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Discourse

1. 'Discoursing' International Law

At the beginning was…discourse. It emerged in the late Middle Ages from the Latin term for 'running about' to denoting a 'conversation' and then, more generally, 'understanding', 'reasoning', and 'thought', and it eventually became the Renaissance literary genre which dealt with the building blocks of modern international law, namely the state and its politics.[1] These were then still delicate subjects involving the secrets of state (*arcana imperii*), at the core of which lay what Giovanni Botero would, in 1589, name the *ragion di stato*, later anglicised as 'national interest' and deeply entangled with the emergence of the concept of modern statehood and the (legal) sovereignty attributed to it.[2] Botero himself was, of course, reacting to (and partly against) earlier ruminations, most notably by Nicholo Machiavelli and contemporaries like Francesco Guicciardini, who took their intellectual cue from the vagaries of government in the Italian city states, and especially Florence, in the early sixteenth century.[3] To thematise 'real' government over concrete territories within the flux of actual history, as opposed to the timeless (Graeco-Roman) ideal-types that heretofore informed political thought, they availed themselves of the local vernacular version of the *discursus*, notably the *discorsi*, which, as a stylistically more open and unrestricted form of treatise, was deemed more appropriate for the delicacy of the topic on hand.[4] While not all works within this vein were named *discorsi*, the latter term came to define a genre which, by content and form, was later associated with Italian Renaissance political thought and, in particular, the Machiavellian tradition and its articulation of the 'art of government'.[5]

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[1] See Riccardo Pozzo and Marco Sgarbi (eds.), *Eine Typologie der Formen der Begriffsgeschichte, Archiv für Begriffsgeschichte* (Meiner Verlag 2010).
[2] See Frank Grunert and Anette Syndikus, *Wissensspeicher der Frühen Neuzeit: Formen und Funktionen* (De Gruyter 2015); Martti Koskenniemi, '"Not Excepting the Iroquois Themselves": Sociological Thought and International Law' (2007) *Max Weber Lecture (EUI)* 1, 12 <http://www.helsinki.fi/eci/Publications/Koskenniemi/MKFlorence-07k.pdf> accessed April 10, 2017.
[3] See Arnold A. Schmidt and John Pocock, *The Machiavellian Moment* (Princeton University Press 1975).
[4] Pozzo and Sgarbi (n 1) 87.
[5] Michel Foucault, 'Governmentality' in Graham Burchell, Colin Gordon, and Peter Miller (eds.), *The Foucault Effect: Studies in Governmentality* (Harvester Wheatsheaf 1991) 87.

Yet, it was not only the theme and style that characterised such *discorsi* but also the professional perspective of their authors as determined by both their position and their audience. Hence, the majority of sixteenth century theorists in Italy were, in one way or another, working for the (proto-) state they were writing about, as secretaries, counsellors, diplomats or, sometimes, spies.[6] Their audience were (intended to be) both their superiors, that is princes or (occasionally) republican governors, as well as their own peers in what was an emerging pan-European (and partially transatlantic) *respublica literaria* concerned with the 'art of government'[7]. This being new and complicated intellectual terrain, the format in which it was expressed could not be confined to the (then) rigid specifications of other literary forms, such as juridical or scholarly speech. Hence, the Italian *discorsi* emerge in contrast to parallel articulations of political (and legal) thought that originated in different settings; for instance, French theorists of (early) absolutism in the sixteenth and seventeenth century were overwhelmingly jurists, educated in a combination of Roman law and (incipient) comparative jurisprudence, and working as practicing lawyers in the *parlements* (i.e. appellate courts), which influenced both their angle of approach to the question of government and their style, with their target audience mainly being their fellow jurists within an emerging public bureaucracy.[8] In Britain, in turn, learned political expression was closely linked to the parliamentary process and often referenced to concrete debates and particular political factions, whereas in the territories comprising the (German) Holy Roman Empire, the same *topos* was not only received into the university curriculum but specifically (re-)produced as a formal academic discipline linked to the humanist canon, made by and for university scholars and following the rigid conventions of scholarly speech.[9]

Roughly four hundred years after the *Discorsi*, Machiavelli´s antipode in the genealogy of discourse (theory), Michel Foucault, would, of course, explain such differences of genre and thinking style by means of the concept of *episteme*, that is, as structures of knowledge formation in a particular time and place, and he would, as his work progressed, draw a line from this to another of his key concepts, notably ´discourse´ itself, before moving on to the idea of ´governmentality´.[10] To Foucault, a discourse is neither merely a particular literary genre nor a cipher for all forms of speech, but it represents the reality behind the modern understanding of reality, notably that all knowledge is produced and that what produces it is, ultimately, power.[11] One corollary of this assertion is, of course, that, contrary to the enlightenment idea that knowledge,

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[6] Pozzo and Sgarbi (n 1) 87.

[7] Ibid. 86; see also Mark Gumaroli, 'The Republic of Letters' (1988) 36 *Diogenes* 129.

[8] Ibid. 86.

[9] Ibid. 88.

[10] Rainer Diaz-Bone, Andrea D. Bührmann, Encarnación Gutiérrez Rodríguez et al, 'The Field of Foucaultian Discourse Analysis: Structures, Developments and Perspectives' (2007) 8 *Forum: Qualitative Social Research* <http://nbn-resolving.de/urn:nbn:de:0114-fqs0702305. acessed April 10, 2017; Thomas Lemke, 'Foucault, Governmentality, and Critique' (2002) 14 *Rethinking Marxism* 49; Nicholas M. Rajkovic, '"Global Law" and Governmentality: Reconceptualizing the "Rule of Law" as Rule "through" law' (2012) 18 *European Journal of International Relations* 29; Ben Golder, 'Foucault and the Incompletion of Law' (2008) 21 *Leiden Journal of International Law* 747.

[11] Marianne Jørgensen and Louise J. Phillips, *Discourse Analysis as Theory and Method* (Sage 2002) 13; Diaz-Bone et al (n 10) 7.

as reason, is autonomous and, hence, subversive of power, all knowledge is always preconfigured by power and, therefore, neither the subject nor the polity is able to divest itself of the condition of being (in) discourse.[12] Another corollary is that discourse is inherently linked to an archaic idea of government which, as Foucault shows, had, up to at least the 18th century, a much broader connotation than merely the exercise of political sovereignty over people and territory.[13] For it referred as much to the government of the self and what would become the private world as it did to public affairs, and it is this '[co-determination] of the sovereign state and the modern autonomous individual' that Foucault would call 'governmentality'.[14] He traces its origins to ancient Greece, though it is the reaction against the 'transcendental singularity' of the subject of Machiavelli's other notorious *discorso*, the *Prince*, that sets in motion the modern discourse on the 'art of government' which articulates governmentality.[15] Its purpose is to constitute a particular rationality for the specific techniques of power that the ordering of people and space in a Westphalian world require, a rationality that eventually comes to be seen as epitomized in the modern state. The latter does not, for Foucault, have an essence in itself but rather denotes a set of practices meant to dispose of people in a particular way, notably by producing and maintaining an epistemic horizon within which that disposition 'makes sense'.[16]

1.1. Discourse and/in the Modern State

The modern state is, hence, a hegemonic configuration of power/knowledge in which law, on one hand, and disciplinary frameworks, on the other hand, have a strictly tactical function vis-à-vis the maintenance of governmentality.[17] Within this scheme, Foucault notoriously distinguished between 'negative' juridical power, which he thought archaic, and 'positive' disciplinary power, which he thought was the principal mode of governmentality in (late) modernity – an assertion that would expose him to the persistent charge of undervaluing the dynamic role of law and legal relations in modern statehood.[18] Yet, if Foucault had an ambivalent position about the role of specific legal practices in modern governmentality, his conception of the discursive nature of modernity implicates a form of *legality* in its very structure. It is a legality both of form and in substance, for modernity is, from this perspective, identical to the specific form of ordering people in space and across time that is articulated in the foundational concept of sovereign statehood. That concept is both an irreducibly legal term and a

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[12] See Vincent Garton and Eugene Yamauchi, 'Event and Discursivity: On Foucault's Conception of Singularity' in Adriana Zaharijevic, Igor Cvejić, and Mark Losoncz, *Engaging Foucault* (2014) <https://bib.irb.hr/datoteka/797851.Engaging_Foucault_vol.1_final.pdf> accessed April 10, 2017.
[13] Lemke (n 10) 2.
[14] Ibid. 3.
[15] Rajkovic (n 10) 32.
[16] Ibid.
[17] Rajkovic (n 10) 32.
[18] See, in particular, Golder (n 11); as well as Victor Tadros, 'Between Governance and Discipline: The Law and Michel Foucault' (1998) *Oxford Journal of Legal Studies* 75; and, again, Lemke (n 10) 2.

historical reference, notably to the Vatellian construct of atomistic states glued together by (national) interest-based international law as it emerged in European early modernity.[19] Hence, the discourse of modernity *is* quintessentially a discourse about sovereign states and their -even in war necessarily legal- relations and it continues to exercise near total epistemic control over the way in which people know and, therefore, live in this world.

Indeed, as has become abundantly clear in the course of the manifold and ongoing crises of the international system since the demise of the Cold War, the various countervailing tendencies subsumed under the label of globalization have not ultimately been able to substitute or even fundamentally modify this Vattellian episteme, even though the material basis and functional position of sovereign statehood has changed significantly over time.[20] Indeed, upon the closer look that the contemporary 'turn to history' in international legal scholarship now affords of this episteme, it becomes clear that the post-Westphalian state never really corresponded to the 'command and control' paradigm that has informed the modern political imaginary, but was always a diffuse stew, close to boiling point, of multiple actors interlinked by constantly changing power relations, never uniform, unidimensional or all-powerful.[21] What has held it together has neither been a compelling material cause -this has changed over time- nor some hermetic semantic bond -aka nation or culture-, but the particular discourse that modernity has produced about itself and which continues to form the limits of the knowable world. As Foucault acutely observed, all thought outside of these confines would have to be labelled impossible or illegal, as belonging to no recognized place, *u-topian* or, indeed, as plainly mad.[22]
Hence, the discourse of international law -the very canonical, Eurocentric and anachronistic international law that has emerged since the sixteenth century- forms the fabric of our world,.. For the mental map within which people stir in this modern world continues to be one of states and governments, discrete borders and nationalities, treaties and customs, with everything else confined to diffuse label such as 'non-state actors' or 'state intent'. Social theorists would denominate this state of being as 'counterfactual' and social psychologists as well as theologians might liken it to the experience of 'cognitive dissonance' when an alternative version of reality is laid over

[19] Koskenniemi (n 2) 24; see also Martti Koskenniemi, '"International Community" from Dante to Vattel' in Vincent Chetail and Peter Haggenmacher (eds.) *Vattel's International Law from a XXI st Century Perspective/Le Droit International de Vattel vu du XXI e Siècle* (Brill 2011) 49; Emmanuel Tourme-Jouannet, 'The Critique of Classical Thought During the Interwar Period:Vattel and Van Vollenhoven' in Anne Orford and Florian Hoffmann, *Oxford Handbook of the Theory of International Law* (Oxford University Press 2016) 104.
[20] See Florian Hoffmann, 'In Quite a State: trials and tribulations of an old concept in new times' in Russell Miller and Rebecca Bratspies (eds.), *Progress in International Organization* (Brill 2007).
[21] See Anthony Carty, *Philosophy of International Law* (Edinburgh University Press 2007).
[22] Michel Foucault, *History of Madness* (Routledge 2006).

experienced reality and comes to shape the way the latter is perceived.[23] In this sense, international law represents a mythology of the modern world, though, ironically, one that was born out of the European enlightenment and has, thus, been identified as an outgrowth of reason rather than faith.[24] It is this mythology that gives rise to the *discorsi* as the literary genre for matters of state and statecraft and which would eventually emerge into the abstract narrative about states and their conduct that is today identified as international law. In (roughly) keeping with Foucault, one might, therefore, contend that international law is at once part of the discursive deep structure of modernity and, as a historical discourse, its product.

1.2. Discourse and/as (the) Theory (of International Law)

That discourse is literally everywhere, which makes its specific discursivity difficult to pin down. The word 'discourse' is now nearly omnipresent in scholarly writing in the humanities and the social sciences -including in and on (international) law- and the expression 'international legal discourse' has almost become an alternative to 'international law' in the more theoretically inclined literature.[25] This indicates that even (international) legal studies have now, by and large, performed the linguistic turn and adopted a broadly discursive approach to their object of study, that is one which focusses on 'language use as social action, language use as situated performance, language use as tied to social relations and identities, power, inequality and social struggle, language use as essentially a matter of 'practices' rather than just "structures" '[26]. Hence, what most of those employing the concept of discourse in international law have in common is the assumption that form (grammar) and meaning (semantics) of texts and textual fields are inseparable from their social context and the factors that determine it. Texts and speech, as well as the social practices attendant to them are, thus, seen as clustering around enunciative principles which differentiate power/knowledge into distinct discursive formations -such as 'international law'.[27]

However, this is, arguably, where the commonality ends, as the term 'discourse' is then used in widely different ways in the (international legal) literature and usually without

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[23] See, for instance, Michael K. Power, 'Habermas and the Counterfactual Imagination' in Michel Rosenfeld and Andrew Arato, *Habermas on Law and Democracy: Critical Exchanges* (University of California Press 1998); and Nicholar H. Taylor, *Cognitive Dissonance and Early Christianity: a Theory and Its Application Reconsidered* (1998) 5 *Religion and Theology* 138.

[24] See Florian Hoffmann, 'International Legalism and International Politics', in Orford and Hoffmann (n 19) 954, 964; and William Scheuerman, 'International Law as Historical Myth' (2004) 11 Constellations 537.

[25] See Jørgensen and Phillips (n 11); John R. Hall, *Cultures of Inquiry: From Epistemology to Discourse in Sociohistorical Research* (Cambridge University Press 1999).

[26] Stef Slembrouk (2003), *What is Meant by Discourse Analysis* (2003) http://www.umsl.edu/~wilmarthp/mrpc-web-resources/discourse-analysis.pdf accessed April 10, 2017.

[27] Hilmar Schäfer, 'Eine Mikrophysik der Praxis: Instanzen diskursiver Stabilität und Intsabilität im Anschluss am Michel Foucault' in Achim Landwehr, *Diskursiver Wandel* (VS Verlag 2010) 115.

being defined or connected with a particular analytical approach. This may be owed both to the colloquiality the term has attained as well as to the particular approach to theory this traditionally theory-averse discipline has developed, notably one marked by the lack of a clearly defined theoretical canon and a concomitant tendency for transdisciplinary borrowing and *bricolage*. Hence, whereas 'discourse analysis' has become an established -if not, therefore, uncontested- part of the methodological portfolio of most humanities and social sciences, in (international) law it is much less clearly defined and delimited. There are comparatively few dedicated and self-conscious 'discourse analyses' in the literature, instead, 'discourse' is often used as a cipher either for theory in general or for a particular theoretical perspective.[28] And theory, in the broad and diffuse way in which it is used in international law, can be deemed to refer to all observations *about* the law that transcend restatements *of* the law within a purely doctrinal context.

This being so, it is difficult to extract a strand or school within the international legal literature that would specifically and exclusively deal with discourse or discourse analysis. Instead, two broad contexts in which discourse, in different guises, plays a role in international law shall briefly be sketched in the following. Firstly, and in continuation of the introductory reflection above, the contention that international law is one of the foundational discourses of modernity shall be further outlined (2). Secondly, the association of discourse with theory shall be explored, notably, on one hand, the different discourses that make up the theory of international law, and, on the other hand, the question of the status and role of theory in international legal discourse (3). These two forays into different aspects of international law's discursivity shall then be rejoined in a (brief) inquiry into the political and ethical implications of these perspectives in relation to international law as a discursive practice (4).

2. International Law as a Discourse of (Political) Modernity

The discursive formation that is international law and that provides the conceptual *imaginarium* of the modern (political) world is not neutral but, as both Foucault and, from a different angle, Marx would contend, enshrines a particular (and asymmetric) power configuration and a specific form of social organization derived therefrom. It is commonly described through the conceptual binary of capitalism and liberalism, though the implied (idea) historical closeness is complex. There can certainly be illiberal capitalisms while liberalism as a specific political philosophy is generally seen as only

[28] See, for instance, Thomas Skouteris, *The Notion of Progress in International Law Discourse* (Springer 2008); Akbar Rasulov, 'The Structure of the International Legal Discourse' (2004) *European Society of International Law Florence Founding Conference* < http://www.esil-sedi.eu/sites/default/files/Rasulov_0.PDF> accessed April 10, 2017; Ulf Linderfalk, 'The Functionality of Conceptual Terms in International Law and International Legal Discourse' (2013) 6 *European Journal of Legal Studies*; Euan MacDonald, *International Law and Ethics after the Critical Challenge: Framing the Legal within the Post-Foundational* (Martinus Nijhoff 2011).

one of several world views which have sprung up in (capitalist) modernity.[29] Yet, liberalism -as it emerged in and through the capitalist mode of production- stands out as the most characteristic type of modern political thought, for it is, in contrast to worldviews that either seek to overtly insert 'pre-modern' elements (such as faith, nation, community, or race) into modern political discourse, or that see themselves as modern fundamental critiques of that capitalist modernity (such as Marxism), self-consciously and affirmatively modern. Liberalism can, thus, be seen as having a meta-theoretical aspect to it, namely as what could be termed a general ideological framework of modernity, which is at once an expression of the structural forces that shape (modern) social relations and a way of concealing their operation.[30] Its main plotline is to frame the quest for the production of social order under conditions of plurality and from within the world as the specifically modern predicament.[31] It, therefore, sets out its answer as a way to overcome the gap between the universal (abstract) and the particular (concrete), left open by the loss of (pre-modern) transcendental-mythical authority and which threatens to pulverize social order and paves the way for a *bellum omnium contra omnes*.[32]

The liberal response to this threat is, then, built by means of three conceptual moves:[33] first, 'reason' is reduced to being a universal instrument for the articulation of (individual) self-interest, which is, in turn, deemed to be driven by the desire for self-preservation. Political freedom is, thus, portrayed as the mere capacity to enact the precepts of reason with regard to one's self-interest. This configuration is, then, interpreted as 'naturally' introducing the need -as well as the individual insight into such need- for a political society which serves the (sole) purpose of enforcing order among its self-interested and, therefore, always potentially antagonistic members. Stylized as a constraint on individual liberty, such an order requires consent, which, in turn, is framed as being given by means of a hypothetical (social) contract. The latter gives rise

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[29] llen Frankel Paul, Fred D. Miller Jr., and Jeffrey Paul (eds.), *Liberalism and Capitalism* (Cambridge University Press, 2012).

[30] See Susan Marks 'The End of History ? Reflections on Some International Legal Theses' (1997) 3 *European Journal of International Law* 449; and ibidem. 'Big Brother Is Bleeping Us-with the Message That Ideology Doesn't Matter' (2001) 12 *European Journal of International Law* 109-23; and Hoffmann (n 19) 959.

[31] Hoffmann (n 19) 963.

[32] See Quentin Skinner, 'The Ideological Context of Hobbes's Political Thought' (1966) 9 *Historical Journal* 286– 317, 298.

33 The short rendering of the 'liberal' scheme that follows is based on a series of hypotheses on liberalism that are necessarily eclectic, abridged, and stylized; while a more thorough and more nuanced argument is not viable in the remit of this contribution, it would not, it is contended, reach fundamentally different conclusions; for (very general) reference, see, for instance, Leo Strauss, *The Political Philosophy of Hobbes: its Basis and Genesis* (Oxford University Press, 1936); F.A. v. Hayek, *The Constitution of Liberty* (University of Chicago Press, 1960); Noberto Bobbio, *Thomas Hobbes and the Natural Law Tradition* (University of Chicago Press, 1993); James M. Buchanan and Gordon Tullock *The Calculus of Consent: Logical Foundations of Constitutional Democracy* (University of Michigan Press, 1966); John Rawls, *Political Liberalism* (Columbia University Press, 1996); Joseph Raz, *The Morality of Freedom*, Clarendon Press, 1986); as well as Amartya Sen and Bernard Williams (eds.), *Utilitarianism and Beyond* (Cambridge University Press, 1982); Jean Hampton *Hobbes and the Social Contract Tradition* (Cambridge University Press, 1986); David Dyzenhaus and Thomas Poole (eds.), *Hobbes and the Law* (Cambridge University Press, 2013); Francis Fukuyama, *The End of History and the Last Man* (Free Press, 1992); and, again, Carty (n 21); and Lemke (n 10).

to the second move of liberalism, notably the postulate of a rigidly divided public and private sphere. For what liberal individuals -or, indeed, states- ultimately consent to is a scheme for social order that is geared to ensuring that the exercise of their liberty is not threatened by the inherent antagonism this implies. Liberalism purports to achieve this by separating off a private -or domestic- sphere, in which articulations of individual liberty are located, from a (much smaller) public -international- sphere, in which the terms of basic collective survival are politically negotiated. However, this only works if politics is tightly enclosed into a girdle of representative institutions, fundamental rights and, today, largely autonomous markets, which radically reduce the space for contestation and, therefore, violence. In other words, the particular that gives rise to difference –in value or identity- is largely removed from the realm of politics in order to constitute a politically neutral public sphere which allows a universalized *homo oeconomicus* to self-interestedly pursue her individual well-being. However, as real social relations under capitalism are necessarily asymmetric and stratified, rather than horizontal, symmetric, and, in that sense, harmonious as liberalism's (self-)image would have it, it needs, in a third move, to paint over its reality with a veneer that makes the particular ordering of (liberal) capitalist society appear universal, necessary and 'natural'.

Historically, this liberal scheme is linked both to the constitutionalization of political power in the domestic sphere and to the constitution of (Westphalian) statehood in the international sphere. Modern international law is, hence, in essence a liberal law and the discipline of international law was already born as a framework to 'defend a liberal-internationalist project […].'[34] It is through the concept of sovereignty that states are conceived of as self-interested monads which acquire identity through antagonistic differentiation amongst one another.[35] State action is conceived as inherently strategic and utility-oriented, reducing international relations to being a network of 'private' economic and military engagements.[36] This private pursuit of survival comes to constitute the public sphere of states, while the public pursuit of freedom is relegated to the private sphere of civil society.[37] It is, therefore, part of liberalism's strategy of concealment to set up an artificial antagonism -both epistemic and empirical- between politics and law by framing either in a particular way: it reduces politics to rational (self-)interest-driven *Realpolitik* which privileges the 'pure fact' of power which 'naturally' runs up against a law styled as powerless but inherently expressive of the ideals of justice and peace. Within this way of thought, the discipline of international relations then emerges as, initially, the realist venture to frame international life in strictly functional(ist) terms with a view to thereby killing off international law's pretense of objectivity and autonomy.[38] The latter, in turn, would linger on as a residue of naturalism and the permanent (bad) conscience of international society.

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[34] Martti Koskenniemi, *From Apology to Utopia* (2nd ed.) (Cambridge University Press 2005) 71.
[35] Carty (n 21) 161.
[36] See Hannah Arendt, *The Human Condition* (Chicago University Press Chicago 1958).
[37] Carty (n 21) 161.
[38] See Beth A Simmons and Richard H Steinberg, *International Law and International Relations* (Cambridge University Press 2006); Gerry Simpson, 'The Situation on the International Legal Theory Front: The Power of Rules and the Rule of Power' (2000) 11 *European Journal of International Law* 439.

Yet, this stylized antagonism is part of liberalism's plot, for only a clear-cut dichotomy between the apologism of power politics and the utopian faith in the values of legal cosmopolitanism could compel the sort of compromise solution liberalism has on offer. It comes in form of the Vattelian 'classical' system of international law, which has, arguably, been providing the basic blueprint for the way in which the international, its law and its politics are conceived in liberal modernity. In essence, that blueprint is based on the paradoxical combination of a strong concept of (state) sovereignty with the equally strong presumption of the rationality of state action. Hence, the narrow balance between the *bellum omnium*, on one hand, and hegemony (and subjection thereunder), on the other, is achieved by simultaneously attributing to each component of this 'society' free (political) will *and* the (rational) insight that that will must not be exercised discretionarily but in such way as to be compatible with its (continued) exercise by all. In other words, political power and universal rationality are here deemed to relativize, and, indeed, neutralize one another. In this scheme, law is not just an instrument to safeguard this balance but its very expression. It forms an epistemic horizon which structures the way in which power-holders and their rationalizers (aka international lawyers) communicate amongst themselves and amongst each other about the (international) world.

The discourse of liberalism, therefore, doubly quarantines politics: first it recasts it in the caricature of realism and then contains it within the thick legal wall of a rump public sphere. This is bound to corrode the foundations for political authority, producing a vacuum into which 'the law' is drawn. This law is, of course, no real substitute for political authority, it can but mimic it in form but not in substance, indeed, it must continuously expand its formal rule in order to cover up its inherent lack of political substance, leading to a process of legal hyperthrophy. Liberal international law must, in other words, continuously expand and incrementally cover all the discursive space of international life in order to protect its purely formal authority and eliminate the possibility of uncovering its lack of (political) authority. International law, thus, strives to rule, and the ideal of the international rule of law is a reflection of modernity's imperialist discursivity.[39]

In the course of this expansion, international law becomes proceduralised and historically grown fundamental concepts are either disembedded or replaced by purely relational and relativist terms such as efficiency, accountability, or transparency. This is, of course, the process which critical international lawyers have called the turn to managerialism in international life, and which introduces a new naturalism in international relations which 'gives voice to special interests in functionally diversified regimes of global governance and control.'[40] Like the old natural law, it is meant to stand

[39] See Antony Anghie, *Imperialism, Sovereignty and the Making of International Law* (Cambridge University Press 2007); Ruth Buchanan and Sundya Pahuja, 'Legal Imperialism: Empire's Invisible Hand?', in Paul Passavant and Jodi Dean (eds.), *Empire's New Clothes: Reading Hardt and Negri* (2004), 73; and Brian Z. Tamanaha, 'The Dark Side of the Relationship between the Rule of Law and Liberalism' (2008) 3 *New York University Journal of Law and Liberty* 516.

[40] Martti Koskenniemi, 'Miserable Comforters: International Relations as New Natural Law' (2009) 15 *European Journal of International Relations* 395, 411.

against the uncertainties of political deliberation, and, thus, purports to insert a new objective normativity into international affairs, one that aspires to a paradigm of technically optimized self-regulation largely immunized from political disturbances.[41] This, then, produces a new international legality, one less based on states ruling *through* (international) law and more on a diffuse rule *of* a transnational legal governance.[42]

Such is the force and all-pervasiveness of this liberal (legal) discursivity that it internalizes even the resistance it inevitably generates against the hollowing out of political authority. Hence, as the recent resurgence of populist neo-nationalism across the globe shows, at least part of the reaction to the hegemony of liberalism comes in form of the realist *politics redux* that it has itself set up as the caricature antagonist against whom only a liberal world order can safeguard.[43] Thus, the more the international legal project and its utopia of a global rule of law is assailed by crude affirmations of power politics, the firmer it becomes entrenched as modernity's essential normative ideal. Its seeming inescapability, even in the face of open adversity, demonstrates modernity's imperial discursivity.

3. Discourse as the Theory of International Law

Liberal modernity, as was argued earlier, represents a 'superstructural' discourse in which (international) law is deeply implicated. Yet, what does this implication precisely mean, what role does the historically grown body of norms, actors, institutions, and practices that are denominated international law play in the grand scheme of liberal modernity ? Or is posing that question itself epistemologically illegitimate as it presumes the availability of a meta-theoretical perspective -and the attendant language- that would allow external descriptions of international law and its workings which would aspire, if not to objectivity, at least to some shared perception of plausibility ? For if this latter question was answered in the affirmative – notably that such an inquiry was neither possible nor desirable-, then 'only' immanent exegesis, the interpretation of texts and practices from within their own semantic structure and logical premises would be a worthwhile pursuit. This is, of course, a question of theory, of its status in international law as a discipline and its particular modes. It is a question intimately linked with discourse, as all reflection to do with the what, how and why of international law is bound to frame international law as a discourse which, in turn, itself represents a discourse (on international law as a discourse). This discursivity is, again, inescapable, as even self-consciously anti-theoretical accounts of international law are ultimately nothing but particular discourses on what it is and how it works (or not). In this sense, all discourses (on international law) are theory, and all theory consists of discourse.

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[41] See, on the point, Sahib Singh, The Potential of International Law: Fragmentation and Ethics (2011) 24 *Leiden Journal of International Law*, *24*(1) 23; see also Martti Koskenniemi, 'The Politics of International Law – 20 Years Later' (2009) 20 *European Journal of International Law* 7; and the International Law Commission's *Report on Fragmentation of International Law: The Difficulties Arising from the Diversification and Expansion of International Law*, A/CN.4/L.682 (13 April 2006).

[42] See Rajkovic (n 10) 45; and, generally, Martti Koskenniemi, 'Global Governance and Public International Law' (2004) 37 *Kritische Justiz* 241.

[43] Hoffmann (n 19) 984.

While this is a truism for all the humanities and social sciences, including law, international law is, arguably, an especially theory-based discipline – notwithstanding the marked theory aversion of a majority of its practitioners. This has, of course, to do with its paradoxical nature as a law conceived to represent, constitute and govern the modern system of territorially-based nation-states that is at once a function of the powers that are and the normative framework governing them.[44] It has, thus, always been a methodologically unique and theoretically engaged field of law. It articulates the tautological conception of a horizontal, rather than vertical, normativity that derives from the hard realities of inter-state relations but that is, simultaneously, deemed to constrain these very relations. As a consequence, it does not, unlike domestic (public) law, simply involve the application of law to facts, but inevitably also raises questions about the grounds of jurisdiction and the particular normative framework that is to apply in a given situation. Its notorious structural coupling between apology and utopia impels international lawyers to operate with much more variable background assumptions about what the law is and what it means than their domestic counterparts, a predicament that necessarily leads to the generalization and (abstract) reconstruction that is the essence of theorizing.

International law is, therefore, permeated by theoretical discourses, though 'theory as theory' has received an at best mixed reception within the discipline. Ironically, the reason for this predicament is theory itself, or, rather, a change over time of what has counted as theory in and of international law. During the long reign of the natural law tradition over the pre-disciplinary *ius gentium*, there was no difference between theory and practice, as the law was always constructed from first principles which were, in turn, embedded in a broader justificatory discourse. The practice of law was then naturally theoretical and holistic, as no disciplinary differentiation into international and domestic law existed. This, arguably, only changed in the course of the nineteenth century and with the advent of (legal) positivism, which resulted in the emergence of the idea of a specific legal science which had law as its object and which, therefore, required both a distinct type of theory and distinct types of practitioners.[45] It narrowed the previously much wider connotation of legal doctrine to the systematization of a distinct body of legal rules which it conceived of as autonomous and objective. In this initial form, positivism had a self-consciously theoretical and critical intent, as it sought to counter both the earlier natural law scholasticism and an inherently conservative historical jurisprudence with a (meta-)normative commitment to justice and world peace. Yet, this utopianism would eventually be tamed by a gradual merger with the pragmatic and (state) apologetic practitioner's approach and its privileging of a descriptive jurisprudence over explicit -and explicitly critical- theory. It would, in form of a largely unacknowledged (pseudo-)positivism, become the default mindset of the post-War discipline and with it would come a distinct aversion to any theorizing that goes beyond the auxiliary function of aiding a narrowly and pragmatically conceived 'practice'.

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[44] See Florian Hoffmann, 'An Epilogue on an Epilogue', Symposium Issue on the re-edition of Martti Koskenniemi's 'From Apology to Utopia' (2006) 7 *German Law Journal* <http://www.germanlawjournal.com/index.php?pageID=11&artID=780> accessed April 10, 2017.

[45] See Jörg Kammerhofer, 'International Legal Positivism' in Orford and Hoffmann (n 19) 407.

This has meant that any inquiry into international law's historical pedigree, its political connotation or, indeed, its role within any larger theoretical framework has been seen to be beyond the limits of the discipline and outside of its episteme, at best complementary knowledge but not part of the hard core of legal scholarship.[46] As a consequence, 'theory as theory' has been at once inside and outside of the discipline, pursued by self-professed international lawyers but too far on the margins of mainstream law school curricula and professional practice to have developed a discipline-specific meta-theoretical consciousness. Hence, by comparison with other disciplines and in contrast to its own sophisticated dogmatic vocabulary, international law has not much engaged in meta-theoretical systematization of the theory landscape. Nor has it tended to deal with basic epistemological and ontological concepts in explicitly meta-theoretical terms but has, instead, mostly drawn on variable vocabularies in an eclectic and *bricolage* manner. As a result, there is not only no consensual representation of the theory landscape in international law, but no agreement on the appropriateness of such a representation either. Indeed, as will be seen, one influential position in this theory landscape questions the very disciplinarity of international law and, thereby, the conventional meaning of theory itself.[47]

Behind these questions lurk, of course, some of the foundational issues of all discourse analysis, and, indeed, of the *scientiae humanitatis* as such. They form the basic parameters of all theoretical reflection and, thus, provide the grid through which the different theory projects, like the tiles of a jigsaw puzzle, produce the bigger (meta-theoretical) picture of the theory landscape in international law. As with all grids, and, indeed, with all mapmaking, this landscape is an artificial notion that serves, however, a heuristic purpose with a view to making the assumptions behind and the objectives of theory construction explicit and amenable to critical engagement. Indeed, the first relevant parameter of theory-mapping is, arguably, the very motivation behind theory-making, for the latter is not a neutral activity but always informed by a host of normative assumptions about the world, how it can be known, and what people ought to do with that knowledge. This is all the more the case in international law, where, as was seen, self-conscious theorizing is not considered part of the disciplinary core and where, therefore, an explicit engagement with theory already represents a normative stance. What has generally motivated this stance across the theoretical spectrum has been a general dissatisfaction with the classical 'canonical' conception that dominates the teaching and practice of the discipline and that is held to insufficiently account for the 'reality' both of international law and of the world in which it exists – even if what is deemed canonical differs (slightly) across international law's different spheres of influence.[48]

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[46] See Florian Hoffmann, 'Teaching General Public International Law' in Jörg Kammerhofer and Jean D'Aspremont, *International Legal Positivism in a Postmodern World* (Cambridge University Press 2014) 349, 356.

[47] Martti Koskenniemi, 'Law, Teleology and International Relations: An Essay in Counterdisciplinarity' (2012) 26 *International Relations* 3.

[48] See Anthony Carty, 'Convergences and Divergences in European International Law Traditions' (2000) *European Journal of International Law* 11; see also the ample use made of the 'canon(ical)' terminology in Jeffrey L. Dunoff JL and Mark A. Pollack, *Interdisciplinary Perspectives on International Law and International Relations: The State of the Art* (Cambridge University Press 2013).

Theory arises, therefore, in the first place as an attempt to frame the (pseudo-)positivist 'classroom' story as itself a discourse and, therefore, as an object of theoretical discourse.[49] However, when it comes to the particular conception of that theoretical discourse, a first divide opens up between two distinct (meta-)theoretical agendas that could be described as, respectively, *ideology critique* and *paradigm change*. Very broadly speaking, the first is committed to the tradition of critical theory in that it seeks emancipatory enlightenment by uncovering and exposing the 'dark sides' of the canonical narrative and its application to contemporary issues.[50] Hence, it directly engages the predicament outlined in the previous section, namely international law as a discursive formation of liberal-capitalist modernity and its attendant features of colonialism, imperialism, and exploitation. Its aim is to uproot the semantic unity of this narrative through critical reconstructions of the history (of ideas) of international law,[51] through post- and decolonial re-representations of the canon,[52] through deconstructive or psychoanalytical readings of its key concepts,[53] and through a legal realist or historical materialist recasting of its effects.[54] It is by means of these techniques that the ideology of international law is made explicit, thereby enabling a critical positioning vis-à-vis its practice. The common driving force of critical legal theories is a strong and usually explicit normative commitment to the same values that early (legal) positivism incorporated, namely peace, justice, and equality.[55] Its main concern is, consequently, with epistemology and ethics, that is, with questions concerning meaning and representation, as well as with the precepts of a critically emancipated practice.

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[49] Hoffmann (n 46) 361.

[50] See Akbar Rasulov, 'New Approaches to International Law: Images of a Genealogy' in José Maria Benyto and David Kennedy (eds.), *New Approaches to International Law: The American and European Experiences* (Asser 2014), 151.

[51] See, inter alia, Matthew Craven, 'Theorizing the Turn to History in International Law' in Orford and Hoffmann (n 19) 21; Martti Koskenniemi, 'Histories of International Law: Dealing with Eurocentrism' (2011) 19 *Rechtsgeschichte* 152; Thomas Skouteris, 'Engaging History in International Law' in Beneyto and Kennedy (n 50) 99

[52] See, for instance, Anghie (n 38); Luis Eslava, Global Space, Local Life (Cambridge University Press 2015); Balakrishnan Rajagopal, International Law From Below: Development, Social Movements, and Third World Resistance (Cambridge University Press 2003); James Gathii, 'International Law and Eurocentricity' (1998) 9 *European Journal of International Law* 184; and Martti Koskenniemi, Walter Rech, and Manuel Jiménez Fonseca, International Law and Empire: Historical Explorations (Oxford University Press 2017).

[53] See, for instance, Sahib Singh, 'Narrative and Theory: Formalism's Recurrent Return' (2014) 84 British Yearbook of International Law 304; and Peter Fitzpatrick, 'Taking place: Westphalia and the Poetics of Law' (2014) 1 London Review of International Law 155; Costas Douzinas, Critical Jurisprudence: The Political Philosophy of Justice (Hart 2005).

[54] For the former, see Gregory Sheffer, 'The New Legal Realist Approach to International Law' (2015) 28 *Leiden Journal of International Law* 189; as well as a constructive engagement with this approach in Andrew Lang, 'New Legal Realism, Empiricism, and Scientism: The Relative Objectivity of Law and Social Science' (2015) 28 Leiden Journal of International Law 231; and a strong critique in Jan Klabbers and Ino Augsberg, 'The New Legal Realist Approach to International Law' (2015) 28 Leiden Journal of International Law; and the rejoinder in Gregory Shaffer, ' New Legal Realism's Rejoinder' (2015) 28 Leiden Journal of International Law 479,; for the latter see Robert Knox, 'Marxist Approaches to International Law' in Orford and Hoffmann (n 19) 306.

[55] See Martti Koskenniemi, *Gentle Civilizer of Nations* (Cambridge: Cambridge University Press, 2004).

On the other side of this divide stands the paradigm change agenda which is primarily concerned with international law's ontology as a system of norms, actors, and institutionalized practices. Here, too, the canon is bracketed on account of its purported misrepresentation of international legal reality, but the emphasis is much less on critique and much more on the construction of alternative accounts of international, transnational, and global normativity. The reason for this difference with critical theory derives from the general background assumption of this perspective, namely that the real-life practice of international law already contains the keys to its re-description by, for instance, articulating certain value positions or certain general functions which, however, lie outside of the canonical description. The legal paradigm changers are, thus, driven by a meta-theoretical endeavour to open up to new forms of representation that promise to map international legal reality (more) accurately, or, to put it in the well known -if not uncontroversial- terminology of an influential line in the philosophy of science, to shift to a paradigm that, by comparison with the canon, better accounts for observable international legal phenomena.[56] Such a paradigm shift may consist of just a slight reinterpretation of the sources doctrine with a view to 'legalizing' different types of non-state actor, or it may be about the transformation of the entire conceptual universe which international law inhabits to, for instance, one constructed in the language of 'policy science' or of 'law as a social system'.[57] The shared ambition of these approaches to theory is, therefore, to reframe what is considered as international law, how it should be analysed and, ultimately, how it should be practiced. That, too, is, of course, a normative project enclosed in a (re-)descriptive one.[58]

These two motivational foundations for theorizing are, of course, not mutually exclusive and they tend to be present in most self-conscious theoretical projects, if to different degrees. However, they do raise some fundamental questions about methodology and about what theoretical discourses can and cannot do, or, put differently, what can be said about international law and what not. As such they relate to the epistemic standpoint of the theorist as well as to the ontological status given to international law, and they play out, again, in form of a set of interleaved dichotomies that refer back to a whole string of meta-theoretical debates in the philosophy of science. These can, of course, not be fully referenced here, nor are they in the vast majority of theoretical discourses on international law, but their distillate is still relevant to understanding the theory landscape and the relative location of theoretical positions in it.

Grosso modo, the relevant debates in the philosophy of science begin with the emergence of scientific positivism in the early nineteenth century, its productive opposition to (Hegelian) idealism, and the resulting renaissance of (neo-)Kantian thought, which can be said to have laid the groundwork for the intense engagement

[56] See Thomas Kuhn, *The Structure of Scientific Revolutions* (3rd ed.) (University of Chicago Press, 1996); and Hall (n 25).

[57] See, for the former, Jean d'Aspremont, *Formalism and the Sources of International Law: A Theory of the Ascertainment of Legal Rules* (OUP Oxford 2011), for the latter, Harold H. Koh, 'Is there a "New" New Haven School of International Law ?' (2007) 32 *Yale Law Journal* 559; for the latter, Andreas Fischer-Lescano and Gunther Teubner, *Regimekollisionen: Zur Fragmentierung des Globalen Rechts* (Suhrkamp 2006).

[58] For a perceptive critique of this venture, see Singh (n 52).

with methodology -and, thus, theory- that characterises the ensuing differentiation of distinct branches of knowledge production on the basis of distinct methodologies.[59] They refer to such debates and, inevitably, dichotomies as the *Methodenstreit* in the late nineteenth and early twentieth century, with its distinction between understanding and explanation, that is between a focus either on (subjective) meanings and interpretation, or on (objective) cause and effect, with the former (originally) associated with the humanities and incipient social sciences, the latter with the natural sciences; and follow up tussles such as the 'Value Judgement Dispute' (*Werturteilsstreit*) on the status of values in scientific discourse, as well as the influential (Neokantian) distinction between *nomothetic* -i.e. generalizing and law/pattern/structure-procuring- and *idiographic* -individualizing and situation/idea/concept-oriented- approaches. These, in turn, connect to the question of the status of a deductive versus an inductive methodology, as well as to the way in which space -in form of 'culture'- and time -in form of 'history'- are accounted for in any 'scientific' discourse. The former query has, as was already seen, led to language and the inexorable situatedness of 'truth' therein, which has, in turn, produced yet another divide, notably between the postulation of universal properties on the basis of which a common epistemic horizon -and, thus, understanding- is possible, and their denial in the name of the inherent incommensurability of 'language games'.[60] The latter has resulted in a productive debate on the nature of historical knowledge in the wake of the idiographic programme of 'old' and 'new' historicism and, as a consequence thereof, has led to the ascendancy, in the humanities and parts of the social sciences, of interpretivism and a general hermeneutic mindset.[61] The latter militantly contrasts itself with the 'external' and objectifying viewpoints of positivism/utilitarianism, functionalism, and -to an extent- structuralism and assumes an 'internal' perspective as a matter of ontological necessity.[62]

This external/internal distinction resonates, of course, with the well-known dichotomy employed in Anglo-American jurisprudence, most notably by H.L.A. Hart and later by Ronald Dworkin, and which draws on the analytical philosophical tradition as it developed in the Viena Circle and then 'travelled' to ordinary language philosophy and Wittgenstein on which especially Hart then draws.[63] Dworkin, in turn, connects it with (continental and especially Gadamerian) hermeneutics and helps establish it as the main counterpoint to legal realism and those critical-legal positions that build on it.[64] This divide between a (hermeneutic) internal and a (positivist/functionalist/structuralist)

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[59] For a critical review of these debates, see Anne Orford, 'Scientific Reason and the Discipline of International Law' (2014) 25 *European Journal of International Law* 369; see also Hans Joas and Wolfgang Knobl, *Sozialtheorie* (Suhrkamp 2004); and Hall (n 21).

[60] See Peter Winch, The Idea of a Social Science and Its Relation to Philosophy (Routledge 2007); and, again,Singh, both (n 52) and 'Incommensurability' in this volume.

[61] See most recently Alexandra Kemmerer, 'Sources in the Meta-Theory of International Law: Hermeneutical Conversations' in Samantha Besson and Jean D'Aspremont (eds.), *The Oxford Handbook on the Sources of International Law* (Oxford University Press forthcoming 2017), also available at the *Max Planck Institute for Comparative Public Law & International Law (MPIL) Research Paper* No. 2017-02 < https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2923099> accessed April 10, 2017.

[62] See Koskenniemi (n 41).

[63] H.L.A. Hart, *The Concept of Law* (3rd ed.) (Oxford University Press 2012).

[64] Ronald Dworkin, *Law's Empire* (Harvard University Press, 1986).

external approach has, however, never gone uncontested, not least in terms of the ethical and political consequences of either theory choice. Hence, both the *Positivismusstreit* of the 1960s between Frankfurtian critical theory and Popperian (falsificationist) positivism, as well as the later debate between an exponent of the former school, Jürgen Habermas and the praeceptor of philosophical hermeneutics, Hans-Georg Gadamer, was, in part, about the inherent interconnection between 'empirical' reality -as evidenced, in particular, through a diachronic reading of history and historical 'progress'- and the hermeneutic reconstruction of the (historical) text. For the tradition of (Frankfurtian) critical theory would insist, if in convoluted and increasingly diffuse ways, that empirical reality and hermeneutic 'truth' were interconnected and that the one was not meaningful without the other.[65] Such an interconnectedness or, indeed, hybridity has, from different vantage points, also been emphasised in deconstructivism, in neo-pragmatism, and in the growing body of post- and decolonial literatures which dissect the Eurocentric conception of knowledge that builds on these dualisms.[66]

International legal theorizing reflects, of course, these divides and their contestations, even if explicit meta-theoretical discussions remain rare. Put very broadly and in simplified terms, the critical legal tradition (aka 'ideology critique') has, for the most part, grown out of the legal realist programme of connecting law with its empirical effects, but has then gradually forked into a hermeneutic and a socio-legal branch. The former performed first a linguistic, and then a historical (or, rather, historicist) turn and has essentially worked on canonical international law as the constituted discourse *within* which a critical hermeneutics must necessarily take place.[67] It has found its most dynamic contemporary expressions in the (post-/decolonial) Third World Approaches to International Law (TWAIL) and in a 'new historicism' that seeks to synthethise conceptual history with TWAIL-inspired and political economy-oriented readings of the canon.[68] This has led at least some of the critical hemeneuts to conceptually split that canon into its formal and its substantive aspects – with the former referring to the tradition of legal formalism and progressive positivism, the latter to the colonial, imperial, capitalist legacy of the historical-empirical discourse. The resulting critical agenda then pits the former against the latter, that is, a critically-reconstructed formalism based on international law's inherent indeterminacy and committed to the old positivist ideals of peace, justice and equality, against an international (legal) discourse that purportedly continues to embody and enact the colonial, imperial, and capitalist agenda of always.[69]

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[65] Hans Joas, 'The Unhappy Marriage of Hermeneutics and Functionalism: Jürgen Habermas' Theory of Communicative Action' in ibidem. *Pragmatism and Social Theory* (Chicago Univerity Press 1993) 125.

[66] See Amy Allen, *The End of Progress: Decolonizing the Normative Foundations of Critical Theory* (Columbia University Press 2016); and Bruno Latour, *An Inquiry Into Modes of Existence: An Anthropology of the Moderns* (Harvard University Press, 2013).

[67] See Jorge Galindo, 'Martti Koskenniemi and the Historiographical Turn in International Law' (2005) 16 *European Journal of International Law* 539.

[68] See Martti Koskenniemi, 'Vitoria and Us. Thoughts on Critical Histories of International Law' (2014) 22 *Rechtsgeschichte/Legal History* 119; and the very recent collection of essays in Wouter Werner, Marieke de Hoon, and Alexis Glán, *The Law of International Lawyers: Reading Martti Koskenniemi* (Cambridge University Press 2017).

[69] See Hoffmann (n 24) 980.

As such, this critical programme seeks to resurrect the utopian aspects of the international legal project against what it sees as an apologist takeover of the discourse. This apologism refers both to classical (political) realism and its core categories of national interest and state-based power, as well as to new forms of decentered domination by 'functionalist' regimes wedded to the logic of capitalism or Eurocentric values (as, for instance, expressed by liberalism). The ultimate apologist, from this perspective, is international law's significant other, namely 'international relations', which tends, in these accounts, to be reduced to a sole derivative of Morgenthauean realism. Likewise, the socio-legal paradigm changers within the theory of international law are deemed to be apologist to the degree to which they adopt external criteria to measure and evaluate international legal practice. From their own perspective, these approaches pursue, of course, a rather different agenda that stems from an engagement with several 'tricky' issues in (canonical) international law; among these are, firstly, the fragmentation debate that concerns the emergence of a plurality of distinct international legal regimes operating in an increasingly autonomous and partially incompatible fashion, and which has sparked theoretical interest in the inherent unity or plurality of the international legal project; secondly, the perennial question of the legal status of non-state actors has fostered a theoretical engagement with the nature of sovereignty and the sources of international law; and, thirdly, the problem of compliance has continued to inspire theoretical reflection on the nature of statehood, normativity, and legal governance.

Several paradigm change projects have emerged from these engagements; one set of theories has emanated from a combination of, on one hand, the social-legal branch of post-realist (critical) theory and the 'law and society' and 'law in context' approaches that grew from these, and, on the other hand, broader research agendas in legal sociology and comparative law. In international law, these have brought about several approaches that could be jointly classified as variants of 'legal pluralism' which, as the label implies, focus on the multiplicity of normative sources and outcomes from a global perspective. They share a general openness to sources beyond the classical canon and, indeed, incorporate, to different degrees, the transnational legal sphere and its private transactional components. The two most clearly defined approaches in this vein have been the Global Administrative Law (GAL) school and autopoietic systems theory, both of which operate with functionalist criteria to account for the different forms of global normativity.[70] However, whereas the latter's explicit purpose is a radically pluralist re-description of law from a social systems perspective, and is, therefore, situated at the outer end point of the paradigm change agenda, the former merely seeks to identify the overarching administrative principles which are deemed to govern contemporary global legal governance.

In this endeavour to overcome both the sources and the fragmentation predicament in form of a meta-law that preserves unity and enables universality, it is a close kin to another influential approach on the paradigm change side of the spectrum, notably

[70] See Benedict Kingsbury, 'The Concept of "Law" in Global Administrative Law' (2009) 20 *European Journal of International Law* 23; and, again, Fischer-Lescano and Teubner (n 57).

international constitutionalism.[71] Yet, whereas GAL comes from the empiricist socio-legal perspective, international constitutionalism stands in the hermeneutic tradition in its attempt to interpret existing legal regimes in light of core (constitutional) values which it deems to form the semantic brace around the international legal project. Like GAL, it is not far from classical positivism, and, indeed, can be seen as an attempt to salvage positivism by incorporating a higher-level normativity – empirically grounded in GAL's case, axiological in international constitutionalism's case. Both agenda's have been accused of apologism, either of the reigning logic of liberalism and capitalism, or of Eurocentrism, or of both, and they have, in turn, charged the ideology critics of an ephemerous utopianism that refuses to concretize and expose its political positions through alternative proposals.

Two further approaches stand on their own and outside of those (hermeneutic or socio-legal) endeavours that have grown out of the direct engagement with the canon and its practical limitations. They can, arguably, be described as both ideology critical and paradigm changing, insofar as both consider the canonical conception -and those theoretical endeavours that derive therefrom- as, essentially, false consciousness, while offering a fundamentally different way of 'seeing' international law. One, the 'law and economics' perspective, is now, next to (pseudo)positivism, the most widely adhered to theory of international law even if it has tended to be highly critical of any presumption of the autonomy of international legal discourse.[72] It comes from the (scientific) positivist-utilitarian side of the methods debate and it subscribes to a formalized rational-interest realism that renders international law an always context-contingent epiphenomenon of specific (power) game constellations to solve global collective action problems. The other, notably different variants of Marxist thought, has survived on the extreme margins of the theory debate, though it has, arguably, experienced a renaissance of sorts in recent times.[73] It sees canonical international law as epiphenomenal of the historical dialectic of material reproduction and rejects, albeit to different degrees, the possibility of a progressive re-reading of the discourse in favour of an entirely new conception of law and legal relations.

These, then, are (some of) the theoretical discourses and their (roughly sketched) epistemic coordinates on the dynamic map of the theory of international law. Yet, what if a third dimension were added to this map so as to represent international law's discursivity as the 'real-life' experience it is to those speaking and acting it ? Would there then appear elevations from which to behold a pristine bigger picture as well as valleys of ignorance, interspersed by stretches of path dependent 'muddling through' ?[74] Could

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[71] See, inter alia, Anne Peters, 'The Merits of Global Constitutionalism' (2009) 16 *Indiana Journal of Global Legal Studies* 397; for a critical reflection on the proximity of GAL and constitutionalism, see M-S Kuo, 'Taming Governance with Legality? Critical Reflections upon Global Administrative Law as Small-C Global Constitutionalism' (2011) 44 *New York University Journal of International Law and Politics* 55.

[72] See Eric A. Posner, *The Perils of Global Legalism* (University of Chicago Press Chicago 2009); and Eric A. Posner and Jack L. Goldsmith, *The Limits of International Law* (OUP Oxford 2005).

[73] China Miéville, *Between Equal Rights: A Marxist Theory of International Law* (Brill Leiden 2005); and, again, Knox (n 54).

[74] See Florian Hoffmann, ''Facing the Abyss: International Law Before the Political' in Marco Goldoni and Christopher McCorkindale (eds.) *Hannah Arendt and the Law* (Hart 2012) 173, 180.

this serve as a guide for the remaining open questions of international law, notably, how to 'do' it, and what for ? Or is such (self-)transparency of (the) discourse an impossibility and its proposition, thus, an immorality ?

4. Beyond Discourse ?

In line with an influential stream in international legal theorizing, Anne Orford has recently affirmed this dual injunction, namely that international lawyers ought to feel ethically bound to continuously ask 'what […] the social significance of [their] science [is]', while recognizing that it is impossible to answer that question 'once and for all'.[75] She thereby reframes the stakes involved in theorizing international law – it is, essentially, about the justification of practice, both as an ethical query of how (any) practice can be justified under conditions of fundamental uncertainty, and as a political project that seeks to articulate and concretize certain values through and from within the discourse of international law. One (possible) corollary of this position is a rejection of meta-theory and the taxonomical mindset that comes with and, instead, a re-description of international law as a singular 'counter-discipline'. Here, international law's deeper point is *phronesis*, practical reason, which, from the broadly Kantian perspective adopted in these accounts, is distinct from both the analytical reason of science and the aesthetic reason of art.[76] It is, instead, the (apparently) self-sufficient practice of (legal) argument that forms the identity of international law and that is delimited by a hermeneutic methodology of continuous (re-)interpretation of a given body of rules and principles within practical (i.e. discursive) contexts. As such, the lawyer's task would be twofold: on one hand, she constructs a coherent narrative that is reflective of the values and visions deemed to inhere in that body of rules with a view to solving 'real life' problems in concrete 'cases'; yet, as the self-consciously ironical cosmopolitan that the proponents of this view would like her to be, she would do so in full awareness of the inherent limitations of the hermeneutic horizon; she would, therefore, understand her -and her counterpart's- argument in a procedural way, notably as the collective and public bringing 'into the open the contradictions of the society in which [the law] operates and the competition of opposite interests that [underlie it].'[77]

It is a position that is inherently attractive, as it seems to preserve agency while maintaining critical distance within the existing discourse.[78] It is, thereby, also closer to latter generation Frankfurtian critical theory than many of its proponents wish to admit, for it is, in essence, a discourse theory of (international) law.[79] As such it ends up going down a similar (neo-)Kantian path towards a sort of realist cosmopolitanism, even if it

[75] Orford (n 57) 385.
[76] Koskenniemi (n 47).
[77] Ibid. 19; for the figure of the 'liberal ironist', see Richard Rorty, *Contingency, Irony, and Solidarity* (Cambridge University Press 1989).
[78] See Tanja Aalberts and Ingo Venzke, 'Moving Beyond Interdisciplinary Turf Wars: Towards an Understanding of International Law as Practice' in Jean D'Aspremont, Tarcisio Gazzini, André Nollkaemper, and Wouter Werner, *International Law as Practice* (Cambridge University Press 2017) 287.
[79] See Jürgen Habermas, *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy* (MIT Press 1996).

prefers the more iconoclastic language of critique and is averse to the openly liberal(ist) overtones of the Habermasian fold.[80] Yet it is, arguably, affected by the same contradictions and aporias as the latter theory, a contention that, however, cannot be worked out in full in this contribution. Just two difficulties might be hinted at: one concerns the ethical proposition which, in its focus on the critical practitioner endowed with progressive political ideals, remains a postulate quite outside of the discourse from which this figure is meant to spring. For how exactly a self-relativizing formalism paired with the critical consciousness of the deep problematicity of the canonical discourse on which it is premised is meant to work has not really been shown yet.[81] Another relates to the somewhat mysterious foundations for the progressive politics which is meant to inform critical practice. Here, the proponents of this position have so far engaged in studied restraint, lest they expose any personal politics. Instead, and in line with their militant hermeneutics, they have simply read progressiveness out of -or, perhaps, into ?- the historically constituted discourse of international law, a somewhat paradoxical proposition given the simultaneous exposure of its colonial, imperialist and exploitative legacy. One might argue that Habermas, in his discourse theory, at least takes the trouble to review and re-appropriate a good part of modern social theory in order to ground the facticity of his normative project – and in that he remains a true exponent of the Frankfurtian critical project even if he may fail to thereby escape either contradiction or Eurocentrism.[82] No such effort seems to have been deemed necessary to (try to) ground progressive politics in international legal discourse. Hence, whence it hails ?

Ultimately, both the question of ethics and of politics might have to bracketed by the meta-question of epistemology. For before an ethics and a politics can be outlined, an epistemic space for this would have to be identified. If such a space did not exist, that is, if (the) discourse -of modernity, of liberal-capitalism, of international law- was truly inescapable, then little more than irony remains. This may well be the case, though thinkers like Hannah Arendt have shown that there might nonetheless be singular moments, *kairoi*, during which another politics, and another law can be beheld.[83] This is worth exploring !

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[80] See Jan Klabbers, 'Towards a Culture of Formalism? Martti Koskenniemi and the Virtues' (2013) 27 *Temple International and Comparative Law Journal* 417.

[81] See insightfully on this point, Sahib Sing, 'The Critic(al) Subject' in Werner, de Hoon, Glán (n 66); for a similar theoretical construct with regard to human rights (practice), see also Florian Hoffmann, 'Shooting in the Dark: reflections towards a pragmatic theory of human rights (activism)' (2006) 41 *Texas International Law Journal*, 403.

[82] Besides *Beteween Facts and Norms*, see also his foundational *Theory of Communicative Action* (Beacon Press, 1985); see, critically, Joas (n 63); and Allen (n 64).

[83] Hannah Arendt, *On Revolution* (Viking Press 1963); and Hoffmann (n 72).