hopf endeavored to distinguish from the logic of practices.³¹² Inasmuch as I find important and convincing Hopf’s conceptual distinction between habits and practices, I am not persuaded that the two forms of behavior represent two fundamentally different logics of social action. It seems to me that *both* are part and parcel of an understanding of social action rooted in the “automatic system” of the brain, that is, in the unreflective nether regions of being.³¹³ Or, as Bourdieu put it, individuals who embody practices do so “without entering consciousness except in an intermittent and partial way.”³¹⁴ If we accept this to be so, it does *not* make sense to conceive of habits and practices as contending logics of social action but rather as two sides of the same behavioral coin—namely as more (in the case of practices) or less (in the case of habits) agentic forms of nonreflective participation in social life,

308. David Jason Karp, *The Location of International Practices: What Is Human Rights Practice?*, 39 REV. INT’L STUD. 969, 974 (2013).

309. ARISTOTLE, *supra* note 122, at l. 1141b.

310. See generally Thomas Risse, “Let’s Argue!”: *Communicative Action in World Politics*, 54 INT’L ORG. 1 (2000).

311. Pouliot, *The Logic of Practicality*, *supra* note 22, at 276.

312. Ted Hopf, *The Logic of Habit in International Relations*, 16 EUR. J. INT’L REL. 539, 541 (2010).

313. The formulation of the “automatic system” of the brain is Hopf’s, the antonym in his account of the “reflective system” of the brain, which, he contends, governs social action motivated by the logics of consequences, appropriateness, and practice. See *id.* at 541.

314. BOURDIEU, THE LOGIC OF PRACTICE, *supra* note 62, at 269–70.

whether local, national, or international in character. Be that as it may, how should students of international law study practices if they feel so inclined?

Taking a leaf from Flyvbjerg who, over a decade ago, devoted his career to “making social science matter,” as he put it,³¹⁵ I advance five concrete guidelines for studying practices in international law in a theoretically meaningful way. I propose that any practice-oriented researcher with serious empirical ambitions ought to (1) overcome distance, (2) locate reality, (3) identify activity, (4) reveal meaning, and (5) investigate context.

A. Overcome Distance

This first methodological guideline, as straightforward as it is, is perhaps the hardest to follow. Any scholar of international law who is seriously interested in understanding how international law works in practice (as opposed to merely in theory) ought to leave his or her office once in a while and take a look—up, close, and personally—at what goes on in the many different international courts, government ministries, organizations, law firms, and other settings in which scores of individuals participate on a daily basis in, among other things, the making, breaking, and honoring of international law. All kinds of immersion scenarios are conceivable, from extended internships, to clerkships, to sabbaticals. Oftentimes what we find at the microlevel in such settings may accord in broad outline with what we or others have theorized at the macrolevel. At other times, however—and this is certainly true of what my research over the last few years on the ICC has shown—the existing literature on international law has but a partial, incomplete, and even distorted sense of the everyday life of international law. Even where this is not the case, a focus on the micropolitics of international law will, at a minimum, generate more fine-grained empirical observations than can be collected from hundreds or thousands of miles away or by way of what, not infrequently, are crude quantitative indicators.³¹⁶

What is more, by overcoming the distance, both literally and figuratively, between ourselves and the sites of international law that we study, the potential for more sophisticated (in terms of rendering more complexity visible rather than less) scholarship increases. The academic analyses that result may be considerably messier and less parsimonious than some social scientists desire, but it stands to reason that scholarship founded on, or at least informed by, a genuine immersion in the world of international law, and a self-conscious engagement with its practitioners, has the potential of making the study of international law matter more than it otherwise would. By bringing everyday

315. See FLYVBERG, *supra* note 126, at 129–40 (crafting “*Methodological Guidelines for a Reformed Social Science*”).

316. For pioneering work on the limitations of measurement in the study of international legal phenomena, with particular reference to the practical implications of data-driven governance, see GOVERNANCE BY INDICATORS: GLOBAL POWER THROUGH CLASSIFICATION AND RANKINGS (Kevin Davis, Angelina Fisher, Benedict Kingsbury & Sally Engle Merry eds., 2012).

agents of international law, and their lifeworlds, concretely into view, the interpretive study of international legal practices opens up a black box that scholars have peered into far too infrequently. Indeed, the reduction of distance, my first methodological guideline, is likely a sine qua non of any sustainable bridge-building between the “law-crafts” and those who study them from inside their university offices, whether they are IL or IR scholars or in another discipline entirely.³¹⁷

B. Locate Reality

Overcoming distance alone, however, is not enough in the study of practices in international law. Mere participant observation, without analytical training and ingenuity or a carefully rendered research design, will not result in advanced scholarship on international law. It is important to know where to look. For practices, as Nicolini writes, “cannot be understood without reference to a specific place, time, and concrete historical context.”³¹⁸ In short, it is important to locate the reality of international law. This slightly vague formulation is meant to highlight the importance of carefully reflecting on site selection, that is, choosing the research setting most likely to be analytically useful for an extended immersion in the name of interpretive research on a given research question pertaining to international law. Although the operation of international law can be closely observed in hundreds of settings, not all locations are equally valuable from an analytical standpoint. This being so, sound interpretive research on practices in international law requires a lot of preparatory work. Because ethnographic research is time and resource intensive, it demands a solid understanding, prior to the beginning of principal field research, of where an extended immersion promises to generate the highest observational payoffs. This requires a good preliminary sense of where the international legal action is, or where the reality to be understood can be observed most fully.

A practice-oriented approach will often benefit from decentering. A decentered perspective to the study of international law can either involve the selection of an analytically interesting and unusual site or the application of an unusual theoretical approach to a prominent site. Either way, the chosen site must also be capable of producing a sufficient number of observable—and relevant—processes related to the substantive question about international legal practices that is at stake in the research design. Not every closely observed study of international law’s practice will be automatically worthwhile. It will be compelling *only* to the extent that it is revealing of new or unexpected insights about the international legal order. It is for this reason that any practice-oriented researcher of international law should come with a preliminary sense

317. In recent years anthropologists have begun to discover the study of international law. Unfortunately, and surprisingly, most of the existing anthropological literature is insufficiently empirical, by which I mean founded on participant observation.

318. NICOLINI, *supra* note 43, at 214.

of where the reality of international law can best be studied in her area of specialization. This in turn demands a fairly sophisticated grasp of operational knowledge so as to avoid spending time and effort immersed in an analytically—because practically—marginal research site. Usually, the kind of operational wherewithal that I am speaking of is impossible to acquire from secondary scholarship on international law, the majority of which does not, as mentioned, concern itself with the kinds of textured analyses on which empirically driven and theoretically grounded practice accounts of international legal processes can thrive.

C. Identify Activity

In addition to locating reality, the study of practices in international law requires a researcher to single out analytically significant work activity. In this pursuit it is essential to appreciate that practices

are not objects, they are not in the heads of people, and they are not stored in routines or programmes. Practices only exist to the extent that they are enacted and re-enacted. Focusing on practices is thus taking the social and material doing (of something: doing is never objectless) as the main focus of the inquiry.³¹⁹

It follows that the identification of activity for the purpose of observation and interpretation is an integral methodological task for the study of practices in international law. Generally speaking, the ensembles of patterned activities that constitute practices can come in very different shapes and sizes, which is what makes the interpretive task of identification so important. “These activities may be intentional or unintentional, interpersonally cooperative or antagonistic, but they are inherently multifaceted, woven of cognitive, emotional, semiotic, appreciative, normative, and material components, which carry different valences in different contexts.”³²⁰

I use the term “activity” in order to draw attention to the ontological relationship between actions and practices which different theories render very differently. Rationalist theories, as Schatzki reminds us, “accord priority to action, tying the identity of particular actions to properties of the individuals who perform them (e.g., goals, intentions, and other mental states), and treat practices as contingent agglomerations of already constituted actions.”³²¹ Practice theories, by contrast, treat practices as ontologically prior to actions: “Whereas on practice accounts the actions that comprise a practice are governed essentially by something in common, those comprising social phenomena on individualist analyses are governed by the conjunction of the relevant, only circumstantially identical or interwoven properties of individuals.”³²² The challenge for the field researcher (as well as for practice-

319. *Id.* at 219–21.

320. Charles Camic, Neil Gross & Michèle Lamont, *Introduction: The Study of Social Knowledge Making*, in *SOCIAL KNOWLEDGE IN THE MAKING* 1, 7 (Charles Camic et al. eds., 2011).

321. Schatzki, *Practices and Actions*, *supra* note 215, at 286.

322. *Id.*

oriented scholars not inclined to undertake primary research), then, is not only to identify legally relevant activities but also to figure out whether they are merely actions or whether they combine to form something more socially meaningful.

In making this determination, all practice theorists give pride of place to bodily comportment. *Homo practicus* is understood as both a carrier *and* performer of practices. When looking for activity worthy of interpretation, a great deal of attention must therefore be placed on the skills involved in a practice. “From a practice perspective, knowledge is conceived largely as a form of mastery that is expressed in the capacity to carry out a social and material activity.”³²³ For example, in the case of international adjudication, a practice that can be easily disaggregated in terms of its performative logic is that of representing international law in the courtroom. But performances are also at work at a less obvious level; they attach to all kinds of practices. As Nicolini notes,

All practice theories... leave space for initiative, creativity, and individual performance. These are in fact necessary, as performing a practice always requires adapting to new circumstances so that practising is neither mindless repetition nor complete invention. Yet individual performances take place and are intelligible only as part of an ongoing practice.³²⁴

The upshot of this discussion is that researchers, when looking to make visible practices of international law, should think of activity in a nonconventional way. Describing ad nauseam international legal activity will not suffice. This is *not* what the application of practice theory to international law demands. Nicolini puts it aptly:

The mere ‘a-theoretical’ cataloguing of what practitioners do may be an exciting endeavour for academics who are unfamiliar with the specific occupation, but it sheds little light on the meaning of the work that goes into it, what makes it possible, why it is the way it is, and how it contributes to, or interferes with, the production of organizational life. In other words, listing and enumerating practices by taking them at face-value constitutes a weak approach to practice. Such a descriptive and a-theoretical way of addressing practice, which builds on the misleading assumption that practice is self-explanatory, is scarcely capable of providing [any analytically useful insights]. It is also likely to be conducive to a form of social science that is scarcely relevant, as once the excitement and surprise of learning about an exotic occupation wears out, we are left with a ‘so what’ question, as are the practitioners.³²⁵

In other words, when identifying activities, researchers would be well-advised to adopt a self-consciously analytical stance. As one theorist writes,

It is always necessary to ask what disposes people to enact the practices they do, how and when they do; and their aims, their lived experience and their inherited knowledge will surely figure amongst the factors of interest here. But it is not just a matter of asking what contingencies incline people to enact, or not to enact, practices, as if they exist like tools in a toolbox and it is merely a matter of explaining when and why one or another is picked out. The relationship of practices and people is far more

323. NICOLINI, *supra* note 43, at 5.

324. *Id.* at 4–5.

325. *Id.* at 13.

intimate and profound than this.³²⁶

This brings us to the methodological imperative to reveal meaning in the study of practices.

D. Reveal Meaning

The “study of work as it happens”—Barbara Czarniawska’s evocative label for practice theory—revolves centrally around a search for social meanings.³²⁷ As one scholar writes, “the identity of a practice depends not only on what people do, but also on the significance of those actions.”³²⁸ The search for significance—or meaning—in international law and elsewhere requires a great deal of attunedness to the variety of backgrounds and goings-on that one encounters in a given research setting, and an ability to notice the little things within it (to the extent that they are relevant for making sense of the practice under investigation). This methodological advice runs counter to positivist approaches to international law where parsimony, not texture, is valued above all else. And yet I agree with Nicolini who believes that “good social science makes the world more complex, not simpler. Thicker, not thinner, descriptions are the aim of good social science. And so it should be in the attempt to understand practices.”³²⁹ Drawing on the philosopher of science Isabelle Stengers, Nicolini further claims that “Good science, no matter from which discipline, enriches the ingredients that make up the multi-faceted universe in which we live and makes us more articulate and capable of perceiving differences (and thus meaning).”³³⁰

But what, exactly, do I mean by “meaning”? By saying that practices are inherently meaningful, practice theorists express that the patterned activity comprising practices stands in relation to both subjective beliefs and cultural assumptions about the nature of social life. The idea, coming out of the philosophical tradition of naturalism, is that social behavior is not linear, but constantly constructed and reconstructed by individuals in response to the interpretations of the situations in which they find themselves. To the extent that we believe this to be the case—and that we are skeptical of the alternative view that the world is wholly explicable in objective terms alone—it is incumbent on us to figure out exactly what it is that moves particular individuals in international legal settings to act, knowingly or otherwise, in the diverse manners that they do, and why they consider their behavior(s) appropriate in terms of their subjective beliefs and cultural assumptions. As the philosopher Georg Henrik von Wright observed more than three decades ago,

326. Barnes, *supra* note 110, at 22.

327. NICOLINI, *supra* note 43, at 218; *see generally* BARBARA CZARNIAWSKA, *NARRATING THE ORGANIZATION: DRAMAS OF INSTITUTIONAL IDENTITY* (1997) (arguing that literary devices can help to reveal deeper organizational realities).

328. Stern, *supra* note 34, at 186.

329. NICOLINI, *supra* note 43, at 215.

330. *Id.* at 216.

“The social scientist must understand the ‘meaning’ of the behavioral data which he registers in order to turn them into social facts. He achieves this understanding by describing (interpreting) the data in terms of the concepts and rules which determine the ‘social reality’ of the agents whom he studies.”³³¹ Most crucially, insisted von Wright,

The description, and explanation, of social behavior must employ the same conceptual framework as the social agents themselves. For this reason the social scientist cannot remain an outsider in relation to his object of study in the same sense in which a natural scientist can. This is the core conceptual truth, one could say, in the psychologist’s doctrine of “empathy.” Empathetic understanding is not a “feeling”; it is an ability to participate in a “form of life.”³³²

It was precisely *this* ability that Max Weber, at the turn of the twentieth century, famously associated with the methodological technique of *Verstehen*, or interpretive understanding.³³³

In our own time, the legal scholar Lawrence Lessig, better known for his writings on technology, delivered a spirited argument in favor of taking meaning more seriously in legal research.³³⁴ The following, historical illustration formed part of his argument. Though unrelated to international law, it is worth repeating verbatim because it nicely illustrates the analytical merit of ideographic reasoning relative to nomothetic reasoning:

In 1856, Preston Brooks caned Charles Sumner on the floor of the U.S. Senate. [A rationalist explanation] might speak of the costs this caning created. There is a fairly solid anti-battering norm in most civilized societies. Sumner suffered the costs of being battered; Brooks suffered the costs of being a batterer. [A rationalist explanation] might calibrate the harm to Sumner according to the harm that any victim of a mugging might suffer.

But the costs of this action—raising a cane and battering another with it—have only a slight relation to the costs of a mugging. What was significant in the caning was not the deviation from a norm against battering. Its significance was its meaning. Caning was how a master treated a slave; it expressed the presumption that the social status of the victim was below the social status of the attacker. Caning expressed something by the very choice of weapons used, in the same way that a challenge to a duel would have. A challenge to duel would have meant that the challenger considered the challenged either his equal or his superior. The challenge to duel would have expressed this respect. Depending upon the balance of the social context, it is plausible that the victim of a caning is worse off than the wounded victim of a duel: the victim of a duel suffers only the risk of corporal injury, whereas the victim of a caning suffers certain social injury as well. [A purely rationalist explanation] misses this distinction. The price of caning is a function of the action and the contextual understandings behind it. [A rationalist explanation] focuses on the action and ignores the context. Meaning talk focuses on both. [A rationalist explanation] speaks of the price of behaviors; meaning talk speaks of prices in particular contexts. [A rationalist explanation] abstracts;

331. GEORG HENRIK VON WRIGHT, *EXPLANATION AND UNDERSTANDING* 28 (1971).

332. *Id.* at 28–29.

333. MAX WEBER, *ECONOMY AND SOCIETY: AN OUTLINE OF INTERPRETIVE SOCIOLOGY* 4–22 (Univ. of Cal. 1978) (1922). For the best discussion by far, see FRITZ RINGER, *MAX WEBER’S METHODOLOGY: THE UNIFICATION OF THE CULTURAL AND SOCIAL SCIENCES* (1997).

334. See generally Lawrence Lessig, *Social Meaning and Social Norms*, 144 U. PA. L. REV. 2181 (1996).

meaning talk makes contingent.³³⁵

This insight is hardly revolutionary; anthropologists have founded an entire discipline on its back. And yet, the number of scholars who have embarked on quests for meaning in international law remains regrettably small.³³⁶ One methodological technique of many that is available to the researcher of practices in international law seeking to reveal meaning is that of “shadowing.”³³⁷

By following practitioners, researchers can . . . attain an insider’s view of the patterns of relationship[s], the different perspectives among co-participants—who is who and who knows what—the interests at stake, and how these different perspectives, usually sustained by specific discourses, are worked together, aligned, or played against each other, so creating differential power positions in the field. By the same token, researchers can also identify who occupies the different positions made available by the activity, and appreciate the expectations and privileges that come with them.³³⁸

Needless to say, the technique of shadowing is not only suitable for the excavation of meanings but for enacting some of the other methodological guidelines as well.

E. Investigate Context

The methodological requirement of contextual research on international law is designed to home in on the centrality of the particular. For Flyvbjerg and others convinced that practice-based reasoning is the way forward for both academic *and* applied scholarship,

[w]hat has been called the “primacy of context” follows from the empirical fact that in the history of science, human action has shown itself to be irreducible to predefined elements and rules unconnected to interpretation. Therefore, it has been impossible to derive praxis from first principles and theory. Praxis has always been contingent on context-dependent judgment, on situational ethics.³³⁹

This is so, they say, because it is “the small, local context, which gives phenomena their immediate meaning.”³⁴⁰ And the search for meaning, as we have seen, is an important element in the ontology of practices in international law. At the same time, as Neumann noted, every theory of practice under the sun has been plagued by the methodological challenge “of how to establish the validity of its findings, of how to generalise.”³⁴¹

335. *Id.* at 2183.

336. For an overview of this fledgling literature, see Richard Ashby Wilson, *Tyrannosaurus Lex: The Anthropology of Human Rights and Transnational Law*, in *THE PRACTICE OF HUMAN RIGHTS: TRACKING LAW BETWEEN THE GLOBAL AND THE LOCAL* 342 (Mark Goodale & Sally Engle Merry eds., 2007).

337. BARBARA CZARNAWSKA, *SHADOWING AND OTHER TECHNIQUES FOR DOING FIELDWORK IN MODERN SOCIETIES* (2007) (discussing and illustrating an array of ethnographic techniques for studying people on the move). Other techniques can be consulted in leading anthropology textbooks, especially those dedicated specifically to ethnography. A good starting point is MARTYN HAMMERSLEY & PAUL ATKINSON, *ETHNOGRAPHY: PRINCIPLES IN PRACTICE* (3d ed. 2007).

338. NICOLINI, *supra* note 43, at 222.

339. FLYVBJERG, *supra* note 126, at 136.

340. *Id.*

341. Neumann, *Returning Practice to the Linguistic Turn*, *supra* note 198, at 633.

My requirement of contextual analysis implies a *deliberate eschewing* of generalization about the practice of international law. With this guideline, I do not mean to disparage the indispensable quest for general statements about how international law works. Nor do I believe that insights derived with the help of practice-oriented reasoning are inherently incapable of being scaled up to the level of statistical analysis, and thus to nomothetic reasoning in search of covering law-style statements about what Barbara Koremenos recently called “the continent of international law.”³⁴² My point is a different one: By sidestepping the immediate (as opposed to long-term) preoccupation with generalization, scholars of international legal practices have a chance of becoming more attuned to noticing, and to registering, what is right in front of them without feeling the need to justify that what they are doing is intellectually worthwhile in any larger scheme of things, which nowadays increasingly means saying something of supposedly universal application. To give an example, if a scholar were to study, from the vantage point of practice theory, the choices justices make in an international adjudicative setting, such as the European Court of Human Rights (ECHR), she would be best served to concentrate fully on the doings and sayings of the individuals and groups in Strasbourg who are living and breathing the life of international human-rights law than to abstract from these local lives of international law in search of more universal patterns of international adjudication. The latter quest is honorable and important and has found many adherents, especially in the last fifteen or so years. At the same time, it glosses over, by necessity, the inner workings of, in our example, the ECHR. Arguably, an in-depth and closely observed study of the everyday legal practices of even a subset of the forty-seven judges of the ECHR chambers (and their legal teams) would be no less, and possibly even more, illuminating than a coarse-grained study of international legal action that treats international courts and tribunals as virtually indistinguishable unitary actors.

Lest I be misunderstood, I am *not* advocating for a return in the study of international law to descriptive accounts without theoretical reflection. Quite the contrary. Consider, by way of analogy, the question of power and its study in the international system. “The main question,” submits Flyvbjerg, “is not only the Weberian: ‘Who governs?’ posed by Robert Dahl and most other students of power. It is also the Nietzschean question: What ‘governmental rationalities’ are at work when those who govern govern?”³⁴³ On this more complicated understanding of power, which in its contemporary variant owes to the pioneering work of Foucault, power is thought of as

a dense net of omnipresent relations and not only as localized in ‘centers’ and institutions, or as an entity one can “possess.” . . . Knowledge and power, truth and power, rationality and power are analytically inseparable from each other; power produces knowledge, and knowledge produces power. . . . The central question is how power is exercised, and not only who has power, and why they have it; the focus is on

342. Barbara Koremenos, *The Continent of International Law*, 57 J. CONFLICT RESOL. 653, 655 (2013).

343. FLYVBJERG, *supra* note 126, at 131.

process in addition to structure [and agency].³⁴⁴

Applied to the study of international law, such an analytical perspective demands nothing less than what we might call an archeology of power, by which I mean a *specific* and *comprehensive* account of all rules, norms, and processes that govern relations between and among those agents affected—as subjects, objects, or intermediaries—by the practice in the setting under investigation. Accounts can be considered specific to the extent that they avoid generalizing descriptions of power dynamics and focus on, say a particular chamber of judges during a specified and delimited period of time. Accounts will be comprehensive to the extent that they do not merely describe the visible distribution of power, but dig up the entire field of power in the context selected for analysis, thus also excavating hidden or otherwise concealed forms of domination. It is this kind of analytical commitment to the interpretive study of international law, exemplified in the context of a study of power, that my fifth methodological guideline captures and seeks to inspire.

Ultimately, to sum up this discussion of methodological guidelines, the study of practices in international law necessitates a combination of “zooming in” and “zooming out.” That is, a practice-oriented approach to the study of international law

requires first that we zoom in on the details of the accomplishment of a practice in a specific place to make sense of the local accomplishment of the practice and the other more or less distant activities. This is followed by, and alternated with, a zooming out movement through which we expand the scope of the observation following the trails of connections between practices and their products. The iterative zooming in and out stops when we can provide a convincing and defensible account of both the practice and its effects on the dynamics of organizing, showing how that which is local . . . contributes to the generation of broader effects Because the zooming in and out is achieved by switching theoretical lenses, the result is both a representation of practice and an exercise of diffraction whereby understanding is enriched through reading the results of one form of theorization through another.³⁴⁵

VII

CONCLUSION

By relating theory to the practice of international law, I have sought to make a contribution to the study of international courts and tribunals in general, and to the study of the ICC in particular. The quest is part and parcel of what Gregory Shaffer and Tom Ginsburg recently termed “the empirical turn in international legal scholarship.”³⁴⁶ Although not widely pursued in the study of international law, practice theory, in all of its guises, offers numerous analytical entry points for making sense of international legal phenomena. Indeed the sociologists Charles Samic, Neil Gross, and Michèle Lamont recently argued that practice-oriented reasoning is amenable to answering

344. *Id.* at 131–32.

345. NICOLINI, *supra* note 43, at 219.

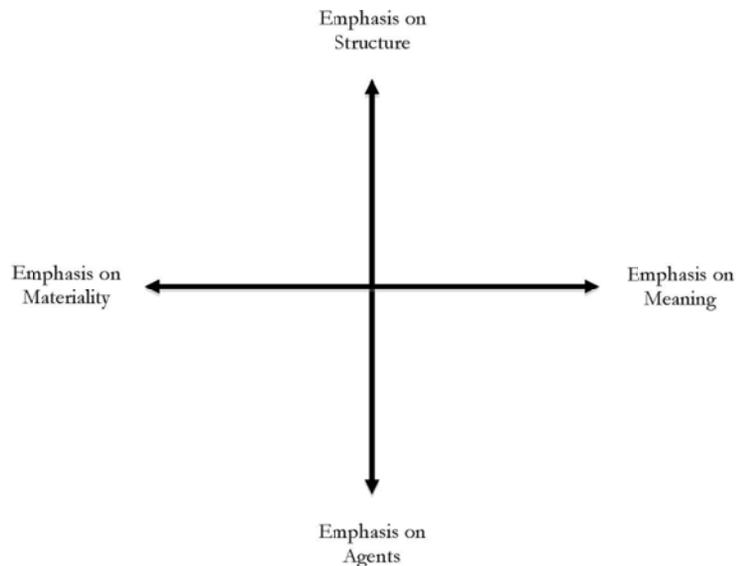
346. Gregory Shaffer & Tom Ginsburg, *The Empirical Turn in International Legal Scholarship*, 106 AM. J. INT’L L. 1, 1 (2012).

different *types* of questions about social life, thereby illustrating the approach's broad analytical utility:

[S]ubjecting practices to analysis opens up the “black box” of social life: the intricate web of situated human experience which traditional conceptions of human action, social structure, and culture all elided. For some scholars, this move is motivated by *explanatory questions*, that is, by an interest in locating within practices the underlying causal processes or mechanisms by which certain social factors translate (or fail to translate) into various downstream consequences, as well as in identifying the upstream sources of those processes. For other scholars, *interpretive questions* have primacy, and comprehending agents' practices is essential for understanding the subjective meanings that they attach to what they say and do. For still other social scientists and humanists, practices are compelling objects of investigation on more *intrinsic grounds*; by examining them, researchers can either discover otherwise-concealed social regularities or (according to an inverse rationale) deconstruct the very notion of such regularities. Either way, scholars continue, analyzing social practices reinserts human conduct into its *specific historical contexts* and preserves its multidimensionality, thus not only challenging universalizing claims about the nature of action but encouraging *critical reflexivity* about this constitutive aspect of the social world on the part of researchers studying social practices—and, by extension, on the part of agents engaging in those practices.³⁴⁷

Furthermore, the ontology of practices uniquely squares analytical emphases on agents, structure, materiality, *and* meaning in the study of international law. This relationship is illustrated in figure 2.

Figure 2: The Ontology of Practices in International Law



Source: Adapted from Adler & Pouliot, *supra* note 104, at 22.

347. Camic, Gross, & Lamont, *supra* note 320, at 8.

Although different theories of practice manage the interrelationships among these emphases differently—and thus would be located in different quadrants in figure 2—all can be made eminently usable for capturing the social lives of international law. This is so because

a practice-oriented framework can accommodate a variety of theories and paradigms in offering a large menu for choice: (1) whether to concentrate on the material or symbolic dimensions of practice, or both; (2) whether to focus on the structural or agential nature of practice, or both; (3) whether to look into the stabilizing or dynamic aspects of practice, or both; (4) whether to treat practice as *explanandum* or *explanans*, or both; (5) if *explanandum*, what other factors (whatever their ontological status) to conjure in explaining the lifecycle of practice; (6) if *explanans*, what other determinants to add on to practices themselves in explaining transformation; (7) if *explanans*, what type of interplay of practices is generating transformations; and (8) if *explanans*, what transformation the ordinary unfolding of practice produces.³⁴⁸

However, because the study of practices in international law is still a very new proposition, a great deal of translational research is required, especially because practice theorists in the humanities and social sciences have not, as we have seen, been overly keen to delve into the weeds of empirical life. As one scholar observes, “In spite of building on the shoulders of giants, practice theory is still in its infancy and whether it will ever become a powerful bandwagon is yet to be determined. Most importantly, the practice approach is still largely untested.”³⁴⁹ Among the major theorists, Bourdieu has arguably come closest to linking close observations of the everyday to theoretical reflection, and yet even his accounts have been subjected to endless criticism, notably on methodological grounds. Consequently, “the proof of the [analytical power of the] approach will be in the capacity of future texts to represent practice,” in the domain of international law and elsewhere, “in a rich and insightful way. Therefore, the way forward is, first and foremost, to develop the approach by using it.”³⁵⁰ I and the other contributors to this issue of *Law and Contemporary Problems* have sought to do just that.

Yet some scholars circumspect about the promise of practice-oriented research designs in the study of the international system have cautioned that “most of us, young and old, lack experience of the big issues of international political life.”³⁵¹ If we believe the cautioner, the IR scholar Chris Brown,

[t]his is a problem for proponents of the ‘practice turn’ as much as for those who rely on practical wisdom. Both the ‘practice turn’ and the idea of practical reason rest on notions of knowing how to go on in the world, and whether this ability is seen as resting on acquired dispositions or the ability to reason from experience, it cannot be learnt only from books.³⁵²

348. Adler & Pouliot, *supra* note 104, at 21.

349. NICOLINI, *supra* note 43, at 240.

350. *Id.*

351. Brown, *supra* note 127, at 455.

352. *Id.*

It goes without saying that book knowledge is insufficient for generating knowledge about the power of practices in the international system. Even so, I am not convinced that experience is quite as difficult to come by as Brown suggests. I propose that the supposed problem is more imagined than real. It certainly *is* a problem for those metatheoretical IL and IR scholars whose research is rooted in deskwork rather than fieldwork. It is considerably less problematic a proposition for anyone steeped in qualitative methods, from archival to observational research. In other words, the ostensible problem is methodological in nature, not epistemological. This being so, it can be addressed, if not entirely solved, with recourse to the methodology of the social sciences, especially the increasingly sophisticated literature on small-n research.³⁵³

Put differently, practices can be *made* known. Scores of textbooks in anthropology have addressed the perennial challenge of “access.”³⁵⁴ It also bears emphasizing that many a setting outside of the field of IR is considerably more challenging—not to mention dangerous—than working for extended periods of time alongside diplomats and otherwise distinguished professionals in the world of international law. This is not to say that Brown does not have a point. He is correct to argue that access to “high level” practices is usually prohibitive. However, an abundance of practical knowledge is located well below the higher echelons of international politics. The same applies to the world of international law. In fact, often much more useful knowledge is to be collected where power does not formally reside, or at least not in its most concentrated form.

As a matter of fact, the imagined problem only becomes real if the disciplines and subfields directed toward the study of international law—chiefly IL and IR—are content with the very limited methodological training they provide and the disregard for rigorous and in-depth field research they generally espouse. It is unheard of in other disciplines (for example, anthropology) and subfields (for example, comparative politics) to throw up one’s hands simply because access to potential evidence is difficult. Anthropologists do not shy away from difficult settings and often devote years to immersing themselves in previously alien or otherwise unfamiliar research sites. In anthropology, at least in its cultural variant, immersion continues to be a *sine qua non* of doctoral training. Historians dig deep into archives, almost always acquiring over the course of several years language and other skills necessary for deciphering human artifacts that they did not theretofore possess. It stands to reason that IL and IR scholars—and anyone else interested in “reading” international law in this sense—can be taught to do the same.

353. See, e.g., JOHN GERRING, *CASE STUDY RESEARCH: PRINCIPLES AND PRACTICES* (2006).

354. See, e.g., *GAINING ACCESS: A PRACTICAL AND THEORETICAL GUIDE FOR QUALITATIVE RESEARCHERS* (Martha S. Feldman, Jeannine Bell & Michele Tracy Berger eds., 2003); HAMMERSLEY & ATKINSON, *supra* note 337, at 41–62; see also David Buchanan, David Boddy & James McCalman, *Getting In, Getting On, Getting Out and Getting Back*, in *DOING RESEARCH IN ORGANISATIONS* 53–67 (Alan Bryman ed., 1988).

By making a case for a practice-based approach to the empirical analysis of the ICC, I have sought to lay some of the theoretical and methodological groundwork for more ideographic research on the determinants of international law, by which I mean scholarship that is more rigorously descriptive of what Karl Llewellyn called the “law-crafts” than we have been accustomed to. By complementing the increasingly nomothetic study of international law with ideographic ways of seeing the everyday life of international lawyers, we stand to gain a richer, more realistic understanding of how international law works.